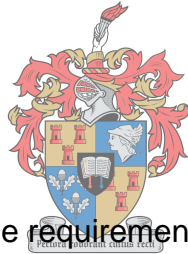


# Public interest standing in Bill of Rights litigation under the South African Constitution: Lessons from India

by

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This thesis presented in fulfilment of the requirements for the degree of Master of Laws  
in the Faculty of Law at Stellenbosch University

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1918 - 2018

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March 2018

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## Summary

Section 38(d) of the Constitution of the Republic of South Africa, 1996, states that anyone acting in the public interest may approach a court for relief arising from the infringement or threatened infringement of a right in the Bill of Rights. This relaxed approach to *locus standi* permits litigants to act on behalf of sections of the public whose human rights have been infringed, whether or not the individual victims are aware of these violations or able to approach the court for relief themselves. A similar mechanism for approaching the courts in the public interest was introduced in India in the late 1970s, but this broadening of *locus standi* has over time extended beyond the objectives for which it was intended originally, with mixed results.

After examining the history and background of the development of public interest standing in South Africa and India, the thesis proceeds to analyse the manner in which the courts have dealt with public interest standing in the respective jurisdictions. A study of case law, legislation and academic commentary dealing with this area of the law constitutes the basis for analysing the judicial management of public interest standing in these two jurisdictions.

The thesis finds that South Africa has much to learn from both the advantages and pitfalls of the Indian experience of public interest standing. It concludes with recommendations on how public interest standing in South Africa could be strengthened, including identifying the most appropriate public interest representative, the management of public interest standing cases by the courts, the involvement of third parties, and potential legislative interventions.

## Opsomming

Artikel 38(d) van die Grondwet van die Republiek van Suid-Afrika, 1996, bepaal dat enigeen wat in die openbare belang optree, 'n hof kan nader vir gepaste regshulp indien daar aangevoer word dat daar of 'n skending van 'n reg in die Handves van Regte dreig, of reeds 'n skending plaasgevind het. Hierdie breë benadering tot *locus standi* stel litigante in staat om op te tree namens dele van die publiek wie se menseregte geskend is, ongeag of individuele slagoffers bewus is van hierdie oortredings, of nie in 'n posisie is om self die hof vir gepaste regshulp te kan nader nie. 'n Soortgelyke meganisme om die howe in die openbare belang te benader, is in die laat 1970's in Indië bekendgestel, maar hierdie uitbreiding van *locus standi* het met verloop van tyd verder uitgebrei, met gemengde resultate.

Nadat die geskiedenis en agtergrond van die ontwikkeling van *locus standi* in die openbare belang in Suid-Afrika en Indië ondersoek is, analiseer hierdie tesis die benadering van howe in die onderskeie jurisdiksies ten opsigte van *locus standi* in die openbare belang. 'n Studie van regspraak, wetgewing en akademiese kommentaar, vorm die basis vir die ontleding van die regterlike prosese rakende *locus standi* in die openbare belang.

Hierdie tesis bevind dat Suid-Afrika baie van die voordele en slaggate van die Indiese ervaring van *locus standi* in die openbare belang ervaar het. Dit sluit af met aanbevelings oor hoe *locus standi* in die openbare belang in Suid-Afrika versterk kan word, insluitende die identifisering van die mees toepaslike verteenwoordiger van die openbare belang, die bestuur van sake by die howe wat handel oor *locus standi* in die openbare belang, die betrokkenheid van derde partye en moontlike wetgewende ingrypings.

## Acknowledgements

“It’s a dangerous business, Frodo, going out your door. You step onto the road, and if you don’t keep your feet, there’s no knowing where you might be swept off to.”<sup>1</sup>

One of the most significant and humbling things I have learned at university is that no accomplishment can be accredited to just one person. Alone, the world can seem big and unfriendly, and one can too easily lose their way. It is with heartfelt gratitude that I therefore thank the team of people that helped me “keep my feet” on the road to completing this thesis.

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<sup>1</sup> J R R Tolkien *The Fellowship of the Ring* (1954) 87.

“For from him and through him and for him are all things. To him be the glory forever!”<sup>2</sup>

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<sup>2</sup> Romans 11:36 (New International Version).

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## Chapter 1: Introduction

### 1 1 Motivation and background for research

Access to justice enables everyone to protect the human rights enshrined in the Bill of Rights, regardless of their socio-economic circumstances. It also aims to ensure that rights are enforced equally in society.<sup>1</sup> Courts have a duty to interpret the law in a way that promotes social transformation and access to justice.<sup>2</sup> One of the ways in which this is possible is a generous and creative approach to the rules of standing.<sup>3</sup>

Section 38(d) of the Constitution of the Republic of South Africa, 1996 (“the South African Constitution”), states that anyone acting in the public interest may approach a court for relief arising from the infringement or threatened infringement of a right in the Bill of Rights.<sup>4</sup> After the introduction of the South African Constitution, and as a result of uncertainty with how to deal with section 38(d), the South African Law Commission (“the SALC”) was given the task of making recommendations for public interest actions.<sup>5</sup> The result was the proposed introduction of legislation that would regulate class and public interest actions.<sup>6</sup>

The SALC defined a public interest action as “an action instituted by a representative in the interest of the public generally, or in the interests of a section of the public, but not necessarily in that representative’s own interest”.<sup>7</sup> These actions therefore potentially offer a mechanism through which the violation of the rights of

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<sup>1</sup> J R Midgeley “Access to Legal Services: A Need to Canvass Alternatives” (1992) 8 *South African Journal on Human Rights* 74 75.

<sup>2</sup> T Ngcukaitobi “The Evolution of Standing Rules in South Africa and Their Significance in Promoting Social Justice” (2002) 18 *South African Journal on Human Rights* 590 590.

<sup>3</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 230; P N Bhagwati “Judicial Activism and Public Interest Litigation” (1985) 23 *Columbia Journal of Transnational Law* 561 568, 571.

<sup>4</sup> The predecessor of this provision was section 7(4)(b)(v) of the Constitution of the Republic of South Africa, Act 200 of 1993 (“the interim Constitution”). Section 7(4)(b)(v) of the interim Constitution is discussed in greater detail in parts 2 4 1 and 2 4 4 1 below.

<sup>5</sup> C F Swanepoel “The Judicial Application of the ‘Interest’ Requirement for Standing in Constitutional Cases: ‘A Radical and Deliberate Departure from Common Law’” (2014) 47 *De Jure* 63 67. These are discussed in part 2 3 3 below.

<sup>6</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998, including Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995.

<sup>7</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 23 at 4.3.2.

large portions of the public can be challenged.<sup>8</sup> This is especially pertinent in South Africa's economic and social context, where many poor people are not afforded adequate access to justice.<sup>9</sup>

However, despite the fact that the SALC expressly recommended that the promulgation of legislation regulating public interest actions<sup>10</sup> would enable any person "to institute an action in court claiming relief by way of a public interest action",<sup>11</sup> there is currently no legislation in force regulating public interest actions as proposed by the SALC.<sup>12</sup> Accordingly, in developing public interest standing, the courts have had to look primarily to the South African Constitution for guidance. The judiciary has repeatedly identified the need for relaxed rules of standing for the enforcement of rights, and therefore welcomed the opportunity to develop section 38(d) of the South African Constitution. This has resulted in the establishment of a threshold test for determining whether an applicant may be granted standing in the public interest.<sup>13</sup>

A purposive and creative interpretation of section 38(d) by the courts may facilitate access to justice.<sup>14</sup> This method of interpretation, stemming from section 39 of the South African Constitution, focuses on the realisation of the values in the Constitution, and also gives content to the meaning of access to justice.<sup>15</sup> However, in the absence of legislation, it is not only the South African Constitution that can be of assistance. Other jurisdictions where public interest standing is recognised can offer valuable guidance for South Africa. One such jurisdiction is India. A preliminary study of the role of public interest standing within the framework of public interest litigation in India

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<sup>8</sup> S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 89.

<sup>9</sup> Y Vawda "Access to Justice: From Legal Representation to Promotion of Equality and Social Justice – Addressing the Legal Isolation of the Poor" (2005) 26 *Obiter* 234 234. In this article, the author argues that the term "access to justice" needs to be redefined to promote equality and social justice of vulnerable groups in South Africa.

<sup>10</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 23 at 4.3.2.

<sup>11</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 v para 4.

<sup>12</sup> C F Swanepoel "The Judicial Application of the 'Interest' Requirement for Standing in Constitutional Cases: 'A Radical and Deliberate Departure from Common Law'" (2014) 47 *De Jure* 63 69.

<sup>13</sup> See parts 2 4 3 and 2 4 5 below.

<sup>14</sup> N J Udombana "Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies" (2005) 5 *African Human Rights Law Journal* 47 47.

<sup>15</sup> J Radebe "Address by the Minister of Justice and Constitutional Development Mr Jeff Radebe on the occasion of Access to Justice Conference" (2011), Sandton <[http://www.justice.gov.za/m\\_speeches/2011/20110708\\_min\\_ajc.html](http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html)>.

illustrates the potential for further development of public interest standing in Bill of Rights litigation in South Africa.

## **1 2 Scope of thesis**

This thesis will focus on the development of public interest standing in South Africa and India. An examination of the manner in which the courts have dealt with public interest standing in South Africa and India will constitute the basis for formulating recommendations for the further development of public interest standing in South Africa to facilitate greater access to justice.

## **1 3 Research questions, aims and hypotheses**

This research project focuses on two questions. The first question concerns the main problems, advantages and disadvantages of public interest standing in South African Bill of Rights litigation. The second question focuses on the extent to which the relaxation of standing in the Indian model of public interest litigation can inform the development of public interest standing in South African Bill of Rights litigation. This study has four research aims in answering the above-mentioned research questions.

The first research aim is to analyse the incremental, casuistic development of public interest standing in South Africa, both prior and subsequent to the adoption of the South African Constitution, paying attention to both the advantages and disadvantages of this form of standing in the context of human rights-related litigation. It is hypothesised that the process of analysing the incremental, casuistic development of public interest standing in South Africa and India will clarify the areas of development required in Bill of Rights litigation under the South African Constitution.

The second research aim is to analyse the development of public interest standing within the broader framework of public interest litigation (“PIL”) in India in order to evaluate its strengths and weaknesses. In this regard, it is hypothesised that public interest standing within the Indian social action litigation experience model offers lessons for the development of public interest standing in South Africa, especially because of the number of similarities between South Africa and India.<sup>16</sup> However,

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<sup>16</sup> S Meer “Litigating Fundamental Rights: Rights and Social Action Litigation in India: A Lesson for South Africa” (1993) 9 *South African Journal on Human Rights* 358 372. See part 1 4 below.

South African courts will need to be discerning when deciding what elements to adopt to avoid the problems that have arisen in India.<sup>17</sup>

Thirdly, this research will aim to evaluate the possibilities for further interpretation and application of section 38(d) of the Constitution by drawing on detailed comparative research on the development of public interest standing in India. Broad rules of standing promote effective litigation in the public interest<sup>18</sup> and contribute to increased access to justice in the Indian public interest litigation model. Therefore it is hypothesised that this mechanism can yield benefits that are valuable in South Africa.<sup>19</sup>

The final research aim of this study will be to offer proposals for the development of public interest standing in South Africa that address key areas of consideration identified in this study. The hypothesis is that, apart from extending rights to all population groups, a broad but nuanced approach to public interest standing that incorporates lessons learned from the Indian public interest litigation model will contribute to increased access to justice in South Africa.

#### **1 4 Methodology**

There is a pressing need for purposive and creative interpretation of the Constitution in South Africa,<sup>20</sup> which is why it is the primary method of interpretation proposed in this research. A purposive interpretation of section 38(d) of the South African Constitution helps to determine the primary intention of the constitutional drafters, regardless of what consequences the lawmaker may have foreseen.<sup>21</sup>

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<sup>17</sup> J Fowkes “How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 435. See part 3 4 2 below.

<sup>18</sup> S Budlender, G Marcus and N M Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014) 128.

<sup>19</sup> J Fowkes “How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 436.

<sup>20</sup> N J Udombana “Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies” (2005) 5 *African Human Rights Law Journal* 47 47.

<sup>21</sup> L du Plessis “Interpretation” in S Woolman M and Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 6 2008) 32–18.



The South African Constitution is founded on abstract values and principles.<sup>22</sup> As stated by the Constitutional Court in the case of *S v Makwanyane* (“*Makwanyane*”),<sup>23</sup> an interpretation of the Bill of Rights should be “generous and purposive” and demonstrate a commitment to the underlying constitutional values, as well as an understanding of the language used.<sup>24</sup>

In order to answer the research questions of this study, it is necessary to incorporate a comparative methodology. The Court in *Makwanyane* noted that South Africa is not obliged to consider foreign constitutions<sup>25</sup> but that, if consulted, they must be referred to with “due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution”.<sup>26</sup> The Court in the case of *K v Minister of Safety and Security*<sup>27</sup> held that it would seem “unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems’ grappling with issues similar to those with which we are confronted”.<sup>28</sup> Therefore, it is clear that consideration of the jurisprudence of foreign jurisdictions is necessary to add value to the interpretation of rights in South Africa.

At this point, it is necessary to assess the value that comparative research will add to this thesis. If the study of other jurisdictions holds any potential at all, it must be consulted for the sake of any wisdom that can be gained.<sup>29</sup> The literature on public interest standing in South Africa frequently looks to the jurisdiction of India.

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<sup>22</sup> J Goldsworthy “Constitutional Interpretation” in M Rosenfeld and A Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 689 705.

<sup>23</sup> 1995 6 BCLR 665 (CC).

<sup>24</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 9. Reference must also be made here to section 39 (the interpretation clause) of the Constitution. Section 39(1) states: “When interpreting the Bill of Rights, a court, tribunal, or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.”

<sup>25</sup> The wording of the predecessor of section 39 of the final Constitution was section 35 of the interim Constitution. Section 35(1) stated that, when interpreting the Bill of Rights, courts “may have regard to comparable foreign case law”.

<sup>26</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 39.

<sup>27</sup> 2005 6 SA 419 (CC).

<sup>28</sup> *K v Minister of Safety and Security* 2005 6 SA 419 (CC) para 35.

<sup>29</sup> *K v Minister of Safety and Security* 2005 6 SA 419 (CC) para 35.



Consequently, and for a number of other reasons discussed below, this thesis considers the development of public interest standing in India.

India gained its independence on 15 August 1947 and, with it, a Constitution (“the Indian Constitution”) guaranteeing enforceable fundamental rights and setting out Directive Principles of State Policy to inform state governance aimed at the furtherance of social justice.<sup>30</sup> However, the implementation of these rights remained largely unrealised in the wake of the colonial heritage of British rule. It was not until the late 1970s that fundamental rights arguably gained life through the development of public interest litigation, and were no longer seen purely as academic.<sup>31</sup>

When considering the Indian Constitution and Indian case law, it is important to note that the Indian Constitution is viewed by courts as a living and dynamic document, able to adapt and develop with time.<sup>32</sup> Apart from also being a post-colonial democratic state, India is an ideal legal system to compare to South Africa for numerous reasons. According to Meer, the populations of South Africa and India both display diversity in race, religion, language and culture, as well as stark disparities between wealth and poverty.<sup>33</sup> The history of colonialisation and its subsequent influence on the two jurisdictions will also facilitate clear assessments of similarities and differences between public interest standing in both India and South Africa.<sup>34</sup>

Owing to the potential benefit to be derived from a study of public interest standing in India, an in-depth study of the Indian experience and the potential lessons it holds for the development of public interest standing in South Africa is justified. The research questions that this study will address were recognised and confronted approximately forty years ago in India.<sup>35</sup> There are also clear parallels between the normative

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<sup>30</sup> Constitution of India, 1949; S Meer “Litigating Fundamental Rights: Rights and Social Action Litigation in India: A Lesson for South Africa” (1993) 9 *South African Journal on Human Rights* 358 358 – 359. Part 3 2 below provides greater detail on the Indian Constitution and judicial structure.

<sup>31</sup> S Meer “Litigating Fundamental Rights: Rights and Social Action Litigation in India: A Lesson for South Africa” (1993) 9 *South African Journal on Human Rights* 358 359.

<sup>32</sup> J Goldsworthy “Constitutional Interpretation” in M Rosenfeld & A Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 689 705; T Ngcukaitobi “The Evolution of Standing Rules in South Africa and Their Significance in Promoting Social Justice” (2002) 18 *South African Journal on Human Rights* 590 601.

<sup>33</sup> S Meer “Litigating Fundamental Rights: Rights and Social Action Litigation in India: A Lesson for South Africa” (1993) 9 *South African Journal on Human Rights* 358 372.

<sup>34</sup> C Rautenbach “Phenomenon of Personal Laws in India: Some Lessons for South Africa” (2006) 39 *Comparative and International Law Journal of Southern Africa* 241 241 – 242.

<sup>35</sup> See part 1 3 for research questions.

frameworks of the constitutions of both South Africa and India and the respective social contexts.<sup>36</sup> A comparative study of the two jurisdictions will therefore yield valuable insights.

This research will be founded on a study and interpretation of section 38 – specifically, section 38(d) – of the South African Constitution in order to examine public interest standing in Bill of Rights litigation. Over and above critically analysing South African and Indian courts' interpretation of public interest standing in constitutional cases, relevant journal articles, books and chapters in books, theses and dissertations, publications, addresses and reports will comprise valuable secondary sources.

Much of the literature on the subject of this thesis relates to public interest litigation – especially in the context of India – and not always specifically to public interest standing. It will thus be necessary to guard against conflating the two concepts. Public interest standing in India is created by the Supreme Court's expansive interpretation of article 32 of the Indian Constitution,<sup>37</sup> which, along with a relaxation in the procedure of approaching the courts, enables public interest litigation. Public interest standing in South Africa is explicitly mentioned in section 38(d) of the South African Constitution. As both jurisdictions have interpreted these provisions with the aim of increasing access to justice, it will be possible to draw parallels between case law and literature on public interest standing in South Africa and India and thus make pertinent remarks and offer relevant suggestions within the ambit of the research questions and aims.

## **1 5 Overview of chapters**

### **1 5 1 Chapter 2: The history and evolution of public interest standing in South Africa**

This chapter will focus on the incremental, casuistic development of public interest standing in South Africa. Following a discussion of the history and context of public interest standing, this chapter will assess the recommendations proposed by the SALC and the potential for the implementation of its submissions regarding public interest actions. It will also discuss the merits and pitfalls of public interest standing as it is currently applied in South Africa.

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<sup>36</sup> *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 32.

<sup>37</sup> See part 3 3 3 below for a detailed discussion of this development.

1 5 2 Chapter 3: The history and evolution of public interest standing in India

This chapter will be constructed in a similar manner to the previous chapter, and will focus on the incremental, casuistic development of public interest standing in India. This will entail a study of the history and context of public interest standing in India, including an analysis of its pre-constitutional law and developments. A foundation of the development of public interest standing can then be utilised to identify the merits and pitfalls of public interest standing as currently applied in India.

1 5 3 Chapter 4: The future development of public interest standing in South Africa

This chapter will draw on insights gained from the advantages and disadvantages of public interest standing as currently applied in South Africa and India respectively in order to identify areas of greatest importance regarding the future development of public interest standing in South Africa. These observations will be incorporated into proposals for the further development of public interest standing in South Africa.

1 5 4 Chapter 5: Conclusion

The concluding chapter will summarise the key findings of this thesis and highlight important points to be taken into consideration in the development of public interest standing in future in South Africa. This will also be an opportunity to evaluate the fulfilment of the research aims, and highlight areas for potential further research. This chapter will conclude with final reflections on the significance of the research conducted.

## **Chapter 2: The history and evolution of public interest standing in South Africa**

### **2 1 Introduction**

Public interest standing was introduced to South African law by section 38(d) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). This constitutional provision institutes the broadest ground of standing of the five grounds contained in section 38. Subsection (d) displays a significant departure from the restricted common law rules of standing.<sup>1</sup> The South African Law Commission (“the SALC”) duly made numerous recommendations and proposed the introduction of legislation that would regulate class and public interest actions.<sup>2</sup> This legislation was not adopted, thus the development of public interest standing has been left to the courts.<sup>3</sup>

This chapter will examine the incremental, casuistic development of public interest standing from Roman and Roman-Dutch law, to South African common law and finally under the Constitution. This will also include a discussion of the recommendations proposed by the SALC.<sup>4</sup>

A holistic overview of public interest standing will facilitate an analysis of the main problems, advantages and disadvantages of public interest standing in South African Bill of Rights litigation and, in turn, enable proposals later in the study for the development of public interest standing in South Africa to address problems or deficiencies identified.

### **2 2 Public interest standing under the common law**

#### **2 2 1 Introduction**

Before the introduction of the Constitution of the Republic of South Africa, Act 200 of 1993 (“the interim Constitution”), South African courts adopted a restrictive approach to the issue of standing. Litigants had to have the capacity to sue, as well as a

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<sup>1</sup> Public interest standing under the common law is discussed under part 2 2 below.

<sup>2</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998, including Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995.

<sup>3</sup> The role of the courts in the development of public interest standing is discussed in part 2 4 4 below.

<sup>4</sup> See part 2 3 below.

demonstrable legal interest in the matter, in order to seek relief in court.<sup>5</sup> The common law restricted who was able to bring a matter before a court by requiring “personal, sufficient and direct”<sup>6</sup> loss or damage to have been suffered by such party. Regardless of whether there was a direct impact on an interest of the public, the right on which the applicant based their claim for relief had to be enjoyed personally.<sup>7</sup> This principle was reaffirmed by the Appellate Division as late as 1993.<sup>8</sup>

Accordingly, if an applicant failed to show both that they had a personal interest in the matter and that they personally had been adversely affected by the wrong alleged, they were denied standing.<sup>9</sup> This narrow approach sought to prevent flooding the gates with inappropriate or vexatious litigation and a consequent obstruction of the administration of justice.<sup>10</sup> Actions in the public interest were therefore not recognised in South African law.<sup>11</sup>

## 2 2 2 The *actio popularis* in Roman law

Litigation in the public interest was permissible in certain circumstances under Roman penal law by means of the *actio popularis* (or “popular action”). The Digest described the *actio popularis* as “a popular action which looks to the public interest”.<sup>12</sup> The purpose of the action was to serve the *ius populi* (the interest of the people) and it was

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<sup>5</sup> L Baxter *Administrative Law* (1984) 644.

<sup>6</sup> *Standard General Insurance Co v Gutman* NO 1981 2 SA 426 (C); *Christian League of Southern Africa v Rall* 1981 2 SA 821 (O); *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 3 SA 369 (A); *Cabinet for the Territory of South West Africa v Chikane and Another* 1989 1 SA 349 (A).

<sup>7</sup> T Ngcukaitobi “The Evolution of Standing Rules in South Africa and Their Significance in Promoting Social Justice” (2002) 18 *South African Journal on Human Rights* 590 591. For a classic example of this reasoning, see *Dalrymple v Colonial Treasurer* 1910 TS 392.

<sup>8</sup> *Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd* 1993 2 SA 307 (A) at 321.

<sup>9</sup> C Loots “Standing, Ripeness and Mootness” in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2 2005) 7–2. See *Bamford v Minister of Community Development and State Auxiliary Services* 1981 3 SA 1054 (C) para 1059 E – 1060 A.

<sup>10</sup> C F Swanepoel “The Judicial Application of the ‘Interest’ Requirement for Standing in Constitutional Cases: ‘A Radical and Deliberate Departure from Common Law’” (2014) 47 *De Jure* 63 65, 82.

<sup>11</sup> C Loots “Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation” (1987) 104 *South African Law Journal* 131 132.

<sup>12</sup> Dig. 47.23.1, translated in A Watson *The Digest of Justinian, Volume IV* (2011) 307; J A van der Vyver “*Actiones Populares* and the Problem of Standing in Roman, Roman-Dutch, South African and American Law” (1978) 3 *Acta Juridica* 191 192.

thus a means by which a right of the people could be defended.<sup>13</sup> There was no general action in the public interest by which this could be achieved, but rather a variety of actions.<sup>14</sup> However, an *actio popularis* could only be brought for a closed list of causes.<sup>15</sup>

Van der Keessel subdivided the list of possible *actiones populares* into three categories. The first category was for actions whereby rights could be claimed (*actiones ordinariae*). The second was for actions to safeguard traffic on public highways and navigation on public rivers, as well as a claim for the production of a free man being held in slavery (*remedia possessoria*). The third category comprised actions which could be instituted if tombs were violated or boundaries disturbed (the *actio sephulchri violati* and *actio de termino moto* respectively).<sup>16</sup>

Any member of the public could institute this action,<sup>17</sup> provided that they were competent to sue *per edictum*.<sup>18</sup> In the event of more than one person coming forward to institute an *actio popularis*, it fell to the praetor to choose the most suitable plaintiff for the matter at hand.<sup>19</sup> A plaintiff with a personal interest in the matter would be given preference.<sup>20</sup>

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<sup>13</sup> J A van der Vyver “*Actiones Populares* and the Problem of Standing in Roman, Roman-Dutch, South African and American Law” (1978) 3 *Acta Juridica* 191 192.

<sup>14</sup> J A van der Vyver “*Actiones Populares* and the Problem of Standing in Roman, Roman-Dutch, South African and American Law” (1978) 3 *Acta Juridica* 191 192; C Loots “Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation” (1987) 104 *South African Law Journal* 131 146.

<sup>15</sup> G E Devenish “*Locus Standi* Revisited: Its Historical Evolution and Present Status in terms of Section 38 of the South African Constitution” (2005) 38 *De Jure* 28 29.

<sup>16</sup> *Praelectiones ad Jus Criminale* 47.23.1; J A van der Vyver “*Actiones Populares* and the Problem of Standing in Roman, Roman-Dutch, South African and American Law” (1978) 3 *Acta Juridica* 191 192.

<sup>17</sup> G E Devenish “*Locus Standi* Revisited: Its Historical Evolution and Present Status in terms of Section 38 of the South African Constitution” (2005) 38 *De Jure* 28 29; J A van der Vyver “*Actiones Populares* and the Problem of Standing in Roman, Roman-Dutch, South African and American Law” (1978) 3 *Acta Juridica* 191 193.

<sup>18</sup> Dig. 47.23.4 reads as follows: “*Popularis actio integrae personae permittitur, hoc est cui per edictum postulare licet.*” This has been translated to English by Watson: “A popular action is granted to a competent person, that is, one whom the edict allows to bring proceedings”. See A Watson *The Digest of Justinian, Volume IV* (2011) 307.

<sup>19</sup> Dig. 47.23.2, translated in A Watson *The Digest of Justinian, Volume IV* (2011) 307; J A van der Vyver “*Actiones Populares* and the Problem of Standing in Roman, Roman-Dutch, South African and American Law” (1978) 3 *Acta Juridica* 191 192.

<sup>20</sup> Dig. 47.23.3(1), translated in A Watson *The Digest of Justinian, Volume IV* (2011) 307; J A van der Vyver “*Actiones Populares* and the Problem of Standing in Roman, Roman-Dutch, South African and American Law” (1978) 3 *Acta Juridica* 191 192.



2 2 3 The *actio popularis* in Roman-Dutch law

The era of Roman-Dutch law quickly ushered out the *actio popularis*.<sup>21</sup> According to the court in *Bagnall v The Colonial Government* (“*Bagnall*”), the action had become outdated in Dutch law due to its inconvenience and therefore never formed part of South African law.<sup>22</sup>

This position was confirmed three years later in the case of *Dalrymple v Colonial Treasurer* (“*Dalrymple*”).<sup>23</sup> According to the court, the *actio popularis* allowed Ministers of Parliament to be sued too easily for public acts, and therefore posed the threat of hampering the government’s execution of its duties.<sup>24</sup> Accordingly, a private person could only sue and institute actions in their own right and “had no title to institute them in the interest of the public”.<sup>25</sup> However, this did not preclude a body representing a number of people from having *locus standi* to represent those people.<sup>26</sup>

There was one exception in Roman-Dutch law to the rule that a private person could pursue only his personal interests in a court action. The *interdictum de libero homine exhibendo* (comparable to the writ of *habeas corpus* in English law)<sup>27</sup> enabled a plaintiff to sue on behalf of a person being kept under restraint without just cause.<sup>28</sup>

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<sup>21</sup> C F Swanepoel “The Judicial Application of the ‘Interest’ Requirement for Standing in Constitutional Cases: ‘A Radical and Deliberate Departure from Common Law’” (2014) 47 *De Jure* 63 65; J A van der Vyver “*Actiones Populares* and the Problem of Standing in Roman, Roman-Dutch, South African and American Law” (1978) 3 *Acta Juridica* 191 193; G E Devenish “*Locus Standi* Revisited: Its Historical Evolution and Present Status in terms of Section 38 of the South African Constitution” (2005) 38 *De Jure* 28 29.

<sup>22</sup> *Bagnall v The Colonial Government* 1907 24 SC 240 474 – 476; G E Devenish “*Locus Standi* Revisited: Its Historical Evolution and Present Status in terms of Section 38 of the South African Constitution” (2005) 38 *De Jure* 28 29. The courts continued to confirm this. See G E Devenish “*Locus Standi* Revisited: Its Historical Evolution and Present Status in terms of Section 38 of the South African Constitution” (2005) 38 *De Jure* 28 30.

<sup>23</sup> 1910 TS 372.

<sup>24</sup> *Dalrymple v Colonial Treasurer* 1910 TS 392.

<sup>25</sup> *Dalrymple v Colonial Treasurer* 1910 TS 382.

<sup>26</sup> *Transvaal Indian Congress v Land Tenure Advisory Board* 1955 1 SA 85 (T); C Loots “*Locus Standi* to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation” (1987) 104 *South African Law Journal* 131 135.

<sup>27</sup> J A van der Vyver “*Actiones Populares* and the Problem of Standing in Roman, Roman-Dutch, South African and American Law” (1978) 3 *Acta Juridica* 191 193.

<sup>28</sup> Dig. 43.29, translated in A Watson *The Digest of Justinian, Volume IV* (2011) 130.

## 2 2 4 Public interest standing in South African law prior to the interim Constitution

As already indicated, South African law did not recognise the Roman law *actio popularis* before the adoption of the interim Constitution. The one exception to the rule that required a direct and substantial interest to establish standing was in terms of the *interdictum de libero homine exhibendo*.<sup>29</sup> This interdict was characterised as an *actio popularis* because it could be instituted by anyone.<sup>30</sup> Prior to the adoption of the interim Constitution, it was the only remnant in South African law of the Roman law *actiones populares*.<sup>31</sup>

The cases discussed below illustrate the courts' restrictive approach to public interest standing. Plaintiffs were consistently required to prove a direct interest in any given matter in order to be granted standing, even if seeking relief in the public interest.

### 2 2 4 1 *Bagnall v The Colonial Government*

In *Bagnall*,<sup>32</sup> the plaintiff sought a declaration that the Customs Act<sup>33</sup> bound the Treasurer-General to pay duties for the import of catalogues.<sup>34</sup> Owing to the fact that the plaintiff was a taxpayer and parliamentary voter, as well as the secretary of the South African Manufacturers' Association, he claimed to have an interest in the matter at hand.<sup>35</sup> However, because the plaintiff could not prove that he either had already or would sustain any damage as a result of the Treasurer-General's failure to observe the statute, he was not afforded standing to act in his own interest, let alone the interest of

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<sup>29</sup> C F Swanepoel "The Judicial Application of the 'Interest' Requirement for Standing in Constitutional Cases: 'A Radical and Deliberate Departure from Common Law'" (2014) 47 *De Jure* 63 65.

<sup>30</sup> C F Swanepoel "The Judicial Application of the 'Interest' Requirement for Standing in Constitutional Cases: 'A Radical and Deliberate Departure from Common Law'" (2014) 47 *De Jure* 63 65 – 66; J A van der Vyver "Actiones Populares and the Problem of Standing in Roman, Roman-Dutch, South African and American Law" (1978) 3 *Acta Juridica* 191 193. It is presumed that women and children could only apply for the interdict if the detainee was related to them.

<sup>31</sup> *Wood & Others v Ondangwa Tribal Authority & Another* 1975 2 SA 294 (A) 311 at 294C–F; J A van der Vyver "Actiones Populares and the Problem of Standing in Roman, Roman-Dutch, South African and American Law" (1978) 3 *Acta Juridica* 191 195.

<sup>32</sup> 1907 24 SC 240.

<sup>33</sup> 1 of 1906.

<sup>34</sup> *Bagnall v The Colonial Government* 1907 24 SC 240 at 470, 471.

<sup>35</sup> *Bagnall v The Colonial Government* 1907 24 SC 240 at 471.



the public.<sup>36</sup> Loots notes that this was the first South African case in which the court plainly denounced the idea of an action in the public interest.<sup>37</sup>

#### 2 2 4 2 *Patz v Greene & Co.*

In the case of *Patz v Greene & Co.* (“*Patz*”),<sup>38</sup> the applicant sought an interdict preventing further alleged illegal competition created by the respondents’ identical business. The applicant was a licensed general dealer, butcher and eating-house keeper, and claimed that he had suffered damage because of the proximity to his business in which the respondents operated.<sup>39</sup> The court of first instance held that granting the applicant a right of action would allow any person in the Transvaal the same right of action if they could prove that they sustained damages in their businesses through illegal competition.<sup>40</sup> The court consequently dismissed the application.

On appeal, the Transvaal Supreme Court ruled that the applicant *in casu* had to prove that he had suffered loss through the respondents’ illegal trading in order to be entitled to compensation and an interdict restraining the respondents from carrying on their illegal trade.<sup>41</sup> According to the court, granting an interdict without such proof could negatively impact the respondents’ trade.<sup>42</sup>

The judgment in *Patz* was an adaptation of the English law on standing in public interest cases, for which there existed a “special damage” requirement.<sup>43</sup> Special damage comprises “some peculiar injury beyond that which [the complainant] may be supposed to sustain in common with the rest of the Queen’s subjects by an infringement of the law”.<sup>44</sup> Naturally, there are acts that affect the public that are prohibited by statute. However, simply infringing on such laws did not create a right for anyone to bring an action against such person. In order to have a right of action, a

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<sup>36</sup> *Bagnall v The Colonial Government* 1907 24 SC 240 at 478.

<sup>37</sup> C Loots “Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation” (1987) 104 *South African Law Journal* 131 133.

<sup>38</sup> 1907 TS 427; see also C Loots “Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation” (1987) 104 *South African Law Journal* 131 133 – 134.

<sup>39</sup> *Patz v Greene & Co.* 1907 TS 427 at 428.

<sup>40</sup> *Patz v Greene & Co.* 1907 TS 427 at 433.

<sup>41</sup> *Patz v Greene & Co.* 1907 TS 427 at 433 – 434.

<sup>42</sup> *Patz v Greene & Co.* 1907 TS 427 at 438.

<sup>43</sup> T Ngcukaitobi “The Evolution of Standing Rules in South Africa and Their Significance in Promoting Social Justice” (2002) 18 *South African Journal on Human Rights* 590 591.

<sup>44</sup> *Patz v Greene & Co.* 1907 TS 427 at 433.

plaintiff had to prove that he or she suffered damage over and above the damage suffered by the community as a result of the prohibited act.<sup>45</sup>

This judgment clearly exhibits the restrictive approach to standing in South African law before the introduction of the Constitution. The restrictive approach prevented anyone from approaching a court of law for relief in the public interest unless they were able to prove special damage resulting from an act in terms of a statute.<sup>46</sup>

### 2 2 4 3 *Dalrymple v Colonial Treasurer*

In *Dalrymple*,<sup>47</sup> the applicants were residents of the Transvaal and members of the Legislative Council. They approached the court seeking an interdict preventing the Colonial Treasurer from making payments that were allegedly not statutorily authorised.<sup>48</sup> Unlike the court in *Patz*, Innes CJ distinguished between English and South African law with regard to the interest that a plaintiff must have in order to enforce a public right.<sup>49</sup> In England, the plaintiff would have to have some special interest or sustain some special damages greater than that enjoyed or sustained by ordinary members of the public.<sup>50</sup> Under South African law, however, the court held that a plaintiff was entitled to enforce a public right irrespective of whether his right or injury were greater than other members of the public.<sup>51</sup>

The court found that the payments were illegal,<sup>52</sup> but that the applicants lacked standing in the matter because they were unable to prove personal damage, the breach of a duty owed to them or an infringement of a right vested in them.<sup>53</sup> The court reaffirmed the fact that a private person could only sue and institute actions in his own right and “had no title to institute them in the interest of the public”.<sup>54</sup> Even at the risk

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<sup>45</sup> *Patz v Greene & Co.* 1907 TS 427 at 433.

<sup>46</sup> C F Swanepoel “The Judicial Application of the ‘Interest’ Requirement for Standing in Constitutional Cases: ‘A Radical and Deliberate Departure from Common Law’” (2014) 47 *De Jure* 63 65.

<sup>47</sup> 1910 TS 372.

<sup>48</sup> *Dalrymple v Colonial Treasurer* 1910 TS 372 at 373 – 374.

<sup>49</sup> *Dalrymple v Colonial Treasurer* 1910 TS 372 at 379, 380 – 382; T Ngcukaitobi “The Evolution of Standing Rules in South Africa and Their Significance in Promoting Social Justice” (2002) 18 *South African Journal on Human Rights* 590 592.

<sup>50</sup> *Dalrymple v Colonial Treasurer* 1910 TS 372 at 380 – 381.

<sup>51</sup> *Dalrymple v Colonial Treasurer* 1910 TS 372 at 380.

<sup>52</sup> *Dalrymple v Colonial Treasurer* 1910 TS 372 at 378.

<sup>53</sup> *Dalrymple v Colonial Treasurer* 1910 TS 372 at 396.

<sup>54</sup> *Dalrymple v Colonial Treasurer* 1910 TS 372 at 382, 386 – 387.

of the breach of law going unchallenged, the court was not prepared to relax the rule that a remedy could only be claimed by a person with a legal right. The court felt it would be unjustified in “resuscitating the *popularis actio* ... and ... enlarging its scope” to cover matters which, even when it was in force, were beyond its ambit.<sup>55</sup>

#### 2 2 4 4 *Director of Education, Transvaal v McCagie and Others*

The applicants in *Director of Education, Transvaal v McCagie and Others*<sup>56</sup> (“*McCagie*”) were candidates for the position of headmaster at certain high schools. The persons appointed to these positions did not possess the qualifications required by law, and the applicants accordingly sought to have the appointments declared void.<sup>57</sup> One of the counter-arguments, however, was that the applicants had no *locus standi* because the statute merely regulated the appointment procedure and did not confer rights upon them of any kind.<sup>58</sup>

The Appellate Division, with reference to *Bagnall* and *Dalrymple*, confirmed that the *actio popularis* was not recognised in South African procedural law and that a private individual could not institute an action on behalf of the public.<sup>59</sup> However, the applicants *in casu* were candidates for positions governed by the legislation in question, which meant that they had a direct interest in the matter. The court consequently found that the applicants had the right to enforce the provisions of the statute.<sup>60</sup>

#### 2 2 4 5 *Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd*

The case of *Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd* (“*Roodepoort-Maraiburg*”)<sup>61</sup> concerned the occupation of property by coloured or Asian persons in contravention of the Transvaal Act,<sup>62</sup> which prohibited the occupation of property in certain areas by persons of these ethnic groups. The appellants approached the court to enforce the prohibition.

