Journal of Law, Policy and Globalization www.iiste.org
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.71, 2018

The Relevance of Public Interest Litigation to Democracy and Good Governance in Nigeria

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Abstract
One of the various mechanisms that exist to enhance the practice of precipitating social change by the means of court decisions that reform legal rules, enforce existing laws and articulate public norms is the idea of Public Interest Litigation. The most significant objective behind this mechanism is to promote public good. Nigeria, a country richly endowed with huge human and material resources had lamentably lagged in terms of genuine commitment to the tenets of democracy and adherence to the principles of good governance. However, the emergence of Public Interest Litigation has offered great hope about addressing this situation. Private individuals can now institute legal proceedings towards providing remedies for perceived public wrongs. Against the background, this paper sets out to examine the relevance of public interest litigation to the entrenchment of democracy and good governance in Nigeria. The paper further considered the prospects and challenges of public interest litigation in Nigeria and suggested solutions to these problems.
Keywords: - Nigeria, democracy, good governance, public interest litigation, rule of law, constitutionalism.

INTRODUCTION

The introduction of the Constitution of the Federal Republic of Nigeria, 1999, which ushered in the present democratic dispensation has precipitated a proportionate increase in legal action initiated in a court for the enforcement of public interest or general interest in which public or class or class of community have pecuniary interest or some interests by which their legal rights or liabilities are affected (Adekola, 2015).

Nigeria, a country of about 170 million people (Akinrinmade , 2014) was fashioned out by the British colonialists in 1914 by amalgamating the two hitherto separately governed protectorates (Protectorate of Southern and Protectorate of Northern Nigeria). The British ruled the country until 1st October, 1960 when Nigeria was granted Independence. However, of the 56 years following the attainment of Independence, Nigeria was ruled by the military for close to 30 years, and this has negatively affected the evolution of democratic institutions, the enforcement of the rule of law, the entrenchment of good governance and the achievement of National development (Nwoke, 2009:7).Military regimes have never feigned being democratic. As a matter of fact, they are antithetical to democracy and constitutionalism and the rule of law (Nwoke, 2009). In the context of Nigeria, democratic ethos, rule of law and constitutionalism were virtually in abeyance during military rule and this reflected badly on good governance and development.

Inevitably, economic growth has been badly retarded and governance was abysmally poor. Basic necessities of life that ensure high living standards are absent while government did not appear accountable to the people. The enforcement, protection, development and enhancement of public interest were largely the exclusive preserve of (Akinrinmade, 2014).

The advent of public interest litigation in recent years has however changed this trend (Akinrinmade, 2014). It should be pointed out that the emergence of public interest litigation in Nigeria dated back to the days of military rule; but what was observed was that individuals (usually lawyers) approached the court to litigate on matters touching on public interest (Fawehinmi v. Akilu, 1987; Fawehinmi v. NNPC, 1991; Fawehimi v. Abacha, 1996; Fawehimi v. CBN, 1992). One reason for this was that until very recently, the protection and enforcement of public rights was the exclusive preserve of the Attorney- General of the Federation or that of the State. This position of the law was derived from common law principles, a vestige of the country's colonial experience, which is still applicable within the Nigerian legal system till date. The invariable consequence of this was that, the Attorney General, being a political appointee of the government and a principal member of the executive arm, more often than not, did not live up to this responsibility, apparently due to political considerations. This left the helpless public at the mercy of the government.

However, since the beginning of the current democratic dispensation which started on 29th May, 1999, the position has changed with the activities of individuals (both lawyers andnon-lawyers), human rights groups and NGOs, such as Socio-Economic Rights and Accountability Project (SERAP), Centre for Anti-Corruption and Open Leadership (CACOL), Coalition of Democrats for Electoral Reform (CODER), among others; who now employ the forum of public interest litigation to enforce public rights.This paper will be divided into five sections. The first section shall consider conceptual clarifications of some of the major terms to be applied in this paper with particular focus on *Public Interest Litigation* (PIL), *Democracy* and *Good Governance*. The second section shall examine the doctrine of *Locus standi*; the previous rigid position of the Nigerian judiciary on its

application as regards public interest litigation, and the subsequent relaxation and liberalisation of its application. The third section shall examine the relevance of public interest litigation to democracy and good governance in Nigeria. The fourth section shall consider the limitations and prospects of public interest litigation in Nigeria, and the fifth shall proffer solutions to the identified limitations and also discuss how the nexus between public interest litigation, democracy and good governance can be further utilised to the advantage of Nigeria.

