

**PUBLIC INTEREST LITIGATION AS PRACTICED BY SOUTH AFRICAN  
HUMAN RIGHTS NGOs: ANY LESSONS FOR ETHIOPIA?**

**Submitted in partial fulfilment of the requirements of the degree LL.M in  
Human Rights and Democratization in Africa, Faculty of Law, Centre for  
Human Rights, University of Pretoria**

**BY**  
**YOSEPH MULUGETA BADWAZA**

The logo of the University of the Western Cape, featuring a classical building with six columns and a pediment.

**UNIVERSITY of the  
WESTERN CAPE**  
**Prepared under the supervision of  
Professor JR de Ville**

**At the Community Law Centre, Faculty of Law, University of the Western  
Cape**

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## DECLARATION

I, Yoseph Mulugeta Badwaza declare that *Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?* is my own work, that it has not been submitted for any degree or examination in any other university or institution, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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Date.....

Supervisor



Full name..... UNIVERSITY of the  
WESTERN CAPE

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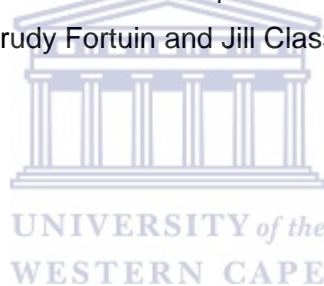
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## LIST OF ABBREVIATIONS

ACLU	American Civil Liberties Union
CALS	Centre for Applied Legal Studies
EBA	Ethiopian Bar Association
FDRE	Federal Democratic Republic of Ethiopia
LHR	Lawyers for Human Rights
LRC	Legal Resources Centre
NAACP	National Association for the Advancement of Coloured People
NGO	Non Governmental Organizations
NRDC	Natural Resources Defence Council
TAC	Treatment Action Campaign



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## CHAPTER ONE

### INTRODUCTION

#### 1.1. Background to the study

Serious human rights violations mainly authored by the state and its various agents go unprosecuted and unpunished due to limitations attributable to the ineffectiveness of mechanisms and institutions. Ideally, such mechanisms and institutions should have been instrumental in the implementation and enforcement of human rights provisions enshrined in constitutions and other laws. In most cases, judiciaries are rendered ineffective and inefficient as a result of manifest interference and systematic neglect by the executive branch.

Moreover, limited legal awareness as well as lack of capacity on the part of victims to approach courts and seek remedies stand as some of the major obstacles hindering access to justice resulting in the failure to achieve a decent level of human rights protection. This state of affairs has resulted in the existence of bills of rights in constitutions that are in effect alienated from the very objectives they were meant to achieve.

The 1994 Ethiopian Constitution<sup>1</sup> has a bill of rights chapter. An array of fundamental rights and freedoms are incorporated in the bill of rights chapter. However, the enforcement of these rights and freedoms has been far from satisfactory. In fact the Constitution has yet to become an organic document that has an impact on the daily lives of Ethiopians.

As noted above, a number of factors contribute to this state of affairs. Nevertheless, it is submitted that with a strong and independent judiciary and vibrant and dynamic civil society, particularly human rights NGOs, much could be done to significantly improve the rather unsatisfactory human rights situation in Ethiopia.

It is against this backdrop of unsatisfactory enforcement of fundamental human rights enshrined in the Constitution that the role of human rights NGOs in Ethiopia should come to the fore. Thus, apart from monitoring violations and conducting legal awareness programs, there is a need for human rights NGOs in Ethiopia to engage in public interest litigation with a view to facilitating the judicial enforcement of fundamental rights representing those who, for various reasons can not access courts.

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<sup>1</sup> Constitution of the Federal Democratic Republic of Ethiopia (FDRE), Procl No. 1/1995 Articles 13-44



A number of reasons could be provided to justify why the South African system has been chosen for a lesson to Ethiopia. One reason could be the legal framework put in place to address issues of access to justice in South Africa. Standing is a crucial question in any venture of public interest litigation. Section 38 (d) of the South African Constitution entitles anyone acting in the public interest to approach a competent court and seek remedies when they feel that a fundamental right is infringed or threatened. This very liberal approach to standing is not common in many legal systems.

For countries like Ethiopia where there is an extremely tight requirement of standing to institute civil proceedings in courts such a liberal approach could be an inspiration. In addition to the guarantees given by the Constitution, in South Africa there exists a relatively advanced and dynamic system of subsidiary legislation that could facilitate the full utilisation of the constitutionally recognised rights of access to justice.

More relevant to this dissertation are the human rights NGOs in South Africa that are engaged in human rights lawyering in general and public interest litigation in particular. Much could be learnt from the experiences of prominent human rights NGOs such as the Legal Resources Centre and Lawyers for Human Rights. In all, Ethiopia, where the activities of human rights NGOs have not yet gone further than the monitoring of violations and fragmented attempts of awareness raising campaigns, could indeed draw lessons from the South African experience in this regard.

## **1.2. Objective of the study**

The dissertation first explores the various forms public interest litigation takes in various legal systems, focusing on the practice in South Africa. Secondly, an examination of the relevant legal regime in Ethiopia will be made with a view to assessing its adequacy to cater for public interest actions and coming up with possible recommendations.

Apart from the analysis of the adequacy of the legal framework, an attempt will be made to identify other factors that may pose a challenge to the introduction of the system in Ethiopia. More specifically, issues related to legal culture, judicial activism and political will shall be discussed with a view to depicting a complete dimension of the problem of introducing public interest litigation.

### **1.3. The research questions**

The study sets out to raise and address various questions related to the introduction of public interest litigation into the Ethiopian legal system. However, the fundamental research questions to be addressed are the following:

1. Is the existing legal and institutional framework in Ethiopia adequate to accommodate public interest litigation (initiated by human rights NGOs)?
2. If not, what lessons could be drawn from other legal systems, particularly the South African experience, to make it adequate?

### **1.4. Hypotheses**

The dissertation takes the following four points as basic assumptions:

1. As much as there is a moral obligation to endorse universally accepted human rights values reduced to legal rights in international and domestic legal instruments, there is a duty on governments to provide effective remedies in the event of violation of those rights.
2. Governmental lawlessness is the major source of human rights violations. This makes individual efforts to vindicate rights extremely cumbersome, given the lack of capacity of victims in terms of resources and awareness.
3. The engagement of human rights NGOs in public interest litigation will have the direct effect of obtaining justice for victims of violations as well as the indirect advantage of promoting judicial activism, and social justice thereby enabling the judiciary to effectively play its role of safeguarding fundamental rights and freedoms.
4. Putting in place a legal and institutional framework conducive particularly to procedural matters such as standing is critical to enable NGOs engage effectively in public interest litigation

## 1.5. Literature survey

The issue of public interest litigation has been the subject of discussion and comments. There is a considerable amount of literature particularly in the form of articles published in academic journals.

Welch<sup>2</sup> discusses in general the strategies human rights NGOs in Africa could employ in the protection of human rights. Litigation is discussed as one of the strategies. With regard to country specific writings, the booklet published by the South African Law Commission<sup>3</sup> provides useful insights to the understanding of public interest action especially on its similarities and differences with class action. Moreover, the booklet is useful as a source to trace the justifications of having public interest actions in South Africa as a mechanism of addressing issues of human rights violations. It is hoped that these justifications will be used in making recommendations as to the introduction of public interest litigation in Ethiopia.

Shehnza Meer in the *South African Journal on Human Rights*<sup>4</sup> explores the origins and functioning of the public interest litigation system in India. Deena Hurwitz presents a concise account of public interest litigation in the United States in the *Yale Journal of International Law*.<sup>5</sup> Apart from these, a number of other pertinent journal articles have been identified.

In conclusion, research works that have raised the specific research questions that this study has set out to address are not available.

## 1.6. Methodology

A thorough library based research on available literature and legal instruments will be the primary method. With the particular purpose of drawing lessons for Ethiopia in view, the study adopts a critical method of evaluating the legal and institutional framework in the selected legal systems with particular focus on the South African situation.

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<sup>2</sup> E. Welch (1995) Protecting human rights in Africa: Roles and strategies of non governmental organisations

<sup>3</sup> South African Law Commission (1998) Recognition of class actions and public interest actions in South African Law, A Report

<sup>4</sup> S.Meer, 'Litigating fundamental rights: Rights litigation and social and social action litigation in India: A lesson for South Africa' (1993) 9 *South African Journal on Human Rights* 358

<sup>5</sup> D. Hurwits, 'Lawyering for justice and the inevitability of international human rights clinics' (2003) 28 *Yale Journal of International Law* 505

## 1.7. Overview of chapters

The study has five chapters. The first chapter deals with introductory matters such as objective, methodology and literature survey. In the second chapter, a working definition of the concept of public interest litigation, the rationale behind it, issues such as access to justice and *locus standi* will be discussed. The third chapter is devoted to the analysis of public interest litigation as employed in different legal systems. With a view to providing a broad perspective to the practice the cases of France, the United States and Canada are presented. However, the chapter will focus more on the Indian and South African systems mainly because of the nature of the problems public interest litigation addresses in the two countries. There will be a fourth chapter dedicated to the examination of the existing legal and institutional framework in Ethiopia in light of the background presented in the previous chapters. The fifth chapter deals with the conclusion and recommendations aimed at pointing out the major lessons to be drawn to introduce public interest litigation in Ethiopia.



## CHAPTER TWO

### CONCEPTUAL FRAMEWORK AND BASIC CONCEPTS

#### 2.1. Introduction

Public interest litigation as an institution serves various purposes. Different forms of public interest litigation have been employed to achieve different goals. At the heart of almost all of these endeavours is the need for social change through law. As indicated in the previous chapter, the objective of this dissertation is not to look into the different aspects of the objectives of public interest litigation in detail. The aim is rather to explore the various strategies that could be adopted in using public interest litigation as an instrument in preventing human rights violations through judicial means and thereby fighting impunity and governmental lawlessness. This chapter sets out to lay the foundation by explaining the contextual meaning and understanding of basic concepts that will be extensively employed in the subsequent chapters.

#### 2.2. What is public interest litigation?

A comprehensive and universally applicable definition of public interest litigation is hard to come up with as it varies in emphasis and strategy according to the various contexts it is used in. As Sarat and Scheingold caution, "providing a single, cross-culturally valid definition of the concept is impossible".<sup>6</sup> Thus, apart from outlining and commenting on the various attempts to define the concept, a working definition is believed to be useful for the purpose of this chapter. Moreover, a discussion of the various aspects of public interest litigation is presented. With a view to facilitating a systematic comprehension of public interest litigation, a brief description of the concept of public interest law is also provided.

A narrow and rather very technical definition of public interest litigation goes as follows:<sup>7</sup>

Public interest litigation is a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected.

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<sup>6</sup> Sarat & Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction in Cause Lawyering: Political Commitments and Professional Responsibilities* (Sarat & Scheingold eds., 1998). Cited in H. Shershkoff 'Public Interest Litigation: Selected issues and examples' an article available at <<http://www1.worldbank.org/publicsector/legal/PublicInterestLitigation.doc>> (accessed on 13 August 2005)

<sup>7</sup> Black's Law Dictionary (7<sup>th</sup> edition) 1229, 1990 Cited in V. Jaichand 'Public interest litigation strategies for advancing human rights in domestic systems of law' (2004) (1) *SUR Int'l Journal on Human Rights* 127

This definition seems to confine the scope of public interest litigation to a purely legalistic engagement in pursuit of financial or other interests and liabilities. The emphasis placed in this definition seems to be more on the legal rights and liabilities of the class or group. However, public interest litigation may not be limited to seeking enforcement of existing legal rights. As we shall see subsequently, public interest litigation goes to the extent of creating legal and social norms that could be used to shape future actions. In other words, the definition does not fully reflect the very purpose of public interest litigation as a strategy to achieve broader social goals than mere vindication of legal rights and interests of groups.

The Durban Symposium<sup>8</sup> defined public interest litigation in a fairly broad manner. The definition starts by negatively describing public interest law. According to this definition, public interest law is not a specific field of law. It is not public law, not administrative law, not criminal law and not civil law.<sup>9</sup> It is “a way of working with the law and an attitude towards the law”.<sup>10</sup> Despite its ostensible vagueness, this definition of public interest law provides a valuable lead towards a comprehensive and practice-oriented understanding of public interest law and litigation. It is submitted that the rather deliberate failure to confine the ambit of public interest law to a specific field is consistent with the inherent flexibility and innovative characteristics of public interest litigation. In other words any law affecting the public in any way could be the subject of public interest action either to be used as a tool or itself being a target. Law in this context could broadly be understood to include legislation, policy measures, executive orders or governmental action and inaction.

Therefore in stark distinction to the definition provided in the Black’s Law Dictionary, the Durban Symposium suggests that bringing selected cases to the courts is not the only strategy that constitutes public interest litigation. The process could include law reform, legal education, literacy training and legal services. According to this view, public interest litigation is not an endeavour reserved to lawyers only. It also involves the concerted efforts of other professionals, who do not necessarily have expertise in the field of law as it has to be

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<sup>8</sup> Held from June 29-July 8, 1997 under the auspices of Public Interest Law Initiative, Columbia University, sponsored by the Ford Foundation and the Open Society Institute at the University of Natal Durban, South Africa. Available at < <http://www.pili.org/publications/durban/preface.html> > (accessed 15 August 2005)

<sup>9</sup> As above

<sup>10</sup> As above

complemented by lobbying, research, advocacy and human rights education.<sup>11</sup> Stated concisely, public interest litigation “is a demonstrated attempt at rights empowerment”.<sup>12</sup>

This seemingly over-broad formulation of public interest litigation contains the outstanding goals that a well-structured and concerted public interest litigation practice seeks to achieve both in the process and in the outcome. In other words, the overarching notion of rights empowerment caters for the multifaceted importance of public interest litigation ranging from vindication of rights to bringing about social change conducive for sustainable promotion and protection of human rights and democratic values in a society. Therefore it is only natural that its success is contingent upon the broad based participation of activists and professionals of various trades apart from lawyers. Viewed from this perspective, the definition could serve as a basis for evaluating the wide ranging aspects of public interest litigation as well as the far-reaching effects it might have both as a process and as an end in itself.