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<sup>55</sup> *Dalrymple v Colonial Treasurer* 1910 TS 372 at 386.

<sup>56</sup> 1918 AD 616.

<sup>57</sup> *Director of Education, Transvaal v McCagie and others* 1918 AD 616 at 619.

<sup>58</sup> *Director of Education, Transvaal v McCagie and others* 1918 AD 616 at 621.

<sup>59</sup> *Director of Education, Transvaal v McCagie and others* 1918 AD 616 at 621; C Loots “Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation” (1987) 104 *South African Law Journal* 131 135.

<sup>60</sup> *Director of Education, Transvaal v McCagie and others* 1918 AD 616 at 622.

<sup>61</sup> *Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87.

<sup>62</sup> 35 of 1908.

According to the court, any member of the public who could show that they were adversely affected by non-compliance with a statute enacted in the public interest<sup>63</sup> would have *locus standi* to enforce that statute.<sup>64</sup> In addition, the court held that:

“Where it appears either from the reading of an enactment itself or from that plus a regard to surrounding circumstances that the Legislature has prohibited the doing of an act in the interest of any person or a class of persons, the intervention of the Court can be sought by any such person to enforce the prohibition without proof of special damage.”<sup>65</sup>

On the facts, the court found that the prohibition in the legislation had been enacted for the benefit of the municipality. As the municipality owned property in the township concerned, it automatically had *locus standi* to enforce the statute.<sup>66</sup> From this decision, it is clear that a person need not have suffered personal harm or damage as a consequence of conduct that is expressly prohibited by statute enacted in the public interest, in order to approach a court for a remedy.<sup>67</sup>

## 2 2 5 Relaxation of the direct interest requirement

For many years after *Roodepoort-Maraiburg*, there were no significant decisions concerning the issue of *locus standi*.<sup>68</sup> However, in the later cases discussed below, the courts displayed a more liberal attitude to standing.

### 2 2 5 1 *Wood & Others v Ondangwa Tribal Authority & Another*

The case of *Wood & Others v Ondangwa Tribal Authority & Another* (“*Wood*”)<sup>69</sup> presents an exception to the “personal damage” rule set out in *Patz* and is referred to by Devenish as “a *locus classicus* in South African jurisprudence in relation to

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<sup>63</sup> It is disconcerting to note in retrospect that the enforcement of apartheid legislation was considered to be in the public interest. However, this skewed understanding of the public interest nevertheless contributed to the relaxation of standing.

<sup>64</sup> *Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 96.

<sup>65</sup> *Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 96.

<sup>66</sup> *Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 98.

<sup>67</sup> T Ngcukaitobi “The Evolution of Standing Rules in South Africa and Their Significance in Promoting Social Justice” (2002) 18 *South African Journal on Human Rights* 590 592.

<sup>68</sup> C Loots “Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation” (1987) 104 *South African Law Journal* 131 136.

<sup>69</sup> 1975 2 SA 294 (A).

standing”.<sup>70</sup> This decision is an example of a successful action in the public interest prior to the interim Constitution.

Wood, an Anglican bishop, approached the court for an interdict ordering the respondents to desist from administering corporal punishment to members of his church who were suspected of being members or sympathisers of either the Democratic Co-Operative Development Party or the South-West Africa People’s Organisation.<sup>71</sup> The court *a quo* held that the applicants’ personal rights or interests were not affected because they were church leaders. Therefore, they lacked standing.<sup>72</sup>

On appeal, the Appellate Division held that courts should broadly interpret the interests of persons whose liberty is at stake.<sup>73</sup> In cases of illegal deprivation of liberty, someone approaching the court would not be acting in the interests of the public but would rather be acting in the interest of the detainees who were unable to come to court themselves. The court found that the interest that a person may have in the liberty of another may arise not only through family relationship or personal friendship but also through the relationship that may bind the two persons by reason of an agreement, express or implied, relating to a matter of common interest, such as a partnership, a society, a church or a political party.<sup>74</sup>

Following this line of reasoning, any member of such a society or body would have an interest in the liberty of a co-member.<sup>75</sup> Rumpff CJ even extended this principle to other cases where a third person seeks the intervention of a court of law for humanitarian reasons.<sup>76</sup> However, courts had to be satisfied that the interested person on whose behalf the application was brought would have brought the application themselves if they were able to do so.<sup>77</sup>

Van der Vyver notes that the Appeal Court’s decision in *Wood* contributed to restoring the basic characteristic of the *actiones populares* in the *interdictum de libero*

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<sup>70</sup> G E Devenish “*Locus Standi* Revisited: Its Historical Evolution and Present Status in terms of Section 38 of the South African Constitution” (2005) 38 *De Jure* 28 32.

<sup>71</sup> *Wood & Others v Ondangwa Tribal Authority & Another* 1975 2 SA 294 (A) paras 298G–H.

<sup>72</sup> *Wood & Others v Ondangwa Tribal Authority & Another* 1975 2 SA 294 (A) para 305F.

<sup>73</sup> *Wood & Others v Ondangwa Tribal Authority & Another* 1975 2 SA 294 (A) para 310F, G.

<sup>74</sup> *Wood & Others v Ondangwa Tribal Authority & Another* 1975 2 SA 294 (A) paras 312D–H.

<sup>75</sup> *Wood & Others v Ondangwa Tribal Authority & Another* 1975 2 SA 294 (A) para 312H.

<sup>76</sup> *Wood & Others v Ondangwa Tribal Authority & Another* 1975 2 SA 294 (A) para 312H.

<sup>77</sup> *Wood & Others v Ondangwa Tribal Authority & Another* 1975 2 SA 294 (A) para 311F.

*homine exhibendo* and other applications brought by third persons for humanitarian reasons.<sup>78</sup> After this decision, it was unnecessary for applicants to show their personal interest in the matter at hand as either relations or friends.<sup>79</sup> The court also held that the competency to bring such an application could reside in more than one person.<sup>80</sup>

The *Wood* decision created precedent for any third person to apply for an interdict to restrain human rights infringements by state authority if the applicant could show that the victims of such infringements were not in a position to bring the application themselves.<sup>81</sup> As was the case with the *actiones populares* in Roman law, the competency to approach the courts in such matters was not dependent upon the applicant's interest in the matter.<sup>82</sup> Loots noted even before the interim Constitution was adopted that this decision proves that anyone should be able to bring an action in the public interest for issues of great importance to society.<sup>83</sup>

#### 2 2 5 2 *Bamford v Minister of Community Development and State Auxiliary Services*

The case of *Bamford v Minister of Community Development and State Auxiliary Services* ("*Bamford*")<sup>84</sup> is noteworthy because the applicant claimed to be acting purely in the public interest.<sup>85</sup> The applicant was a Member of Parliament and a resident of the suburb of Rondebosch in Cape Town, who approached the court to enforce the Rhodes' Will (Groote Schuur Devolution) Act.<sup>86</sup> This Act contained provisions aimed at preserving access to the park on Groote Schuur Estate in Rondebosch for the benefit

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<sup>78</sup> J A van der Vyver "Actiones Populares and the Problem of Standing in Roman, Roman-Dutch, South African and American Law" (1978) 3 *Acta Juridica* 191 197.

<sup>79</sup> *Wood & Others v Ondangwa Tribal Authority & Another* 1975 2 SA 294 (A) para 311F.

<sup>80</sup> *Wood & Others v Ondangwa Tribal Authority & Another* 1975 2 SA 294 (A) paras 312D–F.

<sup>81</sup> J A van der Vyver "Actiones Populares and the Problem of Standing in Roman, Roman-Dutch, South African and American Law" (1978) 3 *Acta Juridica* 191 198.

<sup>82</sup> J A van der Vyver "Actiones Populares and the Problem of Standing in Roman, Roman-Dutch, South African and American Law" (1978) 3 *Acta Juridica* 191 198.

<sup>83</sup> C Loots "Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation" (1987) 104 *South African Law Journal* 131 146.

<sup>84</sup> 1981 3 SA 1054 (C).

<sup>85</sup> C F Swanepoel "The Judicial Application of the 'Interest' Requirement for Standing in Constitutional Cases: 'A Radical and Deliberate Departure from Common Law'" (2014) 47 *De Jure* 63 66.

<sup>86</sup> 9 of 1910; *Bamford v Minister of Community Development and State Auxiliary Services* 1981 3 SA 1054 (C) para 1054D.



of the public.<sup>87</sup> The applicant, alleging that he had a right of access to the park as a member of the public, thus sought a permanent interdict preventing the respondent from erecting houses on the estate.<sup>88</sup>

One of the grounds on which the respondent opposed the application was the applicant's standing to bring the matter.<sup>89</sup> The respondent argued in this regard that the applicant did not allege that he himself had ever exercised the right of access to the park, nor did he intend to do so in future.<sup>90</sup> According to the *Roodepoort-Maraiburg* judgment, this meant that the applicant should therefore not be afforded standing.<sup>91</sup>

However, in its decision, the court *in casu* noted that an important difference between *Roodepoort-Maraiburg* and *Bamford* was the purpose of the statutory provisions concerned. Unlike the statute in *Roodepoort-Maraiburg*, which prohibited certain actions, the statute in *Bamford* conferred a positive right of access to all members of the public.<sup>92</sup> As a result, the court held that unlawful interference with such a right entitled any member of the public to seek relief without proof of special damages.<sup>93</sup>

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<sup>87</sup> Clause 13 of the late Right Honourable Cecil John Rhodes's will became incorporated in the preamble of the Act. See *Bamford v Minister of Community Development and State Auxiliary Services* 1981 3 SA 1054 (C) paras 1055H – 1056C. Clause 13(3) reads as follows:

“13. I give my property following, that is to say, my residence known as De Groote Schuur situate near Mowbray in the Cape Division in the said Colony together with all furniture, plate, and other articles contained therein at the time of my death, and all other land belonging to me situated under Table Mountain, including my property known as Mosterts to my trustees hereinbefore named upon and subject to the conditions following, that is to say: ...

(3) The said residence and its gardens and grounds shall be retained for a residence for the Prime Minister for the time being of the said Federal Government of the States of South Africa to which I have referred in Clause 6 hereof, my intention being to provide a suitable official residence for the First Minister in that Government befitting the dignity of his position and until there shall be such a Federal Government may be used as a park for the people.”

<sup>88</sup> *Bamford v Minister of Community Development and State Auxiliary Services* 1981 3 SA 1054 (C) paras 1056C–D.

<sup>89</sup> *Bamford v Minister of Community Development and State Auxiliary Services* 1981 3 SA 1054 (C) para 1059E.

<sup>90</sup> *Bamford v Minister of Community Development and State Auxiliary Services* 1981 3 SA 1054 (C) para 1059G.

<sup>91</sup> *Bamford v Minister of Community Development and State Auxiliary Services* 1981 3 SA 1054 (C) paras 1059G–H.

<sup>92</sup> C F Swanepoel “The Judicial Application of the ‘Interest’ Requirement for Standing in Constitutional Cases: ‘A Radical and Deliberate Departure from Common Law’” (2014) 47 *De Jure* 63 67.

<sup>93</sup> *Bamford v Minister of Community Development and State Auxiliary Services* 1981 3 SA 1054 (C) paras 1059H and 1060A.

In order to hand down an interim order, the court had to balance the relief sought by the applicant against the resultant harm that the respondent would suffer by the granting or refusal of the interim interdict. In doing so, the court took cognisance of the fact that the applicant brought the action “to vindicate the rights of the public”.<sup>94</sup> The respondent was ordered to cease building, and was interdicted from continuing, pending the outcome in the trial court.<sup>95</sup> It is clear from this decision that, against the backdrop of the public’s growing concern for the protection of the environment, private persons may have an interest in a general administrative action.<sup>96</sup>

### 2 2 5 3 *Veriava and Others v President, SA Medical and Dental Council, and Others*

In the case of *Veriava and Others v President, SA Medical and Dental Council, and Others* (“*Veriava*”),<sup>97</sup> the South African Medical and Dental Council had made a decision not to investigate a complaint pertaining to improper and disgraceful conduct of certain registered professionals.<sup>98</sup> This was allegedly a failure of a statutory duty on the part of the respondents.<sup>99</sup> The applicants accordingly sought to have this decision reviewed and set aside, but the respondents argued that the applicants lacked *locus standi* because they had failed to show that they had personally suffered damage or injury.<sup>100</sup> However, counsel for the respondents acknowledged that a breach of statute

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<sup>94</sup> *Bamford v Minister of Community Development and State Auxiliary Services* 1981 3 SA 1054 (C) paras 1061B–H. As public interest standing was not recognised in South African law at this time, the applicant was not able to bring the action on behalf of the public.

<sup>95</sup> *Bamford v Minister of Community Development and State Auxiliary Services* 1981 3 SA 1054 (C) para 1062C.

<sup>96</sup> G E Devenish “*Locus Standi* Revisited: Its Historical Evolution and Present Status in terms of Section 38 of the South African Constitution” (2005) 38 *De Jure* 28 32.

<sup>97</sup> 1985 2 SA 293 (T); B Mqingwana *An Analysis of Locus Standi in Public Interest Litigation with Specific Reference to Environmental Law; a Comparative Study Between the Law of South Africa and the Law of the United States of America* Unpublished LLM thesis, University of Pretoria (2011) 18 – 19.

<sup>98</sup> The Medical, Dental and Supplementary Health Service Professions Act 56 of 1974 conferred upon the South African Medical and Dental Council (“the Council”) the power to deal with complaints of conduct against any person registered under the Medical and Dental Act that were allegedly damaging to the profession. See *Veriava and Others v President, SA Medical and Dental Council, and Others* 1985 2 SA 293 (T) para 311C.

<sup>99</sup> *Veriava and Others v President, SA Medical and Dental Council, and Others* 1985 2 SA 293 (T) paras 315G–H.

<sup>100</sup> *Veriava and Others v President, SA Medical and Dental Council, and Others* 1985 2 SA 293 (T) para 315B.



in question, which had been enacted in the interest of medical practitioners as a class of persons, would cause sustained damages for the class.<sup>101</sup>

One of the aims of the statute in question was to protect members of the public in their dealings with members of the medical profession. However, at the same time, it was also aimed at protecting members of the medical profession.<sup>102</sup> The court referred to both *McCagie* and *Roodepoort-Maraisburg* in its decision regarding the issue of *locus standi*.<sup>103</sup> According to the court, in instances where a statutory provision prohibits an act in the interest of a class of persons, then any such person could approach the court to enforce the prohibition without having to prove special damage.<sup>104</sup> The interest of the class can be determined from either the reading of a statute or from a combination of the statute and the surrounding circumstances.<sup>105</sup> As a result, the court found that members of the medical profession had a real and direct interest in the prestige, status and dignity of their profession.<sup>106</sup>

## 2 2 6 Conclusion

This section started by noting the existence of the *actio popularis* in Roman law, which was available only in certain circumstances. Due to the inconvenience of the action, however, it quickly fell into misuse under Roman-Dutch law.<sup>107</sup>

The decision in *Patz* marked a re-emergence of the *actio popularis*.<sup>108</sup> Building on this development, the *Wood* and *Veriava* matters demonstrated a willingness by the courts to adopt an increasingly liberal stance to the issue of *locus standi*. However, the special damage requirement remained in force and effectively limited who was able to approach courts seeking the enforcement of prohibitions of acts laid down by

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<sup>101</sup> *Veriava and Others v President, SA Medical and Dental Council, and Others* 1985 2 SA 293 (T) para 315C.

<sup>102</sup> *Veriava and Others v President, SA Medical and Dental Council, and Others* 1985 2 SA 293 (T) para 316F.

<sup>103</sup> *Veriava and Others v President, SA Medical and Dental Council, and Others* 1985 2 SA 293 (T) para 315G.

<sup>104</sup> *Veriava and Others v President, SA Medical and Dental Council, and Others* 1985 2 SA 293 (T) para 315F.

<sup>105</sup> *Veriava and Others v President, SA Medical and Dental Council, and Others* 1985 2 SA 293 (T) paras 315E–F.

<sup>106</sup> *Veriava and Others v President, SA Medical and Dental Council, and Others* 1985 2 SA 293 (T) para 311B.

<sup>107</sup> *Dalrymple v Colonial Treasurer* 1910 TS 372 at 392.

<sup>108</sup> R G McKerron *The Law of Delict* 7 ed (1971) 283.

legislation. Individuals approaching a court were only entitled to claim appropriate relief that was in their personal, sufficient and direct interest.<sup>109</sup>

As public interest law expanded, this requirement needed to be amended.<sup>110</sup> The issue of standing to claim relief in the public interest began receiving considerable attention in the 1970s when a number of legal academics around the world wrote on the subject and presented strong arguments for the relaxation of standing rules to accommodate this development.<sup>111</sup> However, the position of the courts regarding public standing before the interim Constitution remained restrictive.

Even though the courts stood firm on the principle that the litigant must have a personal interest in a matter to have standing, the liberalisation of *locus standi*, seen in the cases of *Wood* and *Bamford*, finally resulted in the recognition of public interest standing in section 7(4) of the interim Constitution and, later, section 38 of the final Constitution.<sup>112</sup> The following section will provide an overview of the South African Law Commission's recommendations regarding the interpretation and development of public interest standing in South Africa's constitutional dispensation.

## **2 3 Report and recommendations by the South African Law Commission**

### **2 3 1 Introduction**

Soon after the interim Constitution came into effect, the SALC began investigating the need to introduce legislation to deal with class actions and public interest suits.<sup>113</sup> The result was the proposed introduction in 1998 of legislation that would regulate class and public interest actions.<sup>114</sup> In *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* (sometimes referred to simply as "*Project 88*"), the SALC notes that public interest actions were included in both the interim and final Constitutions, and could be seen as "part of the worldwide movement to make

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<sup>109</sup> This requirement was confirmed by the court in *Milani and Another v South African Medical and Dental Council and Another* 1990 1 SA 899 (T).

<sup>110</sup> G E Devenish "Locus Standi Revisited: Its Historical Evolution and Present Status in terms of Section 38 of the South African Constitution" (2005) 38 *De Jure* 28 36.

<sup>111</sup> South African Law Commission *Working Paper 57: The Recognition of a Class Action in South African Law* (1995) 8 at 2.3.

<sup>112</sup> See part 2 4 below.

<sup>113</sup> T Ngcukaitobi "The Evolution of Standing Rules in South Africa and Their Significance in Promoting Social Justice" (2002) 18 *South African Journal on Human Rights* 590 610.

<sup>114</sup> Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995.

access to justice a reality”.<sup>115</sup> As the promulgation of section 38 of the Constitution envisions a notable departure from the common-law rules relating to standing, it is worth considering the recommendations of the SALC.<sup>116</sup>

The recommendations by the SALC address the need for a public interest action in South African law, and also propose a definition and requirements for such an action. Although the SALC made it clear that legislation would also be necessary to broaden the scope of public interest actions to non-Bill of Rights cases, the recommendations contained in *Project 88* concern public interest standing to enforce constitutional rights.<sup>117</sup> The development of public interest standing was something that the SALC felt should not be left solely to judicial development.<sup>118</sup>

A study of these recommendations will reveal what the SALC deemed most important regarding the development of public interest standing in South Africa. This section will also assist in laying a foundation for proposals for the development of public interest standing in South Africa to address problems or deficiencies identified in relation to public interest standing.

### 2 3 2 Background to the investigation

In 1992, the former Minister of Justice requested that the SALC investigate the possible recognition of class actions. However, the Working Committee also included actions in the public interest in its investigation, with the aim of contributing to increased access to justice.<sup>119</sup>

The SALC begins its report by providing background to the investigation it conducted on public interest actions. Here, it acknowledges the traditionally restrictive nature of the South African law of standing.<sup>120</sup> The SALC also recognises that the

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<sup>115</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 v para 1.

<sup>116</sup> C F Swanepoel “The Judicial Application of the ‘Interest’ Requirement for Standing in Constitutional Cases: ‘A Radical and Deliberate Departure from Common Law’” (2014) 47 *De Jure* 63 67.

<sup>117</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 14 at 3.3.3.

<sup>118</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 15 at 3.4.1.

<sup>119</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 v paras 1, 4 at 1.3.1.

<sup>120</sup> See part 2 2 for the way in which public interest standing was approached by the courts prior to the introduction of the interim Constitution.

courts previously required a personal, sufficient and direct interest before a litigant would be afforded standing in court and that this has been problematic in public law.<sup>121</sup> For instance, the findings of *Project 88* note that it was difficult for applicants to prove compliance with the personal interest requirement where interests of litigants were shared with the public,<sup>122</sup> as was the case in *Bamford*.<sup>123</sup> The requirement also resulted in representative organisations being denied standing if the organisations themselves lacked direct interest, even if their members did not.<sup>124</sup>

An important factor leading to the investigation by the SALC was the use of public interest actions in foreign jurisdictions outside the scope of constitutional law. The report refers to some examples where public interest actions would find application outside the scope of Bill of Rights litigation. These include actions where a number of persons have the same or similar claims or defences; actions arising from a single event (“sudden mass disaster”); actions arising from a single cause but at different times and under different circumstances (“creeping disaster”); actions arising from consumer transactions (“consumer claims”); and actions arising from a common factor affecting a class (such as pregnant women, children, parents and the disabled).<sup>125</sup> These actions provided insight into the scope of public interest standing.

### 2 3 3 The nature and function of public interest standing

#### 2 3 3 1 *Distinction between public interest actions and class actions*

As *Project 88* offers recommendations regarding both public interest actions and class actions, which are separate and distinct procedures, it is necessary to distinguish between the two.<sup>126</sup> The SALC notes that the essential difference between these

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<sup>121</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 1 at 1.2.1. The SALC noted, however, that these problems were not exclusive to the realm of public law, but that they occurred less in matters of a private law nature. See part 2 2 above.

<sup>122</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 1 at 1.2.1.

<sup>123</sup> See part 2 2 5 2 above for a discussion of this case.

<sup>124</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 1 – 2 at 1.2.1.

<sup>125</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 2–3 at 1.2.3.

<sup>126</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 v para 2.

actions is the binding nature of the judgment handed down. The judgment in a class action binds all members of the class, whereas the judgment in a public action does not bind the people in whose interest it is brought.<sup>127</sup>

A class action is defined by the SALC as:

“an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and which action is certified as a class action in terms of the Act”.<sup>128</sup>

In contrast, the SALC defines a public interest action as “an action instituted by a representative in the interest of the public generally, or in the interests of a section of the public, but not necessarily in that representative’s own interest”.<sup>129</sup> This reflects the definition offered by Loots, who highlights that public interest actions are brought by plaintiffs seeking to benefit any portion of the public by the relief sought.<sup>130</sup> These actions therefore potentially offer a mechanism through which the violation of the rights of large sections of the population can be challenged.<sup>131</sup> This is an especially pertinent feature in South Africa’s economic and social context, where many poor people are not afforded adequate access to justice.<sup>132</sup>

Both public interest and class actions are representative in nature, requiring a plaintiff to act on behalf of a number of people. However, whereas a litigant in a class action suit must have some interest in common with the other members of the class in question in order to be afforded standing, a public interest litigant need not have a personal or direct interest in the matter. In fact, such litigant should not be acting primarily in their own interest.<sup>133</sup> Whether or not the interests of someone wishing to

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<sup>127</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 v para 2.

<sup>128</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 vi para 8.

<sup>129</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 23 at 4.3.2.

<sup>130</sup> C Loots “Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation” (1987) 104 *South African Law Journal* 131 132.

<sup>131</sup> S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 89.

<sup>132</sup> Y Vawda “Access to Justice: From Legal Representation to Promotion of Equality and Social Justice – Addressing the Legal Isolation of the Poor” (2005) 26 *Obiter* 234 234 (arguing that the term “access to justice” needs to be redefined to promote equality and social justice of vulnerable groups in South Africa).

<sup>133</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 6 – 7 at 2.2 and 2.3.

be afforded standing in the public interest are affected, their primary desire must be to benefit the public. The SALC acknowledges that it may be difficult to find such a person.<sup>134</sup>

### 2 3 3 2 *The meaning of “in the public interest”*

The SALC included a discussion of the implications of the words “in the public interest”, for interpretation purposes.<sup>135</sup> This is necessary to consider, especially as someone wishing to approach a court in the public interest may be representing a portion of the public or the public in general.

According to the SALC, this phrase can have one of two meanings. Firstly, it can mean that it is in the public interest to have a particular matter decided by a court. Secondly, it can allude to a benefit that would be shared by members of the public in the event of a successful outcome in a public interest action. The SALC does not indicate a preferable interpretation.<sup>136</sup> The courts have therefore been required to provide an interpretation of the meaning of the phrase “in the public interest”.<sup>137</sup>

### 2 3 3 3 *The plaintiff in public interest actions*

The SALC deemed it important that anyone should be able to institute an action in the public interest, even without a direct interest in the relief claimed.<sup>138</sup> However, courts would be able to limit unmeritorious public interest actions by requiring that the action be instituted in the interest of the public (whether a section of the public or the public as a whole) and on the condition of the presence of a suitably qualified representative.<sup>139</sup>

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<sup>134</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 6 at 2.2.2.

<sup>135</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.5.2. The judiciary has been left to develop its own definition of the phrase.

<sup>136</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.5.2.

<sup>137</sup> See part 4 3 5 1 below.

<sup>138</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 v para 4.

<sup>139</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 25 at 4.4.4. This recommendation is discussed in greater detail under part 4 2 1 below.



It was proposed that the person wishing to institute a public interest action need only identify the public interest action as such and to nominate themselves or any other suitable person as the representative plaintiff of those on whose behalf the relief would be claimed.<sup>140</sup> Upon satisfaction that the action should proceed by way of a public interest action, the court would appoint a representative.<sup>141</sup>

This representative should be “suitably qualified” or “genuine” in his or her endeavours to represent the public interest.<sup>142</sup> The requirement of promoting the “best interests” of the public also implies that the representative concerned should be independent of the defendant(s), and that there should be no apparent conflict of interest.<sup>143</sup>

#### 2 3 3 4 *Proposed legislation to regulate public interest actions*

According to the SALC, subjecting public interest actions to “costly procedures and requirements” would be contrary to the spirit and purport of section 38 of the Constitution.<sup>144</sup> No certification of public interest actions was to be required for this reason.<sup>145</sup> However, in order to ensure greater access to justice, the SALC proposed legislation that would regulate public interest standing.<sup>146</sup> Although both the interim and final Constitutions provide for public interest actions in a constitutional context, the SALC found that legislation would be necessary to give effect and meaning to the right to approach a court for relief in the public interest.<sup>147</sup>

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<sup>140</sup> See part 4 2 1 below for a discussion of the importance of roles that public interest litigants and representatives play today.

<sup>141</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 27 at 4.6.2.

<sup>142</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 27 at 4.6.2 and 4.6.3.

<sup>143</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 27 at 4.6.3.

<sup>144</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 25 at 4.4.4.

<sup>145</sup> However, part 4 3 4 below re-assesses the recommendation against certification in light of lessons learned from the development of public interest standing in India.

<sup>146</sup> W L R de Vos “Reflections on the Introduction of a Class Action in South Africa” (1996) 4 *Journal of South African Law* 639 641.

<sup>147</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 14 at 3.3.3.

The SALC identified the need to introduce legislation to compensate for the alleged failure of the courts to develop public interest actions up to that point.<sup>148</sup> Looking to the future, the SALC feared that without legislation regulating public interest actions, development of public interest standing by the courts would take place without uniformity or consistency, if at all.<sup>149</sup> In *Working Paper 57: The Recognition of a Class Action in South African Law* (“*Working Paper 57*”),<sup>150</sup> the SALC explicitly proposed the regulation of public interest actions by way of an Act of Parliament and not rules of court. This recommendation was uncontested.<sup>151</sup>

Accordingly, *Project 88* contains a Draft Bill on Class Actions and Public Interest Suits (“the SALC’s draft Bill”).<sup>152</sup> Chapter 2 of the SALC’s draft Bill concerns public interest actions and offers guidance regarding the institution of a public interest action, the representative in these actions and costs. This chapter is only one page in length and speaks primarily to the procedure entailed in public interest actions.<sup>153</sup> Chapter 4 of the Bill offers clarity regarding the appointment of commissioners to collect evidence and make recommendations;<sup>154</sup> settlement, abandonment and discontinuance, and that none of these may occur without prior court approval;<sup>155</sup> and designation of courts by the Minister, which simply enables the Minister to designate in which courts public interest actions can be brought.<sup>156</sup>

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<sup>148</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 22 at 4.2.4.

<sup>149</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 15 at 3.4.1.

<sup>150</sup> South African Law Commission *Working Paper 57: The Recognition of a Class Action in South African Law* (1995) 12 at 2.11.

<sup>151</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 12 at 3.1.3.

<sup>152</sup> Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995, found in South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 87 – 104; G E Devenish “*Locus Standi* Revisited: Its Historical Evolution and Present Status in terms of Section 38 of the South African Constitution” (2005) 38 *De Jure* 28 46.

<sup>153</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 90 – 91.

<sup>154</sup> See part 4 2 3 1 below.

<sup>155</sup> See the introduction to part 4 2 2 below.

<sup>156</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 97 – 98. See part 4 2 2 1 below.



## 2 3 4 Conclusion

In *Project 88*, the SALC highlighted a number of public interest standing-related problems that could arise without legislation regulating public interest actions. The SALC accordingly sought to introduce legislation to give content to section 38(d) of the Constitution. However, this draft Bill was not adopted.

The courts' approach to the development of public interest standing may have been criticised by the SALC in the publication of its report and recommendations in 1998, but much advancement has occurred since. The way the courts have dealt with issues of public interest standing during the era of constitutional democracy will be examined in the following section.

## 2 4 Public interest standing under the South African Constitution

### 2 4 1 Introduction

The introduction of the interim Constitution caused the private law model of standing to be replaced by a flexible public law model.<sup>157</sup> The common law position relating to standing has now been significantly broadened. Section 7(4)(b)(v) of the interim Constitution explicitly recognised public interest standing as a ground of *locus standi* by which to approach a court for relief in the event of an infringement or threat of infringement of a right in the Bill of Rights. The content of this provision was largely incorporated into section 38 of the final Constitution, which reads as follows:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.”<sup>158</sup>

According to Loots, the need for this provision in the interim Constitution and, ultimately, the final Constitution, could be found in the practical barriers preventing

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<sup>157</sup> T Ngcukaitobi “The Evolution of Standing Rules in South Africa and Their Significance in Promoting Social Justice” (2002) 18 *South African Journal on Human Rights* 590 602.

<sup>158</sup> Section 38 of the Constitution of the Republic of South Africa, 1996.

people from approaching a court for relief when their fundamental rights were infringed.<sup>159</sup> The standing provisions of the Constitution should be interpreted in a manner that gives effect to the fundamental values of the Constitution, in order to promote social justice.<sup>160</sup>

#### 2 4 2 Public interest standing under section 38(d) of the 1996 Constitution

It is trite that standing to bring a case before a court of law is a procedural precondition for a determination of the merits of such case.<sup>161</sup> The existence of *locus standi* depends on the party wishing to bring such matter, as opposed to having any link to the issue in question.<sup>162</sup> Public interest standing, specifically provided for in section 38(d) of the Constitution, creates the opportunity for any individual or group to approach a court if moved by a desire to benefit any portion of the public.<sup>163</sup>

This broadened scope of standing is required for litigation of a public character, where the relief sought is generally forward-looking and general in its application.<sup>164</sup> It also displays elements of the Roman law *actio popularis* (especially the *actiones ordinariae*)<sup>165</sup> insofar as it also recognises each person's interest in the due performance of government activities, and accordingly enables the validity of such actions to be challenged by anyone.<sup>166</sup>

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<sup>159</sup> C Loots "Standing to Enforce Fundamental Rights" (1994) 10 *South African Journal on Human Rights* 49 49.

<sup>160</sup> T Ngcukaitobi "The Evolution of Standing Rules in South Africa and Their Significance in Promoting Social Justice" (2002) 18 *South African Journal on Human Rights* 590 602.

<sup>161</sup> C Loots "Standing, Ripeness and Mootness" in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2 2005) 7–2.

<sup>162</sup> C Loots "Standing, Ripeness and Mootness" in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2 2005) 7–1.

<sup>163</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 2.2.1; C Loots "Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation" (1987) 104 *South African Law Journal* 131 132. The Constitutional Court has recently confirmed in *Mokone v Tassos Properties CC and Another* 2017 5 SA 456 (CC) at para 17 that issues do not have to be important to all citizens to be deemed to be of general public importance; they need only be of importance to a "sufficiently large section of the public".

<sup>164</sup> V Amar and M V Tushnet *Global Perspectives on Constitutional Law* (2009) 10. However, the relief may also be retrospective, as would be the case of an interdict for unlawful behaviour, for example.

<sup>165</sup> See part 2 2 2 above for Van der Keessel's categorisation of *actiones populares*.

<sup>166</sup> M Wiechers *Administrative Law* (1985) 275; G E Devenish "Locus Standi Revisited: Its Historical Evolution and Present Status in terms of Section 38 of the South African Constitution" (2005) 38 *De Jure* 28 42. See part 2 2 2 above.

Standing under section 38(d) of the Constitution is supported by the doctrine of the “ideological” or “non-Hohfeldian” plaintiff.<sup>167</sup> Hohfeld suggests that plaintiffs in a court of law must either be seeking a determination of the existence of a right, privilege, immunity or power. It follows that a “non-Hohfeldian” plaintiff is a party who is granted standing without seeking to vindicate any fundamental legal right of their own.<sup>168</sup> Accordingly, a plaintiff seeking standing under section 38(d) of the Constitution of South Africa is not granted standing necessarily in order to vindicate a fundamental legal right of their own, but rather to institute an action for relief in the public interest.

Section 38 of the Constitution therefore introduces a “radical departure”<sup>169</sup> from the common-law rules that regulated the issue of standing, arguably most evident in section 38(d). This is because the applicant in a public interest action is not the direct bearer of the right concerned and need not have a direct interest in the remedy sought. The public interest standing provision found in the Constitution is a significant departure even from the old *actiones populares* found in Roman law, which only allowed an applicant to act in the public interest in specific instances.<sup>170</sup> This makes it the most extensive of the five listed grounds enabling parties to seek enforcement of rights contained in the Bill of Rights.<sup>171</sup>

The role of courts in a new constitutional democracy, as noted by O’Regan J in *Ferreira v Levin NO* (“*Ferreira*”),<sup>172</sup> is to facilitate access to justice, which is not possible without a forward-thinking approach to the issue of standing.<sup>173</sup> Furthermore, this role is not confined to the Constitutional Court, as held by the court in *Beukes v Krugersdorp Transitional Local Council and Another*.<sup>174</sup> All courts should now adopt a broad

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<sup>167</sup> C Loots “Standing, Ripeness and Mootness” in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2 2005) 7–2.

<sup>168</sup> L L Jaffe “The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff” (1968) 116 *University of Pennsylvania Law Review* 1033 1033 – 1047.

<sup>169</sup> *Kruger v President of the Republic of South Africa and Others* 2009 1 SA 417 (CC) para 22.

<sup>170</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 233. A Berger Encyclopedic Dictionary of Roman Law (1953) defines *actiones populares* as “actions which can be brought by ‘any one among the people’. They are of praetorian origin and serve to protect public interest (*ius populi*).”

<sup>171</sup> C Loots “Standing, Ripeness and Mootness” in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2 2005) Juta & Co Ltd 7–11.

<sup>172</sup> 1996 1 SA 984 (CC).

<sup>173</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 230.

<sup>174</sup> 1996 3 SA 467 (W).

approach to standing when adjudicating constitutional issues.<sup>175</sup> Standing should therefore not be granted only to those with a direct interest in the outcome of the case, especially where remedies may have far-reaching impacts for many people.<sup>176</sup>

### 2 4 3 Requirements for invoking section 38(d)

In order to invoke section 38 of the Constitution, there must be an infringement or threatened infringement of a right in the Bill of Rights and the applicant must fall within a category listed under section 38. However, an applicant alleging *locus standi* under section 38(d) and purporting to act in the public interest does not have to prove an infringement or threatened infringement of the public's rights.<sup>177</sup> They need only allege that the challenged rule or conduct is objectively in breach of a right enshrined in the Bill of Rights<sup>178</sup> and that the public has a sufficient interest in the relief sought.<sup>179</sup>

In *Port Elizabeth Municipality v Prut* ("Prut"),<sup>180</sup> the court held that the issue of whether a litigant will be accorded public interest standing, regardless of his or her own interest in the matter, depends on whether the matter is of purely academic interest or not.<sup>181</sup> Public interest standing is also more likely to be granted if a decision in the matter may quash similar disputes.<sup>182</sup> Thus, an allegation of an infringement of or threat to a right is necessary to confer standing, but the applicant need not necessarily be the holder of the right or rights in question. Melunsky J in *Prut* held further that courts should more readily allow standing in terms of section 38(d) where there "is a pressing

<sup>175</sup> *Beukes v Krugersdorp Transitional Local Council and Another* 1996 3 SA 467 (W) para 474E.

<sup>176</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 230.

<sup>177</sup> C Loots "Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation" (1987) 104 *South African Law Journal* 131 132; South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26. Loots notes that a public right is a right enjoyed by all members of the public, and that it is possible for a plaintiff to bring an action based on a public right while seeking relief in his or her own interest. This must be distinguished from an action in the public interest.

<sup>178</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 235.

<sup>179</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 168. See also C Plasket "South Africa" (2009) 622 *The Annals of the American Academy of Political and Social Science* 256 262. The court in *Port Elizabeth Municipality v Prut* 1996 4 SA 318 (E) has noted, however, that this requirement is difficult to prove.

<sup>180</sup> 1996 4 SA 318 (E).

<sup>181</sup> *Port Elizabeth Municipality v Prut* 1996 4 SA 318 (E) at 325I.

