

A CONCEPTUAL EXPOSE OF PUBLIC INTEREST LITIGATION IN POST 2013 ZIMBABWE By Tafara Goro

A. Introduction:

Zimbabwe recently witnessed a new constitutional phase through the enactment of the new Constitution¹, which saw the introduction of the concept of Public Interest Litigation, (hereinafter referred to as PIL)². Zimbabwe's constitutional framework is earmarked by a broadened Bill of Rights³. The Constitution is the Supreme Law of the Land⁴ conferring rights on legal persons⁵ a forum to vindicate breach of the same⁶. Zimbabwe's transformative constitutional project is grounded in the Constitution's Founding Values. The progressive nature of the dispensation is premised upon Chapter 4 (the Bill of Rights), and, in particular, Section 85 of the Constitution⁷.

Crucially, a key aspect in every constitutional democracy is the justiciability of human rights⁸. Section 85 of the Constitution entrenches this philosophy⁹. Subsection (1), liberalizes the traditional concept of legal standing traversing the blinkered common law rules of legal standing by allowing any person to approach a court of law in the public interest. This provision contradicts the traditional notion calling for a rigid application of rules of legal standing through the direct and substantial interest test as sanctioned in Section 24¹⁰ of the Lancaster House Constitution.¹¹

¹ Constitution Amendment No. 20, Act of 2013 promulgated on 22 May 2013.

² The new Zimbabwean Constitution has been aptly termed a transformative one, which is a framework for the large-scale transformation of the Zimbabwean society through law.

³ Compare with Chapter 3 of the Lancaster House Constitution.

⁴ Section 2 of the Constitution.

⁵ That is to mean natural and juristic persons.

⁶ Section 69, 56 and 85 of the Constitution.

⁷ Which provides for enforcement of fundamental human rights.

⁸ See Section 69 of the Constitution.

⁹ The provision contains a broadened concept of legal standing in human rights litigation to include, those who are acting in public interest.

¹⁰ It provides: "(1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress."

¹¹ Geoff Feltoe, *Locus Standi in Public Law*, 2002 Issue No 7 Zimbabwe Human Rights Bulletin 187.

What now boggles the mind is the proper meaning of PIL within the purview of Section 85

(1) (d) and whether or not the way it is couched in our Constitution is sufficient to achieve the ideal? If one tries to understand the nature and scope of PIL within the purview of Zimbabwean decisions brought under Section 24 of the previous Constitution: **Law Society of Zimbabwe v. Minister of Justice & Parliamentary Affairs & Anor**¹², **In re Wood & Anor**¹³, **Ruwodo N.O. v. Minister of Home Affairs & Ors**¹⁴, **Retrofit (Pvt) Ltd v. PTC & Anor**¹⁵, **United Parties v. Minister of Justice, Legal and Parliamentary Affairs & Ors**¹⁶, **Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General & Ors**¹⁷, **Minister of Lands & Ors v. Commercial Farmer's Union**¹⁸, one will be left with a limited appreciation of the functionalities of PIL in Zimbabwe.

In other words, the Zimbabwean courts restrictively interpreted legal standing to encompass persons who had a direct and substantial interest in the matter¹⁹, ratepayers²⁰, associations²¹, class actions²², and any person in cases of unlawful detention²³ or habeas corpus applications²⁴, among others. GUBBAY CJ (as he then was) in the **United Parties case**²⁵, held that²⁶:

*...S 24 (1) affords the applicant legal standing to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is detained. It has no right to do either on behalf of the general public or anyone else*²⁷.
(Emphasis added).

¹²SC-16-06.

¹³1994 (2) ZLR 155 (S).

¹⁴1995 (1) ZLR 227 (S).

¹⁵1995 (2) ZLR 199 (S).

¹⁶1997 (2) ZLR 254 (S).

¹⁷1993 (1) ZLR 242 (S).

¹⁸2001 (2) ZLR 457 (S).

¹⁹See *Stevenson v Minister of Local Government and National Housing & Ors* 2002 (1) ZLR 498 (S).

²⁰*Ibid.*

²¹See *ZIMTA & Ors v Minister of Education & Culture* 1990 (2) ZLR 48 (H), *Communications and Allied Services Workers Union of Zimbabwe v Tel-One (Pvt) Ltd* HH-91- 2005, *Law Society of Zimbabwe & Ors v Minister of Finance (Attorney-General Intervening)* 1999 (2) ZLR 231 (S).

²²Under the Class Actions Act [Chapter 8:17].

²³See *Wood & Ors v Ondangwa Tribal Authority & Anor* 1975 (2) SA 294 (A) and *Deary NO v Acting President of Rhodesia & Ors* 1979 RLR 200 (G).

²⁴See also Section 50 (7) (a) of the Constitution of Zimbabwe Amendment No. 20 Act of 2013 promulgated on 22 May 2013.

²⁵*Supra.*

²⁶At p 258B-E of the cyclostyled judgment.

²⁷*Mawarire v. Robert Mugabe N.O CCZ-1-13.*

Are GUBBAY's sentiments still applicable in the new constitutional dispensation? No²⁸. The previous constitutional legal framework discouraged efforts to practice PIL in Zimbabwe²⁹. Thus, PIL forums opted for the provision of legal aid to victims of human rights violations because the terrain was not conducive. Is this all what PIL entails? No. The functionalities of PIL are more comprehensive³⁰. PIL covers a large spectrum, which include inter alia, legal aid, clinical legal education, establishment of PIL law centres, judicial activism, collaborative and investigative litigation, non-adversarial litigation, epistolary jurisdiction, extended legal standing, as embraced India. However, despite the limited scope of PIL in Zimbabwe, PIL organizations have managed to assist hundreds of victims of human rights violations through free legal aid services.

B. Scope of discussion

This hypothesis is an academic exposition of the practice of PIL in Zimbabwe. It is calculated at supplementing the incomplete knowledge of what PIL entails in Zimbabwe, exposing the proper meaning of Section 85 (1) (d) of the Constitution, shedding light on the full potentials of PIL in triggering social change and legal reforms. From this end, this study zeros in to discuss the following fundamental questions:

- What is PIL, its development, its fundamental aspects and the strategies involved?
- What is the strategical importance of PIL over other traditional modes of litigation?

C. Dissecting the fundamental aspects of PIL

a) Access to justice and Legal standing

Access to justice is an important and independent human right necessary for the enforcement of substantive rights. The Zimbabwean Constitution guarantees the right of access to justice³¹. On an international plane, there is a plethora of international instruments enshrining

²⁸Tatenda Chiware & Otto Saki, *The Law in Zimbabwe*, 2007, p.8 noted that this decision has been roundly criticized as it limits the practice of PIL.

²⁹Ibid.

³⁰See Chapter 2 below.