In line with this broader conception of public interest litigation, the definition provided by Abram Chayes is adopted as a working definition for this study. Writing about public interest litigation in the American context, which is also referred to as public law litigation, Chayes says the following:<sup>13</sup>

Public law litigation refers to the practice of lawyers [...] seeking to precipitate social change through court ordered decisions that reform legal rules, enforce existing laws, and articulate public norms.

This definition highlights the most important aspects of public interest litigation. It touches upon the purposive endeavour to bring about social change and enforcement of laws with a view to articulating public norms through the use of the law. It is critical to note that when it comes to human rights protection, the bulk of violations in most cases emanate from the lack of enforcement of constitutional and statutory guarantees of fundamental rights and freedoms. It could also be attributed to factors ranging from poor state of compliance with national and international obligations to complete disregard of these obligations by states. This, among others, calls for the need for a practice of public interest law.

In relation to this transformative role of public interest litigation, it is said that particularly in the United States where law and courts play a significant role in both public and private life, public interest litigation has often served as a vehicle for social reform for those with commitments to

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<sup>11</sup> As above

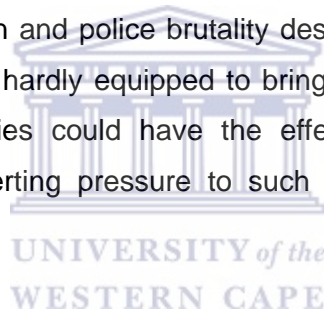
<sup>12</sup> As above

<sup>13</sup> A. Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281

social justice and the rule of law.<sup>14</sup> With the prevalence of the rule of law comes an increased respect and protection of human rights as constitutional and statutory guarantees are given effect to in a manner that makes them applicable to a wider section of the public at a time. This, one could say, is one of the most significant attributes of public interest litigation.

As a mechanism for social criticism and mobilization, public interest litigation is important not only for setting legal precedents as a consequence of the judicial process, but also for its extra-judicial effect, i.e. for its capacity to raise consciousness, mobilize constituencies, garner political leverage, and develop cultures of accountability and norms of legality, irrespective of victory or defeat in courts.<sup>15</sup> It follows that the process of public interest is as important as the end result in achieving long-term social change through law.

Apart from its utility as a process, public interest litigation could also be used to achieve multiple long and short-term ends. It is said that in many countries various public interest groups have designed and implemented several strategies to address a variety of social and legal concerns such as corruption and police brutality despite the fact that national judiciaries are in considerable disarray and hardly equipped to bring about the desired change.<sup>16</sup> In the long run, however, such activities could have the effect of testing judiciaries and other governmental institutions by exerting pressure to such an intense level that the need for change can no longer be ignored.



It is interesting to note that paradoxically, many of the countries where public interest litigation is being most energetically pursued are precisely those countries where one would expect people to avoid courts. As Troncoso noted these are countries:<sup>17</sup>

with political and social arrangements that are not especially tidy, places of often messy and unpredictable political, social, economic and institutional climates. Where litigation costs are high and the courts are very much the weakest branch: riddled with corruption, in the shadow of a strong executive, under equipped and hard to access.

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<sup>14</sup> H. Hershkoff and A. McCutcheon, 'Public Interest Litigation: An International Perspective' in *Many Roads to Justice*. M. McClaymont and S. Golub (eds.), 2000, 96-97

<sup>15</sup> As above. See also J. Lobel, 'Losers, Fools & Prophets: Justice as Struggle', (1995) *80 Cornell L. Rev.* 1331

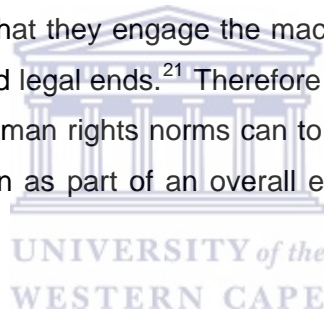
<sup>16</sup> B. M. Troncoso, 'Public Interest Litigation in the Comparative Perspective: On Social Change and Institution Building in Latin America' available at <[http://www.princeton.edu/~gradconf/index\\_files/papers/Troncoso.pdf](http://www.princeton.edu/~gradconf/index_files/papers/Troncoso.pdf)> (accessed on 13 August 2005)

<sup>17</sup> As above



Yet, Troncoso maintained, we continue to witness amongst a small but growing number of public intellectuals and NGOs in such turbulent settings, a turn towards the courts to bring about not only social but institutional change, despite widespread lack of confidence in courts among the general populace.<sup>18</sup> Thus one can argue that a completely free and democratic political structure and truly independent judiciary is not necessarily a precondition to engage in public interest litigation activities. Activists could effectively use the law to bring about change in the structure and operations of the judiciary itself. The interesting implication here being that, above and beyond judicial effects, public interest litigation has some role to play “in strengthening democracy, its nature and its institutions and perhaps even its judiciaries”.<sup>19</sup> It is also said in this connection that even when public interest suits prevail in court, often their most lasting legacy is not the relief ordered by the court but the lawsuit’s contribution to the ongoing community discourse about an important public issue.<sup>20</sup>

It is said that public interest litigation is a particularly interesting mobilizing tool because, nearly by definition it provides a nexus where a number of societal actors, institutions and systems are forced to interact in such a way that they engage the machinery and negotiate the aspirations of democracy for both political and legal ends.<sup>21</sup> Therefore as an integral part of the aspirations and ideals of any free society, human rights norms can to a large extent be promoted through the use of public interest litigation as part of an overall effort to overhaul and strengthen the institutions of democracy.



In this endeavour of activists to engage in public interest litigation and promote the ideals of human rights, judiciaries need to respond adequately with a view to encourage the precipitation of change and democratic reform. This is because, beyond formal legal rules and protections, public interest litigation reinforces an essential constitutive and sustaining component of a democratic society namely, accountability through dynamic linkages between the state and its citizens, irrespective of initial underlying conditions that may be perceived as possible

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<sup>18</sup> As above

<sup>19</sup> Robert Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton: Princeton University Press, 1993), especially 163-186 Cited in Troncoso (n 16 above)

<sup>20</sup> J. Lobel, 'Courts as Forums for Protest' A paper presented at the University of Texas School of Law. Cited in Troncoso (n 16 above)

<sup>21</sup> S. Golub and M. McClymont, 'Introduction: A Guide to this Volume' in McClymont and Golub (n 14 above),

impediments to achieve such goals.<sup>22</sup> This is largely due to the inventive exercise public interest litigation involves by providing the judiciary as well as activists with the leeway that enables them to loosen or to set aside strict procedural requirements of a traditional litigation process.

In conclusion, there is every reason to emphasise the notion that public interest litigation is more than just an engagement with courts to win or lose a claim involving the public. Public interest litigation is rather a mechanism that allows individuals and groups to become active participants in the political and legal system in such a way that their actions create wider effects that allow for learning and institutional and structural modification and improvement.<sup>23</sup>

### **2.3. The place of litigation**

A number of rationales have been forwarded to justify public interest litigation. Promoting access to justice through judicial engagement is a fundamental consideration. The complex structural and institutional barriers one faces in accessing courts calls for the involvement of other entities such as human rights NGOs to engage in wide ranging activities with a view to facilitating access to justice to those who need assistance in this regard. Thus, underlying the concept of public interest litigation is the achievement of the right of access to justice. The universal recognition accorded to this right and the related concept of an effective remedy will be discussed in a more detailed manner in the subsequent sections of this chapter.

The most important rationale underlying the practice of public interest litigation, however, seems to be the need for social change by using the law as a vehicle. It is said that law affects society in many complicated ways; social and economic practices likewise affect legal processes. In the global transition toward human rights and rule of law values, litigation can be instrumental in achieving goals that are shared by a broad spectrum of people with varying ideologies. Despite broad variations across countries in terms of legal, cultural political, social and economic conditions, one can point to several key factors that seem to shape litigation and are in turn altered through litigation. These factors include the system of government and scope of existing laws, the independence of the judiciary as well as the operation of the court system and public attitude towards law.<sup>24</sup>

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<sup>22</sup> See M. Beutz, 'Functional Democracy: Responding to Failures of Accountability', (2003) 44 *Harv. Int'l L.J.* 387

<sup>23</sup> Troncoso (n 16 above)

<sup>24</sup> Hershkoff and McCutcheon (n 14 above), 285

It is, therefore, submitted that embedded in the practice of public interest litigation are the issues of the right to access to justice, and the utility of law as an instrument of social change. Increased engagement with courts as a result of effective realisation of the right of access to justice could give rise to the formulation and development of new rules that could serve as precedent in subsequent litigation. This state of affairs could in turn have the effect of bringing about positive changes in attitudes towards the law and its important role in societal transformation.

The notion of using the law as an instrument of social change provides the broad context within which one could look into the institution of public interest litigation. It is submitted that social change through law could best be achieved by using litigation as a principal tool. This argument might be challenged by arguing that more weight should be attached to legislative reforms that have immediate, profound and practical effects. It is obvious that one cannot convincingly argue that litigation is a global strategy. The peculiar context of every society might call for one or a combination of other strategies. Be that as it may, litigation processes could readily provide the input for further legislative reforms in the form of precedents and judicial norms that could be taken up and transformed into legislation. Thus, the resultant social change in such cases could to a large extent be attributed to litigation processes. In addition, the added advantage litigation has in bringing about profound changes in the whole legal culture of a society by enhancing the participation of a variety of interests from among members of the society makes it even a stronger force in achieving social change. This assumption holds true particularly in the case of transitional societies. In the words of Hershkoff and McCutcheon:<sup>25</sup>

In transitional societies shifting from authoritarian rule to democratic governance, litigation can help new constitutional principles to take root, as well as increase public awareness of human rights and embolden those with legal claims to come forward.

It has been further argued that a multitude of complex structural factors determine whether legislation or litigation serve as the dominant force at a given time, including the role of the state, economic and social development, the nature of the rights being sought and the broader political climate. However as Hunter emphatically pointed out, the most powerful activity within social change lawyering is the use of litigation to obtain enforcement and comprehensive interpretation of statutes.<sup>26</sup> This is particularly critical in relation to the interpretation and enforcement of fundamental rights and freedoms as sustained enjoyment of these rights and freedoms creates a strong basis for further social change.

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<sup>25</sup> As above

<sup>26</sup> See Nan D. Hunter, 'Lawyering for Social Justice' (1997) 72 *N.Y.U. L. Rev.* 1013

Litigation can help to reform existing laws that hinder or prevent members of disadvantaged groups from participating fully and fairly in society. It can enforce rights that existing laws guarantee, but which are not followed in practice. Litigation can also complement a broader political movement, or foster mobilization and encourage alliances that then produce political action. Furthermore, litigation can help change attitudes towards the law and create a culture in which government and private entities respect and enforce human rights values.<sup>27</sup>

In theory, litigation engaged in with a public purpose in view can precipitate a number of important effects that involve policy formation, political mobilization, government monitoring, and legal enforcement. Litigation is an important participatory activity that complements and supports electoral politics. For marginalized groups, it sometimes offers the only, or least expensive, entry into political life at a given time. The shared act of litigation, the temporary coming together in the collective of a plaintiff-class, contributes to a sense of public purpose and solidarity and builds social capital by encouraging trust and cooperation. In this view, litigation confers political entitlements on groups that otherwise lack the requisite political power and influence to participate in decision-making in a meaningful manner. It also confers legitimacy by including previously ignored or excluded interests in the broader agenda of social change by creating the forum for participation.<sup>28</sup>

In addition to that, although writers frequently refer to (public law) litigation as a form of top-down social engineering, in practice it makes use of local knowledge and on-the-ground methods in designing remedies and strategies for implementation. Litigation also contributes to the provision of public goods by holding government accountable for failing to carry out constitutional and statutory obligations, and by filtering out discriminatory and corrupt practices from public decision-making.<sup>29</sup> Against critics who claim that structural reform injunctions violate the principle of separation of powers, reformers argue that public law cases promote both accountability and transparency in government decision-making.<sup>30</sup>

There is a concern expressed by some commentators as to the adequacy of a judicial decree to bring about a programme of reform unless it reflects a social consensus in favour of reform

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<sup>27</sup> Hershkoff and McCutcheon (n 14 above), 283

<sup>28</sup> H. Shershkoff (n 6 above)

<sup>29</sup> As above. As an essentially collectivist endeavour, public interest litigation has as its prime objective the promotion of the public good as opposed to that of interest groups and political parties which may tend to advance the interests of their members and affiliates.

<sup>30</sup> As above

or the public at large or at least the represented group has an internal and independent reason to change. However this concern is countered by the stronger argument that we cannot say whether a government actor will undertake a process of self-reform unless pressed by the threat of litigation. A lawsuit can motivate other institutions to act by highlighting an issue of concern and by placing it on the public agenda, or by fostering alliances, which, even in defeat, become important for later mobilization efforts. Viewed from another angle, an individual's participation in litigation can itself be an empowering event that encourages further activity and changes in behaviour.<sup>31</sup>

It is against this background of the critical importance of litigation in human rights lawyering and the utility of law as a vehicle for social change that one should appreciate the whole essence and significance of public interest litigation in the protection and promotion of human rights. With a view to providing a context-specific understanding of the concept of public interest litigation as well as its different characteristics, the subsequent sections are devoted to a description of the concept and exposition of its constituent elements.

