A CRITICAL ANALYSIS OF PUBLIC INTEREST LITIGATION AS A MEANS OF ACHIEVING HUMAN RIGHTS AND JUSTICE IN UGANDA

BY

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A RESEARCH PROPOSAL SUBMITTED TO THE DEPARTMENT OF PUBLIC AND COMPARATIVE LAW, SCHOOL OF LAW IN FULFILLMENT OF THE REQUIREMENTS FOR THE A WARD OF A BACHELORS DEGREE IN LAW OF KAMPALA INTERNATIONAL UNIVERSITY

JUNE, 2019

DECLARATION

I **NAYEBARE FAITH** do hereby declare to the best of my knowledge and belief that this is my original piece of work and that it has never been submitted for the award of any credentials to any university or college or published as a whole or part.

I further declare that all materials cited in this proposal which are not my own have been fully acknowledged.

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APPROVAL

This dissertation titled "**A Critical Analysis of Public Interest Litigation as a Means of Achieving Human Rights and Justice in Uganda**;" has been submitted under my supervision and approval.

Signed..... Date 20-06-2019

DR. HANAFI ADEKUNLE HAMMED

DEDICATION

I dedicate this research to my parents and my family at large. Thank you for all the support rendered to me throughout the entire course. May the Almighty God bless you all.

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First and foremost, I would like to thank my Creator for breathing life into me and for entrusting me with the will, strength and wisdom to work on this research.

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Above all, i express my heartfelt gratitude to all friends and relatives who cannot be mentioned individually by name due to limited space. I acknowledge and appreciate all of you.

LIST OF ABBREVIATION

ACLU	American Civil Liberties Union
CEE	Central and Eastern European
EAN	Environmental Action Network
EU	European Union
NAACP/LDEF	National Association for the Advancement of Colored People/Legal Defense and Educational Fund
NEA	National Environment Act
NEMA	National Environmental Management Authority
NGO	Non Governmental organizations
PIL	Public Interest Litigation
ULS	Uganda Law Society
USA	United States of America

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ABSTRACT

The study critically analyzed public interest litigation as a means o achieving human rights and justice in Uganda, it was guided by the following objectives; To examine the scope of Public interest litigation in Uganda, to determine how public Interest Litigation can be applied to advocate for human rights in Uganda, to examine the prospects of public interest litigation in Uganda and to identify the challenges faced in the implementation of public interest litigation in Uganda, the study used doctrinal research design where both primary and secondary data was used. the study concludes that The quality of the litigation voice is very important and competent public interest litigators are crucial to win social rights cases, Growth of international networks of legal services organisations and international 'backstop organisations are central to develop social rights jurisprudence, providing local partners with knowledge on international norms, precedent in other jurisdictions, and sound legal arguments, In as much as there is a beneficial relationship between marginalised groups and professional public interest litigators taking up their cases, the study concludes that competent public interest litigators (supported by international expertise), is a key to winning cases in court, but that real policy impact is rare without organisations and social movements that can utilize the litigation process as part of a broader strategy of social and political mobilization. The study reveals that Public interest litigation has an important role to play in the civil justice system in that it affords a ladder to justice to disadvantaged sections of society, some of which might not even be well-informed about their rights. Furthermore, it provides an avenue to enforce diffused rights for which either it is difficult to identify an aggrieved person or where aggrieved persons have no incentives to knock at the doors of the courts. The study recommends that One way to achieve this objective could be to confine PIL primarily to those cases where access to justice is undermined by some kind of disability.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 BACKGROUND TO THE STUDY

Public interest litigation refers to legal tools which allow individuals, groups and communities to challenge government decisions and activities in a court of law for the enforcement of the public interest.[1] This kind of litigation has also been defined as any litigation conducted for the benefit of public or for removal of some public grievance.

The word 'Public interest[2] means "The common well being also known as public welfare" and the word 'litigation' means "a legal action including all proceedings the reeling, initiated in a court of law with the purpose of enforcing a right or seeking a remedy."[3] also defined the meaning of "Public interest". Jeffrey M. Berry pointed out:
"Public interest Law" has been a uniquely American development. It has been defined in many ways"[4] The Council for public interest law set up by the Ford Foundation in the USA in its report has opted for a broad definition.

Public interest Law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interest such efforts have been undertaken in recognition of the fact that the ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interest. Such groups and interest include the poor, environ, consumers, racial and ethnic minorities and others.[5]

The emergence of Public Interest Litigation has recognised that the right to elective 'access to justice' is the most basic and fundamental human right in the welfare state which guarantees social rights. For the enjoyment of the traditional legal right as well as the new social rights this tool pre-supposes the mechanisms for their elective protection and the traditional conception of adjudication. Moreover the assumptions on which it is based are proving to be inadequate for the

[1] Deshpande, "Public Interest Litigation", *Facts*, Vol.II, 1983,p.11, at pp. 11-12
[2] According to the Oxford English Dictionary (2nd edition Vol. XII) 2009
[3] Strouds Judicial Dictionary, Volume 4 (IV edition) and in Black Law Dictionary (sixth Edition) (1996)
[4] Jeffrey Berry.M: 1977 *lobbying the people (The Political Behaviour of Public Interest Groups)* Princeton University press, New Jerely,p.6
[5] Christopher Mtikila , "Balancing the scales of justice Financing public interest law in America. A report by the council for public interest law (1976) pp 6-7"

operation of the Public Interest Litigation[6]. Consequently, the courts have liberalized the standard of locus standi to meet the challenges of the time. In Ugandan law, Public Interest Litigation means litigation for the protection of public interest. It is litigation introduced in a court of law not by the aggrieved party but by the court itself or by any other private party. It is not necessary for the exercise of the court's jurisdiction, that the person who is the victim of the violation of his or her right should personally approach the court. Public Interest Litigation empowers the public promoting judicial activism. Such cases may occur when the victim does not have the necessary resources to commence litigation or his freedom to move court has been suppressed or encroached upon. The court can itself take cognizance of the matter and proceed suo motu or cases can commence on the petition of any publics pirited individual[7].

Public interest litigation therefore involves approaching court to obtain a remedy that benefits the public as a whole or greater sections of it. In most cases, the affected individual or community may not be in position to bring such an action in their own capacity. In this case, it is important that the rules of standing i.e. Locus Standi be relaxed to allow any other person than the one affected to bring a case before a court of law challenging violations of rights of the affected communities.[8] Relaxation of rules of standing is therefore an extremely important aspect of Public Interest Litigation and makes us each other's keeper. The Constitution of the Republic of Uganda, contain provisions that permit any person to bring a matter in the public interest in the defence of human rights. For example under the Constitution of Uganda makes provision for a number of fundamental rights and freedoms.[9] Article 50 of the same Constitution permits any person who claims that a fundamental or right or freedom guaranteed under the Constitution has been infringed or threatened to apply to a competent court for redress. The Constitution therefore permit any person to bring a public interest litigation case where fundamental rights and freedoms are infringed upon or threatened. It does not matter whether that persons

[6] Dembowski, Hans (2009). "Erratic justice?". *Development and Cooperation.* Frankfurt am Main: Societäts-Verlag. 36 (3): 122–123.

[7] Rose Mwebaza, 'Access to Information, Public Participation and Justice in Environmental Decision Making in Uganda', 9 *East Afr. J. Peace & Hum. Rts* 37 (2003).

[8] Phillip Karugaba, 'Public Interest Litigation in Uganda, Practice and Procedure: Shipwrecks and Seamarks,' A paper Presented at the Judicial Symposium on Environmental Law for Judges of the Supreme Court and Court of ppeal, 11th – 13th September, Imperial Botanical Beach Hotel. Also available on http://greenwatch.or.ug/pdf/news/SHIPWRECKS_AND_SEAMARKS.pdf.

[9] Chapter 4, Constitution of the Republic of Uganda, 1995 (As Amended)

individualrights have been threatened. A person here refers to both natural and legal persons therefore associations and NGO's can institute cases in the public interest.[10]

Once the hurdle of establishing legal standing is overcome, petitioners in a public interest matter have the more pressing challenge of proving the impugned violations. As earlier indicated, the affected population is often unable to afford litigation and petitioners are usually third parties concerned over the plight of the affected communities. Information is therefore key in building a credible case yet it is often not readily available and in many cases is concentrated either in arms of government or the parties that are sought to be challenged. In such situations, the right to information plays a very crucial role in obtaining these relevant pieces of information hence becoming an important tool for public interest litigation.

Public interest litigation[11] is a term that is often used, but that is less often understood. The goal of this overview is to assist those who do not have legal training or who are unfamiliar with the practice of public interest litigation to understand the basic goals and strategies involved. This guide is not meant to substitute for legal advice; anyone considering engaging in litigation before the courts should consult an experienced attorney. Public interest litigation emerged in the United States as part of the civil rights movement; litigation was part of a broad plan of social action. Today, public interest litigation is used across the globe; notable successes include cases focused on workplace sexual harassment in Uganda, housing rights and HIV treatment in Uganda, race discrimination and, community land rights and torture compensation in Uganda Public interest litigation is a powerful tool when deployed effectively and as part of a holistic program of advocacy for social change. Indeed, this is what makes public interest litigation different from any other legal case – public interest litigation should always be a part of a broader campaign to bring about social change on a particular issue.

The idea of the term "human rights" is older and not the invention of the twentieth century. The genesis of human rights is the utopian concept of natural rights traceable from the days of the

[10] Greenwatch Uganda Limited v. Attorney General and Uganda Electricity Transmission Company Ltd (UETCL), HCCS No. 139 of 2001 (High Court) (unreported), See also Legal and Human Rights Centre, Lawyers Environmental Action Team & The National Organisation for Legal Assistance v. Attorney General, Misc. Civil Cause No. 77 of 2005 (The Takrima provisions case).

[11] Public interest litigation is also sometimes referred to as strategic litigation or impact litigation.

Greek or even earlier. The period of renaissance witnessed the basic changes in the belief of society. People thought that an idea of human right is to be a general, social need and reality. The real foundation of human rights was truly laid when resistance to religious intolerance and political economic bondage began. The Magna Carta (1215), The petition of Rights (1628), and the English Bill of Right (1689) were proof of the human rights.

The bedrock of public interest litigation lies in the Constitution[12]. It provides: "Any person or organization may bring an action against the violation of another person's or group's human rights." This is set against the backdrop of the Article[13] which provides for the enforcement of individual constitutional rights. In the words of the Former President of the Law Society Mr. Andrew Kasirye, The Constitution makes us "our brother's keeper". [14]By using the expression "any person" instead of say "an aggrieved person" it allows any individual or organization to protect the rights of another even though that individual is not suffering the injury complained of. It effectively abolishes locus standi as we know it in the Common Law tradition. Whenever there is an injury caused by any act/omission contrary to the Constitution, any member of the public acting bona fide can bring an action for redress of such wrong. Another avenue to public interest litigation lies in Article 137(3)[15], which allows any person who alleges a violation of the Constitution to have taken place to petition the Constitutional Court. Such a violation may stem from an act or omission of a person/organization or from an Act of Parliament being inconsistent with the Constitution. The article provides; 3)

"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."

The concept of human rights has assumed importance globally during the past few decades ever since the announcement of the Universal Declaration of Human Rights. Human rights are the

[12] Article 50(2) of Constitution of the Republic of Uganda 1995

[13] Article 50(1) of Constitution of the Republic of Uganda 1995

[14] Opening speech at Regional Workshop on Tobacco: "The Role of Civil Society Organisations in the development of Tobacco Control Legislation 18-20 August 2002.

[15] The 1995 Constitution of the republic of Uganda

important element of philosophical, social and political debates of the twentieth century. Number of people around the world suffers from their basic needs. They are also refrained from the enjoyment of the basic economic, social, cultural, civil as well as political rights. This challenge is the basic issue not only concern with the one country but also universal and global. The idea of the term "human rights" is older and not the invention of the twentieth century. The genesis of human rights is the utopian concept of natural rights traceable from the days of the Greek or even earlier. The period of renaissance witnessed the basic changes in the belief of society. People thought that an idea of human right is to be a general, social need and reality. The real foundation of human rights was truly laid when resistance to religious intolerance and political economic bondage began[16].

In Uganda, the legal basis of PIL in Uganda is Objective XXIX (g) and article 3 (4) of the 1995 constitution which require every citizen to uphold and defend the constitution. It is the duty of every citizen to respect the rights and freedoms of others[17]. Under article 17 (c), every citizen has a duty to protect children and vulnerable persons against any form of abuse, harassment or ill-treatment. These provisions form the foundation for PIL in Uganda.

There are also two main constitutional provisions that are considered to be the enabling law for PIL. To start with, under article 50 (2) of the constitution, any person or organisation may bring an action against the violation of another person's or group's human rights. An action may be lodged in the High Court which, under Article 50 (1), is the competent court for redress where human rights and freedoms have been violated or threatened. The procedure is by way of plaint as required by Order 4 Rule 1 of the Civil Procedure Rules. In *Charles Harry Twagira v. Attorney General*[18], the court of appeal held that article 50 actions had to be filed by plaint.
The other avenue available is under Article 137 (3) of the Constitution. Under the said provision, any person who alleges that an Act of parliament or any other law or any act or omission by any person or authority is inconsistent with the constitution may petition the constitutional court for a declaration to that effect. The constitutional court may, under Article 137 (4), in addition to the

[16] Henry Campbell Black, *Black's Law Dictionary,* 6th Edition 1990, West Publishing Co., p.1229.
[17] Under article 17 (b) and article 20(2) of the 1995 Constitution of The Republic of Uganda
[18] Civil Appeal No. 61/2002

declaration sought grant an order of redress or refer the matter to the High Court to investigate and determine the appropriate redress.

There has been a big debate as to whether an action should be brought under Article 50 or under Article 137. In *Attorney General v. David Tinyefuza*[19] *Wambuzi CJ* (as he then was) put the matter to rest when he concluded that unless the question before the constitutional court depends for its determination on the interpretation or construction of the constitution, the constitutional court has no jurisdiction. Therefore if a person alleges a violation of a human rights and fundamental freedoms, the appropriate forum is the High Court.