<sup>182</sup> *Port Elizabeth Municipality v Prut* 1996 4 SA 318 (E) at 325E–F.

public interest that the decision be given soon”. However, public interest standing must not be confused with standing based on an “interested public” or a public opinion.<sup>183</sup>

Additionally, the Constitutional Court has proposed that a focus on whether it is objectively in the interest of the public that a matter be heard would act as a safeguard against the abuse of public interest standing by “busybodies”.<sup>184</sup> In his minority judgment *Lawyers for Human Rights*, Madala J reinforced the fact that cases should be examined carefully and individually,<sup>185</sup> which will help to ensure that only cases genuinely in the public interest are heard. It is the view of the SALC that the relief sought by the litigant can be useful in determining their intent.<sup>186</sup>

#### 2 4 4 The role of the courts in the development of public interest standing

The development of public interest law – and public interest standing – will depend on the legal issues brought to court by public interest litigants.<sup>187</sup> The cases discussed below discuss the courts’ interpretation of section 38(d) of the Constitution. The judgments handed down by the courts will clarify the current position of public interest standing in South Africa.

##### 2 4 4 1 *Ferreira v Levin NO*

##### **2 4 4 1 1 Majority judgment**

In *Ferreira*,<sup>188</sup> the Constitutional Court adopted a broad approach to section 7(4) of the interim Constitution.<sup>189</sup> Section 417 of the former Companies Act (“the Companies

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<sup>183</sup> M Du Plessis, G Penfold and J Brickhill *Constitutional Litigation* (2013) 47. See in this regard *Glenister v President of Republic of South Africa and Others* 2009 1 SA 287 (CC).

<sup>184</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 18.

<sup>185</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 68.

<sup>186</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26. According to the SALC, the phrase “in the public interest” can mean either that it is in the interest of the public that a matter be heard or that every member of the public will benefit from a finding in their favour.

<sup>187</sup> *Minister of Justice and Correctional Services v Estate Stransham-Ford* 2017 3 SA 152 (SCA) para 24.

<sup>188</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC).

<sup>189</sup> Section 7(4) of the interim Constitution was the predecessor to section 38 of the final Constitution. See part 2 4 1 above.

Act”<sup>190</sup> concerned the interrogation of persons in connection with the winding-up of companies unable to pay their debts. Both of the applicants in this case had been summoned in terms of subsection 471(1) and (2), which they submitted would compel them to answer self-incriminating questions. The matters were referred to the Constitutional Court to determine the consistency of the challenged provisions of the Act with the interim Constitution.

The applicants sought to have section 417(2)(b) of the Companies Act declared unconstitutional and therefore invalid.<sup>191</sup> However, the Court could only exercise its jurisdiction to do so if the applicants had the necessary standing. The applicants were neither “accused persons” for purposes of section 25(3) of the interim Constitution, nor was there any way to determine whether they would be in future.<sup>192</sup> Consequently, there was no actual or threatened infringement of the applicants’ right to a fair criminal trial. However, Chaskalson P found that the applicants nevertheless had sufficient interest in the decision on the constitutionality of section 417(2)(b).<sup>193</sup>

By the Court’s reasoning, the matter was technically rendered academic or hypothetical<sup>194</sup> by the conundrum presented by section 7(4) of the interim Constitution, which requires actual or threatened infringement of a right contained in the Bill of Rights. However, in order to ensure that constitutional rights were given the full measure of protection they deserved, the Court adopted a broad approach to

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<sup>190</sup> 61 of 1973. Section 417 of the Companies Act deals with the summoning and examination of persons as to the affairs of a company in winding up proceedings. Subsections 417(1) and 417(2)(b) state in part as follows:

“417. Summoning and examination of persons as to the affairs of the company

(1) In any winding-up of a company unable to pay its debts, the Master of the Court may, at any time after a winding-up order has been made, summon before him or it any director or office of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company”; and

“(2) (b) Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may be used as evidence against him.”

<sup>191</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) paras 161 – 162.

<sup>192</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 41.

<sup>193</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 163.

<sup>194</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 164.



standing.<sup>195</sup> Whereas a narrow reading of section 7(4)(b) of the Constitution would not enable the applicants to challenge the impugned section of the Companies Act, the Court found that section 98(2) of the interim Constitution vested a jurisdiction in the Constitutional Court to “interpret, protect and enforce” constitutional provisions.<sup>196</sup> A broad approach to standing enabled any of the persons listed under section 7(4)(b) to approach a court for relief in their own interest. The Court did not consider the possibility of the applicants acting in the public interest.

#### **2 4 4 1 2 *Minority judgment of O’Regan J***

In contrast to the majority of the Court, O’Regan J held that there was no evidence on record before the Court that enabled the applicants to rely on own-interest standing.<sup>197</sup> However, she noted that even in the absence of an actual or threatened infringement of a right, the special circumstances of the case at hand warranted reliance on public interest standing.<sup>198</sup> This ground of standing contained in section 7(4)(b)(v) was a new departure in South African law from common law.<sup>199</sup>

Wider rules of standing are appropriate for constitutional litigation,<sup>200</sup> as they ensure that it is not only persons with vested interests in the actual or threatened infringement of rights in the Bill of Rights who are granted standing. This approach helps ensure that such issues are heard by the courts.<sup>201</sup> However, O’Regan J was cautious<sup>202</sup> of affording applicants public interest standing because remedies sought in constitutional

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<sup>195</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 165.

<sup>196</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 167.

<sup>197</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 231.

<sup>198</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 233.

<sup>199</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 233.

<sup>200</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 229.

<sup>201</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 230.

<sup>202</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 234. In O’Regan J’s words: “This court will be circumspect in affording applicants standing by way of section 7(4)(b)(v)”. This view is shared by Indian courts. See *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 9. This case is discussed in part 3 3 4 4 2 below.



challenges generally have a wider impact than private litigation.<sup>203</sup> Consequently, public interest applicants are required to prove that they are acting genuinely in the public interest.<sup>204</sup> O'Regan J then set out a list of factors to determine whether an applicant is acting genuinely in the public interest.<sup>205</sup> These elements must be considered in the context of each case.<sup>206</sup> They also function as safeguards to avoid abuse of public interest standing. The factors include:

“whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court.”<sup>207</sup>

O'Regan J concluded that public interest standing should be granted to the applicants *in casu* for a number of reasons: the impugned provision of the Companies Act was objectively in breach of the Bill of Rights; there would be a delay if the Court were forced to wait for other persons to bring the same challenge; the relief sought was within the Court's jurisdiction, and of a general nature; there had been considerable input from *amici curiae*; and those directly interested in the constitutionality of section 417 had been afforded adequate opportunity to place their views before the Court.<sup>208</sup>

#### 2 4 4 2 *Lawyers for Human Rights v Minister of Home Affairs*

In *Lawyers for Human Rights v Minister of Home Affairs* (“*Lawyers for Human Rights*”),<sup>209</sup> the first applicant, a human rights non-governmental organisation, and second applicant, a foreign national, sought a declaration that certain provisions of the

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<sup>203</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) paras 229 – 230.

<sup>204</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 234.

<sup>205</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 234.

<sup>206</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 234.

<sup>207</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 234.

<sup>208</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 236.

<sup>209</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC).

Immigration Act (“the Immigration Act”)<sup>210</sup> were unconstitutional. The impugned provisions in section 34 of the Act<sup>211</sup> concerned the treatment of “illegal foreigners” in South Africa.<sup>212</sup>

Section 34(1) concerned the power of an immigration officer to arrest, detain and deport “illegal foreigners”. Sections 34(8) and (9) concern “illegal foreigners” at ports of entry. According to section 34(8), immigration officers are given the discretion to detain “illegal foreigners” on the vehicles used to enter South Africa. Section 34(2) stipulates that “illegal foreigners” must be released from detention within forty-eight hours if they are not to be deported. However, according to section 34(2), this provision does not extend to “illegal foreigners” detained on ships in terms of section 34(8).

The Constitutional Court deemed this matter to be one of “immense public importance” for three reasons. Firstly, the impugned provisions restricted liberty and dignity of people classified as “illegal foreigners”.<sup>213</sup> The Court held that it would be a blight on South Africa’s constitutional democracy if national integrity were secured at this cost.<sup>214</sup> Secondly, the Court recognised that many of the people deemed to be “illegal foreigners” may lack financial resources and support of family and friends, as well as an understanding of South African law.<sup>215</sup> This placed them in a weak position to seek redress in court for violations of their rights. Lastly, the Court acknowledged the fact that many of the ships on which “illegal foreigners” were detained do not remain in port for longer than a few days at most.<sup>216</sup> This, too, was indicative of there being very little chance that the people affected would be able to approach a court to vindicate their rights.<sup>217</sup>

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<sup>210</sup> 13 of 2002.

<sup>211</sup> Subsections 1, 2, 8 and 9 of the Immigration Act 13 of 2002.

<sup>212</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) paras 2 – 13.

<sup>213</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 20.

<sup>214</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 20.

<sup>215</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 21.

<sup>216</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 21.

<sup>217</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 22.

In his majority judgment, Yacoob J noted that section 38 of the Constitution introduced a “radical departure” from standing under the common law.<sup>218</sup> Public interest standing under section 38(d) is clearly intended to have a wider reach than standing to act on behalf of another person, as well as a class of persons. It must therefore be interpreted with this understanding.<sup>219</sup>

As a point of departure, the Court referred to O’Regan J’s minority judgment in *Ferreira* to determine the reach of section 38(d) of the Constitution.<sup>220</sup> The Court confirmed that, when dealing with standing under section 38(d), it is important to ascertain whether a person or organisation acts genuinely in the public interest. The Court then endorsed the factors laid down by O’Regan to determine whether the applicant is acting genuinely in the public interest, and also reaffirmed the broad approach to standing advocated by the majority in *Ferreira*.

As in O’Regan J’s minority judgment in *Ferreira*, two issues needed to be addressed before the applicant could be afforded public interest standing.<sup>221</sup> These were distilled by the court as follows. Firstly, there must be an inquiry into the subjective position of the party claiming to act in the public interest. Secondly, there must be proof that it is objectively in the public interest for the matter to be brought before the court. A person or organisation alleging public interest standing will be permitted to proceed if these two requirements are met.<sup>222</sup>

In its inquiry into the subjective position of the first applicant, the Court held that it is of primary importance that a litigant relying on public interest standing does so in good faith.<sup>223</sup> The Court noted that Lawyers for Human Rights was a non-profit organisation with a principal objective to “promote, uphold, foster, strengthen and enforce in South

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<sup>218</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 14.

<sup>219</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 15.

<sup>220</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 17, referring to *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 234.

<sup>221</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 18.

<sup>222</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 18.

<sup>223</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 18.

Africa all human rights”, and that this indicated that it was acting genuinely in the public interest.<sup>224</sup>

Thereafter, the Court had to consider whether it was objectively in the public interest that the matter be heard. It noted *obiter* that the consideration of abstract matters, where no individuals could be said to have had their rights infringed or threatened,<sup>225</sup> may be deemed objectively in the public interest in certain circumstances.<sup>226</sup> On the facts, the Court held that, due to a lack of “resources, knowledge, power or will to institute appropriate proceedings”, there was a remote chance that the provisions in question would be challenged by those affected by the impugned provisions of the Immigration Act.<sup>227</sup> Failure of the Court to declare the challenged provisions unconstitutional would affect hundreds of immigrants detained illegally and facing removal from South Africa. Accordingly, the Court found that it was objectively in the public interest that the matter be heard.<sup>228</sup>

As it was ascertained that Lawyers for Human Rights was acting genuinely in the public interest, it was found to have public interest standing. The Court did not deem it necessary to determine whether or not the second applicant had standing.<sup>229</sup>

Madala J penned a minority judgment, which is also significant for the purposes of this thesis because it proposes the addition of a further factor to be taken into account when considering whether or not to grant public interest standing.<sup>230</sup> He suggested that the egregiousness of the conduct complained of must also be considered.<sup>231</sup>

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<sup>224</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 22. Madala J (at para 78) concurs with this in his minority judgment.

<sup>225</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 67.

<sup>226</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 18.

<sup>227</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 22.

<sup>228</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 22.

<sup>229</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 23.

<sup>230</sup> The consideration of this factor is additional to the other factors in the list proposed by O'Regan J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 234.

<sup>231</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 73.

### 2 4 4 3 *Albutt v Centre for the Study of Violence and Reconciliation*

The case of *Albutt v Centre for the Study of Violence and Reconciliation*<sup>232</sup> concerns convicted prisoners and the issue of presidential pardon under section 84(2)(j) of the Constitution, and whether the victims of offences committed with a political motive were entitled to a hearing. The applicant, Mr Albutt, applied for leave to appeal directly to the Constitutional Court and for direct access to the Constitutional Court.<sup>233</sup>

In the High Court, a coalition of non-governmental organisations (“NGOs”)<sup>234</sup> launched an urgent application for an interdict preventing the President from granting any pardons until the finalisation of the main application.<sup>235</sup> The NGOs relied on section 38(b), (c) and (d) of the Constitution to litigate on behalf of victims of offences committed with political motive. The NGOs challenged the exclusion of victims from participating in the special dispensation process on the grounds that it was inconsistent with *inter alia* section 33 of the Constitution.<sup>236</sup> The High Court found that the NGOs had standing to act on behalf of victims who could not act in their own name, in the interest of victims and also in the public interest.<sup>237</sup>

The issue of standing then had to be revisited by the Constitutional Court.<sup>238</sup> The applicant contended that the NGOs were entitled to seek declaratory relief only, as opposed to an order preventing the President from granting the pardons.<sup>239</sup> In this regard, the Court acknowledged the broad approach to standing adopted by the Constitution, especially regarding the violation of rights in the Bill of Rights, and most apparent in section 38(d).<sup>240</sup>

The NGOs contended that their primary aim was to assist victims of political violence, and that they had an interest in upholding the rule of law and ensuring

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<sup>232</sup> 2010 3 SA 293 (CC).

<sup>233</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 1.

<sup>234</sup> Centre for the Study of Violence and Reconciliation, Khulumani Support Group, International Centre for Transitional Justice, Institute for Justice and Reconciliation, South African History Archives Trust, Human Rights Media Centre and Freedom of Expression Institute.

<sup>235</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 9.

<sup>236</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 9.

<sup>237</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 10.

<sup>238</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) paras 32 – 35.

<sup>239</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 32.

<sup>240</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 33.

compliance with the Constitution.<sup>241</sup> As the matter concerned the exclusion of victims from participation in the special dispensation, they had an interest in fulfilling its objectives.<sup>242</sup> The NGOs were granted public interest standing on the basis that the process followed by the President had to comply with the Constitution and the rule of law. The Court also noted that the victims of that process had been unable to seek relief themselves.<sup>243</sup> The NGOs were accordingly afforded standing to seek an order preventing the President from granting the pardons without affording the victims of the offences an opportunity to be heard.

#### *2 4 4 4 Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others*

In *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* (“*Democratic Alliance*”),<sup>244</sup> the Democratic Alliance (the “DA”) brought an application for an order reviewing, correcting and setting aside the decision of the then Acting National Director of Public Prosecutions to discontinue its prosecution of President Jacob Zuma on corruption charges, as well as a declaration that the decision was inconsistent with the Constitution. The High Court found that the DA did not have standing to bring the application.<sup>245</sup>

However, on appeal, the Supreme Court of Appeal reiterated the fact that the Constitution adopts a broad approach to standing, in particular, when it comes to the violation of rights in the Bill of Rights.<sup>246</sup> The federal constitution of the DA recognised the Constitution as the supreme law of the land and displayed a commitment to protect South Africans from abuse of power.<sup>247</sup> This showed *bona fides* on the part of the DA to act in the public interest.

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<sup>241</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 34.

<sup>242</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 34.

<sup>243</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 34.

<sup>244</sup> 2012 3 SA 486 (SCA).

<sup>245</sup> *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 3 SA 486 (SCA) para 11.

<sup>246</sup> *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 3 SA 486 (SCA) para 42, citing *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) paras 33–34.

<sup>247</sup> *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 3 SA 486 (SCA) para 43.



The court held further that all political parties participating in parliament are representing the public.<sup>248</sup> In addition, both political parties and the public necessarily have an interest in ensuring that public power is exercised in accordance with constitutional and legal prescripts and that the rule of law is upheld.<sup>249</sup> This clearly includes the actions of the National Prosecuting Authority.<sup>250</sup> However, the court noted that few South African citizens or political parties have the resources or ability to bring an application of this kind.<sup>251</sup>

After its inquiry into the subjective position of the applicant's claim to be acting in the public interest, as well as proof that it is objectively in the public interest for the matter to be brought before the court, the court was convinced that the DA was acting genuinely in the public interest and that it was in the public interest that the matter be heard.<sup>252</sup>

## 2 4 5 Conclusion

Before the adoption of the interim and final Constitutions, the courts enforced strict *locus standi* rules and did not afford applicants standing if applicants lacked a personal, sufficient and direct interest in the relief sought. Section 38(d) now allows anyone to approach a court in the public interest to seek relief for an infringement or threatened infringement of a right in the Bill of Rights.

The cases discussed in this section show the way the courts have handled this new and broad ground on which standing can be granted. It is clear from all of the jurisprudence on the subject that a person or organisation wanting to rely on public interest standing must be acting genuinely in the public interest. O'Regan J proposed a number of factors in *Ferreira* to aid in this determination. A further factor was added by Madala J in his minority judgment in *Lawyers for Human Rights*, but the list has not been expanded since. As well as ensuring that the applicant is acting genuinely in the

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<sup>248</sup> *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 3 SA 486 (SCA) para 44.

<sup>249</sup> *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 3 SA 486 (SCA) para 44.

<sup>250</sup> *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 3 SA 486 (SCA) para 44.

<sup>251</sup> *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 3 SA 486 (SCA) para 44.

<sup>252</sup> *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 3 SA 486 (SCA) para 45.



public interest, the court must be satisfied that it is objectively in the public interest that the matter be heard. This test is still applied by the courts today.

Public interest standing has been developed solely by the courts, without the aid of legislation. Whether or not a lack of statutory regulation has been the root cause of some of the pitfalls present in this area of the law today is a matter for speculation. There are also a number of merits regarding the status of public interest standing. The following section will aim to provide an evaluation of public interest standing as it is currently applied under the constitutional dispensation.

## **2 5 Assessment of the status of public interest standing in South Africa at present**

### **2 5 1 Merits of public interest standing in South Africa**

The Constitution of the Republic of South Africa envisages a society built on social justice, equality, human dignity and respect for fundamental human rights and freedoms.<sup>253</sup> In reality, however, South Africa is still an unequal society with high levels of poverty<sup>254</sup> and a highly skewed income distribution.<sup>255</sup> Public interest actions, although not traditionally brought as a matter of urgency,<sup>256</sup> are an important mechanism through which systemic violations of socio-economic rights affecting a large section of the public can be challenged.<sup>257</sup>

The generous approach to standing adopted by the courts helps to facilitate constitutional litigation on behalf of those who were denied basic rights under the apartheid regime and who today may remain unaware of their rights. The Constitutional Court has held that this is particularly important in South Africa.<sup>258</sup> Public interest

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<sup>253</sup> S Ngcobo “Probono.org and the Delivery of Access to Justice to All” (2011), Johannesburg <[www.probono.org.za/wp-content/uploads/2011/05/CJ-Speech-15Apr.doc](http://www.probono.org.za/wp-content/uploads/2011/05/CJ-Speech-15Apr.doc)>. See also *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 8.

<sup>254</sup> Statistics South Africa *Poverty Trends in South Africa Report No. 03-10-06* (2017) 14. According to this report, the number of South Africans living in poverty in 2011 was 27,3 million (53,2% of the population), which increased in 2015 to 30,4 million (55,5% of the population). The latest published statistics show that 13,8 million South Africans live below the food poverty line (R441 per month).

<sup>255</sup> Y Vawda “Access to Justice: From Legal Representation to Promotion of Equality and Social Justice – Addressing the Legal Isolation of the Poor” (2005) 26 *Obiter* 234 238.

<sup>256</sup> 2017 3 SA 152 (SCA) para 76.

<sup>257</sup> S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 89.

<sup>258</sup> *Kruger v President of the Republic of South Africa and Others* 2009 1 SA 417 (CC) para 23; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 33.

actions, in particular, offer a mechanism by which the violations of the rights of large portions of the public can be challenged.<sup>259</sup> The Constitutional Court has even held that it may be in the public interest to hear abstract matters under certain circumstances.<sup>260</sup> These elements contribute to making public interest standing a means of increasing access to justice for the poor and vulnerable.

The Constitutional Court has laid down a number of factors to determine the genuineness of an applicant relying on section 38(d) for standing.<sup>261</sup> This has helped to exclude busybodies and applicants acting for political or profit motives. As public interest standing also facilitates the crafting of structural, forward-looking and community-orientated remedies,<sup>262</sup> it is helpful that the courts thus far have created a general standard for the suitable public interest litigant.

Due to the fact that so many South Africans are not in a position to approach the courts for legal redress, as well as the technicality of legal procedures and the need for the opportunity to attain justice, section 38 the Constitution has specifically enabled “anyone” asserting a right in the Bill of Rights to approach a court.<sup>263</sup> Section 38(d) enables plaintiffs to approach courts for relief in the public interest on behalf of those who, due to their circumstances, are unable to do so themselves.<sup>264</sup> This inability to approach a court could be due to such people’s ignorance of their rights or enforcement thereof, their fear of the judicial process, or the trauma or cost of litigation.<sup>265</sup> Having one person or organisation able to approach a court on behalf of all of those whose rights are infringed offers a solution to those unable to do so. This was virtually inconceivable under the common law.<sup>266</sup>

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<sup>259</sup> S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 89.

<sup>260</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 18.

<sup>261</sup> See parts 2 4 4 1 2 and 2 4 4 2 above in this regard.

<sup>262</sup> Socio-Economic Rights Institute of South Africa *Public Interest Legal Services in South Africa: Project Report* (2015) 52 – 53.

<sup>263</sup> *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 4 SA 1184 (SCA) para 1194[6] B–C; C F Swanepoel “The Judicial Application of the ‘Interest’ Requirement for Standing in Constitutional Cases: ‘A Radical and Deliberate Departure from Common Law’” (2014) 47 *De Jure* 63 72.

<sup>264</sup> S Meer “Litigating Fundamental Rights: Rights and Social Action Litigation in India: A Lesson for South Africa” (1993) 9 *South African Journal on Human Rights* 358 362.

<sup>265</sup> C Loots “Standing to Enforce Fundamental Rights” (1994) 10 *South African Journal on Human Rights* 49 49 – 50.

<sup>266</sup> See part 2 2 above.

Courts have shown sensitivity towards those who lack resources or support to approach a court for vindication of their rights. Public interest standing has allowed matters to be brought by persons or organisations with the ability and financial means on behalf of these people. In *Lawyers for Human Rights*, the Constitutional Court noted that circumstances may dictate the hearing of proceedings brought in the public interest without a live case.<sup>267</sup> In such cases, the factors laid down by O'Regan would be useful in determining whether such abstract matters should be allowed to proceed.<sup>268</sup>

It is also worth noting that, despite a lack of legislation enacted to regulate public interest standing, some of the recommendations proposed by the SALC have been implemented by the courts. The courts have been hesitant to provide a definition of a public interest action,<sup>269</sup> but have instead, as already noted, developed an inquiry to ascertain whether a matter is brought genuinely in the public interest. This involves an examination of the subjective position of the party claiming to act in the public interest, and proof that it is objectively in the public interest for the matter to be brought before the court.<sup>270</sup> In this way, the courts have also laid down certain requirements for public interest actions, as recommended by the SALC.<sup>271</sup> This has meant that section 38(d) has been given content by the courts and that public interest standing has indeed been developed to some extent, despite the fears of the SALC.<sup>272</sup>

## 2 5 2 Pitfalls of public interest standing in South Africa

The broader approach to standing envisaged by section 38(d) of the Constitution has enabled a wider spectrum of litigants to enforce rights contained in the Bill of Rights. However, public interest standing does not require meaningful interaction between the

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<sup>267</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 18.

<sup>268</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 18.

<sup>269</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 24 at 4.3.4.

<sup>270</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 18.

<sup>271</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.4.5. There are requirements for public interest actions suggested by the SALC that have not been implemented. These are incorporated into part 4 2 1 below.

<sup>272</sup> See part 2 3 1 above.

representatives who bring the public interest action and those directly affected by the litigation.<sup>273</sup> There is thus the risk that those whose rights are directly affected will not be given an opportunity to be heard or to participate in the relevant litigation. In addition to this, there is no indication that the public interest representative is authorised to speak on behalf of those they seek to represent, nor that they share the victims' goals or ideas.<sup>274</sup> Consequently, there is the risk that those parties approaching the courts for relief in the public interest are not the most suitable representatives to act in the public interest in the given matter.<sup>275</sup>

The Constitutional Court has attributed the difficulty of providing a set test for public interest standing to the fact that the phrase "in the public interest" is difficult to define.<sup>276</sup> In every situation, the court will have to determine this by carefully considering the impact of the rights violation on those concerned.<sup>277</sup> However, even these considerations by the courts do not ensure that the representative is the most suitable representative as opposed to simply being a genuine one.<sup>278</sup>

There are inherent risks involved in granting public interest standing if litigants do not act genuinely in the public interest. These include, *inter alia*, inefficient use of limited judicial resources,<sup>279</sup> the possibility that courts could be flooded with claims brought by people with no real interest in the matters,<sup>280</sup> as well as the possibility that public interest actions could constitute an abuse of process, and a mechanism for the furtherance of profit, political or popularity-seeking motives.<sup>281</sup> This, in turn, presents

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<sup>273</sup> K Schiemann "Locus Standi" (1990) *Public Law* 342 349.

<sup>274</sup> W J Aceves "Actio Popularis – The Class Action in International Law" (2003) 2003 *University of Chicago Legal Forum* 353 398 – 399.

<sup>275</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 24–26 at 4.4.1 and 4.4.6.

<sup>276</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 68.

<sup>277</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 68, citing Ackermann J in the matter of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2002 2 SA 1 (CC).

<sup>278</sup> This problem is dealt with in part 4 2 1 below.

<sup>279</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 35.

<sup>280</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26. This was a concern even before the adoption of the interim Constitution and was consequently a factor in favour of the limitation of public interest standing, as confirmed by the court in the case of *Dalrymple v Colonial Treasurer* 1910 TS 372.

<sup>281</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 35–38.

the risk that judges admit cases on the basis that they concern popular issues in society as opposed to issues of systemic and isolated rights violations.<sup>282</sup>

In contrast with the approach of the Indian Supreme Court to public interest actions,<sup>283</sup> South African courts have exhibited what Fowkes terms “cautious minimalism”.<sup>284</sup> This is a practice of refusing to hear cases that are not well developed or resourced, and most likely lack sufficient information and perspectives.<sup>285</sup> A concern with this approach is that it precludes the Constitutional Court from providing lower courts, litigators and citizens with clear guidelines for how to proceed under such circumstances.<sup>286</sup> Needless to say, this approach may be seen to impede the development of public interest standing. In contrast to cautious minimalism, however, there is a danger that public interest actions can encourage courts to disregard the doctrine of separation of powers and fulfil roles of executive and legislative branches of government.<sup>287</sup>

## 2 6 Conclusion

Under the common law, actions in the public interest were virtually unknown. However, there were a few reported cases that could have been said to have been brought in the public interest, despite not specifically being presented as such.

The requirements relating to standing under the common law have been significantly broadened by section 38 of the Constitution. Public interest standing, specifically

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<sup>282</sup> Deva (2009) *CJQ* 36. See, however, a counter-consideration in this regard in *Kesavnanda Bharathi v Union of India* 1973 4 SCC 225, where the court held that:

“The court is not chosen by the people and is not responsible to them in the sense in which the House of the People is. However, it will win for itself a permanent place in the hearts of the people and augment its moral authority if it can shift the focus of judicial review from the numerical concept of minority protection to the humanitarian concept of the protection of the weaker section of the people.”

<sup>283</sup> See parts 3 3 3 and 3 3 4 below.

<sup>284</sup> J Fowkes “How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 446 – 447.

<sup>285</sup> J Fowkes “How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 446.

<sup>286</sup> J Fowkes “How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 446.

<sup>287</sup> M P Jain “The Supreme Court and Fundamental Rights” in S K Verma and K Kusum (eds) *Fifty Years of the Supreme Court of India* (2003) 1 86. The author cautions courts against using public interest litigation in a way that encroaches on the powers of the executive and the legislature, especially given the fact that the administration lacks a sense of accountability and responsibility.

provided for in section 38(d), now creates the opportunity for any individual or group to bring a case before a court if moved by a desire to benefit any portion of the public concerning the infringement or threatened infringement of a right in the Bill of Rights.

However, with no legislation governing section 38(d), as suggested by the SALC, the Constitution alone has had to provide the framework for courts within which public interest litigation framework is developed.<sup>288</sup> This lack of legislation has exposed shortcomings that need to be addressed. These shortcomings were predicted by the SALC and include the need to regulate public interest standing by providing a definition for public interest actions,<sup>289</sup> clear requirements for public interest standing by way of legislation,<sup>290</sup> stipulation that a number of courts that should have jurisdiction to hear matters brought in the public interest<sup>291</sup> and provision for financial support in the case of under-resourced litigants.<sup>292</sup> If addressed, these areas will help to create greater legal certainty regarding public interest standing and can offer ways of navigating the pitfalls of public interest standing.

In order to determine how best to address these concerns, the following chapter will seek to determine to what extent public interest standing in India has developed and helped to advance access to justice, especially for the poor, and whether these lessons can be applied in a South African context. The findings from India in this regard can potentially offer much guidance for the enhanced realisation of improved access to justice in South Africa through the development of public interest standing.

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<sup>288</sup> C F Swanepoel “The Judicial Application of the ‘Interest’ Requirement for Standing in Constitutional Cases: ‘A Radical and Deliberate Departure from Common Law’” (2014) 47 *De Jure* 63 69.

<sup>289</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 24 at 4.3.4.

<sup>290</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.4.5.

<sup>291</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 30 at 4.8.2.

<sup>292</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 ix para 24.



## **Chapter 3: The history and evolution of public interest standing in India**

### **3 1 Introduction**

The issue of the liberalisation of standing rules was raised in India forty years ago, and has since given rise to the public interest litigation (often referred to simply as “PIL”) movement. This development in Indian law has provided ways of protecting the weaker sections of society, conserving public resources, and controlling the exercise of public power.<sup>1</sup> Public interest standing has, however, also created much controversy because of the extent to which it can be abused by busybodies and ultimately hamper the administration of justice. The development of this area of Indian law is pertinent when assessing the extent to which Indian courts have contributed to improved access to justice for all citizens, especially as this was the motivation behind the creation of public interest litigation.

This chapter will first provide an overview of the Constitution of India, 1949 (“the Indian Constitution”), as well as the judicial structure. With this foundation, it will be possible to discuss public interest standing as approached by the courts over the three broad phases of public interest litigation. An analysis of the development of public interest standing in India will facilitate an evaluation of strengths and weaknesses of public interest standing as currently applied in India.

### **3 2 The Constitution of India and judicial structure**

#### **3 2 1 Introduction**

The development of public interest standing in India must be understood against the background of the Constitution of India, 1949 (“the Indian Constitution”)<sup>2</sup> and the Indian Supreme Court. This section will highlight only the most important elements of these two pillars in Indian society for purposes of this thesis.

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<sup>1</sup> M N Chaturvedi “Liberalizing the Requirement of Standing in Public Interest Litigation” (1984) 26 *Journal of the Indian Law Institute* 42 42.

<sup>2</sup> Constitution of India, 1949.



### 3 2 2 The Indian Constitution

India gained independence from Britain on 15 August 1947.<sup>3</sup> The Constituent Assembly adopted a transformative constitution on 26 November 1949, which came into effect on 26 January 1950 and remains in force today.<sup>4</sup> The Constituent Assembly, led by Dr Bhimrao Ramji Ambedkar, comprised people from a variety of backgrounds, all of whom had made significant contributions in their respective and diverse fields.<sup>5</sup> The result of work on this project that began in December 1946 was – and still is – the longest and most detailed constitution in the world.<sup>6</sup>

Although the Indian Constitution does not strictly apply the doctrine of separation of powers,<sup>7</sup> it incorporates many checks and balances drawn from the American system, as well as a list of justiciable rights based on the American Bill of Rights.<sup>8</sup> It is primarily, according to Austin, a “social document”: a tool designed to enable social revolution.<sup>9</sup>

The preamble to the Indian Constitution articulates a commitment to secure justice, liberty, equality and fraternity for all Indian citizens.<sup>10</sup> It reads:

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<sup>3</sup> S Meer “Litigating Fundamental Rights: Rights and Social Action Litigation in India: A Lesson for South Africa” (1993) 9 *South African Journal on Human Rights* 358 358.

<sup>4</sup> Preamble of the Indian Constitution; Article 394; R Abeyratne “Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy” (2014) 39 *Brooklyn Journal of International Law* 1 26.

<sup>5</sup> A Govindjee “Lessons for South African Social Assistance Law from India: Part I – The Ties That Bind: The Indian Constitution and Reasons for Comparing South Africa With India” (2005) 3 *Obiter* 575 580.

<sup>6</sup> R Abeyratne “Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy” (2014) 39 *Brooklyn Journal of International Law* 1 26; A Govindjee “Lessons for South African Social Assistance Law from India: Part I – The Ties That Bind: The Indian Constitution and Reasons for Comparing South Africa With India” (2005) 3 *Obiter* 575 580.

<sup>7</sup> A Govindjee “Lessons for South African Social Assistance Law from India: Part I – The Ties That Bind: The Indian Constitution and Reasons for Comparing South Africa With India” (2005) 3 *Obiter* 575 580.

<sup>8</sup> S D Susman “Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation” (1994) 13 *Wisconsin International Law Journal* 57 60; R Abeyratne “Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy” (2014) 39 *Brooklyn Journal of International Law* 1 26; S Muralidhar “India: The Expectations and Challenges of Judicial Enforcement of Social Rights” in Langford M (ed) *Social Rights Jurisprudence* (2008) 102.

<sup>9</sup> G Austin *The Indian Constitution: Cornerstone of a Nation* (1972) 27, 55, 75. Austin records that a social revolution in this context meant (citing K Santhanam of the Constituent Assembly) “to get (India) out of the medievalism based on birth, religion, custom and community and reconstruct her social structure on modern foundations of law, individual merit, and social education”. See also A Govindjee “Lessons for South African Social Assistance Law from India: Part I – The Ties that Bind: The Indian Constitution and Reasons for Comparing South Africa with India” (2005) 3 *Obiter* 575 581; S Deva “Public Interest Litigation in India: A Critical Review” (2009) 28 *Civil Justice Quarterly* 19 21.

<sup>10</sup> Preamble to the Indian Constitution.

“We, the people of India, having solemnly resolved to constitute India into a sovereign, secular, democratic republic and to secure to all citizens justice – social, economic and political; equality of status and of opportunity and to promote among them all fraternity assuring dignity of the individual, and the unity and integrity of the nation.”<sup>11</sup>

Of particular interest to this study is the social justice that the Indian Constitution sought to facilitate. This was a significant motive of the drafters of the document.<sup>12</sup> Part III of the Indian Constitution guarantees a number of fundamental rights and obliges the State to take measures to improve the living conditions of the underprivileged. Article 32 of the Indian Constitution is described as “a right to constitutional remedies” and has been made a fundamental right.<sup>13</sup> It specifically grants the right to approach the High Court or Supreme Court for a remedy if a “fundamental right” in article 12 to 31 is infringed.<sup>14</sup> Together, the fundamental rights and Directive Principles of State Policy (“the Directive Principles”) in Part IV, aim to achieve social revolution in India.<sup>15</sup>

The Directive Principles are instrumental in assisting the court in deciding cases before it.<sup>16</sup> These are non-justiciable “principles of policy” to be followed by the State.<sup>17</sup> However, the Directive Principles are still vital for governance of the country.<sup>18</sup> Former Justice Bhagwati viewed the Directive Principles as the most important part of the Constitution.<sup>19</sup> Among these is article 39A, which focuses the State’s efforts on securing equal justice and free legal aid “to ensure that opportunities for justice are not denied to any citizen by reason of economic or other disabilities”.

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<sup>11</sup> Preamble to the Indian Constitution.

<sup>12</sup> A M Rajsekhariah “The Indian Constitution and Socio-economic Justice: The Ambedkar Perspective” in Singh and Gadkar *Social Development and Justice in India* (1995) 230.

<sup>13</sup> P K Ghosh “Judicial Activism and Public Interest Litigation in India” (2013) 1 *Galgotias Journal of Legal Studies* 77 81.

<sup>14</sup> P P Craig and S L Deshpande “Rights, Autonomy and Process: Public Interest Litigation in India” (1989) 9 *Oxford Journal of Legal Studies* 356 357.

<sup>15</sup> G Austin *The Indian Constitution: Cornerstone of a Nation* (1972) 27; P K Ghosh “Judicial Activism and Public Interest Litigation in India” (2013) 1 *Galgotias Journal of Legal Studies* 77 81.

<sup>16</sup> S D Susman “Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation” (1994) 13 *Wisconsin International Law Journal* 57 62.

<sup>17</sup> Article 37 of the Indian Constitution. See R Abeyratne “Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy” (2014) 39 *Brooklyn Journal of International Law* 1 32.

<sup>18</sup> Article 39 of the Indian Constitution.

<sup>19</sup> P N Bhagwati “Judicial Activism and Public Interest Litigation” (1985) 23 *Columbia Journal of Transnational Law* 561 568.

According to Muralidhar, it appeared that the Directive Principles would be made enforceable in the early drafting phases of the Constitution.<sup>20</sup> This proposal was ultimately not adopted. However, article 37 of the Indian Constitution prescribes that, although the Directive Principles are not judicially enforceable, they form an integral part of the governance of India and must be applied in the law-making process.<sup>21</sup> They have also been utilised to give content to various fundamental rights.<sup>22</sup>

### 3 2 3 The Indian Courts

The Indian Constitution also introduced three branches of government and included a parliamentary system with a president and a prime minister.<sup>23</sup> They play an important role in holding the Government accountable to the Constitution and the rule of law.<sup>24</sup>

The Supreme Court is the apex court and also the only federal court, and seats twenty-six justices appointed from the High Courts around the country.<sup>25</sup> It has become tradition that the longest-serving justice serves as the Chief Justice.<sup>26</sup> The Supreme Court of India has original jurisdiction over all cases concerning fundamental rights,<sup>27</sup> as well as extensive appellate jurisdiction.<sup>28</sup> It also has advisory jurisdiction on any dispute between the central and state governments and between state governments.<sup>29</sup>

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<sup>20</sup> S Muralidhar "India: The Expectations and Challenges of Judicial Enforcement of Social Rights" in M Langford (ed) *Social Rights Jurisprudence* (2008) 103.

<sup>21</sup> Article 37 of the Indian Constitution.