#### **2.4. Essential preconditions for successful public interest litigation**

As has been noted in the previous sections, the various general and specific objectives public interest litigation seeks to achieve necessitate an essentially flexible and innovative approach both in terms of structure and strategies employed. In other words, as much as flexibility and a liberal approach are required of courts, there is also a need for public interest groups to structure themselves in such a fashion that allows adaptability to the specific needs of particular cases as well as to their working environments. It is only such a sound appreciation of a combination of factors that could enable activists to conduct successful public interest interventions by adapting their activities to the requirements of a traditionally rigid procedural atmosphere of litigation and additional impediments that are specific to the various contexts in which they operate. As it is to some extent the result of challenges posed to the traditional model of adjudication, effective public interest litigation involves a unique bundle of procedures and substantive rights guarantees. Among these are procedural flexibility, relaxed rules of standing, a broader interpretation of fundamental freedoms enshrined in statutes and constitutions, remedial flexibility, and ongoing judicial participation and supervision.<sup>32</sup> All these

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<sup>31</sup> As above, 16

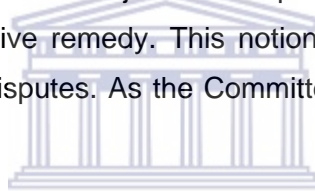
<sup>32</sup> See J. Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) *Am. J. Comp. L.*, 498. See also R. K. Agrawal 'The Barefoot Lawyers: Prosecuting Child Labour in the Supreme Court of India' (2004) *21 Arizona Journal of International and Comparative Law*, 693

considerations of procedural and strategic issues generally revolve around the concepts of the right of access to justice and *locus standi* (standing).

#### 2.4.1. Access to justice

The concept of access to justice is one of the fundamental considerations in any discussion of public interest litigation. Access to justice is a very broad concept. The right of access to justice generally guarantees that every person has access to an independent and impartial court and the opportunity to receive a fair and just trial when that individual's liberty or property is at stake.<sup>33</sup> Moreover, access to justice involves the availability of appropriate means of redress or remedies to aggrieved individuals or groups. It also implies that appropriate means of ensuring governmental accountability are put in place.<sup>34</sup>

It is said that access to justice is not the same as access to court. In other words, it is access to remedies i.e. substantive justice as opposed to access to procedural justice that needs to be pursued. Access to justice is also linked to judicial independence and legal education.<sup>35</sup> This is related to the notion of an effective remedy. This notion goes beyond just providing judicial remedies in the case of private disputes. As the Committee on Economic, Social and Cultural Rights noted:<sup>36</sup>



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 the requirements of the Covenant in their decision making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate.

There are numerous impediments to the right of access to justice. These include high court fees, restrictive jurisdictional rules, overly complex regulations, ineffective enforcement mechanisms and corruption.<sup>37</sup> Such impediments could stand in the way of those who want to engage in public interest cases as much as they discourage individual victims to approach courts and seek remedies.

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<sup>33</sup> Pursuing the Public Interest: A Handbook for Legal Professionals, 214 Available at <<http://www.pili.org/2005r/content/view/48/53/>> (accessed on 12 August 2005)

<sup>34</sup> The Committee on Economic, Social and Cultural Rights, 'The Domestic Application of the Covenant' General Comment Number 9 (Ninth Session) UN doc. E/C. 12/1998/24, Paragraph 2.

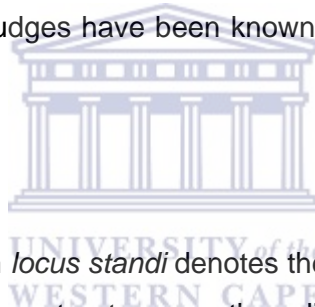
<sup>35</sup> Pursuing the Public Interest (n 33 above)

<sup>36</sup> General Comment Number 9 (n 34 above), paragraph 9

<sup>37</sup> Pursuing the Public Interest (n 33 above)

Therefore, it is imperative to note the critical importance of broader conceptions of access to justice to make the best use of public interest litigation in bringing about justice to a larger group. With such conception in mind particularly in public interest cases, the traditional requirements to approach courts as well as any administrative tribunals need to be rendered either inapplicable or largely relaxed in order to make these forums accessible. Critical in this consideration are the requirements of standing and strictly formal ways of preparing a petition. These, as will be argued in the subsequent sections, need to be made less stringent in public interest litigation cases.

Procedural flexibility involves a flexible application of rules of procedure in public interest cases with a view to broadening access to justice. Thus a petition may be filed just by letter addressed to a court instead of going through the complex and expensive requirements of preparing a regular petition. This has the rationale of serving the interests of the poor.<sup>38</sup> It is said that fairness requires that a person acting *pro bono publico* should not have to incur personal expenses for the preparation of a regular petition that seeks to guarantee the rights of the poor. For example, in India, judges have been known to encourage and even invite public interest action.<sup>39</sup>



#### **2.4.2. Standing (*locus standi*)**

A very broad definition of the term *locus standi* denotes the existence of a right on an individual or group of individuals to have a court enter upon the adjudication of an issue brought before that court by proceedings instigated by the individual or group. The right once found exists apart from the factual or legal merits of the issue before the court or the jurisdiction of the court to adjudicate upon the issue.<sup>40</sup> Standing to sue is not dependent on the success or merits of a case. It is a condition precedent to a determination on the merits. It follows therefore that if the plaintiff has no *locus standi* or standing to sue, it is not necessary to consider whether there is a genuine case on the merits; his/her case must be struck out as being incompetent.

Standing can also be defined as a party's right to make a legal claim or seek judicial enforcement of a duty or right.<sup>41</sup> The notion of standing is closely associated with access to

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<sup>38</sup> P.N. Bhagwati, 'Judicial Activism and Public Interest Litigation', (1985) 23 *Columbia Journal of Transnational Law*, 568 Cited in Agrawal (n 32 above)

<sup>39</sup> Cassels (n 32 above)

<sup>40</sup> L. Stein (ed.) *Locus standi*, (1979) 2

<sup>41</sup> Black's Law Dictionary (7<sup>th</sup> edition) 1999

justice. As a basic threshold in the initiation of legal proceedings, *locus standi* is an important factor in any discourse on the right of access to justice. As outlined above, the traditional rule of standing in many legal systems requires the existence of a real interest affected or threatened for a petitioner to approach a court of law and seek remedies.

A broader and more liberal approach to standing results in enhancing access to justice. This is an important component in building a legal and social order that is applicable to the powerful as well as the weak. Such an equitable order helps to build a civil society that provides the essential element for participatory democracy. By stressing increased application of public norms and progressive communal values, broadening legal standing provides societal restraints on excessive individualism and abuse of power both economic and political. As it emphasises the importance of compliance with duties, not only rights, the expansion of the ability to sue builds a stronger framework for the protection of individual rights.<sup>42</sup> This assertion is particularly relevant in cases where non-state actors such as multinational corporations are the subjects of public interest suits. There have been many instances of such suits particularly in the field of environmental protection. Rights groups claim standing in suits against multinational corporations by taking the right to safe and clean environment as an issue of public concern.

Relaxed rules of standing imply a deviation from the traditional rules of *locus standi*, which requires parties to have some real interest in the proceedings. Thus, individuals and groups who would want to bring cases to a court of law on matters affecting the public interest are allowed standing even though they do not have a real and personal interest in the matter.<sup>43</sup> In some countries, academics, social activists and NGOs have enjoyed standing to initiate public interest actions on a variety of issues.<sup>44</sup>

### **2.4.3. Broader interpretation of rules**

Broader interpretation of fundamental freedoms essentially entails the creative application of constitutional provisions of fundamental freedoms with a view to converting formal guarantees

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<sup>42</sup> J. Bonnie, *Standing to Sue: The First Step in Access to Justice* (1999), preface.

<sup>43</sup> Cassels (n 32 above)

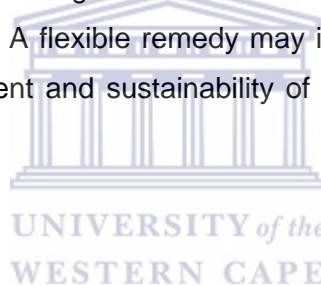
<sup>44</sup> In India, the Supreme Court once held that any member of the public can maintain an application for appropriate direction where a person or a determinate class of persons is unable to approach the courts for relief due to poverty, helplessness, disability or social or economic marginalization ( *Gupta V India* A.I.R. 1982 S.C. 49) Cited in Agrawal (n 32 above)



in constitutions to positive human rights.<sup>45</sup> When resolving public interest suits, judges assume different roles than in private litigation. Most importantly, they give substantive content to public norms in constitutional or statutory provisions that underlie the cases and attempt to prevent or correct inappropriate governmental behaviour.<sup>46</sup> Although judicial activism reflected in the liberal and positive interpretation of human rights provisions is a key component, it is not enough. Activism should also be demonstrated by those who are engaged in public interest intervention by way of creatively exploiting gaps and loopholes in those provisions in a manner that could motivate the courts to interpret them in favour of a wider protection and promotion of the rights and freedoms.

#### **2.4.4. Remedial flexibility**

The need for remedial flexibility arises from the understanding of the inadequacy of existing remedies intended to deal with situations where private rights are pursued. As far as remedies are concerned, in most cases of law suits between private parties the enforcement of the applicable legal right is achieved through the attainment and execution of monetary judgment quantifying the established harm. A flexible remedy may involve the courts' ongoing follow up and supervision of the enforcement and sustainability of the relief it gave in a public interest litigation action.<sup>47</sup>



#### **2.5. Conclusion**

In general, apart from complementing the substantive aspects of public interest litigation that emphasise the societal transformative aspect of the institution, the above stated preconditions are equally important for a successful public interest engagement with courts. A holistic understanding of public interest litigation therefore goes beyond the mere taking up of cases by an individual or a rights activist group and seeking remedies. It also involves a careful appreciation of the dynamics of the interactions that exist among the various actors involved in the process. Success in a lawsuit in the strict sense of the term may not always be achieved. Therefore the impact of each case on the attitude of the judiciary towards public interest suits and the contribution each case makes to the gradual transformation of the legal culture have to be primary concerns in assessing the effectiveness of the process.

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<sup>45</sup> Cassels (n 32 above), 498

<sup>46</sup> C. Tobias, 'Standing to Intervene' (1991) *Wisconsin Law Review* 420

<sup>47</sup> Bhagwati (n 38 above), 575

## CHAPTER THREE

### PUBLIC INTEREST LITIGATION IN DIFFERENT LEGAL SYSTEMS

#### 3.1. Introduction

Engagement in public interest litigation by NGOs should be preceded by a careful appreciation of all the factors that are likely to impact on the process. As much as having the commitment to bring about social change through law is necessary, it is also important to understand the specific context with a view to designing the appropriate strategy. Crucial issues such as judicial activism, legal culture, political will and the role and perception of the public and the state towards civil society are some of the considerations that should guide the actions of those who pursue public interest litigation. Furthermore, the conception towards law and the judicial process, in other words, the type of legal system also dictate the choice of particular strategies that should be adopted to engage in public interest litigation. It follows therefore that the *modus operandi* of a public interest group that seeks to engage in a common law jurisdiction may be different in a number of ways from its variant in a continental law jurisdiction due to the fundamental differences of the two systems in relation to law and the judicial process in general. As aptly put by Hershkoff:<sup>48</sup>

Social, economic, and political conditions create different pressures and opportunities for public interest litigation, which is further affected by the nature of the existing legal regime, the independence and prestige of the judicial system, and forms of professional organization. Governments also differ considerably in their support of non-governmental groups pursuing public interest litigation.

Strategic considerations, including the composition and ideology of the judiciary, the cost of litigation and the unequal distribution of legal resources also militate against litigative strategies aimed at social change.<sup>49</sup> These underlying considerations, among others, necessitate the examination of public interest litigation from the perspective of different legal systems. As stated in the first chapter, the objective of this study includes drawing lessons that could assist in introducing the practice of public interest litigation in Ethiopia. This objective calls for assessment of public interest litigation as practiced in various contexts with a view to adopting best practices. Therefore, it is with this particular objective in mind that this chapter sets out to examine the operation of public interest litigation in different legal systems.

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<sup>48</sup> Hershkoff (n 6 above)

<sup>49</sup> Cassels (n 32 above) 496

Again, as pointed out in the previous chapter, a thorough examination of all the countries referred to is beyond the purview of this study. For the reasons explained in chapter one a general overview of public interest litigation in the US, Canada and France will be provided. A more in depth examination of the system in India and South Africa is presented because the peculiar nature of issues that are addressed by public interest litigation in these countries is more akin to what is believed to exist in Ethiopia too.

### **3.2. The civil law/ common law divide**

Traditionally, public interest representation in civil proceedings exclusively belongs to the state, both in civil law and common law systems. The governmental institutions in charge of this exclusive mandate in various legal systems resemble each other. The civil law *ministere public* (public prosecutor) and the common law attorney general are both prosecutorial bodies that beside their primary function of prosecution of criminal acts possess important powers in the pursuit of the public interest in civil proceedings.<sup>50</sup> Thus, the state has the role of defining, protecting and enforcing the public interest no matter where the danger to that interest comes from. Central to this understanding of the role of the state is the question as to how the state protects the public interest against governmental action.

It is said that the matters of the public interest typically represented by the government/ the state differ in common law systems and in civil law systems. Yet the concept of the public interest equally expanded in both systems with the increasing complexity of social problems as a result of modern civilization. It is partly the need to address this expansion of public interest matters that calls for the involvement of private individuals and groups in representing the public and litigating rights on their behalf. Therefore, the state's monopoly in public interest litigation and the related doctrines of standing and cause of action have been revised to a great extent in both civil law and common law systems.<sup>51</sup>

However, this expansion of the public interest scope and the resultant involvement of private individuals and groups in pursuit of public interest ends do not seem to be appreciated and developed in the same way in the two legal systems. One could say that the involvement of the public prosecutor in civil litigation representing the public interest is stronger in civil law jurisdictions. This could be attributed to a number of reasons. One could be the basic difference

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<sup>50</sup> V. Langer 'Public interest in Civil Law, Socialist Law, and Common Law Systems: the Role of the Public Prosecutor' (1988) (36) *The American Journal of Comparative Law*, 279

<sup>51</sup> As above

between the two systems in the approach towards law and the legal process in general. It could be argued that the code-based nature of legal rules justified by strict notions of legislative supremacy can to a certain extent restrict the role of the judge in a civil law system to strictly applying the law as it is given by the legislature. This makes judicial discretion and creative interpretation of rules almost unnecessary. Thus there is always a tendency on the part of the civil law judge to wait for legislative guidance in the form of a statute before developing a legal rule. As has been pointed out by Apple and Deyling:<sup>52</sup>

“...judges in the civil law systems view themselves less as being in the business of creating law than mere appliers of the law i.e. a more technical and less active role in the development of the law than their common law counterparts.”