However, there are instances where the constitutional court will entertain matters that would otherwise fall under Article 50. In *Joyce Nakacwa v. Attorney General*[20] the constitutional court held that it has jurisdiction to entertain matters that would otherwise fall under Article 50 if this is done in the process of a constitutional interpretation under Article 137 of the Constitution

Articles 50 (2) and 137[21] offer standing to public interest litigants in Uganda. In *Batu -Ltd v. Tean* court held that "person" "organisations" and "groups of persons" can be read into Article 50 (2) to include public interest litigants. This can be applied mutatis mutandis to article 137 of the constitution.

Besides the constitution, there are also other laws that enable PIL in Uganda. For example, a person may under section 71 of the National Environment Act obtain a restoration order against any person who has harmed, is harming or is reasonably likely to harm the environment.
By and large the law in Uganda widely confers standing on persons and organisations interested in bringing suits in respect of vulnerable persons where there are violations of human rights. In recognizing that public interest litigants have locus standi, the court in BAT-Ltd v. TEAN (supra) noted that "it cannot be denied that such group of persons abound in our society and we cannot hide our heads in the sand by saying that the constitution does not expressly mention

[19] Constitutional Appeal No. 1 of 1997
[20] Constitutional Petition No. 2 of 200
[21] The 1995 Constitution of the Republic of Uganda

them and therefore they must be excluded from the constitutional provision regarding recourse to remedies when rights are violated."

Despite widely conferring standing on public interest litigants, Uganda needs to learn a lot from India in the area of PIL. Compared to Uganda, India's PIL laws and mechanisms are far better. It is upon this basis that Uganda should borrow a leaf.

1.2 STATEMENT OF THE PROBLEM

Public interest litigation (PIL) can be an excellent way to secure justice if you have suffered loss or harm in circumstances which raise questions of public interest. However, sometimes PIL may not be the best way to achieve the outcome you need.

In Uganda, public interest litigation is coming of age. Some examples of public interest litigation are the Rwanyarare/Ssemogerere petitions in the Constitutional Court in respect of political rights; Uganda Law Society (ULS) petition on the Referendum Act; ULS petition on execution of death penalty sentences passed by a field court martial without affording a right of appeal; the constitutional petition on the Divorce Act; Greenwatch actions; (Butamira, AES access to information, Golf Course development (now Garden City Shopping Centre), curry powder, chimpanzees kaveera), constitutional petition against the death penalty, petition on freedom of worship by Seventh Day Adventists; TEAN actions on smoking in public places and on stronger warning labels for tobacco products. "The harvest is plentiful but the labourers are few". Many more issues abound all bedded in the Constitution but hot with controversy for example, issues of torture of suspects in detention, arrest of persons released by the Courts, street vendors' rights, pornography, prostitution, dismissal of alcoholics from police. Despite the way it has been applied, public interest litigation attracts a lot of attention and for this reason is often wrongly called "publicity interest litigation". Nonetheless the media are an important and indispensable ally in any battle for societal rights. Public interest litigation is a new tool in the arsenal of civil society. It presents a strategic opportunity to engage the Judiciary in ordinary societal issues. It allows civil society organizations to jump from conference table lamentations to strategic, decisive and enforceable action. It also allows the Judiciary to take its rightful place in the shaping and development of society. The attempts at public interest litigation in Uganda have

been beset with technicalities, which we propose to discuss below in a humble attempt to bring clarity to this area of the law and, by so doing, promote a culture of constitutionalism, of human rights enforcement and the Rule of Law

1.3 OBJECTIVE OF THE STUDY

The objective of this study is divided into two, which are general and specific objectives.

1.3.1 General Objective

Therefore, the main purpose of this study is to critically analyze Public Interest Litigation as a tool of achieving Human Rights and Justice in Uganda.

1.3.2 Specific Objectives

i. To examine the scope of Public interest litigation in Uganda.
ii. To determine how public Interest Litigation can be applied to advocate for human rights in Uganda.
iii. To examine the prospects of public interest litigation in Uganda.
iv. To identify the challenges faced in the implementation of public interest litigation in Uganda.

1.4 RESEARCH QUESTIONS

The questions that this research hopes to answer are:

i. What is the scope of Public interest litigation in Uganda?
ii. How has public Interest Litigation been applied to advocate for human rights in Uganda?
iii. What are the prospects of public interest litigation in Uganda?
iv. What are the challenges faced in the implementation of public interest litigation in Uganda?

1.5 SCOPE OF THE STUDY

This study looks into the law of public interest litigation can be used as a means in achieving human rights and justice in Uganda. The study focuses on existing laws governing Public interest litigation in Uganda, their implementations and impacts on the rights of citizens.

The study will consider relevant laws, International instruments and other laws from England where common law was adopted and incorporated into our laws.

1.6 SIGNIFICANCE OF THE STUDY

The study is will be helpful With the rapid growth of filing Public Interest Litigations and other petitions in High Courts and Supreme Court, it is just and necessary to deal with public issue involved in such cases and to deliver the justice to the persons affected by adopting the measures of speedy disposal of cases and by increasing the number of judges in High Court and Supreme Court as compare to number of cases. The study will be helpful to the Judiciary in delivering delayed justice is the justice denied in Public Interest Litigations. The study will be necessary to look into the issues raised by Media, Press relating to any scams and scandals and to take the sue-moto cognizance of such cases by initiating the Sue-Moto Public Interest Litigations on larger scales, so that the fear our judicial system should reach in the mind of such persons, who are responsible for such scams and scandals and the other person will hesitate to do so.

1.7 METHODOLOGY

The study will majorly adopt doctrinal methodology. It will use both primary and secondary data sources on the legal and institutional frameworks on environmental protection in Uganda. For primary sources, the study will analyze the statutes, case law and other instruments for example delegated legislations. Secondary sources, the study will collect and analyze information from books and Articles on Public litigation as a means of achieving human rights and justice in Uganda.

1.8 LITERATURE REVIEW

Dasgupta [22] has observed that although PIL has played an important role in the uplifting of Indian society however, there is a strong need to distinguish between legitimate cases and frivolous cases. Sahu[23] has concluded that "while the Court has entertained PILs on

[22] Dasgupta, M. *Public interest litigation for labour: how the Indian Supreme Court protects the rights of India's most disadvantaged workers. Contemporary South Asia*, 16(2).

[23] Sahu G. (2008). *Public Interest Environmental Litigations In India : Contributions and Complications.* The Indian Journal of Political Science, LXIX(4).

environmental problems such as water pollution, air pollution, and forest degradation from industrial activities, it has maintained a distance from PILs for environmental protection due to infrastructure projects such as big dam, thermal power plant, airport and railway construction, etc." Shunmugasundaram[24], in his article has shown disdain for the judiciary because of increasing incidents of overreaching in the disguise of activism, lack of accountability, trespassing of power domain and has provided judicial restraint as a solution. Singh[25] in her research has found that "purelypolitical questions and policy matters notinvolving decision of a core legal issue is therefore outside the domain of judiciary." A field study by Dasgupta[26] has termed the Supreme Court of India as "labour-friendly" institution. While a World Bank working paper by Gauri[27] after extensive research has found that "win rates for fundamental rights claims are significantly higher when the claimant is from an advantaged social group than when he or she is from a marginalized group."

Further on, Desai and Muralidhar[28] observe that "while in some cases, the Court has expressed its reluctance to step into the legislative field, in others it has laid down detailed guidelines and explicitly formulated policy", which was based on their analysis of cases concerning adoption of children by foreign nationals, sexual harassment, torture in custody, the management of the Central Bureau of Investigation and vehicular pollution[29]. While examining the decision of Supreme Court in 2001 on the issue of conversion of commercial vehicles of Delhi government on CNG, seems to appreciate its effect on environmental and health. However, they further develop an opinion in favor of regulators and legislature by observing that: "Some of the

[24] Shunmugasundaram, R. (2007). Judicial activism and overreach in India. *Amicus Curiae*, (72).

[25] Singh, R. (2015). *An analytical and critical study on judicial activism visvis judicial overreach with respect to legislative function of the Indian parliament.* For PhD. Veer Narmad South Gujarat University.

[26] Dasgupta, M. (2009). Public interest litigation for labour: how the Indian Supreme Court protects the rights of India's most disadvantaged workers. *Contemporary South Asia*, 16(2).

[27] Gauri, V. (2009). Public Interest Litigation in India: Overreaching or Underachieving?.*Policy Research Working Paper*, [online] (5109). Available at: http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-5109 [Accessed 4 Dec. 2016].

[28] Desai, A. and Muralidhar, S. (2000). *Public Interest Litigation: Potential and Problems.* In: B. Kirpal, A. Desai, G. Subramanium, R. Ramachandran and R. Dhavan, ed., *Supreme but not infallible : Essays in honour of the Supreme Court of India*, 1st ed. New Delhi: Oxford University Press.

[29] Desai, A. and Muralidhar, S. (2000). *Public interest litigation: potential and problems.* In: B. Kirpal, A. Desai, G. Subramanium, R. Ramachandran and R. Dhavan, ed., *Supreme but not infallible : Essays in honour of the Supreme Court of India*, 1st ed. New Delhi: Oxford University Press.

roadblocks to CNG implementation could have been avoided, or at least minimized, had the conversion been originally mandated through the normal legislative process."[30]. A study carried out by Thiruvengadam chronicles a number criticisms on PIL regarding the issue of overreaching into the legislation arm of the state by prominent former and serving justices of Indian courts, with the most important comment of that being Justice Kaju in 2008, who alleged that PIL "has developed into an uncontrollable Frankenstein." Thiruvengadam[31] Furthermore, a review of past decade or so reveals that there has been a strong criticism against this judicial overreach by the courts, that includes a 1996 Rajya Sabha bill which attempted to regulate PILs, a statement by Manmohan Singh in 2007 in reaction to the overreaching of the powers by courts Shankar and Mehta[32], calls from the bench to set guidelines for PIL. There are also arguments in favor of the judicial overreach by several authors.

Srikrishna[33], Furthermore, another reason for showing reluctance in the use of contempt of court order is, that judges have to rely on officials of executive agencies to get that order executed and can't do it on their own, as "judges cannot step down from their benches and take [violators] away."Sood[34], This hurdle is also recognized by the judges in the *MadhuKishwar v. State of Bihar* i.e. a 1982 PIL case against the issue of non-equal inheritance rights for the women under tribal law. The petitioner Madhu Kishwar in her book mentions that the court did not accepted her plea to issue contempt of court order for the reason that "the Bihar government or its police are not going to heed it any more than they did our original order." Kishwar[35] Another issue in implementation of detailed guidelines-set forward as a result of PIL cases is that, it is more difficult to ensure-the implementation in private sector. Avani Sood explains that although the directives given by court in Vishaka case were being implemented by the

[30] Rosencranz, A. and Jackson, M. (2003). The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power. *Columbia Journal of Environmental Law*, 28, pp.1-23.
[31] Thiruvengadam, A. (2007). Recent PIL cases decided by the Supreme Court. [Blog] *Law and Other Things*. Available at: https://lawandotherthings.blogspot.com/2007/07/recent-pil-cases-decided-by-supreme.html [Accessed 5 Dec. 2016].
[32] Shankar, S. and Mehta, P. (2008).Courts and Socioeconomic Rights in India. In: V. Gauri and D. Brinks, ed., *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, 1st ed. New York: Cambridge University Press.
[33] Srikrishna, B. (2005). *SKINNING A CAT*. [online] Available at: http://www.ebc-india.com/lawyer/articles/2005_8_3.htm#Note71 [Accessed 4 Dec. 2016].
[34] Sood, A. (2008). Gender Justice through Public Interest Litigation: Case Studies from India. *Vand.J. Transnat'l L*, [online] 41(833). Available at: http://scholarship.law.berkeley.edu/facpubs/2285/ [Accessed 4 Dec. 2016].
[35] Kishwar, M. (2001).*Off the beaten track*. 1st ed. New Delhi: Oxford University Press.

government gradually, largely due to the monitoring by the NGOs, however in case of private sector, the only thing the court could do was to ask government to create incentives or ensure the inclusion of those directives under the standing orders of industries to get these implemented in all sectors. This clearly reflects on the lack of means available to judiciary in getting its PIL directives implemented smoothly.

Public interest litigation and Judicial Activism in Uganda; Improving the enforcement of economic, social and cultural rights. Christopher Mbazira.[36] This paper examines at length the nature of public interest litigation and its foundation. It offers a human rights based review of the applicability of PIL in relation to economic, social and cultural rights. In order to test its applicability, the author examines the justifiability of the ESCRS in Uganda. In addition, he looks at a vigilant judiciary as a fundamental step towards cultivating fertile ground for judicial activism and public interest litigation especially in protection of ESCRS. However, I intend to go beyond his discussion that looks at ESCRS as a whole and to focus majorly on those rights that are directed affected by an environment that is not preserved and protected such as the right to a clean and healthy environment, right to proper standard of health and a right to life.

Public Interest Litigation as a mechanism for enforcement of environmental Rights and duties **in** Uganda. Emmanuel Kasimbazi.[37]This paper examines the nature, history and theoretical basis for public interest litigation. The role of public interest litigation in the enforcement of environmental rights and duties in Uganda is highlighted. The paper further offers a fully-fledged outline on the procedure of the enforcement mechanism, discusses the constraints and makes recommendations for its successful application in Uganda. However, the paper is too generalized in stating the constraints. It dwells more on other constraints such as time limits, effects of civil procedure, and high costs of litigation. Much as the issue of limited judicial activism is mentioned, it is not the paper's main objective to highlight it as a pressing issue. This paper therefore, serves to expound more on why there is limited judicial activism in Uganda as a major constraint to enforcing environmental rights and duties. Below, I will examine the numerous

[36]Mbazira.C" Public interest litigation and Judicial Activism in Uganda; Improving the enforcement of economic, social and cultural rights." (HURIPEC, Working paper No.24,2009)

[37]Kasimbazi . Public Interest Litigation as a mechanism for enforcement of environmental Rights and duties in Uganda.

papers that have been carefully written closest on the topic of my research Public Interest Litigation in Uganda, Practice and Procedure, Shipwrecks and Seamarks. Phillip Karugaba.[38]This is a paper meant to examine the practice and procedure of public interest litigation in Uganda. It's a paper written from the human rights perspective that offers a discursive and thorough dissection of cases, both from Uganda and other jurisprudences, offering a trail in development of public interest litigation as an enforcement mechanism in Uganda. The author, in detail looks at the body of jurisprudence that has arises mainly from the preliminary objections raised by the attorney General and other respondents to frustrate public interest litigations as a major constraint to its applicability in Uganda. In relation to the main objective of my research which is to conclusively determine the underlying factors behind the reluctance of lawyers to participate in environmental related public interest litigations, it offers a miniscule answer. The paper points out in a paragraph about limited judicial activism. Therefore, in addition to the constraints that have been highlighted, my research will expound on the reasons given by the lawyers as to why public interest litigation is not a field they would easily venture into.

