

## **‘Development Law Hub’; THISDAY Lawyer, 26 May 2015**

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Public Interest Litigation (PIL) refers to the practice of precipitating social change through court decisions that reform legal rules, enforce existing laws and articulate public norms. It has as its prime objective the promotion of the public good. In developing democracies, PIL helps new constitutional principles and guarantees, take root, as well as increase public awareness and embolden those with legal claims to come forward. Despite the many successes recorded in Nigeria through PIL, this kind of lawyering continues to fall victim to the famous ‘tragedy of the commons’ in which seemingly rational individualistic decision, ultimately destroys the collective good. Our purpose here is therefore, to highlight successes as well as call attention to the challenges that ought to be resolved in order to deepen impact. The narrative that follows is sub-divided into three sections as follows:

- Section 1: Profile of Historical Cases.
- Section 2: Profile of Recent (Ongoing & Completed Cases)
- Section 3: Proposals for avoiding the ‘tragedy of the commons’.

### **Profile of Historical cases:**

The Olisa Agbakoba Legal’s, Public Interest Litigation (OAL, PIL) programme was developed to advance human rights and development through public interest law. It is the result of a study in 1995 by Olisa Agbakoba, SAN for the Inter-African Network for Human Rights and Development (AFRONET) and the International Centre for the Legal Protection of Human Rights (INTERIGHTS) on the legal protection of human rights under the National Constitutions of African countries. From 1995-1999 OAL’s PIL was targeted at advancing human rights. We use the following three cases as illustrative of this era:

#### 1. Olisa Agbakoba v. Director State Security Services (1995)

The Court of Appeal in this case, held that the state could not withdraw a citizen’s passport as that would amount to denying the citizen the means of exercising his right of exit and entry into Nigeria as guaranteed by the Constitution.

#### 2. Peter Nemi v. Attorney General of Lagos state (1997)

The issue of the constitutionality of prolonged incarceration, in dehumanizing conditions, of death row prisoners and the rights of prisoners to humane treatment was brought before the court. The Court of Appeal held that prisoners have enforceable rights as citizens and suggested that prolonged incarceration of convicted prisoners could constitute breach of their right to dignified and humane treatment.

### 3. Onuoha Kalu v. The State (1998)

OAL litigated the constitutionality of the death penalty. Though the Supreme Court agreed with most of OAL submissions, it held that the death penalty is constitutional since the Constitution of Nigeria explicitly permits it. The Court, however, stated that the National Assembly can take steps to expunge the death penalty. Additionally, the Court left open the question of whether remaining on death row for a significant amount of time might amount to a procedural rights violation, but hinted that such prolonged detention is improper—a question OAL will pursue further.

#### **Profile of Recent Cases**

Currently, OAL, PIL programme focuses on issues of public policy, governance and constitutionalism. The shift in focus is strategic. Following the transition from full blown autocracy, via what Levitsky and Way (2002) referred to as 'competitive authoritarianism' towards liberal democracy, it stands to reason that the anti-establishment slant in the human rights struggle must be re-imagined. Every 'placard' we raise today must have an inbuilt collaborative strategy. Therefore, in pursuit of our current vision, cases are initiated with the primary aim of deepening democracy; helping democratic institutions to deliver the desired goods to the Nigerian people. The firm has continued to advance its PIL as highlighted in the following sample of cases:

#### **1. Constitution Advocacy Cases - Separation of Powers/Judicial Independence**

Two cases were filed. The aim is to advance the concept of separation of powers, guaranteed by the Constitution. The ultimate objective is to safeguard the independence of the judiciary which will ensure effective administration of justice and adequate protection of civil liberties in Nigeria.

The Cases are:

##### i. OA v AG Federation (Judicial Funding - Federal).

Here, the Court is to interpret Sections 81(1),(2),(3) and Section 84 of the Constitution and determine the constitutionality or otherwise of the present practice where the President includes in the Appropriation Bill, the amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the Federation. Therefore the object of the Suit is to make the judiciary financially independent from the Executive.

Judgment delivered and NASS has appealed.

##### ii. OA v AG Ekiti State (Judicial Funding - Ekiti).

This is the Ekiti State version of the Judicial Funding Case.

## 2. Social Justice and Social Engineering Cases

### i) South East Discrimination Case

The Case was filed to address the social economic imbalance in the country vis-à-vis the South-Eastern States Example: states and Local Government Areas imbalance, dearth of federal presence, poor road network, abandoned natural resources, and business-hostile policies on trading, neglect of worst erosion sites in sub-Saharan Africa /ecological disaster.