³¹Section 85 and Section 69, in particular subsection (3) thereof as read in tandem with Section 56 of the Constitution. See Section 3 and also Section 46 of the Constitution.

this right³². However, access to courts is limited and regulated through the doctrine of legal standing³³ (the ability of a person to approach a court of law for redress)³⁴. Rules of legal standing determine who can approach a court of law for redress. In **Charan Lal Sahu v. Giani Zail Singh**³⁵, legal standing was defined as the legal capacity to invoke the jurisdiction of the court.³⁶ If the individual initiating proceedings satisfies the court that he has suffered or is likely to suffer legal injury, then he is deemed to possess “*sufficient interest*” in the matter and *vice versa*³⁷.

Traditionally, courts rigidly applied rules of legal standing³⁸. In **Wood & Ors v. Ondangwa Tribal Authority & Anor**³⁹, the court dismissed the ability of an individual to proceed by popular action. The court ruled that *actions populares* had become obsolete⁴⁰, and as such, where an individual wants to vindicate a public right he was required to allege a *personal prejudice*⁴¹. The court reaffirmed the application of the *direct and substantial interest*⁴² test which has been described as a form of “*individualized litigation*”⁴³.

b) The concept of PIL

Justice Bhagwati summarized the concept of PIL in **Gupta v. Union of India**⁴⁴ in the following words:

³² Art. 7(1) of the African Charter, Art.14 of ICCPR, Art. 10 of UDHR and CRPD, Art. 13(1). See also *Golder v. United Kingdom*, 21 February 1975, §38, Series A No. 18.

³³ For example the right of access to courts in Section 69 of the Constitution is regulated by Section 85 of the Constitution.

³⁴ *Access to justice: Proposals for Improving Public Access to Courts*, Legal standing: *Standing to bring a Legal Action*, Paper 2, Zoila Hinson and Dianne Hubbard, Legal Assistance Centre, 2012 page 1.

³⁵ (1984) 1 SCC 390: AIR 1984 SC 309.

³⁶ See also Nestadt JA’s ruling in *Mars Inc v. Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575 where the Honorable asserted that it is a general rule of law that the person instituting proceeding bears the onus of proving that he has legal standing.

³⁷ *Stevenson v Minister of Local Government and National Housing & Ors* 2002 (1) ZLR 498 (S).

³⁸ CHIDYAUSIKU CJ in *Mawarire v. Mugabe & Ors* CCZ1-13.

³⁹ 1975 (2) SA 294.

⁴⁰ *National Party, SWA v. Konstitutionale Raad* 1987 (3) SA 544.

⁴¹ See also ZIYAMBI JA’s dissenting opinion in *Stevenson v. The Minister of Local Government and National Housing & 10 Ors* SC-36-02.

⁴² *Stevenson v Minister of Local Government and National Housing & Ors* 2002 (1) ZLR 498 (S).

⁴³ Surya Deva, *Public Interest Litigation in India: A critical review* Civil Justice Quarterly Issue 1, 2009 at page 19, <http://ssrn.com/abstract=1424236> (last accessed on 01 November 2014 at 1014hrs GMT).

⁴⁴ 1981 (Supp) SCC 87, p. 210.

*Where a legal wrong or a legal injury is caused to a person or to determinate class of persons by reason of violation of any constitutional or legal right... such person... by reasons of poverty, helplessness or disability ... [are] unable to approach the court for relief, any member of public can maintain an application for an appropriate direction, order or writ in the High Court... seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons.*⁴⁵ (Emphasis supplied).

In India, the concept is part of “judicial activism”⁴⁶. PIL is employed as a social tool to enhance the *culture of human right*. A precise definition of PIL has not been fully developed. Jeremy Cooper provides a working definition as the ability of an individual to approach a court of law in vindication of a public right in circumstances where he himself has or has not suffered any prejudice in relation to the particular wrong⁴⁷. In other words, PIL means litigation initiated by an individual before a court of law enforcing a public interest⁴⁸. It is a *pro bono* public concept that robs the attention of the courts to check the conduct of state agencies where such conduct violates the Bill of Rights⁴⁹. PIL accelerates the arms of the law to impart justice for all⁵⁰. PIL generally involves civil matters⁵¹ as was noted in the Indian case of **Janata Dal**⁵². It is best practiced in human rights violations cases, appointment of members of the judiciary and other government officials⁵³, environmental protection⁵⁴, public accountability⁵⁵, etc.

⁴⁵ *Gupta v. Union of India* 1981 (Supp) SCC 87, p. 210.

⁴⁶ See Chapter 3 below for a discussion on the development of PIL in India.

⁴⁷ Jeremy Cooper, *Public Interest Law Revisited*, 2:1 (1998) Bangladesh Journal of Law at page 2.

⁴⁸ Ibid.

⁴⁹ Rajiv Gandhi, *Public Interest Litigation: An expression of voice for the sufferers of silence*, National University of Law, Patiala, Punjab, at page 1, <http://ssrn.com/abstract=1510271> (accessed on the 1st of November 2014, 0710hrs GMT).

⁵⁰ *Peoples Union for Democratic Rights v. Union of India* (A.I.R..1982 , S C 1473).

⁵¹ For example, claims that a law is unconstitutional, that there has been discrimination, or that someone is entitled to compensation based on violations of their rights, claims for reparation or compensation based on a criminal act, etc.

⁵² (1992) 4 SCC 305.

⁵³ *SCAORA v Union of India* (1993) 4 SCC 441, *In re Special Reference No. 1 of 1998* (1998) 7 SCC 739.

⁵⁴ See the case of *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 SFCC 647, *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212.

⁵⁵ *Common Cause v Union of India* 1999 94) SCALE 354 at 413, *Shiv Sagar Tiwari v. Union of India* (1996) 2 SCC 558, *Vineet Narain v. Union of India* (1998) 1 SCC 226 at 243.

c) **Legal standing and PIL**

Desai and Muralidhar noted that in most developing countries, the legal process intimidates litigants who are mostly alienated from the justice system and normally find the experience in the courts traumatizing⁵⁶. Therefore, if access to justice is to be progressively realized, radical development of the **traditional individualized** notion of legal standing to the **community oriented** PIL notion is imperative⁵⁷. The loosening of legal standing makes PIL a unique form of litigation⁵⁸. The rationale behind the liberalization process was summarized by Justice Bhagwati in **S.P. Gupta v. Union of India**⁵⁹ as follows:

Today... the theatre of law is fast changing and the problems of the poor are coming to the forefront⁶⁰. The court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people...to whom freedom and liberty have no meaning⁶¹.

The Honorable Justice went on and held that⁶²:

The only way in which this can be done is by entertaining writ petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong... who by reason of their poverty or socially or economically disadvantaged position are unable to approach the court for relief⁶³. (Emphasis supplied).