The lengthy procedure involved in the law-making process might take some time to come up with laws that could readily cater for new developments. This makes the civil law system appear to be less receptive of developments as compared to the common law where a judge has a more expansive mandate and disposition to use his/her common sense and extra legal reasoning in deciding cases. Therefore, viewed from the perspective of judicial activism, there seem to be better conditions in common law jurisdictions for the engagement in public interest litigation by private persons and groups such as human rights NGOs.

This common law/civil law divide however, is no longer a crucial determinant factor as far as the development of public interest litigation is concerned. This is because first, the distinctions between the two systems are becoming increasingly blurred. It is said that common law countries are adopting some of the characteristics of the civil law system while civil law countries are incorporating features of the common law tradition into their legal systems.<sup>53</sup> Secondly, public interest litigation as we see it today seems to defy the legal system divide because it is being practiced in many countries irrespective of the legal system adopted. The increasing worldwide recognition of human rights norms and democratic ideals that resulted in the proliferation of constitutions with enforceable bills of rights has played a significant role in this regard.

Furthermore, success stories in public interest litigation activities in one country have the effect of motivating similar endeavours in other countries. This does not mean however that the particular legal system a country adopts does not at all impact on the development and success of public interest litigation as a practice. Particularly, as far as the judicial activism aspect of public interest litigation is concerned, the practice is more likely to be successful in

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<sup>52</sup> J. Apple and R. Deyling, A Primer on the Civil Law System 37

<sup>53</sup> As above 39

common law jurisdictions than in civil law systems because of the different roles judges play in the two systems. The difference in the nature of judicial decisions in the two systems can also be reckoned as a factor. Judicial decisions in civil law systems serve only as inspiration and influence for future decisions as opposed to those in the common law systems where they are binding sources of law. In short, as Langer pointed out “tradition and experience will continue to influence the position of the public interest litigant in various legal systems”.<sup>54</sup> This point becomes more evident as we see how public interest litigation develops and functions in different countries. It is against the backdrop of these basic considerations that characterise the two legal systems that one has to consider the various aspects of public interest litigation as it functions in various contexts.

### 3.3. Public interest litigation in specific contexts

#### 3.3.1. France: strong public prosecutor

As a principle of French procedural law, a plaintiff must demonstrate a personal interest in order to have standing to institute a suit in a court of law.<sup>55</sup> According to article 31 of the New Code of Civil Procedure (N.C.P.C.):<sup>56</sup>

Anyone who has an interest in a claim being successful or rejected, may institute proceedings, except for those cases where the law grants a right of action to those persons qualified to support or contest a claim, or to defend a given interest.

This provision applies the maxim ‘no interest, no action’. Thus having an interest is the first requirement in order to institute proceedings. The plaintiff must have an action protected by law and must be individually and directly concerned.<sup>57</sup> With regard to *locus standi* in collective interest cases, French law recognises that trade unions and professional associations have the right to go to court to defend the collective interests of their members.<sup>58</sup> In other words, under French law, there is no equivalent to class actions in the strict sense of the term. However, under certain circumstances, it is possible for certain associations to institute proceedings to represent either several individual interests or a collective interest. In either case, associations

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<sup>54</sup> Langer (n 50 above)

<sup>55</sup> C. Dadomo and S. Farren, *The French Legal System* (1993), 158

<sup>56</sup> “*L’action est ouverte a tous ceux qui ont un interet legitme au success ou au rejet d’une pretention, sus resereve des cas dans lesquels la loi attribute le droit pretention, ou pour defender un interet determine.*”  
Translation as above.

<sup>57</sup> As above 159-160

<sup>58</sup> Articles L. 411-11, *Code du travail* Cited in Dadomo and Farren

need an explicit mandate to act for their members. It seems that these actions may oscillate between representative actions and public interest litigation.<sup>59</sup>

Actions by an association, either in the individual interest of its members<sup>60</sup> or for the protection of the collective interest it represents,<sup>61</sup> are also available. However, these associations must comply with very strict conditions to be able to bring an action. The associations must be duly authorised by the public authorities. In order to be duly authorised an association must be considered representative, which means that it must have been formed for at least one year, it must exercise public activities in the interests of the members and it must have a sufficient number of members. Furthermore, in the case of representation in court, the association may represent the interests of its individual members only if they have given the association an explicit mandate.<sup>62</sup>

As regards administrative courts, the Administrative Supreme Court (*Conseil d'Etat*) has allowed that associations may bring actions before such courts either to defend their own interests or to defend the collective interest they represent.<sup>63</sup> Apart from this, there is a procedure in French administrative law that allows individual citizens to request the administrative judge to examine whether an administrative act complies with rules and laws of general application and, in the event that it does not, to declare it null and void.<sup>64</sup> It is said that this principle applies to all administrative measures, whether they apply unilaterally to individuals or are administrative contracts or regulatory measures. This recourse for review against unlawful administrative action is said to be based on the violation of the fundamental principle of legality according to which the administration must be subject to the law or legality i.e. the rule of law.<sup>65</sup>

Although the *Conseil d'Etat* has been reluctant to admit an *actio popularis* which would allow every citizen to challenge any administrative measure, it has adopted a liberal approach with respect to the notion of having an interest in the action. The interest may be a purely moral one

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<sup>59</sup> C.Memoge and N. Bessot 'National Report for France' available at [http://www.europa.eu.int/comm/competition/antitrust/others/private\\_enforcement\\_executive\\_summary](http://www.europa.eu.int/comm/competition/antitrust/others/private_enforcement_executive_summary) (accessed no 13 August 2005)

<sup>60</sup> Consumer Code Article 22-1 Act of January 5,1988

<sup>61</sup> Articles L-421-1 and L-421-7 Consumer Code

<sup>62</sup> Memoge and Bessot (n 59 above)

<sup>63</sup> Dadomo and Farren (n 55 above) 231

<sup>64</sup> As above

<sup>65</sup> As above, 214

as far as the plaintiff is individually and directly affected by the administrative act challenged. This notion of individual concern has been widely interpreted by administrative courts. For example, users of a public service are entitled to an action for annulment against decisions affecting the operation of the service, or decisions having repercussions for the finances of a local authority.<sup>66</sup>

Although, as appears from the above discussion, there are some exceptions, the strict requirements of standing under French law seem to leave very little room for the initiatives of individuals and groups to institute cases in the public interest. This can also be attributed to the peculiar design of the whole civil justice system which emphasises reliance on judge-controlled proceedings, documents and affidavits rather than arguments of litigants. This tendency to avoid fact-finding is said to have “discouraged the growth of public interest litigation in France”.<sup>67</sup>

Another explanation for this state of affairs could be the rather extensive powers given to the *ministere public* to commence and intervene in actions involving the public interest.<sup>68</sup> However, as matters of the public interest have grown from the traditional private areas to the problems of consumer and environmental protection, urban development, social security, antitrust etc., the suitability of the *ministere public* to defend the new interests has been questioned.<sup>69</sup>

The main basis of this growing objection is the hierarchical organisation of the *ministere public* that seems to limit its independence from the executive. Another objection points to the insufficiency of this institution’s training and expertise in highly specialised problems of the modern era. It follows that the *ministere public* appears to be inherently unsuited to becoming the forceful promoter of the type of public interest actions that are most important in modern societies.<sup>70</sup>

It has been suggested that this failure of the *ministere public* in modern public interest litigation could be remedied by the importation of certain features of the common law adversary system

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<sup>66</sup> As above, 215

<sup>67</sup> D. Provine, ‘Legal Systems of the World: France’ available at <http://www.public.asu.edu/~mrovin/France.html> (accessed on 15 August 2005)

<sup>68</sup> Langer (n 50 above) 281

<sup>69</sup> As above, 284

<sup>70</sup> M. Cappelletti, ‘Governmental and Private Advocates for the Public Interest’ (1975) 73 *Michigan Law Review*, 793, 869 cited in Langer (n 50 above), 284

as this is viewed essential to the efficient representation of the public interest. The suggestion goes on to say that it is necessary to replace the neutral and bureaucratic *ministere public* with a partisan and fighter plaintiff.<sup>71</sup> One of the mechanisms suggested as possible alternatives to the institution of the *ministere public* is the initiative to be taken by private individuals and rights groups seeking standing in court to engage in public interest litigation.<sup>72</sup> For this private and group initiative to be successful, it has to be supplemented by at least two other considerations. First, less strict rules of standing should be adopted for public interest litigants and second, judges should begin to play a more proactive role in admitting public interest cases and adopt a broader interpretation of fundamental rights and freedoms in the constitution and statutes.<sup>73</sup>

It is said in this connection that judicial institutions in France are designed for the resolution of specific disputes, rather than the development of legal doctrine that can be extended to new problems. The pressure to pay more attention to individual rights, to open up government operations to a more exacting public scrutiny as well as to maintain fair and accessible forums for the resolution of disputes will continue to transform French legal institutions in such a way that could create a conducive setting for public interest litigation by private individuals and rights groups.<sup>74</sup>

### 3.3.2. United States: an all-inclusive movement

It has been widely held that the emergence of public interest litigation in the U.S. dates back to the celebrated campaign that resulted in the decision in *Brown v. Board of Education*,<sup>75</sup> in which the U.S. Supreme Court declared unconstitutional a state's segregation of public school students by race. The *Brown* case included many procedural features that have since been associated with public interest litigation. In *Brown*, the defendant was a public institution, the claimants comprised a self-constituted group with membership that changed over time, relief was prospective i.e. seeking to reform future action by government agents and the judge played a leadership role, complemented by the parties' efforts at negotiation.<sup>76</sup> One can see here a typical public interest litigation process with all its distinguishing features. The equality guarantee under the US Constitution was the primary legal tool used to engage the court with

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<sup>71</sup> As above, 285

<sup>72</sup> As above

<sup>73</sup> As above

<sup>74</sup> Provine (n 67 above)

<sup>75</sup> 347 US 483 (1954) Cited in Hereshkoff (n 6 above)

<sup>76</sup> See Hereshkoff (n 6 above)



the transformative function of the law as instrument of social change. It is said in relation to this that public interest litigation after *Brown* is often generally perceived as part of a broader effort to use the tools and principles of legal liberalism as a way to change existing patterns of power and privilege.<sup>77</sup>

In the U.S., public interest litigation early on modelled itself on the National Association for the Advancement of Coloured People (NAACP) use of the public interest law firm and legal defence fund established to design and pursue litigation. The activities of such groups had the aim of bringing about political and social equality to the represented groups. Neier pointed out in this connection that since the early 1950s, the courts were the most accessible and often, the most effective instrument for bringing about changes in public policy sought by social protest movements.<sup>78</sup> Influenced by this model, as well as by the decentralized volunteer membership structure of the American Civil Liberties Union (ACLU), private foundations during the 1960s began to provide funds to establish formal organizations focused on systemic law-based reform efforts in a broad range of fields.<sup>79</sup>

At the same time, the federal government established a national agency, the Legal Services Corporation, to fund lawyers for the poor working in neighbourhood offices that provided individual client service and also challenged government practices on a systemic, class wide basis.<sup>80</sup> It is said in this connection that:<sup>81</sup>

The most significant precursors of modern public interest litigants, the NAACP, the American Civil Liberties Union (ACLU), and legal aid offices created to furnish urban poor persons with legal service pursued civil lawsuits in the early twentieth century. It was not until the 1960s, however, that these entities and today's public interest litigants, such as the Natural Resources Defence Council (NRDC), became actively involved in the kinds of cases that typify modern public law suits.

Private law firms also undertook *pro bono* activities, and statutory measures allowing the payment of attorneys' fees to prevailing plaintiffs in specified public law cases created a financial incentive for lawyers, both private and not-for-profit, to undertake such work. Moreover, the federal government contributed to public law reform efforts by appearing as *amicus curiae* in private law suits or initiating its own compliance actions.<sup>82</sup>

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<sup>77</sup> As above

<sup>78</sup> A. Neier, *Only Judgment: The Limits of Litigation in Social Change* (1982), 72

<sup>79</sup> Hereshkoff (n 6 above)

<sup>80</sup> As above

<sup>81</sup> Tobias ( n 46 above) , 419

<sup>82</sup> As above

Many public interest law practitioners in the U.S. complement their court-centred work with such activities as community organizing, media outreach, public education, lobbying, and legislative and regulatory drafting. In the process, they promote the creation of consensus by forging alliances with mainstream as well as constituent groups, while also achieving greater visibility, credibility, and support. Their work includes transactional activities, including community development projects, the establishment of community non-profit groups, and grass-roots counselling centres, often at shelters or other service-provider sites, that educate the public and help to empower affected constituencies concerning their legal and political options.<sup>83</sup>

In the period between 1965 and 1975, a multitude of developments altered the nature of much federal civil litigation and the understanding of what entities seeking to institute or intervene in these lawsuits needed to show. Public interest litigants increased their participation in federal cases and public law litigation grew. Judges created novel substantive rights and expanded those previously recognized, while they were more receptive to citizen involvement in administrative proceedings and court room litigation. Congress enacted 'social' legislation that fostered such participation by the statutes' intended beneficiaries.<sup>84</sup> Public interest litigants capitalized on certain aspects of the equity-based Federal Rules of Civil Procedure that facilitated their involvement in lawsuits, and courts applied the Rules in ways that were solicitous of the needs of the public interest groups and private individuals.<sup>85</sup> Therefore public interest litigation in the American context demonstrates a concerted engagement both by the legislature and the judiciary that made the activities of the public interest groups successful. As Tobias noted:<sup>86</sup>

In short, the Federal Rules as written and as enforced, together with the other developments explored, offered a conducive environment in which public law litigation could grow and mature.

