



Access to Justice in Namibia:
Proposals for Improving Public Access to Courts

***LOCUS STANDI:* STANDING TO BRING A LEGAL ACTION**

Paper No. 2



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Access to justice is both an independent human right and a crucial means to enforce other substantive rights. Namibia has a progressive, modern constitution, guaranteeing an impressive set of rights for the individual. Yet without a realistic means to enforce those rights, substantive guarantees can far too easily become merely a set of empty promises.

The Constitution of Namibia guarantees access to justice. But some legal procedures limit the ability of individuals, particularly marginalised populations, to access the courts. In this series of papers, the Legal Assistance Centre examines several discrete access to justice issues, including examples from other jurisdictions and arguments put forward by government, civil society and academia. On the basis of this information, we propose reforms to improve access to justice in Namibia.

This series of papers on access to justice covers the following four topics:

- (1) access to justice as a human right
- (2) *locus standi* (standing to bring a legal action)
- (3) costs and contingency fees
- (4) *amicus curiae* participation.

The paper on access to justice as human right includes a brief summary of our recommendations on the other three topics.

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CONTENTS

SUMMARY	i-vii
1. INTRODUCTION	1
2. CURRENT COMMON LAW STANDING IN NAMIBIA	2
2.1 “Direct and substantial interest”	2
2.2 No standing to protect academic or hypothetical interests	6
2.3 No standing to protect “the public interest”	7
2.4 Common law standing required to seek a declaratory order	9
2.5 Common law standing and the “unclean hands” doctrine	15
2.6 Exceptions and expansions of the rules on common law standing	17
3. STANDING UNDER THE NAMIBIAN CONSTITUTION	20
4. STANDING UNDER PARTICULAR STATUTES	28
5. ACTIONS BY MULTIPLE PLAINTIFFS	29
6. STANDING OF GOVERNMENT ACTORS TO APPROACH THE COURTS	29
6.1 Attorney General	29
6.2 Ombudsman	33
7. MOOTNESS	35
8. COMMON LAW STANDING AND ACCESS TO JUSTICE	40
9. PUBLIC INTEREST STANDING BEFORE INTERNATIONAL TRIBUNALS	46
10. STANDING IN FOREIGN JURISDICTIONS	54
10.1 South Africa	55
10.2 India	75
10.3 Canada	82
10.4 United Kingdom	88
10.5 Israel	89
10.6 Uganda	90
10.7 Kenya	92
10.8 Tanzania	93

10.9	Chile	93
10.10	Argentina	93
10.11	United States	94
10.12	Ontario	97
10.13	Zimbabwe	101
11.	CRITICISMS OF PUBLIC INTEREST STANDING	103
12.	DETAILED RECOMMENDATIONS	112
12.1	Continued development of common law	112
12.2	Law reform on standing	112
APPENDIX A:	South Africa – Public Interest and Class Actions Bill	127
APPENDIX B:	Ontario, Canada – Class Proceedings Act 1992	132
APPENDIX C:	Zimbabwe – Class Actions Act 10 of 1999	145

LOCUS STANDI: STANDING TO BRING A LEGAL ACTION

Summary

Introduction

Locus standi, or ‘standing’, refers to whether a particular applicant is entitled to seek redress from the courts in respect of a particular issue. Because the rules of *locus standi* determine whether an individual can approach the courts to vindicate a right, they significantly affect an individual’s ability to enforce his or her substantive rights and to protect the rights of others. Narrow standing rules can prevent meaningful enforcement of constitutional rights and progressive legislation.

Namibia’s current law on standing

Namibia’s current law on standing is very restrictive; it requires the applicant to demonstrate a direct and substantial interest in the subject matter and outcome of the application. This interest must be current and actual, as opposed to being abstract, academic, hypothetical or simply too remote.¹ The common law rules on standing also apply to standing to seek declaratory relief.² One of the major problems with these restrictive standing rules is that they can operate to insulate some rules from all challenges to their validity and constitutionality.

The Namibian courts have recognised a few exceptions to the common law criteria on standing: (1) where the interested individual cannot make the application himself and there is a good reason for the applicant to make the application on the other person’s behalf, such as in cases where the interested persons were in detention or vulnerable to reprisals;³ (2) allowing a member of a group which a particular law was designed to protect to bring a suit regarding the law without showing actual damage;⁴ and (3) in theory but noted only in *dicta* in Namibia to date, where a broadened approach to standing is necessary to curb an abuse of public power.⁵

Articles 25(2) and 18 of the Namibian Constitution control standing in certain cases. Article 25(2) specifies that “aggrieved persons” may approach the courts alleging a violation of a fundamental right or freedom, whilst Article 18 guarantees that “persons aggrieved” by the acts of administrative bodies and administrative officials shall have the right to seek redress. The Constitution does not define the term “aggrieved person”. The Namibian courts initially

¹ *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 12.

² *Southern Engineering and Another v Council of the Municipality of Windhoek* 2011 (2) NR 385 (SC).

³ *Wood and others v Ondangwa Tribal Authority* 1975 (2) SA 294 (A); *Vaatz v The Municipal Council of Windhoek* [2011] NAHC 178 (22 June 2011). See also *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13; *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at para 16.

⁴ See *Macropulos v Mullinos* 1966 (1) SA 477 (W).

⁵ *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13.

interpreted standing under Articles 18 and 25 to be identical to standing under the common law,⁶ but the 2009 case of *Uffindell v Government of Namibia*⁷ and several subsequent cases seem to point in the direction of a more liberal approach to standing in respect of constitutional issues. However, the question of whether constitutional standing is in fact broader than common law standing remains somewhat unclear.⁸

In addition to standing under the common law and the Constitution, an applicant may have standing under the terms of a particular statute or rule, with recent Namibian legislation demonstrating a distinct trend towards liberalising standing.⁹

Class actions, where one or more plaintiffs litigate against a defendant not only on their own behalf but on behalf of other similarly-situated persons, do not exist in Namibia. The Rules of the High Court contain a procedure for joinder, whereby any number of persons can be joined as plaintiffs or defendants, provided that their claims or defences depend on substantially the same questions of law or fact.¹⁰ But joinder is inadequate as a means for access to justice by multiple individuals, because they will often be isolated and unknown to each other.

Some government officials have special forms of standing. Article 79(2) of the Constitution of Namibia authorises the Supreme Court to “deal with matters referred to it for decision by the Attorney-General under this Constitution” – but this avenue has been utilised only twice since Independence.¹¹ The Ombudsman also has the power to approach the courts, but only in respect of a specific complaint, including a complaint from an aggrieved person that a fundamental right or freedom guaranteed by the Constitution has been infringed or threatened.¹²

Another aspect of standing is mootness – ie when a court declines to hear the merits of a case because judicial resolution of the dispute that once existed between the parties will no longer have a practical effect due to changed circumstances.¹³ This can be another stumbling block to the adjudication of issues which remain relevant to the public at large even if moot between the

⁶ *Kerry McNamara Architects Inc and others v Minister of Works, Transport & Communication and others* 2000 NR 1 (HC).

⁷ *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC). ⁷ *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13; see *Dalrymple v Colonial Treasurer* 1910 TS 372, 378 (“[N]o man can claim damages in a civil action unless he has himself been injured. ... And the rule applies to wrongful acts which affect the public, as well as to torts committed against private individuals.”). *Southern Engineering and Another v Council of the Municipality of Windhoek* 2011 (2) NR 385 (SC). *Wood and others v Ondangwa Tribal Authority* 1975 (2) SA 294 (A); *Vaatz v The Municipal Council of Windhoek* [2011] NAHC 178 (22 June 2011). See also *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13; *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at para 16. See *Macropulos v Mullinos* 1966 (1) SA 477 (W). *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13. *Kerry McNamara Architects Inc and others v Minister of Works, Transport & Communication and others* 2000 NR 1 (HC).

⁸ In the unreported case of *Maletzky and others v Attorney General and others* [2010] NAHC 173 (HC), the Court rejected an applicant’s contention that “any person aggrieved by a violation of the fundamental right of another may approach the high court for an appropriate relief”. On the other hand, the *Uffindell* approach was followed in an even more recent unreported case, *Petroneft International Glencor Energu UK Ltd and Another v Minister of Mines and Energy and Others* [2011] NAHC 125. See also *Lameck and Another v President of Republic of Namibia and Others* at para 1 and *Trustco Insurance Limited t/a Legal Shield Namibia v Deeds Registries Regulation Board* SA 14/2010 at para 18.

⁹ Combating of Domestic Violence Act 4 of 2003, section 4(2); Maintenance Act 9 of 2003, definition of “complainant” in section 1 read together with section 9; Liquor Act 6 of 1998, section 9(3); draft Child Care and Protection Bill, dated 12 January 2012, section 47(2).

¹⁰ Rules of the High Court, Rule 10(1) and (3).

¹¹ In *Ex parte Attorney-General: In re Corporal Punishment* 1991 NR 178 (SC) and in *Ex parte Attorney-General: In re The Constitutional Relationship Between the Attorney-General and the Prosecutor-General* 1998 NR 282 (SC).

¹² Namibian Constitution, Article 25(2), Ombudsman Act 7 of 1990, section 5(1)(a)(ii)(dd)-(ee).

¹³ The Namibian criteria on mootness are not entirely clear. For example, in *Namunjepo v Commanding Officer, Windhoek* 1999 NR 271 (SC), the Supreme Court decided a case where the particular relief sought in the case was no longer applicable, but the same legal issue remained relevant in a pending civil case between the same parties. In contrast, in *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011 (2) NR 469 (SC), the Supreme Court declined to address an issue which had become moot even though it was likely to arise again in other pending litigation between the same parties.

parties – especially in the case of a time-bound issue which is likely to recur, but because of its nature will likely be rendered moot before it can be resolved by the courts in any specific instance.

Common law standing and access to justice

Narrow standing rules pose several serious problems in terms of access to justice. Namibia's current common law standing rules fail to recognise and account for the practical barriers that prevent low-income, poorly-educated and otherwise marginalised groups from accessing the courts. Rules of *locus standi* that favour the wealthy are likely to lead to substantive holdings that do the same, if only because the wealthy are able to access courts and obtain holdings which serve their interests whilst low-income litigants cannot. There are also instances where individuals fear standing alone to challenge a government law or action – or even a family issue with rights implications – meaning that restrictive standing rules may leave the legality of some laws or actions unchallenged.

The traditional standing requirement of a “direct and substantial interest” also creates two interrelated rule-of-law problems. First, this approach immunises some unlawful or unconstitutional conduct from judicial scrutiny because no individual has a sufficient interest to challenge it – such as where a law which is arguably unconstitutional affects the entire public, but does not harm the legal interest of any specific individual or entity. Second, common law standing rules developed to protect a narrow set of private law rights and thus fail to function properly in a legal context that imposes broader duties on the State. Broader forms of standing could provide a means for citizens and courts to ensure that the government functions accountably.

Existing common-law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. ... [I]t is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation.

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) at 229

In other jurisdictions, various forms of public interest standing have proved to provide several advantages. Litigation brought by an individual or organisation on behalf of third parties who are unable to access the courts has proven successful at protecting the rights of marginalised groups. Furthermore, forms of standing that permit cases to be brought on behalf of large numbers of similarly-situated individuals can lead to more effective protection of substantive rights by permitting the consolidation of resources and a continuity and centralisation of strategy. Broader standing mechanisms also advance the goals and values of a participatory democracy by permitting the participation and involvement of socially and economically disadvantaged individuals who may be unable to assert their rights through the political process.

Comparative law on standing

Various international tribunals have increasingly recognised the rights of individuals and organisations to approach them, even when their own rights have not been violated. Examples include the African Commission on Human and Peoples' Rights, the Economic Community of West African States Community Court of Justice, the Common Market for Eastern and Southern Africa Court of Justice, the East African Court of Justice and the Inter-American Commission on Human Rights.

Other countries have adopted broader forms of standing generally, or in respect of some categories of issues (such as constitutional challenges). General examples include:

- **representative standing**, which permits an individual to bring an action on behalf of another individual or group;
- **organisational standing**, which permits an organisation to bring an action on behalf of its members;
- **class actions**, which permit large numbers of individuals with common issues to consolidate their claims or defences into a single action lead by a representative party; and
- **public interest standing**, where any member of the public can mount a legal challenge in respect of a general public harm without showing special injury.