<sup>22</sup> P K Ghosh "Judicial Activism and Public Interest Litigation in India" (2013) 1 *Galgotias Journal of Legal Studies* 77 83. See part 3 3 4 2 4 below, which notes the role of the Directive Principles of State Policy in the development of public interest standing.

<sup>23</sup> Articles 52, 74(1), 75(1), 79; S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57 60.

<sup>24</sup> S Muralidhar "India: The Expectations and Challenges of Judicial Enforcement of Social Rights" in Langford M (ed) *Social Rights Jurisprudence* (2008) 102.

<sup>25</sup> S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57 60. The Supreme Court initially seated five justices, but now, by constitutional amendment in 1986, seats twenty-six.

<sup>26</sup> S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57 60 – 61.

<sup>27</sup> Article 32 of the Indian Constitution.

<sup>28</sup> Articles 131 – 134 of the Indian Constitution set out the jurisdiction of the Supreme Court; S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57 61.

<sup>29</sup> S Shankar and P B Mehta "Courts and Socioeconomic Rights in India" in V Gauri and D M Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 146 148.

However, it has no control over its docket, which has contributed towards its high case load.<sup>30</sup> This, in conjunction with the fact that the Supreme Court judges preside over cases in small panels and serve terms of one to six years, has slowly resulted in discrepancies in its decisions.<sup>31</sup>

Like the Supreme Court, the High Courts also have original jurisdiction to enforce fundamental and other rights.<sup>32</sup> However, the roll in High Courts comprises mostly appeals from district courts and summons and petitions in terms of article 226 of the Indian Constitution.<sup>33</sup> A typical High Court judge handles between seventy and one hundred cases each day.<sup>34</sup> Each state of India has a High Court at the top of its own hierarchy of courts.<sup>35</sup> These courts, in turn, each seat a Chief Justice and a varying number of additional judges appointed by the president.<sup>36</sup> High Court judges are fit to be appointed to serve on the bench of the Supreme Court after five years.<sup>37</sup>

Fundamental rights are only enforceable against the State.<sup>38</sup> Articles 32 and 226 of the Indian Constitution provide a remedy for the violations of rights and against unlawful legislative and executive act by giving the Supreme Court and High Courts power in the nature of judicial review.<sup>39</sup> This essentially means that the validity of the

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<sup>30</sup> S Shankar and P B Mehta "Courts and Socioeconomic Rights in India" in V Gauri and D M Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 146 148.

<sup>31</sup> S Shankar and P B Mehta "Courts and Socioeconomic Rights in India" in V Gauri and D M Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 146 149.

<sup>32</sup> Article 226 of the Indian Constitution; A Grover "India" (1996) 1 *Asia Pacific Journal of Environmental Law* 86 86.

<sup>33</sup> Anonymous "High Courts in India" (2013) *IndiaNetzone*. Available at: <[http://www.indianetzone.com/3/high\\_courts\\_india.htm](http://www.indianetzone.com/3/high_courts_india.htm)>.

<sup>34</sup> S Shankar and P B Mehta "Courts and Socioeconomic Rights in India" in V Gauri and D M Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 146 149.

<sup>35</sup> Articles 214, 216, 217(1) of the Indian Constitution; S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57 60.

<sup>36</sup> Articles 216 and 217 of the Indian Constitution.

<sup>37</sup> Article 124(3)(a) of the Indian Constitution.

<sup>38</sup> Article 12 of the Indian Constitution includes in its definition of "the State":

"... the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

<sup>39</sup> A Grover "India" (1996) 1 *Asia Pacific Journal of Environmental Law* 86 86.

decisions of government can be challenged in the High Courts, as well as the Supreme Court.<sup>40</sup>

As will be shown in the course of this chapter, the Supreme Court of India has displayed judicial activism in the way that it has converted constitutional litigation into public interest litigation. The basic mandate given by the Directive Principles regarding the governance of India gave rise to this creative interpretation exhibited by many justices of the Supreme Court.<sup>41</sup> This activism was aimed primarily at realising social justice for all and indeed went a long way to affording the Supreme Court the status of a “people’s court”,<sup>42</sup> but consequently the Court has also faced criticism for its unorthodox methods.<sup>43</sup>

### 3 3 The evolution of public interest standing

#### 3 3 1 Introduction

A relaxation of the rules of standing found in article 32 of the Indian Constitution function as one of the primary mechanisms enabling public interest litigation (or “PIL”) in India.<sup>44</sup> This section will examine the Indian courts’ traditional approach to standing, as well as document the transformation of the rules pertaining to standing, which facilitated the development of public interest litigation in India, and how these changes were applied in case law.

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<sup>40</sup> S Muralidhar “India: The Expectations and Challenges of Judicial Enforcement of Social Rights” in Langford M (ed) *Social Rights Jurisprudence* (2008) 102.

<sup>41</sup> P N Bhagwati “Judicial Activism and Public Interest Litigation” (1985) 23 *Columbia Journal of Transnational Law* 561 568.

<sup>42</sup> R Dhavan “Law as Struggle: Public Interest Law in India” (1994) 36 *Journal of the Indian Law Institute* 302 302–303.

<sup>43</sup> P N Bhagwati “Judicial Activism and Public Interest Litigation” (1985) 23 *Columbia Journal of Transnational Law* 561 567, 569. Bhagwati describes justices of the Supreme Court exercising judicial power “explosively” in order to aid the disadvantaged.

<sup>44</sup> Indian public interest litigation is in no way related to the American model of public interest litigation, which is why many authors refer to it rather as social action litigation. See P Singh “Protection of Human Rights Through Public Interest Litigation in India” (2000) 42 *Journal of the Indian Law Institute* 263 263; U Baxi “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India” (1985) 4 *Third World Legal Studies* 107 108.

## 3 3 2 Traditional approach to standing

One of the ways in which the British rule left its mark on India could be seen in the model of adjudication.<sup>45</sup> This Anglo-Saxon model required compliance with procedural technicalities such as *locus standi*, as well as adherence to an adversarial system of litigation.<sup>46</sup> Under the common law system, the main function of the court was to give remedies to persons whose legal rights were affected.<sup>47</sup>

A person could only bring an action for judicial redress if they personally experienced a threat or violation of their legal rights or interests by the State.<sup>48</sup> Thus, only the holder of the right could sue for actual or threatened violation of the right.<sup>49</sup> It was inconceivable that anyone would be able to approach the court for relief without being personally affected by the rights violation.<sup>50</sup> Furthermore, the courts were accessible only to those who could afford to approach them.<sup>51</sup> Marginalised and disadvantaged groups were consequently denied access to the courts and remained unable to enforce their basic human rights due to a lack of resources.<sup>52</sup>

Article 32 of the Indian Constitution specifically grants the right to approach the Supreme Court for a remedy if a fundamental right in article 12 to 31 is infringed.<sup>53</sup> It reads as follows:

“Remedies for enforcement of rights conferred by this Part

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<sup>45</sup> P Singh “Protection of Human Rights through Public Interest Litigation in India” (2000) 42 *Journal of the Indian Law Institute* 263 264.

<sup>46</sup> *Forward Construction Co. v Prabhat Mandal (Regd.)* 1986 1 SCC 100, 104.

<sup>47</sup> M N Chaturvedi “Liberalizing the Requirement of Standing in Public Interest Litigation” (1984) 26 *Journal of the Indian Law Institute* 42 44. Former Justice Krishna Iyer called this common law approach “the traditional individualism of *locus standi*” in *Municipal Council, Ratlam v Vardhichand* AIR 1980 SC 1622 at 1623.

<sup>48</sup> *Charanjit Lal v Union of India* AIR 1951 SC 41; P N Bhagwati “Judicial Activism and Public Interest Litigation” (1985) 23 *Columbia Journal of Transnational Law* 561 570.

<sup>49</sup> P N Bhagwati “Judicial Activism and Public Interest Litigation” (1985) 23 *Columbia Journal of Transnational Law* 561 570 – 571.

<sup>50</sup> M N Chaturvedi “Liberalizing the Requirement of Standing in Public Interest Litigation” (1984) 26 *Journal of the Indian Law Institute* 42 44.

<sup>51</sup> S D Susman “Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation” (1994) 13 *Wisconsin International Law Journal* 57 63.

<sup>52</sup> P Singh “Protection of Human Rights through Public Interest Litigation in India” (2000) 42 *Journal of the Indian Law Institute* 263 264.

<sup>53</sup> P P Craig and S L Deshpande “Rights, Autonomy and Process: Public Interest Litigation in India” (1989) 9 *Oxford Journal of Legal Studies* 356 357.



- (a) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
- (b) The Supreme Court shall have the power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any rights conferred by this Part.
- (c) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
- (d) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.”<sup>54</sup>

In cases where the complaint is of a legal wrong, article 226 grants standing to the plaintiff to approach the High Court.<sup>55</sup> In addition to articles 32 and 226 of the Constitution, section 133 of the Code of Criminal Procedure allows a public-spirited citizen to approach a Magistrate’s Court for removal of a nuisance by filing a petition.<sup>56</sup>

At the time of its adoption, article 32 of the Indian Constitution was narrowly construed.<sup>57</sup> As was the approach under the common law, only petitioners with a direct interest in the disputed law could petition the court to redress violations of the fundamental rights enshrined in Part III of the Constitution.<sup>58</sup> This strict approach to standing was not absolute and evolved to allow for various exceptions.<sup>59</sup> However, even such decisions did not revolutionise the concept of standing in the way that public interest litigation has done, according to Chaturvedi.<sup>60</sup>

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<sup>54</sup> Article 32 of the Indian Constitution.

<sup>55</sup> Article 226(1) allows anyone to approach the High Court “for the enforcement of any of the rights conferred by Part III and for any other purpose”. See J Cassels “Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?” (1989) 37 *American Journal of Comparative Law* 495 498.

<sup>56</sup> Section 133 of The Code of Criminal Procedure, Act 2 of 1974; P K Ghosh “Judicial Activism and Public Interest Litigation in India” (2013) 1 *Galgotias Journal of Legal Studies* 77 79.

<sup>57</sup> R Abeyratne “Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy” (2014) 39 *Brooklyn Journal of International Law* 1 34.

<sup>58</sup> R Abeyratne “Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy” (2014) 39 *Brooklyn Journal of International Law* 1 34.

<sup>59</sup> *R v Paddington Valuation Officer, ex parte Peachey Property Corpn. Ltd.* [1966] 1 QB 380; *Municipal Corporation v Govind Laxman Savant* AIR 1949 Bom 229; *KR Shenoy v Udipi Municipality* AIR 1974 SC 2177; *Allahabad University Teachers’ Association v Chancellor, Allahabad University* AIR 1982 All 343; *VR Sreerama Rao v Telugudesam* AIR 1983 AP 96.

<sup>60</sup> M N Chaturvedi “Liberalizing the Requirement of Standing in Public Interest Litigation” (1984) 26 *Journal of the Indian Law Institute* 42 46 – 48.



### 3 3 3 The introduction of public interest litigation

#### 3 3 3 1 *The 1975 – 1977 state of emergency*

Following her conviction for election fraud in the general elections and calls for her resignation, Prime Minister Indira Gandhi declared a state of emergency in India in June of 1975, allowing her and the Indian National Congress Party to rule by executive decree.<sup>61</sup> In an attempt to remain in power during this time, four constitutional amendments were passed. These were attempts by the Prime Minister to restrict civil liberties and freedom of the press, and to manipulate the judiciary.<sup>62</sup> The most notable of these attempts were contained in the Forty-second Amendment.<sup>63</sup> The primary effects of this particular piece of legislation were the disqualification of election disputes from judicial review, the transferral of certain state government powers to central government, and the conferral of unfettered power to Parliament to amend the Constitution and pass any law in line with a Directive Principle.<sup>64</sup>

The state of emergency ended in March 1977, soon after which the Janata Party won the elections. The Janata Party quickly repealed the controversial constitutional amendments by passing the Forty-third and Forty-fourth Amendments.<sup>65</sup> However, the emergency period and its accompanying constitutional amendments had undermined the Supreme Court's legitimacy by limiting its powers. The Supreme Court responded to this problem by expanding its jurisdiction and making the judicial process more accessible and participatory.<sup>66</sup> This expansion was achieved by consistently

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<sup>61</sup> R Abeyratne "Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy" (2014) 39 *Brooklyn Journal of International Law* 1 37. See *Indira Gandhi v Raj Narain* AIR 1975 SC 2299, which followed Indira Gandhi's corrupt practices in her election campaign.

<sup>62</sup> R Abeyratne "Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy" (2014) 39 *Brooklyn Journal of International Law* 1 38.

<sup>63</sup> The Constitution (Forty-second Amendment) Act, 1976.

<sup>64</sup> M Mate "The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventative Detention Cases" (2010) 28 *Berkeley Journal of International Law* 216 234.

<sup>65</sup> M Mate "The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventative Detention Cases" (2010) 28 *Berkeley Journal of International Law* 216 244, as referred to by R Abeyratne "Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy" (2014) 39 *Brooklyn Journal of International Law* 1 38.

<sup>66</sup> Z Holladay "Public Interest Litigation in India as a Paradigm for Developing Nations" (2012) 19 *Indiana Journal of Global Legal Studies* 555 559; S Shankar and P B Mehta "Courts and Socioeconomic Rights in India" in V Gauri and D M Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 146 149. By doing so, the Supreme Court could better prevent a repeat of the undermining of civil liberties that occurred during the emergency period.

confirming that the Directive Principles were justiciable under article 21 (the right to life).<sup>67</sup> The Supreme Court applied and evolved the basic structure doctrine to interpret the status of Directive Principles and fundamental rights.<sup>68</sup> The Court has justified the enumeration of many additional rights to those explicitly in the Constitution, by interpreting the right to life as entailing a right to livelihood.<sup>69</sup> Article 21 has since been expanded further by a number of judgments, which contributed to the inclusion of its interpretation the right to equality under article 14 and freedom under article 19,<sup>70</sup> the right to education,<sup>71</sup> the right to food<sup>72</sup> and the right to shelter,<sup>73</sup> to name a few.

### 3 3 3 2 *The need for public interest litigation*

The economy of India was in depression during the 1960s as a result of political uncertainty and corruption.<sup>74</sup> The emergency period of 1975–1977 was a time of “state repression and governmental lawlessness”.<sup>75</sup> During this time, thousands of innocent people including political opponents were sent to jail and there was complete deprivation of civil and political rights.<sup>76</sup>

Against this background, the Supreme Court noted aptly that the bulk of the Indian population was living in abject poverty, which sapped its faith in the existing social and

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<sup>67</sup> R Abeyratne “Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy” (2014) 39 *Brooklyn Journal of International Law* 1 39. The ambit of article 21 saw its first notable development in the decision in *Maneka Gandhi v Union of India* 1978 2 SCR 621. The words “personal liberty” were expanded by the Supreme Court to include the right to travel abroad.

<sup>68</sup> *Minerva Mills Ltd. v Union of India* 1981 1 SCR 206 208, 209. Here, the Supreme Court held that:

“The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. ... [The] harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.”

<sup>69</sup> Z Holladay “Public Interest Litigation in India as a Paradigm for Developing Nations” (2012) 19 *Indiana Journal of Global Legal Studies* 555 567.

<sup>70</sup> *Maneka Gandhi v Union of India* 1978 2 SCR 621.

<sup>71</sup> *Unni Krishnan v State of A.P.* 1993 1 SCR 594.

<sup>72</sup> *PUCL v Union of India*, Writ Petition (Civil) No. 196 (2001).

<sup>73</sup> *Tellis v Bombay Mun. Corp.* 1985 2 SCR Supp. 51.

<sup>74</sup> A Govindjee “Lessons for South African Social Assistance Law from India: Part I – The Ties that Bind: The Indian Constitution and Reasons for Comparing South Africa with India” (2005) 3 *Obiter* 575 589.

<sup>75</sup> P Singh “Enforcing Social Rights through Public Interest Litigation: An Overview of the Indian Experience” in S Deva (ed) *Socio-Economic Rights in Emerging Free Markets: Comparative Insights from India and China* (2015) 101 104.

<sup>76</sup> P Singh “Protection of Human Rights through Public Interest Litigation in India” (2000) 42 *Journal of the Indian Law Institute* 263 264.

economic system.<sup>77</sup> With little hope of restructuring this system in order to make fundamental rights meaningful to these large sections of society, there was a desperate need for a “rescue plan”.<sup>78</sup> The post-emergency period provided an occasion for the judges of the Supreme Court to challenge the obstacles to the provision of access to justice for the poor.<sup>79</sup>

According to former Justice Bhagwati of the Supreme Court, the traditional approach to standing in fundamental rights matters in India posed the greatest barrier to access to justice for the poor.<sup>80</sup> The Supreme Court has consequently noted that these common law *locus standi* rules are socially and culturally inappropriate to India.<sup>81</sup> The Court’s early cases may have imposed strict standing requirements. However, article 32 does not require this restrictive approach, as it sets forth the right of individual citizens to petition the Supreme Court via “appropriate proceedings” to enforce fundamental rights.<sup>82</sup> The rescue plan had materialised in the form of public interest litigation, which sought to facilitate access to justice for the “lowly and the lost” by relaxing the rules of *locus standi*.<sup>83</sup>

### 3 3 3 3    *The role of the judiciary in the introduction of public interest litigation*

Aware of what a deviation from the strict approach to standing could help to achieve in India, the Supreme Court began utilising a range of techniques of judicial activism<sup>84</sup> to convert much of constitutional litigation into public interest litigation, with the

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<sup>77</sup> 1982 AIR 1473 3.

<sup>78</sup> *People’s Union for Democratic Rights v Union of India* 1982 AIR 1473 3.

<sup>79</sup> P Singh “Protection of Human Rights through Public Interest Litigation in India” (2000) 42 *Journal of the Indian Law Institute* 263 264; U Baxi “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India” (1985) 4 *Third World Legal Studies* 107 108.

<sup>80</sup> P N Bhagwati “Judicial Activism and Public Interest Litigation” (1985) 23 *Columbia Journal of Transnational Law* 561 570.

<sup>81</sup> *Forward Construction Co. v Prabhat Mandal (Regd.)* 1986 1 SCC 100, 104.

<sup>82</sup> R Abeyratne “Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy” (2014) 39 *Brooklyn Journal of International Law* 1 43.

<sup>83</sup> *Forward Construction Co. v Prabhat Mandal (Regd.)* 1986 1 SCC 100, 104; A M Sood “Gender Justice Through Public Interest Litigation: Case Studies from India” (2008) 41 *Vanderbilt Journal of Transnational Law* 833 839. Public interest litigation is enabled primarily by a departure from the traditional rules of standing.

<sup>84</sup> P N Bhagwati “Judicial Activism and Public Interest Litigation” (1985) 23 *Columbia Journal of Transnational Law* 561 563 – 566. Bhagwati discusses “technical activism”, “juristic activism” and “social activism” as three main forms that judicial activism can take.

intention of making social justice a reality for all.<sup>85</sup> In order to do so, the Court relied on epistolary jurisdiction which allowed it to treat letters as writ petitions and thereby do away with many of the procedural hurdles traditionally involved in litigation.<sup>86</sup>

Public interest litigation can therefore be said to be led – and even encouraged – by judges in India.<sup>87</sup> Correctly approached, public interest litigation offers the state an opportunity to right a wrong or redress injustice.<sup>88</sup> The challenge to make these changes was levelled at the judiciary by Justice Bhagwati, who believed that judges have the potential to play an active role in law-making.<sup>89</sup>

The Indian Constitution does not make open reference to the doctrine of separation of powers, although it still creates checks and balances for the different branches of government.<sup>90</sup> Consequently, there is the danger that courts disregard their constitutional role and compromise their autonomy from the other branches of government in seeking to vindicate the rights of those who lack access to justice. However, there are those who believe that judicial activism is a necessary reaction to state lawlessness.<sup>91</sup>

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<sup>85</sup> P N Bhagwati “Judicial Activism and Public Interest Litigation” (1985) 23 *Columbia Journal of Transnational Law* 561 567; S Deva “Public Interest Litigation in India: A Critical Review” (2009) 28 *Civil Justice Quarterly* 19 23. Deva notes that the groundwork for public interest litigation in India was set by Bhagwati and Iyer JJ in the 1970s and 1980s. This included modifying the traditional requirements of locus standi, liberalising the procedure to file writ petitions, creating or expanding fundamental rights, overcoming evidentiary problems, and evolving innovative remedies.

<sup>86</sup> M N Chaturvedi “Liberalizing the Requirement of Standing in Public Interest Litigation” (1984) 26 *Journal of the Indian Law Institute* 42 49.

<sup>87</sup> U Baxi “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India” (1985) 4 *Third World Legal Studies* 107 111. Here, Baxi observes that “on and off the bench” many Justices promoted judicial activism to achieve social justice.

<sup>88</sup> L Seth “Social Action Litigation in India” in S Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 97 100; *People’s Union for Democratic Rights v Union of India* 1982 AIR 1473 3.

<sup>89</sup> P N Bhagwati “Judicial Activism and Public Interest Litigation” (1985) 23 *Columbia Journal of Transnational Law* 561 563.

<sup>90</sup> Singh N and Vijay A “Separation of Powers: Constitutional Plan and Practice” (2013) 3 *International Journal of Scientific and Research Publications* 1 1.

<sup>91</sup> P Singh “Public Interest Litigation” (2005) 41 *Annual Survey of Indian Law* 537 539.

### 3 3 3 4 *Relaxed standing as a mechanism to launch public interest litigation*

One of the main factors impeding the effective use of the law and the judicial system by the disadvantaged was access to justice.<sup>92</sup> The Supreme Court discovered that a greater number of people could be afforded access to justice if the traditional rules of standing were relaxed.<sup>93</sup>

The famous case of *SP Gupta v Union of India* (known as the *Judges Transfer* case) is a prominent example of the Supreme Court's observation that the rules of standing needed to be liberalised to accommodate public interest standing.<sup>94</sup> In support of this departure from the traditional approach to standing, the Court referred to Cappelletti's work concerning diffuse rights.<sup>95</sup> Diffuse or "meta-individual" rights and interests are thus named because of their collective and fragmented nature, and are interests held by the public as opposed to any one individual.<sup>96</sup> The infringement of such interests traditionally could not be remedied because no one person could prove a sufficient interest in the remedy or, more simply, no one had the right to seek a remedy.<sup>97</sup> Cappelletti and Garth believed that greater access to justice could be achieved if the rules of standing were relaxed to allow for the vindication of diffuse rights in court.<sup>98</sup>

Article 32 contains the right to constitutional remedies. This is a fundamental right to approach the Supreme Court for a writ order<sup>99</sup> where someone's fundamental rights

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<sup>92</sup> P N Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Columbia Journal of Transnational Law* 561 570.

<sup>93</sup> P N Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Columbia Journal of Transnational Law* 561 570.

<sup>94</sup> *SP Gupta v President of India* 1982 2 SCR 365 para 20; M N Chaturvedi "Liberalizing the Requirement of Standing in Public Interest Litigation" (1984) 26 *Journal of the Indian Law Institute* 42 43. See part 3 3 4 2 2 below for a case discussion.

<sup>95</sup> *SP Gupta v President of India* 1982 2 SCR 365 para 20; Cappelletti M "Vindicating the Public Interest Through the Courts: A Comparativist's Contribution" in M Cappelletti and B Garth (eds) *Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report* Vol III (1979) 520 – 522.

<sup>96</sup> M Cappelletti and B Garth "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) 27 *Buffalo Law Review* 181 194, 239.

<sup>97</sup> M Cappelletti and B Garth "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) 27 *Buffalo Law Review* 181 194, 209.

<sup>98</sup> M Cappelletti and B Garth "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) 27 *Buffalo Law Review* 181 216.

<sup>99</sup> Article 32(2) of the Indian Constitution lists examples, which include "writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*". See part 3 3 2 above for the full content of Article 32. See also: A M Sood "Gender Justice Through Public Interest Litigation: Case Studies from India" (2008) 41 *Vanderbilt Journal of Transnational Law* 833 843 – 844. Sood notes that this list is not a *numerus clausus*.

have been infringed.<sup>100</sup> It is, essentially, a fundamental right that can be used to protect other fundamental rights.<sup>101</sup> The Supreme Court has held that interpretation of article 32 must be in line with the Preamble of the Indian Constitution, the fundamental rights and the Directive Principles of State Policy.<sup>102</sup> Creative interpretation of article 32 by the judiciary has allowed many other rights (other than the fundamental rights contained in articles 12 to 31 of the Indian Constitution) to be enforced.<sup>103</sup>

Bearing in mind that public interest litigation was devised to address rights violations of those who could not afford to approach the courts themselves, the importance of *locus standi* becomes clear. The relaxed rules of standing are considered a *sine qua non* of public interest litigation.<sup>104</sup>

### 3 3 4 Development of public interest standing by the courts

#### 3 3 4 1 Overview

Since its inception, public interest litigation in India has evolved over three broad phases.<sup>105</sup> This section will discuss the development of public interest standing within public interest litigation by the courts according to this timeline. Deva notes that these phases are distinguishable based on who initiated the proceedings, what the focus of the matters were, the parties against whom relief was sought, and the judiciary's responses.<sup>106</sup>

#### 3 3 4 2 The first phase

As early as 1976, the Indian Supreme Court declared that, where there is an infringement of a "community interest", *locus standi* rules should not prevent an

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<sup>100</sup> Article 32(1) of the Indian Constitution.

<sup>101</sup> N B Rakshit "Right to Constitutional Remedy: Significance of Article 32" (1999) 34 *Economic and Political Weekly* 2379 2380.

<sup>102</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67 70.

<sup>103</sup> P N Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Columbia Journal of Transnational Law* 561 567; S Meer "Litigating Fundamental Rights: Rights and Social Action Litigation in India: A Lesson for South Africa" (1993) 9 *South African Journal on Human Rights* 358 366 – 369. These include the right to a speedy trial, the right to human dignity, the right to be free from exploitation, the right to livelihood, the right to be protected from industrial hazards and environmental pollution, and the right to legal aid.

<sup>104</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19, 24.

<sup>105</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 27 – 29.

<sup>106</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 27.



interested party from claiming relief.<sup>107</sup> The first phase of public interest litigation, which began early in the same decade and continued into the 1980s, mostly concerned cases relating to disadvantaged sections of society.<sup>108</sup> Relief sought in these cases arose predominantly from actions or omissions of government, which resulted in violations of fundamental rights, and public interest litigation suits were generally filed by public-spirited persons.<sup>109</sup>

### **3 3 4 2 1 *Fertilizer Corporation Kamgar Union v Union of India***

#### (a) Majority judgment

In *Fertilizer Corporation Kamgar Union v Union of India* (“*Fertilizer Corporation Kamgar Union*”),<sup>110</sup> workers along with a union of workers of the Sindri Fertilizer Factory approached the Supreme Court under article 32 of the Indian Constitution. The petitioners sought a writ voiding a government company’s suspicious sale of the steel plant where the workers were employed. This, they claimed, caused the public exchequer a huge loss that, in turn, affected the citizenry of the country.<sup>111</sup>

The petitioners alleged that the sale was arbitrary and unfair because of the tender process followed, and that the sale therefore violated article 14 of the Indian Constitution. They also claimed that the sale would violate their right to carry on their occupation as industrial workers under article 19 of the Indian Constitution. Consequently, the petitioners approached the Court to prevent the sale by the respondents and to declare that the decision to sell the plant was unconstitutional.<sup>112</sup>

The Court held that the right to approach a court for a constitutional remedy under article 32 remained vested in those whose rights had been directly affected. On the facts and with this strict approach to *locus standi*, the Court did not find that any rights of the petitioners had been, or would be, violated by the sale of the steel plant. Their right to carry on any occupation, trade or business would not be affected because, firstly, they would not be left jobless even if they had to be deployed to other plants

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<sup>107</sup> *Maharaj Singh v Uttar Pradesh* AIR 1976 SC 2602 at 2609; J Cassels “Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?” (1989) 37 *American Journal of Comparative Law* 495 498.

<sup>108</sup> S Deva “Public Interest Litigation in India: A Critical Review” (2009) 28 *Civil Justice Quarterly* 19 27.

<sup>109</sup> S Deva “Public Interest Litigation in India: A Critical Review” (2009) 28 *Civil Justice Quarterly* 19 27.

<sup>110</sup> 1981 AIR 344.

<sup>111</sup> *Fertilizer Corporation Kamgar Union v Union of India* 1981 AIR 344.

<sup>112</sup> *Fertilizer Corporation Kamgar Union v Union of India* 1981 AIR 344.



and that, secondly, article 19 in any event did not include the right to hold a particular job or occupy a specific post.<sup>113</sup>

The arbitrariness and unfairness of the sale was attributed by the petitioners to a significant difference between the bidding price for the plant and the amount finally agreed upon for the sale. The petitioners argued that the bid had been restricted to a select group of persons, and that re-advertising the sale after the material variation in the terms of the sale would have resulted in a higher sale price. However, the Court was convinced by evidence led by the respondents that this would not be the case. The respondents proved that the plant had become outdated, unsafe and uneconomical to run, and that the reduction of the tender price was a necessary and fair consequence of the reduction of goods included in the sale.<sup>114</sup>

None of the petitioners' rights were found to have been violated. The petition was therefore dismissed. Nevertheless, the Court noted that, had the sale of the plant been found to be unjust, unfair or *mala fide*, the workers may well have been entitled to relief.<sup>115</sup>

(b) Minority judgment of Iyer J

Justice Iyer offered a separate concurring judgment with Justice Bhagwati in the case of *Fertilizer Corporation Kamgar Union*, in which he dealt primarily with the issue of standing. He was not personally convinced that the arguments of the respondents disproved allegations of the sale of an obsolescent steel plant for junk price, which had parts that could still have been salvaged. Iyer J also observed that the employment arrangement offered to the workers in the wake of the sale would probably only be temporary, or at least not sufficient to ensure the steady public sector employment owed by a government company under article 14 of the Indian Constitution.<sup>116</sup> In light of a different understanding to the majority of the Court about what interpretation of the facts would give rise to the most equitable outcome, Iyer J proceeded to deliver his shared minority judgment. Due to the need to develop the rules of standing and explore who might be able to challenge State maladministration and when, Iyer J took the stance of assuming that the State company had acted *mala fide*. He noted as a

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<sup>113</sup> *Fertilizer Corporation Kamgar Union v Union of India* 1981 AIR 344.

<sup>114</sup> *Fertilizer Corporation Kamgar Union v Union of India* 1981 AIR 344.

<sup>115</sup> *Fertilizer Corporation Kamgar Union v Union of India* 1981 AIR 344.

<sup>116</sup> *Fertilizer Corporation Kamgar Union v Union of India* 1981 AIR 344.

point of departure that there is a distinction between the fundamental right under article 32 to enforce fundamental rights and the interest sufficient to claim relief under article 226. Unlike article 32, there is nothing in the provision of article 226 to define “person aggrieved”, “standing” or “interest” that gives access to the Court to seek redress.

Iyer J was of the view that in a society where freedoms suffer from atrophy, broad approach to standing is necessary, even if it poses some risks. Furthermore, a fear that all and sundry will waste time and money pursuing frivolous cases would prevent the creation of opportunities for public-minded citizens to be able to rely on the legal process. In his judgment, he pointed out that if a citizen is a member of an organisation with a particular interest in the issue at hand, such person cannot be denied standing.<sup>117</sup> According to the learned judge:

“In simple terms, *locus standi* must be liberalised to meet the challenges of the time. *Ubi jus ibi remedium* must be enlarged to embrace all interests of public-minded citizens or organisations with serious concern for conservation of public resources and the direction and correction of public power so as to promote justice in its triune facets.”<sup>118</sup>

In summary, this minority decision sets out four reasons for the liberalisation of the rules of *locus standi*. Firstly, relaxed standing is necessary to protect individuals’ rights from an abuse of state power. Secondly, social justice requires judicial review of administrative action. Thirdly, it would encourage a healthy system of administrative action. Finally, it enables citizens to play a part in securing justice whenever the State acts beyond its powers.<sup>119</sup>

### **3 3 4 2 2 SP Gupta v Union of India**

Another of the earliest judgments that contributed to the transformation of standing in Indian law was the *Judges Transfer* case,<sup>120</sup> in which the Supreme Court of India noted the importance of “the initiative and zeal” of public-minded persons and organizations in the enforcement of public duties and the protection of social, collective, diffused rights.<sup>121</sup> The Supreme Court recognised that in order for this to be made possible, these persons and organisations needed to be allowed to approach the Court even if

<sup>117</sup> *Fertilizer Corporation Kamagar Union v Union of India* 1981 AIR 344.

<sup>118</sup> *Fertilizer Corporation Kamagar Union v Union of India* 1981 AIR 344.

<sup>119</sup> *Fertilizer Corporation Kamagar Union v Union of India* 1981 AIR 344; P K Ghosh “Judicial Activism and Public Interest Litigation in India” (2013) 1 *Galgotias Journal of Legal Studies* 77 80.

<sup>120</sup> AIR 1982 SC 149. See part 3 3 3 above.

<sup>121</sup> *SP Gupta v President of India* 1982 2 SCR 365 para 188.

their own rights were not directly affected. It has also made it clear that access to the legal system should not be limited to “men with long purses”.<sup>122</sup>

The petitioners in this case approached the Supreme Court to challenge a letter addressed by the Law Minister of the Government of India to the Governor of Punjab and the Chief Ministers of the other States, and thereafter circulated to the Chief Justices of the High Courts.<sup>123</sup> The letter effectively called for the transfer of High Court judges to ensure that at least one third of judges serving at a particular High Court should be from outside that state. It also set down the procedure for handling the transfers. According to the petitioners, the letter was intended as an attack on the independence of the judiciary.<sup>124</sup>

The Court noted that diffuse interests could not be properly protected without allowing people to approach the Court in the public interest.<sup>125</sup> The Court expanded on Cappelletti and Garth’s work<sup>126</sup> by giving three reasons for the liberalisation of standing rules.<sup>127</sup> Firstly, a relaxed approach to *locus standi* is necessary to secure fundamental rights of the poor people of the country. Secondly, it is important in a modern welfare state for any member of the public to be able to seek legal redress for an act or omission by the State in respect of a public duty it owes. Finally, relaxed rules of standing are necessary to curb state power and prevent violations of law.<sup>128</sup>

These, according to the Supreme Court, were adequate reasons to alter the status quo regarding the rules of standing.<sup>129</sup> The decision to do so was also fuelled by the need to uphold the rule of law, which the Court recognised would be undermined should no one be accorded standing to challenge cases of public wrong or public

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<sup>122</sup> *SP Gupta v President of India* 1982 2 SCR 365.

<sup>123</sup> *SP Gupta v President of India* 1982 2 SCR 365 para 2.

<sup>124</sup> *SP Gupta v President of India* 1982 2 SCR 365 para 2.

<sup>125</sup> *SP Gupta v President of India* 1982 2 SCR 365 para 20.

<sup>126</sup> M Cappelletti and B Garth “Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective” (1978) 27 *Buffalo Law Review* 181 194, 209.

<sup>127</sup> *SP Gupta v President of India* 1982 2 SCR 365 paras 190 – 191; M N Chaturvedi “Liberalizing the Requirement of Standing in Public Interest Litigation” (1984) 26 *Journal of the Indian Law Institute* 42 49. These echo the reasons provided by the court in *Fertilizer Corporation Kamgar Union v Union of India* 1981 AIR 344. See part 3 3 4 2 1 above.

<sup>128</sup> *SP Gupta v President of India* 1982 2 SCR 365 para 18.

<sup>129</sup> *SP Gupta v President of India* 1982 2 SCR 365 para 18; J Cassels “Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?” (1989) 37 *American Journal of Comparative Law* 495 497.

injury.<sup>130</sup> Thus, any member of the public acting *bona fide* and having a “sufficient interest”<sup>131</sup> in the matter has a right to access the Court to redress a legal wrong. This right of access carries even more weight when the plaintiff may be suffering from a disability or when the violation of collective diffuse rights is at stake.<sup>132</sup>

On the matter of *locus standi*, it was necessary to take into account that the petitioners were practising advocates. The Court was thus convinced that the petitioners would certainly be interested in challenging the constitutionality of any action by the State or public authority which undermined the independence of the judiciary.<sup>133</sup> In connection with this, the Court referred to lawyers as “priests of the temple of justice” as an illustration of their essential and integral part of the judicial system.<sup>134</sup>

The Court therefore concluded that lawyers have a special interest in preserving the integrity and independence of the judicial system.<sup>135</sup> The petitioners, being lawyers, had sufficient interest to challenge the constitutionality of the circular letter and they were therefore entitled to file the writ petition as public interest litigation. They clearly had a concern deeper than that of a busybody.

### **3 3 4 2 3 *Bandhua Mukti Morcha v Union of India***

Bandhua Mukti Morcha is a non-governmental organisation aimed at ending bonded labour in India. After conducting surveys regarding working conditions on stone quarries near Delhi, the petitioner organisation addressed a letter to Chief Justice Bhagwati relaying the allegedly inhumane conditions under which a large number of bonded labourers there worked. The petitioner argued that this violated article 23 of the Indian Constitution, which prohibits forced labour. Consequently, it sought the proper implementation of existing social welfare legislation by the government on behalf of these workers.<sup>136</sup>

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<sup>130</sup> *SP Gupta v President of India* 1982 2 SCR 365 para 190.

<sup>131</sup> *SP Gupta v President of India* 1982 2 SCR 365 para 18.

<sup>132</sup> S Deva “Public Interest Litigation in India: A Critical Review” (2009) 28 *Civil Justice Quarterly* 19, 24.

<sup>133</sup> *SP Gupta v President of India* 1982 2 SCR 365 para 26.

<sup>134</sup> *SP Gupta v President of India* 1982 2 SCR 365 para 26.

<sup>135</sup> *SP Gupta v President of India* 1982 2 SCR 365 para 26.

<sup>136</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67 67 – 68.

The government's counter-argument was that bonded labour did not violate any fundamental rights.<sup>137</sup> The government also questioned the *locus standi* of the petitioner. The Supreme Court, however, dismissed these arguments and relied on the *Judges Transfer* decision to entrench a relaxed approach to standing. The Court held that if fundamental rights of a person or group of persons have been violated and these victims are unable to approach the Court as a result of their socio-economically disadvantaged position, any *bona fide* member of the public can approach the Court under article 32 or 226 of the Indian Constitution seeking vindication of those rights.<sup>138</sup> This is so that fundamental rights are made a reality for all.<sup>139</sup> The right to life (under article 21 of the Indian Constitution) protected the right to live with dignity. A reading of a number of directive principles supported the fact that the right to live with dignity included the right to live free from exploitation.<sup>140</sup>

According to the Court, the purpose of the proceeding was to enforce a fundamental right. As article 32 does not limit the kind of proceeding by which such an action can be brought, only stipulating that proceedings be "appropriate", the Court held, significantly, that writing a letter to the Court would be a sufficient proceeding to seek relief in this case.<sup>141</sup> *Bandhua Mukti Morcha* was afforded standing to act in the public interest and was granted the relief it sought.