The forms of public interest litigation in the U.S. are said to have taken three broad forms. One category of public interest litigation, the so-called 'test case', challenges the legality of existing laws and regulations or attempts to give new meaning to existing laws. A test case may be filed on behalf of a single individual, but the effect of *stare decisis* will give the judgment precedential effect in other lawsuits filed by other individuals. In addition, government agents

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<sup>83</sup> As above

<sup>84</sup> Such Acts include National Environmental Policy Act of 1969, Consumer Product Safety Act and Equal Employment Opportunity Act of 1972. See Tobias 418

<sup>85</sup> As above

<sup>86</sup> Tobias (n 46 above)

or bureaucracies may feel obliged to conform their programs to a test case ruling without further action by a court.<sup>87</sup>

A second form of action, the 'structural reform suit', challenges deficiencies in the enforcement of existing laws and seeks to regulate the defendant's (which could either be a government organ or a non-state actor) future conduct through the imposition and monitoring of detailed judicial decrees that spell out in highly specific terms constitutional or statutory requirements.<sup>88</sup> This form of litigation seems to have as its rational basis the ever existing gap between law and practice. It is said that in practice, the line between the creation of new law and mere enforcement is blurred. Rights frequently have an indeterminate scope and are given content and acquire social meaning only through an on-the-ground process of implementation.<sup>89</sup>

Finally, both forms of actions depend on declaratory relief i.e. the judicial expression of a constitutional or statutory norm that informs and educates the other branches of government and the public at large. This third form seeks to achieve a declaratory judgment that could either rectify past irregularities and rights violations or which is designed to shape future action. Furthermore, the declaration may constitute recognition of an already existing right or a right acquired as a result of a certain action or inaction by the defendant in the public interest litigation.<sup>90</sup>

It has been said that the American situation with respect to public interest litigation is quite different in comparison to Continental Europe. The social consciousness of problems such as racial, sex and employment discrimination, environmental protection and consumer fraud is stronger than in Europe. Adding the diversity of group interests and antagonism toward the government as well as the dynamic nature of the American legal culture, public interest litigation is much more intense and presents a wider variety of litigants than it does in European countries.<sup>91</sup> As has been pointed out above, this could also be attributed to the active role of the judge in the common law legal system to which the U.S. belongs.

In conclusion one can say that the American system of public interest litigation is the result of conscious efforts exerted by a variety of actors including the active role of the government.

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<sup>87</sup> Hereshkoff (n 6 above)

<sup>88</sup> As above

<sup>89</sup> As above

<sup>90</sup> As above

<sup>91</sup> Langer (n 50 above) 302

What is interesting about public interest litigation in the U.S. is that apart from the primary goals public interest litigants seek to achieve, there is an implicit recognition given to their contribution as providers of input for sound decision making. In the words of Tobias:<sup>92</sup>

Public interest litigants provide unique expertise, information and perspectives. The input of public interest litigants can improve administrative and judicial decision making.

To this could be added the role played by public interest groups as non litigants. In such instances public interest groups influence the outcome of public interest suits by intervention as *amicus curiae*.<sup>93</sup> These striking features of the U.S. system of public interest litigation provide valuable lessons for any endeavour of public interest litigation in developing legal systems such as Ethiopia. This however, does not mean that one has to lose sight of the specific contexts that dictate social, political, economic and cultural life in the different societies.

### 3.3.3. Canada: a Charter driven move

The occurrence of public interest cases has grown significantly in Canada since the advent of the Canadian Charter of Rights and Freedoms<sup>94</sup> and through a significant relaxation of the standing rules. Even before the advent of the Charter, the Supreme Court, through the cases of *Thorson v. Canada (Attorney General)*,<sup>95</sup> *McNeil v. Nova Scotia (Board of Censors)*,<sup>96</sup> *Canada (Attorney General) v. Borowski*<sup>97</sup> and *Finlay v. Canada (Minister of Finance)*,<sup>98</sup> increased the role of public interest litigants, particularly in the capacity of interveners. Since then, in many Charter cases the Court has become a multilateral forum with many and more nuanced positions than the traditional purely adversarial and bilateral process.<sup>99</sup> This is due to the increasing involvement of public interest groups as litigants or as *amicus curiae* interveners. The Federal government's Court Challenges Program contributed to this process. The program

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<sup>92</sup> Tobias (n 46 above) 419

<sup>93</sup> Langer (n 50 above) 303

<sup>94</sup> Canadian Charter of Rights and Freedoms, Schedule B, Act, 1982

<sup>95</sup> [1975] 1 S. C. R. 138 The Court recognized discretionary public interest standing, allowing Thorson to challenge the constitutionality of official bilingualism

<sup>96</sup> [1976] 2 S. C. R. 256 McNeil, a newspaper editor, was granted public interest standing to challenge the censorship of the film *Last Tango in Paris*

<sup>97</sup> [1981] 2 S. C. R. 575 Borowski, an anti-abortion activist, was granted public interest standing to challenge certain exculpatory sections of the Criminal Code relating to abortion

<sup>98</sup> [1986] 2 S. C. R. 607 Finlay was granted public interest standing to challenge Manitoba's alleged violation of a federal-provincial cost-sharing program

<sup>99</sup> D. Gourlay, 'Access or Excess: Interim Costs in Okanagan' (2005) (63) *University of Toronto Faculty of Law Review*, 114

assisted in funding selected constitutional challenges in recognition of the broad public ramifications and the particular interests affected by the legislation under review.<sup>100</sup>

In pre-Charter days, the judiciary developed the notion of a discretionary grant of standing supplementary to standing as of right. It allowed the validity of statutes to be challenged by a plaintiff asserting in the public interest that the statute violated the rights of someone other than the plaintiff. This amounted to a major liberalization of the common law rule of standing.<sup>101</sup>

In Canada, public interest standing will only be granted if three criteria are met: 1) there is a serious issue as to the validity of the impugned law, 2) the plaintiff is directly affected by it or has a genuine interest in its validity, and 3) there is no other reasonable or effective way the validity of the impugned provision can be determined. This test is referred to as the *Borowski* test of public interest standing in Canada.<sup>102</sup>

Unlike the case of the U.S. however, there seems to be no readily available standing right for public interest litigants. Section 24(1) of the Charter provides that anyone whose rights or freedoms, as guaranteed by the Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.<sup>103</sup> The provision does not grant automatic standing rights to those who seek to bring suits in the public interest. It is said that where no standing as of right exists, courts have the discretionary power to grant public interest standing to any party, including an individual or corporate entity, to challenge the constitutional validity of a law or government action on the basis that it violates any rights of people other than the plaintiff recognized in the Charter.<sup>104</sup>

### 3.3.4. India: judicial activism

It has been said that unlike the case of public interest in Canada or the United States, the public interest movement in India has been almost entirely initiated and driven by the judiciary.<sup>105</sup> Perhaps the most remarkable aspect of this whole movement of public interest litigation in India was the shift that occurred in the 1980s in the Indian Supreme Court's

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<sup>100</sup> G. Beaudoin and E. Mendes, (eds.) *The Canadian Charter of Rights and Freedoms* 3<sup>rd</sup> ed, 1996, 1-17

<sup>101</sup> Gourlay (n 99 above)

<sup>102</sup> As above

<sup>103</sup> Canadian Charter (n 94 above)

<sup>104</sup> M.Gaudet 'Standing to Assert Equality Rights' available at  
<<http://www.ccppcj.ca/documents/gaudet.en.html>> (accessed 15 August 2005)

<sup>105</sup> Bhagwati (n 38 above) 561 Cited in Cassels (n 32 above) 497

perception of its own function with regard to human rights protection. Far from being a merely defensive fortress for the protection of the traditionally accepted 'fundamental' human rights, such as equality before the law and personal liberty, the Indian Supreme Court adopted a highly visible role as the initiator of affirmative action to force national and state governments to accept the existence of a whole range of positive rights, hitherto more or less unrecognized outside the canons of international statements of human rights principles.<sup>106</sup> Thus one can see a clear case of judicial activism targeted at curing social ills ranging from poverty, lack of respect for fundamental rights to unacceptable levels of inequality between the poor and the rich.

A number of distinctive characteristics of public interest litigation can be identified, each of which is novel and in some cases contrary to the traditional legalist understanding of the judicial function.<sup>107</sup> This somewhat radical attitude of judges in the Indian Supreme Court seems to have been driven by the emphatic and unambiguous 'no' the judges gave to the following questions:<sup>108</sup>

Can judges really escape addressing themselves to substantial questions of social justice? Can they simply say to litigants who came to them for justice and the general public that accords them power, status and respect, that they simply follow the legal text when they are aware that their actions will perpetuate inequality and injustice? Can they restrict their enquiry into law and life within the narrow confines of a narrowly defined rule of law?

In short, at the heart of the Indian type of public interest litigation lies the firm belief that a sustained effort on the part of the highest judiciary to provide access to justice for the deprived sections of Indian society is a constitutional as well as a social ideal envisaged by the Indian Constitution.<sup>109</sup>

The Constitution of India provides the legal basis for the development of public interest litigation. Under article 32, the Supreme Court of India is given an original jurisdiction over all cases concerning fundamental freedoms enshrined in the Constitution.<sup>110</sup> The Preamble to the Indian Constitution expresses a commitment to secure to all citizens of India "justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of

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<sup>106</sup> J. Cooper 'Poverty and Constitutional Justice: the Indian Experience' (1993) (44) Mercer L. Rev. 615

<sup>107</sup> Cassels (n 32 above) 497

<sup>108</sup> P. Bhagwati, Chief Justice on What Justices Should Do, The Times of India, Sept. 21, 1986, at 9 cited in Cooper (n 106 above) 611

<sup>109</sup> Bhagwati (n 38 above) 700

<sup>110</sup> Art 32 (2) of the Indian Constitution reads: The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, *quo warranto* and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part

status and opportunity; and to promote among them fraternity assuring the dignity of the individual and the unity and integrity of the nation.”<sup>111</sup> The Constitution also guarantees specific fundamental rights<sup>112</sup> and non-justiciable directive principles of state policy and governance.<sup>113</sup> It was this legal basis that was expansively interpreted by the Indian judiciary to allow standing to citizens and thereby facilitating access to justice.

Being aware of the limitations of legal realism, the judiciary in India has struggled to bring law into the service of the poor and the marginalised. In advancing public interest litigation through the enforcement of fundamental rights in the Constitution, the courts sought to rebalance the distribution of legal resources, increase access to justice and infuse formal legal guarantees with substantive and positive content. As a result, originally aimed at combating inhumane prison conditions, and the horrors of bonded labour, public interest actions have now established the right to a speedy trial, the right to legal aid, the right to a livelihood, a right against pollution, a right to be protected from industrial hazards, and the right to human dignity.<sup>114</sup>

Public interest litigation in India is channelled through two avenues. If the complaint is of a legal wrong, the appropriate forum is the High Court of the state under Article 226 of the Constitution.<sup>115</sup> If a fundamental right is alleged to have been violated, the remedy may be sought from the High Court or directly from the Supreme Court under Article 32.<sup>116</sup> Therefore, as far as the Indian context is concerned, public interest litigation has a strong of constitutional basis also in procedural matters.

Most constitutionally-based public interest litigation in India is aimed not at challenging the validity of legislative measures, but rather at enforcing existing laws and forcing public agencies to take steps to enhance the welfare of citizens.<sup>117</sup> It is submitted that the major problem in most developing countries with aspirations of a new democratic order is not as such the problem of giving formal guarantees to the protection of fundamental rights and freedoms. It is rather the inability or unwillingness to give effect to these guarantees for various reasons. Thus

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<sup>111</sup> Preamble, Indian Constitution

<sup>112</sup> Part III, Arts. 12-35, Constitution of India

<sup>113</sup> Part IV, Arts. 36-51

<sup>114</sup> Cassels (n 32 above) 497

<sup>115</sup> As above

<sup>116</sup> As above

<sup>117</sup> As above,503

the Indian experience, particularly the extent the judiciary went to accommodate public interest litigants could provide a valuable lesson in seeking to facilitate meaningful implementation of laws to turn formal guarantees of rights to substantive realization.

Another remarkable feature of public interest litigation in India is shown by the realization of the transformative functions of ideals provided for in the Constitution in the form of directive principles. It has been stated that through the expansive reading of fundamental rights, informed by a commitment to the non-enforceable social welfare objectives of the Directive Principles, the courts have sought to read substance into these otherwise formal guarantees.<sup>118</sup>

The most important aspect of radicalism promoted by the Indian judiciary in relation to public interest litigation, however, is demonstrated by the way the courts addressed the issue of *locus standi*. It has been held that where a wrong against community interest is done, ‘no *locus standi*’ will not always be a defence against a public interest litigant that seeks to take the wrong doer to court.<sup>119</sup> The Court expressed the view that, “(*locus standi*) has a larger ambit in current legal semantics than the accepted individualist jurisprudence of old.”<sup>120</sup> The Indian approach to public interest since then has extended the rules of standing to the point that they may be said to have ceased to present any real obstacle to the public interest litigant. As a result, public interest litigation has been initiated by individuals on behalf of other individuals and groups, by academics, journalists and by many social action organisations.<sup>121</sup>

Not only was standing opened to members of the public at large, but equally important was the fact that the rules of civil procedure relating to form of petitions were also relaxed to allow for what has come to be known as an epistolary (petition written in a letter form) jurisdiction. The courts resorted to such relaxed understanding of procedural requirements with the rationale that the cause of justice can never be allowed to be thwarted by any procedural technicalities.