### ii) Education Discrimination Case

The Action challenged the Admission Inequality in Federal Government Colleges (Unity Schools). The Court was asked to declare that application by government of different Cut-Off Marks for Unity Schools, based on gender, ethnicity and states of origin is discriminatory and a violation of Fundamental guarantees to Freedom From Discrimination under Section 42 of the Constitution which prohibit administrative or executive actions by government that discriminates between Nigerians on grounds of ethnicity, gender, religion and place of origin. Court delivered Judgment and declared that state and gender based disparity in admission cut-off marks for Unity Schools is discriminatory.

### iii) Religion Discrimination Case,

This is a Fundamental Rights Action for establishment of Ecclesiastical Courts, for Christians to have their religious affairs adjudicated by persons adequately learned in Ecclesiastical laws/biblical jurisprudence. The basis of this action is that though Nigeria is a multi-religious country and the Constitution prohibits state religion, Islamic and Customary practitioners are recognized and accommodated in the Constitution by the establishment of the Customary and Islamic court systems.

## 3. Integrity and Good Governance Cases

These are Cases filed to enhance respect for Rule of law, sustain democracy and Government accountability to the public.

*Olisa Agbakoba v Minister for Finance and Others.*

The basis of the Suit is that the Constitution guarantees a system of Local Government by democratically elected Government Councils. 14 states have failed to conduct Local Council Elections. This amounts to a civil coup d'état. The Court is asked to declare that these 14 states are not entitled to receive Public Revenue from the Federation Account.

## 4. General public interest cases

### (i) AGF v AG Lagos

The Case is at the Supreme Court and challenges the power of Lagos State Government to control Federal lands in Lagos State. Lagos State has refused to recognize Federal Government title documents over such lands and requires Federal Title holders to undergo a process called Regularization which amounts to Double Consent and violates the Land Use Act.

### (ii) AGF v AG Lagos

This Case is also at the Supreme Court. It challenges the power of Lagos State Government to collect Wharf Landing Fees from goods imported through the Lagos Sea Ports. Lagos has no power to levy Import Duties.

### (iii) OA v FBN & Priscilla Ogwemoh v FBN

These are Cases about Margin Loan Facilities granted by banks to individuals. The banks failed to monitor adequately Capital Market fluctuations to ensure that shares purchased with the loans were sold when their values depreciated to the agreed level, called "Trigger Points".

## Change

It is hoped that the inauguration of a new government on May 29 would offer Nigeria massive opportunity to deepen her democracy. As evidenced in the last General Elections in Nigeria, Nigerians are eager to work with a government that would be keen to fight corruption, restore security, close the infrastructural gaps and grow a strong and inclusive economy. Since our priorities in PIL are often determined by public opinion, we will be closely monitoring the performance of the incoming government, at all levels (Local, State and Federal) vis a vis the priorities of the Nigerian people. This would help us formulate public interest cases with the possibility of enhancing Nigeria's comprehensive development.

In conclusion, although several victories have been won in court via PIL, there remains the problem of enforcement. By its nature PIL is not meant to stop in court. To create the expected strategic impact, such cases need to be accompanied by massive awareness creation/social pressures. Unfortunately, public interest lawyers/institutions are often hindered by the famous 'tragedy of the commons', in which everyone's business becomes no one's business. Unlike the usual court cases, with defined clients that engage the lawyer, the 'client' in most public interest cases is the ubiquitous 'public'. Also, unlike the usual court cases, the cost of PIL could be dearer. This is because apart from the cost of consulting, researching,

filing and appearing in court, PIL being a dynamic tool of change; requires the exertion of multiple points of pressure alongside litigation. It is recommended, therefore, that lawyers/institutions, who take this path be supported to succeed. They must not walk alone. It would be great to have a network of people who support PIL on a consistent basis and will help in defining PIL's priorities and mounting pressure on government to implement favourable decisions. The era of standing idly-by and expecting the manifestation of development miracle has gone for good. Development is the direct result of a purposive action. In fact, it is only those who desperately desire a positive change of direction that are able to envision a pathway from a seeming cul-de-sac. "Equity", they say, "does not aid the indolent."

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***\*Led by Dr. Wilfred Mamah, the Development Law Group of OAL, is deeply committed to employing the tools of advisory, policy dialogues, research, consultancy, legal reforms, litigation and social advocacy in creating a dependable framework for social, political and economic order in Nigeria and Africa***