Legal and institutional constraints to Public Interest Litigation as a mechanism for the Enforcement of Environmental Rights and Duties in Kenya. Odhiambo Michael.[39]This paper examines the constraints that have impeded the effective use of public interest litigation in the protection and enforcement of environmental and natural resource rights in Kenya. It looks at the legal constraints as those problems that exist within the legal framework and institutional ones that reflect the lack of capacity, opportunity and resources, whether in the legal profession or within civil society for taking up and prosecution cases of that nature. This paper however, where the constraints are highlighted, they are not grounded to the Ugandan context and therefore solutions cannot be conclusively drawn from problems that are not home grown. Never the less it offers some best practices that can be drawn from Kenya in order to offer recommendation for the Ugandan context.

[38]Phillip Karugaba. " Public Interest Litigation in Uganda, Practice and Procedure, Shipwrecks and Seamarks. Report on The Proceedings Of The Regional Symposium on Public Interest Litigation For Lawyers In East Africa, Green Watch in partnership with ELAW, ILEG, LEAT. 2005

[39]Odhiambo, Micheal, "Legal and institutional constraints to Public Interest Litigation as a mechanism for the Enforcement of Environmental Rights and Duties In Kenya." A paper presented at the fifth International Conference on Environmental Compliance and enforcement."

Human rights and Public Interest Litigation in East Africa: A Bird's Eye View. J. Oloka-Onyango.[40]This paper provides a comparative analysis of PIL among the three East African countries of Kenya, Tanzania and Uganda to determine its impact on the structures of governance, accountability and equality in the region. It analyses the manner in which PIL has grown and assesses the extent to which it has affected socioeconomic and political conditions in the region with respect to the lived experiences of the individuals, groups and institutions targeted by that kind of litigation. The author actually highlights part of the problem that my research is intended to cover. He states that there is a surprising paucity of specialized PIL layers in all three east African countries coupled with a lack of technical expertise among top ranks because many haven't done academic or practical courses in PIL. According to him most PIL lawyers suffer from exhibitionism who file petitions for political advantage. Nevertheless, the paper mainly looks at PIL through constitutional lenses especially towards the enforcement of civil and political rights.

1.9 ORGANIZATION LAYOUT

This study comprises of five chapters.

Chapter one covers the background of the study, statement of the study, General objective of the study, specific objective, research questions, scope of the study significance of the study, research methodology, literature review and the organizational layout.

Chapter two deals with object of public inter litigation to safeguard and protect constitutional and legal rights of disadvantaged people.

Chapter three identifies the Constitutional Provisions of Public Interest Litigation as a means of achieving human rights and justice. This chapter also examines the constitutional provisions of public interest litigation i.e. Article 50 and Article 32 of the Constitution. This Chapter will also deals with the various articles relating to violation of human rights in Uganda.

Chapter four provides the Public Interest Litigation regarding different Countries:

[40]J.Oloka-Onyango; "Human Rights and Public Interest Litigation In East Africa: A Bird's View"

This chapter deals with the origin and current position of public interest regarding Australia, Canada, France, South Africa and Japan. Public interest law also helped the above countries uplifted life of downtrodden people.

Chapter five highlight findings, conclusion and recommendations on public interest litigation as a means of promoting human rights and justice in Uganda.

CHAPTER TWO
SCOPE OF LEGAL FRAMEWORK ON PUBLIC INTEREST LITIGATION IN UGANDA

2.1 INTRODUCTION

This chapter will discuss the enabling Ugandan law on public interest litigation. It will delve into its history and development. For the purposes of this chapter, a dissection of four selected cases will be used as a case study to trail the development of public interest litigation

2.2 THE SCOPE OF PUBLIC INTEREST LITIGATION IN UGANDA

Historically, in Uganda the year 1967, enforcement of rights was under Article 22 of the constitution of the republic of Uganda. This Article stated that

22(1) subject to the provision of (5) of this Article, if any person alleges that any of the provisions of Articles 8 to 20 inclusive has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the high court for redress.

Important to note in this Article is that a person could only seek for redress only with respect to enforcement of his right and not any other persons right.

Following the coming into force of the 1995 Constitution, the law was changed under article 50(2) which states: 'any person or organization may bring an action against the violation of another persons or groups human rights.

Public interest litigation refers to legal actions brought to protect or enforce rights enjoyed by members of the public or large parts of it.[41] In *Mtikila V Attorney General H.C.C.S 5/199*, it is described as thus, "*...it is not the type of litigation which is meant to satisfy the curiosity of the people but it is a litigation which is instituted with a desire that the court would be able to give effective relief to the whole or a section of the society.*" It is an enforcement mechanism which has been used to propel great social and legal reform around the world.

[41] Phillip Karugaba(TEAN) "Public Interest Litigation In Uganda; Practice & Procedure- Shipwrecks and Seamarks

The earliest notable case to which the birth of Public Interest Litigation can be attributed is *Brown V Board of Education of Topeka 347 U.S 483* in which a group of persons successfully sued in the US Supreme Court, against racial discriminative practices in schools as being unconstitutional denial of Equal Protection under the law. According to Helen Hershkoff, the result of this case provided inspiration to the new age of lawyers who saw law as a source of liberation as well as transformation for marginalized groups.[42]

Public Interest Litigation (PIL) is a legal action which is taken in a court of law for legal right of the community[43]. The phrase "Public Interest Litigation" refers to particular human claim made in a politically organized society or political institution. The concept of human rights has assumed importance globally during the past few decades ever since the announcement of the Universal Declaration of Human Rights[44]. Human rights are the important element of philosophical, social and political debates of the twentieth century. Number of people around the world suffers from their basic needs. They are also refrained from the enjoyment of the basic economic, social, cultural, civil as well as political rights. This challenge is the basic issue not only concern with the one country but also universal and global[45].

The idea of the term "human rights" is older and not the invention of the twentieth century. The genesis of human rights is the utopian concept of natural rights traceable from the days of the Greek or even earlier. The period of renaissance witnessed the basic changes in the belief of society. People thought that an idea of human right is to be a general, social need and reality. The real foundation of human rights was truly laid when resistance to religious intolerance and political economic bondage began[46]. The Magna Carta (1215), The petition of Rights (1628), and the English Bill of Right (1689) were proof of the human rights.

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[42]H.Hershkoff, *Public Interest Litigation: Selected Issues and Examples,* WORLD BANK, http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Publicinterestlitigation%5B1%5D.pdf;

[43] Cummings and Rhode (2009) "Public Interest Litigaiton". See also Rhode, D (2009) "Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line" Fordham L. Rev 77, p. 1435; Blasi, G. (2009) "Framing Access to Justice: beyond Perceived Justice for Individuals", Loy. L.A. L. Rev. 42, p. 913.

[44] Deshpande, "Public Interest Litigation", *Facts*, Vol.II, 1983,p.11, at pp. 11-12

[45] Blasi, G (2009) "Framing Access to Justice: beyond Perceived Justice for Individuals", LOY. L.A. L. REV. 42, p. 913.

[46] Epp, C. R. (2009). Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State. Chicago: University of Chicago Press.

As earlier noted, public interest litigation provides a new dimension through which the law can be applied. There are three notions that give a theoretical basis for the existence of public interest litigation. The first being that it is a reflection of judicial intervention in the procedural defects of the enactment process that exclude or dilute the interests of affected groups.[47]Secondly, it is based on the view that there is a chasm between the "law on the books" and the "law on the ground"[48]. This means that it is a recognition that laws are easier written than put into practice and therefore it provides an efficient means of seeing law on paper translate into reality and practice. Thirdly, it has been part of what the socialists call the "new social movement" in which participants contest the terms of public meaning where those who lack formal access to power become visible through the forum.[49]

Uganda provides useful jurisprudence on the field of Public interest litigation. It has been employed mostly as a tool of environmental enforcement in the courts. Needless to say, its beginnings were a rocky one, but now it has firmly gained root in the legal system even though it is not as popular as it is in other jurisdictions like India, Pakistan, Indonesia, Bangladesh and the Philippines.

2.3 ROLE OF PUBLIC INTEREST LITIGATION

As a form of formal popular justice, PIL has proven to serve a number of interests especially towards the enforcement of rights. Public interest litigation allows the public to move from mere woes and cries to enforceable action that will enable the deprived sections of society to realize their rights. It was held *in BandhuaMuktimorcha V Union of India (1984) S.C,* where Bhagwati .J. noted that public interest litigation is an opportunity for government and its officers to make human rights meaningful to the deprived and vulnerable sections of the community and assure them social and economic justice which is the signature tune of the Constitution.[50]

[47] Ely, Democracy & Distrust (1980) quoted in HellenHershoff, " Public interest Litigation, Selected Issues and Examples"
[48] "Idealogy, Experience, and the Rule of Law in Developing Societies" 2000 presented at the UNRISD conference in Bangkok, Thailand (unpublished manuscript on file with the author at New York University School of law)
[49] "An Introduction to the study of Social Movements" (1985), 53 Soc.res 74 (1985)
[50] Public Interest Litigation 2nd Edition

It is also a basis for assisting those who cannot access courts of law to protect their rights for instance the poor, the illiterate and the children. This can be largely attributed to the fact that most of the disadvantaged are actually illiterate about their rights and yet are the biggest victims of rights' infringement and therefore need legal messiahs to advocate for them.

Public interest litigation is a mechanism for speeding up justice. It allows an organization or any member of the public to file a single action for the benefit of all those who are injured. This was enunciated in the case *of Oposa V Factoran (1993) Supreme Court of Philippines G.R 101083* where the suit was said to be filed on behalf of petitioners and on behalf of others so numerous that it was impracticable to bring them all before court.[51] In this way, court avoids the scenario of having to entertain numerous suits by different aggrieved parties concerning the same possible defendant.

It is used to challenge deficiencies in the enforcement of the existing laws and seeking to regulate the future conduct of the public authority- "through the imposition and monitoring of detailed decrees that spell out in highly specific terms constitutional or statutory requirements."[52] It can be argued in light of judicial review though enforcement may be problematic. According to Mbazira, judicial enforcement of socio-economic rights is viewed as undemocratic because it is argued that courts whose judges are unelected and not accountable are empowered to set aside the decisions of the democratically elected representatives of the people.[53]

Nevertheless, the drive towards achieving equality, accountability and enforcement of rights geared by PIL cannot be ignored but rather lauded. PIL has been very instrumental in the stated ways and with the courts continued entertaining of PIL's, the face of law is slowly morphing from its strict application of rules to more sociologically based approaches of justice

Historically, in Uganda, in the year 1967, enforcement of the rights was under Article 22 of the 1967Constitution of the republic of Uganda. This article stated;

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[51] Reprinted in the Environmental case book for Practitioners and Judicial officers – Judicial Symposium on Environmental law and Practice in Uganda p.314-329

[52]H.Hershkoff, *Public Interest Litigation: Selected Issues and Examples,* WORLD BANK, http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Publicinterestlitigation%5B1%5D.pdf;

[53]C.Mbazira. Enforcing the Economic, Social and Cultural Rights in the South African Constitution as Justiciable Individual Rights.; The Role of Judicial Remedies. Dissertation in fulfillment of a PHD. May 2007

22(1)subject to the provisions of (5) of this Article, if any person alleges that any of the provisions of Articles 8 to 20 inclusive has been , is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the high court for redress.

Important to note in this article is that a person could only seek for redress only with respect to enforcement of his right and not any other person's right.

Following the coming into force of the 1995 Constitution, the law was changed under Article 50(2) which states; Any person or organization may bring an action against the violation of another person's or group's human rights.

This therefore, contrary to the Article 22 of the 1967 Constitution confers a right on any person to enforce the rights of any other person. This shows a change in the law since 1967 to current due to the development of the rule of law.

The emergence of Public Interest Litigation has recognised that the right to elective 'access to justice' is the most basic and fundamental human right in the welfare state which guarantees social rights. For the enjoyment of the traditional legal right as well as the new social rights, this tool pre-supposes the mechanisms for their elective protection and the traditional conception of adjudication[54]. Moreover, the assumptions on which it is based are proving to be inadequate for the operation of the Public Interest Litigation. Consequently, the courts have liberalised the standard of locus standi to meet the challenges of the time. In Indian law, PIL means litigation for the protection of public interest[55]. It is litigation introduced in a court of law not by the aggrieved party but by the court itself or by any other private party. It is not necessary for the exercise of the court's jurisdiction, that the person who is the victim of the violation of his or her right should personally approach the court. Public Interest Litigation empowers the public promoting judicial activism.

[54] Felstiner, W., Abel, R., & Sarat, A. (1980-1981). "The emergence and transformation of disputes - naming, blaming, and claiming..." Law and Society Review, 15(3), 631 655.

[55] Hertogh, M & Halliday, S. (2004). Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives. Cambridge: Cambridge University Press.

Such cases may occur when the victim does not have the necessary resources to commence litigation or his freedom to move court has been suppressed or encroached upon. The court can itself take cognizance of the matter and proceed suo motu or cases can commence on the petition of any public-spirited individual.
In simple words, it means litigation filed in a court of law, for the protection of "Public Interest", such as those against pollution, terrorism, constructional hazards or those for road safety etc.

Public interest litigation is not defined in any statute or in any Act. It has been interpreted by judges considering the interest of public at large. Although, the main and only focus of such litigation is "Public Interest", there are various areas where Public interest litigation can be filed, For example, Violation of basic human rights of the poor, Content or conduct of government policy, Compel municipal authorities to perform a public duty. Violation of religious rights or other basic fundamental rights

In Garner[56]defines Public Interest as something in which the public, the community at large has something pecuniary interest or some interest by which their legal rights or liabilities 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 the citizens generally in affair of local, state or national government.

Public interest litigation describes legal actions brought to protect or enforce rights enjoyed by members of the public or large parts of it. It has been used as a tool of great social change in India, Pakistan, Bangladesh and the Philippines on such diverse issues as the environment, health and land issues[57].