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<sup>118</sup> As above, Although the Directive Principles are not enforceable, the courts consistently use them to interpret enforceable fundamental rights to the extent of reading them into fundamental rights), to ground their assumption of jurisdiction over regulatory matters, and to support remedial strategies they adopt. The reliance on the directive principles is said to have been particularly apparent in legal aid in the directive principles on which the courts relied to support their findings that legal aid is a fundamental right under Art. 21 and, suggested even in the absence of legislation that if legal aid was not provided by the state, criminal trials might be void. (See *Hussainara Khatoon v. Home Secretary, State of Bihar* A.I.R. 1979 S.C. 1360; 1369; 1377)

<sup>119</sup> *Maharaj Singh V. Uttar Pradesh*, A.I.R. 1976 S.C.2262, 2269 Cited in Cassels (n 32 above) 498

<sup>120</sup> As above

<sup>121</sup> As above, 499



Thus they unhesitatingly and without the slightest qualms of conscious cast aside the technical rules of procedure in the exercise of their dispensing power and treated the letter of public minded individuals and groups as a writ petition and acted upon them.<sup>122</sup>

With regard to remedies, it is said that the Indian courts have demonstrated an ability to press against the boundaries of the traditional understanding. The courts have not limited themselves to the usual remedies granted to them under Article 32(2) of the Constitution.<sup>123</sup> It is said in this connection that the courts have shown a willingness to experiment with remedial strategies that require continuous supervision and that appear significantly to shift the line between adjudication and administration. Apart from appointing socio-legal commissions to gather facts during proceedings, they would also create agencies to suggest appropriate remedies and to monitor compliance with orders. The courts' final orders in public interest litigation matters are also made to be detailed, specific and intrusive with a view to facilitating compliance.<sup>124</sup>

In conclusion, the judiciary-driven movement of public interest litigation in India seems to be way beyond mere pursuit of constitutional and statutory rights and freedoms. It is a transformative tool that is energetically pursued to change existing disparities in social, economic and cultural aspects of life in the society to a better and more equitable state by transforming formal commitments and constitutional ideals into enforceable and practical judicial pronouncements. This is very much in keeping with the very purpose of an ideal public interest litigation endeavour that aims to bring about social change through law.

### **3.3.5. South Africa: a civil society movement**

In the South African context, public interest litigation could be viewed from two historical perspectives. The first one is the public interest movement of the apartheid era where human rights activists and civil society organisations sought to fight the oppressive regime by using loopholes in the laws and the internal contradictions of the system. The second one is a more direct and constitutionally recognised use of access to justice and public interest *locus standi* guarantees to eradicate the entrenched inequality, among other social ills, in every sphere of life as a result of the apartheid legacy.

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<sup>122</sup> P. Hassan and A. Azfar 'Securing Environmental rights through public interest litigation in South Asia' (2004) (22) *Virginia Environmental Law Journal*, 227

<sup>123</sup> See note 110 above

<sup>124</sup> Cassles (n 32 above) 506

One commentator sarcastically said that one of the rare benefits of the oppressive apartheid system was the development, in South Africa of a vibrant NGO community which included several organizations engaged in public interest lawyering. The most successful of these were the Legal Resources Centre (LRC), the Centre for Applied Legal Studies (CALs) and Lawyers for Human Rights.<sup>125</sup>

In the 1970s public interest groups such as the Legal Resources Centre (LRC) and the Centre for Applied Legal Studies (CALs) contributed to the mounting pressure by utilizing apartheid's legal system and illuminating its inequities. It is said that these groups seized on the fact that though Acts of parliament were beyond judicial review, government ministries' implementation processes and regulations were not.<sup>126</sup> This is another instance where one can see the law, no matter how oppressive a system may be, being creatively used by public interest groups to bring about social change.

In 1980 and 1983, the LRC successfully challenged in the Supreme Court several ministerial acts that were issued by authorities based on the pass laws. The appellate victories of the LRC and CALs, and their allies rested on a common strategy. They did not press judges to cut down apartheid as such because this would have not been successful at the time. Rather, they exploited the courts' partial independence and rule of law rhetoric by focusing on narrower issues such as government's excessive exercise of power in interpreting and implementing Acts of parliament.<sup>127</sup> Furthermore, it is said that despite its partial independence the judiciary had exercised self-imposed subordination. In the words of Golub, "CALs and LRC probed the interstices of apartheid's legalistic self-delusion to undermine that self-imposed subordination".<sup>128</sup>

Viewed broadly, public interest litigation in apartheid South Africa was part of a political struggle waged on several levels. Public interest groups, such as the Black Sash helped mobilize the population and conduct national advocacy and publicity drives to complement litigation strategies. The litigation activities of the public interest lawyers and their policy work are said to have been successful because they chose issues and aspects of the struggle that already had

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<sup>125</sup> D. McQuoid-Mason 'Access to Justice in South Africa' (1999) (17) *Windsor Yearbook of Access to Justice*, 245

<sup>126</sup> S. Golub 'Battling Apartheid, Building a New South Africa' in McClaymont and Golub (n 14 above) 25

<sup>127</sup> As above 27

<sup>128</sup> As above

great momentum within the mass liberation movement.<sup>129</sup> Thus, it is imperative to note that litigation as a tool of social change needs to be dictated by an informed and coordinated effort based on a sound appreciation of the crucial problems in a society.

### 3.3.6. Public interest litigation in post apartheid South Africa

As pointed out above, the role of public interest litigation in post apartheid South Africa involves fighting against harmful legacies of apartheid by seizing the opportunities created by a relatively responsive government. In other words, there has been an inevitable shift from challenging an unjust system towards litigating cases that are aimed at enforcing rights enshrined in the Constitution. Apart from that, public interest lawyers also assume the task of nurturing the democratic order by advocating for a more open and transparent government apparatus that is committed to cure the ills of apartheid by designing and implementing progressive policies and laws targeted at eliminating the structural social and economic inequality in South Africa.<sup>130</sup>

The legal framework is conducive for public interest litigants. The South African Constitution has adopted a very liberal *locus standi* for those who seek to litigate in the public interest the rights enshrined in the Bill of Rights of the Constitution.<sup>131</sup> With regard to access to justice, section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court or, where appropriate, another independent and impartial forum. This explicit guarantee of the right of access to justice coupled with the relaxed approach to standing in rights litigation has the aim of making the courts accessible to the ordinary citizen either by self-representation or through public interest groups and individuals. In the words of Jagwanth:<sup>132</sup>

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<sup>129</sup> As above, 29

<sup>130</sup> As above, 35

<sup>131</sup> Section 38 reads: Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights: The persons who may approach a court are:

- a) anyone acting in their own interest;
- b) anyone acting on behalf of another person who cannot act in their own name;
- c) anyone acting as a member of, or in the interest of, a group or class of person;
- d) anyone acting in the public interest; and
- e) an association in the interest of its members.

<sup>132</sup> S. Jangwanth 'Democracy, Civil Society and the South African Constitution: Some challenges' Discussion Paper 65 UNESCO/MOST at <<http://www.unesco.org/most/wsf/english/index.shtml>> (accessed 23 August 2005)

Institutional obstacles as well as lack of access to resources and lack of knowledge about the content of rights frequently make litigation in the courts virtually impossible for ordinary people. The role of civil society thus becomes paramount and ensures that judicial rights discourse does not remain the domain of the privileged few in society.

Human rights groups in South Africa have used this liberalized standing requirement to either initiate court cases or intervene on behalf of disadvantaged groups and individuals in litigation on various human rights issues. Several public interest cases were brought to court by NGOs in pursuit of fundamental civil and political as well as social and economic rights recognized by the Constitution. It is said that the express recognition of justiciable social and economic rights in the Constitution, the historical and active use of legal action by civil society and the well-reasoned and high-profile court judgments have made South Africa a good illustration of both the possibilities and the difficulties of social justice litigation.<sup>133</sup>

NGOs either act as parties in litigation or intervene as *amicus curiae*. An example of organized civil society bringing cases to the attention of the court is the high profile and successful case of the Treatment Action Campaign (TAC)<sup>134</sup> where the TAC successfully argued in the Constitutional Court that the government has the legal duty to provide anti-retroviral drugs to HIV positive pregnant women. Many public interest groups took part in this case in different capacities. The LRC was the instructing attorney in the TAC case.<sup>135</sup> It is said that the TAC case is a typical example of the critical connection between litigation and social mobilization. The case is one of strategically chosen litigation, which was at the same time linked to a great deal of mobilization in the streets, political lobbying in Parliament and working with the churches and trade unions.<sup>136</sup>

As pointed out above, with the advent of constitutional democracy in South Africa, public interest groups tend to focus on constitutional litigation and rights empowerment through education and advocacy campaigns with a view to achieving enhanced implementation of the rights guaranteed in the Bill of Rights. For example, apart from the provision of legal assistance, Lawyers for Human Rights has been involved in several constitutional cases including the *Makwanyane* case<sup>137</sup> which abolished the death penalty in South Africa, in which it was *amicus curiae*. LHR was also successful in having the core aspects of the new

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<sup>133</sup> Centre on Housing Rights and Evictions, 'Litigating Economic, Social and Cultural Rights: Achievements, Challenges, and Strategies', 2003, 95

<sup>134</sup> *Minister of Health and others v Treatment Action Campaign and others* 2002 (10) BCLR 1033 (CC)

<sup>135</sup> See Jangwath (n 132 above)

<sup>136</sup> G. Budlender (interview) in 'Litigating Economic, Social and Cultural Rights' (n 133 above) 96

<sup>137</sup> 1995 (3) SA 391 (CC)

Immigration Act concerning the arrest and detention of non-nationals declared unconstitutional.<sup>138</sup>

In general the history and development of public interest litigation in South Africa is a vivid demonstration of the function of the law as an instrument of social change even in the worst forms of oppressive systems. The small but vibrant public interest movement which originated as a strategy to complement the struggle against apartheid used the law to achieve meaningful gains by using the gaps and loopholes in the legal and political system. This public interest movement is still playing a significant role in strategic litigation activities that is aimed at transforming the South African society into one based on freedom, equality and human dignity, as professed by the Constitution.

### **3.4. Conclusion**

The whole import of the discussion in this chapter is that public interest litigation can be practiced in different social, political and legal milieu. A seemingly repressive regime is not necessarily a bar to the activities of public interest lawyers and human rights activists as the inherent contradictions in such a system could be creatively utilized to achieve gradual changes in the system. Another point is that public interest litigation is not limited to any particular sector of the social structure. It could be spearheaded by the judiciary, like the Indian situation or by NGOs as in South Africa or it may be the result of simultaneous and coordinated activities by various groups including the government as in the United States.

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<sup>138</sup> Press Release dated April 22, 2003. *Lawyers for Human Rights and Others v Ministry of Home Affairs and Others* Cited in Jaichard ( n 7 above) 135

## CHAPTER FOUR

### ASSESSMENT OF THE ETHIOPIAN SITUATION

#### 4.1. Introduction

As has hitherto been stressed, the immense advantages of public interest litigation can only be utilized once a careful assessment of the legal, political and institutional realities of a system is made. This ought to be done with a view to evaluating the system's suitability to justify choice of the practice as a feasible strategy. The objective of this study includes the examination of those factors in Ethiopia with a view to assessing the adequacy of the legal and institutional framework and making recommendations that could be used to introduce the practice of public interest litigation. Accordingly, this chapter will illustrate the paramount considerations that need to be reckoned with in the Ethiopian context with a view to assessing whether or not the legal and institutional framework could cater for the practice of public interest litigation by NGOs and other entities. A conclusion will be drawn based on this assessment that will serve as a basis to determine the nature and extent of the recommendations to be made.

#### 4.2. The legal framework

Success of public interest litigation is a function of a number of factors. Nevertheless, a legal and institutional framework that could be used as a springboard for the activities of groups and individuals that seek to engage in the practice is the minimum requirement. Furthermore, it is believed that the institutional set up is to a large extent the result of the legal framework. This makes the analysis of both necessary. It is with this understanding as a basis that one should approach the evaluation of the Ethiopian context.

As has been discussed in the foregoing chapters, the linkage between the right of access to justice and *locus standi* is so strong that access to justice could to a large extent be affected by the way a legal system addresses the issue of *locus standi*. Thus the discussion of the legal framework is couched in such a way that facilitates the evaluation of its adequacy in addressing the two issues.

##### 4.2.1. The Constitution

It is submitted that effective enforcement of constitutionally guaranteed rights and freedoms in Ethiopia can greatly enhance the process of democratization and societal transformation. It is

further submitted that despite formal guarantees and official rhetoric as to a commitment to human rights protection and nurturing of the rule of law, little progress has been seen in practice. As has been pointed out above, the Constitution has yet to become a living document that affects the daily lives of Ethiopians in a meaningful way as it is declared to be an expression of their “strong commitment to build a political community founded on the rule of law and guaranteeing a democratic order and advancing economic and social development”.<sup>139</sup>

Public interest litigation can be an important tool that could be used to bring about the fulfillment of these ideals by creating an environment conducive to a better enforcement of rights and promoting the culture of the rule of law. As rights are increasingly litigated with the public interest in view and government and non-state actors begin to be held accountable for their actions, people will develop confidence in law and its role in social change. With the active engagement of civil society and the judiciary, the FDRE Constitution, as the “supreme law of the land”<sup>140</sup> can indeed be used as a key instrument in realizing these ideals of rights empowerment and further societal transformation.

The Constitution has a bill of rights chapter which incorporates readily justiciable rights including civil and political rights, social and economic rights and the right to development. The right of access to justice is part of this catalogue of rights contained in the bill of rights. Article 37(1) entitles ‘everyone’ with a justiciable claim to approach judicial bodies and get relief.<sup>141</sup> It is interesting to note that Article 37 also deals with the issue of *locus standi*. One can argue that although sub article 1 of Article 37 seems to be referring to individuals pursuing their own interests when it says ‘everyone’, it could also broadly be applied to include persons (natural or juristic), who seek to litigate in pursuit of interests other than their own. In other words, as there seems to be no condition attached to the exercise of the right i.e. it is not expressly required that there be an interest specific to the person approaching the court, this provision could be used by NGOs and private persons to take public interest cases to courts.

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<sup>139</sup> Constitution preamble para.1

<sup>140</sup> Article 9 (1) provides: The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.

<sup>141</sup> Article 37 which is entitled ‘right of access to justice’ reads:

1. Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgement by, a court of law or any other competent body with judicial power
2. The decision or judgment referred to under sub-article 1 of this article may also be sought by:
  - a. any association representing the collective or individual interest of its members; or
  - b. any group or person who is a member of, or represents a group with similar interests.