Mutuso Dhliwayo⁶⁴ said that:

PIL is a tool to promote better implementation of the law, and to push the boundaries of its interpretation. It is mainly used for the benefit of the poor and marginalised members of society. It is most effective when used in conjunction with other tools for empowerment and capacity building, such as legal literacy and legal clinics, research,

⁵⁶ Desai, A. H., & Muralidhar, S. (2000) *Public Interest Litigation: Potential and Problems*, In *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, edited by B. N. Kirpal, A. H. Desai, G. Subramaniam, R. Dhavan & R. Ramachandran. New Delhi: Oxford University Press, at page 3.,

⁵⁷ Ibid.

⁵⁸ PIL petitions are mainly with regards to constitutional matters brought only against the state, not private parties.

⁵⁹ (1981) (Supp) SCC87: AIR 1982 SC 149.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Mutuso Dhliwayo, *PIL as an empowerment tool: The case of the Chiadzwa Community Development Trust and diamond mining in Zimbabwe*, A 'Legal tools for citizen empowerment' publication (2013).

advocacy campaigns, registration of groups as legal entities, and social and grassroots movements to leverage legal rights⁶⁵ (*Emphasis supplied*).

d) Features of PIL

Patiala Punjab summarized the features of PIL as follows⁶⁶:

- Expanded purview of the human rights regime⁶⁷.
- Accelerated right of access to courts through relaxed rules of legal standing and reduced court formalities to encompass epistolary jurisdiction⁶⁸.
- Extended reliefs as remedies for unlawful government action⁶⁹.
- Judicial monitoring of State institutions like jails, juvenile homes, and the like through judicial invigilation⁷⁰.
- Implementation of new fact-finding methods by the court⁷¹.

In addition to these features outlined by Patiala Punjab⁷², in a PIL matter parties to the suit do not engage in an adversarial mode of litigation but engage in a dialogue through the assistance of the court as to how best the situation at hand or the violation be addressed for the public good or the benefit of all members of the public⁷³. In other words, a critical feature

⁶⁵ Ibid, at page 5.

⁶⁶ Rajiv Gandhi, *Public Interest Litigation: An expression of voice for the sufferers of silence*, National University of Law, Patiala, Punjab, at page 3, <http://ssrn.com/abstract=1510271> (accessed on the 1st of November 2014, 0710hrs GMT).

⁶⁷ Ibid.

⁶⁸ For example, initiation of proceedings by writing a letter or sending a telegram to the court bringing its attention on issues warranting its intervention.

⁶⁹ Rajiv Gandhi, *Public Interest Litigation: An expression of voice for the sufferers of silence*, National University of Law, Patiala, Punjab, at page 3, <http://ssrn.com/abstract=1510271> (accessed on the 1st of November 2014, 0710hrs GMT).

⁷⁰ Ibid.

⁷¹ In this regard, the court may appoint its own socio-legal commissions of inquiry and investigation officers to gather and verify the veracity of complains against the conduct of government, its agencies and institutions as part of investigative litigation.

⁷² Rajiv Gandhi, *Public Interest Litigation: An expression of voice for the sufferers of silence*, National University of Law, Patiala, Punjab, at page 3, <http://ssrn.com/abstract=1510271> (accessed on the 1st of November 2014, 0710hrs GMT).

⁷³ See *Dr Upendra Baxi v State of U.P.* (1986) 4 SC 106 at 117 wherein the court ruled that in a conventional adversarial system a lawyer from each party is expected to present contending opinions that will assist the judge to make a determination. However, in PIL, there are no winners and losers. All the parties, judges and lawyers are expected to participate in resolving the problem at hand.

of the practice of PIL is that at the end of the hearing of a PIL matter there is no loser or winner as both parties contribute one way or another to the public good⁷⁴.

e) **Aspects of PIL**

Some features of PIL include:

(a) **Non-adversarial in nature**⁷⁵. In the case of **Bandhuv Mukti Morcha v. Union of India**⁷⁶, the court argued that PIL departs from the traditional individualized mode of litigation which was equal to warfare⁷⁷. PIL constitutes two important aspects:-

i) The “**collaborative litigation**” aspect. The court robs three different mandates which are

(a) **ombudsman**⁷⁸: when receiving complaints and sifting the most important ones for attention⁷⁹, (b) **forum**: when it provides a platform for public debate of public interest issues in depth, and lastly, when it plays a (c) **mediator**’s role: that is coming up with possible compromises to amicably solve competing interests.

ii) The “**investigative litigation**”. The court engages the Registrars, Magistrates, experts in certain fields as a form of *amicus curiae participation*, etc, to carry out investigation into complaints made especially where the relevant state department is reluctant to provide sufficient information⁸⁰ on a particular issue⁸¹.

(b) **Broader Representative Capacities**: PIL departs from the *direct and substantial interest* requirement traditionally followed⁸². It allows a person whether or not he has suffered prejudice as a result of unlawful government conduct under determination to bring a matter in the public interest.

⁷⁴ Ibid.

⁷⁵ See *Dr Upendra Baxi v State of U.P. (1986) 4 SC 106 at 117* wherein the court ruled that in a conventional adversarial system a lawyer from each party is expected to present contending opinions that will assist the judge to make a determination. However, in PIL, there are no winners and losers. All the parties, judges and lawyers are expected to participate in resolving the problem at hand.

⁷⁶ M.P. Jain, *The Supreme Court and Fundamental Rights*, in S.K. Verma and Kusum (eds), *Fifty Years of the Supreme Court of India—Its Grasp and Reach* (New Delhi: Oxford University Press, 2000) at page 86.

⁷⁷ Ibid. See also *People’s Union for Democratic Rights v. Union of India*.

⁷⁸ In Zimbabwe, this office has been integrated into the mandate of the Zimbabwe Human Rights Commission.

⁷⁹ In India, this is mostly done by PIL Committees.

⁸⁰ One of the hassles faced by a petitioner even where he has a grievance is lack of access to necessary information important for his case. In this regard for the court to gather necessary information, it appoint commissions of enquiry. See also the provisions of Section 62 of the Constitution on the right of access to information. *Indian Council for Enviro-Legal Action v. Union of India (1996) 3 SCC 212, Ram Kumar Misra v State of Bihar (1984) 2 SCC 451*.

⁸¹ For example, conditions in prisons or treatment of detained persons, under-trials etc.

⁸² Sangeeta Ahuja, *People, Law and Justice: A casebook on Public Interest Litigation*, in 2 volumes (New Delhi: Orient Longman, 1996).