CONCEPTUAL CLARIFICATIONS

Public Interest Litigation

Public interest litigation presupposes placing of cases at judicial platform with a view to advancing a point of law of social utility or significance (Hershkoff and McCutcheon, 2000: 284). .Itloosely refers to legal practices undertaken to help the poor or marginalised persons or to effect change in the public interest, or "not for profit" terms (probono public) (Adekola , 2015:23) it is the advocacy of otherwise under –represented or vulnerable individuals, especially those living in poverty.

Black's Law Dictionary defines *public interest* as "… the general welfare of the public that warrants recognition and protection (2) something in which the public as a whole has a stake; especially an interest that justifies governmental regulation, while *litigation* is defined as "the process of carrying on a law suit. The combination of the two definitions therefore approximates"a law suit carried on to protect the general *public* welfare that justifies government *regulation*". The term has also been defined as "*cases* which raise issues beyond any personal interest of the parties in the matter, affecting identifiable sectors of the public or vulnerable groups; seeking to clarify or challenge important questions of law, involving serious matters of public policy or general public concern and/or concerning systemic default or abuse by public body (Mel Cousins: 2011).

Public interest litigation otherwise known as "Public law litigation" was coined by Professor Hayes Abraham of the Harvard Law School to underscore the practice by lawyers in the USA who attempted to enforce social transformation by means of judicialmechanisms (Ibidapo-Obe, 2008:24).

More fundamentally, however, public interest litigation is built on a tradition championed by Louis Brandeis who, while making a speech in 1905, lamented that "able lawyers have, to a large, extent, allowed themselves to become adjuncts of great corporations and have neglected their obligations to use their powers to protect the people (Quoted in Ibidapo-Obe, 2008:24). Another early champion of public interest litigation was Roger Baldwin, a prominent US Attorney, who, in 1921 formed the American Civil Liberties' Union (ACLU) to champion unpopular legal causes on volunteer basis, (Ibidapo-Obe, 2008), also Thurgood Marshall employed the forum of National Association for the Advancement of Colored People (NAACP) to legally enforce racial equality among African-Americans, and together with others, succeeded in compelling America to live up to its creed. Apart from the United States, public interest litigation had been employed to influence policies of government and to protect the weak, marginalised, the poor and the under-represented. For example, in the United Kingdom, Raymond Blackburn, a notable public interest activist had litigated, in person, on issues of concern to members of his constituency in the Greater London Area, (Ibidapo-Obe,2008:26) Also in Hong Kong, Pamela Barker, another activist, litigated a series of important cases to challenge the poor treatment ofVietnams refugees by the government.

In India, public interest litigation had safeguarded the rights of the Indian citizens and has strengthened the place of the Supreme Court of India as the guardian of Fundamental Rights.

DEMOCRACY

Many theories have been propounded on how societies had evolved.One of such is the theory of social contract which posits that there exists an unwritten contract between the members of a society by which each member had surrendered a fraction of his freedom so that society can thrive, (Goonetilleke, 2014). This decision to surrender absolute individual freedom for the society to function undergirds the basic tenets of democracy; because in an autocracy, society stays together by force. It has been contended repeatedly that the best form of government is *democracy*; or better still, *constitutional democracy* (that is a form of democracy governed by a well-articulated legal and political document called *constitution*. According to Ben Nwabueze, from human experience, no other form of rule so far devised by mankind "conduces as much to the realization of the ends of human existence upon this earth as one limited by a guarantee of the liberty of the individual under a Constitution that has the force of a supreme overriding (Nwabueze, 2009: 2).