### **3 3 4 2 4 Trends identified from the first phase**

It is clear from the early cases dealing with public interest standing that certain judges on the bench of the Supreme Court were active in declaring that the rules governing *locus standi* developed by Anglo-Saxon jurisprudence were unsuited to the social and cultural setting of India.<sup>142</sup> The Supreme Court began recognising public interest as a means of achieving the ends of justice.<sup>143</sup> The traditional rules pertaining to *locus standi* in India were relaxed by interpreting articles 32 and 226 in line with other

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<sup>137</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67 68 – 69.

<sup>138</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67 70.

<sup>139</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67 70.

<sup>140</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67 69.

<sup>141</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67 71, 72.

<sup>142</sup> *Forward Construction Co. v Prabhat Mandal (Regd.)* 1986 1 SCC 100, 104; G L Peiris "Public Interest Litigation in the Indian Subcontinent: Current Dimensions" (1991) 40 *International Comparative Law Quarterly* 66 66.

<sup>143</sup> G L Peiris "Public Interest Litigation in the Indian Subcontinent: Current Dimensions" (1991) 40 *International Comparative Law Quarterly* 66 66.

fundamental rights and the Directives Principles. This enabled the Court to entertain letters as writ petitions.<sup>144</sup>

The Supreme Court prioritised the protection of the vulnerable by enabling public interest petitioners to represent those who were unable to represent themselves, ignorant of their rights or scared of the judicial process. Relaxed standing thus became a crucial part of the mechanism of public interest litigation, enabling courts to tackle issues such as social justice, labour conditions and the environment.<sup>145</sup> The petitioners in the cases discussed above all acted *bona fide* in the public interest and displayed a sufficient interest in the matter before the court.

Despite its commitment to broadening access to justice, the Supreme Court maintained deference for administrative processes, as seen in *Bihar Legal Support Society v Chief Justice of India*.<sup>146</sup> However, it did not forfeit opportunities to advocate for an interpretation of *locus standi* rules that favoured those who could not afford to approach the courts for judicial redress of the violation or threatened violation of their fundamental rights by the State.

### 3 3 4 3 *The second phase*

The second phase of public interest litigation in India, which occurred during the 1990s, saw an expansion in the range of issues raised.<sup>147</sup> Issues for which public

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<sup>144</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67 68.

<sup>145</sup> R Dhavan "Law as Struggle: Public Interest Law in India" (1994) 36 *Journal of the Indian Law Institute* 302 309.

<sup>146</sup> 1986 4 SCC 767. In this case, the Bihar Legal Support Society filed a writ petition concerning bail applications. These applications were made on behalf of people who could not afford to approach the court themselves, with a submission that the Supreme Court should afford the liberty of all citizens the same importance and list the applications immediately. The Supreme Court noted that the refusal or granting of bail or anticipatory bail fell within the jurisdiction of the High Court. Only in matters of grave injustice or a substantial question in law should the Supreme Court be allowed to hear such matters, especially if they affect the poor. Due to the fact that the immediate listing of bail applications in question could not be considered within the administrative jurisdiction of the Supreme Court, the writ petition had to be disposed of. However, in its deliberations, the Court paid specific attention to the fact that the majority of the Indian people are denied access to justice primarily as a result of their poverty. Owing to their desperation, they are vulnerable to abuse and being taken advantage of by more powerful interests in society. Even if they were aware of the rights and benefits conferred upon them by the law, their lack of material resources keep them in a socially and economically disadvantaged position. The Court therefore noted its appreciation of the petitioner's concern.

<sup>147</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 27.



interest litigation were filed now included pollution of rivers,<sup>148</sup> the right to education,<sup>149</sup> sexual harassment in the workplace,<sup>150</sup> relocation of industries<sup>151</sup> and the right to health,<sup>152</sup> to name a few.<sup>153</sup> Relief was claimed not only from government but also against private individuals in relation to policy matters.

The response of the judiciary in this phase was bold.<sup>154</sup> The courts broke new ground during this time and expanded greatly upon the initial objective of public interest litigation. However, during the course of the development of case law in this phase, standing rules had relaxed to the extent that the mechanism of public interest litigation became open to abuse.<sup>155</sup>

### **3 3 4 3 1 MC Mehta v Union of India and Others**

The case of *MC Mehta v Union of India and Others*<sup>156</sup> concerned a petition brought by an individual interested in protecting the lives of the people of the city of Kanpur who used water from the Ganga River.<sup>157</sup> This related to pollution of the river by tanneries. Despite statutory duties imposed on government for the prevention and control of water pollution, evidence showed that the discharge of sewage water into the river, as well as an absence of systematic cleaning plans, had resulted in sickness, infectious diseases and death of people using the river water.<sup>158</sup>

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<sup>148</sup> *Almitra H Patel v Union of India* AIR 2000 SC 1256.

<sup>149</sup> *Mohini Jain v State of Kamataka* 1992 3 SCC 666; *Unni Krishnan v State of Andhra Pradesh* 1993 1 SC 645.

<sup>150</sup> *Vishaka v State of Rajasthan* AIR 1997 SC 3011; *Apparel Export Promotion Council v AK Chopra* AIR 1999 SC 625.

<sup>151</sup> *MC Mehta v Union of India* 1996 4 SCC 750.

<sup>152</sup> *Parmanand Kataria v Union of India* AIR 1989 SC 2039; *Paschim Banga Khet Mzdoor Samity v State of West Bengal* 1996 4 SCC 37; *Kirloskar Bros Ltd v ESIC* 1996 2 SCC 682; *Air India Stat. Corp v United Labour Union* 1997 9 SCC 377.

<sup>153</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 27.

<sup>154</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 28.

<sup>155</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 28.

<sup>156</sup> 1988 1 SCC 471.

<sup>157</sup> The petitioner, Mahesh Chandra Mehta, is a lawyer who specialised in conservation of the environment. Since this decision, he has won many landmark cases and has had a number of awards bestowed upon him. In this regard, see A Khan (ed.) *Padma Achievers 2016* (2017) 173. Mr Mehta later acted as counsel for the petitioners in *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715, which also concerned pollution caused by tanneries. See part 3 3 4 3 3 below.

<sup>158</sup> *MC Mehta v Union of India and Others* 1988 1 SCC 471 530.



Under common law, the tanneries' actions could have been challenged by a riparian owner. However, the petitioner in this case was not such an owner and could therefore not be said to be directly affected. He was seeking relief on behalf of those people who used the water.<sup>159</sup> The Court held that the pollution was a public nuisance, which is widespread, and any person purporting to act in the public interest should accordingly be afforded standing.<sup>160</sup> The petitioner was thus allowed to seek enforcement of statutory provisions imposing duties on the municipal authorities to prevent the water pollution.<sup>161</sup> In its judgment, the Supreme Court dealt with a range of possible interventions to both solve the problem of water pollution in the Ganga River and prevent the problem from re-occurring.

### **3 3 4 3 2 Vishaka v State of Rajasthan**

In *Vishaka v State of Rajasthan* (“*Vishaka*”),<sup>162</sup> Vishaka and other women groups approached the Supreme Court under article 32 of the Indian Constitution for enforcement of the fundamental rights of all working women. The rights in question were the right to equality (article 14), the right to freedom (article 19), which includes the right to practice any profession or to carry out any occupation, trade or business, and the right to life (article 21). The petitioners also sought suitable methods for realisation of the concept of “gender justice”, prevention of sexual harassment of women in all work places through judicial process, as well as legislation to this effect.

The Court relied on article 32 of the Indian Constitution to grant standing to the petitioners seeking to vindicate the fundamental rights of working women.<sup>163</sup> In its judgment, the Court laid down elaborate guidelines to ensure the prevention of sexual harassment of women. These guidelines had been developed during the course of the hearings which took place.

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<sup>159</sup> *MC Mehta v Union of India and Others* 1988 1 SCC 471 551.

<sup>160</sup> *MC Mehta v Union of India and Others* 1988 1 SCC 471 552.

<sup>161</sup> It is interesting to note that in January 2017, thirty-two years and approximately Rs 20 billion of government spending after the PIL in this case was filed, the Ganga River was still not considered sufficiently clean. The Supreme Court has since passed an order transferring the matter to the National Green Tribunal to ensure that the government fulfils its obligations as per the judgment of the Supreme Court. In this regard, see Anonymous “SC Transfers 32-Year-Old Ganga Clean-Up PIL to NGT” (2017) *LiveLaw News Network*. Available at: <<http://www.livelaw.in/sc-transfers-32-year-old-ganga-clean-pil-ngt/>>.

<sup>162</sup> AIR 1997 SC 3011.

<sup>163</sup> *Vishaka v State of Rajasthan* AIR 1997 SC 3011.

Even though these guidelines were pronounced only to be of force and effect until legislation was enacted to replace them, the Supreme Court had effectively used its jurisdiction under article 32 to fulfil the function of lawmaker.<sup>164</sup> Over and above this, Deva notes that the *Vishaka* decision is an example of symbolic justice, and that the judgment handed down by the Court did little to curb sexual harassment of women in the workplace in reality.<sup>165</sup>

### **3 3 4 3 3 *Vellore Citizens Welfare Forum v Union of India***

Another case worth noting is *Vellore Citizens Welfare Forum v Union of India* (“*Vellore*”).<sup>166</sup> This concerned a public interest petition under article 32 of the Indian Constitution filed by the Vellore Citizens Welfare Forum against the state for pollution being caused by over 900 tanneries in the state of Tamil Nadu.<sup>167</sup>

The Supreme Court relied on article 21 (the right to life) in conjunction with articles 47, 48A and 51A(g) of the Indian Constitution (which address duties of the State concerning public health, protection and improvement of the environment and natural environment respectively), to set out its constitutional mandate to protect and improve the environment. In view of a number of statutes enacted in line with the constitutional mandate to protect and improve the environment, as well as evidence to show the threats of widespread pollution and disease in the event that the tanneries continued operations as normal, the Supreme Court found it necessary to direct the government to take action under the Environment (Protection) Act, 1986. It also issued “pollution fines” to all of the tanneries in the five provinces of Tamil Nadu. These were to be deposited in an “Environment Protection Fund”, which would be used to compensate aggrieved persons identified by the authorities and to restore the environment. The Court also suspended closure orders of certain tanneries and set out conditions for their re-opening.<sup>168</sup>

### **3 3 4 3 4 *Trends identified from the second phase***

The second broad phase of public interest litigation differs significantly from the first. The cases discussed above, as well as Deva’s observations regarding public interest

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<sup>164</sup> *Vishaka v State of Rajasthan* AIR 1997 SC 3011.

<sup>165</sup> S Deva “Public Interest Litigation in India: A Critical Review” (2009) 28 *Civil Justice Quarterly* 19 36.

<sup>166</sup> AIR 1996 SC 2715.

<sup>167</sup> *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715.

<sup>168</sup> *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715.

actions launched during this time,<sup>169</sup> reveal changes in attitude to public interest litigation by petitioners, and in approach by the courts.

During the second phase of public interest litigation, there was an increase in the number of lawyers and organisations relying on public interest standing in the courts.<sup>170</sup> The relief these litigants sought on behalf of the public tended away vindication of the fundamental rights of the poor and socio-economically vulnerable, and gradually became more middle-class focused. The broader range of issues brought to the courts for relief in the public interest required more creative remedies from the courts.<sup>171</sup> No longer was public interest standing a mechanism for holding the state accountable for its actions and omissions in relation to its duties owed to the public. Relief was sought against private individuals for policy matters.<sup>172</sup>

Courts responded to these claims by extending the protection of fundamental rights. Former Chief Justice Bhagwati firmly believes that judges play an important part in making law and do not merely interpret the law.<sup>173</sup> This appears to be justified by the Supreme Court by the broad interpretation given to fundamental rights. However, the judiciary also traversed from purely interpreting the law to the law-making arena,<sup>174</sup> a role fulfilled in the cases of *Vishaka* and *Vellore*, for example. Courts increased their oversight and follow-up of their orders. Despite the generous approach to standing and interpretation of constitutional norms, Shankar and Mehta observe that courts often gave weak remedies, like setting up committees and negotiation channels.<sup>175</sup>

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<sup>169</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 27 – 28.

<sup>170</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 27 – 28.

<sup>171</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 28.

<sup>172</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 27 – 28.

<sup>173</sup> P N Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Columbia Journal of Transnational Law* 561 562, 563. See part 3 3 2 above.

<sup>174</sup> S Shankar and P B Mehta "Courts and Socioeconomic Rights in India" in Gauri V and Brinks D M (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 146 146.

<sup>175</sup> S Shankar and P B Mehta "Courts and Socioeconomic Rights in India" in V Gauri and D M Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 146 147.

The cases discussed above display the Supreme Court's commitment to serving the public interest in a wide range of issues.<sup>176</sup> However, the relaxation in the interpretation of articles 32 and 226 of the Indian Constitution opened the gates for frivolous and *mala fide* petitioners to claim relief under the guise of public interest litigation.

### 3 3 4 4 *The third phase*

There are a handful of decisions handed down recently that pertain specifically to public interest litigation and *locus standi*. The judgments discussed below demonstrate the courts' approach to these inseparable issues. They also provide insight to the public interest-related problems experienced by the Indian courts in recent years.

#### 3 3 4 4 1 *Vivek Srivastava v Union of India*

The petitioner in *Vivek Srivastava v Union of India* ("*Vivek Srivastava*")<sup>177</sup> was a resident of the city of Allahabad wishing to contest the proposed development of 22,77 acres of open ground that had allegedly acted as "lungs" for the city for one hundred years.<sup>178</sup> The cause of action arose from the military authorities' plan to construct a residential duplex complex. The petitioner claimed to have no ulterior motive in bringing this petition in the public interest, and wished only to prevent damage to the ecology and environment of the city that he alleged would be the result of the construction.<sup>179</sup>

The first, third and fourth respondents ("the respondents") argued that the petitioner lacked *locus standi* to bring the matter and was disguising it as public interest litigation. This, they contended, was because he had neither shown himself to be a representative of the public interest nor had he proved to have an interest in the land. A further counter-argument was that no public interest was involved and no fundamental rights were threatened or raised. The respondents also contended that the land was categorised as "Defence Land", that the proposed development formed part of the Marriage Accommodation Project which was an exclusive army matter, and that the construction would not disturb the environment. A number of other counter

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<sup>176</sup> *MC Mehta v Union of India and Others* 1988 1 SCC 471; *Vishaka v State of Rajasthan* AIR 1997 SC 3011 and *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715.

<sup>177</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897.

<sup>178</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 para 2, 4.

<sup>179</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 para 2, 15.

affidavits were filed by second, fifth, sixth, seventh, eighth and ninth respondents in support of the construction and claims.<sup>180</sup>

The court therefore had to consider whether the petitioner had *locus standi* to raise issues of ecology and environmental protection on behalf of the citizens of the city under article 226 of the Indian Constitution.<sup>181</sup> The court acknowledged that entertaining writ petitions was a crucial way of providing access to justice to many people who are denied basic human rights.<sup>182</sup> However, only a person acting in good faith with a sufficient interest in the proceedings, and who is not a busybody or meddling interloper, will be afforded *locus standi* to approach a court for the vindication of fundamental rights.<sup>183</sup> The “public interest”, according to the court, will be matters in which the community at large has either a pecuniary interest or an interest by which their legal rights or abilities are affected.<sup>184</sup>

The Allahabad High Court found that the right to life under article 21 of the Indian Constitution included the right of every citizen “to breathe clean and pure air”.<sup>185</sup> Over and above this, article 48A of the Indian Constitution instructs the State to strive to protect and improve the environment, which is a Directive Principle of State Policy.<sup>186</sup> Article 51A of the Indian Constitution contains a duty for citizens to endeavour to protect the natural environment.<sup>187</sup> According to the court, these considerations made the matter one of public importance.<sup>188</sup> The matter was found to be brought to enforce the fundamental right of people unable to approach a court, and was not in pursuance of a grudge or other private motive.<sup>189</sup> The court reaffirmed the fact that anything endangering quality of life in derogation of laws should enable any person to entreat the court to prevent the damage that could be caused. The Supreme Court has confirmed the need for every locality to be provided with green spaces for recreation

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<sup>180</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 paras 7 – 11.

<sup>181</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 para 1.

<sup>182</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 para 22.

<sup>183</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 paras 17, 20.

<sup>184</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 para 18.

<sup>185</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 para 25.

<sup>186</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 para 26.

<sup>187</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 para 27.

<sup>188</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 para 29.

<sup>189</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 para 29.

and fresh air.<sup>190</sup> In this case, the court found that the lungs of the city needed to be protected and thus afforded the petitioner standing.<sup>191</sup> Ultimately, the respondents were given three months in which to restore the land to its original condition.<sup>192</sup>

### **3 3 4 4 2 Mahanagar Ghaziabad Chetna Munch v State of Uttar Pradesh**

In *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* (“*Mahanagar Ghaziabad Chetna Munch*”),<sup>193</sup> the petitioners launched writ proceedings to cease and prevent further construction of the proposed “Haj House”, which was a meeting place for Haj pilgrims.<sup>194</sup> The government agreed to lease the land to Haj Samiti (the Haj Committee of Uttar Pradesh) for thirty years, but construction of Haj House would be paid for by the state of Uttar Pradesh. The reasons given for the relief sought were that the construction was a misuse of the national treasury, that it would interfere with the construction of a national highway, a major gas pipeline and air force activities, as well as that Haj House would “destroy communal harmony”.<sup>195</sup>

One of the central counter-arguments of the respondents was that the writ should be dismissed because the petitioners lacked *locus standi* to bring the matter before the court. Before making a finding, the court embarked on a thorough review of *locus standi* in public interest actions. The court began this discussion by acknowledging the need for checks and balances concerning the filing of writ petitions in the public interest. In this regard, there are two requirements developed by the courts and still applicable today, which are that the petitioner must be acting *bona fide* and must also have a sufficient interest in the proceedings.<sup>196</sup>

The court elaborates by stating that: “[a] writ petitioner who comes to the court for relief in the public interest must come not only with clean hands like any other writ petitioner but also with a clean heart, clean mind and clean objective”.<sup>197</sup> By setting

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<sup>190</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 paras 58 – 59, referring to *Municipal Corporation, Ludhiana and Anr. v. Balinder Bachan Singh (Dead) by LRS. and Ors.* (2004) 5 SCC 182 at 187 and *Bangalore Medical Trust v. B.S. Muddappa and Ors.* A.I.R. 1991 SC 1902.

<sup>191</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 para 30.

<sup>192</sup> *Vivek Srivastava v Union of India* 2005 3 AWC 2897 para 78. The Court notes that the land had been dug up at a few places before an interim order was handed down to stop the construction.

<sup>193</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113.

<sup>194</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 55.

<sup>195</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 paras 1 – 2.

<sup>196</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 7.

<sup>197</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 7.



the standard this high for public interest petitioners, the court intends to exclude those wishing to meddle with judicial process, gain publicity, seek personal gain or private profit, and those acting with a political motive.<sup>198</sup> The courts must thoroughly examine every case brought in the public interest in order to uphold public interest standing as a means for securing social justice.<sup>199</sup>

Although this judgment does not display a novel approach to public interest litigation, many courts still entertain frivolous and *mala fide* petitions, which waste the judiciary's resources.<sup>200</sup> This may, in part, be due to the fact that public interest standing is no longer only granted to petitioners who can show a genuine grievance to a fundamental right caused by state conduct, but to petitioners who prove a sufficient interest in the matter.<sup>201</sup>

Irrespective of the cause of courts being flooded with matters merely disguised as public interest cases, the court states that this situation needs to be stopped.<sup>202</sup> The modern approach to public interest litigation may be "towards freer movement both in nature of litigation and approach of the courts",<sup>203</sup> but this must enable public-spirited citizens to bring genuine cases to court rather than granting standing to litigants "whose bonafides [sic] and credentials are in doubt".<sup>204</sup> Courts must focus on the issues of *locus standi* and "cleanness" of the petitioners before deciding any matter brought in the public interest.<sup>205</sup>

In its finding, the court held that the land on which Haj House was to be built had been obtained lawfully. Additionally, the court found that the purpose of the construction of Haj House was to protect the interests of pilgrims as members of the secular state by providing them with a meeting place, and that it accordingly did not constitute the promotion of a particular religion by the state for purposes of article 27 of the Indian Constitution, nor could it be considered an abuse of the public exchequer. The state of Uttar Pradesh was therefore not getting "mixed up with religion" and found

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<sup>198</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 paras 7 – 8.

<sup>199</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 9.

<sup>200</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 10.

<sup>201</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 22.

<sup>202</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 10.

<sup>203</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 22.

<sup>204</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 paras 17, 22.

<sup>205</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 35.



to be protecting its citizens.<sup>206</sup> The court also found that the contention that communal harmony would be ruined was unfounded. It is important that majority religions and faiths exercise greater patience towards followers of minority religions, as the Indian mantra “unity in diversity” provides.<sup>207</sup>

In addition to these findings, it came to light that the first petitioner was not a registered organisation despite alleging the contrary. A certain Mahesh Kumar Ahuja was found to be an office bearer of this “registered organisation” and had filed a similar petition on the same cause of action as the present one, which was rejected by the civil court. The petitioners withheld this information from the High Court in the present case.<sup>208</sup>

The petitioners were unable to prove that they were acting *bona fide* and that they had a sufficient interest in the proceedings.<sup>209</sup> The petition was therefore dismissed.

### **3 3 4 4 3 Ayaubkhan Noorkhan Pathan v State of Maharashtra**

In *Ayaubkhan Noorkhan Pathan v State of Maharashtra*,<sup>210</sup> the State of Maharashtra issued a caste certificate stating that the appellant belonged to a scheduled tribe. Thereafter, the appellant was able to fill a position as senior clerk in a municipal corporation, reserved for persons of scheduled tribes. The fifth respondent then filed a complaint nine years later, challenging the validity of the appellant’s certificate on the grounds that the appellant could not belong to a scheduled tribe because he was a professing Muslim. The appellant denied this allegation. The fifth respondent filed a writ petition challenging the Scrutiny Committee’s rejection of the application to review and recall the caste validity certificate, after which the matter was referred to the Scrutiny Committee again. In the present appeal, the appellant argued that the fifth respondent lacked *locus standi* to challenge his certificate.<sup>211</sup>

On the facts, the Supreme Court found on the facts that the fifth respondent had acted *mala fide*, with the sole intention of harassing the appellant. In this regard, it held that the High Court should have denied the fifth respondent standing in the first

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<sup>206</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 54.

<sup>207</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 56.

<sup>208</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 3.

<sup>209</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 35.

<sup>210</sup> 2013 4 SCC 465.

<sup>211</sup> *Ayaubkhan Noorkhan Pathan v State of Maharashtra* 2013 4 SCC 465 paras 2 – 3.

place.<sup>212</sup> The Supreme Court revisited the issue of *locus standi* in public interest litigation and confirmed that a third person with no interest in the matter at hand cannot claim to have standing to raise “any grievance whatsoever”.<sup>213</sup> However, if aggrieved persons are unable to approach the court because of ignorance, illiteracy or a lack of resources, an independent third party may approach a court of law on their behalf in the public interest.<sup>214</sup> This independent third party can be anyone, provided they do not have no right whatsoever “to post or property”.<sup>215</sup>

Significantly, the Court held that it is possible that certain issues may need to be considered even if the petitioner’s good faith is doubted.<sup>216</sup> In such cases, the court should proceed *suo motu*.<sup>217</sup> This, according to the Court, will only be the case in exceptional circumstances, which ultimately this matter was not. The original petitioner (referred to as “respondent 5” in the judgment) was thus found to lack standing and had abused the process of the Court.<sup>218</sup>

### **3 3 4 4 Trends identified from the third phase**

The third phase is a period in which the scope of public interest litigation widened even further. It has even been suggested that anyone is able to launch public interest litigation proceedings for almost anything.<sup>219</sup> There are also increasingly examples in case law that go so far as to be labelled “blatant misuse of the process of PIL”.<sup>220</sup>

Notable examples of this abuse of public interest litigation include petitions to reschedule power cuts and load shedding that were to be implemented during cricket telecast hours,<sup>221</sup> to relocate the wild monkeys in Delhi,<sup>222</sup> and to seek a ban on

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<sup>212</sup> *Ayaaubkhan Noorkhan Pathan v State of Maharashtra* 2013 4 SCC 465 para 4.

<sup>213</sup> *Ayaaubkhan Noorkhan Pathan v State of Maharashtra* 2013 4 SCC 465 paras 22.

<sup>214</sup> *Ayaaubkhan Noorkhan Pathan v State of Maharashtra* 2013 4 SCC 465 para 22.

<sup>215</sup> *Ayaaubkhan Noorkhan Pathan v State of Maharashtra* 2013 4 SCC 465 para 14, quoting *Ghulam Qadir v. Special Tribunal & Ors.*, 2002 1 SCC 33.

<sup>216</sup> *Ayaaubkhan Noorkhan Pathan v State of Maharashtra* 2013 4 SCC 465 para 22.

<sup>217</sup> *Ayaaubkhan Noorkhan Pathan v State of Maharashtra* 2013 4 SCC 465 para 22.

<sup>218</sup> *Ayaaubkhan Noorkhan Pathan v State of Maharashtra* 2013 4 SCC 465 para 47.

<sup>219</sup> S Deva “Public Interest Litigation in India: A Critical Review” (2009) 28 *Civil Justice Quarterly* 19 27.

<sup>220</sup> S Deva “Public Interest Litigation in India: A Critical Review” (2009) 28 *Civil Justice Quarterly* 19 34.

<sup>221</sup> *K.M. Nataraj vs State Of Karnataka* AIR 1997 Kant 36.

<sup>222</sup> *New Friends Colony Residents vs Union of India (Uoi)* (14 March 2007) (Delhi High Court).

publication of allegedly “obscene and nude” photographs in newspapers.<sup>223</sup> According to Fowkes and upon observation of the judgments discussed in this section, most instances today appear to raise issues of concern to the middle class.<sup>224</sup>

It is submitted that not all cases which constitute an abuse of public interest standing by commentators necessarily waste judicial resources by being heard. Many of these matters may also be matters that are interesting to the public.<sup>225</sup> However, the courts consistently repeat that petitioners wishing to invoke public interest standing will only be able to do so for matters in which the community at large has either a pecuniary interest or an interest by which their legal rights or abilities are affected. Clearly, cases brought by *mala fide* petitioners with no sufficient interest must not be entertained.

Despite misuses of public interest litigation, there are also examples of individuals taking matters to the courts for the vindication of fundamental rights.<sup>226</sup> For instance, in *Tarak Singh v Jyoti Basu*,<sup>227</sup> an individual brought a case of judicial misconduct to the Supreme Court in the form of public interest litigation.<sup>228</sup> A judge had used his position to obtain an allotment of government land.<sup>229</sup> The Court found that a private interest cannot be elevated above a public interest.<sup>230</sup> Accordingly, the procurement of the land grant was found to be an abuse of position, and was consequently cancelled.<sup>231</sup>

The Annual Survey of Indian Law has published reports in 2005<sup>232</sup> and 2013,<sup>233</sup> which provide helpful overviews of the more recent development of public interest standing within public interest litigation. Singh confirms Deva’s observations regarding

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<sup>223</sup> *Ajay Goswami vs Union Of India & Ors* Writ Petition (civil) 384 of 2005; S Deva “Public Interest Litigation in India: A Critical Review” (2009) 28 *Civil Justice Quarterly* 19 34.

<sup>224</sup> J Fowkes “How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 442.

<sup>225</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 (2) AWC 1113 para 11 – 12. The court found that a matter of public interest does not mean “that which is interesting as gratifying curiosity or a love of information or amusement”.

<sup>226</sup> J Fowkes “How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 444.

<sup>227</sup> 2005 1 SCC 201.

<sup>228</sup> *Tarak Singh v Jyoti Basu* 2005 1 SCC 201 para 2.

<sup>229</sup> *Tarak Singh v Jyoti Basu* 2005 1 SCC 201 paras 6 – 8.

<sup>230</sup> *Tarak Singh v Jyoti Basu* 2005 1 SCC 201 para 24.

<sup>231</sup> *Tarak Singh v Jyoti Basu* 2005 1 SCC 201 para 24.

<sup>232</sup> P Singh “Public Interest Litigation” (2005) 41 *Annual Survey of Indian Law* 537 – 556.

<sup>233</sup> A Hingorani “Public Interest Litigation” (2013) 49 *Annual Survey of Indian Law* 969 – 1000.

the scope of public interest litigation in recent years, and notes that public interest standing has been utilised to raise predominantly middle class and political governance issues, as opposed to further “social empowerment”.<sup>234</sup> The concept of justiciability has been expanded to allow the constitutional validity of a wide range of laws to be challenged by invoking article 32, even for political and private gain.<sup>235</sup> In summary, the author maintains that PIL now includes “any matter for the enforcement of public interest”.<sup>236</sup>

However, the position confirmed by the courts in the cases above shows a commitment to reigning in the scope of public interest standing. The judiciary continues to confirm that meddlesome bystanders should not be granted standing to act on behalf of the public.<sup>237</sup> In this regard, a quote by the Allahabad High Court bears repeating:

“A time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that courts are flooded with a large number of so-called public interest litigations where even a miniscule percentage can legitimately be called public interest litigations.”<sup>238</sup>

### 3 3 5 The PIL petitioner

Indian public interest litigation is made possible by an expansive approach to standing.<sup>239</sup> Today, any member of the public or a social action group acting *bona fide* can bring an application in a High Court or the Supreme Court seeking relief on behalf of persons unable to approach the court themselves for vindication of their legal rights.<sup>240</sup> However, only petitioners found to meet the requirements laid down by the courts will be allowed to launch proceedings in the courts to vindicate fundamental rights and challenge the infraction of statutory provisions.<sup>241</sup>

According to the Madras High Court, not only must the petitioner be acting

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<sup>234</sup> P Singh “Public Interest Litigation” (2005) 41 *Annual Survey of Indian Law* 537 537.

<sup>235</sup> P Singh “Public Interest Litigation” (2005) 41 *Annual Survey of Indian Law* 537 537, 358.

<sup>236</sup> P Singh “Public Interest Litigation” (2005) 41 *Annual Survey of Indian Law* 537 538.

<sup>237</sup> *Amanullah & Anr vs State of Bihar & Ors* on 12 April, 2016 (Delhi High Court).

<sup>238</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 10.

<sup>239</sup> J Fowkes “How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 435.

<sup>240</sup> P N Bhagwati “Judicial Activism and Public Interest Litigation” (1985) 23 *Columbia Journal of Transnational Law* 561 571.

<sup>241</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 7.

genuinely in the public interest, but the proceedings they seek to launch must also be aimed at redressing genuine public wrongs and injuries.<sup>242</sup> There is recent evidence that the courts are revisiting the original objective of the relaxation of public interest standing.

The PIL petitioner will not be afforded standing to approach the courts in the public interest, however, if such party is “a mere busybody or a meddlesome interloper”, or lacks “a sufficient interest in the proceeding”.<sup>243</sup> Any citizen who has a sufficient interest in any matter of public interest and a person who takes a genuine concern in the plight of an oppressed group will invariably be deemed to have a sufficient interest in their relief just for that reason.<sup>244</sup> However, irrespective of how genuine a cause brought before a court by a public interest litigant may be, the court must dismiss matters brought by those whose motives and credentials are in doubt.<sup>245</sup>

In a determination of standing in any given matter, the courts will first ascertain whether there is anyone who would have standing under the traditional rules to approach a court for relief.<sup>246</sup> In the absence of such a person, the courts will allow the action to be brought by anyone “acting bona fide with a view to vindicating the cause of justice” and without a profit-making or political motive.<sup>247</sup> The greater the fundamental right infringements, the more willing the courts are to enable the enforcement of rights.<sup>248</sup> However, no one can be compelled by the courts to launch a public interest action.<sup>249</sup>

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<sup>242</sup> *Thol. Thirumavalavanedii v Home Secretary* 2013 5 CTC 113; A Hingorani “Public Interest Litigation” (2013) 49 *Annual Survey of Indian Law* 969 993.

<sup>243</sup> *SP Gupta v President of India* 1982 2 SCR 365.

<sup>244</sup> J Fowkes “How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 438.

<sup>245</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 17, quoting *TN Godavarman Thirumulpad v Union of India and Ors.* 2006 5 SCC 28.

<sup>246</sup> *Fertilizer Corp. Kamagar Union v Union of India* 1981 AIR 344.

<sup>247</sup> *SP Gupta v Union of India* AIR 1982 SC 149 para 17. Plaintiffs will, accordingly, be refused standing when they raise private issues or raise issues for personal gain or profit. In this regard, see *Raunaq International Ltd v IVR Construction Ltd* 1999 AIR SC 393 para 12 – 14; *TN Godavarman Thirumulpad v Union of India* 2006 AIR 1774 SC para 23.

<sup>248</sup> As examples, see the judgments discussed in parts 3 3 4 3 1 and 3 3 4 4 3 above.

<sup>249</sup> *Gouriet v Union of the Post Office Workers* [1977] 3 All ER 70 at 96; M N Chaturvedi “Liberalizing the Requirement of Standing in Public Interest Litigation” (1984) 26 *Journal of the Indian Law Institute* 42 44.

Jain and Jain classify petitioners into three general categories of standing.<sup>250</sup> The first category comprises petitioners who have a direct interest in the outcome of the case as a result of an infringement of their legal rights. Such persons clearly have standing according to the traditional rule. The second category comprises petitioners who claim injury as members of the public. Their rights and interests are those enjoyed by every member of the public. These persons are afforded standing if they have a sufficient interest in the matter. The third category consists of persons who are total strangers (what the court has called “meddlesome interlopers”).<sup>251</sup> According to the courts’ approach to public interest standing, persons falling under this category clearly should not have standing.<sup>252</sup>

The second category of petitioners is the group that is affected by the liberalisation of standing rules discussed in this thesis. They are the public-spirited persons and organisations whose “initiative” and “zeal” must be utilised for social collective rights to be protected.<sup>253</sup> Whether or not a member of the public has a sufficient interest in order to be afforded standing to bring a PIL has to be determined by the court on a case by case basis, as it is not possible to lay down a hard and fast rule for determination.<sup>254</sup>

Roughly four-fifths of public interest actions are filed by individuals and a very small percentage of actions brought in the public interest are brought by non-governmental organisations.<sup>255</sup> Fowkes notes that this is a direct correlation with the success rate of advantaged litigants since 1990, which has steadily increased.<sup>256</sup> Gauri notes that the

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<sup>250</sup> M P Jain and S N Jain *Principles of Administrative Law* 8 ed (2017) 400, referred to by M N Chaturvedi “Liberalizing the Requirement of Standing in Public Interest Litigation” (1984) 26 *Journal of the Indian Law Institute* 42 43.

<sup>251</sup> *SP Gupta v President of India* 1982 2 SCR 365.

<sup>252</sup> M N Chaturvedi “Liberalizing the Requirement of Standing in Public Interest Litigation” (1984) 26 *Journal of the Indian Law Institute* 42 43.

<sup>253</sup> *SP Gupta v Union of India* AIR 1982 SC 149 para 20.

<sup>254</sup> *SP Gupta v Union of India* AIR 1982 SC 149 para 20.

<sup>255</sup> V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team *Policy Research Working Paper 5109* (2009) 12, 14.

<sup>256</sup> J Fowkes “How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 442. The author qualifies this observation by offering a number of reasons for this trend.



success rate of public interest claims brought by disadvantaged litigants concerning Fundamental Rights has declined drastically.<sup>257</sup>

### 3 3 6 Conclusion

The first phase of public interest litigation contributed to realising the type of social revolution that the founders had expected to achieve through the Constitution.<sup>258</sup> Due to relaxed rules of standing, judges have been forced to engage with the problem of access to courts and to cater for those who are most vulnerable in society. The judiciary addressed these issues by recognising the rights of the underprivileged and handing down orders to government to make amends for the alleged violations.<sup>259</sup> Public interest litigation on behalf of such groups has been permitted, even encouraged, so as to enable the protection and enforcement of basic rights in the Indian Constitution.<sup>260</sup>

The second phase saw cases brought in the public interest becoming more institutionalised in that several specialised NGOs and lawyers started bringing matters of public interest to the court on a more regular basis.<sup>261</sup> The judiciary's response became bolder than the initial phase, something which Deva attributes to the fact that the courts began to make law and not just interpret it.<sup>262</sup> The misuse of the relaxed rules of standing also increased dramatically.<sup>263</sup> This phase has thus been criticised for starting to move beyond the objective of the relaxation of standing rules.

The third phase has seen a development of public interest litigation to the point where it is time for judicial introspection and review of what courts have tried to achieve through PIL.<sup>264</sup> The attitude of the judiciary towards PIL over these three phases seems to have been influenced by, according to Deva, "the issues in vogue". However,

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<sup>257</sup> V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team *Policy Research Working Paper 5109* (2009) 16.

<sup>258</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 27.

<sup>259</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 27.

<sup>260</sup> A Govindjee "Lessons for South African Social Assistance Law from India: Part I – The Ties that Bind: The Indian Constitution and Reasons for Comparing South Africa with India" (2005) 3 *Obiter* 575 590.

<sup>261</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 27.

<sup>262</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 27.

<sup>263</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 27.

<sup>264</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 27.



the courts have maintained a commitment in their judgments to serving the initial purpose of allowing public interest standing, and to deterring petitioners who do not approach the courts with clean hands, hearts, minds and objectives.<sup>265</sup>

The case discussions and trends identified from the three phases of public interest litigation in India make it possible to identify merits and pitfalls of public interest standing. The following section will therefore aim to assess the status of public interest standing in India at present.

### **3 4 Assessment of the status of public interest standing in India**

#### **3 4 1 Merits of public interest standing in India**

Public interest standing in India has been liberated from restrictive rules and now enables engagement with contentious social issues, ranging from children's rights to preservation of the environment.<sup>266</sup> Supreme Court judges like Krishna Iyer and PN Bhagwati liberalised rules of *locus standi* and simplified the appeals process through the introduction of public interest litigation. The PIL system allows any member of the public (be they individuals or NGOs) to champion public interest causes simply by sending a letter or petition to the Supreme Court or High Courts.<sup>267</sup> This relaxation of standing rules has led to the courts hearing issues they had never had to deal with before.<sup>268</sup> In turn, this has aided India in the quest to provide access to justice to all citizens.<sup>269</sup>

As already stated, only those acting genuinely in the public interest are permitted to approach courts for relief in public interest litigation.<sup>270</sup> Common to all three phases of development of public interest litigation is the courts' commitment to determining the public interest and to enforcing fundamental rights. Despite the flood of vexatious and frivolous petitions, the courts have not allowed matters of public interest to be heard at the request of unsuitable public interest petitioners. The courts have also instituted

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<sup>265</sup> See part 3 3 4 4 2 above.