The following table provides more specific examples.

COUNTRY	TYPES OF STANDING
South Africa	Constitutional standing (Bill of Rights) a. anyone acting in their own interest; [traditional standing] b. anyone acting on behalf of another person who cannot act in their own name; [representative standing] c. anyone acting as a member of, or in the interest of, a group or class of persons; [class actions]; d. anyone acting in the public interest; [public interest standing] e. an association acting in the interest of its members. [organisational standing] Common law standing similar to Namibia, but apparently acquiring a broadened application in light of the underlying constitutional dispensation
India	Public interest standing any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision Representative standing Class actions
Canada	Public interest standing applicable in cases arising under the Constitution or other laws where the litigant raises a serious issue and a genuine interest in the issue, and there is no other reasonable and effective means of bringing the issue before the courts
United Kingdom	Broad general rules on standing “sufficient interest in the matter to which the application relates”; no need to show a direct legal or financial interest, and the applicant does not need an interest that is unique, different from, or greater than, the interest of any other member of the public Taxpayer/ratepayer standing Organisational standing

Israel	Public interest standing Representative standing
Uganda	Public interest standing Representative standing
Kenya	Constitutional standing <ul style="list-style-type: none"> • standing to sue on one's own behalf • representative standing • class actions • public interest standing • organisational standing
Tanzania	Public interest standing where the petition is <i>bona fide</i> and evidently for the public good and where the Court can provide an effective remedy"
Chile	Public interest standing on Constitutional issues <i>accion de amparo</i> (a plaintiff alleging that a constitutional right has been violated may go directly to a court to enforce the right)
Argentina	Public interest standing <i>accion difusas</i> (diffuse, or people's, legal action), based on constitutional protection for human rights and the principles of Roman Law which state that all citizens have duties to protect the public domain
United States	Class actions allowed under Federal Rule of Civil Procedure 23 if four criteria are met: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defences of the representative parties are typical of the claims or defences of the class; and (4) the representative parties will fairly and adequately protect the interests of the class
Ontario	Class actions useful example of statutory regulation of class action (Class Proceedings Act 1992)
Zimbabwe	Constitutional standing where a right has been, is being or is likely to be contravened in relation to the plaintiff himself or herself – with an exception to cover cases brought on behalf of a person who is detained. Class actions useful example of statutory regulation of class action (Class Actions Act 1999)

In South Africa, in the leading case of *Ngxuza and others v Permanent-Secretary, Department of Welfare, Eastern Cape and another*,¹⁴ the Court addressed and dismissed several common concerns which apply to all forms of representative standing:

- (1) **“the ‘floodgates’ argument – that the courts will be engulfed by interfering busybodies rushing to court for spurious reasons”**: The Court noted that this is improbable, given the inhibiting effect of potential costs orders. Furthermore, this concern could be addressed by a procedural requirement that an applicant seek leave from the court before proceeding on a representative basis.

¹⁴ *Ngxuza and others v Permanent-Secretary, Department of Welfare, Eastern Cape and another* 2001 (2) SA 609 (E).

- (2) **“the ‘classification’ difficulty” – “the determination of a common interest sufficient to justify class or group or representative representation”, as opposed to a common interest which is “broad and vague”:** This concern could be also addressed by a procedural requirement that an applicant seek the court’s leave to proceed on behalf of the group in question, based on an assessment of the facts of the specific case at hand.
- (3) **“the ‘different circumstances’ argument” – the objection that a respondent might defend against different members of the represented class differently:** The Court concluded that this issue “does not really impinge on standing but relates to the merits of the representative claim”; the grant of representative standing does not imply that the respondent must mount a uniform defence to the claims of every member of the represented group.
- (4) **“the ‘res judicata’ difficulty-that some members of the group may not wish to associate themselves with the representative litigation”:** This concern can be addressed by requiring the representative party to give “sufficient notice to all affected” so that they may opt out of the action if they wish.
- (5) **“the ‘practical impossibility’ argument – that it is impossible for the Court to deal with cases involving thousands of people and that it would adversely affect public administration if scarce resources have to be used to defend such cases in Court”:** This is not a question that a court should be asking in determining standing; if a group’s rights have been violated, it is inappropriate “for either the judicial or administrative arms of government to say that it will be difficult to give them redress” and therefore deny them access to the courts. Administrative bodies can avoid such litigation by respecting the principle of legality, and if courts must act in new and innovative ways to accommodate such groups of people, “then so be it”.

Criticisms of public interest standing

Despite the wide use of various forms of public interest standing across a variety of jurisdictions and legal systems, it nonetheless has its critics.

Critics have argued that public interest litigation inevitably entails **judicial policy-making**, which lies outside the courts’ constitutional function and violates the separation of powers. However, limits on jurisdiction prevent courts from exceeding the judicial sphere. Furthermore, substantive law limits both the rights the courts can recognise and the nature of the relief they can grant; a court can legitimately craft policy only to implement or enforce a recognised legal right, and it must craft that policy to fit the shape and nature of the right itself. In addition, the legislature and executive can prevent judicial encroachment by fulfilling their constitutionally-mandated roles.

A second concern repeatedly is that broader standing will result in **floods of litigation brought by busybodies**, overwhelming the courts and preventing the proper allocation of judicial resources to private law cases. However, courts in judicial systems with robust public interest litigation have dismissed such concerns as being unrealistic, with the normal costs of litigation serving as a useful deterrent to frivolous litigants. Namibia can easily employ procedural mechanisms to limit any feared litigation flood, particularly by developing appropriate criteria for public interest standing. Furthermore, it must be remembered that public interest litigation can actually use judicial resources more efficiently than private litigation, by allowing for consolidation of cases with common issues.

Another concern is that representative forms of standing could violate **personal autonomy**; if a person's rights are violated, that person should have the right to decide whether or not to sue. But this concern fails to consider the political and social realities of many Namibians. Many marginalised citizens cannot, in practice, approach the courts due to expense, lack of education, ignorance of their rights, unfamiliarity with court systems, distance and bias – so that failure to approach the courts reflects this power imbalance rather than an individual choice not to assert legal rights. Personal autonomy can be safeguarded in representative forms of standing, by require plaintiffs to attempt to notify represented parties about the litigation and permit them to opt out if they choose, and by ensuring that representative parties are genuine and do their job adequately.

Another concern is that **representative standing may be insufficiently direct and concrete**. Critics contend that a personal stake in the litigation will ensure that the plaintiff hones the best, most effective arguments for his or her case, thereby allowing the court to make the best decision. But public interest standing usually comes into play where there is no other way to bring an issue before the court. Moreover, courts can ensure the best possible arguments by requiring that the public interest litigant demonstrate a genuine interest in the matter before the court and is appropriately placed to present the necessary legal and factual issues.

Critics of public interest standing have asserted that relying on litigation to advance a cause can actually **weaken popular movements** by channelling resources and energy away from community organising, public outreach and education and government advocacy. But strategy is a determination for social justice movements to make for themselves. The courts have no authority to decide what strategy best serves a movement, and questions about appropriate standing should not take this factor into account.

RECOMMENDATIONS

- (1) **Constitutional standing**: The judicial development of a liberalised approach to constitutional standing in Namibia is welcomed, and we hope that subsequent jurisprudence will continue to develop this concept in a way that will promote access to justice for all Namibians.
- (2) **Mootness**: Namibian courts should consider developing doctrines that permit litigation to continue when a particular dispute has become moot, but the case addresses the legitimacy or constitutionality of laws or regulations that affect the rights of individuals beyond the particular parties to the dispute.
- (3) **Law reform on standing**: We recommend that Namibia introduce a statute to reform the common law on standing, so as to permit –
 - **representative standing** to litigate on behalf of another whose rights have been violated;
 - **public interest standing** to challenge government action that is illegal or unconstitutional even if no one has standing at common law; and
 - **class actions**, in which a number of actions with common issues, claims, or defences are consolidated to be litigated together.

LOCUS STANDI: STANDING TO BRING A LEGAL ACTION

1. Introduction

Locus standi refers to “a plaintiff’s or an applicant’s right to claim the relief he seeks”.¹ If an interest is harmed, the requirements of *locus standi* dictate whether a particular applicant is the party who may seek redress for that harm or enforce a legal right before the court; whether an individual has *locus standi* thus depends on the relationship between that individual and the right that has been violated.² **Because the rules of *locus standi* determine whether an individual can approach the courts to vindicate a right, they significantly affect an individual’s ability to enforce his or her substantive rights and to protect the rights of others.**

In Namibia, *locus standi* to challenge a law, policy, or action requires that the individual have a direct legal right that has been harmed by the law, policy, or action he or she seeks to challenge. Unfortunately, such narrow standing rules can prevent even progressive legislation from truly protecting individuals’ rights and interests. For example, imagine a corporation has been granted permission by the government to withdraw massive amounts of groundwater. Doing so will harm nearby farmers, but the farmers do not own or have a legal interest in the groundwater, and the relevant legislation does not give them a special right to challenge the government’s decision. Under current standing doctrine, the farmers would not have standing, and would thus have no way to protect their rights.

In contrast, countries such as Canada, India, and South Africa all have forms of “public interest standing” – standing that permits a person or non-governmental organisation to approach the court and challenge a law, practice, or action in certain circumstances without having a direct legal interest in the matter. Such standing in these countries can include both (a) standing “in the public interest”, ie standing to challenge legislation as invalid or unconstitutional on its face without representing any specific individual whose rights have been violated, and (b) **representative standing**, ie standing to represent separate, distinct groups whose rights have been violated but are unable to approach the court themselves. Individuals and organisations have used these broader forms of standing to challenge invalid legislation and to assist marginalised communities to protect their rights.

¹ Cheryl Loots, “*Locus Standi* to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation”, 104 SALJ 131 (1987) at 131. *Locus standi* also has a second aspect: it may “refer to the capacity of a party to litigate” either on one’s own behalf, or on the behalf of another. Ibid. For example, under Namibia’s Constitution, a married woman has the *locus standi* to sue or be sued on her own behalf. *Myburgh v Commercial Bank of Namibia* 1999 NR 287 (HC) at 290-91. *Locus standi* also addresses an individual’s authority to sue in the name of an organisation or corporation. In *Pinkster Gemeente van Namibia v Navolgers van Christus Kerk van SA* 2002 NR 14 (HC), the High Court held that an individual lacks *locus standi* to sue on behalf of an applicant organisation if he has not been granted that authority before filing the law suit. Numerous Namibian decisions address whether a particular party has capacity to sue in particular factual contexts. This paper will not address that issue.

² Cheryl Loots, “*Locus Standi* to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation”, 104 SALJ 131 (1987) at 132.

Public interest standing rules serve several democratic purposes. First, they recognise that many poor and marginalised groups are not able to access the courts in practice due to ignorance of their rights, expense, physical distance to the courts or fear of government institutions. Second, they permit challenges to invalid or unconstitutional legislation that would otherwise be immunised from examination by the courts because no individual has standing to challenge them. Perhaps more importantly, public interest standing reflects the fact that constitutions such as Namibia's impose affirmative duties on the state. Unlike common law standing requirements, public interest standing provides a means for individuals to ensure that the state lives up to its constitutional commitments. In addition, public interest standing permits democratic participation, by ensuring that socially and economically marginalised groups who are not well represented in political processes can approach the courts to protect their rights.

This paper examines the current law on *locus standi* and evaluates how existing rules block access to the courts for particular groups – noting how public interest litigants are especially discouraged from bringing cases. It then makes specific recommendations on new approaches to *locus standi* in Namibia which could improve access to justice and broaden possibilities for public interest litigation. We hope that these proposals and the research on which they are based will stimulate law reform that improves access to justice and thus helps protect the rights of all Namibians.

2. Current common law standing in Namibia

2.1 “Direct and substantial interest”

Common law standing in Namibia requires the applicant to demonstrate “‘a direct and substantial interest’ in the subject matter and outcome of the application”.³ A “direct and substantial interest” is “an interest in the right which is the subject-matter of the litigation and ... not merely a financial interest which is only an indirect interest in such litigation”.⁴ An applicant must thus display a “legal interest” in the case.⁵ An “indirect, commercial interest only” in the outcome of a case⁶ or the fact that the outcome might deprive a party of a defence⁷ is insufficient. The High Court has clarified that *locus standi* to sue requires “at least the same interest as a person desiring to intervene in litigation to the Supreme Court”.⁸ The interest required to intervene has, in turn, been defined in terms identical to those required for *locus standi* to sue.⁹

³ *Clear Channel Independent Advertising v Transnamib Holdings* 2006 (1) NR 121 (HC) at paragraph 45, quoting *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415B.