Democracy has been defined as a political government carried out either directly by the people (direct democracy) or by means of elected representatives, otherwise known as representative democracy (Benhabib, 1996:2). In the same vein, democracy has been defined as a system of government in which power is vested in the people who rule either directly or through elected representative (Dahl,1989: 33). The most attractive argument often canvassed in favour of democracy is that it is the most effective check against autocracy and tranny. In that regard, Nwabueze has stated pointedly that "… Tyranny (a product of authoritarianism) once allowed to establish itself, deprives the people of the capacity to resist because of the pervasive atmosphere of

terror, fear, tension and insecurity created in them by the mass killings, murders, disappearances and tortures… Exposure to the arrogance and adulation of absolute power invariably turns even a person of naturally kind, modest and tolerant disposition into vainglorious, intolerant, immodest and cruel person, suffused with the belief in his superior abilities and in his infallible wisdom and a desire for unquestioning obedience to his whims and caprices… (Nwabueze, 2009:5-6)

To counter this frightening scenario, Nwabueze argues that the best substitute is a (constitutional) democracy where there exists due limitation on government as an antithesis to arbitrary rule, because in a constitutional democracy there are necessary minimum restraint mechanisms such as: (i) accountability of government to an entity distinct from itself (ii) regular and free elections modelled on universal adult suffrage (iii) freedom of association and freedom to organise opposition to government in office (iv) enforcement of the rule of law (v) respect for human rights and (vi) an independent judiciary, among others (Nwabueze, 1973).

GOOD GOVERNANCE

The term *good governance* is a relatively new concept. It first gained global attention in 1989 in the World Bank Report, when the Bank, compelled by concerns over the effectiveness of financial aid to developing sub-Saharan countries, sought for better yardsticks to evaluate countries in need of financial aid, and to assess how well the funds were utilised by the beneficiary countries (Azinge, 2009: 335). In a United Nations Development Program (UNDP) Policy paper (Governance for sustainable Human Development,1997 UNDP Policy Paper:2-3) the term *good governance* was defined as “the exercise of economic, political and administrative authority to manage a country’s affairs at all levels. It comprises mechanisms, processes and constitutions, through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences”. The Report acknowledges the following as core characteristics of good governance: (i) Participation (ii) Rule of Law (iii) Transparency (iv) Responsiveness (v) Consensus Orientation (vi) Equity (vii) Effectiveness and Efficiency (i) Accountability; and (ix) Strategic Vision.

Within the context of Nigeria, the term *good governance* has come to be known as *democracy dividends*; this has assumed greater relevance and currency in the present democratic dispensation (Akomolede&Akpambang, 2010:3).

THE CONCEPT OF LOCUS STANDI AND PUBLIC INTEREST LITIGATION IN NIGERIA

The concept of locus standi, is the set of rules which determine whether a person who initiates legal proceedings is a proper person to do so (Salman and Oniekoro, 2015:120). The concept is rooted in the common law as developed in England. Locus stand is one of the concepts of English common law transplanted into Nigerian law during the British colonial rule (Taiwo, 2009:552).

For over a long period of time, Nigerian courts had taken restrictive common law approach to locus standi (Obebe v. Military Government of Kwara State, 1994; Adefulu v. Oyesile, 1989; A.G. Anambra State v. A.G. Federation, 2007). The first Nigerian case that tested the public interest litigation of a plaintiff and clearly highlighted the attitude of courts to standing is the case of Olawoyinv. Attorney-General of Northern Region (1961). In the case, the applicant challenged the constitutionality of the provisions of the Children and Young Person’s Law, 1958 of the Northern Region of Nigeria, which prohibited political activities for juveniles and also spelt out penalties on juveniles and others who are parties to certain offences specified in the statute. The applicant argued that he wanted to give political education to his children but the enforcement of the provisions of the statute would abridge his rights and rights of other people with similar intention, regarding freedom of conscience and freedom of expression. The lower court dismissed the action on the ground that only a person whose rights had been affected by a law may sustain a claim for the violation of his rights and that the rights must have been in direct or imminent danger. The decision of the lower court was affirmed by the Federal Supreme Court.