According to Bhagwati j in *Bandhua Mukti Morcha V Union of india*[58] opines as follows; *Public interest litigation is not in the nature of adversary litigation but it is a challenge and an*

[56] *Garner, Bryan A. (2007). Guidelines for Drafting and Editing Court Rules (PDF) (5th ed.). Washington, D.C.: Administrative Office of the United States Courts. Garner, Bryan A. (2015). Guidelines for Drafting and Editing Legislation. Dallas: RosePen Books.*
[57] Scheingold, Stuart A. (1974) The Politics of Rights: Lawyers, Public Policy, and Political Change. New Haven, CT: Yale University Press.
[58] (1997) 10 SCC 549

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.[59]

In Australia, the criteria used by the Public Interest Law Clearing House (Vic) Inc. and the Public Interest Law Clearing House Inc. (NSW) to determine public interest cases to support are; The matter must require a legal remedy and be of public interest, which means it must;
a) affect a significant number of people not just the individual or;
b) raise matters of broad public concern or;
c) impact on disadvantaged or marginalized group; and
d) it must be a legal matter which requires addressing pro bono publico('for the common good')[60]

In Uganda, public interest litigation is coming of age. Some examples of public interest litigation are the Rwanyarare/Ssemogerere petitions in the Constitutional Court in respect of political rights; Uganda Law Society (ULS) petition on the Referendum Act; ULS petition on execution of death penalty sentences passed by a field court martial without affording a right of appeal; the constitutional petition on the Divorce Act; Greenwatch actions; (Butamira, AES access to information, Golf Course development (now Garden City Shopping Centre), curry powder, chimpanzees kaveera), constitutional petition against the death penalty, petition on freedom of worship by Seventh Day Adventists; TEAN actions on smoking in public places and on stronger warning labels for tobacco products.

"The harvest is plentiful but the labourers are few". Many more issues abound all bedded in the Constitution but hot with controversy for example, issues of torture of suspects in detention, arrest of persons released by the Courts, street vendors' rights, pornography, prostitution, dismissal of alcoholics from police[61].

[59] Narayama: Public Interest Litigation [2nd Edn 2001]
[60] Penny Martin Defining and refining the concept of practicing in the public interest [Alternative Law Journal Vol. 28 Number 1 February 2003 P.4]
[61] Zemans, F. K. (1983). "Legal Mobilization: The Neglected Role of the Law in the Political System." American Political Science Review, 77(3), 690-703.

Public interest litigation attracts a lot of attention and for this reason is often wrongly called "publicity interest litigation". Nonetheless the media are an important and indispensable ally in any battle for societal rights. Public interest litigation is a new tool in the arsenal of civil society. It presents a strategic opportunity to engage the Judiciary in ordinary societal issues. It allows civil society organizations to jump from conference table lamentations to strategic, decisive and enforceable action. It also allows the Judiciary to take its rightful place in the shaping and development of society.

The attempts at public interest litigation in Uganda have been beset with technicalities, which we propose to discuss below in a humble attempt to bring clarity to this area of the law and, by so doing, promote a culture of constitutionalism, of human rights enforcement and the Rule of Law.

2.3 LEGAL FRAMEWORK ON PUBLIC INTEREST LITIGATION

The bedrock of public interest litigation lies in Article 50(2) of the Constitution. It provides that 'any person or organization may bring an action against the violation of another persons or groups human rights''

2.4.1 The 1995 Constitution of Uganda

Psalms 82:3-4 "*Defend the poor and the fatherless, do justice to the poor and affected and needy, deliver the poor and the needy, free them from the hand of the wicked*"

The principal law providing for public interest litigation is found in the supreme law of the land- the 1995 Constitution of the Republic of Uganda. Under Art 50 of the constitution.

Art 50(1) any person who claims that a fundamental or other right freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation."

Art 50(2) any person or organization may bring an action against the violation of another person's or group's human rights.

The use of "any person" rather than an "aggrieved person" in the provision abolishes the requirement for *locus standi*in these situations as established by common law doctrines.

Secondly under art 137(3) of the constitution.

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 or in contravention of a provision of the Constitution, may petition the constitution for a declaration to that effect and redress where appropriate.*

Justice Mulenga JSC in *Ismail Serugo V KCC and Attorney General*rightly asserted that the right to present a constitutional petition was not vested only in the person suffering the injury but also in any other person.[62] This is position is reinforced by Art 3(4) of the Constitution that imposes a right and duty on every citizen of Uganda to defend the Constitution.

2.4.2 The National Environmental Act (cap 153)

Section.71 of the National Environmental Act (cap 153) also 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 cases.

The establishment of the United Nations in 1945 dramatically changed the course of environmental protection through the establishment of its specialized agencies by 1970 that were involved in issues of environmental management.[63] Later on in 1992 the Rio conference was held and it adopted the Rio Declaration.[64] This declaration recognized the need for intergenerational equity, the need for states to enact effective environmental legislation, the adoption of the precautionary principle that advocates against postponement of problem solving and the financial and technological responsibility of developed countries, the involvement of women, the youth, indigenous and local communities, the private sector and non-governmental organizations in achieving sustainable development. Thus most environmental legislations have developed along the above mentioned lines.

However, till 1980, no African country had developed framework environmental legislation.[65] Analyses produced in the 1970's and early 1980's on the theme of environmental regulation

[62] Constitutional Appeal No.21/1998

[63] The World Health Organization, Organization for Economic Co-operation and Development and Food and Agricultural Organization which were very instrumental towards environmental conversation.

[64] In 1972, the Stockholm conference was held and it recommended the creation of an environmental agency known as UNEP

[65] Countries like Libya enacted environmental laws in 1982 setting the pace for other African countries.

were criticized for leaning towards romanticizing the colonial laws.[66] After the NRA took the reins of power in 1986, there was massive reformation in the governmental structure of the nation especially in law reform.[67] The ministry of Environmental Protection was established and its mandate was to coordinate and regulate national efforts in the management of life supporting natural resources as to ensure their availability for sustainable development.[68]In 1991, the government initiated a consultative process to improve environmental governance through the NEAP, a major milestone in Uganda's development of environmental law as it provided strategies for addressing concerns in the areas of policy, legislation, institutional reforms and new investments with a view of promoting sustainable development.[69] It was followed by the adoption of the National Environment Management Policy for Uganda 1994, which set out the overall policy goals, objectives and principles for environmental management.[70] In order to achieve the overall policy goal of sustainable development, the NEMP recommended four initial actions which included *inter alia*, the creation of an appropriate institutional and legal framework as well as the revision and modernization of sectoral policies, laws and regulations.[71] It was through this process that the current legal regime relating to the management of the environment emerged.

Therefore the need for the fight to save the environment arises from necessity to preserve basic human rights and even the right to health itself. The right to a clean and healthy environment has been guaranteed in several constitutions including Uganda's.[72] This is because human rights are inter related, interdependent, indivisible and as long as the environment is not protected, rights such as life are put at stake and in jeopardy. Cases have been decided premised on this relationship for instance in *Consumer Education & Research Centre V Union of India*, it was held that a worker's right to health forms an integral part of the right to life.[73] It has been noted that much of Uganda's disease burden is environment-related. The increases in health problems

[66]HandBookOn Environmental Law In Uganda. Edited by Kakuru.K and .Ssekyana.I. Volume 1 PG 4
[67]Handbook OnEnvironmemtal Law in Uganda . Edited by Kakuru.K.&. Ssekyana.I. Volume 1 pg 68
[68] Supra note above
[69]Nema (1994) State of the Environment Report for Uganda 1994. National Environment Management Authority preface.P.V
[70]Nema (1998) State of the Environment Report for Uganda 1998 National Environment Management Authority pg 242
[71]Handbook On Environmental Law in Uganda . Edited by Kakuru.K.&. Ssekyana.I. Volume 1 pg 69
[72] Article 39 of Constitution of the Republic of Uganda, 1995
[73] 1995 AIR 922

are due to the environmental risks that arise largely from unsustainable development policies related to the use of water and land resources, transportation and energy.[74] Therefore African countries including Uganda have recognized the link between health and environment through the Libreville Declaration on Health and Environment signed in 2008 and the subsequent Luanda Commitment in 2010.

Given the above submissions, it is evident however that the level of achievement of the protection of the environment is still lagging behind. Arguments have been put forward that the protection of the right to a clean and healthy environment is a social economic right that calls for a positive obligation from the state in order to enforce. In addition, Globalization and the BrettenWoods Institution Structural adjustment programs have also made government involvement in the protection of the environment stagnated due to the free market economy that Uganda subscribes to. As a result, civil society has been actively participating in the fight to protect the environment. Organizations like Green Watch, The Environmental Action Network have been instrumental, through public interest litigation in this sector. Public interest litigation therefore has been the major weapon that civil society has employed through a legal battle with the judiciary that was hesitant in embracing the notion of public interest litigation, in order to advocate for the protection of the environment. It is a tedious task that has been left mostly entirely in the hands of civil society as it is a rare occurrence for lawyers take up this responsibility of delving into environmental matters.

Section 4 of the national Environment Act establishes the national Environment management Authority (NEMA), the primary agency in Uganda charged with overseeing all activities within an impact on the environment[75]one of NEMA's functions is to work with various government departments and agencies to ensure the government considers environmental concerns in general national planning[76] Nema also monitors and regulates private and cnon-governmental entities on environmental issues, and requires environmental impact assessments from any entity whose proposed activities are likely to have a significant impact on the environment[77]

[74] NEMA(2010) State of the Environment Report for Uganda (2010) National Environment Management Authority
[75] National Environmental Act, Chapter 153 Section 4, 5 (Uganda 1995)
[76] Section 4, 5 of the Constitution of the republic of Uganda 1995
[77] Section 6, 19 and 20 of the 1995 Constitution of the republic of uganda

Section 3 of the NEA provides every person the right to a healthy environment[78] the Section also provides that every person has a duty to maintain and enhance the environment, including the duty to inform the authority (NEMA) or the local environment committee of all activities and phenomena that may affect the environment significantly."105 To ensure enforcement of these rights and duties, NEA gives NEMA and the local environment committee authority to initiate action against individuals whose activities pose a threat to the environment[79]. The action could be aimed at halting the activity or requiring that the activity undergo an environmental audit or monitoring[80]. Section 3, subsection 4 also allows NEMA or the local environment committee to initiate an action regardless of whether or not the complainant can demonstrate likelihood of personal loss or injury from the defendant's activity[81].

2.5 CONCLUSION

Ugandan laws such as the 1995 Constitution and National Environment Act ("NEA") provide potential litigants with standing to bring actions on behalf of the public[82]. In Uganda, public interest litigation is brought on behalf of the public or on behalf of a significant part of the public in an effort to defend their rights.[83] Accordingly, any concerned person, group of people, or organization can bring a public interest action to enforce or defend the rights of a group of people[84].

So it is in advancing the cause of observance and protection of fundamental human rights.

There has been more human rights litigation in the last 5 years than probably the whole of Uganda's history put together.

Sadly most of it still reflects restraint. Rather than expand the human rights through liberal interpretations, we have tended to remain shackled with technical and legalistic approaches

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[78] National Environmental Act, Chapter 153 Section 3, (Uganda 1995)

[79] Byabazaire V Mukwano Indus. H.C. Misc. App. No. 909 of 2000 (High Court Jan. 24, 2001) reprinted in 1 Guide to Environmental law in Uganda, Supra Note 12, at 39, 43

[80] National environment Act Chapter 153, Section 3

[81] National environment Act Chapter 153, Section 4

[82] Envtl. Action Network, Ltd. v. Attorney Gen., H.C. Misc. App. No. 39 of 2001 (High Ct. Aug. 28, 2001), *reprinted in* 1 Guide to Environmental Law in Uganda, *supra* note 12, at

[83] Emmanuel Kasimbazi, *Public Interest Litigation as a Mechanism for Enforcing Environmental Rights and Duties in Uganda, in* Compliance and Enforcement in Environmental Law 579, 579 (LeRoy Paddock et al. eds., 2011).

[84] Under the court structure in Uganda, the Supreme Court is the highest Court and is composed of seven justices including the Chief Justice of Uganda. *Courts of Law in Uganda*, Chr. Michelsen Inst., http://www.cmi.no/pdf/?file=/uganda/doc/court-administrationuganda- october-05.pdf (last visited May 20, 2013).

looking for safe, politic or popular positions. If we are to give full meaning to the rights and freedoms recognized in the Constitution, if we are to give it life, it is time for a change.

CHAPTER THREE

CONSTITUTIONAL PROVISIONS OF PUBLIC INTEREST LITIGATION AS A MEANS OF ACHIEVING HUMAN RIGHTS AND JUSTICE

3.1 INTRODUCTION

This chapter also examines the constitutional provisions of public interest litigation that is Article 50 and Article 32 of the Constitution. This Chapter will also deals with the various articles relating to violation of human rights in Uganda.

Ugandan laws such as the 1995 Constitution and National Environment Act ("NEA") provide potential litigants with standing to bring actions on behalf of the public.[85] In Uganda, public interest litigation is brought on behalf of the public or on behalf of a significant part of the public in an effort to defend their rights.[86] Accordingly, any concerned person, group of people, or organization can bring a public interest action to enforce or defend the rights of a group of people.[87]

3.2 THE 1995 UGANDA CONSTITUTION

Article 50 of the 1995 Constitution of Uganda gives public interest litigants standing.[88] Article 50(1) states, "any person who claims that a fundamental or other rights or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation."[89] The Article, thus, applies to *any* individual whose rights have been violated.[90]

Article 50(2) further allows "any person or organization" to petition the court to enforce "another person's or group's human rights."[91]

The Constitution further provides as follows:

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[85] Envtl. Action Network, Ltd. v. Attorney Gen., H.C. Misc. App. No. 39 of 2001 (High Ct. Aug. 28, 2001), *reprinted in* 1 Guide to Environmental Law in Uganda, *supra* note 12,

[87] Under the court structure in Uganda, the Supreme Court is the highest Court and is composed of seven justices including the Chief Justice of Uganda. *Courts of Law in Uganda*, Chr. Michelsen Inst.,

[88] Article 50 of constitution of the republic of Uganda 1995; *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *21.