⁴ *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415F-H, quoted in *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others*, 2000 NR 1 (HC) at 7D-F.

⁵ *Clear Channel Independent Advertising v Transnamib Holdings* 2006 (1) NR 121 (HC) at paragraph 45, quoting *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 166A.

⁶ *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 170H; see also *Clear Channel Independent Advertising v Transnamib Holdings* 2006 (1) NR 121 (HC) at paragraph 48 (“Even if such a person can be financially affected by a decision ... he does not have a strong enough interest.”)

⁷ *Clear Channel Independent Advertising v Transnamib Holdings* 2006 (1) NR 121 (HC) at paragraph 48, citing *Standard General Insurance Co Ltd v Gutman NO and Others* 1981 (2) SA 426 (C) at 434C-G; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (T) at 804B.

⁸ *Id* at paragraph 48, citing *Milani and Another v South African Medical and Dental Council and Another* 1990 (1) SA 899 (T) at 903A-B.

⁹ As explained in *Yam Diamond Recovery (Pty) Ltd in re Hofmeister v Basson & Others* 1999 NR 206 (HC) at 211H-212C:

An indirect (even if substantial) financial interest arising perhaps from the outcome of the plaintiff's action against the liquidators is not conclusive to afford applicant the right to be joined as a defendant. It must be a direct interest in the sense formulated by Corbett J (as he then was) in the case of *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415F-H, in the following terms:

The facts of *Clear Channel Independent Advertising v Transnamib Holdings*¹⁰ demonstrate the kind of legal interest required for standing. The first applicant had leased space on the first respondent's property. Although the first applicant had the option to renew the lease before it expired, it wrote to the first respondent before the expiration of the contract stating that it did not want to renew its lease. Subsequently the first and second applicants wrote to the first respondent to inquire about entering into similar lease agreements. Instead, the first respondent entered into a lease agreement with the second respondent. The applicants challenged this agreement seeking an interdict against the implementation of the contract on the ground that the first respondent failed to respond to the requests from the applicants or to invoke a tender process.

In assessing whether the first applicant had a "direct and substantial interest" in the subject matter and outcome of the application, the Court turned first to the contract between the first applicant and the first respondent. It noted that the lease had expired, and therefore terminated without renewal. Because the lease expired and was not renewed, the first applicant lacked any right to the property. The second applicant never had a lease with the first respondent, and therefore never had a right to expect the first respondent to enter into an agreement with it. The Court concluded that "the only possible interest that First Applicant could have had to provide it with any standing came to an end with a termination of its lease agreement with First Respondent" and that the second applicant never had any such right.¹¹ Thus neither party had standing. Both parties' financial or commercial interests may have been harmed by the first respondent's decision, but financial and commercial interests alone are insufficient to convey standing. Rather, a party needs a legal interest – such as a lease to the property in question – to gain standing. In this case, neither party had *locus standi*.

An applicant has *locus standi* to come to court only to protect his own interests; a derivative interest in the subject of the litigation does not support standing. In *Kerry McNamara Architects Inc and others v Minister of Works, Transport & Communication and others*,¹² the government sought tenders for the design and building of a government office complex in Windhoek. The tenderers included a company called International Construction Ltd (IC). After reviewing the documents, the government decided to award the tender to a different company. The applicants in the ensuing court case were companies who had agreed to make their professional services available to IC; if IC had been awarded the tender, the applicants would have provided their services to build the office complex and would have been entitled to their professional fees. The applicants sought to challenge the award of the tender to the fourth respondent rather than to IC.

In *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) Horwitz AJP (with whom Van Blerk J concurred) analysed the concept of such a 'direct and substantial interest' and after an exhaustive review of the authorities came to the conclusion that 'it connoted (see at 169) an interest in the right which is the subject-matter of the litigation and ... not merely a financial interest which is only an indirect interest in such litigation'. This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions ... and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court ..."

See also *Development Bank of Namibia v MC Bouers CC and Others* [2011] NAHC 12 at paras 10-12, noting that an applicant must establish that "he has a direct and substantial interest in the subject matter of the litigation which could be prejudiced by the judgment of the Court", amongst other criteria (quoting *Minister of Local Government and Land Tenure and Another v Sizwe Development and Others*; In re *Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677 (TK)).

¹⁰ *Clear Channel Independent Advertising v Transnamib Holdings* 2006 (1) NR 121 (HC).

¹¹ At para 50.

¹² *Kerry McNamara Architects Inc and others v Minister of Works, Transport & Communication and others* 2000 NR 1 (HC).

The Court concluded that the applicants lacked standing to bring the application. After laying out the familiar direct and substantial interest standard, the Court articulated the rule that a derivative interest is not a direct and substantial interest that can support standing.¹³

The requirement that an applicant must have a direct, not derivative, interest in the subject of the litigation means, for example, that a subtenant lacks standing to vindicate a tenant's right to occupy:

The subtenants' right to, or interest in, the continued occupancy of the premises subleased is inherently a derivative one depending vitally upon the validity and continued existence of the right of the tenant to such occupation. The subtenant, in effect, hires a defeasible interest. He can consequently have no direct legal interest in proceedings in which the tenant's continued right of occupation is in issue, however much the termination of that right may affect him commercially and financially.¹⁴

Nor does an attorney who acts as a conveyancer of property have standing to apply in his own name for review of the conveyance; because the attorney acted only as the principal's agent, only the principal has the necessary interest to support *locus standi*.¹⁵ The High Court has also held that an agent cannot institute legal proceedings in his own name without authorisation from the principal.¹⁶ In the same vein, a parent company does not have standing to institute proceedings merely because its subsidiary company has standing; rather, a parent company has standing based on a subsidiary's standing only if the subsidiary is under the "functional control" of the parent such that it is "the agent or employee; or tool or simulacrum of the parent" and that in such a situation the holding company's and subsidiary's legal interests are identical and the subsidiary could be said to be carrying on business as the parent's business".¹⁷

A recent Supreme Court case found *locus standi* based on the legal interest in a contract concluded between two parties – even though the contract was arguably concluded for the purpose of providing standing for the legal challenge at issue. The case of *Trustco Insurance t/a Legal Shield Namibia and another v Deed Registries Regulation Board and others*¹⁸ involved a contract between Trustco and a law firm. Trustco wished to offer its clients a free conveyancing service as part of a legal insurance package, and therefore entered into a contract with a law firm for the provision of conveyancing services at an hourly rate rather than at the prescribed fees set by regulation. Both contracting parties sought to challenge the constitutionality of the conveyancing tariffs, arguing that they violated the right to practice a profession and the right to administrative justice. The first issue to be disposed of was whether the parties had *locus standi* for this challenge.

The High Court found that Trustco, the first appellant, did not have standing to pursue the challenge as it was neither a legal practitioner nor able to establish that its ability to carry on

¹³ At 7C-8C.

¹⁴ *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 417B-C, quoted in *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others* 2000 NR 1 (HC) at 7F-G.

¹⁵ *Vaatz v Registrar of Deeds: In re Grootfontein Municipality* 1993 NR 170 (HC) at 170A-171E.

¹⁶ *Konga Clearing Agencies CC v Minister of Finance* 2011 (2) NR 623 (HC), citing *Sentrakoop Handelaars Bpk v Lourens and Another* 1991 (3) SA 540 (W). The applicant, a clearing agent, sought the release of a consignment of tobacco products detained by customs officials. The High Court found that legislation which makes it possible for customs officials to collect duties and levies from the clearing agent, for which the principal remains primarily liable, does not affect the *locus standi* of the agent, who must show that it has "the necessary authority and mandate of the principal" to bring the legal action in question. At para 12.

¹⁷ *Oranjerivierwinkelders Kooperatief Beperk and another v Professional Support Services CC and others* 2011(1) NR 184 (HC) at para 19.

¹⁸ *Trustco Insurance t/a Legal Shield Namibia and another v Deed Registries Regulation Board and others* 2010 (2) NR 565 (HC); 2011 (2) NR 726 (SC).

business as a short-term insurer had been impaired by the regulations at issue.¹⁹ The Supreme Court took a different view, agreeing with the first appellant's argument that its freedom to contract was impaired by the challenged tariffs and that it therefore had a legal interest in the outcome to the proceedings:

The respondents seek to rebut [the first appellant's] argument on the ground that the first appellant is seeking "to raise itself up by its own bootstraps" by concluding an agreement with the second appellant that is unenforceable for the reason of the regulatory restriction on the second appellant. This argument is similar to the conclusion of the High Court that the first appellant has sought "to hitch-hike a ride on the back of the second appellant" and "to approach the Court through the backdoor".

I cannot agree. These proceedings will determine whether the contract entered into between the first and second appellants is void, so the outcome of the proceedings will determine the first appellant's legal obligations *vis à vis* the second appellant. In my view, the first appellant thus does have a direct and substantial legal interest in the outcome of these proceedings. I have not overlooked the respondents' argument that by entering into an agreement that will be unenforceable if these proceedings fail, the first appellant has created its own legal interest in the proceedings, but in my view there is nothing undesirable in such conduct. In a constitutional state, citizens are entitled to exercise their rights and they are entitled to approach courts, where there is uncertainty as to the law, to determine their rights. If the appellants are correct, and the Tariffs are in conflict with Article 21(1)(j) or Article 18 of the Constitution, then their contract will be valid and they will have successfully vindicated their rights. If they are incorrect, then they will have obtained clarity on their legal entitlements. The rules of standing should not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements.²⁰

Other applications of the current standard further elucidate the nature of the "direct and substantial interest" required to support standing. The High Court has held, for example, that if an unqualified person is seated in the National Assembly and thus threatens the validity of Acts of Parliament, "any citizen who is affected" by such legislation has the *locus standi* to approach a Court for relief.²¹

An "unrehabilitated insolvent" does not have *locus standi* to sue for payment on an insurance agreement on her own behalf, but may sue on behalf of her estate.²² Similarly, beneficiaries of wills have *locus standi* to support their own interests, but (in contrast to the executor) do not have *locus standi* to sue to vindicate the rights of the estate against a third party.²³ A beneficiary does, however, possess *locus standi* "to sue on his own behalf in order to safeguard his right to inheritance where the right is infringed or threatened to be infringed"; thus if a third party sues or seeks a declarator that would affect the inheritance rights of the beneficiaries, the beneficiaries have *locus standi* to oppose it.²⁴

¹⁹ 2011 (2) NR 726 (SC) at para 8.

²⁰ At 17-18.

²¹ *Federal Convention, Namibia v Speaker, National Assembly, Namibia* 1991 NR 69 (HC) at 90I-91A, citing *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A).

²² *Otto v Channel Life Namibia Ltd and Another* 2007 (1) NR 328 (HC) at para 3.

²³ *Stellmacher v Christians* 2008 (2) NR 587 (HC) at para 13. In *Beukes and Others v Engelbrecht and Others* 2005 NR 305 (HC), a will restricted the alienation of the testator's property: only heirs and their descendants were permitted to purchase the land. Two descendants of an heir gave the land to a third party. The Court held that the remaining heirs had a "real and substantial interest" in nullifying the gift because if the restraint were found valid, "the applicants would be entitled to argue that the land should never have been donated ... and that the possibility existed that it would be offered to them, or their heirs, if those properly entitled to own it were not interest[ed] in it." 2005 NR 305 (HC). The Court's conclusion, however, seemed to rest on the terms of the particular will, rather than on the mere fact that the applicants were beneficiaries of the will with the right to enforce its terms.

²⁴ *Stellmacher v Christians* 2008 (2) NR 587 (HC) at paras 13-14.

2.2 No standing to protect academic or hypothetical interests

The Namibian courts have also held that an interest which is “abstract, academic, hypothetical or simply too remote” does not provide standing; to justify standing, the interest must be both “current” and “actual”.²⁵

There are two aspects to this requirement. One issue is that the interest itself must be current: an interest which has not come into existence or an interest which has been extinguished cannot support standing.²⁶ The second thread of the requirement seems to require that the injury or threat to the interest must also exist in the present.