About twenty years later, this attitude of the courts reached its highwater mark in the case of Senator Adesanyav. President of the Federal Republic of Nigeria (1981) a case considered as locusclassicus on locus standi in Nigeria. Here, the appellant filed an action challenging the constitutionality of the appointment of a serving judge as the substantive Head of the national electoral body (FEDECO) by the President of the Federation. Although the Supreme Court, in its decision, conceded the importance and desirability of encouraging individual citizen to test the constitutionality or otherwise of the action of government, yet by a majority, the court held that an individual plaintiff could not initiate public interest litigation, except he is personally and directly affected by the act complained of, or his rights had been violated. However, there was a sudden and dramatic U-turn in another celebrated case of Chief GaniFawehinmiv. Col HaliluAkilu&Another (1987).Where the Supreme Court took a relaxed approach on the doctrine of locus standi. In that case, the court held inter alia that the appellant, as a person, a Nigerian, a friend and a legal adviser to Dele Giwa, a journalist, had a personal and private right under the law to ensure that a crime was not committed, and if committed, to lay a criminal charge against anyone known to have or suspected to have committed the crime. The court declared

that anyone who has enough information in his possession to establish the crime and identify the accused is entitled to lay a charge.

It is sad to acknowledge that many cases, particularly cases filed to enforce human rights were lost as a result of the courts' earlier rigid approach to the question of locus standi. It is gratifying, however, that the liberal approach to the doctrine of locus standi by the courts has found its way into the current Fundamental Rights (Enforcement Procedure) Rules, 2009, and this approach has guided the courts in the manner they deal with the question of applicant's/plaintiff's locus standi.

Accordingly, it can be presumably inferred that previous cases that were dismissed by the courts on the ground of locus standi are no longer correct law (Salman and Oniekoro, 2015)

RELEVANCE OF PUBLIC INTEREST LITIGATION TO DEMOCRACY AND GOOD GOVERNANCE IN NIGERIA

The right of an individual to participate in the governance of his country is a fundamental tenet of constitutional democracy (Popoola, 2011: 117). This idea is recognized in the 1999 Constitution of Nigeria[(CFRN, 1999:42, 14 (2) (a), 14 (1)]

Participation in governance by an individual is actualised by choice of persons to govern his country through popular election and choice of policies to be implemented by the elected government. These afford the individual a measure of control over the government. However, the individual's right of control is not limited to these, be could also freely comment on propriety of government action, influence public opinion and also initiate court proceedings against government and its agencies where he perceives any transgression of the constitution by the government. One way of exercising these rights is by way of Public Interest Litigation. One of the key features of good governance is participation in government, and direct and active participation in governance through elections, expression of public opinions, constructive criticism of government policies and influencing parties' politicalprogrammes are salient attributes of democracy. Nigerian citizens have, over the years, taken full advantages of the latter, while their adoption and use of the former have increased with the advent of the ongoing democratic dispensation which started on 29th May 1999. The emergence of groups like Socio-Economic Rights & Accountability Project (SERAP), Constitutional Rights Project (CRP), Partnership for Justice (PJC), Committee for Defence of Human Rights (CDHR) and other civil society groups and stakeholders, allof whom are employing public interest litigation as a mechanism to check government excesses, hold them accountable to the people and enforce public rightsare adequate proofs of increasing political awareness of Nigerians in that regard.

Furthermore, the adoption and consistent use of the mechanism ofpublic interest litigation encourages judicial enforcement of the limitations of the constitution, in that; it allows the lone individual tointervene, by way of court action, to delimit arbitrariness of government. As pointed out by a scholar, "Democracy will only have meaning where the basic rights of the individual are not only protected but he is also empowered, unhindered by the majority, to intervene personally, where his guaranteed rights and the other limitations on government powers are being violated (Popoola, 2011: 118-119). Without any doubt, Nigeria stands to gain a lot from unhindered application of public interest litigation in terms of improved governance and enhanced democracy.