(c) **Epistolary**⁸³ **jurisdiction:** to facilitate access, the court allow informal modes⁸⁴ of robbing its attention, e.g., through telegrams⁸⁵, newspaper articles, text messages, and letters⁸⁶. This is one aspect which points to the flexibility of PIL. In the American case of *Gideon v. Wainwright*⁸⁷, a prisoner's postcard was treated as a petition.

f) Subjects of PIL

A PIL may be filed in matters relating to the violation of basic human rights of the poor, conduct of government agencies, violation of rights of religious groups, labour matters, neglected children, torture of detained persons, environmental protection⁸⁸, heritage and culture, and other matters which are of a public interest nature⁸⁹. "Any person"⁹⁰ who acts bona fide⁹¹ may approach the High Court or any other court as prescribed by law to file a PIL matter, alleging a violation of fundamental rights or genuine defiance of the laws⁹². A PIL is normally filed against the State or its institutions or agencies and not against a private person. A private party can be cited as a respondent and cannot be filed against him alone⁹³.

I. An Overview of the practice of PIL in Zimbabwe: Prior and post to the adoption of the new Constitution

⁸³ Concise Oxford Dictionary, 10th Edition, defines *epistolary* to relate to or denoting the writing of letters or literary works in the form of letters.

⁸⁴ See Section 3 of the Delhi High Court (Public Interest Litigation Rules, 2010) No. 451/Rules/DHC.

⁸⁵ *Sunil Batra (II) v. Delhi Administration* (1980) 3 SCC 488- the case concerned a petition drawing the court's attention with regards to inhumane treatment of prisoner. The court's attention was drawn through a telegram send by the petitioner.

⁸⁶ *Sachidan and Pandey v .State of West Benga* AIR 1987 (SC) 1109.

⁸⁷ See *In re Bhavani River-Shakti Sugars* (1998) 6 SCC 335. In the Judge's case (1996) 3 SCC 212, the court turned a letter into a petition.

⁸⁸ *Shiram Food & Fertilizer case* AIR (1986) 2 SCC 176 SC.

⁸⁹ See the Supreme Court of India Guidelines on PIL discussed in Chapter 3 below.

⁹⁰ In terms of Section 9 of the Interpretation Act [Chapter 1:01], a person in this context includes juristic persons.

⁹¹ *PUDR v. Union of India* AIR 1982 SC 1473, and also *Bandhua Mukti Morcha v. Union of India* (1984) 3 S.C.C. 161.

⁹² In *Gupta v. Union of India* (1981) (Supp) SCC87: AIR 1982 SC 149, the court justified such extension of standing in order to enforce rule of law and to realize the right of access to justice for all using Article 32 (1) of the Constitution of India .

⁹³ Ibid.

i. Prior to the adoption of the 2013 Constitution

From the 1980s- 2013⁹⁴, not much has been said on the practice of PIL in Zimbabwe. One of the reasons for that was the prevailing constitutional framework and judicial attitudes which did not support the practice of PIL. Legal standing was tested through the “sufficiency” test subject to limited exceptions⁹⁵. An individual was not allowed to litigate in the public interest⁹⁶. This only came to be recognized in the new Constitution⁹⁷. This radical shift in the new constitutional ideology is a reflection on the need to nurture and develop our human rights jurisprudence⁹⁸. **A genesis of the liberalisation process started in 1999⁹⁹ with the adoption of the Class Actions Act¹⁰⁰ which laid the groundwork for the growth of PIL in Zimbabwe¹⁰¹. The direct and substantial interest test¹⁰² was applied in a plethora of cases outlawing the practice of PIL: Law Society of Zimbabwe v. Minister of Justice & Parliamentary Affairs¹⁰³, In re Wood¹⁰⁴, Ruwodo N.O. v. Minister of Home Affairs & Ors¹⁰⁵, Retrofit (Pvt) Ltd v. PTC¹⁰⁶, United Parties v. Minister of Justice, Legal and Parliamentary Affairs & Ors¹⁰⁷, Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General & Ors¹⁰⁸, Minister of Lands & ors v. Commercial Farmer’s Union. These legal principles were aptly summarised in the United Parties case¹⁰⁹ where GUBBAY CJ (as he then was) held at page 258B-E of the judgment that:**

...S 24 (1) affords the applicant legal standing to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is

⁹⁴ Before the adoption of the new Constitution, Amendment Act No.20 of 2013 promulgated on the 22nd of May 2013.

⁹⁵ Section 24 (1) of the Lancaster House Constitution.

⁹⁶ *United Parties v. Minister of Legal & Parliamentary Affairs* 1997 (2) ZLR 254 (S).

⁹⁷ Amendment Act No. 20 of 2013, Section 85 (1) (d).

⁹⁸ Section 3- Founding values of our Constitutional Amendment Act No. 20 of 2013 promulgated on 22 May 2013.

⁹⁹ Class Actions Act No. 10 of 1999.

¹⁰⁰ [Chapter 8:17].

¹⁰¹ See the Preamble to the Class Actions Act [Chapter 8:17].

¹⁰² See *Stevenson v Minister of Local Government and National Housing & Ors* 2002 (1) ZLR 498 (S).

¹⁰³ SC-16-06.

¹⁰⁴ 1994 (2) ZLR 155 (S).

¹⁰⁵ 1995 (1) ZLR 227 (S).

¹⁰⁶ 1995 (2) ZLR 199 (S).

¹⁰⁷ 1997 (2) ZLR 254 (S).

¹⁰⁸ 1993 (1) ZLR 242 (S).

¹⁰⁹ Supra.

*detained. It has no right to do either on behalf of the general public or anyone else*¹¹⁰.
(Emphasis added).

This constitutional framework expressly outlawed the practice of PIL in Zimbabwe. Faced with this challenge, PIL organizations, for example, ZLHR opted for the provision of legal aid to victims of human rights violations. ZLHR's PIL Unit in this endeavour assisted thousands of victims of human rights violations through free legal aid services, clinical education, human rights campaigns, etc.¹¹¹. One notable incident in which it played a significant role was during the 2005 clean-up campaign¹¹². Members of ZLHR who are experts in different fields of law and are spread across the nation take PIL cases.

ii. **The new constitutional dispensation in the practice of PIL in post 2013 Zimbabwe**

The new Constitution¹¹³ has ameliorated legal standing considerably, particularly; in Section 85 (1) of the Constitution¹¹⁴. The progressive nature of Zimbabwe's constitutional project is imbedded in the broadened Bill of Rights, with the right of equal access to justice being a *causa sine qua non* to its full realization. Almost **"any person"** can approach a court of law alleging a threat or infringement of the Bill of Rights on his behalf or not¹¹⁵ and **"the court may grant appropriate relief"**¹¹⁶. Under this constitutional dispensation, the relief to be

¹¹⁰ See also *ZIMTA & Ors v. Minister of Education and Culture* 1990 (2) ZLR 48 (HC).