In *Hendricks v Attorney General*,²⁷ for example, defendants in a criminal case sought to challenge the constitutionality of a subsection of a statute other than the subsection under which they were charged. The High Court concluded the applicants were not “aggrieved persons” under Article 25(2) of the Constitution of Namibia because they were not charged with the allegedly constitutionally infirm subsection, they did not intend to violate it, and their constitutional rights were therefore not currently threatened:

[N]o case has been made out in their founding papers that any of their rights or freedoms has either been infringed or threatened by the provisions of section 2(2) of the Act. It is clear that they are not being charged with a contravention under any of the paragraphs of that subsection or that they are in jeopardy of being deemed to be brothel-keepers thereunder. They do not say in their affidavits that they have [performed] or intend to perform any of the acts referred to in section 2(2)(a)-(g) of the Act. Hence, the determination of the constitutionality of those provisions will, as far as they are concerned, only be of academic interest. No case has been made out that the provisions affect any of their rights or freedoms nor are there any facts apparent from the papers on account of which it can be said that they may be regarded as “aggrieved” by the existence of those provisions on the statute book.²⁸

However, the Namibian Supreme Court recently held that an applicant facing a real threat of a violation of his constitutional rights has standing to challenge an allegedly unconstitutional law even if it remains uncertain whether his rights will ultimately be violated. In *Alexander v Minister of Justice*,²⁹ the applicant sought to challenge the constitutionality of section 21 of the Extradition Act, which states that a defendant committed by a magistrate for extradition is not permitted bail pending the order of extradition or the determination of his appeal. Although the applicant had been arrested under the Extradition Act, the hearing to decide between commitment for extradition or discharge had not yet occurred. The state argued that the matter was not ripe for review because it was uncertain whether the applicant would be committed for extradition; even if section 21 were invalid, his rights were not yet threatened. The Supreme Court, however, noted that “the extradition proceedings have been set in motion by the provisional warrant and arrest of the appellant and there is no indication that the matter would not run its course from there”;³⁰ in other words, the applicant’s rights were threatened by the hearing itself. Because there was a real risk of his being subject to an allegedly unconstitutional order under section 21, he need not wait until his rights were actually being violated to challenge the constitutionality of the provision.³¹

²⁵ *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 12.

²⁶ *Clear Channel Independent Advertising v Transnamib Holdings* 2006 (1) NR 121 (HC) at para 49, citing *Plettenberg Bay Entertainment v Minister van Wet en Orde* 1993 (2) SA 396 (C) at 401 E.

²⁷ *Hendricks v Attorney General* 2002 NR 353 (HC), which deals with the Combating of Immoral Practices Act 21 of 1980.

²⁸ At 371B-E.

²⁹ *Alexander v Minister of Justice* 2010 (1) NR 328 (SC).

³⁰ At para 71.

³¹ At para 69-71.

A party usually lacks a current interest in the constitutionality of a statute if that statute is no longer in force.³² However, the Supreme Court has held that an applicant retains sufficient interest in the constitutionality of a repealed statute if the question of constitutionality is an issue in another case in which the applicant is a party. In *Namunjepo v Commanding Officer, Windhoek Prison*,³³ the applicants, prisoners, sought an order directing the removal of irons, chains or other mechanical restraints; declaring the use of restraints unconstitutional; and declaring unconstitutional the sections of the Prisons Act that authorised restraints. By the time the Supreme Court heard the case, the Prisons Act had been superseded by new legislation and the applicants had been released from the mechanical restraints. As a result, the respondent argued that the appeal had become an “abstract or academic exercise”.³⁴ The Supreme Court disagreed, reasoning that the applicants retained a sufficient interest in the constitutionality of the Prisons Act because they had instituted a civil suit against prison authorities arguing that the relevant sections of the Prison Act were unconstitutional – meaning that the Court’s decision on constitutionality would effectively decide the civil case.³⁵

2.3 No standing to protect “the public interest”

The Namibian High Court has expressly stated that “our law does not recognise standing on the basis of a citizen’s action to vindicate the public interest”.³⁶ However, the dearth of case law on this issue obscures how this rule will play out in practice.

Thus far, the most relevant example is an unreported case, *Nguvauva v Ovambanderu Tribal Authority and others*.³⁷ In this case, the designated Paramount Chief of the Ovambanderu Tribal Authority filed suit to prevent an individual from being buried in the Ovambanderu tribe’s sacred burial ground. The Court first held the applicant had no standing to sue as the designated Paramount Chief, finding that this status endowed him with only “a contingent right which is not sufficient to found his *locus standi* in this matter”.³⁸ The Court then addressed – and rejected – the applicant’s contention that “since the subject matter of the application is sensitive and finality in it is called for, it is important to deal with the merits even if the objection on *locus standi* succeeded”.³⁹ The Court expressed the fear that permitting an applicant to sue when that applicant lacked common law standing would open the floodgates of litigation to the meddlesome busybody, noting that permitting standing because a matter is sensitive and finality desirable “is surely a recipe for chaos in the business of the Court”:

Acceptance of the submission would indubitably create a very dangerous and uncontrollable precedent. What it amounts to is that any busybody, meddling and misguided crusader, would approach the Court when he or she knows he or she has no *locus standi* and nevertheless argue at the end of the day that the merits of the matter should be heard because the subject matter is sensitive and is important to a certain community or certain communities of the country.⁴⁰

³² See, for example, *JT Publishing (Pty) Ltd & another v Minister of Safety and Security & others* 1997 (3) SA 514 (CC).

³³ *Namunjepo v Commanding Officer, Windhoek Prison* 1999 NR 271 (SC).

³⁴ At 275E-F.

³⁵ At 275G-276B.

³⁶ *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13; see *Dalrymple v Colonial Treasurer* 1910 TS 372, 378 (“[N]o man can claim damages in a civil action unless he has himself been injured ... And the rule applies to wrongful acts which affect the public, as well as to torts committed against private individuals.”).

³⁷ *Nguvauva v Ovambanderu Tribal Authority and others*, A 312/2010 [2010] NAHC 182 (4 Nov 2011) (unreported).

³⁸ At para 8. The Court also concluded that, because there was no reigning Paramount Chief, there was no Supreme Council “which would be competent and would have full power to legitimately and lawfully consider” the issue at hand, apparently implying that only the Supreme Council would have the jurisdiction to address this issue. At para 9. It also declined to consider the applicant’s argument that he had standing as a member of the community because, according to the court, the applicant had not raised that argument in his founding papers. At paras 6-7.

³⁹ At para 9.

⁴⁰ *Ibid.*

Thus an individual's status as a member of the public and the importance of the subject matter of the case are insufficient to confer standing.

Nonetheless, a local ratepayer and taxpayer has standing to challenge municipal actions relating to municipal funds and property. In *Grobbelaar v Council of the Municipality of Walvis Bay*,⁴¹ the applicant sought to prevent the municipality of Walvis Bay from transferring properties to individuals who had purchased them through a public auction on the ground that the auction was racially discriminatory. The respondents sought to strike out portions of the applicant's replying affidavit on the ground that it contained impermissible new statements of fact. The statement at issue read:

I also submit that even if I was not interested to attend, or purchase property at the said auction at all, I would still have *locus standi* to challenge the said auction by virtue of the fact that I am a resident and municipal rate and tax payer of Walvis Bay with a direct and substantial interest in the municipality's finances.⁴²

The Court held that this statement was not a new allegation of fact, but a submission that "follows not only as a matter of logic, but is also a conclusion based on the legal relationship between the parties. This conclusion can be inferred from the first applicant's allegations and status as municipal rate and tax payer, which establishes *locus standi* for such an applicant to challenge municipal actions relating to illegal actions by the municipality in dealing with municipal funds and property".⁴³ The Court cited a number of South African cases that have reached the same conclusion on the basis of "a relationship of trust (ie a fiduciary relationship) between the council and the ratepayers in respect of municipal funds and property".⁴⁴ It therefore declined to strike the statement.⁴⁵ However, this holding explicitly applies only to *locus standi* to (a) challenge decisions of municipal bodies and (b) to challenge decisions relating to municipal funds and property.

In a recent unreported case involving a local authority, *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others*,⁴⁶ **the High Court suggested that Namibia's new constitutional dispensation requires a broader approach to standing as part of the "doctrine of legality" – even though the case at hand did not raise specific constitutional issues.** Here a resident claimed that the Municipality had approved the construction of dwellings on a neighbouring property in violation of the Town Planning Scheme. The applicant's *locus standi* was challenged on the grounds that she had failed to demonstrate that her property was negatively affected, and that she could claim damages in respect of any reduction in her property value, rather than the demolition which she sought. The Court found that "Town Planning Schemes can in an appropriate case such as the present entitle affected residents to have them enforced", stating that a person living in a particular area has standing to enforce a scheme which provides amenities that the resident would like to see maintained.⁴⁷ The Court noted, "more importantly", that failure to recognise standing in this circumstance would be "a *carte blanche* to arbitrariness which is the antithesis of the new ethos brought about by the Namibian Constitution that all administrative action derive legitimacy from either the Constitution and laws (which include subordinate legislation) made under it".⁴⁸ However, since

⁴¹ *Grobbelaar v Council of the Municipality of Walvis Bay* 2007 (1) NR 259 (HC).

⁴² At para 31.

⁴³ At para 37.

⁴⁴ At para 38.

⁴⁵ At para 43.

⁴⁶ *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* (A 310/08) [2011] NAHC 90 (24 March 2011).

⁴⁷ At para 29, quoting *BEF (Pty) Ltd v Cape Town Municipality and others* 1983 (2) SA 387 (C) at 401B-F.

⁴⁸ At para 30.

the applicant in the case at hand owned a property adjacent to the offending building, the approach taken in this case might not extend to the larger public.

2.4 Common law standing required to seek a declaratory order

Standing to seek declaratory judgements High Court Act 16 of 1990, section 16(d)

The High Court shall ... have power ... in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

Namibian courts have applied common law rules of standing to determine who may approach the courts seeking declaratory relief. Section 16(d) of the High Court Act 16 of 1990 grants the High Court power “in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination”.⁴⁹

The general rules on declaratory judgements were recently set out by the Supreme Court in the case of *Southern Engineering and Another v Council of the Municipality of Windhoek*.⁵⁰

The grant of declaratory relief is a discretionary matter. Ordinarily, a court will only grant declaratory relief when two conditions are met. First, the court must be satisfied that the person seeking declaratory relief is a person interested in an existing, future or contingent right or obligation and secondly the court must consider it appropriate to grant declaratory relief in the circumstances of the case.

In particular, the relief sought must not be abstract, or of academic or hypothetical interest only and it must afford the litigant a tangible advantage. (*Ex parte Nell*, 1963 (1) SA 745 (A) at 759A-B; *Reinecke v Incorporated General Insurances Ltd*, 1974 (2) SA 84 (A) at 93B-E). Where an order does no more than restate general principles of law, and does not determine any existing, future or contingent right, it is not appropriate for a court to grant declaratory relief. Such a declaratory order would be an “exercise in futility”. (*Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 97D-E).

... Where a court has granted declaratory relief, the ordinary principle is that an appellate court will not interfere with the decision to grant relief unless the appellate court is satisfied that the discretion conferred upon the lower court was not judicially exercised. (*Ex parte van Schalkwyk NO and Hay NO* 1952 (2) SA 407 (A) at 410H; *Lawson & Kirk (Pty) Ltd v Phil Morkel Ltd* 1953 (3) SA 324 (A) at 332A-B).

... it is a clearly established legal principle that declaratory relief should not be awarded unless it affords, some tangible relief ...⁵¹

⁴⁹ High Court Act 16 of 1990, section 16(d).

⁵⁰ *Southern Engineering and Another v Council of the Municipality of Windhoek* 2011 (2) NR 385 (SC).

⁵¹ At paras 48-52. In this case, an apparently declaratory provision in the High Court order being appealed was found to have no tangible effect. The Supreme Court thus found that the High Court had “failed to act judicially in the exercise of its discretion” and so set aside this portion of the High Court order made by the High Court. At para 52.