<sup>266</sup> G L Peiris "Public Interest Litigation in the Indian Subcontinent: Current Dimensions" (1991) 40 *International Comparative Law Quarterly* 66 72.

<sup>267</sup> S Shankar and P B Mehta "Courts and Socioeconomic Rights in India" in Gauri V and Brinks D M (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 146 149 – 150.

<sup>268</sup> S Ahuja *People, Law and Justice: A Casebook of Public-Interest Litigation* vol. II (1997) 766.

<sup>269</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 23.

<sup>270</sup> *SP Gupta v President of India* 1982 2 SCR 365.

guidelines to help them deal with the immense number of cases purportedly brought in the public interest.<sup>271</sup>

Punitive cost orders have been identified as a way to manage the misuse of public interest standing, which can serve as a deterrent for *mala fide* petitioners.<sup>272</sup> Over and above this, the Supreme Court has advised against litigants approaching the court in the public interest in areas wherein they have little or insufficient knowledge or expertise.<sup>273</sup> Such caution is taken to ensure that the public or specifically affected group is not poorly represented or unduly disadvantaged as a result of the outcome of the case.

A driving force behind the liberalisation of public interest standing rules in India has been to enable the voices of the poor and disadvantaged to be heard in the courts. This “conceptual latitudinarianism”, as the Supreme Court has termed it, allows plaintiffs to approach courts for remedies shared by many others,<sup>274</sup> and serves to achieve greater social justice by increasing access to courts.<sup>275</sup> The Supreme Court of India has noted that, without granting third parties standing to approach the courts and raise issues affecting the public at large, economic and social justice would not be realised.<sup>276</sup> In addition to this, those oppressed by injustices would remain estranged and application of the constitutional Directive Principles would be limited.<sup>277</sup>

Public interest litigation is seen by some lawyers, journalists and others in civil service as unnecessarily adding to the burdens of the administration of justice that is already sorely stretched.<sup>278</sup> While it is true that there is an immense backlog of cases,

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<sup>271</sup> Supreme Court of India Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation (Based on full Court decision dated 01-12-1988 and subsequent modifications). See part 4 2 2 1 for more information concerning these guidelines.

<sup>272</sup> *Dattaraj Nathuji Thaware v State of Maharashtra* 2005 AIR SC 540 paras 13, 17.

<sup>273</sup> *SP Anand, Indore v HD Deve Gowda* 1996 8 SCALE at 199.

<sup>274</sup> *Mumbai Kangar Sabhha v Abdulbhai* AIR 1976 SC 1455.

<sup>275</sup> Z Holladay “Public Interest Litigation in India as a Paradigm for Developing Nations” (2012) 19 *Indiana Journal of Global Legal Studies* 555 571.

<sup>276</sup> *State of West Bengal vs Union Of India* AIR 1996 Cal 181 para 46.

<sup>277</sup> *Olga Tellis v Bombay Mun. Corp.* 1986 AIR 180; *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67 802; S D Susman “Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation” (1994) 13 *Wisconsin International Law Journal* 57 72.

<sup>278</sup> *People’s Union for Democratic Rights v Union of India* 1982 AIR 1473 1478; S D Susman “Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation” (1994) 13 *Wisconsin International Law Journal* 57 82.

this is no reason for denying the poor and vulnerable access to justice.<sup>279</sup> However, Fowkes notes that many impactful public interest cases consist of “ordinary judicial responses to ordinary kinds of state defaults”, as opposed to inventive remedies.<sup>280</sup> This is why the author contends that the vast number of public interest cases has given the courts more opportunities to build precedent.<sup>281</sup>

For the reasons discussed above, it is easy to see why former Justice Bhagwati held fast to the belief that public interest litigation is “one of the most powerful weapons invented by the court for the purpose of delivering distributive justice to disadvantaged groups of people.”<sup>282</sup> Public interest standing, in conjunction with the procedural innovation in public interest litigation that enables public-spirited persons to seek judicial redress for the violation of fundamental rights by merely writing a letter to a court or judge,<sup>283</sup> still has the capacity theoretically to render justice to the poor, deprived and illiterate, to women and children, to the unorganised labour sector, to those handicapped by ignorance, indigence and illiteracy and to other downtrodden persons.<sup>284</sup>

### 3 4 2 Pitfalls of public interest standing in India

The liberalisation of the rules regulating *locus standi* may have promised much for the people of India and the vindication of their fundamental rights, but Sudarshan argues that this has yet to change the lives of the poor and disadvantaged in reality.<sup>285</sup> This may be attributed, in part, to the fact that public interest litigation addresses a variety of issues, which do not always relate to violation of fundamental rights.<sup>286</sup> Another

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<sup>279</sup> L Seth “Social Action Litigation in India” in S Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 97 100; *People’s Union for Democratic Rights v Union of India* 1982 AIR 1473.

<sup>280</sup> J Fowkes “How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 446.

<sup>281</sup> J Fowkes “How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 446.

<sup>282</sup> P N Bhagwati “Judicial Activism and Public Interest Litigation” (1985) 23 *Columbia Journal of Transnational Law* 561 577.

<sup>283</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67.

<sup>284</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 18.

<sup>285</sup> R Sudarshan “Courts and Social Transformation in India” in P Domingo, R Gargarella and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (2006) 161.

<sup>286</sup> S Deva “Public Interest Litigation in India: A Critical Review” (2009) 28 *Civil Justice Quarterly* 19 33.

cause may be sheer size of the population and the consequent extent of systemic injustice that has been left unaddressed.

Unfortunately, even though well-meaning bystanders seeking public interest standing are allowed to approach courts on behalf of those who are unable to, such plaintiffs are often not well or personally acquainted with the facts.<sup>287</sup> This leaves much fact-finding to be conducted by the courts.<sup>288</sup> It also means that courts often entertain frivolous petitions, which they may discover only once the matter is in the process of being adjudicated. This can cause delays, and result in more urgent issues remaining pending for extended periods of time.

A further shortcoming of public interest standing is that it enables representatives to litigate on behalf of those directly affected without the latter's meaningful participation. Courts risk being considered paternalistic by granting remedies in such cases.<sup>289</sup> It is worth noting here, however, that the very purpose of relaxing the rules of *locus standi* in India was to enable those unable to address the court directly to procure enforcement of their rights.<sup>290</sup> Rakshit believes that the legal significance of article 32 for all people is undermined by the financial inability of most to approach the court for a remedy.<sup>291</sup>

According to Meer, petitioners who act spontaneously when approaching courts in the public interest are at risk of a lack of commitment and may lose interest in the litigation.<sup>292</sup> This leaves the courts to monitor the implementation of their orders in order to ensure compliance.<sup>293</sup> Compounding this difficulty, and due to the relaxed rules of standing, courts have had to hear cases without the well-developed arguments

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<sup>287</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 816, and *People's Union for Democratic Rights v Union of India* 1982 AIR 1473.

<sup>288</sup> S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57 80.

<sup>289</sup> S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57 84.

<sup>290</sup> *SP Gupta v President of India* 1982 2 SCR 210; *Fertilizer Corporation Kamagar Union v Union of India* 1981 AIR 584.

<sup>291</sup> N B Rakshit "Right to Constitutional Remedy: Significance of Article 32" (1999) 34 *Economic and Political Weekly* 2379 2380.

<sup>292</sup> S Meer "Litigating Fundamental Rights: Rights and Social Action Litigation in India: A Lesson for South Africa" (1993) 9 *South African Journal on Human Rights* 358 371.

<sup>293</sup> South African Law Commission *Working Paper 57: The Recognition of a Class Action in South African Law* (1995) 10 at 2.8. This practice is referred to as creeping jurisdiction.

presented by parties in adversarial proceedings in order to enforce fundamental rights.<sup>294</sup>

The relaxed test for public interest standing has placed great strain on judicial resources due to the expedited fashion in which cases are expected to be heard.<sup>295</sup> This has not been aided by the vast number of matters disguised as public interest issues that have flooded the courts.<sup>296</sup> Consequently, one of the greatest challenges facing Indian courts is the determination of cases that are brought legitimately in the public interest and those that are not.<sup>297</sup> The current sifting process required to distinguish between these two categories, too, places a strain on judicial resources. Thus, when dealing with public interest cases, the courts have attempted to define the public interest, as well as which persons are permitted to raise this interest.<sup>298</sup> The term “public interest” has, however, become so broadly construed by the courts that it can arguably be used by petitioners to raise any issue broadly related to governance.<sup>299</sup>

Before the introduction of public interest litigation, the rules of standing had been an effective gatekeeper for the courts.<sup>300</sup> Now, however, the extent of the relaxation of the rules regulating public interest standing has caused the courts in India to be flooded with litigation allegedly brought in the public interest. The judiciary in India has expressed concerns regarding the volume of cases brought in the public interest and had to adjust its proceedings accordingly.<sup>301</sup> Over and above these challenges, the

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<sup>294</sup> S D Susman “Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation” (1994) 13 *Wisconsin International Law Journal* 57 77; *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 802.

<sup>295</sup> J Cassels “Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?” (1989) 37 *American Journal of Comparative Law* 495 508.

<sup>296</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 10.

<sup>297</sup> S Deva “Public Interest Litigation in India: A Critical Review” (2009) 28 *Civil Justice Quarterly* 19 19.

<sup>298</sup> S D Susman “Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation” (1994) 13 *Wisconsin International Law Journal* 57 72. For examples in case law, see *Olga Tellis v Bombay Mun. Corp.* 1986 AIR 180, and *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67.

<sup>299</sup> P Singh “Promises and Perils of Public Interest Litigation in India” (2010) 52 *Journal of the Indian Law Institute* 172 177.

<sup>300</sup> S D Susman “Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation” (1994) 13 *Wisconsin International Law Journal* 57 81.

<sup>301</sup> S D Susman “Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation” (1994) 13 *Wisconsin International Law Journal* 57 82. The procedures involved in public

expansive approach to standing adopted in India has put pressure on courts to develop theories of justiciability by which to sift out issues that are unsuitable to resolution.<sup>302</sup> This, in turn, creates the danger that courts overstep the limits of their judicial function.<sup>303</sup>

Despite the capability of public interest standing to aid public interest litigation in achieving greater access to justice in India, Gauri argues that this original objective of public interest litigation is no longer paramount.<sup>304</sup> There are two factors on which this claim is based. Firstly, the middle classes have the resources to mobilise more easily than the poor, and also possess the funds to approach courts, which in turn enable more benefits from public interest actions.<sup>305</sup> Secondly, Indian judgments have been criticised for exhibiting “urban and middle class bias”, which demonstrate judges’ personal ideologies and world views.<sup>306</sup>

### 3 5 Conclusion

This chapter has documented the conditions in which public interest litigation arose in India during the 1970s and 1980s, and the subsequent role of the courts in promoting social justice. The Supreme Court facilitated this process by instituting procedural changes, which allowed and encouraged public interest organisations to file petitions on behalf of disadvantaged portions of the population aimed at holding the government accountable for large-scale violations of fundamental rights.<sup>307</sup>

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interest litigation will not be a focal point of this research. The effect of public interest standing on such procedures will only be discussed insofar as they are relevant to the research question.

<sup>302</sup> J Cassels “Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?” (1989) 37 *American Journal of Comparative Law* 495 507.

<sup>303</sup> *SP Gupta v President of India* 1982 2 SCR 210 at 84.

<sup>304</sup> V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team *Policy Research Working Paper 5109* (2009) 8.

<sup>305</sup> V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team *Policy Research Working Paper 5109* (2009) 8.

<sup>306</sup> V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team *Policy Research Working Paper 5109* (2009) 8.

<sup>307</sup> R Abeyratne “Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy” (2014) 39 *Brooklyn Journal of International Law* 1 42.



Over forty years since its inception, the Indian jurisprudence concerning public interest standing raises a number of pertinent questions. On the one hand, public interest standing potentially makes litigation and legal relief more accessible to the poor, as it has enabled courts to fashion creative remedies. On the other hand, the Indian approach to public interest standing has also been criticised for the burdens it places on the judiciary, the potential detachment of plaintiffs from the issues they bring to court, and the fact that those affected by the outcome of the case more often than not have no role to play in these decisions.

The value of the findings in this chapter regarding public interest standing in India will become evident in the following chapter, when they are utilised to offer guidance to the development of public interest standing in Bill of Rights litigation in South Africa. Chapter Four will build on the similarities and differences in the evolution of public interest standing in South Africa and India by identifying important considerations for the further development of public interest standing in South Africa.

## Chapter 4: The future development of public interest standing in South Africa

### 4 1 Introduction

The introduction of public interest standing in the Constitution of the Republic of South Africa, 1996 (“the Constitution”) was a welcome departure from the strict rules of standing under the common law.<sup>1</sup> By doing away with the direct interest requirement, section 38(d) of the Constitution now makes provision for anyone to approach a court seeking relief in the public interest for an infringement of a right in the Bill of Rights.

In 1998, the South African Law Commission (“the SALC”) explicitly recommended legislation regulating actions brought in the public interest to prevent public interest standing from being developed haphazardly, or not at all.<sup>2</sup> This was proposed in the form of recommendations and a Bill.<sup>3</sup> The Bill sought to regulate public interest standing, which was introduced into South African law by the Constitution. However, the Bill was not passed and the development of public interest standing in South Africa over the past twenty odd years has remained the responsibility of the judiciary.

The absence of promulgated legislation has left the courts to give content to section 38(d). They have developed public interest standing consistently and, in so doing, have evaded fears of the SALC. The landmark judgments of *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (“*Ferreira*”)<sup>4</sup> and *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* (“*Lawyers for Human Rights*”)<sup>5</sup> currently still provide relatively clear guidance.

This judicially developed guidance calls into question the need for and applicability of the SALC’s Bill today. The very purpose for which the legislation was proposed has been arguably rendered moot. The courts have developed public interest standing without the adoption of legislation, and also maintained a level of uniformity in this development for the meaning and content of section 38 to be sufficiently clear today.

However, an assessment of the development of public interest standing in India reveals the need to revisit some recommendations made by the SALC that have not

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<sup>1</sup> See Chapter 2 above.

<sup>2</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 15 at 3.4.1.

<sup>3</sup> Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995.

<sup>4</sup> 1996 1 SA 984 (CC).

<sup>5</sup> 2004 4 SA 125 (CC).

yet been addressed adequately by the courts in South Africa. Three in particular would have a notable bearing on the further development of public interest standing in South Africa. These pertain to the need for, firstly, an appropriate public interest representative in public interest matters; secondly, careful management of public interest standing cases by the courts; and, thirdly, the involvement of third parties to assist in cases brought in the public interest. Once these areas of potential further development have been explored, this chapter will proceed to examine ways in which the recommendations offered in this chapter could be implemented.

## **4 2 Key considerations for the development of public interest standing in South Africa**

### **4 2 1 An appropriate public interest representative**

Section 38(d) of the Constitution explicitly makes provision for any person to institute an action in court claiming relief by way of a public interest action. However, it must be noted that the public interest applicant need not be the representative in the public interest action proceedings. It may well be the case that the person wishing to seek relief in the public interest is not the best or most appropriate representative for the matter. This distinction has not been dealt with explicitly in case law. It will therefore be addressed below.

#### *4 2 1 1 The public interest applicant*

According to the SALC's recommendations, any person or organisation is entitled to launch an action in the public interest. Applicants need not have any direct, indirect or personal interest in the relief they seek.<sup>6</sup> The SALC recommended further that the person claiming relief should identify the action as one being brought in the public interest and nominate a suitable person to act as a public representative in the matter.<sup>7</sup>

In *Lawyers for Human Rights*, the Constitutional Court noted that South Africans are becoming increasingly aware of their constitutional rights and infringements

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<sup>6</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.4.5. See part 2 3 3 3 above for a discussion on the plaintiff in public interest actions.

<sup>7</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.4.5.

thereof.<sup>8</sup> The courts have confirmed that an applicant approaching the courts in terms of section 38(d) need only show an infringement or threat to a right in the Bill of Rights in order to claim relief in the public interest. It has been noted that the public will usually have an interest in the enforcement of rights generally.<sup>9</sup> In theory, therefore, it should not be difficult for a prospective public interest applicant to prove this objective requirement for invoking public interest standing.

However, the objective requirement for public interest standing must be complemented by a subjective inquiry into the genuineness of the applicant.<sup>10</sup> Essential to the nature of public interest standing is that the applicant must be motivated by a primary desire to benefit the public – whether at large or in part – and not themselves.<sup>11</sup> As section 38(d) is the ground for standing with the widest reach, it is fitting that this is a preliminary concern. In determining whether an applicant is acting genuinely in the public interest, South African courts have been given considerations to take into account in light of the facts and circumstances of each case. These were laid down by O'Regan J in her minority judgment in *Ferreira* and later confirmed and expanded on by the majority in *Lawyers for Human Rights*, as well as a minority judgment by Madala J.<sup>12</sup>

O'Regan J referred to the factors she proposed in *Ferreira* as “considerations”, denoting flexibility in the approach taken by the courts.<sup>13</sup> At the same time, however, her judgment states that courts must be “circumspect” in affording public interest standing.<sup>14</sup> This displays the courts’ commitment to ensuring that matters brought in the public interest be treated with care. Judges need to apply their minds to the two-legged threshold test in order to prevent applicants from pretending that actions are being brought in the public interest with a political or profit motive. This test entails an inquiry into the subjective position of the party claiming to act in the public interest, as

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<sup>8</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 71.

<sup>9</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 235.

<sup>10</sup> See part 2 4 4 2 above.

<sup>11</sup> See part 2 3 3 1 above.

<sup>12</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 234. See part 2 4 4 1 above.

<sup>13</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 234.

<sup>14</sup> See Chapter 2, footnote 202.

well as proof that it is objectively in the public interest for the matter to be brought before the court.

The Indian courts have developed a similar, yet simpler, preliminary inquiry for public interest actions. All that is required of a public interest petitioner is that they act *bona fide* and demonstrate a sufficient interest in the relief sought.<sup>15</sup> The Supreme Court has explicitly refrained from developing rules or detailed factors to determine the genuineness of applicants, stating that matters need to be dealt with on a case-by-case basis.<sup>16</sup> Whether directly because of a lack of a more rigorous threshold test for potential public interest or not, public interest standing consequently been abused by *mala fide* applicants in the Indian courts.

Jurisprudence from India shows a motivation to make justice accessible to the poorest of the poor. This led to the Supreme Court accepting letters addressed to it by any member of the public alleging a violation of a fundamental right.<sup>17</sup> Based on an overview of the phases of the evolution of public interest standing in India,<sup>18</sup> it is submitted that much of the misuse of public interest litigation that occurred could have been prevented by a more cautious approach to relaxed rules of standing. The formulation of a test, or at least a more detailed set of factors, to help courts determine the genuineness of public interest litigants would not have compromised the Supreme Court's commitment to providing access to justice. Instead, it is submitted that some form of threshold test for potential litigants would have helped to prevent public interest standing being invoked by busybodies and meddlesome interlopers.

#### 4 2 1 2 *The public interest litigant as representative*

In most of the South African case law and literature on public interest standing, the terms public interest “applicant”, “litigant” and “representative” are used synonymously. A public interest applicant is someone wishing to approach the courts and launch proceedings in the public interest.<sup>19</sup> However, according to the SALC's recommendations, such person or organisation is not expected to be the

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<sup>15</sup> See part 3 4 4 above.

<sup>16</sup> *SP Gupta v Union of India* AIR 1982 SC 149 para 20.

<sup>17</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67.

<sup>18</sup> See parts 3 3 4 and 3 4 above.

<sup>19</sup> See part 4 2 1 1 above.

representative, or litigant, once the proceedings have been launched.<sup>20</sup> What is certain, however, is that the representative will be the public interest litigant, whether or not they brought the application.

#### **4 2 1 2 1 The role of the public interest representative**

##### (a) Nomination and appointment of a suitably qualified representative

The SALC recommends that the public interest applicant be the one to nominate a representative in the matter once obtaining the nominee's consent.<sup>21</sup> The representative may be the applicant themselves or another person or organisation. The representative can then be appointed by the court after the court is satisfied that the action is a *bona fide* public interest action.<sup>22</sup> Should they later appear not to be an appropriate representative, the SALC also recommends that the representative should be removed and replaced by the court either *mero motu* or on good cause shown by an interested party.<sup>23</sup> This is possible at any time before judgment is handed down.<sup>24</sup>

It is worth noting that the SALC speaks of the appointment of a "suitably qualified" representative by the court.<sup>25</sup> Such a person may not be easy to find.<sup>26</sup> This qualification raises the question whether courts are in a position to exercise this power of appointment exclusively. Although the SALC does not provide detail in this regard, it can be assumed that the public interest applicant will have to provide reasons for their choice of nominee for representative. However, even if this is not the case, the SALC made provision for representatives who later appear not to be the best

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<sup>20</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 90; Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995. Section 2(2) of the SALC's draft Bill states: "The person who institutes a public interest action shall identify the action as such and shall nominate either himself or herself or any other suitable person as representative of those on whose behalf the relief is claimed."

<sup>21</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.4.5.

<sup>22</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.4.5.

<sup>23</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.4.5. This replacement procedure is also necessary in the event of the death of the representative.

<sup>24</sup> Section 3(2) of the Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995.

<sup>25</sup> This requirement is not completely new. If more than one plaintiff came forward to institute an *actio popularis* under Roman law, the praetor would elect the most suitable plaintiff. See part 2 2 2 above.

<sup>26</sup> See part 2 3 3 1 above.



candidate to represent the public in the matter concerned by suggesting a vested power in the court to remove and replace such representatives. A requirement that the representative in the matter be suitably qualified was intended to limit unmeritorious public interest actions.<sup>27</sup>

The Rules of the Constitutional Court make provision for unrepresented parties to apply to the court. In terms of Rule 4(11)(a), the Registrar is expected to refer an unrepresented party to “the nearest office or officer of the Human Rights Commission, the Legal Aid board, a law clinic or such other appropriate body or institution that may be willing and in a position to assist such party.”<sup>28</sup> This provision would help to provide a solution should the procedure of nomination and appointment of a representative come into force.

(b) Representative of the *vox populi*

The *vox populi* – or voice of the people – is naturally inherent to the concept of public interest standing. Anyone representing the public interest in court when alleging that a right in the Bill of Rights has been infringed or threatened is, by implication, speaking on behalf of the public. Standing has traditionally played the role of gatekeeper for the courts; a procedural mechanism intended to prevent certain people from gaining access to courts.<sup>29</sup> When considering the role of the public interest litigant as they represent the *vox populi*, it is desirable to have the most representative of litigants before the courts.<sup>30</sup>

Section 38(d) of the Constitution signifies an action on behalf of people on a basis wider than the class actions contemplated in section 38(c).<sup>31</sup> Whilst the ground of public interest standing has many merits,<sup>32</sup> both the Constitutional Court and the SALC have conceded that the words “in the public interest” are difficult to define objectively,

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<sup>27</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.4.4.

<sup>28</sup> The Constitutional Court Rules, 2003; K Hofmeyr “Rules and Procedure in Constitutional Matters” in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 3 2007) 5–2.

<sup>29</sup> K Schiemann “Locus Standi” (1990) *Public Law* 342 342.

<sup>30</sup> R Binch “The Mere Busybody: Autonomy, Equality and Standing” (2002) 40 *Alberta Law Review* 367 384.

<sup>31</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 15.

<sup>32</sup> See part 2 5 1 above.

and will depend on the impact of the alleged violation.<sup>33</sup> What is clear from the broad approach to public interest standing adopted by the courts is that “[t]he public will ordinarily have an interest in the infringement of rights generally, not particularly”.<sup>34</sup> The Constitutional Court explains this statement by maintaining that the public has an interest in the objective breach of a right in the Bill of Rights.<sup>35</sup> This is supported by section 7(1) of the Constitution, which states that the Bill of Rights “enshrines the rights of all people in our country”.<sup>36</sup> Whether or not the public has a sufficient interest in the particular relief sought will be up to the public interest litigant to prove.<sup>37</sup>

In *Southern African Litigation Centre v National Director of Public Prosecutions*,<sup>38</sup> the applicants launched an application on behalf of victims of torture against the National Director of Public Prosecutions for a decision taken not to investigate alleged crimes against humanity.<sup>39</sup> As the entire international community has an interest in the prosecution of perpetrators of crimes against humanity, there was no doubt that the public had an interest in the matter.<sup>40</sup> The applicants were granted standing under section 38(d).<sup>41</sup> From this decision, it is clear that courts should welcome suitable applicants who wish to represent the public in cases with greater consequences of the infringement of rights.

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<sup>33</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 68; South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.5.2.

<sup>34</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 235.

<sup>35</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 235.

<sup>36</sup> Section 7(1) of the Constitution of the Republic of South Africa, 1996.

<sup>37</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 168.

<sup>38</sup> *Southern African Litigation Centre v National Director of Public Prosecutions* 2012 (10) BCLR 1089 (GNP).

<sup>39</sup> *Southern African Litigation Centre v National Director of Public Prosecutions* 2012 (10) BCLR 1089 (GNP) paras 8 – 13.

<sup>40</sup> *Southern African Litigation Centre v National Director of Public Prosecutions* 2012 (10) BCLR 1089 (GNP) para 12.1.

<sup>41</sup> *Southern African Litigation Centre v National Director of Public Prosecutions* 2012 (10) BCLR 1089 (GNP) para 13.

(c) Adequate representation of the voices of the affected persons

Once a person or organisation has been proven subjectively to be acting genuinely in the public interest and that it is objectively in the public interest for the proceedings to be brought, and a suitable representative for the matter has been nominated and appointed, the proceedings can commence.<sup>42</sup> However, the concept of a suitably qualified representative has not been expanded by the SALC, the courts or literature on the subject. Whereas the term “suitably qualified” may on the face of it refer to abilities, experience or resources on the part of the person or organisation concerned, it is submitted that this needs to be understood more broadly in the context of public interest standing. Due to the potentially large impact of judgments handed down in litigation in the public interest, as well as the fact that the representative represents the *vox populi* in these matters, a representative cannot be considered suitably qualified if they do not speak on behalf of *all* people affected by the infringement of rights in a particular case.

Currently, there is a risk that those whose rights are directly affected by a given case brought in the public interest will not be given a meaningful opportunity to be heard or to participate in the relevant litigation.<sup>43</sup> There is no requirement that those acting in the public interest must have engaged with those they represent in court. Therefore, public interest standing can lead to representatives litigating on behalf of those directly affected without the latter’s meaningful participation.<sup>44</sup> The courts have also displayed a willingness to proceed *suo motu* if issues that require their consideration are raised by a public interest petitioner whose good faith is in question.<sup>45</sup> Although this mechanism can act as a safeguard against petitioners who lose interest in the cases they bring in the public interest, it may undermine the judiciary’s impartiality, as well as the relief granted, to proceed without a public interest representative at all.

Susman investigates whether India’s dispossessed have been given an audible voice in court by litigants by examining three phases of public interest litigation cases

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<sup>42</sup> See parts 2 4 4 1 2, 2 4 4 2 and 4 2 1 1 above

<sup>43</sup> See part 2 5 2 above.

<sup>44</sup> K Schiemann “Locus Standi” (1990) *Public Law* 342 349.

<sup>45</sup> *Ayaaubkhan Noorkhan Pathan v State of Maharashtra* 2013 4 SCC 465 para 22.

in which these people's engagement may have an impact.<sup>46</sup> The first phase starts when the suit is initially brought, the second phase comprises the subsequent case and the third phase concerns the remedy or remedies ordered.<sup>47</sup>

In the first phase, the voices of those represented are only heard if they wish to dissociate from the action.<sup>48</sup> This is not problematic in South Africa because judgment in public interest actions is not *res judicata* against all interested parties.<sup>49</sup>

The second phase has the potential to include greater input from affected persons, as it spans the proceedings of public interest litigation.<sup>50</sup> Susman refers to two examples from case law where the Supreme Court's investigative commission sought input from people with a material interest in the outcome of the case.<sup>51</sup> This was implemented in order that as many affected people as possible might express their needs and wishes.<sup>52</sup> However, this became more challenging as the court's case load increased.<sup>53</sup>

It is a reality that cases like *Bandhua Mukti Morcha v Union of India* ("*Bandhua Mukti Morcha*"), for example, were brought by petitioners who had little or no contact with the actual victims.<sup>54</sup> This scenario is also possible in the South Africa context where interaction can be hindered by victims' will to engage, knowledge of the rights infringement in question, lack of means of transport or where public interest litigants do not speak the same language as those they represent, for instance.

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<sup>46</sup> S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57 87.

<sup>47</sup> The phases that Susman highlights, and which are discussed in this section, must not be confused with the phases of public interest litigation in India. In this regard, see part 3 3 4 above.

<sup>48</sup> S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57 87.

<sup>49</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 8 at 2.4.3.

<sup>50</sup> S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57 88.

<sup>51</sup> S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57, with reference to *Olga Tellis v Bombay Mun. Corp.* 1986 AIR 180 and *Khatri v State of Bihar II* 1981 1 SCC 635.

<sup>52</sup> S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57 86 – 88.

<sup>53</sup> S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57 88. See part 4 2 3 1 below for a discussion on the appointment of experts and commissions by courts.

<sup>54</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67. See part 3 3 4 2 3 above.

In *Lawyers for Human Rights*, the Court acknowledged that the “illegal foreigners” detained at ports under various provisions of the Immigration Act<sup>55</sup> may well have been deported within a matter of days.<sup>56</sup> This afforded the applicant organisation very little time to engage with the victims. In this regard, the public interest dictated that the constitutionality of the impugned provisions be challenged as soon as possible to prevent further rights violations.<sup>57</sup> The second applicant in *Lawyers for Human Rights* was a certain Ann Francis Eveleth. As an American land activist and spokesperson for the National Land Committee, who had been illegally arrested at the World Summit on Sustainable Development and detained for failing to renew her residency permit,<sup>58</sup> she was a suitably qualified representative for the “illegal foreigners” in the Constitutional Court. Yacoob J did not mention this in his majority judgment and instead permitted her involvement because it would have a minimal impact on the cost of proceedings.<sup>59</sup> However, Madala J, in his minority judgment, did make reference to the suitability of the second applicant to the proceedings by stating that she had been illegally arrested and detained without trial under the repealed Aliens Control Act.<sup>60</sup> It is submitted that Madala J’s reasoning shows greater understanding of the importance of having a suitably qualified representative in public interest cases, especially if time is limited and opportunities for meaningful interaction are few.

The later decision in *Albutt v Centre for the Study of Violence and Reconciliation* (“*Albutt*”)<sup>61</sup> demonstrates the Constitutional Court’s commitment to affording victims the opportunity to engage in matters affecting them. In *Albutt*, the applicant NGOs were granted standing to represent victims and the public where the issue of engagement with victims arose. The victims of crimes committed with political motive

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<sup>55</sup> 13 of 2002.

<sup>56</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 21. For a case discussion, see part 2 4 4 2 above.

<sup>57</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 22.

<sup>58</sup> Anonymous “Foreign nationals ‘held for months’” (2002) *Independent Online*. Available at: <<https://www.iol.co.za/news/politics/foreign-nationals-held-for-months-95584>>.

<sup>59</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 23.

<sup>60</sup> 96 of 1991; *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 50.

<sup>61</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC); see part 2 4 4 3 above.

had not been afforded an opportunity to engage in a special dispensation process pardoning convicted prisoners, which warranted intervention.<sup>62</sup>

The South African Constitutional Court has shown a commitment to including victims of rights violations in public interest proceedings. However, it is clear that time constraints may in exceptional circumstances warrant the hearing of matters in the public interest as soon as possible so as to provide redress and prevent further rights violations. This has meant that few (if any) of the voices of affected persons are consulted in the proceedings.

(d) Issues raised by public interest litigants

Relaxed standing provisions in India have enabled the courts to hear a range of issues in the public interest over the past forty years.<sup>63</sup> According to Dhavan, those who are most susceptible to exploitation either struggle personally to win their demands and receive their just deserts, or otherwise depend on the struggle or support of others for their continued existence.<sup>64</sup> Peasants, workers, women, children, the elderly and the vast number of people “condemned to redundancy” are examples of people who are in a constant state of struggle.<sup>65</sup> They have benefited from public interest litigation because of the opportunities that it creates for the enforcement of their fundamental rights.<sup>66</sup> This is because public interest litigation requires cooperation between the disadvantaged and those in a position to defend them.<sup>67</sup>

According to Gauri’s findings, the fifteen percent of public interest cases in India that are filed by non-governmental organisations (“NGOs”) are more likely to address concerns of the poor than the middle class, a statistic that has remained relatively

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<sup>62</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 10.

<sup>63</sup> R Dhavan “Law as Struggle: Public Interest Law in India” (1994) 36 *Journal of the Indian Law Institute* 302 316 – 320.

<sup>64</sup> R Dhavan “Law as Struggle: Public Interest Law in India” (1994) 36 *Journal of the Indian Law Institute* 302 322.

<sup>65</sup> R Dhavan “Law as Struggle: Public Interest Law in India” (1994) 36 *Journal of the Indian Law Institute* 302 322. Dhavan reported that, at the time of publication of the article, the estimated number of people “that the economy does not need” was in excess of 400 million.

<sup>66</sup> R Dhavan “Law as Struggle: Public Interest Law in India” (1994) 36 *Journal of the Indian Law Institute* 302 323.

<sup>67</sup> R Dhavan “Law as Struggle: Public Interest Law in India” (1994) 36 *Journal of the Indian Law Institute* 302 323. See part 4.2.3 below for a discussion of the involvement of third parties to assist in cases brought in the public interest.



constant since the relaxation of standing rules.<sup>68</sup> Gauri attributes this phenomenon partially to the fact that judges are more alert to the concerns of the middle and upper classes because of their own social class and ideological dispositions.<sup>69</sup> The commentator notes, however, that mobilisation by private individuals is the cause of the steady increase in the number of Fundamental Rights claims brought on behalf of disadvantaged groups.<sup>70</sup>

Fowkes notes that these trends show a direct correlation with the success rate of advantaged litigants since 1990, which has steadily increased.<sup>71</sup> The success rate of public interest claims brought by disadvantaged litigants concerning fundamental rights, however, is shown to have declined drastically.<sup>72</sup> While keeping in mind the capability of public interest standing to aid public interest litigation in achieving greater access to justice in India, there is clearly evidence to support Gauri's claim that the objective of public interest litigation has been lost.<sup>73</sup>

Dugard and Roux suggest that the South African Constitutional Court is less accessible than the Indian Supreme Court, based on a comparison of the number of cases involving the poor and the considerable difference in population size between the two countries.<sup>74</sup> There may indeed have been more cases brought and heard in

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<sup>68</sup> V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team *Policy Research Working Paper 5109* (2009) 12.

<sup>69</sup> V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team *Policy Research Working Paper 5109* (2009) 8.

<sup>70</sup> V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team *Policy Research Working Paper 5109* (2009) 12.

<sup>71</sup> J Fowkes "How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL" (2011) 27 *South African Journal on Human Rights* 434 442. The author qualifies this observation by offering a number of reasons for this trend.

<sup>72</sup> V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team *Policy Research Working Paper 5109* (2009) 16.

<sup>73</sup> V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team *Policy Research Working Paper 5109* (2009) 8; J Fowkes "How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL" (2011) 27 *South African Journal on Human Rights* 434 437.

<sup>74</sup> J Dugard and T Roux "The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995 – 2004" in P Domingo, R Gargarella and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (2006) 111 – 112. The authors maintain that the reason for this is the epistolary jurisdiction of the Indian Supreme Court, which

the public interest in India than South Africa in total, but Fowkes observed in 2011 that the Constitutional Court was, in fact, receiving 200 to 250 informal petitions per year.<sup>75</sup> This is almost identical to the average of 260 public interest litigation cases before the Indian Supreme Court each year. Gauri uses this figure to disprove the claims made by critics that public interest litigation drains court resources.<sup>76</sup> However, it is not clear to what extent Gauri's findings take cognisance of the resources needed to operate the filtering mechanisms put in place by the Indian courts, which deal with the vast number of petitions the courts receive but ultimately do not entertain.<sup>77</sup>

(e) Relief sought by public interest litigants

Certain limitations to public interest actions were suggested to the South African Law Commission to consider in light of its recommendations.<sup>78</sup> Among these were suggestions that the relief in terms of public interest actions should be limited to claims of declaratory or interim relief, that the public interest action is not suited to actions for damages, and that it should be subjected to a certification process.<sup>79</sup> However, the Draft Bill on Public Interest Actions and Class Actions proposed by the SALC ("the SALC's draft Bill") thereafter contains no limitations on the relief that could be attained through public interest actions.<sup>80</sup> Public interest litigants are therefore not limited in the relief they seek.

The Constitutional Court in *Ferreira* held that the provisions of section 7(4) did not limit standing in constitutional challenges to only rights in the Bill of Rights.<sup>81</sup> The Court found that section 98(2) vests a general jurisdiction in the Constitutional Court to

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enables the Court to treat letters and petitions as writs launching public interest litigation. See part 3 3 3 3 for an explanation of the term epistolary jurisdiction".

<sup>75</sup> J Fowkes "How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL" (2011) 27 *South African Journal on Human Rights* 434 441.

<sup>76</sup> V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team *Policy Research Working Paper 5109* (2009) 10.

<sup>77</sup> These filtering mechanisms are discussed in greater detail in part 4 2 2 1 below.

<sup>78</sup> C F Swanepoel "The Public Interest Action in South Africa: The Transformative Injunction of the South African Constitution" (2016) 41(2) *Journal for Juridical Science* 29 36.

<sup>79</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 25 at 4.4.2 and 4.4.3.

<sup>80</sup> Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995.