¹¹¹ Zimbabwe Lawyers for Human Rights, *Annual Report 2005*, at page 4. In this Annual Report, ZLHR noted that PIL seeks to increase respect for the law and restore confidence in the law and the justice delivery system where it has deteriorated or broken down. Through this, it assists to seek compensation for victims of human rights violations.

¹¹² During the "Operation Murambatsvina". It has also assisted political victims after the controversial 2002 and 2008 elections.

¹¹³ Constitution of Zimbabwe, Amendment No. 20 Act of 2013 promulgated on 22 May 2013.

¹¹⁴ It provides that: "(1) Any of the following persons, namely—(a) any person acting in their own interests; (b) any person acting on behalf of another person who cannot act for themselves; (c) any person acting as a member, or in the interests, of a group or class of persons; (d) **any person acting in the public interest**; (e) any association acting in the interests of its members; is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation."

(Emphasis added). This provision is similar to Section 38 of the South African Constitution. See *Southern African Litigation Centre & Anor v. National Director of Prosecutions & Ors* unreported case in the Gauteng High Court Case Number: 77150/09.

¹¹⁵ It can be argued that the enshrinement of an environmental right in our Constitution was partly responsible for the broadening of standing.

¹¹⁶ Worded similar to Section 24(1) of the Canadian Charter of Rights and Freedoms ("Canadian Charter") which provides: "Anyone whose rights or freedoms, as guaranteed by this 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." (Emphasis supplied)

given by a competent court should be “appropriate”¹¹⁷ and is within the court’s discretion¹¹⁸. The Saskatchewan Court of Appeal interpreted “appropriateness” to relate to the efficacy of the remedy viewed from the perspective of the complainant, the right violated¹¹⁹, and the interested parties¹²⁰.

The South African Constitutional Court has ruled that Section 38 (*similar to our Section 85*) applies also to situations where there is a threat or infringement of rights which are not included in the Bill of Rights¹²¹. South African jurisprudence is transplantable in this country as our Constitution is similar to the South African Constitution¹²² and we share commonalities in our legal systems. It is also by no coincidence that the concept of PIL is enshrined in Section 38 (1) (d) of the South African Constitution.

As alluded to above, the Zimbabwean Constitution entrenches the practice of PIL in terms of **Section 85 (1) (d)**. However, despite the entrenchment of the concept of PIL in our Constitution, its practice is far from the ideal. This constitutionally protected right¹²³ emanates from the **presupposition that all individuals in case of violation of a human right have the capacity and ability to approach a court of law for redress**¹²⁴. This is far from the ideal.

J. Factors impeding equal access to justice in Zimbabwe

There are various factors hindering equal access to justice in Zimbabwe which includes:

¹¹⁷ *Maharaj v Attorney-General of Trinidad and Tobago* (No. 2) [1979] AC 385 (PC)

¹¹⁸ In *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) the New Zealand Court of Appeal held that such a remedy existed despite the fact that the New Zealand Bill of Rights Act 1990 made no express provision therefore.

¹¹⁹ *Nilabati Behera v. State of Orissa* [1993] AIR 1960 (SC) 1969, Verma J pointed out that the Court was obliged to forge new tools in order to do complete justice.

¹²⁰ *Saskatchewan Human Rights Commission v. Kodellas* (1989) 60 DLR (4th) 143 at 162 (Sask CA).

¹²¹ *Ferreira v. Levin NO & Ors and Vryenhoek & Ors v. Powell NO & Ors* 1996 (1) BCLR 1 (CC). O’Regan correctly observed at para 229 that: “[e]xisting common-law rules of standing have often developed in the context of private litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. But it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation.” (Emphasis supplied).

¹²² Decisions such as the *Wildlife Society of Southern Africa & Tourism of the Republic of South Africa & Ors* 1996 (3) SA 1095 (Tks), *Director: Mineral Development, Gauteng Region, & Anor v. Save the Vaal Environment & Ors*, 1999 (2) SA 709 (SCA), *De Cock v. Minister of Water Affairs et al* 2005 (12) BCLR 1183 (CC), *Ngxuza & Ors v. Perm Sec, Dept of Welfare Eastern Cape & Anor* 2001 (2) SA 609 (E) brought under the concept of PIL in South Africa through Section 38 of the Constitution are highly persuasive.

¹²³ Section 69 (3) of the Constitution.

¹²⁴ Michael Kirby, *Deconstructing the law’s hostility to Public Interest Litigation.*, Law Quarterly Review (2011) 2529.

- a. **Legal illiteracy.** In Zimbabwe many people are ignorant of their rights and thus do not know when they are tempted with¹²⁵.
- b. **Costs and Low incomes.** The poor and downtrodden sections of our society are unable to approach the courts¹²⁶ due to the expenses involved¹²⁷. Legal Aid provided for in terms of the Legal Aid Act¹²⁸ is not easily procurable¹²⁹, mainly in civil matters because of the stringent requirement that an applicant needs to satisfy before he is granted legal aid¹³⁰.
- c. **Complexity of court procedures.** Victims of human rights violations, many of them do not know how to use the courts¹³¹ as noted by Ferris¹³². Many victims of human rights violations are “unsophisticated” to institute or defend court proceedings¹³³. This is usually accelerated by their financial position¹³⁴.
- d. **Inaccessibility of our courts.** Physical distance from the courts sometimes impede on the individual’s ability to approach a court of law¹³⁵.
- e. **Lack of access to information** held by government agencies¹³⁶. This is mainly due to the stringent requirements set out in the Access to Information and Protection of Privacy Act¹³⁷. A discussion on the provisions of this Act falls outside the scope of this work save to

¹²⁵ L Feris, *Environmental Rights and Locus Standi* in A Paterson & AJ Kotze *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 129.

¹²⁶ Ibid.

¹²⁷ Cheryl Loots, *Standing to Enforce Fundamental Rights*, 10 SAJHR 49 (1994) at p. 49.

¹²⁸ [Chapter 7 : 16].

¹²⁹ L. Madhuku, *Introduction to Zimbabwean law*, Weaver Press (2010), page 128 and 134.

¹³⁰ These requirements are set out in Section 8 and 9 of the Legal Aid Act [Chapter 7 : 16] which include inter alia, whether in the Director’s opinion the applicant has insufficient means to obtain the services of a legal practitioner on his own account; and he has reasonable grounds for initiating, carrying on, defending or being a party to the proceedings for which he applies for legal aid; and he is in need of or would benefit from the services provided in the proceedings for which he seeks legal aid. In assessing the means of the person the Director excludes the dwelling house of the applicant, necessary beds, bedding and clothing of the applicant or any member of his family, necessary furniture of the applicant, other than beds, and household utensils in so far as they do not exceed in value such sum as may be prescribed, tools and implements necessarily used by the applicant in his trade or occupation and food and drink necessary to meet the needs of the applicant and members of his family for one month.