It would be argued further that unrestricted use of public interest litigation in Nigeria would not only guarantee access to courts and due process of law, it would also develop the judiciary to become a truly independent, fearless, courageous and impartial arm of government that could serve as effective bulwark of constitutional democracy and bastion of good governance. This development would indeed strengthen the presence of separation of power: a sine qua non to effective and enduring democracy. However, it is needful to sound a note of warning about the possibility of the judiciary stretching this ideal approach beyond its reasonable limits. The danger of an overactive judiciary has been summed up in Montesquieu's rationale for separation of powers -"…were the power of judging joined with the legislature, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator . Were it joined to the executive power, the judge might behave with all the violence of the oppressor (Quoted in Goonetilleke, 2014)

Lastly, Public Interest Litigation's most vital role is the protection of human rights. This fundamental role is exemplified significantly during the military when frequent abuses of human rights of persons, interest groups and marginalised groups were at their climax. Individuals and human rights organizations such as Civil Liberties Organizaiton (CLO), CDHR (Committee for the Defence of Human Rights), among others were at their best defending the victims of human rights abuse. Perhaps, late Chief GaniFawehinmi, SAN and Femi Falana, SAN had the most enviable records of championing the cause of victims of human rights abuse during these dark periods in the nation's history. With the advent of the ongoing democratic dispensation, however, there are relatively few cases of human rights abuses by government or its agencies, compared to the military era; despite this, some states of the federation have established the Officesof the Public Defender, a State-owned agency established to enforce the human rights of individual citizens, at no expense to the victims of human rights abuse.

For example. Lagos State was the first to establish the Office of the Public Defender on July, 24th 2000.

LIMITATIONS AND PROSPECTS OF PUBLIC INTEREST LITIGATION IN NIGERIA.

a. Non-justiciability of Socio-Economic Rights

One obvious limitation to the effective application of Public Interest Litigation in Nigeria is the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy contained in Chapter II of the Constitution of the Federal Republic of Nigeria, 1999 (CFRN, 1999:13-24). The Socio-Economic rights provided for in that segment of the constitution have been rendered non-justiciable by virtue ofthe provisions of section 6 (6)(c) of the constitution.The section provides that "…the judicial powers vested in accordance with the foregoing provisions of this section shall not, except as otherwise provided by the constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution" Accordingly, attempts to litigate on the prescribed socio-economic rights had met with serious difficulties and thereby making it almost impossible to successfully challenge government inaction to formulate policies toward achieving those objectives prescribed in Chapter II of the constitution. For example in the case of Archbishop OlubunmiOkogie v. The Lagos State Governor (1981) NCLR 218 where the court, faced with the task of interpreting a similar provision in the country's 1979 Constitution, declared that section 13 (of the 1979 constitution) has made Chapter II (of the 1979 Constitution on Fundamental Objectives and Directive Principles of State Policy) non-justiciable. However, since the beginning of the current democratic dispensation, the spate of judicial decisions on this issue point to the fact that as long as these obligations (that is the objectives in Chapter II of the constitution) are directly linked with the provisions of Chapter IV of the constitution on fundamental human rights, they deserve to be justifiable. Accordingly, inAttorney-General of the Federation v. Attorney General of Ondo State (2002) FWLR (Pt 111) 1072, a case involving dispute on whether the National Assembly had power to establish an Anti-Corruption agency called Independent Corrupt Practices Commission (ICPC). In that case, the court had to interpret the provisions of Section 15(5) of Chapter II of the 1999 constitution which provides that "the state shall abolish all corrupt practices and abuse of power". To resolve the dispute the court considered items 60(a) 67 and 68 of the Exclusive Legislative List, and it held that the National Assembly has exclusive power to make laws on issues bordering on the State's power to abolish corruption and abuse of power which fall under the Fundamental Objectives and Directive Principles of State Policy in Chapter II of the constitution. The direct implication of this remarkable judicial decision is that the provisions of Chapter II of the constitution can be realized through public interest litigation, particularly, because virtually all the provisions of Chapter II of the constitution are closely linked with the provisions of Chapter IV on fundamental rights. While the former prescribes the basic obligations of the government towards the citizens, the latter provides for the basic entitlements each citizen has for being a human being.