<sup>81</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 167.

interpret, protect and enforce the provisions of the Constitution.<sup>82</sup> Swanepoel is of the view that this helps to pave the way for the SALC's proposal that public interest actions should be introduced by way of legislation into non-constitutional areas of the law.<sup>83</sup>

#### **4 2 1 2 2 The undesirable public interest representative**

The adequate representation of the public interest is clearly an important consideration linked to public interest standing. It goes without saying that insufficient or *mala fide* representation creates the risk of cases being represented by parties with no real interest in the outcome or desire to benefit the public. Of the general categories of standing,<sup>84</sup> it is necessary here to revisit that of the total stranger and “meddlesome interloper” or busybody. Both are undesirable public interest representatives.<sup>85</sup>

A busybody – or, in the alternate words of Binch, “an unattached third party” – is an example of an undesirable litigant.<sup>86</sup> They are applicants with improper or strictly private motives, and who consequently should not be allowed to litigate in the public interest. Third parties who initiate litigation when they do not have appropriate motive or interest in resolving the issues raised in adjudication may overburden court resources.<sup>87</sup> However, Binch notes that the demands and practical costs of litigation help to discourage litigants intending to sue without forethought.<sup>88</sup>

The busybody rationale is believed to safeguard personal autonomy. Personal autonomy is the idea that private individuals should be given decision-making power in matters concerning them. Public interest litigants thus pose a threat to individual conceptions of what comprises a “good life”.<sup>89</sup> However, “one man’s busybody may be

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<sup>82</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 167.

<sup>83</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 11 para 3.1.1.

<sup>84</sup> These categories are discussed in part 3 3 5 above.

<sup>85</sup> *SP Gupta v President of India* 1982 2 SCR 365.

<sup>86</sup> R Binch “The Mere Busybody: Autonomy, Equality and Standing” (2002) 40 *Alberta Law Review* 367 368.

<sup>87</sup> R Binch “The Mere Busybody: Autonomy, Equality and Standing” (2002) 40 *Alberta Law Review* 367 368.

<sup>88</sup> R Binch “The Mere Busybody: Autonomy, Equality and Standing” (2002) 40 *Alberta Law Review* 367 369.

<sup>89</sup> R Binch “The Mere Busybody: Autonomy, Equality and Standing” (2002) 40 *Alberta Law Review* 367 368.

another man's saviour",<sup>90</sup> affording them access to justice they may not have obtained otherwise. This is particularly apt in matters where the litigant is representing the interests of disadvantaged persons.

As has already been noted, public interest litigation in India became the subject of abuse by claimants who disguised private disputes as matters of public interest.<sup>91</sup> The Constitutional Court has developed factors to give content to section 38(d) of the Constitution,<sup>92</sup> which serve the purpose of excluding undesirable applicants from approaching the courts for relief in the public interest. These factors could be completed by integrating the SALC's recommendations that deal with representatives who are shown to be unfit to litigate in the public interest.<sup>93</sup>

#### **4 2 1 2 3 The preferred public interest representative**

Preferred public interest representatives claim injury as members of the public, and not necessarily as a result of any personal loss or damage. Their rights and interests are those enjoyed by every member of the public.<sup>94</sup> In its recommendations, the SALC was of the view that any person should be able to institute action in a court claiming relief by way of a public interest action in the interest of the public generally or of any particular section thereof, irrespective of whether or not such person has any direct, indirect or personal interest in the relief claimed.<sup>95</sup>

The public interest representative may be a person or an organisation. In India, approximately four-fifths of public interest litigation cases are filed by individuals.<sup>96</sup> The

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<sup>90</sup> R Binch "The Mere Busybody: Autonomy, Equality and Standing" (2002) 40 *Alberta Law Review* 367 368. In this article, the author quotes the Law Reform Commission of British Columbia *Report on Civil Litigation in the Public Interest* (Victoria: Queen's Printer for British Columbia, 1980) 61.

<sup>91</sup> V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team *Policy Research Working Paper 5109* (2009) 2. See part 3 4 2 above.

<sup>92</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 234; *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) paras 18, 73. See part 2 4 3 above for a discussion of the requirements for invoking section 38(d).

<sup>93</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.4.5; see part 4 2 1 2 1 (a) above.

<sup>94</sup> M N Chaturvedi "Liberalizing the Requirement of Standing in Public Interest Litigation" (1984) 26 *Journal of the Indian Law Institute* 42 43.

<sup>95</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 v para 4.

<sup>96</sup> J Fowkes "How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL" (2011) 27 *South African Journal on Human Rights* 434 443. Some Indian individuals have filed and/or argued

Supreme Court held that it is the right of a public minded citizen to bring an action for the enforcement of fundamental rights of a disabled segment of the citizenry. This attitude enabled the applicant in *Sheela Barse v Union of India*,<sup>97</sup> who was a social activist, to petition on behalf of children who were illegally detained in jails. The victims in this case fall under Dhavan's sector of the "socially and politically powerless",<sup>98</sup> and had no hope of vindication of their rights without someone to act on their behalf.<sup>99</sup> Sheela Barse initiated proceedings in the Supreme Court by sending a report she had written which exposed the problem of mentally ill children jailed for "safekeeping". As a result of the findings in her report, the Supreme Court declared the admission and detention of innocent, mentally ill persons to jails unconstitutional and illegal. As Iyer J stated in *Fertilizer Corporation Kamgar Union v Union of India* ("*Fertilizer Corporation Kamgar Union*"), which is particularly apt considering Sheela Barse's connection with those she represented in court:

"If a citizen is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any one of the 660 million people of this country, the door of the court will not be ajar for him. But he belongs to an organisation which has special interest in the subject matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered."<sup>100</sup>

Cote and Van Garderen note that in South Africa, institutional applicants (such as NGOs) usually represent the public interest. The authors argue that, unlike most individuals, these NGOs are able to prevent cases from being lost if clients are no longer able or willing to continue.<sup>101</sup> Organisations such as Lawyers for Human

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hundreds of PILs in their lifetimes. See, as an example, H V Nair "PIL warrior Prashat Nhushan: Scams, isolation and his beliefs" (2013) *India Today*. Available at: <<http://indiatoday.intoday.in/story/pras-hat-bhushan-coal-scam-2g-radia-tapes/1/321465.html>>. There are even examples of university students invoking public interest standing. See in this regard *Uhinamma Sivdas v State (Delhi Administration)* W.P. No. 2526 of 1982; *Poola Bhaskara Vijayakumar v State of Andhra Pradesh and another* W.P. No 1822 of 1985; *Mohini Jain v State of Kamataka* 1992 3 SCC 666. In J Fowkes "How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL" (2011) 27 *South African Journal on Human Rights* 434 444 footnote 45, the author mentions other individuals who have filed hundreds of PILs.

<sup>97</sup> *Sheela Barse v Union of India* 1986 SCALE 6 230.

<sup>98</sup> R Dhavan "Law as Struggle: Public Interest Law in India" (1994) 36 *Journal of the Indian Law Institute* 302 322.

<sup>99</sup> See part 4 2 1 2 1 (d) above.

<sup>100</sup> *Fertilizer Corporation Kamgar Union v Union of India* 1981 AIR 344.

<sup>101</sup> D Cote and J van Garderen "Challenges to Public Interest Litigation in South Africa: External and Internal Challenges to Determining the Public Interest: Current Developments / Case Notes" (2011) 27 *South African Journal on Human Rights* 167 174. The authors found that practical considerations, such

Rights,<sup>102</sup> Dignity SA,<sup>103</sup> the National Society for the Prevention of Cruelty to Animals,<sup>104</sup> Black Sash<sup>105</sup> and the Psychological Society of South Africa<sup>106</sup> have all litigated in the public interest in court, the latter three between 2016 and 2017 in the Constitutional Court. The Socio-Economic Rights Institute (SERI), Treatment Action Campaign (TAC) and Section 27 are other notable examples of organisations that are dedicated to campaigning for the realisation and enforcement of human rights.

Evaluating the genuine interest of a public interest organisation will usually involve a perusal of its activities. Binch notes that this may be a barrier for more recently established organisations, but that it would be difficult to test genuine interest any other way.<sup>107</sup> Although this judicial scrutiny is necessary to ensure the best representation for the public interest, the exercise of that discretion must be sensitive to the barriers impairing access to justice for individual members of socially disadvantaged groups.<sup>108</sup>

It may seem inequitable that persons may be forced to accept consequences without having participated in the process determining those consequences, but this is a reality, regardless of whether litigation is brought by an individual or a group.<sup>109</sup> In India, individual clients, who usually have little interest in longer-term legal positions and have fewer resources, can easily be persuaded to accept settlements. The result is that precedents favouring wealthier, routine litigators are more likely to become

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as transport costs and commitment to what can be a very lengthy litigation process, often deter clients from remaining on board with the litigation until completion.

<sup>102</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC).

<sup>103</sup> *Minister of Justice and Correctional Services v Estate Stransham-Ford* 2017 3 SA 152 (SCA) para 76.

<sup>104</sup> *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2017 4 BCLR 517 (CC). According to the Court in paras 11 and 40 respectively, the NSPCA operates in the public interest in combating animal cruelty.

<sup>105</sup> *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* 2017 3 SA 335 (CC).

<sup>106</sup> *Psychological Society of South Africa v Qwelane and Others* 2017 8 BCLR 1039 (CC). At paragraph 17, the Court confirmed public interest standing for organisational applicants which are neither parties nor *amicus curiae* to a matter. See *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd and Another* 2006 6 SA 103 (CC), which the Court referred to in support of this finding.

<sup>107</sup> R Binch "The Mere Busybody: Autonomy, Equality and Standing" (2002) 40 *Alberta Law Review* 367 389 – 390.

<sup>108</sup> R Binch "The Mere Busybody: Autonomy, Equality and Standing" (2002) 40 *Alberta Law Review* 367 390.

<sup>109</sup> R Binch "The Mere Busybody: Autonomy, Equality and Standing" (2002) 40 *Alberta Law Review* 367 384.



established in law, and precedents that might assist future non-repeat player litigants are less likely to become so.<sup>110</sup> Fowkes notes that this occurs in South Africa too.<sup>111</sup> Unless measures are implemented in South Africa to prevent a similar progression as the number of cases brought in the public interest increases, access to justice of under-resourced South Africans may very well be inhibited.

#### 4 2 1 3 *Recommendations*

The challenges facing South African courts will be to ensure that the disenfranchised are given a voice in public interest cases with outcomes that affect them directly, so as to be faithful to the public interest. It is submitted that South African courts can learn from the generally communally inclusive approach of the Indian Supreme Court, which is committed to engineering imaginative remedies that best meet the needs of victims of fundamental rights infringements.<sup>112</sup>

This would be achieved by requiring public interest applicants to nominate representatives, who will act on behalf of the public on court approval. It is also recommended that courts should require proof of engagement between public interest representatives and those they represent, especially (and at least) those with a material interest in the outcome of the case.

#### 4 2 2 Management of public interest standing cases by the courts

In line with its recommendations concerning public interest applicants and representatives, elements of the SALC's draft Bill regulating public interest standing pertain to the role of courts in managing public interest standing.<sup>113</sup> It is submitted that management of public interest standing at least to some extent by the courts is necessary because of the potential impact on the public (or portion thereof) by cases brought in the public interest.

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<sup>110</sup> J Fowkes "How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL" (2011) 27 *South African Journal on Human Rights* 434 445.

<sup>111</sup> J Fowkes "How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL" (2011) 27 *South African Journal on Human Rights* 434 445. See S Budlender, G Marcus and NM Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014) 9 – 10.

<sup>112</sup> G van Bueren "Alleviating Poverty through the Constitutional Court" (1999) 15 *South African Journal on Human Rights* 52 68. This proposal is expanded on in part 4 2 3 below.

<sup>113</sup> Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995.

The SALC proposed that settlement, discontinuation or abandonment of an action brought in the public interest should only be possible with the court's approval.<sup>114</sup> This, along with making the identification of Bill of Rights adjudication as a public interest action and the appointment of an appropriate representative subject to approval of court, shows the SALC's understanding that the courts should be placed in a better position to manage public interest standing cases. It is also a safeguard in the event of undesirable representatives attempting to rely on public interest standing with motives other than those for which the ground of standing was introduced to serve. Furthermore, it is submitted that courts will also be able to manage judicial resources more effectively if these provisions are implemented.

The management of judicial resources and the effect of judgments in cases brought in the public interest are two important considerations to keep in mind when considering how courts can better manage cases brought in the public interest. These two elements discussed in this section aim to provide greater clarity on the consideration that must be had by courts when granting public interest standing and subsequently adjudicating matters brought in the public interest.

#### 4 2 2 1 *Management of judicial resources*

In the case of *Fertilizer Corporation Kamgar Union*, Iyer J displayed boldness in the face of the potential influx of public interest cases that could be brought by relaxed rules of standing, saying that "some risks have to be taken and more opportunities opened for the public-minded citizen to rely on the legal process and not be repelled from it by narrow pedantry now surrounding *locus standi*".<sup>115</sup> The South African Supreme Court of Appeal, too, noted that "[c]ourts are no strangers to floodgates arguments" and that this is not something to fear if cases are well-founded.<sup>116</sup> These statements show the Indian and South African courts' commitment to developing the law without fear. However, practice has revealed that courts also need to consider the resources they have at their disposal and how best to utilise them in order to promote access to justice in word and deed.

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<sup>114</sup> Section 14 of the Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995.

<sup>115</sup> *Fertilizer Corporation Kamgar Union v Union of India* 1981 AIR 344.

<sup>116</sup> *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 3 SA 486 (SCA) para 47.

Two concerns related to the relaxation of standing rules are that they will cause an unmanageable influx of litigation and thereby put strain on scarce judicial resources.<sup>117</sup> These have recently been reaffirmed as a challenge to the South African public interest environment.<sup>118</sup> One way in which these resources should be managed, according to Hogg, is by applying them to real issues, as opposed to hypothetical ones.<sup>119</sup> Here, it is pertinent to discuss the role the public interest litigation cells play in ensuring that only real issues and genuine public interest cases end up in court.

The Indian Supreme Court relaxed the rules of *locus standi* to the point that it entertained letters from anyone alleging an injustice warranting constitutional investigation.<sup>120</sup> The Indian courts have since had to introduce a filtering mechanism in the public interest litigation cells.<sup>121</sup> A public interest litigation cell (sometimes referred to in the literature simply as a “PIL cell”) was established in the registry of the Supreme Court of India in 1985.<sup>122</sup> This provided the Court with a means of sorting through all of the letters sent as public interest litigation petitions. These were read by judges and administrative staff of the Court alike, and over time guidelines were established for determining which letters could be entertained as writ petitions and which could not.<sup>123</sup> These guidelines list specific categories of rights violations which may be entertained as public interest matters, and therefore help the public interest litigation cells to operate more efficiently.<sup>124</sup>

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<sup>117</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 75; P W Hogg *Constitutional Law of Canada* 3 ed (1992) 1263.

<sup>118</sup> See part 2 5 2 above.

<sup>119</sup> P W Hogg *Constitutional Law of Canada* 3 ed (1992) 1263.

<sup>120</sup> R Dhavan “Law as Struggle: Public Interest Law in India” (1994) 36 *Journal of the Indian Law Institute* 302 306 – 307; see part 3 3 4 2 4 above.

<sup>121</sup> S Ahuja *People, Law and Justice: A Casebook of Public-Interest Litigation* vol. II (1997) 774 – 776. See part 3 1 2 2 of this chapter above.

<sup>122</sup> S Ahuja *People, Law and Justice: A Casebook of Public-Interest Litigation* vol. II (1997) 774 – 776.

<sup>123</sup> Supreme Court of India Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation (Based on full Court decision dated 01-12-1988 and subsequent modifications).

<sup>124</sup> Supreme Court of India Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation (Based on full Court decision dated 01-12-1988 and subsequent modifications) 1 – 2. See part 4 3 2 below for a breakdown of the categories contained in the guidelines.

By 1994, a total of 159 666 letters had been received by the Court, and a total of 94 832 cases had been lodged.<sup>125</sup> Similar cells have since been established in various High Courts.<sup>126</sup> Due to filtering mechanisms that the Indian Supreme Court has implemented, the Court now hears an average of 260 public interest litigation cases per year, which is only 0,4 per cent of its docket.<sup>127</sup> These measures have clearly helped to manage the effect of extreme relation of *locus standi* allowed by the Supreme Court.

Given the flood of cases brought in the public interest in India that warranted the implementation of the PIL cells, it is doubtful that such a measure<sup>128</sup> would be necessary in South Africa. It is submitted that a “cell stage” would only be more burdensome on the judiciary. South African courts do not have the same case load as their Indian counterparts.<sup>129</sup> A cell stage is also unnecessary in South Africa because of the safeguards developed by the courts to manage public interest standing, which are sufficiently comprehensive to prevent abuse of public interest standing as in India.

The SALC lists the Constitutional Court, High Courts, Land Claims Court, Labour Court and Magistrates’ Courts as courts that should be able to hear matters brought in the public interest.<sup>130</sup> It also proposed that the Minister of Justice be given discretion to designate any other courts too.<sup>131</sup> A range of courts with jurisdiction to hear cases brought in the public interest will help to spread the case load by making potential litigants aware of the forums in which they can seek judicial redress. The value of this proposal is enhanced by the fact that it is only the Indian Supreme Court and High Courts that can hear cases brought in the public interest.

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<sup>125</sup> S Ahuja *People, Law and Justice: A Casebook of Public-Interest Litigation* vol. II (1997) 775.

<sup>126</sup> S Ahuja *People, Law and Justice: A Casebook of Public-Interest Litigation* vol. II (1997) 776.

<sup>127</sup> J Fowkes “How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 452; V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team *Policy Research Working Paper 5109* (2009) 10.

<sup>128</sup> S Ahuja *People, Law and Justice: A Casebook of Public-Interest Litigation* vol. II (1997) 774 – 776.

<sup>129</sup> J Rowlatt “India Chief Justice in ‘Tearful’ Plea for More Judges” (2016) *BBC World*. Available at <<http://www.bbc.com/news/world-asia-india-36125018>>.

<sup>130</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 30 at 4.8.2.

<sup>131</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 30 at 4.8.2.

#### 4 2 2 2 *The effect of judgments in cases brought in the public interest*

The crafting of public interest remedies in India currently lacks involvement by affected parties.<sup>132</sup> Susman notes that the remedies ordered by the Indian High Courts have more accurately reflected the wishes and needs of the victims than the Supreme Court.<sup>133</sup> This, she notes, is because the High Courts are more inclined to grant remedies in line with traditional norms.<sup>134</sup> In cases where affected persons in a public interest litigation suit are not given a voice in court, the “public interest” is left to the courts to determine. Thus, without the involvement of those affected by the breach of rights in the Bill of Rights, remedies granted may not be most fitting, and their effectiveness may be undermined.<sup>135</sup>

In *Kruger v President of the Republic of South Africa*,<sup>136</sup> the Constitutional Court held that the relief sought in litigation of a public character is generally forward-looking and general in its application, and therefore it may directly affect a wide range of people. In addition, the harm alleged may be “diffuse or amorphous”.<sup>137</sup> This does not preclude relief sought from being retrospective in nature. Insofar as the effect of judgments in cases brought in the public interest is concerned, Van Bueren recognises that the potential of South African courts to uphold human rights is even greater than that of its Indian counterparts. Whereas the Indian Constitution contains Directive Principles, which the author describes as “weak”, South African courts are called to enforce “strong rights”.<sup>138</sup>

In South Africa, the SALC proposed that judgment in public interest actions is not *res judicata* against all interested parties.<sup>139</sup> This means that the judgment does not

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<sup>132</sup> The involvement of affected parties is discussed in greater detail in part 4 2 1 2 1 (c) above.

<sup>133</sup> S D Susman “Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation” (1994) 13 *Wisconsin International Law Journal* 57 90 – 93.

<sup>134</sup> S D Susman “Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation” (1994) 13 *Wisconsin International Law Journal* 57 92.

<sup>135</sup> S D Susman “Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation” (1994) 13 *Wisconsin International Law Journal* 57 90.

<sup>136</sup> 2009 1 SA 417 (CC).

<sup>137</sup> *Kruger v President of the Republic of South Africa* 2009 1 SA 417 (CC) para 23. The Court here was referring to *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 229.

<sup>138</sup> G van Bueren “Alleviating Poverty through the Constitutional Court” (1999) 15 *South African Journal on Human Rights* 52 67.

<sup>139</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 8 at 2.4.3.

bind the people in whose interest it is brought.<sup>140</sup> They would therefore still have opportunities to litigate their own claims. This is different to the Indian approach. The Indian courts have recognised the need to prevent more than one case being raised from the same cause of action and so decided that judgment in public interest actions is *res judicata*.<sup>141</sup>

Whether or not a judgment is binding on the people in whose interest the case was brought, it is submitted that the doctrine of *res judicata* bears less weight if judgments handed down in public interest matters take cognisance of the needs and desires of the persons concerned and seek to provide relief that is effective. A well-researched and sufficiently supported matter<sup>142</sup> brought by a suitably qualified public interest representative<sup>143</sup> will enable courts to make judgments that take into consideration all those affected by the impugned conduct or legislation.<sup>144</sup>

In *Ferreira*, O'Regan J noted that litigation of a public or constitutional nature generally can be said to affect more people than private litigation.<sup>145</sup> In fact, forward-looking relief is specifically sought so that it may directly affect a wide range of people.<sup>146</sup> However, relaxed rules of public interest standing pose a risk of prejudice to persons who would be affected by a decision, but are not before the court.<sup>147</sup> It is therefore of great importance that due regard is given to a determination of the public interest in each case before the courts, as well as participation of those affected in order to do so.

One of the ways in which courts can best manage the development of public interest standing is by keeping in mind the range of persons affected by judgments handed down in matters where relief is sought on behalf of the public. This is because, as

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<sup>140</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 v para 2.

<sup>141</sup> *Karam Chand Anr v Union Of India & Ors* (24 April 2014) (National Green Tribunal) para 25.

<sup>142</sup> In this regard, see part 4 2 3 below.

<sup>143</sup> See part 4 2 1 2 1 above.

<sup>144</sup> In this regard, see S Budlender, G Marcus and N M Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014) 109 – 126. Here, the authors discuss seven factors to ensure that public interest litigation effects social change.

<sup>145</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 229.

<sup>146</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 229.

<sup>147</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 4 SA 125 (CC) para 75; P W Hogg *Constitutional Law of Canada* 3 ed (1992) 1263.



mentioned, the relief granted will affect the public, whether at large or only in part. A requirement of notice “or otherwise” in event of settlement, abandonment or discontinuance, as proposed by the SALC,<sup>148</sup> would show consideration and respect to the number and range of persons likely to be affected by judgments. Giving notice is a way of keeping the public informed.<sup>149</sup> Judicial resources could potentially also be better managed if courts have warning regarding such changes in the court roll.

Swanepoel recommends that another significant consideration related to the nature of the relief sought should be whether the relief granted has the potential of significantly transforming society and reinforcing the constitutional legal order.<sup>150</sup> The author believes that a public interest action is more likely to be approved by a court if the nature of the relief sought is consistent with the crafting of suitable remedies that foster the ideals and values of constitutional societal transformation.<sup>151</sup>

#### 4 2 2 3 *Recommendations*

A danger inherent to a relaxed approach to standing under section 38(d) of the Constitution is the influx of litigants that the courts may have to deal with and, in their wake, a proliferation of issues allegedly brought in the public interest. However, the Constitutional Court has developed safeguards to prevent the flood of litigation experienced by the Indian Supreme Court that occurred in the wake of epistolary jurisdiction and the relaxation of standing rules.<sup>152</sup>

It will not be necessary to introduce a cell stage in future if recommendations regarding regulating public interest standing in this thesis are implemented. However, public interest litigation cells may in future offer a way in which judicial resources can be better managed, especially if key areas of consideration are not implemented. Even if the “cautious minimalism” approach of the courts changes, the exploitation of public

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<sup>148</sup> Section 14 of the Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995.

<sup>149</sup> Section 14 of the Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995.

<sup>150</sup> C F Swanepoel “The Public Interest Action in South Africa: The Transformative Injunction of the South African Constitution” (2016) 41(2) *Journal for Juridical Science* 29 44.

<sup>151</sup> C F Swanepoel “The Public Interest Action in South Africa: The Transformative Injunction of the South African Constitution” (2016) 41(2) *Journal for Juridical Science* 29 44.

<sup>152</sup> See part 3 3 3 3 above.

interest standing could be discouraged through punitive cost orders,<sup>153</sup> which act as a safeguard against meddlers.<sup>154</sup>

Lastly, it is recommended that courts require notice in event of settlement, abandonment or discontinuance. This is a way of keeping public interest representatives accountable to those they represent.

#### 4 2 3 Involvement of third parties to assist in cases brought in the public interest

The relaxation of standing rules to accommodate public interest standing has seen the disappearance of the direct (or personal) interest requirement. A potential public interest litigant in South Africa no longer needs to prove that they personally suffered damage as a result of the alleged infringement of rights. The relaxation of standing to allow public interest standing and disappearance of the direct interest requirement have therefore been linked to the loss of the litigant as a source of facts.<sup>155</sup>

In an attempt to promote access to justice and to have the *vox populi* brought to court by public interest representatives, the courts may need to share the fact-finding burden with the litigant. This does not mean to say that well-meaning bystanders who are completely unacquainted with the facts should be given an expectation that the courts will bear the fact-finding burden.<sup>156</sup> Rather, those litigants who act genuinely in the public interest, but may lack the resources or knowledge to represent the public best in the matter, should be supported in their endeavours to benefit the public.

In India, public interest proceedings entail a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the court to enforce constitutional rights of the community, and to ensure social justice.<sup>157</sup> Third parties

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<sup>153</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 64.

<sup>154</sup> *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the RSA* 1996 3 SA 1095 (Tk) at 1106G; T Ngcukaitobi "The Evolution of Standing Rules in South Africa and Their Significance in Promoting Social Justice" (2002) 18 *South African Journal on Human Rights* 604.

<sup>155</sup> S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57 80.

<sup>156</sup> S D Susman "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" (1994) 13 *Wisconsin International Law Journal* 57 80 – 81. The author notes that the relaxation of standing rules in India placed a fact-finding burden on the judiciary. The large number of cases filed in the public interest increased this burden to an unmanageable level.

<sup>157</sup> *People's Union for Democratic Rights v Union of India* 1982 AIR 1473 3 – 6; L Seth "Social Action Litigation in India" in S Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 99 – 101. The court sets out a detailed exposition of what this process entails.

may therefore have much to offer both public interest litigants and the courts in cases brought in the public interest. Some of them have the ability to raise issues that pertain to the public interest, whereas others have the capacity to assist public petitioners to present their cases in court. Experts and commissions, for example, may also have a role to play in the public interest by helping to ascertain the genuineness of matters presented, as well as ensuring that those represented are given an audible voice in court.

Public interest standing can facilitate the involvement of more voices and issues raised. A key feature of public interest litigation is that, by forming alliances between the disadvantaged, academics and professionals, it empowers people to “take on, discipline and interrogate power”.<sup>158</sup> In fact, Dhavan notes a correlation between the efficacy of public interest litigation and intervention of lawyers, judges, informed activists and the media.<sup>159</sup> Thus, public interest standing is invoked by a person or organisation, but requires these third parties to assist in representing the public interest adequately.

It must also be noted that the development of public interest standing in both India and South Africa can contribute to the prevention of self-help.<sup>160</sup> The Indian Supreme Court has noted that failure of the courts to provide relief to persons concerned about a matter may encourage such persons to prefer the “streets as dispenser of justice”.<sup>161</sup>

#### 4 2 3 1 *The appointment of experts and commissions by courts*

In *Bandhua Mukti Morcha*, the Indian Supreme Court noted that article 32 of the Indian Constitution afforded the Court an “implied and inherent ... power to appoint a commission or an investigating body” in public interest litigation cases.<sup>162</sup> It also has the power to appoint investigative commissions<sup>163</sup> and commissions to monitor

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<sup>158</sup> R Dhavan “Law as Struggle: Public Interest Law in India” (1994) 36 *Journal of the Indian Law Institute* 302 321, 323.

<sup>159</sup> R Dhavan “Law as Struggle: Public Interest Law in India” (1994) 36 *Journal of the Indian Law Institute* 302 324.

<sup>160</sup> S D Susman “Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation” (1994) 13 *Wisconsin International Law Journal* 57 71.

<sup>161</sup> *Fertilizer Corporation Kamagar Union v Union of India* 1981 AIR 344 353.

<sup>162</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67 91.

<sup>163</sup> A M Sood “Gender Justice Through Public Interest Litigation: Case Studies from India” (2008) 41 *Vanderbilt Journal of Transnational Law* 833 842.

compliance.<sup>164</sup> These appointments have the capacity to ensure centrality of the public interest in proceedings. In *Bandhua Mukti Morcha*, for example, the commission was able to provide confirmation of the inhumane work environment of stone quarry labourers alleged by the petitioner.<sup>165</sup> Fact-finding commissions also help to lessen the evidentiary burden for underprivileged litigants.<sup>166</sup> The National Human Rights Commission, too, is responsible for routinely attending to certain types of violations once precedent has been set in the Supreme Court, and provides investigative support to the Supreme Court.<sup>167</sup>

It follows that courts may convene a committee of experts to contribute specialised knowledge on the subject matter of the litigation, especially complex socio-economic or scientific issues, for example.<sup>168</sup> These experts and commissions could provide the court with details regarding what would constitute appropriate relief, how many people might be directly or indirectly affected by any order made by the court, the degree of their vulnerability, the consequences of the infringement of the right or rights in question, and whether those persons or groups have been given an opportunity to present evidence and argument to the court.<sup>169</sup> This, in turn, would enable courts to evaluate the genuineness of the public interest applicant.

#### 4 2 3 2 *Amici curiae*

The Rules of the South African Constitutional Court permit a person with an interest in a matter before the Court who is not a party in the matter to be admitted as an *amicus curiae* (or “friend of the court”).<sup>170</sup> This traditionally occurs at the request of the court

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<sup>164</sup> A M Sood “Gender Justice Through Public Interest Litigation: Case Studies from India” (2008) 41 *Vanderbilt Journal of Transnational Law* 833 842.

<sup>165</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67 at 68.

<sup>166</sup> See *Wangla v Union of India* 1988 1 Scale 188.

<sup>167</sup> J Fowkes “How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 463.

<sup>168</sup> A M Sood “Gender Justice Through Public Interest Litigation: Case Studies from India” (2008) 41 *Vanderbilt Journal of Transnational Law* 833 842. See part 4 2 1 2 1 (c) above.

<sup>169</sup> All of these potential areas of fact-finding pertain to the factors to determine the genuineness of the public interest litigant, as listed by O’Regan J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 234. In this regard, see part 2 4 4 1 above.

<sup>170</sup> Rules of the Constitutional Court GN R1675 in GG 25726 of 31-10-2003, rule 10; I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 15 – 16; K Hofmeyr “Rules and Procedure in Constitutional Matters” in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 3 2007) 5–4. See also *Hoffmann v South African Airways* 2000 11 BCLR 1235 (CC) para 63, where the court defines and describes *amici curiae*.

to represent unrepresented parties or interests or to help the court answer original questions of law that may surface during a matter.<sup>171</sup> Since the introduction of the South African Constitution, a further type of amicus has been introduced, namely, *amici curiae* who wish to intervene in a matter to advance a position of their choosing. Budlender is of the view that this type of friend of the court can promote participatory democracy in matters of public interest and assist in representing a range of people and interests that would otherwise not appear before the court in a given matter.<sup>172</sup>

In the case of *Fose v Minister of Safety and Security*,<sup>173</sup> the Constitutional Court held that, in addition to having an interest, the submissions of the *amicus curiae* must be relevant to the proceedings and must raise new contentions which may be useful to the court. Provided the latter two requirements are met, the courts will not refuse the application of an *amicus* purely because of a lack of a sufficient interest in the issues of law and policy related to the matter at hand.<sup>174</sup> Submissions from *amici curiae* lengthen court proceedings and can also cause delays.<sup>175</sup> However, in *Ferriera*, the Constitutional Court acknowledged the “valuable assistance” offered by the *amici curiae*.<sup>176</sup> On many other occasions, too, the Court has recognised the importance of *amici curiae* and the way they aid the Court in its deliberations.<sup>177</sup>

In India, *amici curiae* can be appointed by the court to find relevant factual data, provide comparative examples from other courts, suggest innovative remedies and ensure that the court does not overlook important considerations.<sup>178</sup> They can also assist in seeing public interest actions through even if the original petitioners are

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<sup>171</sup> G Budlender “Amicus Curiae” in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (OS 07 2006) 8-1.

<sup>172</sup> G Budlender “Amicus Curiae” in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (OS 07 2006) 8-1.

<sup>173</sup> *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 9.

<sup>174</sup> G Budlender “Amicus Curiae” in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (OS 07 2006) 8-10.

<sup>175</sup> *Teddy Bear Clinic for Abused Children & Another v Minister of Justice and Constitutional Development & Another* 2014 2 SA 168 (CC); S Budlender, G Marcus and N M Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014) 20.

<sup>176</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 4.

<sup>177</sup> K Hofmeyr “Rules and Procedure in Constitutional Matters” in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 3 2007) 5–10.

<sup>178</sup> A M Sood “Gender Justice Through Public Interest Litigation: Case Studies from India” (2008) 41 *Vanderbilt Journal of Transnational Law* 833 842.

unable or unwilling to.<sup>179</sup> However, the Indian Supreme Court's choices of *amici* have been criticised for being "extremely ad hoc", for adding little value to proceedings by way of their interventions and, moreover, for generally affording *amici* too much power and responsibility in public interest actions, which undermines the host of other voices they theoretically represent.<sup>180</sup> If provided for in legislation concerning public interest actions, this imbalance can be better avoided in South Africa.

#### 4 2 3 3 *The role of social movements*

Van Bueren notes that the South African public's interest in using law and litigation to alleviate poverty is discouraged by a lack of awareness of legal processes and a familiarity with the daily injustices which occur despite constitutional guarantees.<sup>181</sup> Experience in India has shown public interest petitioners the value of public awareness and support, as well as the involvement of the media.<sup>182</sup> During the Emergency of 1975 – 1977, the press in India was restricted by government censorship, but reacted thereafter by providing widespread coverage on instances of injustice to keep the population informed.<sup>183</sup>

Cote and Van Garderen have contended that South Africa needs social movements to ensure acceptance and support for public interest litigation initiatives.<sup>184</sup> This will help to relieve pressure on institutions that are currently instituting cases in the public interest. It will also aid in addressing the involvement of more voices in these cases, which, according to Susman's findings, is imperative if public interest standing is indeed going to serve the public interest.

In order for public interest actions to be brought timeously and comprehensively, taking the public interest into account fully, there is a need for involvement from civil

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<sup>179</sup> A M Sood "Gender Justice Through Public Interest Litigation: Case Studies from India" (2008) 41 *Vanderbilt Journal of Transnational Law* 833 842.

<sup>180</sup> A M Sood "Gender Justice Through Public Interest Litigation: Case Studies from India" (2008) 41 *Vanderbilt Journal of Transnational Law* 833 842 – 843.

<sup>181</sup> G van Bueren "Alleviating Poverty through the Constitutional Court" (1999) 15 *South African Journal on Human Rights* 52 53.

<sup>182</sup> A M Sood "Gender Justice Through Public Interest Litigation: Case Studies from India" (2008) 41 *Vanderbilt Journal of Transnational Law* 833 896 – 898.

<sup>183</sup> U Baxi "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" (1985) 4 *Third World Legal Studies* 107 114 – 116.

<sup>184</sup> D Cote and J van Garderen "Challenges to Public Interest Litigation in South Africa: External and Internal Challenges to Determining the Public Interest: Current Developments / Case Notes" (2011) 27 *South African Journal on Human Rights* 167 175.



society, non-governmental organisations and Chapter 9 institutions, such as the South African Human Rights Commission.<sup>185</sup> There is also a need for the education and training of lawyers to embrace not only the narrower traditional means of legal education, but to secure the input of community groups and non-governmental organisations. This, in turn, will facilitate involvement by affected parties, which has a particular impact on the crafting of remedies in the public interest.<sup>186</sup>

The Truth and Reconciliation Commission has recommended that legal professionals be encouraged to work with non-governmental organisations to train and enlarge their fields of *pro bono* work in the economic, social and cultural field.<sup>187</sup> Similarly, Van Bueren entreats the legal profession to assume greater compassion in its quest for an accessible legal system.<sup>188</sup> Lawyers are in a position to champion causes on behalf of the people in matters affecting the public interest and should use their skills to ensure greater resource allocation and combat systemic injustice.<sup>189</sup> There are many examples in Indian case law of lawyers bringing matters to court in the public interest.<sup>190</sup>

In the context of both India and South Africa, Fowkes notes that public interest standing enables members of the public to act as alarm bells. In other words, members of the public are able to institute cases concerning violation of rights that would otherwise not have been litigated had it not been for public interest standing. This is possible especially in the absence of high costs of approaching court.<sup>191</sup>

A central goal of all cases brought genuinely in the public interest is to effect positive change for the public in the long run. However, in order for this to be made possible, public interest litigants will need support to research the given legal issues thoroughly,

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<sup>185</sup> J Fowkes “How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 463.

<sup>186</sup> See the discussion in part 4 2 1 2 1 (c) above for a more detailed explanation of the role of the voices of affected persons over the three stages of public interest litigation identified by Susman.

<sup>187</sup> Truth and Reconciliation Commission of South Africa *Final Report* (1998) vol 4, 324 – 325.

<sup>188</sup> G van Bueren “Alleviating Poverty through the Constitutional Court” (1999) 15 *South African Journal on Human Rights* 52 73.

<sup>189</sup> G van Bueren “Alleviating Poverty through the Constitutional Court” (1999) 15 *South African Journal on Human Rights* 52 73.

<sup>190</sup> For example, *SP Gupta v President of India* 1982 2 SCR 365 and *MC Mehta v Union of India and Others* 1988 1 SCC 471, discussed under parts 3 3 4 2 2 and 3 3 4 3 1 respectively.

<sup>191</sup> J Fowkes “How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 444.

to time the filing of their cases well and to coordinate the sharing of information amongst the different actors.<sup>192</sup> Dugard and Langford note that litigation supported by social movements in these ways is more likely to be impactful regardless of the outcome of the case, and that civil society will be empowered as a result.<sup>193</sup> This point is illustrated in the cases of *Mazibuko v City of Johannesburg* (“*Mazibuko*”),<sup>194</sup> which centred on the enforcement of the right of access to water under section 27 of the Constitution, and *Leon Joseph v City of Johannesburg* (“*Joseph*”),<sup>195</sup> which concerned the right to electricity.

Significantly, the applicants in *Mazibuko* were supported by the Anti-Privatisation Campaign’s (“APC”) broader drive for access to water, whereas the applicants in *Joseph* who were applying only for the reconnection of their electricity had no such support from civil society.<sup>196</sup> Thus, notwithstanding the judicial defeat, the litigation in *Mazibuko* positively impacted water campaigns beyond that of APC, and gave hope to other movements against the commercialisation of basic services.<sup>197</sup> On a practical level, the litigation also resulted in the City of Johannesburg increasing the amount of water it provided to the poorest households in the city.<sup>198</sup> Despite the judicial victory in *Joseph* on the other hand, the Constitutional Court’s order pertaining to reconnection of electricity to the building concerned was impossible to implement because of damage caused in the interim.<sup>199</sup> These examples illustrate the importance of support from civil society in public interest litigation, and the fact that a single case brought in

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<sup>192</sup> S Budlender, G Marcus and NM Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014) 4.