Unfortunately, the courts have provided little guidance regarding the meaning of “existing, future or contingent right or obligation”. In *Nekwaya and another v Nekwaya and another*,⁵² the High Court provided some clarification. The case dealt with a dispute over property of the deceased father of the two applicants (children born to the deceased outside marriage) and the first respondent (a child born to the deceased inside marriage). The deceased had a right to occupy the property with an option to purchase that would come into effect when the area was surveyed. After the father’s death, the original executor of the estate transferred this right to the two applicants. The executor then died as well, and the first respondent became executor of his father’s estate. The first respondent apparently claimed that the transfer of the right in the property to the two applicants was invalid because the right was not inheritable. In response, the applicants sought a declaratory order that they were the sole owners of the property or, in the alternative, were the only people with a “permit to occupy” (PTO) the property and should be recorded as such.

In its judgment, the Court addressed the applicant’s standing to seek a declaratory order under section 16(d) of the High Court Act. It reasoned that the applicants had a right to the property subject to a “suspensive condition.” The Court noted, “A suspensive condition suspends the operation of the contract, or the vesting and taking effect of the benefit until the condition is fulfilled. Pending fulfilment of the condition a legal relationship exists between the parties that is recognized and protected by law.”⁵³ It then reasoned that the primary requirement for seeking a declaratory judgment was the existence of a right, no matter its nature:

Interpreting and applying a similar provision, which contains identical words as the Namibian provision quoted above, in s 19 (1) (a) of South Africa’s Supreme Court Act, 1959 (Act No. 59 of 1959) in *Government of the Self-Governing Territory of Kwazulu v Mahlangu* 1994 (1) SA 626 (T), Eloff, JP stated at 634B, ‘The important element in this section is that the power of the Court is limited to a question concerning a right. The nature and scope of the right might be inquired into, but in the absence of proof of such a right, or at least *a contention that there is such a right*, the Court has no jurisdiction.’⁵⁴

Therefore a key question in determining an applicant’s standing to seek a declaratory order is whether the applicant has a right. Even though the right of the applicants was subject to a suspensive condition, they nonetheless had a right, and therefore had standing to seek a declaratory order.⁵⁵

The High Court has not interpreted the reference to “any interested person” to alter standing requirements in cases involving declaratory orders. Although the holding of *Kauesa v Minister of Homes Affairs and others*⁵⁶ does not interpret section 16(d), its discussion of the Court’s jurisdiction pursuant to that provision seems to confirm that standing to seek a declaratory order is limited to common law standing. The applicant was a police officer who had made statements accusing the command structure of the police, which he asserted consisted entirely of white officers, of facilitating corruption and abuses of power and obstructing goals of development and national reconciliation. Regulation 58(32) issued in terms of the Police Act 19 of 1990 provided that a member of the Police Force “shall be guilty of an offence [against duty and

⁵² *Nekwaya and another v Nekwaya and another* (A 262/2008) [2010] NAHC 11 (17 January 2010).

⁵³ At para 20.

⁵⁴ At para 25, quoting *Jacob Alexander v Minister of Home Affairs and Immigration and others* Case No. A 155/2009 (judgment on 9 June 2009) (unreported) at 4; (emphasis added in *Nekwaya* judgement).

⁵⁵ At para 26. See also *Mahe Construction (Pty) Ltd v Seasonaire* 2002 NR 398 (SC); in this case, the Supreme Court found, without revealing its reasoning, that the applicant was “interested in an existing right”, that the order would be binding on the parties, and that there was a real dispute such that the Court’s pronouncement would not be “abstract or academic”. At 411A-B.

⁵⁶ *Kauesa v Minister of Homes Affairs and others* 1994 NR 102 (HC).

discipline] ... if he ... comments unfavourably in public upon the administration of the Force or any other Government department;” Facing a pending prosecution under Regulation 58(32), the applicant sought a declaratory order that this regulation was invalid.

Before turning to the merits of the case, the Court addressed its own jurisdiction, noting that it had jurisdiction to hear civil disputes and criminal prosecutions as well as “*in its discretion*, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination”.⁵⁷ “However,” it commented, “before the applicant can succeed, he must persuade this Court on a balance of probabilities that: He is an aggrieved person as contemplated by subart (2) of art 25 of the Constitution of the Republic of Namibia”.⁵⁸ In other words, despite the jurisdiction conferred by section 16(d), the applicant nonetheless needs standing under the Constitution; and, as will be discussed below, case law appears to be developing in the direction of a broader approach to constitutional standing, which could in turn affect the scope of standing for persons seeking declaratory orders.

Maletsky and others v The Attorney General and others⁵⁹ confirms that the requirements of constitutional standing apply to applicants seeking declaratory orders on constitutional rights. The fifteen applicants in *Maletsky* sought an order declaring unconstitutional a variety of laws, rules and practices affecting the ability of indigent applicants to approach the courts, the seizure and sale of immovable property to satisfy judgments, and rules regarding home loans, banks debts and the taxation of legal fees. The respondents challenged the *locus standi* of the applicants. The Court assessed *locus standi* in terms of the common law and the Constitution,⁶⁰ but apparently took for granted that the declaratory order mechanism did not alter or expand the standing requirements. Indeed, a search of the case law has not revealed a case in which a court has even considered the possibility that section 16(d) might alter standing requirements for applicants seeking declaratory orders.

The case of *Mushwena v Government of the Republic of Namibia*⁶¹ added another consideration to standing in respect of declaratory judgements. The applicants in *Mushwena* had been indicted in the High Court on a number of offences. The judge ordered them released on the ground that the Court lacked jurisdiction to try them. They were released, but arrested again on the same day on different charges, released again two days later, and then immediately arrested yet again on the original charges. The applicants sought a declaratory order that the final arrest was unlawful along with an interdict ordering the government to release them. Meanwhile, the State had appealed the judge’s decision that the Court lacked jurisdiction, and that appeal was pending in the Supreme Court at the time.

The High Court declined to decide the merits of the case. In so doing, it noted that a declaratory order “will not be granted where the issue before the Court is academic, abstract, or hypothetical”.⁶² It thus applied the normal standing requirements to standing to obtain a declaratory order. It did not complete its analysis with that reasoning, however, going on to hold that a declaratory order should not be granted by the *High Court* when doing so would render an

⁵⁷ At 107B-C, quoting High Court Act 16 1990, section 16(d) (emphasis in Court’s judgement).

⁵⁸ At 107C.

⁵⁹ *Maletsky and others v The Attorney General and others* [2010] NAHC 173 (HC).

⁶⁰ At paras 26-35.

⁶¹ *Mushwena v Government of the Republic of Namibia* 2004 NR 94 (HC).

⁶² At para 20.

issue before the *Supreme Court* academic, abstract, or hypothetical.⁶³ When the High Court declines to grant a declaratory order on this basis, it must “be satisfied” that the parties before the Supreme Court are the same, that the issue before the Supreme Court arises from the same set of facts as the issue before the High Court, and that if it granted declaratory relief, the Supreme Court’s decision “would have no practical effect and would be unenforceable as between the parties before the High Court in respect of the declaratory relief sought”.⁶⁴ Here, the Court reasoned that if it granted the declaratory order, but failed to order the applicants’ release, it would issue a “mere advisory opinion”. But if it granted the declaratory order and released the applicants, then it would permit them to leave Namibia, which would render the Supreme Court’s judgment unenforceable.⁶⁵ It therefore declined to consider the application.⁶⁶

Namibian courts have not yet commented extensively on how they interpret or apply section 16(d). A few cases, however, provide some guidelines. First, an application for a declaratory order will not succeed unless the application makes clear the substance of the requested order. In *Kulmann and others v The Master and others*,⁶⁷ the applicants sought a declaratory order “regarding” clauses five and six of a will.⁶⁸ However, they failed to submit a specific proposed declaration or to explain the substance of the declaration they sought. This lack of guidance was particularly problematic because the will contained two apparently contradictory clauses. Because the court was left “in the dark as to what declaratory order it was being requested to make”, the application failed.⁶⁹

The case of *Merlus Seafood Processors (Pty) Ltd v Minister of Finance*⁷⁰ concerned whether an applicant was a “manufacturer” for purposes of the Income Tax Act 24 of 1981, a designation which would entitle the applicant to some tax relief. The company’s application to the Directorate of Inland Revenue for registration as manufacturer had been denied, so it approached the High Court seeking both review of this decision and a declarator that it was a manufacturer within the meaning of the statute. The review was abandoned, but the applicant persisted in its request for a declarator.

The respondent argued that the applicant had “utilised the review procedure as a guise to obtain declaratory relief”, and that in a review proceeding the Court would normally refer the decision in question back to the administrative body for reconsideration unless there were special circumstances which would give the Court reason to substitute its own judgement for that of the executive.⁷¹ The applicant asserted that a review and a declarator would “operate on different time scales”, with the review relating to the question of past tax benefits and the declarator applicable to tax benefits after the date of the declarator.⁷² The Court found that “despite the discontinuation of the review relief, the continued dispute between the parties would not merely be of academic or abstract interest or would only be a hypothetical one”. It was not disputed that there was an existing dispute between the parties, or that the applicant was an interested party with an existing, future or contingent right which would be affected by the determination of the legal question in issue. Furthermore, there was a tangible advantage to be gained by both parties from

⁶³ At para 21.

⁶⁴ Ibid.

⁶⁵ At para 22.

⁶⁶ At para 27.

⁶⁷ *Kulmann and others v The Master and others* 2007 (2) NR 611 (HC).

⁶⁸ At paras 1-2.

⁶⁹ At paras 44, 48.

⁷⁰ *Merlus Seafood Processors (Pty) Ltd v Minister of Finance* (A 417/09) [2011] NAHC 331 (11 November 2011).

⁷¹ At para 16.

⁷² At paras 17-18.

resolution of the question – the applicant’s tax obligations would be affected by the decision, and the respondent would be assisted in its assessment of the applicant’s future tax liability, and possibly that of other taxpayers. A decision on the question at hand would also be binding on both parties. The Court therefore decided that this was an appropriate case for a declarator.⁷³

There is case law which confirms that section 16(d) does not extend the court’s jurisdiction to cases not involving real disputes between the parties. For example, the applicant in ***Van As and another v Prosecutor-General***⁷⁴ was a criminal defendant who brought a motion posing numerous questions regarding stays of criminal proceedings; how and whether a the right to a fair trial can be derogated from; and whether the release of an accused under Article 12(1)(b) of the Constitution because a trial has not occurred within a reasonable period of time constitutes a permanent stay of execution. The applicant stated that “the object of the application was to provide guidelines as to the procedures to be followed and the legal principles to be applied to an application for the permanent stay of criminal proceedings”,⁷⁵ but later confirmed that he sought a declaratory order under section 16(d).⁷⁶ In determining whether it had the authority to grant the relief sought, the Court noted that it “has not been established to settle academic questions of law or to advise an applicant on how to regulate his affairs or how to conduct prospective litigation”.⁷⁷

The aforesaid is adumbrated in art 80(2) of the Constitution of the Republic of Namibia which provides inter alia:

‘The High Court shall have original jurisdiction to hear and adjudicate upon *all civil disputes and criminal prosecutions*, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms granted thereunder.’

It is clear from the foregoing that the emphasis is on ‘disputes’ and ‘prosecutions’. These may include matters relating to the Constitution but the operative words remain ‘disputes’ and ‘prosecutions’.⁷⁸

In this case, there was a pending prosecution, and therefore the Court considered the substance of the application.

On the other hand, there is also authority for the proposition that an existing dispute is not a prerequisite for a declaratory judgment, although the absence of an existing dispute may incline the Court not to exercise its discretion to grant a declarator.⁷⁹

Case law also indicates that a Namibian court will not issue orders declaring a law unconstitutional when the applicant does not include the government as a respondent. In ***Kavendjaa v Kaunozondunge NO and others***,⁸⁰ the applicant was the illegitimate son of a man who died intestate. He brought an application seeking, amongst other forms of relief, an order declaring unconstitutional the common law rule that the children born outside of marriage could not inherit intestate from their biological fathers. In bringing the application, however, the applicant did not include the government as a party. The Court concluded that this omission was fatal: “It is an

⁷³ At paras 20-32.

⁷⁴ *Van As and another v Prosecutor-General* 2000 NR 271 (HC).