¹³¹ Geoff Budlender, *The Accessibility of Administrative Justice*, 2004 at p. 131.

¹³² Supra, the author noted that “[o]ne should consider that litigation is expensive and very few individuals have the necessary financial resources required for extensive and complicated litigation...people most often affected by environmental degradation are generally poor, which prevents them from gaining access to courts. Public interest organisations consequently take up the task of litigating on behalf of vulnerable groups.”

¹³³ Cheryl Loots, *Standing to Enforce Fundamental Rights*, 10 SAJHR 49 (1994) at p.49.

¹³⁴ Ibid.

¹³⁵ In Zimbabwe, the Labour Court sits in Harare and Bulawayo, and only sits periodically in other cities. The Supreme Court and the Constitution Court only sits in Harare.

¹³⁶ L Feris, *Environmental Rights and Locus Standi* in A Paterson & AJ Kotze *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 129.

¹³⁷ [Chapter 10:27].

say that the Act has been vehemently criticized due to its unjustifiable limitations on the right of individuals to access information held by government agencies¹³⁸.

K. Limitations on the current practice of PIL in Zimbabwe

There are several limitations on the practice of PIL in Zimbabwe¹³⁹ mainly because of the nature of our legal system¹⁴⁰ which include inter alia:

- (i) **Conventional application of rules of legal standing by our courts.**
- (ii) **Minimal opportunity for *amicus curiae* participation¹⁴¹.**
- (iii) **There are no rules of court/guidelines on the filing and determination of PIL matters.**
- (iv) **Court fees and costs.**
- (v) **Political and bureaucratic red tape.**
- (vi) **Human infrastructural underdevelopment resulting in backlogs in court processes¹⁴².**
- (vii) **Lack of public awareness of the provisions of the Constitution¹⁴³.**
- (viii) **Parliamentary supremacy v constitutional democracy¹⁴⁴.**
- (ix) **Lack of funding.**

L. Insights from Indian practice of PIL

In **Parmanand Katara v. Union of India**¹⁴⁵, the court ruled that any public spirited person has got the right to file a PIL suit either in the High Court or Supreme Court¹⁴⁶. This was confirmed in **Council for Environment Legal Action v. Union of India**¹⁴⁷. In this regard,

¹³⁸ See Part II, III and IV of the Access to Information and Protection of Privacy Act [Chapter 10:27].

¹³⁹ Despite PIL's ineradicable importance in modern human rights jurisprudence, and its entrenchment in the Section 85 (1) (d) of the Constitution.

¹⁴⁰ Inherited from the Roman-Dutch and Anglo-Saxony common law systems. See Section 89 of the previous Constitution carried through in Section 192 of the 2013 Constitution.

¹⁴¹ Section 85 (3)(d) of the Constitution embraces the need for *amicus curiae* participation.

¹⁴² Speech delivered by Judge David Smuts at Judge's Symposium 4-5 APRIL 2014, Victoria Falls, entitled "*Ensuring effective justice delivery: Matters to watch out for and avoid: Experience from the Namibian Bench*".

¹⁴³ The State has the obligation to promote public awareness of the Constitution by translating it into all recognised official languages, having it taught in schools, as part of the curricular for training the security services, the Civil Service and employees of public institutions, and to encourage civic organisations and NGOs to disseminate the knowledge of the Constitution. See Section 7 of the Constitution.

¹⁴⁴ For a more detailed discussion on these see David Cote's article, *supra*.

¹⁴⁵ AIR 1989, SC 2039.

¹⁴⁶ Article 226 of the Constitution.

¹⁴⁷ (1996)5 SCC 281.

the Indian Supreme/High Court is empowered to issue writs and decrees in PIL matters. The party filing the suit does not have to prove that s/he has suffered any prejudice or harm. In addition to the right of any member of the public to file a PIL matter in the High/Supreme Court, the court can introduce deserving PIL matters on its own volition¹⁴⁸. The matter is placed on the court PIL roll and the procedure is followed as in other cases. Through these, the Indian courts has ensured better conditions in prisons, has banned under trials and police brutalities, has protected the rights of minorities, children, the aged, women and the like by directing governmental policies.

The procedure in the filing of a PIL suit is regulated by PIL Rules¹⁴⁹. In terms of the PIL Rules, any member of the public who seeks to file a PIL whether in the High/ Supreme Court files it at the respective court's filing counter¹⁵⁰. Section 7 of the Delhi High Court PIL Rules and Guidelines entrenches matters in which a PIL can be filed. A PIL Committee is responsible for the sifting of PIL matters.

The procedure is marked with nominal formalities. The form and content of a PIL petition is contained for example in Section 9 of the Delhi High Court, PIL Rules, 2010¹⁵¹. The Indian Supreme Court developed a peculiar philosophy by allowing the filing of a PIL matter through "*appropriate proceedings*". The court interpreted the term "*appropriate proceedings*" in light of the *purpose* and not the *form* of the proceedings. Thus, in a plethora of PIL cases, the court's attention was moved through telegrams, letters, messages and newspaper reports. It is through this aspect that the court developed what is commonly known as "*epistolary jurisdiction*"¹⁵².

In **Hussainara Khatoun v. State of Bihar (I to VI)**¹⁵³ and also in **D.K. Basu v. State of West Bengal**¹⁵⁴, the court was moved by a letter petition highlighting the repeated instances

¹⁴⁸Article 32 of the Constitution.

¹⁴⁹See Chapter 3 above.

¹⁵⁰Ibid.

¹⁵¹No. 451/Rules/DHC.

¹⁵²See Chapter 2 above.

¹⁵³(1980) 1 SC 81.

¹⁵⁴(1997) 1 SCC 416.

of custodial deaths in West Bengal. The court laid down the procedure supposed to be implemented by the police on the arrest of a person¹⁵⁵.

After filing a petition at the filing counter, a copy of the petition is served on each Respondent and proof of service affixed thereto¹⁵⁶. Proceedings will commence and carried in the same manner, but, the court retains its investigative and inquisitive role. In some cases, the Court appoints its own independent investigation Commissioners to carry out investigations on complaints and supply the court with the relevant information¹⁵⁷. After closure of pleadings, a final hearing is undertaken and the court will pronounce its final decision.

It is equally important to appreciate how the Indian Supreme Court has developed rules calculated at nipping out vexatious and unfounded petitions especially from busybodies. If the court finds that a petition is not bonafide, the petitioner is visited with punitive costs. In terms of Section 5 of the Delhi High Court¹⁵⁸, PIL petitions are processed in a PIL cell¹⁵⁹. The Indian Courts have also established PIL Committees who are responsible for the sifting of PIL cases filed at the court's counter. By doing this, the courts have managed to reduce the number of vexatious petitions and have accelerated the introduction of deserving PIL matters. What is more peculiar with the practice of PIL in India, are the flexible procedures involved, judicial activism, investigative litigation and its collaborative nature.