Article 50(1) of constitution of the republic of Uganda 1995

The High Court interprets Article 50(2) to allow any person or organization to enforce the rights of others, regardless of whether such person's or organization's rights were violated.[92] In 2001, in *Environmental Action Network v. Attorney General*, the High Court discussed Article 50 (2) of the Constitution of Uganda.[93] In that case, the Environmental Action Network ("EAN") filed an action on its own behalf and on behalf of non-smoking Ugandans under Article 50(2) seeking a declaration that unregulated public smoking violates the right of non-smokers to a clean and healthy environment guaranteed under Article 39 of the Constitution.[94] EAN wanted the court to require the government to regulate public smoking, and thereby promote a healthy environment.[95] Respondents argued that petitioner could not bring a case on behalf of the non-smoking public due to a lack of individual interest in the right infringed. The court held that under Article 50(2) "an organization can bring a public interest action on behalf of groups or individual members of the public even though the applying organization has no direct individual interest."[96]

Two years later in *British American Tobacco v. Environmental Action Network*, the High Court reached a similar decision.[97] The case involved a public interest action brought by the EAN under Article 50(2) requesting a declaration that respondent had not fully informed both actual and potential consumers of the dangers a smoking. Plaintiffs requested that the court require respondents to include adequate information on cigarette packaging and in advertisements to fully inform customers of these risks.[98]

In answering the application, respondent contrasted Article 2 of the Ugandan Constitution which lists the categories of people that may seek redress for a violation of the Bill of Rights:

a. anyone acting in their own interest;

b. anyone acting on behalf of another person who cannot act in their own

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[92] British Am. Tobacco Ltd. v. Envtl. Action Network Ltd. H.C. Civil Case 27 of 2003 (High Ct. Apr. 16, 2003), *reprinted in* Guide to Environmental Law in Uganda, *supra* note 12, at *9, *11; *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *21.

[93] The 1995 Uganda Const. art. 50(2); H.C. Misc. App. No. 39 of 2001, at 21.

[94] Uganda Const. arts. 39, 50; *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *17, *19.

[95] *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *19.

[96] The 1995 Uganda Constitution. art. 50(2).

[97] H.C. Civil Case No. 27 of 2003, at *11.

[98] *British Am. Tobacco*, H.C. Civil Case No. 27 of 2003, at *10.

c. anyone acting as a member of, or in the interest of, a group or class of persons

d. anyone acting in the public interest; and

e. an association acting in the interest of its members.

In addition to Article 50, public interest litigants can approach Ugandan courts for enforcement of environmental rights under Article 137(3)of the Constitution[99]. The Clause states:
A person who alleges that(a) an Act of Parliament or any other law or anything in or done under the authority is of any law; or (b) any act or omission by any person or authority, 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.

By referring to "'[a] , person who alleges'" Article 137(3) includes those litigants who may not be directly injured by the violation, and therefore, covers standing to public interest litigants.

3.3 THE NATIONAL ENVIRONMENT ACT 1995

Section 4 of the NEA establishes the National environment management Authority (NEMA), the primary agency in Uganda charged with overseeing all activities with an impact on the environment[100] NEMA also monitors and regulates private and non governmental entities no environmental issues and requires environmental impact assessment from any entity whose proposed activities are likely to have a significant impact on the environment[101].

NEA decentralizes power by giving NEMA the authority to promulgate guidelines for creating a committee on the environment in such district. The district environment committee, headed by a district environment officer performs supervisory and management functions similar to those of the national organization, but aimed at promoting environmental quality at the district level. NEA further decentralizes power by giving the district environment committee power to advise local government systems on the appointment of local environment committees. Such local

[99] Article 137 of the 1995 Constitution of the republic of Uganda
[100] National environment Act Chapter 158, Section 16 (Uganda 1995)
[101] The law includes the 1995 constitution of Uganda, NEMA Act, Water Act, Uganda Wildlife Act, and the several sectoral policies.

environment committees monitor activities at the local level and inform the district environment officer of any activities[102]

In Uganda, the legal basis of PIL is Objective XXIX (g) and Article 3 (4) of the 1995 Constitution which require every citizen to uphold and defend the Constitution. Under Article 17(1) (b) and Article 20(2), it is the duty of every citizen to respect the rights and freedoms of others. Under Article 17(1) (c), every citizen has a duty to protect children and vulnerable persons against any form of abuse, harassment or ill-treatment. These provisions form the foundation for PIL in Uganda.

There are also two main Constitutional provisions that are considered to be the enabling law for PIL. To start with, under Article 50 (2) of the Constitution, any person or organisation may bring an action against the violation of another person's or group's human rights. An action may be lodged in the High Court which, under Article 50 (1), is the competent court for redress where human rights and freedoms have been violated or threatened. The procedure is by way of plaint as required by order 4 rule 1 of the Civil Procedure Rules. In Charles Harry Twagira v. Attorney General[103], the court of appeal held that Article 50 actions had to be filed by plaint.

The other avenue available is under Article 137 (3) of the Constitution. Under the said provision, any person who alleges that an Act of parliament or any other law or any act or omission by any person or authority is inconsistent with the Constitution may petition the constitutional court for a declaration to that effect. The constitutional court may, under Article 137 (4), in addition to the declaration sought grant an order of redress or refer the matter to the High Court to investigate and determine the appropriate redress.

There has been a big debate as to whether an action should be brought under Article 50 or under Article 137. In Attorney General v. David Tinyefuza[104] Wambuzi CJ (as he then was) put the matter to rest when he concluded that unless the question before the constitutional court depends

[102] Mbazira.C" Public interest litigation and Judicial Activism in Uganda; Improving the enforcement of economic, social and cultural rights." (HURIPEC, Working paper No.24,2009)

[103] Civil Appeal No. 61/2002
[104] Constitutional Appeal No. 1 of 1997

for its determination on the interpretation or construction of the Constitution, the constitutional court has no jurisdiction. Therefore if a person alleges a violation of a human rights and fundamental freedoms, the appropriate court is the High Court.

However, there are instances where the constitutional court will entertain matters that would otherwise fall under Article 50. In Joyce Nakacwa v. Attorney General[105] the constitutional court held that it has jurisdiction to entertain matters that would otherwise fall under Article 50 if this is done in the process of a constitutional interpretation under Article 137of the constitution.

Articles 50 (2) and 137 offer standing to public interest litigants in Uganda. In BATU-Ltd v. TEAN court held that "person" "organisations" and "groups of persons" can be read into Article 50 (2) to include public interest litigants. This can be applied mutatis mutandis to article 137 of the constitution.

Besides the constitution, there are also other laws that enable PIL in Uganda. For example, a person may under section 71 of the National Environment Act obtain a restoration order against any person who has harmed, is harming or is reasonably likely to harm the environment.

By and large, the law in Uganda widely confers standing on persons and organisations interested in bringing suits in respect of vulnerable persons where there are violations of human rights. In recognizing that public interest litigants have locus standi, the court in Bat-ltd v Tean "it cannot be denied that such group of persons abound in our society and we cannot hide our heads in the sand by saying that the constitution does not expressly mention them and therefore they must be excluded from the constitutional provision regarding recourse to remedies when rights are violated."

Despite widely conferring standing on public interest litigants, Uganda needs to learn a lot from India in the area of PIL. Compared to Uganda, India's PIL laws and mechanisms are far better. It is upon this basis that Uganda should borrow a leaf.

[105] Constitutional Petition No. 2 of 200

There is a lesson to learn from India's PIL in terms of liberalization of the rules of standing. India has extended the rules of locus standi to the extent that they are not an obstacle to the public interest litigant.[106] In S.P. Gupta v. Union of India[107] Bhagwati C.J held that:
"Where a legal wrong or a legal injury is caused to a person or to 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..."
In India the Supreme Court has recognized that where there is a legal wrong or injury, public interest litigants have locus standi to sue on behalf of vulnerable groups. In Uganda standing is only available only in cases of human rights and constitutional interpretation[108].

Secondly, the procedure for maintaining an action in PIL should be relaxed as that of India. In Uganda the procedure for filing a suit is too formal. Actions must be brought by way of petition or plaint as discussed above. This is unrealistic and distances the courts from the people, majority of whom are ignorant of the law. In India the procedure is flexible. Actions may be commenced not only by formal petition but also by way of letters written to court.[109] In *Mukesh Advani v. State of Madhya Pradesh*[110], the court a newspaper Article about bonded labour as the basis for a PIL petition.

Perhaps the greatest lesson to learn is that of a proactive judiciary. Unlike Uganda's judiciary, the judiciary of India has struggled to bring law into the service of the poor and oppressed.[111] The public interest movement in India has been almost entirely initiated and led by the judiciary.[112] India's judiciary is very actively involved in PIL and the court has done this through a number of ways. The court frequently invites or induces the cases to be brought to

[106] Jamie Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?", American Journal of Comparative Law, Vol. 37, No. 3 (Summer, 1989), pp. 495-519, pg. 498-499.
[107] 1982 S.C. 149, 189
[108] Kasimbazi . Public Interest Litigation as a mechanism for enforcement of environmental Rights and duties in Uganda
[109] Cassels, Judicial Activism and Public Interest Litigation in India, 1989
[110] 1985 S.C. 1368
[111] Cassels, Judicial Activism and Public Interest Litigation in India, 1989, pg. 497
[112] Bhagwati, "Judicial Activism and Public Interest Litigation," 23 Column. J. Transnat'l L. 561 (1985) cited in ibid pg. 497

court.[113] This helps to establish confidence in the judicial system and encourages cases to be taken to court.

The court appoints Commissions of Inquiry or Socio-legal Committees to help investigate and collect the necessary facts, thereby relieving the petitioner of the financial burden of proof. These commissions also make recommendations on the appropriate remedies.[114]

The courts in India have also shifted from the traditional position of determining cases and resisting involvement in any ongoing supervision thereafter. Indian courts have demonstrated willingness to experiment with remedial strategies that require continuous supervision and that appear to shift the line between adjudication and administration.[115] The Ugandan judiciary should adopt this to ensure that its judgments are implemented and curb human rights violations.

In conclusion, PIL is not a new concept in Uganda's legal circles. It has a clear legal basis. However it has quite a number of challenges which can ably be dealt with if a leaf is borrowed from India. Standing should be liberalized as it is in India. The procedure for maintaining an action in the context of PIL should be flexible to ease access to court. More importantly the judges in Uganda need to play an active role as their counterparts in India[116].

Given the above evolution and 3.2 Criteria for Public Interest Litigation

history, suits of public interest litigation have a criteria that they must follow in order for the suit to be entertained before the court. Borrowing from Australian Jurisprudence, the suit must;

1) Affect a significant number of people not just an individual,
2) It must raise matters of broad public opinion,
3) It must impact on the disadvantaged and
4) It must be a legal matter that requires addressing *probono public.*[117]

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[113] Dasgupta M, "Social Action for Women? Public Interest Litigation in India's Supreme Court", Law, Social & Development Journal (LGD) 2002 (1) also available at <http://elj.warwick.ac.uk/global/02-1/dasgupta.html>

[114] Cassels, Judicial Activism and Public Interest Litigation in India, 1989, pg. 500

[115] Ibid pg. 506

[116] Phillip Karugaba. " Public Interest Litigation in Uganda, Practice and Procedure, Shipwrecks and Seamarks. Report on The Proceedings Of The Regional Symposium on Public Interest Litigation For Lawyers In East Africa, Green Watch in partnership with ELAW, ILEG, LEAT. 2005

[117] Penny Martin, " Defining and refining the concept of Practicing in Public Interest" (2003) Alt Law Journal Vol. 28. No.1 Feb 2003 PA

3.4 RECEPTIONS OF PUBLIC INTEREST LITIGATION IN THE COURTS

The reception of PIL's in Africa in General has been lukewarm. As per Oloka-Onyango, it is ironic that despite the grievances in the pre-independent era focusing on a wide range of human rights violations, courts of the 1960's through 1990's were not particularly active in the arena of PIL.[118] The few efforts geared towards enforcement of human rights were not well received because of the highly authoritarian nature of regimes in countries like Nigeria, Sudan and Egypt.[119] In East Africa on the Other hand, the courts unnecessarily leaned towards advancing the interests of the executive. In the Kenyan case of ***Wangaari Mathai V Kenya Times Media Trust,*** in which the plaintiff sought to stop the construction of a multi-story building in Uhuru Park in Nairobi, Justice N. Dugdale ruled that matters of public interest could only be litigated by the Attorney General, effectively ensuring that cases challenging the status quo would be stillborn.[120]

On the Ugandan case, Fredrick Ssempebwa recognized the tendency of the post-independence courts to refrain from "... adjudicating to matters political while providing judicial connivance to political adventurers whose subjugation of the people was the main reason for their legitimacy."[121]

In the environmental law context, cases that were set before the courts were met with mixed reactions ranging from indifference to hostility. Much as some success has been registered in some cases to the extent of defining public interest litigation, the court in its judgments, always implied that the prayers asked for by the applicants amounted to the judiciary usurping the role of parliament as a law making body.

In the case of *Bat V Tean* , Mr.JusticeJ.H.Ntabgoba had this to say about the prayer of the applicants, " *the prayer is asking too much of court...which has no expertise...the prayer*

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[118] Oloka-Onyango. Human rights and Public Interest Litigation in East Africa ; A Bird's eye View (the geo.Wash.int'l Rev Vol 47)

[119] Sidding.A.Hussein,*Sudan: In the Shadows of Civil War and Politicization of Islam, in* human rights under african constitutions: realizing the promise for ourselves 352-365(abdullahi ahmed an-naim, 2003); anthony mcdermott, egypt from nasser to mubarak: a flawed revolution 273-290(1988); kenide mowe, constitutional law in nigeria 21-23, 28-33(2008)

[120] (1989) Civ case.No.1159(unreported) (H.C.K) (Kenya)

[121] E.F.Ssempebwa,*Litigating the Bill of Rights: with Emphasis on the Ugandan Experience,in* human rights and democracy in east africa: the constitutional implication of east african co-operation 154(1997)

imposes on the court a duty it cannot discharge" in relation to an order that the respondents should place on packets of cigarettes warning labels in graphics, the size of which court would determine as being sufficient to fully and adequately inform consumers of the full risks and dangers to their health. He said that failure to make full disclosure of the dangers or risks of smoking cigarettes to the consumers is too remote taking away the life of such consumers. He went on to call the application unclear and embarrassingly ambiguous. His rationale was that the court had no duty to make such a declaration because it had no expertise and yet the court is the expert of experts.