The liberal approach to *locus standi* is further reflected in sub article (2) (b) of Article 37. This class action provision of the Constitution seems to be intended to ease the strict requirement of Article 38 of the Civil Procedure Code of Ethiopia, which requires the consent of all interested persons for a representative to institute a class action.<sup>142</sup> The Constitutional provision allows standing to 'any group or person' who is a member of a group. Commentators argue that the very strict requirement of consent adopted by the Code had rendered the notion of class actions in Ethiopia non-existent. Therefore for class actions to be an effective means of constitutional litigation, the requirement of the consent of class members should be dropped in favour of the more relaxed approach adopted by Article 37(2) (b) of the Constitution.<sup>143</sup>

A close examination of Article 84(2) of the Constitution lends further credence to the argument in favour of broader *locus standi* particularly in cases concerning the constitutional validity of laws. Outlining the powers and functions of the Council of Constitutional Inquiry the sub article provides:<sup>144</sup>

Where any federal or state law is contested as being unconstitutional and such a dispute is submitted to it by any court or *interested party*, the Council shall consider and submit it to the House of the federation for a final decision. (emphasis supplied)

One can argue that law in this context is not confined to the legislative act of a federal or state legislature. It can also include administrative regulations and directives of state organs. The stipulation under Article 9(1) of the Constitution which says that laws, customary practices or decisions of an organ of state or a public official which contravene the Constitution are of no effect seems to provide guidance to this broader understanding.<sup>145</sup>

The term 'interested party' could be understood both in its narrow and broad sense. In the narrow sense it could be limited to refer to a person who is actually a party to litigation. This

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<sup>142</sup> Article 38 (1) of the Code reads: where several persons have the same interest in a suit, one or more of such persons may sue or be sued or may be authorised by the court to defend on behalf or for the benefit of all the persons so interested on satisfying the court that all persons so interested agreed to be so represented.

<sup>143</sup> G. Aberra 'The Scope and Utility of Class actions under Ethiopian Law: A Comparative Study' (2000) (20) *Journal of Ethiopian Law*, 49, 62

<sup>144</sup> The Council of Constitutional Inquiry has the powers to investigate constitutional disputes and submit those matters that need interpretation to the House of Federation, with its recommendations. An interested party dissatisfied with the decision of the Council has the right to appeal to the House of Federation, which has the power to interpret the Constitution. (See. Articles 84(1), 84(3) (a) and 83 (1))

<sup>145</sup> See also article 9(2) which says that all citizens, political organizations, other associations and their officials have the duty to ensure observance of the Constitution and to obey it.



could be the case where an issue of constitutional dispute arises during litigation in court. The broad understanding implies any person or entity who seeks to challenge the constitutional validity of a law irrespective of him/her having a personal interest affected by the challenged legislation. This broader understanding is indeed adopted by the Council.<sup>146</sup> The Rules of Procedure of the Council which have been approved by the House of Federation as per Articles 84(4)<sup>147</sup> of the Constitution added the word 'body' to the Constitution's 'interested party'. Thus any 'interested party or body' can challenge the constitutional validity of laws before the Council and the House of Federation.<sup>148</sup> It is said that an 'interested party or body' may mean any person or body directly affected by the legislation, an interest group, a human rights NGO, an association, a federal or regional agency etc.<sup>149</sup>

In sum, there are sufficient grounds to assume that the Constitution envisages a broad *locus standi* regime that is conducive to public interest groups. It is for these groups and public spirited individuals to engage courts and other organs with judicial competence by taking up cases of significance to the development of a human rights culture in Ethiopia.

#### 4.2.2. The Civil Procedure Code

Article 33(2) of the Code provides for a very strict requirement of interest for a person to have standing in a suit. The negative formulation of the provision is typical of a civil law jurisdiction requirement of the existence of a vested interest as a precondition for *locus standi*.<sup>150</sup> Indubitably, this provision could not be used to bring public interest actions. The tough requirement of a vested interest seems to have been couched having only private suits in mind. As a continental law jurisdiction, the drafters of the Code were evidently inspired by the belief that matters of public interest are the domain of the public prosecutor.

With the advent of the more liberal approach taken by the Constitution as well as the supremacy of same over existing or future laws, this provision of the Code could not be a bar to

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<sup>146</sup> I. Idris 'Constitutional Adjudication under the 1994 FDRE Constitution (2002) (1) *Ethiopian Law Review*, 82

<sup>147</sup> This provision reads: The Council shall draft its rules of procedure and submit them to the House of the Federation and implement them upon approval.

<sup>148</sup> Idris (n 146 above)

<sup>149</sup> A. Mulatu 'Who is the "interested party" to initiate a Challenge to the Constitutionality of laws in Ethiopia?' (1999) (2) *The Law Student Bulletin*, 9-12. Cited in Idris (n 146 above)

<sup>150</sup> Article 32 (2) reads: No person may be a plaintiff unless he has a vested interest in the subject matter of the suit

the activities of NGOs and individuals that seek to litigate in the public interest. Therefore, it is not worthwhile to dwell much on the discussion of the provision.

#### 4.2.3. NGO registration and supervision laws

Freedom of association is recognized under Article 31 of the Constitution in the broadest of terms.<sup>151</sup> The legal regime currently in force as regards the registration and supervision of civil society in general and NGOs in particular is basically composed of two pieces of legislation. These are the 1960 Civil Code<sup>152</sup> and the Associations Registration Regulations of 1966 (Regulations).<sup>153</sup> The latter was issued by the then Ministry of Interior<sup>154</sup> based on the mandate given to the Ministry by the Civil Code to prescribe measures that it thinks fit with a view to placing the offices of associations under its efficient control.<sup>155</sup>

One could make a general statement that the framing of many of the provisions of the Code and the Regulations seems to place much emphasis on the control aspect rather than encouraging and assisting associations. Indeed, the provisions confer extensive powers of control and intervention on the supervising authority, which on occasion have led to an abuse of these powers.<sup>156</sup> The associations' registration office has the power to dissolve an association if it finds that the object or activities of the latter are unlawful or contrary to morality.<sup>157</sup> There is also a duty on associations to inform the office in due time whenever a

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<sup>151</sup> Article 31 reads: Every person has the right to freedom of association for any purpose or cause. Organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited.

<sup>152</sup> See Articles 404-482 of the Civil Code of the Empire of Ethiopia

<sup>153</sup> Legal Notice No. 321/1966

<sup>154</sup> The power of registration and supervision of association has been given to the Ministry of Justice since 1995 (see Proc. No. 4/1995)

<sup>155</sup> See article 479(1) of the Civil Code and article 1 of Legal Notice No.321/1966

<sup>156</sup> The Ministry of Justice on Nov.23, 2003 banned the Ethiopian Free Press Journalists Association on the grounds that the Association failed to submit financial and audit reports on time. The Ministry went further, removed the elected executives of the Association and facilitated the election of new officers in a meeting it called in the Ministry's office. The matter went to Court where the actions of the Ministry were declared to be illegal and an order was given to lift the ban and reinstate the executives. (See Special Report 69 of the Ethiopian Human Rights Council available at <[http://www.ehrco.org/reports/special\\_report\\_69.pdf](http://www.ehrco.org/reports/special_report_69.pdf)> and 'Ethiopia: Human Rights defenders under pressure', a report by the Observatory for the Protection of Human Rights Defenders (*Federation Internationale des Droites de l'homme*) available at <[http://www.fidh.org/IMG/pdf/et\\_obs2005a.pdf](http://www.fidh.org/IMG/pdf/et_obs2005a.pdf)> (accessed on 3 September 2005)

<sup>157</sup> See article 462(1), Civil Code. Article 15(2) of the Regulations provides that the office can dissolve an association for failing 'to comply with any requirement of the law or of these Regulations relating to notices,

general meeting is held.<sup>158</sup> Apart from sending a representative the office has the power to prescribe any measure it thinks fit to ensure the good functioning of the general meeting. It can as of right dictate the particular manner of the proceedings, the times of convocation, the order of the day and the holding of the meeting.<sup>159</sup> The law also imposes criminal sanctions on members and executives of associations for breaches such as failing to deposit the statutes of the association to the office,<sup>160</sup> failing to mention the registration number of the association in its correspondences with third parties,<sup>161</sup> and failing to communicate the statutes of the association to an interested person upon request.<sup>162</sup>

These wide powers of the supervising authority coupled with cumbersome requirements of registration seem to discourage the development of civil society to the desired level.<sup>163</sup> It is said that as a result of these factors, civil society associations do not enjoy full and complete independence to provide an alternative voice for the citizenry or in promoting accountability and transparency in government as they are subject to being closed down or harassed if in disagreement with the policies of the ruling party. Therefore civil society associations in Ethiopia have little or no influence on government policies and programs.<sup>164</sup>

It is evident that such a legal regime is not an ideal playground for those who seek to pursue public interest litigation particularly with the aim of fighting governmental lawlessness through the use of law. Nevertheless, the path to pursue these ends is not totally blocked. As has been stressed above, it is a cardinal consideration in public interest lawyering endeavour that public interest groups adopt strategies that could enable them to operate using all legal and institutional loopholes in the system. In this context, the constitutional guarantee of freedom of association could be used by public interest groups to challenge the legality of tight statutory provisions concerning registration, supervision and sanctions by the supervising authority.

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reports or information required to be provided by associations or with lawful orders of the Office relating to the conduct of the activities of the association.'

<sup>158</sup> Article 473 (1) See also article 10 (1) of the regulations which requires such notification to be made seven days ahead of the date of the meeting

<sup>159</sup> Article 473 (2) and (3)

<sup>160</sup> Article 480 states that the punishments laid down in the Penal Code shall apply in these situations. See also article 20 of the Regulations

<sup>161</sup> Article 481(a)

<sup>162</sup> Article 481(b)

<sup>163</sup> See 'Ethiopia: Human Rights Defenders under Pressure' (n 150 above)

<sup>164</sup> Economic Commission for Africa (UNECA), 'Governance Profile of Ethiopia' in Measuring and Monitoring Progress towards Good governance in Africa, 2004, 23

#### 4.2.4. Licensing and supervision of advocates

In Ethiopia, the Ministry of Justice is the organ entrusted with the power of registration of federal advocates, issuance, renewal and revocation of licenses.<sup>165</sup> The Ethiopian Bar Association (EBA) has a limited right of participation in these processes. The Association has two representatives in the Committee set up by the Ministry to examine license applications<sup>166</sup> and in the Advocates' Disciplinary Council.<sup>167</sup> It also has a representative in the Advocacy Entrance exam Setting and Competence Certifying Board controlled by the Minister of Justice.<sup>168</sup> Thus the EBA has no regulatory authority over its members as regards their professional activities.

The law provides for three types of federal advocates licenses that confer qualifications upon advocates to appear before the different levels of federal courts. The different licenses are issued primarily based on the qualifications and the experience of legal professionals.<sup>169</sup> Of the three types of licenses the special advocacy license is issued to lawyers who seek to defend the *general interests and rights of the society*.<sup>170</sup> Interestingly, the law provides for less rigorous requirements for obtaining such license. Applicants for this license are exempted from such requirements as furnishing of evidence of professional indemnity insurance and sitting for the advocacy entrance examination.

Moreover, holders of such license may not receive any payment from their clients.<sup>171</sup> This could be taken as an encouragement for public spirited lawyers who seek to engage in public interest lawyering including the provision of legal assistance to the disadvantaged and litigation targeted at bringing about respect and promotion of human rights.

Furthermore, advocates are required by law to render free legal services (*pro bono publico*). A minimum of fifty hours a year legal service free of charge or upon minimal payment is required

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<sup>165</sup> Federal Courts Advocates Licensing and Registration Proclamation No. 199/2000, article 19

<sup>166</sup> As above, article 20

<sup>167</sup> As above, article 23

<sup>168</sup> As above, article 27

<sup>169</sup> See generally articles 7-10 as above. Article 7 lists the types of licenses as:

- a. a federal first instance court advocacy license
- b. federal courts advocacy license and
- c. a federal court special advocacy license

<sup>170</sup> As above, article 10(1)

<sup>171</sup> As above, article 10(1) (b)

of any advocate licensed to practice law in the federal courts. The beneficiaries of such services are: 1) persons who can not afford to pay 2) charity organizations, civic organizations, community institutions 3) persons for whom a court requests legal services and 4) committees and institutions that work for improving the law, the legal profession and the legal system.<sup>172</sup> This wide list of beneficiaries of the free legal service scheme could create a favourable opportunity for public interest groups to complement their efforts with *pro bono* work.

In sum, as far as the activities of legal professionals are concerned, the legal framework seems to pose both challenges and opportunities for public interest litigation endeavours. The fact that the overwhelming powers of licensing, supervision and regulation of the conduct of advocates are exclusively exercised by a government organ may have the effect of discouraging advocates from taking up cases against the government. This indeed negatively affects the development of public interest litigation. On the opportunities side, the provision of a special license scheme for public interest advocates and the mandatory requirement of *pro bono* service could be taken as a positive gesture to assist the efforts of those who would seek to litigate in the public interest.

### **4.3. The institutional framework**

As has been pointed out above, the institutional setup is to a large extent a reflection of the legal framework because the institutions are the creations of laws. Nevertheless, given the innovative aspect public interest litigation involves, there is a need for some institutions to operate in a flexible and progressive manner rather than strictly adhering to formalistic requirements set by the law if public interest litigation is to be a meaningful exercise. The judiciary and national human rights institutions are some of such institutions.

#### **4.3.1. The judiciary**

The Constitution declares the establishment of an independent judiciary.<sup>173</sup> The judiciary has the duty of enforcing the Constitution.<sup>174</sup> However, it does not have the power to interpret it.<sup>175</sup> It is said that the fact that the Ethiopian judiciary has the duty of enforcing the Constitution but not the power to interpret it creates an apparent paradox. This apparent paradox is that “a

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<sup>172</sup> Federal Court Advocates' Code of Conduct Regulations No. 57/1999, article 49

<sup>173</sup> Article 78 (1) reads: An independent judiciary is established by this Constitution.