In India, PIL developed as a system through which any private person was allowed to institute legal proceedings in a court of law for the vindication of a public right or interest. In other cases, the court itself through the leadership of vigilant judges like Justice Bhagwati, introduced PIL matters on their own volition through judicial activism and from information gathered from newspaper reports, articles, telegrams to judges etc. In this respect, it is not

¹⁵⁵ Desai, A. H., & Muralidhar, S. (2000) *Public Interest Litigation: Potential and Problems*, In *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, edited by B. N. Kirpal, A. H. Desai, G. Subramaniam, R. Dhavan & R. Ramachandran. New Delhi: Oxford University Press <http://www.ielrc.org/content/a300.pdf> (accessed on 12 October 2014 at 1324hrs GMT).

¹⁵⁶ See Surya Deva, *Public Interest Litigation in India: A Critical Review*, Civil Justice Quarterly Issue 1, 2009 at p.3, <http://ssrn.com/abstract=1424236> (last accessed on 01 November 2014 at 1014hrs GMT).

¹⁵⁷ In *T.N. Godavarman v. Union of India* (1997) 3 SCC 312. the Indian Supreme court appointed an expert committee to examine the issue of depletion of forest cover and to analysis on questions relating to the permission to use forest produce and in what circumstances this can be permissible. After the Committee made enquiries, the court restricted the felling of trees as well as the sale of timbers.

¹⁵⁸ *Public Interest Litigation Rules, 2010*, No. 451/Rules/DHC.

¹⁵⁹ *Ibid*, Section 8.

necessary for the petitioner to prove that he has suffered any prejudice or harm as a result of the legal wrong complained of. Therefore, legal standing is broader in PIL matters than in any other matters since PIL matters are brought in the public interest. More importantly, the Indian and American courts managed to mould the practice of PIL out of the common law rules of legal standing and enhanced a broader locus standi in PIL matters.

Further, PIL historically developed distinct from class or group actions. PIL developed from the thirst to advance social change and in fostering a culture of human rights in the fight for the rights of the indigent members of the society. This is how PIL developed in American, South African and Indian jurisprudence.

It has been seen that PIL covers a large spectrum, which include inter alia, the establishment of human rights advocacy forums, working to promote and protect human rights by fighting to protect environmental rights and consumer rights, legal aid, clinical legal education, establishing PIL law centres, judicial activism, collaborative and investigative litigation, non adversarial litigation, epistolary jurisdiction and extended legal standing, as embraced in America and India.

M. The impetus of PIL¹⁶⁰

The merits and demerits of PIL are well documented¹⁶¹ as outlined below:

Merits

- i. It brings the courts closer to the disadvantaged sections of society¹⁶².
- ii. Curbs impunity and lawlessness through civic participation in governance.
- iii. Enables civil society to spread awareness about human rights¹⁶³.
- iv. Contributes to good governance by keeping the government accountable.
- v. Contributes in the advancement of civil rights and triggers legal reforms¹⁶⁴, at a national¹⁶⁵ and international level¹⁶⁶ as asserted by Rhode¹⁶⁷.

¹⁶⁰ Surya Deva, *PIL in India: A Critical Review*, Reprinted from Civil Justice Quarterly Issue 1, 2009 <http://ssrn.com/abstract=1424236> (last accessed on 01 November 2014 at 1014hrs GMT).

¹⁶¹ Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India* (1985) Third World Legal Studies 107.

¹⁶² Especially the disadvantaged groups.

¹⁶³ Mutuso Dhlwayo, *PIL as an empowerment tool: The case of the Chiadzwa Community Development Trust and diamond mining in Zimbabwe*, A 'Legal tools for citizen empowerment' publication (2013) at page 5.

¹⁶⁴ Sandra Fredman, *Justiciability and the Role of Courts* in Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008).

- vi. Assists in amicably settling controversial policy questions¹⁶⁸, as confirmed in **Vineet Narain v. Union of India**¹⁶⁹.
- vii. Expands human rights jurisprudence and fosters a culture of human rights¹⁷⁰.
- viii. Is an instrument to promote rule of law, fairness and transparency, curb corruption, and enhance accountability in line with public demands that the judiciary should strengthen constitutionalism by giving directions to the government to follow its constitutional obligations¹⁷¹.
- ix. It assists the justice system in gaining public confidence.
- x. Enhances prompt service delivery by administrative authorities when courts issue detailed directives¹⁷².

Demerits

- i. Surya Deva¹⁷³ notes that PIL leads to symbolic justice as the courts cannot enforce many of their broad directives.
- ii. Drains substantial resources from an already overburdened legal system.
- iii. Singh¹⁷⁴ noted that many PIL cases are patently frivolous as it is susceptible to abuse¹⁷⁵.

¹⁶⁵ Ryan Goodman & Derek Jinks, *Acculturation of States: The Empirical Record* in Ryan Goodman & Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (New York: Oxford University Press, 2013).

¹⁶⁶ Karen J. Alter, *International Courts and Democratic Politics* in Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (New Jersey: Princeton University Press, 2014).

¹⁶⁷ Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice* (2009) 36 Fordham Urb. L.J. 603, said PIL is "(...) a key strategy for protecting the rights and enlarging the power of subordinated groups, particularly when other channels of influence are unavailable. Groups hobbled by discrimination or collective action problems may turn to courts as allies in the struggle for social justice".

¹⁶⁸ *Vishaka v. State of Rajasthan*, (1997) Supp. 3 S.C.R. 404, 2, *Lakshmi Kant Pandey v. Union of India*, (1984) 2 S.C.C. 244.

¹⁶⁹ *A.I.R. 1996 S.C. 3386*, 57 (India). In this case, the court had to settle contested government policies with regards to liberalization and privatization, and the contested height of the Narmada dam.

¹⁷⁰ By broadly interpreting rights provided for in the Bill of Rights, in tandem with Universal Declaration of Human Rights (the Universal Bill of Rights).

¹⁷¹ *Mohini Jain v. State of Karnataka* (1992) 3 S.C.C. 666.

¹⁷² *Right to Food Campaign, Legal Action for the Right to Food: Supreme Court Orders and Related Documents*, <http://www.righttofoodindia.org/orders/interimorders.html> [accessed on 10 October 2014 at 2105hrs GMT].

¹⁷³ Supra.

¹⁷⁴ Parmanand Singh, "Human Rights Protection through Public Interest Litigation in India" (1999) XLV *Indian Journal of Public Administration* 731, at page 328 asserted that "the overuse of PIL for every conceivable public interest might dilute the original commitment to use this remedy only for enforcing human rights of the victimised and the disadvantaged groups."