⁷⁵ At 274A.

⁷⁶ At 266I.

⁷⁷ At 274B.

⁷⁸ At 274C (emphasis in Court’s judgement, but not in original constitutional provision quoted).

⁷⁹ *Protasius Daniel and Willem Peter v the Attorney General and Others* Unreported Judgment in High Court Cases A 238/2009 and A 430/2009 delivered on 10 March 2011 at paras 17-18 (quoting *Ex parte Nell* 1963 (1) SA 754 (A)), as quoted in *dicta* in *Merlus Seafood Processors (Pty) Ltd v Minister of Finance* (A 417/09) [2011] NAHC 331 (11 November 2011) at para 19.

⁸⁰ *Kavendjaa v Kaunozondunge NO and others* 2005 NR 450 (HC).

unwholesome practice, to be discouraged, for people to seek to challenge the constitutionality of a law without citing the government which carries the political responsibility for the continued existence of law.”⁸¹ Although the Court did not limit this holding to applications for declaratory orders, such applications seem a likely circumstance in which a party would attempt to have a law declared unconstitutional without the State necessarily being involved.

In general, however, applicants can use declaratory orders to challenge the constitutionality of legislation and the common law. Indeed, in *Myburgh v Commercial Bank of Namibia*, a case in which no one sought a declaratory order, the Court noted in passing that if there is uncertainty as to whether a common law rule remains in force after Independence under Article 66(1) of the Constitution, “any party involved can approach the Court for a declaratory order”.⁸²

A review of the case law has not revealed any categories of cases or areas of law for which the courts, as a general rule, will refuse to grant declaratory orders. As noted in passing in *Mushwena*, a declaratory order is a discretionary remedy,⁸³ and therefore its availability will always turn on the particular facts of the case at hand. But courts have neither stated there are certain areas of law in which they will always or often exercise their discretion not to grant an order, nor produced obvious patterns of cases in which they deny orders.

Litigants can also seek declaratory orders in the Labour Court. The Labour Act 11 of 2007 grants the Labour Court exclusive jurisdiction to grant declaratory orders “in respect of any provision of this Act, a collective agreement, contract of employment or wage order, provided that the declaratory order is the only relief sought”.⁸⁴ It also permits the Labour Commissioner to apply to the Labour Court on his or her own initiative for a declaratory order “in respect of any question concerning the interpretation or application of any provision” of the Labour Act.⁸⁵ In a labour dispute being decided by arbitration, the arbitrator has the authority to make “any appropriate arbitration award”, including a declaratory order.⁸⁶ Additionally, Schedule 1 of the Act includes transitional provisions to address changes in the law from the Labour Act of 1992. Under these provisions, if there is uncertainty as to the interpretation of any law, the status of any person, action or thing, or “how to proceed in any matter,” and the uncertainty is not addressed by the Schedule, “a party may apply to the Labour Court for a declaratory order, and the Court may make any order that is just and reasonable”.⁸⁷

A review of cases addressing declaratory orders has not revealed any cases interpreting these Labour Act provisions. Cases brought under the similar declaratory orders provisions of the previous Labour Act 6 of 1992, however, can grant insight into limits of the Court’s jurisdiction. First, the Labour Court has affirmatively held that it does not have jurisdiction to grant declaratory orders that is co-extensive with that of the High Court. The applicant in *Pietersen v Ohlthaver & List Retirement Fund and Another*⁸⁸ had been employed by a supermarket for twenty-four years before accepting a voluntary retrenchment package. After her retirement, she was informed by the first respondent that her share of the pension fund was N\$112,917.95. Believing herself entitled to more money, she filed a motion seeking a

⁸¹ At 465G-I.

⁸² *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC) at 264D.

⁸³ *Mushwena v Government of the Republic of Namibia* 2004 NR 94 (HC) at para 20.

⁸⁴ Id at section 117(1)(d).

⁸⁵ Id at section 121(2)(d).

⁸⁶ Id at section 86(15)(c).

⁸⁷ Id at Schedule 1, s 17(1).

⁸⁸ *Pietersen v Ohlthaver & List Retirement Fund and another* 1996 NR 255 (HC). The Labour Act 6 of 1992 was amended after this case was decided in 1996. The amendments altered the limitations on the Labour Court’s jurisdiction.

declaratory order requiring the first respondent to provide details regarding contributions to the pension fund and the manner in which the applicant's capital share of the fund was calculated. The applicant stated repeatedly that she did not yet have a dispute with the first respondent; at this stage she merely sought explanations of the mathematical calculations used to determine her capital share, and only after she had those calculations might a dispute arise.⁸⁹ The Labour Court rejected her request for a declaratory order on the ground that it lacked jurisdiction to grant such an order.⁹⁰ The Court reasoned (in *dicta*) that the section of the Labour Act that granted it jurisdiction to issue declaratory orders expressly limited that power to orders "in relation to the application or interpretation of any provision of this Act, or any law on the employment of any person in the service of the State or any term or condition of any collective agreement, any wage order or any contract of employment".⁹¹ It concluded that the legislature did not intend to grant the Labour Court the "unlimited or uncircumscribed powers conferred on the High Court" to issue declaratory orders.⁹² Although the *nature* of the limitation on the Labour Court's power has changed – it is no longer limited to cases addressing the application or interpretation of the Act – a statutory limitation remains. *Pietersen* apparently confirms that this limitation prevents the Labour Court from issuing declaratory orders outside its expressly granted jurisdiction.⁹³

There is one case where an application for a declaratory order from the Labour Court failed because the applicants were not entitled to underlying relief under the Act, meaning that the Labour Court lacked jurisdiction.⁹⁴ In another Labour Court case, the applicant who requested a declarator lost on the merits.⁹⁵ However, neither of these cases shed any light on *locus standi* for declaratory orders under the Labour Act.

2.5 Common law standing and the "unclean hands" doctrine

One of the major problems with Namibia's common law standing rules is that they can operate to insulate some rules from all challenges to their validity and constitutionality.

For example, consider *Shaanika and others v The Windhoek City Police and others*.⁹⁶ The applicants were informal settlers who had shacks or whose shacks had been destroyed. These

⁸⁹ At 257D-258C.

⁹⁰ At 263J.

⁹¹ At 263D-E, quoting Labour Act 6 of 1992, s 18(1)(e).

⁹² At 263H.

⁹³ See also *Nyambe v City Savings* 1996 NR 31 (LC) (rejecting the applicant's request for a declaratory order on the ground that the case turned on whether an employment agreement was wrongfully repudiated, not on how the agreement should be interpreted as required for the Labour Court to exercise its declaratory jurisdiction).

⁹⁴ In *Hannah v Government of the Republic of Namibia* 2000 NR 46 (LC), for example, the Court could not grant the relief requested under the terms of the Act. The applicant, a High Court judge, sought a declaratory order that the Government was not permitted to alter the terms of his employment contract and therefore must continue to pay for his consumption of water and electricity and his refuse disposal. Under section 67(f) of the version of the Labour Act then in force, the Labour Court was empowered to make orders only on behalf of specified categories of individuals, including employees. The applicant claimed the Labour Court had jurisdiction because he was an employee of the State, but the Court held that he did not fall within the statutory definition of employee and therefore dismissed the application because it lacked jurisdiction.

⁹⁵ In *Smit v Standard Bank of Namibia*, 1994 NR 366 (LC), the applicant sought to enforce a housing subsidy promised to him by his employer. When the employer attempted to lock him out of his job in order to force him to accept an alternative proposal, the applicant sought an order declaring the employer's actions unlawful and an interdict preventing the lock-out. The case turned on the substantive issue of whether the housing subsidy was a right, in which case the lock-out would be unlawful under section 79(2)(a)(i)(aa) of the Labour Act then in force, or an interest, in which case it would be permissible. Ultimately, the court dismissed the application because it concluded that the dispute related to an interest, rather than a right – essentially deciding the question at issue, since it stated as the basis for the dismissal that "the dispute between the parties is one relating to a dispute of interest and that consequently the Respondent is in terms of the provisions of the Act entitled to impose a lock-out as provided for in Section 81(1) of the Act".

⁹⁶ *Shaanika and others v The Windhoek City Police and others* 2011 (1) NR 64 (HC).

shacks were or had been illegally located on the property of the second respondent, the City of Windhoek.⁹⁷ The second respondent, the Municipality of Windhoek, began destroying some of the shacks as permitted by section 4(1) of the Squatters Proclamation, AG 21 of 1985, which authorises an owner of land to “demolish and remove together with its contents any building or structure intended for human habitation or occupied by human beings which has been erected or is occupied without his consent on such land”.⁹⁸ Section 4(3) of the Squatters Proclamation was also relevant to the proceedings. It states that unless a person can satisfy the court on a preponderance of probabilities that he is legally entitled to occupy land on which he has erected a structure, he “shall not have recourse to any court of law in any civil proceedings founded on the demolishing or removal or intended demolishing or removal of such building or structure under this section and it shall not be competent for any court of law to grant any relief in any such proceedings to such last-mentioning person”. The applicants filed suit seeking an interdict against the respondents preventing them from destroying their shacks or removing the property. They also sought an order declaring sections 4(1) and 4(3) of the Squatters Proclamation unconstitutional.

The applicants initially obtained the order they sought, but the High Court later reversed that ruling.⁹⁹ **The Court reasoned that the applicants had no right to relief because they had “unclean hands” in that they had broken the law they now sought to challenge, stating that “[c]itizens are obliged to obey the law of the land and argue afterwards”.**¹⁰⁰ Quoting the Supreme Court of Zimbabwe, the Court analogised the case of an applicant who had broken the substantive law to the case of a party who disobeyed a court order.

In my view, there is no difference in principle between a litigant who is in defiance of a court order and a litigant who is in defiance of the law. The Court will not grant relief to a litigant with dirty hands in the absence of good cause being shown or until such defiance or contempt has been purged.¹⁰¹

Under this reasoning, the applicants were not entitled to relief.

In practice, however, the unclean hands doctrine insulates the Squatters Proclamation from judicial review. As this case demonstrates, **sometimes the only people with a “direct and substantial interest,” and thus *locus standi*, will by definition have unclean hands;** in this case, only applicants who had broken the law by erecting shacks on private property without the owner’s permission would have standing to challenge the laws authorising the destruction of their homes. Under the Court’s ruling, however, these applicants cannot challenge the law *because* they have broken it.

Perhaps a person could seek a declaratory judgment regarding the statute’s validity before he or she actually broke the law – but such an applicant would run the risk of being found to lack

⁹⁷ At para 3.

⁹⁸ Section 4(1)(b) of the Squatters Proclamation AG 21 of 1985 reads:

Notwithstanding anything to the contrary in any law contained and without the authority of an Order of Court or prior notice of whatever nature to any person – (b) any building or structure intended for human habitation or occupied by human beings which has been erected on land within the area of jurisdiction of any local authority, without the prior approval of that or any former local authority of any plan or description of such building or structure required by law, may at the expense of the owner of the land be demolished and removed together with its contents by the local authority or the Secretary or any officer employed in his department and authorised thereto by him.

⁹⁹ At paras 1-2.

¹⁰⁰ At para 8, quoting *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister for Information and Publicity in the President’s Office and Others* 2004(2) SA 602 ZS at 607A-608F.

¹⁰¹ At para 9, quoting *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister for Information and Publicity in the President’s Office and Others* 2004(2) SA 602 ZS at 609B.

standing, ie being found to lack an interest in the statute's validity specifically because he or she had not yet violated it.

Namibia's narrow standing rules thus combine with the doctrine of unclean hands to insulate the statute from judicial review. Even if a person wanted to engage in civil disobedience by breaking a law for the specific purpose of arguing that it was unjust or unconstitutional, this doctrine would prevent them from doing so. This inability to challenge the constitutionality of legislation is not consonant with a constitutional democracy.

At the time of publication (November 2012), the *Shaanika* case was on appeal to the Supreme Court.

2.6 Exceptions and expansions of the rules on common law standing

Despite the strict requirements of the common law criteria on *locus standi*, the Namibian courts have relaxed the common law criteria on standing in certain circumstances. Namibian law permits at least two exceptions to common law standing – with a third possible exception having been referenced *only* in dicta.