<sup>174</sup> Article 13 (1)

<sup>175</sup> Article 62 (1) provides: The House[of Federation] has the power to interpret the Constitution

measure, however small, of interpretation is necessarily involved in any act of enforcement of a constitutional provision.”<sup>176</sup> However, a closer study reveals that the paradox is not real. Article 84(1) of the Constitution makes it clear that the act of interpretation the drafters had in mind when they assigned the power of constitutional interpretation to the Federal Council was the act of declaring a federal or state legislation invalid as contrary to the Constitution. Thus, the acts of interpretation by judges in their daily adjudication of cases fall into the category of their mundane actions guided by and enforcing the Constitution, not interpretation envisaged under Article 84(1).<sup>177</sup>

The Constitution states that the fundamental rights and freedoms contained in the bill of rights shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, the International Covenants on Human Rights and international instruments adopted by Ethiopia.<sup>178</sup> Furthermore, all international agreements ratified by Ethiopia are declared to be an integral part of the law of the land.<sup>179</sup> These constitutional provisions seem to provide useful guidance and legitimacy for the judiciary’s use of international human rights instruments in adjudicating cases. However, despite this constitutional leeway for the judiciary to apply international human rights instruments, reference to these instruments by courts is said to be “very minimal, at best, nil at worst.”<sup>180</sup>

Ethiopian law requires that all federal or regional, executive and judicial organs as well as any national or juridical person take judicial notice of laws that are published in the Federal *Negarit Gazeta* (the official law reporter).<sup>181</sup> Thus publication is an absolute requirement for a law to obtain judicial recognition and enforcement. This requirement of publication is further strengthened by the House of Peoples’ Representatives Legislative Procedure Proclamation which defines ‘law’ as:<sup>182</sup>

Proclamations, regulations, directives, that come into force upon approval by the House of Peoples’ Representatives and subsequent publication in the Federal *Negarit Gazeta*, under the signature of the President, in accordance with the procedure laid down here.

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<sup>176</sup> D. Donovan, ‘Leveling the playground: The Judicial duty to Protect and Enforce Constitutional rights of accused persons Unrepresented by Counsel’ (2002) (1) Ethiopian Law Review ,31

<sup>177</sup> As above

<sup>178</sup> See Article 13 (1)

<sup>179</sup> Article 9 (4)

<sup>180</sup> R. Messele, Enforcement of Human Rights in Ethiopia, 2002, 38 available at<<http://www.telecom.net.et/~apap/pdf/ENFORCEMENT%20F%20HR.pdf>>

<sup>181</sup> Article 2 (3), Federal *Negarit Gazeta* Proclamation No.3/1995

<sup>182</sup> Article 2 (1), The House of Peoples’ Representatives Legislative Procedure Proclamation No. 14/1995

Therefore, it is argued that an international human rights convention ratified by Ethiopia pursuant to article 9(4) of the Constitution becomes internally enforceable provided it is transformed into the Ethiopian legal order through a proclamation to be published in the official law reporter. In short, it is the act of publication that brings any ratified convention into effect in Ethiopia.<sup>183</sup> Very few international human rights instruments ratified by Ethiopia are published in the *Negarit Gazeta*. In fact, only the Convention on the Rights of the Child has been published in the *Negarit Gazeta*.<sup>184</sup> This state of affairs evidently undermines the utility of international human rights instruments both as guidance for interpretation and as substantive norms of direct application in the Ethiopian courts. This in turn could discourage judicial activism.

In general, despite complex problems emanating from unfavorable laws and excessive interference of the executive,<sup>185</sup> the judiciary can still play a key role in the development of public interest litigation in Ethiopia. This can be achieved, among other ways, by making use of the constitutional guarantees of access to justice and other fundamental rights and freedoms in such a way that encourage the participation of public interest groups in litigation.

#### 4.3.2. National human rights institutions

As provided for in the Constitution,<sup>186</sup> laws to establish the National Human Rights Commission<sup>187</sup> and the institution of the Ombudsman<sup>188</sup> have been enacted. These institutions have been given fairly wide mandates to carry out their activities.

The Human Rights Commission has as its objective creating awareness about human rights through education, ensuring human rights are protected, respected and fully enforced and having the necessary measures taken where they are violated.<sup>189</sup> The Commission also has the power to investigate complaints of human rights abuses and undertake investigations on its own initiative.<sup>190</sup> It also has the mandate to ensure that laws, regulations, government

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<sup>183</sup> I. Idris, 'The place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia Constitution' (2000) (20) *Journal of Ethiopian Law*, 125

<sup>184</sup> Messele (n 179 above) 40

<sup>185</sup> Governance profile of Ethiopia (n 164 above) 15

<sup>186</sup> See Article 55(14) and 55(15) of the Constitution

<sup>187</sup> Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000

<sup>188</sup> Institution of the Ombudsman Establishment Proclamation No. 211/2000

<sup>189</sup> Article 5, Procl No. 210/2000

<sup>190</sup> As above, article 6(4)

decisions and orders do not contravene the human rights of citizens guaranteed by the Constitution.<sup>191</sup> Although the law does not provide any ready made means of enforcing the Commission's findings, the powers given to it could be used to bring about change in the human rights culture of the country as the commission could be in a better position in terms of resources as compared to human rights NGOs.

The institution of the Ombudsman has the objective of bringing about good governance that is of high quality, efficient and transparent, and based on the rule of law, by ensuring that citizens' rights and benefits provided for by law are respected by organs of the executive.<sup>192</sup> Basically its mandates include the investigation of complaints of maladministration and supervision of the directives, decisions and practices of the executive as to their compliance with the Constitution and other laws.<sup>193</sup>

Nevertheless, there does not seem to be sufficient governmental commitment to make these two institutions carry out their mandates. The institutions did not become operational until late 2004. The appointment of the heads of the two institutions only took place in June 2004; four years after the laws establishing the institutions were enacted.<sup>194</sup> There is no visible indication of the institutions starting operations even after the appointments.

#### **4.4. Conclusion**

It is evident that both the legal and institutional framework currently existing in Ethiopia are laden with complex problems ranging from restrictive laws to inefficiency of institutions resulting in very limited space for the activities of public interest groups. The need for enhanced legal and institutional reform can not be overemphasized. In the mean time, however, NGOs can start to look for ways of engaging in public interest litigation by making use of more liberal and wider provisions of the Constitution on freedom of association, access to justice and standing. Indeed, they have to play a leading role by invoking constitutional rights provisions thereby paving the way for the judiciary to indulge itself with the vision of applying the law in a way that stimulates the process of social change and societal transformation.

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<sup>191</sup> As above, article 6(1)

<sup>192</sup> Article 5, Procl. No. 211/2000

<sup>193</sup> As above, article 6(1)

<sup>194</sup> See FIDH report (n 156 above)



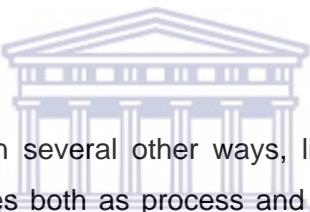
## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1. Introduction

This study argued that the law can be used as an instrument of social change. It highlighted the various aspects of public interest litigation in different legal and political contexts. The work also stressed the point that a creative and progressive use of the law can indeed bring about societal transformation, enhance the protection and promotion of human rights and strengthen democratic institutions. The study also showed that public interest litigation can be spearheaded by NGOs, government initiatives, the judiciary or as a result of the cumulative efforts of all. In line with the core objective of the study, emphasis was placed on the civil society aspect of public interest litigation particularly in South Africa, which is a typical case of the practice promoted by civil society from its inception to the stage of development it has reached today.

#### 5.2. Conclusion



Although the law may be used in several other ways, litigation is the strongest force as it provides a multitude of advantages both as process and as an end in itself. Litigation brings about the participation of a variety of interests in a society. The very process of litigating rights helps new constitutional and statutory norms to take root and motivate those with legal claims to come forward thereby creating public awareness.

Litigation engaged in with a public purpose in view can precipitate a number of important effects that involve policy formation, political mobilization, government monitoring, and legal enforcement. The conducive environment litigation provides for a comprehensive interpretation of fundamental rights and the resultant prevalence of sustained enjoyment of rights by a larger group of the society creates a strong basis for further social change.

Despite broad variations across countries in terms of legal, cultural, political, social and economic conditions, in the global transition toward human rights and rule of law values, litigation can be instrumental in achieving goals that are shared by a broad spectrum of people with varying ideologies. Several key factors shape litigation and are in turn altered through litigation. These factors include the system of government and scope of existing laws, the

independence of the judiciary as well as the operation of the court system and public attitude towards law.

The right of access to justice and of an effective remedy as well as the issue of *locus standi* are primary considerations in any discourse of public interest litigation. There is a strong linkage between these notions and public interest litigation. A liberal approach to *locus standi* helps the enhanced implementation of the right of access to justice by promoting the use of courts as forums of remedying rights violations. Public interest groups can use this liberal approach to standing to litigate rights that are of significance to a large group of people at a time.

Despite the increasing narrowing down of the differences between civil law and common law legal systems, there still seem to be better conditions for the development of public interest litigation in common law systems. Considerations of equity enjoy stronger legitimacy in common law systems as opposed to strict adherence to statutory provisions that characterise civil law jurisdictions. This complements the efforts of public interest groups in common law systems by way of flexible interpretation of procedural and substantive rules which is an essential precondition to public interest litigation.

Issues addressed by public interest litigation vary in different societies. Although there is the active involvement of NGOs in almost all endeavours of the practice, different entities in society can play a role in advancing the cause of public interest through litigation. The evolution of the U.S. model of public interest litigation from enforcement of equality rights in public institutions by public spirited lawyers to issues ranging from structural reform to environmental protection provides a striking comparison to the Indian case which is spearheaded by an active judiciary with the vision of giving substance to constitutional guarantees of rights in the broadest of ways.

Initiated as a civil society movement to complement the struggle against apartheid, the South African model of public interest litigation typifies the utility of the practice as a means of fighting even the worst of repressive regimes by using loopholes both in the legal and institutional setup of the system. The South African model also shows the need to make effective use of meagre human and financial resources by NGOs by changing focus and strategies as changes in the system occur.

The practice of public interest litigation by NGOs in Ethiopia is almost non-existent due to a number of factors. Being a civil law country, there still seems to be emphasis on the role of the

public prosecutor as the sole representative of the public interest. In addition to that, restrictive laws that have not been amended to keep abreast of developments both locally and globally still continue to hamper the free exercise of the freedom of association and the right of access to justice. Weak institutions and a timid judiciary can not be in a position to effectively carry out the dictates of public interest litigation and thereby realize the constitutional ideals of human rights protection and the rule of law.

In spite of these complex problems, there is room to engage in the practice of public interest litigation. There are constitutional guarantees that provide for wider mandates for the activities of both NGOs and the activism of the judiciary. It needs the persistent efforts of human rights NGOs in Ethiopia to test the limits of these formal guarantees by taking test cases that at the same time enable them to see the extent to which the judiciary would go to exercise its constitutionally professed independence. That is the major lesson Ethiopian NGOs could draw from the South African experience.

### **5.3. Recommendations**

It has to be noted that it is not the purpose of this study to portray public interest litigation as a panacea for all social ills. The contention is that human rights norms recognised in the Constitution can take root and become an important component of the democratization process through the participatory nature of the practice. Apart from seeking remedies for rights violations, the process of litigation enhances public awareness of rights thereby creating a vigilant citizenry, which is critical to the transformation of society.

It is imperative that the government take concrete steps to make the legal framework conducive to facilitate public interest litigation as a means of enforcing rights of citizens. Restrictive laws and administrative rules regarding the registration and supervision of NGOs should be harmonised with the more liberal and progressive tenets of the Constitution through legislation and policy measures. Thus there is a need for legal reform.

Specific legislation on issues such as access to justice and *locus standi* for public interest actions need to be enacted to elaborate on the generality of constitutional provisions. This will have the effect of offsetting the reluctance of the Ethiopian judiciary to readily apply constitutional guarantees because of the misguided belief that Constitutional interpretation is the sole jurisdiction of the Federal Council.

Measures ought to be taken to bring about the effective functioning of national human rights institutions such as the Human Rights Commission and the institution of the Ombudsman as they could play an important role in raising awareness. Their mandates could be broadly exercised to represent the public interest in judicial and administrative tribunals thereby complementing the efforts of NGOs. Specific provisions can also be made to the statutes to enable the institutions to engage in litigation. The South African Human Rights Commission for example has the power to bring proceedings in a competent court or tribunal in its own name or on behalf of a person or a group or class of persons.<sup>195</sup>

Human rights NGOs ought to approach public interest litigation in light of the broader implications it has for the process of social change and societal transformation into a rights culture. There is a need on their part to design their strategies having in view the utility of public interest litigation both as a process and as a means of remedying human rights violations. Therefore, they ought to pursue litigation and advance their cause relentlessly even if victory in court has not always been achieved.

Litigation strategies of NGOs should also target international human rights tribunals such as the African Commission on Human and Peoples' rights. As *locus standi* requirements are less rigorous in such forums, NGOs can take cases of significance to secure enforcement of rights which could not be achieved in domestic courts for various reasons. Victory in international tribunals could be used to positively influence the human rights jurisprudence of domestic courts and policy formulation of government.

Finally, litigation efforts of NGOs ought to be complemented by awareness raising activities, media campaigns, parliamentary lobbying and networking with local and international groups pursuing similar goals. In this regard, a very valuable lesson can be drawn from the success in court of the South African civil society group TAC in securing free antiretroviral drugs to prevent mother to child infection of HIV AIDS.

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<sup>195</sup> See section 7(e) of Act No. 54 of 1994, Human Rights Commission Act, 1994

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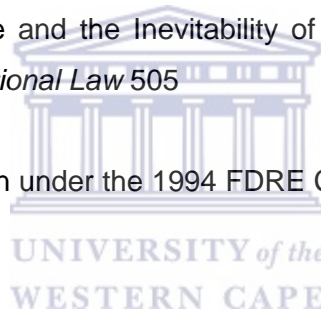
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