In the case of *Tean v AG & Nema*, the same judge had a problem with the prayer of the applicants in order to declare smoking in public illegal. He stated that smoking in public is not a crime in Uganda and courts have no jurisdiction to create crimes or criminalize any acts nor do courts possess any powers to order prosecution which is the power strictly reserved for the Director of Public Prosecutions. He thus stated that the prayer would have been for the Attorney General to take steps to prosecute offenders.

In order to counter the seemingly distant and cold reaction of the courts, the UN, through the United Nations Environment Programme, has undertaken training programmes in environmental law in order to enlighten judicial officers all over the world in environmental law related matters. In 2007, it was reported that several judges had expressed the view that there is a discernible increase in judicial decisions of national courts and tribunals in a number of countries in the field of environmental law, which they said, in several instances could be directly related to UNEP's Judicial capacity building programme. This augurs well, they said, for promoting the realization of the goals of environmental protection and sustainable development through adherence to the Rule of law and the better implementation of national environmental legislation.[122]

[122] UNEP Judicial Training Modules on Environmental law: Application of Environmental Law by National Courts and Tribunals. United Nations Environment Programme, 2007 pg xiii

3.4.1 CONSTRAINTS TO PUBLIC INTEREST LITIGATION

The previous chapter contained the study on why lawyers do not participate in PIL's in Environmental law. I will look into other constraints that have limited the effective operation of public interest litigation in general much as the restrictive *locus standi* has been dealt away with.

Competent court

Article 50 prescribes the forum for enforcement of human rights actions as a "*competent court*" though the expression is not defined. Applications for enforcement of human rights under Article 50 of the Constitution are filed to the High Court.[123] For Article 137 actions, the correct forum is the constitutional court. The challenge always arises in determining whether the action should be under Article 50 or Article 137 and therefore deciding which the correct forum is.

WambuzI CJ (as he was then) in *Attorney General V David Tinyefuza* said, "*In my view, jurisdiction of the constitutional court is limited in Article 137(1) of the Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these circumstances I would hold unless the question before the Constitutional Court depends for its determination on the interpretation or construction of a provision of the Constitutional court has no jurisdiction.*"[124]

In I*smail Serugo v Kcc &AG* court ruled that in the course of handling Article 137 matters, the Constitutional Court could deal with Article 50 matters. However, unless the action requires interpretation of the Constitution, the court of first instance should be the High court.[125]

However, since the High Court has unlimited jurisdiction, it is always flooded with cases and this takes a very long time to determine a case yet violations of environmental rights always involve suffering irreparable damage in which the environment may not be able to be restored to its former state. This delay in delivery of justice makes the realisation of environmental rights through public interest litigation slow and inefficient.

[123] See the Fundamental Human Rights(Enforcement Procedure) Rules S.I No. 26 of 1992.
[124] Constitutional Appeal No.1 of 1997
[125] Supreme court constitutional Appeal No.2 of 1998

3.4.2 Time limitations

Rule 4(1) of the Constitutional Court Rules now declared void required that a petition be filed within 30 days of breach of the Constitution complained of, but this inordinately creates difficulties in environmental public interest litigation.[126] *Oder JSC* in *Serugo's* casesaid that:

"It is certainly ironical that a litigant who intends to enforce his rights for breach of contract or for bodily injury in a running down case has far more time to bring his action than one who wants to seek for a declaration or redress under Article 137 of the Constitution"[127]

However, judicial activism saw court move to mitigate the harshness of the requirement. The case of *Attorney General V Rwanyarare*[128] gives a full review of the 30-days limit. Court referred to the Supreme Court comments in *Serugo*'s case[129] and held that the 30-days rule had the effect of smothering the constitutional right to go to the Constitutional Court rather than encouraging it and they called upon the appropriate authority, the Chief Justice to deal with it. Court held therefore that the 30 days will begin to run from the day the petitioner perceives the breach; that this will make the rule workable and encourage rather than constrain the culture of constitutionalism.

This rule was finally buried in the case of *Uganda Association of women lawyers and 5 others V Attorney General* where the court held that the rule had the effect of amending Article 3(4) of the Constitution which gave the citizens the right and duty at all times to defend the Constitution and therefore, it was declared null and void as it was in conflict with the Constitution.[130]

Phillip Karugaba comments that the life of a rule so infamous, that many petitions had floundered on it and had tied up the court on so many twists and contortions was ended. He

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[126]Constitutional Court Rules (1996)

[127] Odhiambo, Micheal, "Legal and institutional constraints to Public Interest Litigation as a mechanism for the Enforcement of Environmental Rights and Duties In Kenya." A paper presented at the fifth International Conference on Environmental Compliance and enforcement."

[128] Miscellaneous Application No. 3 of 2002 (Arising from Constitutional Petition No.7 of 2002

[129] J.Oloka-Onyango; "Human Rights and Public Interest Litigation In East Africa: A Bird's View"

[130] Constitutional petition no 2 of 2003

further asserts that the legal fraternity would only moan the injustice to those that went before, whose shipwrecks have turned into seamarks.[131]

3.4.3 Effect of the Civil Procedure Act on Public Interest Litigation

Section 7 of the Civil Procedure Act prescribes there under the doctrine of *res judicata.*[132]The doctrine provides that once a matter is heard between parties and the issue is determined by a competent Court, it cannot be tried again between the same parties or different parties under the same title. Explanatory note number 6 under this section provides that:

> *"Where a person litigates bonafide in respect of a public or of private right claimed in common for themselves and others, all persons interested in such a right shall for the purpose of this Section be deemed to claim under the person so litigating".*

This explanatory note tends to limit the operation of public interest litigation and yet PIL is a creature of the 1995 Constitution and it cannot be limited by an earlier Act that is premised on requirements of *locus standi.* This doctrine permits the applicant to make one application in respect of a matter, it prevents a litigant or other persons claiming under the same title from coming back to court to claim further relief not claimed in the earlier action. This poses a big obstacle in public interest litigation; because in a situation where for instance a community is affected by a nuisance and goes to court over the matter to litigate and obtain damages, an organization will be barred from filing a public interest case praying for an injunction; on the ground that the damage is extensive. This means that the violation will continue and yet in some cases, restoration of the environment is impossible.

Further still, the civil procedure laws tend to delay justice for enforcement of human rights through the 45 day Statutory Notice required to be served to the Attorney General under plaint, which would not be the case under Notice of motion that would be more time saving..

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[131]P.Karugaba; *"Public Interest Litigation In Uganda Practice and Procedure : Shipwrecks and Seamarks"* a paper presented at judicial Symposium on Environmental Law for Judges of The Supreme Court and Court of Appeal, Imperial Botanical Beach Hotel Entebbe 2005

[132] The Civil Procedure Act Cap 71,Laws of Uganda ,2000.

3.4.4 Constitutional Limitations

Scholars like Kasimbazi have argued that like other rights, environmental rights are subject to the general limitation under Article 43 of the Constitution which provides that in the enjoyment of the rights under the Constitution, no person shall prejudice the rights of another or national security or public interest.[133] The implication of this provision is that a forest reserve will be cleared in order to fight rebels or that game park will be allocated to displaced persons who have suffered from environmental disasters like a landslide. A PIL will therefore be frustrated because the right to healthy environment and the duty of the government to protect resources has been superseded by national security expressly provided under article 43.[134]

3.4.5 The typical PIL Lawyer

The issue of PIL not being lucrative has been exacerbated by the kind of lawyer PIL's attract. They have political motives hoping to score points among voters in standing for elective positions and therefore it is a publicity stunt. As PIL grows in scope and prominence, it attracts more actors. Lawyers and NGO'S seeking self-promotion may begin to bring such cases for selfish reasons. UpendraBaxi says, eminent lawyers see no role-conflict in appearing one day vigorously arguing for transparency in governance and the next day in indulging in spectacular forensic displays aimed at the protection of the rights of people in high places charged with corruption.[135] Oloka-Onyango comments that PIL lawyers in East Africa are generally often very busy, very complicated, very expensive and very elusive and a few of them have filed petitions to appropriate PIL for corporate gain, political advantage, or personal benefit.[136] For example, the Constitutional Court of Uganda dismissed the petition in *Jude Mbabaali v AG* as being a disguised election matter, which should follow the usual procedure for the resolution of disputes rather than being decided by the judiciary. Justice Eldad Mwangusya said that, " ...this court should not be turned into a court for hearing cases where it is merely required to make findings of fact and legal positions that are obvious and straight forward as opposed to those that require constitutional interpretation. This court should not condone the practice of litigant jumping from courts with jurisdiction to try matters within their jurisdiction to seek reliefs in the constitutional

[133]K.Emmanuel. public interest litigation as an enforcement mechanism in environmental law
[134] Article 43 of the Constitution of Uganda 1995
[135]UpendraBaxi, *the Avatars of Indian Judicial Activism: Explorations in the Geographics of Injustices in* FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH 159(2009)
[136] Supra note 16

court whose jurisdiction....is limited." This behavior, I believe, discourages courts from entertaining suits of PIL and this has a negative effect even on genuine environmental public interest cases.

3.4.6 Reliance on Technicalities and Limited Judicial Activism

As stated in the earlier, Public Interest Litigation is not the typical adversarial form of litigation. It is an avenue where citizens may express concern for issues of national interest in order to foster a democracy. This requires an alert judiciary that will respond to such issues including those that affect the environment. However, in Uganda this trend has not been fully appreciated and in most cases PIL's on environmental issues are dismissed over procedural technicalities[137]. The strict interpretation of the law by courts therefore acts as a barrier to public interest litigation. Like in the case of *Byabazaire* court strictly applied Section 3 of the National Environment Act and denied the applicant a right to be heard holding that it was only NEMA or Local Environment Committees to sue for violations under the Act.

The courts have also been hesitant in granting substantive remedies in public interest litigation, they have in some cases denied the orders prayed for and only stop at declaring that the applicant has a right to sue. For instance, in *Greenwatch and Advocates Coalition for Development and Environment V Golf course Holdings* ,the judge declined to issue an interlocutory injunction on grounds that an injunction cannot be issued against a land owner who holds a certificate of title, otherwise this will amount to violating the provisions of the Registration of Titles Act relating to indefeasibility of title. In this case the applicants, a public interest group were seeking an interlocutory injunction to restrain the respondents from constructing a hotel in a wetland in a bid to conserve the environment.*AkiikiKiiza.J* did not grant the injunction stating that:

> *"I am aware that the NEMA Statute gives them the right to sue but in my view this does not diminish the fact that the suit property belongs to the respondents and in absence of fraud, their title is impeachable!"* [138]

[137] Phillip Karugaba(TEAN) "Public Interest Litigation In Uganda; Practice & Procedure- Shipwrecks and Seamarks

The judge ignored section 43 of the Land Act, which provides that the utilization of land shall be in conformity with the various laws. His strict interpretation of the law frustrated the efforts of the group from stopping a construction that was detrimental to the environment as a wetland that acted a natural channel in which the city waters entered was reclaimed.

Also in *National Association of Professional Environmentalists V AES Nile Power Ltd,*[139] although court accepted that the applicants had a right to bring the application under section 71, he declined to grant the injunction. This trend of decisions of declining to grant remedies on through a positivistic lens that includes strict application of the law hampers the purpose of public interest litigation. PIL as an alternative remedy to the voiceless then ceases to act as the ideal method of securing people's enjoyment to the right to a clean and healthy environment.

3.5 CONCLUSION.

The technical and legalistic hurdles have slowed down the advancement of the fluid movement of public interest litigation in environmental law. Courts are slow to explore into other approaches such as the Human based approach in order to administer justice. If the full meaning of fundamental rights and freedoms enshrined in the Constitution are to be realised, the judiciary should be willing to change its attitude towards PIL's, the citizenry should become more vigilant and the legislature should aptly review the laws that have hampered the development of PILS

CHAPTER FOUR
PUBLIC INTEREST LITIGATIONS IN DIFFERENT COUNTRIES

4.1 INTRODUCTION

PIL is one phrase for a phenomenon that has been described with many different terms: human rights litigation, strategic litigation, test case litigation, impact litigation, social action litigation, and social change litigation are among the most common. Some see the defining feature of PIL as "seeking to precipitate social change through court-ordered decrees that reform legal rules, enforce existing laws, and articulate public norms[140]."

4.2 PUBLIC INTEREST LITIGATION IN INDIA

The development of PIL in India is believed to have been influenced and inspired by the development of its counterpart in America. SK Agrawala holds the view that the inspiration for PIL in India came from the American experience[141]. However, the Indian Supreme Court innovated new methods and devised new strategies for the purpose of providing access to justice to large masses of the downtrodden and deprived people. They are the people who are denied their basic human rights and to whom freedom and liberty have no meaning at all in spite of the constitutional assurance for the same. Even after the lapse of more than three decades of Indian independence and promulgation of a democratic constitution avowing to bring justice, social, economic and political, the failure of the state to create a just, equal and egalitarian society free from oppression and exploitation caused unexpressed disillusionment among the people. The situation was further compounded during the emergency (1975 - 76) clamped by Prime Minister Indira Gandhi. It was during this period that a nationwide movement for free legal services was launched as one of the key-points of the twenty point programme announced by Indira Gandhi. Many judges led by Justice Krishna Iyer and PN Bhagwati displayed a strong sense of social consciousness and became a part of a nationwide movement for legal services. The perception of the failure of the State to resolve the wide spread socio-economic problems motivated a number of conscious citizens, non-governmental organizations and social action groups to raise the voice against the miserable plight of such marginalized sections of the society, who were left with no

[140] heLen herShkoff, PubLic intereSt Litigation: SeLected iSSueSand examPLeS (n.d.), available at http://www1.worldbank.org/publicsector/legal/PublicInterestLitigation.doc.
[141] 371 US 415 (1963).

choice but to knock at the door of the judiciary. This subsequently resulted in judicial activism, which inspired a number of social activist judges like Krishna Iyer and PN Bhagawati to find a new way to revitalize the constitutional power of the court in favour of the people. This led to the birth of the innovative strategy of Public Interest Litigation intending to bring law into the service of the poor and the oppressed. The courts, through PIL, sought to rebalance the distribution of legal resources, increase the access to justice for the disadvantaged in order to secure social justice and make human rights and fundamental freedoms meaningful to them. In short, PIL in India emerged and developed as a most powerful and efficacious tool to render remedial justice through judicial process to the socially, economically and politically disadvantaged sections of the society. PM Bakshi, an Indian jurist, is of the opinion that the seeds of the concept of PIL were initially sown in India by Justice Krishna Iyer[142] in 1976, who, in *Mumbai Kamgar Sabha v. Abdulbhai*, without assigning this terminology, had observed:

> Our adjectival branch of jurisprudence, by and large, deals not with sophisticated litigants but the rural people, the urban lay and the weaker societal segments for which law will be an added terror if technical misdescriptions and deficiencies in drafting pleadings and setting out the cause title create a secret weapon to non-suit a party. Where foul play is absent, and fairness is not faulted, latitude is a grace of processual justice. Test litigation, representative actions, *pro bono publico* and broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral procedural shortcomings.