Standing to sue to protect the liberty interests of another

The High Court has noted that the common law criteria for standing have been relaxed “where the liberty of another individual is involved” – noting that this is in the nature of an exception to the usual standing rules.¹⁰²

The Court based its characterisation of this exception on *Wood and others v Ondangwa Tribal Authority*.¹⁰³ Two of the applicants in the *Wood* case were bishops who sought an interdict forbidding tribal authorities in what was then “South West Africa” from inflicting corporal punishment without trial on individuals who were members of the Democratic Co-operative Development Party or the South West Africa People's Organisation (SWAPO). The lower court dismissed the lawsuit on the ground the applicants lacked standing, reasoning “that an individual is not entitled to institute an action in the interests of the general public”.¹⁰⁴ The appellate court agreed that an individual did not have standing to “protect the rights of the public”, but reasoned that an interest of a person applying for an interdict when another person's liberty is at stake should be widely construed.¹⁰⁵ The Court further considered 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. I am thinking here of a partnership, or a society, or a church, or a political party. Any member of such a society or body would, in my view, have an interest in the personal liberty of a co-member.”¹⁰⁶

¹⁰² *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13. The Supreme Court has also referred to this exception to the usual common law rules of standing “to prevent the injustice that might arise where people who have been wrongfully deprived of their liberty are unable to approach a court for relief”. *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at para 16.

¹⁰³ *Wood and others v Ondangwa Tribal Authority* 1975 (2) SA 294 (A).

¹⁰⁴ At 305E.

¹⁰⁵ At 310D-G.

¹⁰⁶ At 312G-H.

Moreover, the Court took into consideration the practical inability of the persons on whose behalf the applicants acted to bring the action on their own behalf. One applicant had attached an affidavit stating that when he had brought a similar action on behalf of a specific individual, the individual was flogged the same day the application was filed.¹⁰⁷ Also, “because of the great number of people who were illegally arrested and flogged, hundreds of Swapo supporters were in fear of being treated in the same way. It would obviously be impracticable for all those to come with individual applications, supported by affidavits, particularly when they are resident about 800 kilometres from the seat of the Court and when legal assistance is not easily procurable ...”¹⁰⁸

The Court therefore held that the applicants in *Wood* had *locus standi* to bring the application.¹⁰⁹ It further concluded that an applicant generally has *locus standi* to protect the liberty interest of another when he can establish (1) that the detained person could not make the application himself; (2) that “the applicant had good reason for making the application”; and (3) “that the detained person would have made the application himself if it had been in his power to do so”.¹¹⁰ Notably, this holding was restricted by its terms to the protection of the liberty interest of another; a party does not have standing to protect another’s non-liberty rights.

In a recent case, the High Court applied this rule and confirmed that standing to represent another’s interests will not be permitted without, at least, a showing that the individual cannot make the application himself and that there is a good reason the applicant is making the application on the other’s behalf. In *Vaatz v The Municipal Council of Windhoek*,¹¹¹ the applicant objected to re-naming of streets by the municipality and sought an order about this, both on behalf of a “majority of residents residing or operating a business in a street ‘in any municipality in Namibia’”, and on behalf of the residents of Uhland Street, which was not the applicant’s place of residence.¹¹² The Court denied the applicant standing in both instances. With respect to the first group, the Court held that he failed to show –

what right, apart from his misplaced zeal and empty officiousness, he has to make this application ... on behalf of the ‘majority of residents residing or operating a business in a street in any municipality in Namibia’ and why those persons cannot make the application themselves; neither has the applicant satisfied the Court that he has good reason for making the application on behalf of all those nameless and amorphous persons in all the other municipalities in Namibia.¹¹³

With respect to the residents of Uhland Street, the Court held that the applicant had not shown “why those persons cannot make the application themselves; neither has the applicant satisfied the Court that he has good reason to make the application on behalf of those persons.” He therefore lacked the necessary *locus standi* to proceed.¹¹⁴ (The applicant was allowed to proceed in respect of his interests in the name of his own street of residence, but failed on technical

¹⁰⁷ At 313A-B.

¹⁰⁸ At 313B-C.

¹⁰⁹ At 3131F.

¹¹⁰ At 311E-H. *Namibian National Students’ Organisation (NANSO) and others v Speaker of the National Assembly for South West Africa and others* 1990 (1) SA 617 (SWA) similarly held that the Namibian National Students’ Organisation had standing to sue on behalf of its members who were being detained and harassed under the Protection of Fundamental Rights Act 16 of 1988 (SWA). At 627. The Court noted that the question was not academic because members had been arrested under the Act and faced pending prosecutions; as a result, “the various applicants [were] wary of proceeding with some of their legitimate aims because, in exercising their rights to induce people to do various things prevented by ... the Act, they may in fact face immediate arrest and prosecution.” At 627D-E.

¹¹¹ *Vaatz v The Municipal Council of Windhoek* [2011] NAHC 178 (22 June 2011).

¹¹² At paras 2, 10.

¹¹³ At para 2.

¹¹⁴ At para 10.

grounds as he had not properly approached the Court for a declaratory order or a review of an administrative decision.)

Standing to challenge legislation designed to protect a particular group

South African law has long recognised that a member of a group particularly protected by a statute may sue on the basis that the statute has been violated without proving or alleging that he or she has suffered special damage.

In *Macropulos v Mullinos*,¹¹⁵ for example, the applicant sued on the basis that the respondent lacked the certificate and licence required by statute to run a restaurant at a particular location. He argued that his competing business would be harmed by the increased competition. The Court reasoned that the rule from *Patz v Greene* controlled the case and quoted it as follows:

Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage – some particular injury beyond that which he may be supposed to sustain in common with the rest of the [citizenry] by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, then it is not necessary to allege special damage.¹¹⁶

Turning to the relevant legislation on “the licensing of trades and occupations”, the Court concluded that it was “a fiscal statute ... enacted for the benefit of traders”.¹¹⁷ The Court also considered the intent of the ordinance which prevented certain business owners, including restaurant owners, from receiving licenses without producing a certificate from a local authority granting them permission to carry on their business at the particular premises – concluding that its basic purpose was “to ensure adequacy of premises, proper arrangements relating to hygiene and the like” and not, “so far as restaurants are concerned, with the question of overtrading” or the protection of individual traders.¹¹⁸ Because the laws in question were not intended for the special protection of other traders, the applicant lacked standing to sue.

As part of the common law at the time of independence, this rule should remain good law,¹¹⁹ although a search of the case law has not revealed any cases in which a Namibian court has applied it.

Standing to curb an abuse of public power

In *Uffindell*, the High Court notes in *dicta* that “the Court has relaxed the common law criteria to establish standing ... (in Britain) when it is necessary *ex debito justitiae* [by reason of obligation to justice] to curb an abuse of public power”,¹²⁰ implicitly including this exception as part of Namibian law. But no Namibian court seems to have applied this exception, held that it applies in Namibian common law, or even mentioned it again.

¹¹⁵ *Macropulos v Mullinos* 1966 (1) SA 477 (W).

¹¹⁶ At 479, quoting *Patz v Green* 1907 TS 427 at 433.

¹¹⁷ At 479C-D.

¹¹⁸ At 479E-G.

¹¹⁹ Namibian Constitution, Article 140(1).

¹²⁰ *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13 (internal citation omitted).

3. Standing under the Namibian Constitution

Key provisions on standing in the Namibian Constitution

Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom

Article 25(2)

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

Article 18

Articles 25(2) and 18 of the Namibian Constitution control standing in certain cases. Article 25(2) (quoted in the box above) specifies that “aggrieved persons” may approach the courts alleging a violation of a fundamental right or freedom. Using similar but not identical language, Article 18 (also quoted in full above) guarantees that “persons aggrieved” by the acts of administrative bodies and administrative officials “shall have the right to seek redress before a competent Court or Tribunal”.

The Constitution does not define the term “aggrieved person”. The Supreme Court has, however, held that a juristic person may invoke rights in Chapter 3 of the Constitution where these are not explicitly limited to natural persons by their wording, or implicitly limited to natural persons by their nature – noting that the Constitution must be interpreted in a “generous and purposive” manner rather than formalistically, to make its protections of human rights “a practical reality for the people”.¹²¹

It must also be noted that the Constitution does not expressly require that an “aggrieved person” claim that his or her *own* rights were violated. It does not reference the common law requirements for standing or require that a person must have a “direct and substantial interest” in the subject of the litigation in order to have standing. Thus, in theory, the Constitution could permit standing which is different than that allowed under the common law.

For example, the Constitution could be interpreted to permit a party to approach the Court claiming a violation of the rights and freedoms of another provided the applicant could establish a non-legal interest in the person’s rights or freedoms. This type of standing under the Constitution would be similar to the standing recognised in *Wood*.

¹²¹ “Yet, although those values [dignity and the equal and inalienable rights of all people] either by their nature or by reference to their formulation in the first paragraph of the preamble attach to human beings, a number of the fundamental rights and freedoms which they underlie equally apply to juristic persons as well. Those that do not are either qualified by words to that effect (‘men’, ‘women’, ‘children’, etc) or excluded on the basis that, given their peculiar nature, they vest in natural persons only. In the absence of such a qualification or exclusion, the phrase ‘all persons’ must be construed to incorporate juristic persons. A purposive approach commends such a construction. The aim of a generous and purposive interpretation ‘must be to move away from formalism and make human rights provisions a practical reality for the people’ [citing *Smyth v Ushewokunze* 1998 (2) BCLR 170 (ZS) at 177I – J]. Behind the ‘corporate veil’ of juristic persons are their members; behind the legal fiction of a separate legal entity are, ultimately, real people. They are the final beneficiaries of the corporate structures which they have created.” *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2009 (2) NR 596 (SC) at para 40 (some citations omitted).

The Namibian courts initially interpreted standing under Articles 18 and 25 to be identical to standing under the common law. The High Court first addressed standing under Article 18 in *Kerry McNamara Architects Inc and others v Minister of Works, Transport & Communication and others*.¹²² The applicants asserted that they should be permitted to approach the court as “persons aggrieved” by an administrative decision, arguing that the Court “should give a wide meaning to the words ‘aggrieved persons’ to ensure administrative fairness”.¹²³ The Court rejected the argument that Article 18 expanded standing beyond that permitted by the common law: “Art 18 provides a substantive right for aggrieved persons to claim redress and was not intended to widen the ambit to also include persons who would otherwise not have had standing to bring proceedings.”¹²⁴ It then concluded that the applicants lacked common law *locus standi* and thus had no basis to bring a Constitutional challenge.¹²⁵

However, the 2009 case of *Uffindell v Government of Namibia*¹²⁶ seems to point in the direction of a more liberal approach to standing in respect of Constitutional issues. In this case, the Government of Namibia held an auction for the sale of three-year trophy hunting concessions. The applicant bid at the auction for a concession, but lost. The fourth respondent and his company, the fifth respondent, were invited to attend the auction, but were not permitted to register or bid. The fourth and fifth respondents sought and obtained a *rule nisi* and an interim interdict declaring the auction unconstitutional as a violation of their rights to equality, to fair administrative justice and to freely practice a profession or occupation or carry on a business. To remedy the constitutional violation, the Minister made an additional trophy hunting concession available and sold it privately to the fourth respondent. The applicant then brought a separate action challenging the private sale as unconstitutional – on the basis that, as a departure from the established policy on sale of such hunting concessions by auction, it infringed the applicant’s right to equality under Article 10, detracted from his right to fair administrative action under Article 18 and affected his right to practice his profession as a professional hunter protected by Article 21(1)(j).

The respondents challenged the applicant’s *locus standi*, contending that the applicant could not have been joined as a party in the original lawsuit and therefore had no interest in the settlement. The Court agreed that the applicant lacked a legal interest in the original litigation, but found that the subsequent private sale affected rights beyond those of the fourth and fifth respondents. The Court also found that, although the applicant did not stand in a “direct administrative-law relationship” with the first, second, and third respondents, it nevertheless had standing to challenge the administrative decision if “a rational connection is shown to exist between the challenged administrative action and the constitutional rights and legal interests of the applicant allegedly affected by it which, *in a constitutional setting*, must be sufficiently direct and substantial to confer upon the applicant the legal right to challenge it under art 25(2) of the Constitution as an ‘aggrieved person’”.¹²⁷

The Court also noted that, at common law, the question of standing has always been regarded as an incidence of procedural rather than substantive law, which allows the court a greater measure of flexibility in determining whether, given the facts of the particular matter, the substance of the right or interest involved, and the relief being sought, *locus standi* has been established”.¹²⁸ It

¹²² *Kerry McNamara Architects Inc and others v Minister of Works, Transport & Communication and others* 2000 NR 1 (HC).