¹⁷⁵ Desai and Muralidhar, Desai, A. H., & Muralidhar, S. (2000) *Public Interest Litigation: Potential and Problems, In Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, at page 181, edited by

- iv. The judiciary unduly expands its own powers in contravention of the tenets of the doctrine of separation of powers.

N. Recommendations

After a thorough exposition of the subject matter of this discussion, there are areas which still need further research since this hypothesis does not provide everything that can be said in relation to the subject matter of this research. In light of some of the problems outlined above which are still hindering on a full fledged practice of PIL in Zimbabwe, the researcher proffers some of the proposals for reforms below. It is recommended that our courts, not only the Constitutional Court should be properly guided by principles outlined in the Constitution as this is their policy directive in execution of their constitutional mandate¹⁷⁶.

Further, it is critical that the Legislature should enact rules of procedure for the filing of PIL matters. The said Rules should ensure that the courts' doors are open to any *bona fide* public spirited person who wants to file a PIL matter. This can be done in light of the Indian experience. It is through these rules of procedure that provisions for the minimalization of court formalities in the spirit and letter of Section 85 (3) of the Constitution should be enhanced. This is necessary as the absence of rules of procedure culminates in a haphazard consideration of PIL matters in particular bearing in mind that the existing rules of procedure both in the High Court and the Supreme Court¹⁷⁷ were not designed to regulate the filing of PIL matters since same was not sanctioned in the previous Constitution.

The Indian judiciary noticed this loophole in 2010 and enacted comprehensive rules of procedure in PIL matters. Zimbabwe should follow suit. The Rules of Procedure should provide matters which can be admitted as PIL matters, establishment of a PIL Committee responsible for the sifting of PIL matters, costs of filing a PIL petition which must be lower and affordable to the general public¹⁷⁸, issues of Procedure from the filing to the hearing of a

B. N. Kirpal, A. H. Desai, G. Subramaniam, R. Dhavan & R. Ramachandran. New Delhi: Oxford University Press..

¹⁷⁶ See Section 165 of the Constitution.

¹⁷⁷ These Rules are presently applied to regulate matters coming before the Constitutional Court *mutatis mutandis* since there are no rules of procedure in the Constitutional Court of Zimbabwe at the time of writing guiding court processes in the same.

¹⁷⁸ For example US \$1.00 per petition filed in the court can be much reasonable in the prevailing economic situation in Zimbabwe.

PIL matter¹⁷⁹. This will enable an articulate procedure that can be easily utilized by PIL petitioners and the public at large. These Rules should also be made easily accessible to members of the public either electronically, for example through the Judicial Service Commission website or on zimlil.org or hard copies for easier reading. In dealing with the problem of busybodies (those who file vexatious PIL matters), the Rules of Procedure should have a provision that deals with the same and sanction them with punitive costs. However the court should lean in favour of accelerating access than impeding the same in all matters submitted before it.

It is also recommended that the need for *amicus curiae* participation should be facilitated¹⁸⁰. This assists the court in delivering an informed decision necessary to nip out impunity and lawlessness in line with the dictates of our Constitution¹⁸¹. It also recommended that in PIL cases, costs should be kept at a minimum as they have a tendency of impeding on equal access to justice¹⁸². This is possible by allowing individuals to petition the court through relaxed modes of communication such as text messages, telephone conversations with judges, telegrams etc. Our Constitutional Court should also follow the approach of the South African courts as confirmed in **Bio-watch Trust v. Registrar Genetic Resources**¹⁸³ where the South African Constitutional Court ruled that where a private litigant brings a constitutional application he should not bear the costs if a he loses his case, but where the litigant substantially wins the case, the state must pay his costs¹⁸⁴. In this respect, the court tried to reduce costs of litigation and employed this as a means to accelerate access to courts by indigent members of the society¹⁸⁵. Further, in PIL matters, lay persons should be given a leeway to represent themselves even before the Constitutional Court and the court should assist them when presenting evidence as this will also reduce the costs of having the indigent litigant hiring the services of a legal practitioner. It is hoped that if these proposals are

¹⁷⁹ For an articulate and precision formulation of the Rules of Procedure, see the Indian High Court Rules of Procedure in PIL petitions, 2010 referred to above.

¹⁸⁰ See Section 85 (3) (d) of the Constitution.

¹⁸¹ As they are people with a particular expertise in the subject matter of litigation they are better positioned to assist the court to make an informed decision. More crucial *amicus curiae* appear as a friend of court and as an impartial party to the proceedings.

¹⁸² This is not only in terms of attorney's fees, but also the fear of a cost order against the losing side, which must bear the other side's legal costs as well. This can be quite expensive and daunting to any litigant.

¹⁸³ 2009 (10) BCLR 1014 (CC).

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

implemented, costs of litigation will be considerably reduced. This is the same way India managed to curb costs in litigation¹⁸⁶.

The court should allow informal modes of communication between it and the public in PIL matters so as to enhance access to courts through epistolary jurisdiction¹⁸⁷. These include the public robbing the attention of the court, through texts messages, telephone calls, telegrams and newspaper reports in the same way Indian courts have managed to increase access to courts through this method¹⁸⁸. Further, it is proposed that PIL organizations and the civic society engaged in human rights public awareness campaigns should prioritize their agenda of educating members of the public and all stakeholders on the provisions of the Constitution, in particular, the Bill of Rights, roles and mandate of the three state organs¹⁸⁹ in line with the spirit and letter of Section 7 of the Constitution. Further, the ZHRC should also strengthen its involvement in human rights litigation and should be guided by its all embracing functions in terms of Section 243 (1) of the Constitution.

All in all, it is the researcher's hope that the adoption of these proposals and other necessary structural adjustments which are not included as part of the proposals for reform will strengthen the respect, protection and fulfillment of human rights in Zimbabwe, spark debate on state policies having an impact on human rights, the need for and contribute to the development of the practice of PIL in steering social change and democracy.

O. Conclusion

PIL is an essential tool of social change. The adoption of PIL as an instrument of social change and public participation has yielded benefits for countries like India. PIL fosters the progressive realization of equal access to justice and to nipping out atrocities against the needy sections of our societies. Zimbabwe should embrace a fully fledged PIL system in terms of Section 85 (1) (d) of the Constitution in light of the insights gathered from India and other jurisdictions.

¹⁸⁶ See Chapter 4 above.

¹⁸⁷ For what is "epistolary jurisdiction", see Chapter 2 above.

¹⁸⁸ See Chapter 3 and 4 above on how this is done in India.

¹⁸⁹ Although ZLHR has been carrying and still engaged in these campaigns, there is need for a more embraced approach and for these programmes to be directed more to mainly people living in rural areas as they constitute a substantial portion of legally illiterate people in Zimbabwe.