Emphasizing the need for relaxing the traditional rule of *'locus standi'* for espousing the cause of public interest before the law court, justice Krishna Iyer further observed:

"Even Article 226, viewed on wider perspective, may be amenable to ventilation of collective or common grievances as distinguished from assertion of individual rights, ... Public interest is promoted by a spacious constructions of *locus standi* in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualization of the right to invoke

[142] PM Bakshi, Public Interest Litigation, 5 (Ashoka Law House-New Delhi - 2004).

the Higher Courts where the remedy is shared by a considerable number, particularly when they are weaker

However, it was in *Fertilizer Corporation Kamgar Union* v. *Union of India*[143] that the terminologies 'Public Interest Litigation' and 'epistolary jurisdiction' were first used by Justice Krishna Iyer. Justice Iyer had declared in this case, "law, as I conceive it, is a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction[144].

The first public interest case in the Indian Supreme Court was filed by Kapila Hingorani, a senior advocate, in 1979 in the form of a writ of *habeas corpus, Hussainara Khatoon* v. *State of Bihar*[145], bringing to light the fact of unlawful detention of 18 prisoners who were suffering detention awaiting trials for very long periods. This writ petition ultimately led to the revelation of over 80,000 such prisoners who were languishing in various prisons for long awaiting their trial to start.

In the early 1980s and thereafter a good number of cases were brought before the court focusing on the interest of the public or vulnerable social segments. Those landmark cases helped in the construction of the new rules of standing. In *People's Union for Democratic Rights v. Union of India* Justice Krishna Iyer emphasized the need for evolving "a new strategy by relaxing this traditional rule of standing in order that justice may become easily available to the lowly and the lost and thus gave "a new dimension to the doctrine of *'locus standi'*, which has revolutionized the whole concept of access to justice in a way not known before to the western system of jurisprudence[146]." All this led to the liberalization of the rule of standing permitting thereby a member of the public, having no personal interest or oblique motive, to approach the court for the enforcement of the constitutional or legal rights of socially or economically disadvantaged persons who, on account of their poverty or total ignorance of their fundamental rights, are unable to enter the portals of the court for judicial redress.

[143] 2 SCR 52: AIR 1981 SC 344.
[144] 2 SCR 52: AIR 1981 SC 344. p. 354.
[145] AIR 1979 SC 1360.
[146] 3 SCC 235: AIR 1982 SC 1473.

The most significant exposition of PIL jurisprudence came in the landmark verdict given by a seven member Bench presided by Justice PN Bhagwati in *SP Gupta & Others v. Union of India & Others* (1982).

Today a vast revolution is taking place in the judicial process; the theater of law is fast changing and the problems of the poor are coming to the forefront. The court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom liberty and justice have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered legal wrong or legal injury or whose constitutional and legal rights have been violated but who by reason of their poverty or economically disadvantaged position are unable to reach the court for relief[147].

In fact, the Supreme Court of India, in *Sunil Batra* v. *Delhi Administration*[148], for the first time accepted a letter written to the Supreme Court by Sunil Batra, an inmate of Tihar Jail Delhi, highlighting the inhuman torture inflicted on a fellow prisoner by the jail administration. The letter was treated as a writ petition, and while disposing that petition the apex court issued certain directions, including taking suitable action against the erring officials and also expanded the scope of *habeas corpus* to check the violations of fundamental rights of under trials and convicted prisoners.

Thus the credit goes to some activist judges like Krishna Iyer and PN Bhagwati of the Indian Supreme Court for revolutionizing the whole concept of PIL. PIL is now deeply rooted in the Indian judicial system and has become a permanent feature of the humanitarian jurisprudence. The impact of the Indian experiments in PIL has been also felt in a number of SAARC countries which have common law based legal systems.

[147] AIR 1982 SC 149.
[148] 3 SCC 488: AIR 1980 SC 1579.

4.3 PUBLIC INTEREST LITIGATION (PIL) IN CENTRAL AND EASTERN EUROPE

Public interest litigation (PIL) in Central and Eastern Europe[149] has a relatively brief history. Prior to 1990, PIL as now understood was unknown in any of the countries of the region. Under Communism, the state was, by definition, an expression of the public's interest; and law and politics were fused as one. The idea of articulating an alternative, nongovernmental vision of the public interest through law was impossible. Independent courts capable of vindicating such a vision did not exist[150].

As such, PIL is a post-Communist phenomenon. The transformation of law, legal culture, and judicial systems wrought by the fall of Communism opened the way for and was in part fueled by PIL. Over the past fifteen years, independent-minded lawyers, advocacy-oriented nongovernmental organizations (NGOs), and concerned individuals have sought to use PIL to address many problems created by, or left over from, Communist policies, including compensation for lost or stolen property, racial discrimination against the Roma, environmental degradation, and police abuse.

PIL is one aspect of a broader process of fundamental change that has helped consolidate the rule of law in Central and Eastern European societies. In this respect, PIL has been reinforced by the continent-wide political transition unfolding with the enlargement of the European Union (EU). The prospect of admission to a community of states united by shared commitment to common economic rules and legal standards acted as a powerful incentive for post-Communist governments to rapidly professionalize their courts and bars and to enhance the independence of the judiciary as an institution. Yet, as necessary as these changes were in laying the foundation for PIL, they were not by themselves sufficient, as evidenced by the relative paucity of PIL in many of the older EU member states.

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[149] The phrase Central and Eastern Europe (CEE) is used to refer to the region encompassing the following Member States of the Council of Europe, all of which were part of the Soviet Union or under Communist rule until 1989, 1990, or 1991, or are successor states thereof: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croa-tia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Serbia and Montenegro, Slovak Republic, Slovenia, Former Yugoslav Republic of Macedonia, and Ukraine.

[150] Dimitrina Petrova, Political and Legal Limitations to the Development of Public Interest Law in Post-Communist Societies, 3 Parker Sch. J. e. eur. L. 541 (1996).

A second major factor that gave rise to PIL was the important, though distinctly minority, tradition of political and intellectual dissent inherited from the Communist era. Though it has been employed by actors of many different political complexions in different regions, PIL is often a tool of the iconoclast, the victim of human rights abuse, or the minority viewpoint that feels ignored or overridden by majoritarian political decisions. In its earlier incarnations in Central and Eastern European (CEE) countries, PIL was often seized upon by those who had dared to express opposition to rights violations under Communism, including in a number of countries the founders of national Helsinki committees[151]. It was these persons who often saw in PIL the possibility of vindicating fundamental, often constitutional, rights or of providing, through court action, the opportunity for newly democratic governments to correct errors. Even as it has expanded beyond the narrow circle of Communist-era dissenters, PIL has continued in many instances to reflect the courage, commitment to fair legal process, and willingness to stand alone on principle that characterized the tradition of dissent before 1990.

Others note that PIL is "litigation designed to reach beyond the individual case and the immediate client"[152]; that it involves "court-driven approaches in producing significant social reform"[153]; and that it amounts to "espousing causes through litigation[154]." Still others suggest that PIL seeks "to help produce systemic policy change in society on behalf of individuals who are members of groups that are underrepresented or disadvantaged[155]." In the US context, where much PIL originated, the phrase public law litigation has been used to refer to cases involving "allegations broadly implicating the operations of large public institutions such as school systems, prisons, mental health facilities, police departments and public housing authorities; and remedies requiring long-term restructuring and monitoring of these institutions[156]." Similarly, in

[151] Signed in 1975 in Helsinki, Finland, the Final Act of the Conference on Security and Cooperation in Europe—commonly known as the Helsinki Final Act was the first international agreement to accord human rights the status of a fundamental principle in regulating international relations.

[152] Pursuing the Public interest: a handbook for Legal Professionals and activists 81 (Edwin Rekosh, Kyra A. Buchko, & Vessela Terzieva eds., 2000).

[153] Peter H. Schuck, Public Law Litigation and Social Reform, 102 yaLe L.J. 1763, 1769 (1993).

[154] aryeh neier, onL y Judgment 226 (1982).

[155] Helen Hershkoff & Aubrey McCutcheon, Public Interest Litigation: An International Perspective, in many roads to Justice: the Law-reLated work of ford foundation grantees around the worLd283, 284 (Mary McClymont & Stephen Golub eds., 2000).

[156] Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 harv. L. rev. 1015, 1017 (2004); See also Abram Chayes, The Role of the Judge in Public Law Litigation, 89 harv. L. rev. 1281 (1976).

Central and Eastern Europe, PIL (and analogous issue-specific terms, such as Roma rights litigation or mental disability rights litigation) refers to law-based advocacy intended to secure court rulings to clarify, expand, or enforce rights for persons beyond the individuals named in the case at hand. This may be no easy task in a region in which most countries have not developed formal precedent directing courts to follow stare decisis[157].

Primacy must often be placed on giving a judgment significant persuasive power in the arena of public opinion, even if it is not strictly binding on other courts as a matter of law. Judgments of the European Court of Human Rights are legally binding only on the state(s) concerned[158]. However, as Strasbourg jurisprudence proliferates and becomes more widely dissemi-nated among domestic judges and lawyers, it acquires near-precedential value in practice.

PIL may be used to pursue a wide variety of goals. At its most fundamental level, PIL may seek to secure a concrete, enforceable remedy for a breach of law. Such remedies often consist of: a judicial declaration that certain rights have been violated and/or that existing law should be enforced; an order to pay compensation to the victim; and/or a decision to prosecute the wrongdoer(s) when a crime has been committed.

PIL may also aim to improve the state of the law by generating judicial precedent on an issue of significance. Rulings by constitutional and supreme courts are often legally binding and carry political influence. Even in civil law systems, higher courts may be called upon to interpret or to apply to a particular set of facts the broad protections contained in constitutional text and in some legislation.

Further, PIL may be used to pursue broader goals that do not necessarily require though they may benefit from victory in the courtroom. A lawsuit based on a claim of public interest may galvanize popular and political attention or reinforce other means of spotlighting problems such

[157] Stare decisis (from the Latin, "to stand by what is decided") is the doctrine of precedent, known to many common law systems, which holds that once a question has been decided, it generally binds courts of the same jurisdiction in future cases.

[158] European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5, art. 46(1) (en-tered into force 3 Sept. 1953) [hereinafter European Convention].

as advocacy, monitoring, and research. Further, PIL may serve as a fulcrum for common action by a class of victims to improve their condition. In this way, PIL may complement and give added impetus to ongoing efforts to organize certain communities. PIL may also help change the terms of public debate about a problem. Thus, the very process of articulating legal claims for court action may require a potentially transformative reformulation of the question to one involving legal rights and remedies rather than only including historical causes, social attitudes, or political barriers. While certain legal arguments are unlikely winners in court today, PIL may help preserve them for future generations of judges to consider by sparking dissenting decisions that provide a written record of injustice and the claims explaining why it should end[159].

4.4 PULIC INTEREST LITIGATION IN THE USA

Public Interest Litigation in the USA started as an offshoot of the broader movement of Public Interest Law. No doubt, the American society is generally typified by arrogant capitalism and excessive individualism. But at the same time is it is also characterized by a strong tranquil undercurrent of collectivism, social mindedness and caring concern for the community. This concern for the society also got reflected in the legal field resulting in the emergence of Public Interest Law which includes a number of developments such as legal aid, research, formation of public opinion, lobbying and litigation conducted by specialized lawyers and organizations. Public Interest Law provided legal representation to a variety of unrepresented groups or interests in the American society. Although Public Interest Law began in the late 1970s involving activities financed by private foundations and the general public to serve the environmentalists, consumers, old persons, women, children, prisoners, detenues and diverse other groups unrepresented in the decision making process of the state, there were a number of movements and programs which could be identified as the roots of Public Interest Law in America. These roots made substantial contributions to shape up and structure the underlying ideology of Public Interest Law.

The first major root of Public Interest Law goes as far back as 1870s when the legal Aid Movement started in the USA and the first Legal Aid Office was established in New York City in 1876. This Legal Aid Movement was remarkable chiefly for its two main features. Firstly, for

[159] Jules Lobel, Losers, Fools and Prophets: Justice as Struggle, 80 corneLL L. rev. 1331 (1995).

the first time 'pro bono' work became institutionalized displaying commitment and enthusiasm to serve the people. Secondly, the movement reflected not only an individual lawyer's concern, but also the concern for the community as a whole. The second root can be traced to the works of the Progressive Era Reformers who, at the turn of the 20th century, during the time of rapid industrialization and social and political changes, aimed at checking the evils of unregulated business. The third and the most significant root lies in the American Civil Liberties Union (ACLU) and it offshoot the National Association for the Advancement of Colored People/Legal Defense and Educational Fund (NAACP/LDEF).

ACLU founded during World War First mainly focused on lobbying for the protection of the democratic rights of the citizens and also acted as a watchdog of governmental corruption and abuse of power. Similarly, NAACP is credited to have initiated a movement aimed at emancipation of the Black Americans from the legal, political and economic disabilities challenging various inequalities through litigation. Those legal battles against inequalities resulted in several victories which helped to consolidate the foundation of Public Interest Law in the USA Also, some landmark judicial verdicts in cases like *Brown v. Board of Education*[160] (1954), *NAACP v. Button*11 (1963), *NAACP v. Albama ex rel. Patterson*[161] (1958) and so on. aided, to a great extent, the forceful social movement of equality and recognized litigation as one of the strategies of the greater movement of social reform. Besides, the enactment of a legislation in 1974 creating an independent Public Corporation to manage the legal service program helped institutionalize the legal service Program as a part and parcel of the cosmos of Public Interest Law. Gradually, support from charitable organizations like the Ford Foundation, government funded legal aid organizations and public interest law firms, besides the stress laid by the private Bar and the law schools on 'pro bono' activities, eventually helped institutionalize PIL as a part of the American legal system which has now become "a permanent fixture of the American legal landscape[162]."