This is coterminous with the view expressed by Hon. Justice P. Bhaqwatt, former Chief Justice of India that "…human rights depend fundamentally on the right to life and personal liberty which are core human rights. The right to life is not confined merely to physical existence, but it includes also the right to live with basic human dignity with the basic necessities of life such as food, health, education, shelter etc. These human rights fall within the category of social and economic right and they can be realized only by affirmative action on the part of the state and if the state fails to carry out its constitutional or legal obligations in enforcement of these human rights it may be compelled to do so by an activist judiciary.

b. Poverty and Illiteracy

Another factor militating against the steady and consistent use of a public interest litigation in Nigeria is the problems of poverty and illiteracy. Poverty makes access to court virtually impossible, while illiteracy, which fosters ignorance, discourages consciousness of rights to motivate the decision to approach court for redress whenever the rights are violated.

c. Lack of Government funding of Public Interest Litigation

In Nigeria, much of, if not all of initiatives to promote public interest litigate are virtually done by private individuals. Unlike what obtains in advanced democracies like USA or UK, there appears to be no public funding of public interest litigation here. Besides, there are few lawyers who are willing to offer pro bono legal services to indigent victims of state's injustice.

d. Disobedience of Court's orders by the Government

It is the duty of the executive organ of government to ensure prompt obedience of the orders of court. However, in Nigeria, more often than not, it is the government that frequently disobey court orders.

SUGGESTED SOLUTIONS AND CONCLUSION

To tackle the challenges facing public interest litigation and thereby strengthen democracy and achieve good governance in Nigeria, the following suggestions are hereby proffered:

a. To start with, there should be an amendment to the Constitution to make the provisions of Chapter II of the 1999 constitution justiciable. Where this is not immediately achievable, the courts should adopt a pragmatic approach by giving a liberal and broad interpretation of the provisions of Chapter II in a way to compel the government to live up to its obligations as enshrined in that segment of the constitution.

b. It is also suggested that there should be a provision for public funding of public interest litigation as this would encourage public-spirited individuals to institute legal action to secure redress for any action or inaction of the government adversely affecting the public interest.

c. The Nigerian Bar Association, should adopt a policy that would compel lawyers, particularly successful and well-established lawyers to handle pro-bono cases on behalf of indigent citizens in order to broaden access to court and ultimately promote justice. One common problem regarding this issue is that successful and well-established lawyers in Nigeria are wary of being seen as anti-establishment/anti-government in their private legal practice, hence they hardly handle cases touching on public interest. This attitude should change.

d. It is also suggested that there should be a separation of the office of Attorney – General of the Federation from that of the Minister of Justice (this should also apply to States in Nigeria). The former should be strictly a public servant charged with the responsibility of defending public interest while the latter is a political appointee who is free to pursue partisan interests.

e. Lastly, the procedures for initiating public interest litigation should be made less cumbersome, less rigid and less expensive. This would encourage interested individuals to champion causes touching on public interest.

CONCLUSION

Nigerian democracy stands to benefit considerably from active public interest litigation and it is necessary that the government should give the idea a serious consideration. Two of the hallmarks of democracy and good governance are (i) participation of the citizens in governance and (ii) accountability of the government to the citizens. These two parameters are easily achieved where public interest litigation is nurtured and encouraged.

It is gratifying to observe that since the beginning of the current democratic dispensation in 1999, the number of public interest suits in Nigerian courts is impressive, yet it is also noticeable that the government has not shown enough commitment to institutionalise this laudable tool of strengthening democracy and achieving good governance. It is expected that in a not too distant future, the idea of public interest litigation would be accepted wholeheartedly as a tool of deepening democracy and achieving good governance.

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