<sup>193</sup> J Dugard & M Langford “Art or Science? Synthesizing Lessons from Public Interest Litigation and the Dangers of Legal Determinism” (2011) 27 *South African Journal on Human Rights* 39 56.

<sup>194</sup> 2010 4 SA 1 (CC); J Dugard & M Langford “Art or Science? Synthesizing Lessons from Public Interest Litigation and the Dangers of Legal Determinism” (2011) 27 *South African Journal on Human Rights* 39 41 – 45.

<sup>195</sup> 2010 4 SA 55 (CC); J Dugard & M Langford “Art or Science? Synthesizing Lessons from Public Interest Litigation and the Dangers of Legal Determinism” (2011) 27 *South African Journal on Human Rights* 39 45 – 46.

<sup>196</sup> J Dugard & M Langford “Art or Science? Synthesizing Lessons from Public Interest Litigation and the Dangers of Legal Determinism” (2011) 27 *South African Journal on Human Rights* 39 42.

<sup>197</sup> J Dugard & M Langford “Art or Science? Synthesizing Lessons from Public Interest Litigation and the Dangers of Legal Determinism” (2011) 27 *South African Journal on Human Rights* 39 57 – 58.

<sup>198</sup> J Dugard & M Langford “Art or Science? Synthesizing Lessons from Public Interest Litigation and the Dangers of Legal Determinism” (2011) 27 *South African Journal on Human Rights* 39 58.

<sup>199</sup> J Dugard & M Langford “Art or Science? Synthesizing Lessons from Public Interest Litigation and the Dangers of Legal Determinism” (2011) 27 *South African Journal on Human Rights* 39 60.

the public interest can have a great social effect if part of broader social movements and campaigns.

#### 4 2 3 4 *Recommendations*

In order for anyone – from the common person with little or no knowledge of the law and legal procedures, to a senior advocate – to be able to claim relief in the public interest for an infringement of rights, it will not be sufficient merely to act genuinely in the public interest and to prove the public’s interest in the relief sought. Litigation in the public interest often affects many people and interests beyond the parties before the court.<sup>200</sup> The voices of these other affected persons may not play a role in the litigation process at all, unless public interest litigants rely on the insight and involvement of third parties to claim the most meaningful and fitting remedies on behalf of the public. In this way, the impact of public interest cases will permeate larger portions of the public, irrespective of the judicial outcomes.

It is recommended that courts encourage public participation, media coverage of human rights issues, as well as the involvement of experts, commissions and *amici curiae* in matters brought in the public interest. All South Africans have an interest in the infringement of rights in the Bill of Rights generally that affect the public at large or in part, and everyone should be informed and assisted if they do not personally have sufficient facts to tackle systemic injustices.

### 4 3 **Public interest standing: Potential legislative interventions**

#### 4 3 1 Current position in South Africa

At present, there is no legislation in South Africa or India that regulates public interest standing. The Indian Supreme Court has found occasion to state that it is “imperative” that clear guidelines and propositions be laid down, especially concerning *locus standi*.<sup>201</sup> Although the need for such legislation has been expressed in both jurisdictions, the respective legislatures have failed to do so. As a result, the

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<sup>200</sup> G Budlender “Amicus Curiae” in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 07 2006) 8-1.

<sup>201</sup> *Janata Dal v H S Chowdhary* AIR 1993 SC 892 para 61. The Court did, however, take cognisance of the fact that this is not a unanimous viewpoint, and that one school of thought believed that laying down general rules would not be expedient. In this regard, see *SP Gupta v Union of India* AIR 1982 SC 149 para 20.

formulation of rules and procedures regarding public interest standing has been left to the courts.

It is a fact that the law of procedure itself is constantly adapted and incrementally developed in the course of societal transformation, but that this development must be in line with the Constitution.<sup>202</sup> The SALC's draft Bill sought to provide rules and clarity regarding these procedures.<sup>203</sup> The *locus standi* provision in section 38(d) of the South African Constitution may have been relaxed to enable actions in the public interest to be brought even by persons without a direct interest in the matter, but the SALC clearly envisaged the assurance of greater access to justice through the implementation of enabling legislation.<sup>204</sup>

#### 4 3 2 Lessons from India

The language of article 32 of the Indian Constitution is very broad. It does not specify how or by whom the judiciary can be moved.<sup>205</sup> Although this has enabled the Supreme Court to grant creative remedies in the enforcement of fundamental rights, the lack of procedure has led to arguably haphazard development of public interest standing in India which, today, traverses far beyond the scope and objective originally intended by the initiators of public interest litigation.

As the Indian judiciary is aware of the problems associated with public interest litigation, an attempt was made in 1996 at curbing the misuse of public interest litigation in the form of a private member Bill introduced in Indian Parliament.<sup>206</sup> This Bill noted the purpose of public interest litigation, as well as the fact that the mechanism intended to benefit the poor was being misused. It sought to hold the judiciary accountable<sup>207</sup> for the priority that public interest litigation cases were being

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<sup>202</sup> C F Swanepoel "The Public Interest Action in South Africa: The Transformative Injunction of the South African Constitution" (2016) 41(2) *Journal for Juridical Science* 29 31.

<sup>203</sup> Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995.

<sup>204</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 20 at 3.5.1.

<sup>205</sup> *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67 12.

<sup>206</sup> S Deva "Public Interest Litigation in India: A Critical Review" (2009) 28 *Civil Justice Quarterly* 19 38.

<sup>207</sup> V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team *Policy Research Working Paper 5109* (2009) 4.

given over a backlog of other cases.<sup>208</sup> However, the proposed Bill did not receive the support of all political parties and therefore lapsed.<sup>209</sup>

The Supreme Court has also compiled a set of guidelines to be followed for entertaining letters or petitions that it receives.<sup>210</sup> These were introduced to help courts to deal with the influx of public interest cases being filed and to determine which matters may be brought in the public interest. These guidelines stipulate ten categories under which petitions must fall if they are to be classified as public interest litigation and specify which matters will not be admitted.<sup>211</sup>

The categories under which petitions must fall are: bonded labour matters; neglected children; non-payment of wages to workers and exploitation of casual workers and complaints of violation of labour laws (except in individual cases); petitions from jails complaining of harassment; petitions against police for refusing to register a case, harassment by police and death in police custody; petitions against atrocities on women;<sup>212</sup> petitions complaining of harassment or torture of villagers by co-villagers or by police;<sup>213</sup> petitions pertaining to environmental pollution, disturbance of ecological imbalance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wildlife and other matters of public importance; petitions from riot victims; and family pension.<sup>214</sup> Matters that will not be entertained are those that

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<sup>208</sup> A H Desai and S Muraldihar S “Public Interest Litigation: Potential and Problems” (2000) *International Environmental Law Research Centre* 15.

<sup>209</sup> S Deva “Public Interest Litigation in India: A Critical Review” (2009) 28 *Civil Justice Quarterly* 19 38.

<sup>210</sup> Supreme Court of India Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation (Based on full Court decision dated 01-12-1988 and subsequent modifications).

<sup>211</sup> Supreme Court of India Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation (Based on full Court decision dated 01-12-1988 and subsequent modifications) 3; S Deva “Public Interest Litigation in India: A Critical Review” (2009) 28 *Civil Justice Quarterly* 19 38 – 39.

<sup>212</sup> In particular, harassments of brides, bride-burning, rape, murder and kidnapping. Supreme Court of India Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation (Based on full Court decision dated 01-12-1988 and subsequent modifications) 1.

<sup>213</sup> Specifically from persons belonging to Scheduled Castes, Scheduled Caste Tribes and economically backward classes. Supreme Court of India Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation (Based on full Court decision dated 01-12-1988 and subsequent modifications) 2.

<sup>214</sup> Supreme Court of India Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation (Based on full Court decision dated 01-12-1988 and subsequent modifications) 1 – 2.

pertain to landlord-tenant matters; service matters and those pertaining to pension and gratuity; complaints against government departments and local bodies other than complaints covered in the list of admissible matters; admission to educational institutions; and petitions for early hearing of cases pending in High Courts and other lower courts.<sup>215</sup>

As a result of stricter guidelines in place, the Supreme Court considered around 95 per cent of public interest litigation petitions to be frivolous in a statement made in 2008.<sup>216</sup> The guidelines, which were put to use by courts and public interest cells, helped to give greater content to public interest standing and also provided the public with greater certainty regarding the issues for which public interest standing could be utilised.

#### 4 3 3 Potential legislative means through which to develop public interest standing

It is clear that purposive and creative interpretation of section 38(d) of the South African Constitution should thus remain on South African courts' agendas.<sup>217</sup> This method of interpretation focuses on the realisation of the values in the Constitution, and will encourage the further facilitation of access to justice.<sup>218</sup> However, this can be strengthened by legislation or rules of court giving effect and content to public interest standing. Courts and litigants alike need legislation to give meaning to section 38(d).

When considering future development of public interest standing, Fowkes suggests that South Africa should focus on procedural reforms aimed at enhancing access to justice, as these will help the courts to hear more people and more issues.<sup>219</sup> However, the SALC expressly stated that “[i]t will not open the doors of access to justice if public interest actions were subjected to complicated and costly procedures and

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<sup>215</sup> Supreme Court of India Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation (Based on full Court decision dated 01-12-1988 and subsequent modifications) 3.

<sup>216</sup> S Deva “Public Interest Litigation in India: A Critical Review” (2009) 28 *Civil Justice Quarterly* 19 39.

<sup>217</sup> N J Udombana “Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies” (2005) 5 *African Human Rights Law Journal* 47 47.

<sup>218</sup> J Radebe “Address by the Minister of Justice and Constitutional Development Mr Jeff Radebe on the occasion of Access to Justice Conference” (2011), Sandton. Available at: <[http://www.justice.gov.za/m\\_speeches/2011/20110708\\_min\\_ajc.html](http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html)>.

<sup>219</sup> J Fowkes “How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL” (2011) 27 *South African Journal on Human Rights* 434 436.



requirements.”<sup>220</sup> Legislation could also play a role in managing the cost of procedures, which would greatly enhance access to justice.<sup>221</sup>

There are two ways in which public interest standing can be regulated statutorily, namely by Act of Parliament and by Rules of Court. Both of these legislative means are discussed below. Owing to the fact that standing has traditionally acted as a gatekeeper to the courts,<sup>222</sup> more liberalised rules regarding these provisions in both India and South Africa generate the fear that courts will become overburdened. However, the South African Constitutional Court has recognised that courts must facilitate access to justice. The most significant way in which legislation will help in this regard is by providing clear rules and procedures for the implementation of actions in the public interest.

#### 4 3 3 1 *Regulation of public interest standing by an Act of Parliament*

Swanepoel notes that litigation subsequent to the recommendations published by the SALC has fulfilled some of its predictions pertaining to public interest standing.<sup>223</sup> This calls into question whether the enactment of legislation is necessary to address the concerns of the SALC.

However, the SALC noted in *Working Paper 57* that the enactment of a statute authorising public interest actions would demonstrate acceptance of the concept of litigation in the public interest.<sup>224</sup> Statutory law promotes legal certainty, and makes the law accessible.<sup>225</sup> Procedures in statute aim to ensure that rights and obligations are observed.<sup>226</sup> Additionally, the legislature can enable the executive to make

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<sup>220</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 25 at 4.4.4.

<sup>221</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 25 at 4.4.4.

<sup>222</sup> S D Susman “Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation” (1994) 13 *Wisconsin International Law Journal* 57 81.

<sup>223</sup> C F Swanepoel “The Judicial Application of the ‘Interest’ Requirement for Standing in Constitutional Cases: ‘A Radical and Deliberate Departure from Common Law’” (2014) 47 *De Jure* 63 69. The key concerns of the SALC are highlighted in part 2 3 3 above.

<sup>224</sup> South African Law Commission *Working Paper 57: The Recognition of a Class Action in South African Law* (1995) 12 at 2.11.

<sup>225</sup> W D Popkin *Statutes in Court: The History and Theory of Statutory Interpretation* (1999) 93.

<sup>226</sup> J Kotze “How are the Mighty Felled by Statute” (2009) 9 *Without Prejudice* 23 23.

decisions regarding Bill of Rights issues by means of Acts of Parliament that regulate complex situations.<sup>227</sup>

The advantages of legislation are counter-balanced by the danger of over-legislating. There is also the chance that legislation will require interpretation of the courts to give it meaning. However, as there is currently no legislation pertaining to public interest standing, over-legislation is less of a danger in this area specifically. The primary concern regarding development of public interest standing in South African Bill of Rights litigation is that legislation would be unnecessary, as the courts have already interpreted and elaborated section 38(d) of the Constitution.

#### 4 3 3 2 *Regulation of public interest standing by Rules of Court*

The Rules Board for Courts of Law Act<sup>228</sup> empowers the Rules Board for Courts of Law (“the Rules Board”) to review, amend and repeal rules of court in the Supreme Court, High Courts and lower courts.<sup>229</sup> The purpose of this Act is “to provide for the making of rules for the efficient, expeditious and uniform administration of justice”.<sup>230</sup> It is clear, therefore, that rules of court function to improve the administration of justice.

According to section 173 of the South African Constitution which confers power upon the Constitutional Court, the Supreme Court and the High Court “to protect and regulate their own process ... taking into account the interests of justice”.<sup>231</sup> Section 165(2) of the Constitution states that the courts are independent except insofar as they must comply with the Constitution and the law.<sup>232</sup>

In *Glenister v President of Republic of South Africa* (“*Glenister*”),<sup>233</sup> the Constitutional Court had to decide whether to condone the late filing of the applicant’s application for leave to appeal.<sup>234</sup> There may be instances where reasons for a judgment are only furnished after the date of the order, which is when the 15-day time

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<sup>227</sup> F I Michelman “Separation of Powers” in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 6 2008) 12–88.

<sup>228</sup> 107 of 1985.

<sup>229</sup> Section 6 of the Rules Board for Courts of Law Act 107 of 1985 stipulates the powers of the Rules Board.

<sup>230</sup> Preamble of the Rules Board for Courts of Law Act 107 of 1985.

<sup>231</sup> Section 173 of the Constitution of the Republic of South Africa, 1996.

<sup>232</sup> Section 165(2) of the Constitution of the Republic of South Africa, 1996.

<sup>233</sup> 2011 3 SA 347 (CC).

<sup>234</sup> *Glenister v President of Republic of South Africa* 2011 3 SA 347 (CC) paras 43 – 50.

limit is triggered. The Uniform Rules of Court<sup>235</sup> have been amended to provide for this dilemma by postponing the commencement of the period within which leave must be sought until reasons have been delivered.<sup>236</sup> However, there had been no such amendment of the Constitutional Court Rules.<sup>237</sup> The Court noted that section 173 of the Constitution should only be invoked under exceptional circumstances. The use of this power to promulgate the relevant rule was found to be justified on the facts because there were neither rules nor legislation dealing with the dilemma in question.<sup>238</sup> The Court found it necessary to adopt a fitting interim procedure.<sup>239</sup>

The decision in *Glenister* is a concrete example where the Constitutional Court found it necessary to amend the Constitutional Court Rules in the interests of justice. On the facts, the amendment was necessary to address a dilemma that had arisen in practice. There is consequently no reason to prevent the Constitutional Court from amending its Rules to regulate proceedings brought in the public interest which are, as of yet, not dealt with therein. It is therefore recommended that the Constitutional Court codify the guidelines already laid down in *Ferreira* and *Lawyers for Human Rights*.<sup>240</sup> Certain additional recommendations made for the content of legislation or rules in this regard already appear in the Constitutional Court Rules.<sup>241</sup> The Rules Board is statutorily empowered to effect the same changes in the Uniform Rules of Court.

#### 4 3 4 Potential certification of public interest actions

The SALC decided that it would not be in the interest of access to justice to recommend a certification process for matters brought in the public interest. However, in light of the abuse of public interest standing in India, as well as considerations raised in this thesis for the development of public interest standing,<sup>242</sup> it is worth re-

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<sup>235</sup> Uniform Rules of the High Court GN R315 in *GG 19834* of 12-03-1999.

<sup>236</sup> *Glenister v President of Republic of South Africa* 2011 3 SA 347 (CC) para 46.

<sup>237</sup> Rules of the Constitutional Court GN R1675 in *GG 25726* of 31-10-2003.

<sup>238</sup> *Glenister v President of Republic of South Africa* 2011 3 SA 347 (CC) paras 47 – 48.

<sup>239</sup> *Glenister v President of Republic of South Africa* 2011 3 SA 347 (CC) para 48.

<sup>240</sup> See parts 2 4 4 1 and 2 4 4 2 respectively.

<sup>241</sup> Part 4 3 4 below offers recommendations for the content of legislation or rules of court.

<sup>242</sup> See parts 4 2 1, 4 2 2 and 4 2 3 above for discussions of the key considerations concerning the development of public interest standing in South Africa.

considering the advantages of including this step for the purpose of refining public interest standing.

Although creating a barrier to court, a certification process can help to prevent abuse of public interest standing. In addition to this, it can serve to protect the interests of those who are absent during the public interest proceedings.<sup>243</sup> In practice, this procedure would entail the public interest litigant approaching the court for relief in the public interest. Once an appropriate representative has been nominated and appointed,<sup>244</sup> the court would issue an order certifying the action as such in order for it to proceed. The court could then determine the procedure to be followed thereafter, and the case could be heard and decided.<sup>245</sup>

By following this procedure, courts will be enabled to decide before hearing a matter whether or not the litigant is approaching the court genuinely in the public interest and whether, on evidence presented, the public has an interest in the relief claimed. The court is also given an opportunity to evaluate the nominated representative(s) in order to ensure that they are suitably qualified before the matter proceeds, thereby limiting unmeritorious public interest actions.<sup>246</sup>

This proposal may not promise access to justice to the extent that the Indian Supreme Court deemed necessary for the Indian population, and may even limit access to justice on the face of it in South Africa. However, it can aid the courts in managing their resources more effectively and ensuring that the necessary preliminary steps are decided (such as ensuring that the voices of those affected are heard), before the matter commences in court.

#### 4 3 5 Recommendations for content of legislation

##### 4 3 5 1 *Determination of an action as a public interest action*

It would be of value to all parties to public interest proceedings to be able to determine with certainty whether or not an action should proceed as a public interest action. The

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<sup>243</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 39 at 5.5.5.

<sup>244</sup> See part 4 2 1 2 1 (a) above.

<sup>245</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 40 at 5.5.7.

<sup>246</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.4.4.

SALC addressed two significant aspects that could assist in this regard.<sup>247</sup> The first is for the court to differentiate between an action in the public interest and an own-interest action based on a public right.<sup>248</sup> Legislation is necessary to provide a definition for the phrase “in the public interest”, for which there are currently several meanings. This definition should take cognisance of the definitions proposed by the SALC and developed by the courts.<sup>249</sup>

The definition for a public interest action suggested by the SALC is “an action instituted by a representative of the public generally, or in the interest of a section of the public, but not necessarily in that representative’s own interest”.<sup>250</sup> A comparable definition offered by the Indian Supreme Court is “an action initiated in a court of law for the enforcement of public interest or general interest in which the public ... [has] pecuniary interest or some interest by which their legal rights or liabilities are affected”.<sup>251</sup>

It is submitted that the definition offered by the SALC focuses on the genuineness of the applicant, by emphasising that the action being brought is first and foremost in the interest of the *public*. The emphasis in the definition offered by the Indian Supreme Court, however, creates an onus of proof requiring a public interest petitioner to demonstrate what exactly it is that the public has an interest in, in order for such petitioner to be afforded public interest standing. A combination of these two definitions would therefore be most fitting, and would take cognisance of the South African Constitutional Court’s approach to public interest standing.<sup>252</sup>

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<sup>247</sup> C F Swanepoel “The Public Interest Action in South Africa: The Transformative Injunction of the South African Constitution” (2016) 41(2) *Journal for Juridical Science* 29 35.

<sup>248</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.5.2.

<sup>249</sup> See, respectively, South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26 at 4.5.2 and C F Swanepoel “The Public Interest Action in South Africa: The Transformative Injunction of the South African Constitution” (2016) 41(2) *Journal for Juridical Science* 29 37 – 41.

<sup>250</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 24 at 4.3.4.

<sup>251</sup> *Janata Dal v H S Chowdhary* AIR 1993 SC 892 para 53.

<sup>252</sup> See part 4 2 1 1 above.

#### 4 3 5 2 *Guidelines for potential public interest applicants*

Without the existence of epistolary jurisdiction in South Africa, which enables courts to hear matters brought to them simply by letter,<sup>253</sup> potential public interest applicants require professional legal assistance to launch proceedings in the public interest. This dependence on the legal fraternity to approach the courts can be considered somewhat of a barrier of access to justice for the common person. Anyone without legal training or insight into court procedure will need time, money and an ability to employ legalese in order to assemble a case.

It would therefore be of great value to individuals or organisations contemplating bringing an action in the public interest to have access to guidelines regarding matters brought in the public interest. In this regard, the user-friendly guidelines drawn up by Muraldihar for practice and procedure of public interest litigation in the Indian Supreme Court offer much assistance.<sup>254</sup> These guidelines deal with the conversion of a problem into a case, counselling, preparing a case, drafting the petition, preparing the file and the hearing of the case. Such documentation would certainly make public interest law more accessible to the average South African, and enable a greater number of voices to be represented in public interest matters.

#### 4 3 5 3 *Relief claimed in the public interest*

It is suggested that public interest applicants specify whether the action they wish to bring is in the interest of the public generally or in the interest of a particular section of the public. This will aid the court in its application of a number of the factors to determine the genuineness of the applicant. These factors include the nature of the relief sought, whether the relief was of a general or particular nature, and the range of persons or groups who may be directly or indirectly affected by a court order.

According to Swanepoel, the relief sought by a public interest applicant plays a crucial role in the court's decision whether or not to grant public interest standing. The courts should welcome opportunities to grant socially transformative remedies that

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<sup>253</sup> P N Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Columbia Journal of Transnational Law* 561 571.

<sup>254</sup> S Ahuja *People, Law and Justice: A Casebook of Public-Interest Litigation* vol. II (1997) 862 – 875. These guidelines are not to be confused with the Supreme Court of India Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation (Based on full Court decision dated 01-12-1988 and subsequent modifications), discussed in greater detail in part 4 3 2 above.



uphold the ideals and values of the Constitution.<sup>255</sup> Applicants seeking relief of this nature should not hastily be denied standing under section 38(d) of the Constitution.

#### 4 3 5 4 *Parties to the proceedings*

Due to the broad nature of public interest actions and the relief sought in such cases, it is crucial that these matters are correctly represented and that, where necessary, the involvement of third parties is facilitated.<sup>256</sup> This is where the examination of the genuineness of public interest litigants, as developed by the Constitutional Court in *Ferreira and Lawyers for Human Rights*, comes into play.<sup>257</sup> Courts already possess the power to appoint representatives in matters of public interest. However, legislation can oblige courts to appoint the most appropriate representative, which must be someone suitably qualified and genuine in their wish to represent the public interest.<sup>258</sup>

Legislation or Rules of Court can even oblige prospective public interest litigants to afford possibly affected persons or groups opportunities to make representations and present evidence to the court as *amici curiae*.<sup>259</sup> If included in legislation, such a provision will help to ensure greater access to justice for those unable to litigate, and for the public at large. It would also provide greater clarity to all parties involved regarding their roles in public interest actions, and thus improving accountability and transparency.

#### 4 3 5 5 *Nature of the proceedings*

In India, public interest litigation petitions must be based on constitutional claims, and are mostly brought against the state and not private parties. Furthermore, the process is technically non-adversarial. The governmental respondents are expected to work together with the petitioners to address the issue at hand.<sup>260</sup> Emphasising that the

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<sup>255</sup> C F Swanepoel “The Public Interest Action in South Africa: The Transformative Injunction of the South African Constitution” (2016) 41(2) *Journal for Juridical Science* 29 44.

<sup>256</sup> C F Swanepoel “The Public Interest Action in South Africa: The Transformative Injunction of the South African Constitution” (2016) 41(2) *Journal for Juridical Science* 29 44.

<sup>257</sup> See part 2 4 4 above.

<sup>258</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 25 at 4.6.2 and 4.6.3.

<sup>259</sup> C F Swanepoel “The Public Interest Action in South Africa: The Transformative Injunction of the South African Constitution” (2016) 41(2) *Journal for Juridical Science* 29 44.

<sup>260</sup> A M Sood “Gender Justice Through Public Interest Litigation: Case Studies from India” (2008) 41 *Vanderbilt Journal of Transnational Law* 833 840.

government should not look upon public interest litigants as opponents, the Indian Supreme Court has explained that public interest litigation is a collaborative effort between the litigant, the state and the court to “secure observance of the constitutional or legal rights, benefits and privileges.”<sup>261</sup>

A useful way to combine many of the aspects highlighted above for inclusion in legislation in South Africa could be to require a preliminary action to be brought to court by prospective litigants, upon the approval of which a public interest action can commence.<sup>262</sup> A preliminary action affords courts an opportunity to examine whether the action falls within the ambit of Bill of Rights litigation, as well as whether other effective measures exist by which the action can be brought.<sup>263</sup> It also creates a means whereby prospective public representatives can be examined and approved. The implementation of this proposal may better equip litigants to approach the courts in the public interest. However, this is not guaranteed to increase access to justice, as it would add another step to the proceedings. Additional procedural hurdles like this, in turn, can result in delays and greater cost.

Once courts have made a determination as to the acceptability of a public interest action, it will be helpful to consider whether such public interest action has a *prima facie* good chance of success and the potential effect of a successful judgment on the public.<sup>264</sup> Legislating this area of law in South Africa can offer a change in perspective regarding public interest actions and the potential they have to ensure the vindication of rights. It is preferable in South Africa, too, that proceedings are a collaborative effort, keeping in mind the nature of the relief in public interest actions.

#### 4 3 5 6    *Securing funding for an action in the public interest*

In *Working Paper 57*, the SALC noted that access to justice is frequently hampered by lack of funds.<sup>265</sup> This phenomenon has been confirmed recently by Budlender, Marcus and Ferreira, who note that, although there are some well-resourced

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<sup>261</sup> *Sheela Barse v Union of India* AIR 1983 SC 378 8.

<sup>262</sup> C F Swanepoel “The Public Interest Action in South Africa: The Transformative Injunction of the South African Constitution” (2016) 41(2) *Journal for Juridical Science* 29 43 – 44.

<sup>263</sup> C F Swanepoel “The Public Interest Action in South Africa: The Transformative Injunction of the South African Constitution” (2016) 41(2) *Journal for Juridical Science* 29 43 – 44.

<sup>264</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 26.

<sup>265</sup> South African Law Commission *Working Paper 57: The Recognition of a Class Action in South African Law* (1995) 1 at 1.3.

organisations that can support actions brought in the public interest, there is generally little funding available to support public interest applicants.<sup>266</sup> Furthermore, it is difficult to secure funding for an action in the public interest, especially if the cause is an unpopular one.<sup>267</sup>

In India, this is far less problematic. Courts exercise epistolary jurisdiction by entertaining letters from indigent petitioners and appointing fact-finding commissions to provide necessary information in connection with the alleged violation of fundamental rights. South African jurisprudence has thus far tended more towards finding a representative who can act on behalf of those unable to approach the courts for financial reasons. The solution posed in the SALC's final recommendations for this problem was that the Legal Aid Board should be used as a mechanism to provide legal aid to financially needy public interest litigants.<sup>268</sup>

#### 4 4 Conclusion

Despite the fact that section 38(d) of the South African Constitution, in theory, strives to make the courts and relief for the infringement of rights more accessible to everyone, Fowkes holds the view that South African courts are "insufficiently open to ordinary people".<sup>269</sup> With this concern in mind, this chapter drew from the previous two chapters to offer recommendations for the development of public interest standing in South Africa. This was achieved by evaluating the development of public interest standing in India together with recommendations made by the SALC that have not yet been addressed by the South African courts.

A comparison of the SALC's *Project 88* and the independent interpretation and development by the courts of section 38(d) of the Constitution revealed three key

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<sup>266</sup> S Budlender, G Marcus and N M Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014) 10.

<sup>267</sup> South African Law Commission *Working Paper 57: The Recognition of a Class Action in South African Law* (1995) 15 at 3.8.

<sup>268</sup> South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 ix para 24. The objects of Legal Aid South Africa, as contained in section 3 of the Legal Aid South Africa Act 39 of 2014, are to make legal aid and advice available, to provide legal representation at state expense and to provide legal education regarding the rights and obligations of South Africans. Section 4 of the Act empowers the Legal Aid Board to do what is necessary in order to accomplish these objectives.

<sup>269</sup> J Fowkes "How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL" (2011) 27 *South African Journal on Human Rights* 434 438.

considerations for the further development of public interest standing. Firstly, it is clear from South African and Indian jurisprudence that the genuineness of the public interest applicant and the appropriateness of the public interest representative is of utmost importance in matters where relief is claimed on behalf of the public, especially because public interest standing is the ground of *locus standi* that casts the widest net. The second and third considerations, which are closely related and have a bearing on the first, concern the role that courts play in managing matters brought in the public interest and the involvement of third parties to assist in these matters respectively. Owing to the misuse of public interest standing that has occurred in India and the negative impact that this has had,<sup>270</sup> the focal areas contemplated in this chapter offered recommendations by which to reinforce the safeguards laid down by the Constitutional Court in *Ferreira* and *Lawyers for Human Rights*.

All that remains is to provide an overview of this study, as well as present key findings. These will be offered in the following chapter, along with an identification of areas for potential further research.

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<sup>270</sup> See part 3 4 2 above.

## **Chapter 5: Conclusion**

### **5 1 Overview of the study**

The primary focus of this thesis was the evolution of public interest standing in South African Bill of Rights litigation and the ways in which it can be further developed. This research sought to offer recommendations for the further development of public interest standing by examining the evolution of the procedural mechanism of standing in the Indian model of public interest litigation. In order to refine the understanding and procedures relating to public interest standing in South Africa in this way, this thesis sought to determine the merits and pitfalls of public interest standing currently in both jurisdictions.

Article 32 of the Constitution of India, 1949 (“the Indian Constitution”), and section 38(d) Constitution of the Republic of South Africa, 1996 (“the South African Constitution”), have been interpreted broadly with a view to increasing access to justice. Access to justice is essential for securing the protection of human rights, regardless of the socio-economic circumstances of any given case, and constitutional standing provisions make this enforcement possible. This research has emphasised that public interest standing, in particular, is seen to have the widest potential reach in this regard.

The primary contribution of this thesis is the recommendations it offers, which are aimed at addressing the problems identified with public interest standing in South Africa today.<sup>1</sup> The key findings of this research, as well as the considerations necessary for the further development of public interest standing in South Africa, are summarised below.

### **5 2 Key findings**

#### **5 2 1 Public interest standing in South Africa**

The first research aim of this thesis was to analyse the incremental, casuistic development of public interest standing in South Africa, both prior and subsequent to the adoption of the South African Constitution, paying attention to both the advantages

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<sup>1</sup> These recommendations are outlined in parts 4 2 1 3, 4 2 2 3, 4 2 3 4 and 4 3 5 above.

and disadvantages of this form of standing in the context of human rights-related litigation.

The *actio popularis* under Roman law fell into disuse under Roman-Dutch law and was declared completely defunct under South African common law. The only notable exception to the personal interest requirement for invoking the right to approach a court for relief was the decision of *Wood & Others v Ondangwa Tribal Authority & Another*.<sup>2</sup>

Public interest standing was explicitly introduced in section 38(d) of the South African Constitution. Regardless of recommendations offered by the South African Law Commission (“the SALC”), which culminated in a proposed Draft Bill on Class Actions and Public Interest Suits,<sup>3</sup> there has been no legislation implemented to regulate public interest standing. Development of public interest standing has therefore been left to the courts. The cases of *Ferreira v Levin*<sup>4</sup> and *Lawyers for Human Rights v Minister of Home Affairs*<sup>5</sup> have gone the furthest in giving meaning to section 38(d), and have set the precedent for public interest actions today. These two judgments highlighted the importance of the genuineness with which anyone seeks to rely on public interest standing for the enforcement of rights in the Bill of Rights. They also demonstrate the need for it to be objectively in the public interest for a matter to be adjudicated.

Today, a public interest applicant need not have a direct or personal interest in the matter at hand. However, there must be an objective breach of rights in the Bill of Rights and the public needs to have a sufficient interest in the relief sought. This relaxed approach to *locus standi* permits litigants to act on behalf of sections of the public whose human rights have been infringed, whether or not the victims are aware of these violations or able to approach the court for relief themselves. Conversely, public interest standing enables litigants to represent people without any prior engagement and results in *mala fide* applicants wasting judicial resources.

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<sup>2</sup> 1975 2 SA 294 (A). In this case, the court found that anyone could apply for an interdict on behalf of victims of human rights infringements by state authority, but only when such victims were not in a position to bring the application themselves. See part 2 2 5 1 above for a more detailed case discussion.

<sup>3</sup> Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995, found in South African Law Commission *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* R 8/1998 87 – 104. See part 2 3 3 4 above.

<sup>4</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC).

<sup>5</sup> *Lawyers for Human Rights and Other v Minister of Home Affairs and other* 2004 4 SA 125 (CC).



## 5 2 2 Public interest standing in India

The second research aim of this thesis was to analyse the development of public interest standing within the broader framework of public interest litigation (“PIL”) in India in order to evaluate its strengths and weaknesses.

Article 32 of the Indian Constitution permits individuals to seek redress for violations of their fundamental rights. This provision has been interpreted in line with the Directive Principles of State Policy in order to increase access to justice. Sparked by a desire to increase access to justice for the vast number of underprivileged people in India, and facilitated by judicial activism, creative interpretation of article 32 – which later included article 226 – saw a major expansion of the rule of standing in India. The result was that anyone could approach the courts on behalf of those unable to as a result of social and economic disadvantages, provided that such petitioner acted in good faith and not for personal gain or profit. The Supreme Court also interpreted the phrase “appropriate proceedings” to allow letters addressed to the court in the public interest to constitute writ proceedings for purposes of article 32.

The broadening of *locus standi* under article 32 of the Indian Constitution has developed over three broad phases.<sup>6</sup> The scope of public interest standing today has extended beyond the objectives for which it was intended originally, and poses the threat of over-taxing judicial resources and flooding the courts with litigation. Although not every petitioner approaching the courts for relief in the public interest acts with ulterior or improper motives, it is easy for matters of personal gain or private profit to be disguised as public interest actions.

Like South Africa, India has no legislation regulating public interest actions. However, where the South African Constitutional Court has laid down a number of factors to determine whether or not public interest standing should be granted in any given case, the Indian Supreme Court shied away from developing a concrete test. Nevertheless, the Indian courts are aided by guidelines<sup>7</sup> and public interest litigation cells, which help them to sift out a large number of frivolous petitions.<sup>8</sup>

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<sup>6</sup> See part 3 3 4 above, which analyses each of these phases individually.

<sup>7</sup> Supreme Court of India Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation (Based on full Court decision dated 01-12-1988 and subsequent modifications).

<sup>8</sup> See part 4 2 2 1 above.

### 5 2 3 Preventing the abuse of public interest standing

The third research aim was to evaluate the possibilities for further interpretation and application of section 38(d) of the South African Constitution by drawing on the merits and pitfalls of public interest standing in India. The final aim of this research was to offer proposals for the development of public interest standing in South Africa which address key areas of consideration identified in this study.

Owing to the flood of public interest actions filed in the Indian courts, it is vital that South African law creates further safeguards to prevent abuse of the relaxation in the rules of standing to the same extent as seen in India. One of the ways to achieve this is the implementation of legislation regulating public interest actions. Another way to regulate public interest standing in South Africa is to codify the existing guidelines in court rules. These measures will provide greater legal certainty and content for section 38(d) and enable public interest actions to be brought efficiently.

With a broader approach to standing come the needs to filter cases to ensure that public interest applicants raise constitutional issues, that the best representatives act on behalf of the public and that those affected by the alleged rights violations are afforded opportunity to make submissions. Cases brought in the public interest are community-orientated, and their remedies affect the public. This is why public interest litigants require involvement from a range of actors, from non-governmental and non-profit organisations to commissions and, naturally, the public. This will in effect enhance access to justice for those unable to approach the courts for the vindication of human rights.

### 5 3 Areas for potential further research

This research would be complemented by further research in a number of different areas. The development of public interest standing in other jurisdictions (for example, Canada) would be valuable in considering further development of section 38(d). It would also be of great interest to consider the possibilities for public interest standing to launch non-Bill of Rights litigation proceedings, as per suggestion of the SALC. Public interest standing is a procedural mechanism enabling public interest litigation, which is an area of South African law that this thesis has not discussed in detail. However, considering the importance of securing greater access to justice for all, there

is scope for exploring the relationship between public interest standing, access to justice and legal aid strategies.

#### **5 4 Concluding reflections**

The right to approach courts in the public interest is the widest ground of standing available in South Africa. No longer must potential litigants prove a personal interest in the relief they seek in such cases: their rights need not have been affected at all. This creates great potential for anyone to seek access to justice on behalf of those who cannot.

In India, public interest standing has been used and abused, with justifiably mixed results. The courts have had to battle with frivolous petitions brought by people and organisations not acting in the public interest at all, whether well-intended or not. The flood of public interest imposters has meant that fewer true public interest proceedings are launched, and genuine petitioners are discouraged from approaching courts.

To act in the public interest is a high calling. The relief of public interest proceedings is not enjoyed purely by the litigant, in the event that they derive benefit therefrom at all. Shouldering the burden of representing the public interest requires true social conscience. However, the record of the courts shows that these genuine litigants need not act alone, and should be enabled to draw on the insight and expertise of experts, *amici curiae* and society in general. All of these third parties play a part in fostering a culture that promotes transformative constitutionalism.

It is clear then why the Allahabad High Court said that “[t]here must be real and genuine public interest involved in the litigation and not merely an adventure of a knight errant or [poking] one’s nose in for a probe”.<sup>9</sup> Public interest standing holds great potential for constitutional democracy – for holding the state accountable for its obligations to the people of South Africa, for vindicating the rights of those who are disadvantaged by their socio-economic circumstances and for securing access to justice for all – but should not be invoked without due regard for the weight of responsibility of representing one’s known and unknown compatriots.

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<sup>9</sup> *Mahanagar Ghaziabad Chetna Munch vs State of Uttar Pradesh* 2007 2 AWC 1113 para 8.

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