[160] 347 US 483 (1954).
[161] 357 US 449 (1958).
[162] Fred. Strasser, *"Public Interest Law Acquires the Concerns of Middle Age,"* 7 NATIONAL LAW JOURNAL, 1-8 (1985).

The model of Public Interest Litigation that has evolved in the USA is marked by some distinctive characteristics which are peculiar to its social and environmental context. Justice PN Bhagwati holds the view that the US model of PIL is hardy fit to be transplanted to a developing country like India. The US model requires substantial resource investment which is always faced with resource scarcity in spite of the affluence of the American society. But the spread of poverty and ignorance and the lack of adequate resources in India or, for that matter, in any other developing country will always create impediments in the smooth functioning of PIL. Not only this, the issues taken up by PIL in the United States are starkly different from those experienced by the developing countries. "The United States model is, I believe, more concerned with civic participation in governmental decision making and it seeks to represent "interests without groups" such as consumerism or environmentalism. These no doubt form the issues of public interest litigation in India also, but the primary focus its on state repression, governmental lawlessness, administrative deviance and exploitation of disadvantaged groups and denial to them of their rights and entitlements."

Thus, the basic thrust of Public Interest Law in the USA has been to ensure that citizens whose lives may be affected by governmental policies have a right to participate in the formulation of those policies. It is in this sense that a Report by the Council of Public Interest Law, USA (1976) has described Public Interest Law as "the name given to all efforts undertaken to provide legal representation to groups and interests that have been unrepresented or underrepresented in the legal process. Those include not only the poor and the disadvantaged but also ordinary citizens who because they cannot afford lawyers to represent them have lacked access to courts, administrative agencies and other legal forums in which basic policy decisions affecting their interests are made."

In the United States of America much of Public Interest Law has been a triumphant effort to extend the right to citizens to be heard in matters and forums from which they had been previously excluded. In 1966 Justice Warren E. Burger opined, in *Office of Communication of United Church of Christ v. F.C.C* (1966), that since government agencies cannot adequately represent all facets of the public interest, citizen groups must be given the right and opportunity to participate in the administrative process. Thus, in the American judicial system socially

conscious activists, individuals and organization have come forward to advance the cause of unrepresented constituencies like the poor and the helpless, consumers, minorities, women etc. and have often times successfully used the strategy of PIL to eradicate plethora of discrimination and inequalities.

Unlike in the judicial system of other jurisdictions, in America all PIL cases, even those involving constitutional issues, start at the District Court level and therefrom travel upward to the Supreme Court level. But some times the rules of appellate procedures allow some cases to go in appeal directly to the Supreme Court if they involve any issue of major public interest and the apex court grants the permission for the same.

Public Interest Law in the USA suffered serious backlash in and around the 1980s. This backlash was caused mainly for two reasons. Firstly, the vested interests including commercial interests and conservative elements in the American society did not feel comfortable with the remarkable achievements made by PIL and became more organized and came together to attack those new achievements. Secondly, a new wave of conservatism swept the national scene which resulted in the emergence of counter tendencies. This led to the growth of increasing skepticism among the advocates, people, press and even academicians about the relevance of judicial activism as a means of correcting governmental abuses by resorting to the strategy of PIL. Therefore, 1980s and the period thereafter have witnessed a state of restraint and gradual decline for Public Interest Litigation in the US judicial regime. During this period the US Supreme Court is believed to have displayed conservatism in granting standing and has rather taken recourse to standing to reject Public Interest Litigation suits without entering into consideration of the merits of the case[163].

Whereas PIL is gaining popularity in developing countries it is relatively losing its charm and appeal in the American context. These days the American Courts are generally not open to PIL issues unless they are specifically authorized by some statute. Unless there is a very specific statutory PIL scheme the American courts are today generally reluctant to entertain PIL petitions. Some critics say that the things have come to such a pass that describing today someone as 'an

[163] *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 US 464 (1982).

activist judge' in the USA is often regarded an insult or a censure. Unlike in the 1960s and 1970s when the American society was in favor of activist judges, today the Americans generally resent the very idea of judicial activism and rather subscribe to the view that a judge should only interpret and apply the law, and not legislate from the Bench.

Nevertheless, it would be a misrepresentation of the facts to conclude that PIL has completely lost its flavor in the USA. Notwithstanding the reverse trend and declining enthusiasm for PIL, Pubic Interest Law has survived and become an integral part of the mainstream American judicial process for seeking relief and remedy for issues involving public concern. This is manifested by the appreciative mood of the lawyers as a community and the society as a whole who still stress the role and relevance of PIL in social reform and increasing civic participation in governmental decision making process.

CHAPTER FIVE

FINDINGS, CONCLUSION, RECOMMNEDATIONS

5.1 FINDINGS OF THE STUDY

There are many advantages to using PIL as a tool to secure justice. If you feel PIL could help you and your community, it could be worth pursuing further.

a) Access to justice

PIL can secure justice for large numbers of people affected by a common problem.

A single PIL case can secure remedies that benefit all victims, whether or not they have been directly involved in the court process. This can be in the form of compensation, or an order to prevent someone harming you and your community. This can be particularly useful where poor and marginalised groups suffer a common hardship.

In ordinary litigation brought by a victim against a wrongdoer, the cost and resources involved in bringing the legal action are sometimes unaffordable. Because PIL can extend the benefits of a favourable court order to a large number of people, resources can be pooled and cost can be shared across larger groups.

And when the case is in the public interest, there are often a range of organisations that are willing to offer resources and support. This means PIL can be an accessible and effective tool in the hands of the very people who need it most.

In the African Commission on Human and People's Rights, a grouping of local community groups and international organisations successfully challenged the Ugandan governments practice of evicting indigenous communities from their land.

In a single ruling, compensation and the right for thousands of indigenous peoples to return to their lands was secured. A result which was made possible by the pooling of resources and expertise across different organisations.

If you want to secure justice for your community, but need support in doing do, PIL could still be the right tool for you.

b) Empowerment and Promoting Accountable Government

By allowing marginalised groups to challenge unjust action, PIL can empower oppressed peoples. It can unite citizens and civil society groups with diverse interests and backgrounds, provide a forum for them to be heard, and build a common platform to push for change.

From this platform, people can hold governments to account for failures to protect the people they serve.

Beyond achieving justice for affected communities, the accountability PIL can bring benefits all of society by confirming the importance of the rule of law in regulating government actions, and in upholding domestic and international standards of human rights.

In the East African Court of Justice, a group of activists, who had been wrongfully imprisoned before a military court in Uganda, succeeded in challenging their imprisonment on the grounds it violated the rule of law. The judgement upheld the independence of courts and prevented future practices of the government taking the law into their own hands.

This combination of citizen engagement with a practical strategy to limit abuse of power makes it a powerful tool for human rights activists to achieve justice across society.

c) Law and Policy Reform

PIL can achieve meaningful reforms of policies and laws which breach human rights or constitutional provisions.

A PIL case can challenge an unjust policy, law or procedure and can lead to systemic legal change from which all citizens may benefit. In this sense, PIL does not just react to unjust practices, but is proactive, helping to create pressure to make a fairer system for all.

PIL can also obtain a legal interpretation on an untested legal issue and challenge how a particular law or policy is implemented. In this way, PIL can establish a point of principle which governments and corporations are required to follow. Such an outcome can provide clarity for future conduct and define the legal obligations of public or private individuals and organisations.

Facing restrictions on free speech and the imprisonment of government critics, the Ugandan Supreme Court upheld the constitutional right to freedom of expression. The court set out wide

protections for the right to freedom of expression, preventing government from making further restrictions in the future, and ordered them to stop criminal prosecutions of political speech.
In this way, PIL can be invaluable tool in strengthening human rights protections in society more generally.

d) Transparency

Even if unsuccessful, a PIL case can shed light on information previously kept secret and enable truth to be heard. PIL court procedures often involve the compulsory disclosure by each party of relevant documents. This can mean that relevant evidence that is in the public interest can come to light. This can powerfully promote transparency by creating access and bringing public attention to information that may be vital to addressing a human rights concern or promoting social change.
If you believe the government or a corporation are withholding vital information from the public, PIL can be a powerful tool in uncovering such information. This can then be used to hold government/corporations accountable in the public domain or through the legal process.

e) Raising Awareness and Promoting Debate

Beyond providing legal redress, PIL can raise public awareness on a particular issue. If combined with an effective media strategy, PIL can focus public scrutiny on a problem and allow for debate. In the digital age, high-profile coverage of a PIL case can have as much, if not more, influence on achieving change than the courtroom process itself.
If your objective is to secure lasting change in your community, it is not only the outcome of the individual court case that is important, but it is often the wider campaign for justice in the PIL process that will be effective. You should therefore consider carefully how best to brief the media at the outset of any PIL case, and how best to maintain their continued interest and involvement as the case progresses.

5.2 CONCLUSION

The role of civil society organizations in Uganda combined with the organized legal profession provides a useful illustration of how their contributions to human rights have improved and strengthened the rights of a particular group of people. The impact of legal victories on socio-

economic rights in one domestic jurisdiction reverberate around the world in solidarity with other poor, vulnerable and marginalized people. One commentator said the following: "One of the most exciting developments, however, is the justiciability of economic and social rights at the domestic level. Examples of the enforcement of cultural rights exist in Canada and Europe, but economic and social rights have long been seen as matters of policy and thus open to being given low prioritization. Elevating these from the arena of policy to the realms of rights opens a new dimension, which can put substantive meaning in the concept of the indivisibility of all human rights."

The challenge in many other jurisdictions is perhaps more fundamental: to create some measure of enforceability of socio-economic rights through constitutional protection. But constitutions are frames in which all rights are supposed to be pictured: the interdependent and indivisible civil and political rights, and economic, social and cultural rights. Let us not be confused into thinking that there is no picture, if there is no frame. States have undertaken obligations under the International Covenant on Economic, Social and Cultural Rights "to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group and appropriate means of ensuring governmental accountability must be put into place."

A closer examination of many jurisdictions may reveal that there is protection for some of these rights in administrative law or in individual pieces of legislation. The Committee on Economic, Social and Cultural Rights affirmed this when it said: "The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State have a legitimate expectation, based on the principles of good faith, that all administrative authorities will take into account of the requirements of the Covenant in their decision-making".

Clarifying the content of the rights requires a strategy not unlike the one just discussed. In this respect, the issue of access to justice is pivotal together with the co-operation from a range of

civil society actors which has been illustrated by recent experiences in South Africa. Some may wish to categorize the approach of the Treatment Action Campaign on HIV/Aids as a social movement. Neil Stammers says: "Social movements have typically been defined as collective actors constituted by individuals who understand themselves to share some common interest and who identify with one another, at least to some extent. Social movements are chiefly concerned with defending or changing at least some aspect of society and rely on mass mobilization, or the threat of it, as their main political sanction".

He goes on to state that there is a potential role for social movements in the reconstruction of Human Rights[164] and finally quotes Richard Devlin: "If human rights are to be understood as a challenge to power, as a mode of resistance to domination, then we must confront power in all its manifestations".

5.3 RECOMMENDATIONS

PIL in Uganda is a relatively new phenomenon. Nonetheless, as the above discussion suggests, there exists a substantial body of experience and knowledge concerning its possibilities and limits. Together with the richer and deeper PIL experience in other parts of the world, this provides a basis for suggesting a number of measures that private donors, bilateral institutions, and other potential supporters might consider to foster more, and more effective, PIL in Uganda in the future:

i. Establish a sizeable fund specifically dedicated to PIL in Uganda. The fund might be administered by a committee of concerned persons from within the region and beyond to promote the use of PIL to foster legal and social reform. The fund could support individual court cases. It might provide resources necessary to cover, in each case, the costs of activities including documentation, client identification, legal services, paralegal services, travel, and printing and reproduction. The fund could actively solicit proposals that would set forth in reasonable detail the claims at issue, the remedies sought, and the reasons why litigation would serve a broad public interest. The fund should provide

[164] Neil Stammers, "Social Movements and the Social Construction of Human Rights". *Human Rights Quarterly,* 21.4 (1999), 980 at 983.

support for PIL on a continuing basis for at least a decade to allow the necessary time to produce results.

ii. Provide institutional support for NGOs that pursue PIL as part of their substantive mission. Over time, institutions with adequate human, technical, and financial resources will be necessary to select, build, and sustain strategic cases of sufficient quantity and quality to make a difference.

iii. Support the development and professionalization of university-based legal clinics involving law students, under appropriate supervision from qualified attorneys, in various activities related to PIL, including legal research, documentation, and witness and victim interviewing. Support the development of coursework, law faculty, and academic publications focused at least partly on PIL and related fields. Law students can assist lawyers and NGOs in pursuing PIL. Moreover, once exposed to the rewards of work in the public interest, they become the foundation for a growing pool of qualified PIL lawyers for the future.

4. Support the following activities:

a. Engaging members of the private bar who are not full-time PIL lawyers but who can, on occasion, participate in or offer professional assistance to PIL on a pro bono, or reduced fee basis. These efforts might include periodic training for members of the private bar in PIL subjects and reform of bar association rules that unduly restrict the ability of lawyers to work pro bono and/or as staff of NGOs.

b. Bridging the gap between PIL lawyers and members of affected communities. These efforts might include establishing and strengthening organizations of paralegals capable of supplementing litigation through field research, fact-finding, and pursuit of administrative remedies; identification and creation of computerized databases of the needs or problems that might be addressed by PIL; and promoting rights-based education to help community members be more informed and active consumers of PIL.

d. Nourishing, broadening, and consolidating the growing network of PIL advocates and activists across the region and within each country through improved web-based communications platforms, enhanced comparative legal resources, and systematic recording and dissemination of PIL judicial decisions among the bar, the judiciary, and the general public.

e. Modify legal and procedural rules so as to expand public access to courts through PIL, including improving publicly financed legal aid for indigent persons, liberalizing standing requirements to allow NGOs to act on behalf of victims, and providing for attorney fee recovery for legal claims that vindicate broad public interests.

f. Encourage indigenous philanthropy for PIL within Uganda.

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