¹²³ At 11E.

¹²⁴ At 11F-J.

¹²⁵ At 11A-B.

¹²⁶ *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC).

¹²⁷ At para 11 (emphasis added).

¹²⁸ At para 12 (internal citation omitted).

noted furthermore that the “scope and ambit” of a ‘direct and substantial’ interest “are not capable of exact delineation by rules of general application which are cast in stone”, but must be assessed according to the “peculiar facts and circumstances of each case”.¹²⁹

However, in an important passage, the Court stated:

These common-law principles and the measure of flexibility they allow the court is an important reference but not the true criteria for deciding standing when litigants claim that their fundamental rights and freedoms protected under the Constitution have been infringed, derogated from, or diminished.¹³⁰

It noted that Namibia common law does not recognise public interest standing, although the court has relaxed the common law criteria to establish standing in appropriate circumstances – noting instances in Namibia where the liberty of another individual is involved and instances in Britain when it is necessary to curb an abuse of public power. The Court then stated that –

it is especially within the context of the protection and promotion of human rights values after the new constitutional dispensation created at Independence that a more purposive approach must be adopted to accord individuals and classes of individuals standing to enjoy the full benefit of their entrenched rights and to effectively maintain and enhance the values expressed therein.¹³¹

Significantly, the Court then drew a comparison with Constitutional standing in South Africa, citing with approval a passage from the majority opinion of the South African Constitutional Court in the 1996 *Ferreira* case:¹³²

Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.¹³³ ...

The Court then cited additional motivation for a broader approach to Constitutional standing from a concurring judgement in same case:

This expanded approach to standing is quite appropriate for constitutional litigation. Existing common-law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or constitutional nature. Not all non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision

¹²⁹ Ibid (internal citation omitted).

¹³⁰ At para 13.

¹³¹ Ibid.

¹³² *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC).

¹³³ At para 15, quoting *Ferreira* at para 165 (Chaskelson P).

may be of a private rather than a public character. But it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation.¹³⁴

The Court conceded that the reference to standing in the South African Constitution has arguably been “cast in broader terms” than standing in terms of Article 25(2) of the Namibian Constitution, but concluded that this “does not detract from the underlying principle that this court, in giving effect to its constitutional duty under art 5 to respect and uphold the fundamental rights and freedoms enshrined in Ch 3 of the Constitution, must also interpret art 25 (which is part of Ch 3 and the rights contemplated thereunder) in a broad, liberal and purposive way – as this court and the Supreme Court have held on numerous occasions in respect of other Articles in the same Chapter”.¹³⁵

It described the *Kerry McNamara* case as having held “that ‘aggrieved persons’ do not include those who sue on the basis of derivative rights (such as a sub-contractor or sub-lessee)”, but stated that “judicial precedent on the interpretation of that phrase is limited and will undoubtedly require further judicial elaboration in future to determine which persons and classes of persons (or their representatives) are accorded the right to seek protection or enforcement of their fundamental rights from the courts”.¹³⁶

Then, after noting cautionary remarks from previous Namibian cases warning that constitutional law “should be developed cautiously, judiciously and pragmatically if it is to withstand the test of time”,¹³⁷ it proceeded to consider the question of *locus standi* in the case at hand. The Court’s reasoning can be summarised as follows:

- (1) Although the applicant does not stand in a ‘direct administrative-law relationship’ with the first, second and third respondents, “rights and interests flowing from his general relationship with that authority” had been directly affected by the settlement agreement between the authority and the trophy hunter who had been the beneficiary of the agreement.¹³⁸
- (2) The concession being complained of “allows for the exploitation of a natural resource falling in the public domain. There is a pressing environmental and economic need that those resources should be managed responsibly and, ultimately, for the public benefit.” This was, indeed the reason why a State policy had been developed on “the sustainable exploitation of game on State land in the form of concessions to which a particular category of persons (ie professional hunters) had equal access”. That policy was intended to bring about administrative fairness and transparency in the management of that natural resource.¹³⁹
- (3) Since government had established a consistent practice of allowing persons within this particular category to have “equal access” to concessions, “those persons have an interest – more immediate and substantial than those of the public in general – to be aggrieved” if the government unlawfully deviates from the established practice:

[T]he applicant and other persons similarly qualified as professional hunters who manifested an interest in obtaining trophy hunting concessions have reasonable grounds to feel themselves aggrieved for having been denied the opportunity to compete on an equal footing for the concession. In seeking a review of that decision, they would not assert their grievances as mere taxpayers or citizens generally, but as registered

¹³⁴ Ibid, quoting *Ferreira* at para 229 (O’Regan J).

¹³⁵ Ibid.

¹³⁶ At para 15.

¹³⁷ Ibid, citing *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) at 184B (Dumbutshena AJA).

¹³⁸ At para 16.

¹³⁹ At para 17.

professional hunters with a special interest in the management and sustainable utilisation of that public resource; as persons who have previously held trophy hunting concessions and who, by participation in the earlier auction, have manifested an interest in again competing for one on an equal footing with others similarly situated. Even if the phrase ‘aggrieved persons’ is not to be applied on the basis of a subjective assessment – and I expressly refrain from finding that on a purposive approach it may not be so understood – but falls to be assessed by the more stringent standard of reasonableness, I am satisfied that a reasonable person in the applicant’s position would have had cause to be aggrieved and to claim that his or her fundamental rights have been infringed or threatened by the assumedly unlawful decision of the second respondent.¹⁴⁰

The Court concluded that “the applicant had adequate cause to be aggrieved and to claim enforcement or protection of his fundamental rights as contemplated in art 25(2) of the Constitution”¹⁴¹ and proceeded to consider the merits of the case, ultimately finding that no violation of the Constitution had taken place.

The question of whether constitutional standing is in fact broader than common law standing seems to remain unsettled, however. Recently, in the unreported case of *Maletzky and others v Attorney General and others*,¹⁴² the High Court rejected an applicant’s contention that “any person aggrieved by a violation of the fundamental right of another may approach the high court for an appropriate relief”.¹⁴³ The High Court affirmatively rejected this interpretation of Article 25(2), of the Namibian Constitution, differentiating it from the South African Constitution:

It is abundantly clear from the wording of Article 38 of the South African Constitution that there was a deliberate intention on the part of drafters to widen the scope for legal standing unlike the Namibian Constitution which limits the right of action to aggrieved persons only. There is no provision in the Namibian Constitution which expressly authorizes *locus standi* to persons acting as a member of or in the interest of a group or class of persons or acting in the public interest.¹⁴⁴

The Court assumed that an “aggrieved person” must have a direct and substantial interest in the litigation, but it did not explain this conclusion in terms of the text of the Constitution, its drafting history, or its purpose as a whole. This lack of explanation seems odd given the *Uffindell* precedent and the fact that the Constitution does not simply restate the common law standing requirements and does not by its terms require that an aggrieved person complain of a violation of his own rights. Nevertheless, the High Court concluded in this case that “Article 25 (2) was not intended to widen the ambit [of *locus standi*] to include persons who would otherwise not have had standing to bring proceedings. The Namibian Constitution has ... not extended the common law requirements of *locus standi*.”¹⁴⁵

¹⁴⁰ At para 18.

¹⁴¹ Ibid.

¹⁴² *Maletzky and others v Attorney General and others* [2010] NAHC 173 (HC). This case involved a wide range of challenges to laws affecting indigent persons. *Locus standi* was only one of a number of technical problems faced by the applicants, who has asserted many vague claims.

¹⁴³ At para 25.

¹⁴⁴ At para 31. The Court cited this statement by the Supreme Court in *Alexander v The Minister of Justice and Others* 2010 (1) NR 328 (SC) at para 71: “The standing of a party to approach a Court to protect him/her against unlawful interference with his/her rights is dependent on whether his or her rights are infringed or there is a threat of such infringement.” However, the *Alexander* case did not consider the possibility that Constitutional standing might be broader than common law standing, but merely concluded that “the appellant’s constitutional right to liberty is threatened by the provisions of sec 21 of the Extradition Act” and so “the Court *a quo* was wrong when it declined to consider the issue of the constitutionality of sec 21 of the Extradition Act on the basis that it was not ripe for hearing”. At para 71.

¹⁴⁵ At para 29.

On the other hand, the *Uffindell* approach was followed in an even more recent unreported case, *Petroneft International Glencor Energu UK Ltd and Another v Minister of Mines and Energy and Others*.¹⁴⁶ This case involved the legality of a Cabinet decision to revoke the mandate of the fourth respondent, National Petroleum Corporation of Namibia (Pty) Ltd (“Namcor”) to import 50% of Namibia’s annual required petroleum products. This mandate had been granted to Namcor, a parastatal wholly owned by government, in terms of regulations issued under the Petroleum Products and Energy Act, 13 of 1990.

The first applicant (“Petroneft”) and the second applicant (“Glencore”) were international oil traders, with Petroneft being a subsidiary of Glencore. For purposes of understanding the issue of standing, it is not necessary to detail all of the complex contractual agreements at issue; what follows is a simplified summary of the key contractual issues.

Petroneft and Namcor had entered into a joint venture agreement which made them equal shareholders in the resulting joint venture company, which was established to source and sell petroleum products and crude oil pursuant to Namcor’s mandate. Namcor then entered into a supply agreement with this joint venture company, which provided for the supply of petroleum products exclusively by the joint venture company to Namcor, to enable Namcor to fulfil its mandate. The petroleum products supplied under this contractual scheme were procured by Glencore, which entered into separate supply contracts with the joint venture company. Petroneft and Glencore approached the Court, requesting that it review and set aside the government’s revocation of Namcor’s mandate as well as its decision to direct Namcor to terminate its contractual obligations under the supply agreement.

One of the issues which arose concerned the *locus standi* of the applicants, Petroneft and Glencore. “It was contended on behalf of the applicants that, as a consequence of the contractual matrix, they each have a direct and substantial legal interest in the continuation of and compliance with the supply agreement and in Namcor’s continued mandate granted by the Government.”¹⁴⁷ The counterargument was that the applicants’ interest was “merely a financial and commercial interest in the continuation of the mandate and that the applicants themselves were not the contracting parties”, and thus lacked standing to seek the relief claimed in the application.¹⁴⁸

To understand the Court’s analysis of *locus standi*, it is important to note that the claims in the application included an allegation that the decision to revoke the mandate violated the applicant’s right to administrative justice under Article 18 of the Namibian Constitution.

In the matter at hand, the contracting party in the supply agreement at issue was the joint venture company which was 50% owned by Namcor – which was in turn wholly owned by government, which had made the decision that was being challenged. Namcor did not consider itself to be aggrieved by the government’s revocation of the mandate and did not seek to challenge it. Since Petroneft and Namcor were equal shareholders in the joint venture company, it was argued that the joint venture company “would thus be paralysed in the circumstances and would not itself be able to institute the review application and these proceedings by virtue of its shareholding”.¹⁴⁹ Counsel drew an analogy to a previous decision of a Full Bench of the High Court confirming

¹⁴⁶ *Petroneft International Glencor Energu UK Ltd and Another v Minister of Mines and Energy and Others* [2011] NAHC 125.

¹⁴⁷ At para 11.

¹⁴⁸ At para 57, citing *Kerry McNamara Architects Inc and others v Minister of Works, Transport & Communication and others* 2000 NR 1 (HC).

¹⁴⁹ At para 59.

that where it is not possible to obtain a decision of a majority of the members of a close corporation to institute legal proceedings, then an individual member of the close corporation may institute the proceedings.¹⁵⁰ However, the counsel for the applicants relied mainly on the *Uffindell* decision, asserting that “standing – a procedural and not substantive issue – should be viewed more widely in the context of constitutional challenges”.¹⁵¹ The High Court agreed with the fundamental approach to constitutional standing taken in “well reasoned judgement” in the *Uffindell* case, which Smuts J then quoted at length, with approval.¹⁵²

The Court also noted that to deny the applicants standing would effectively allow the government to insulate its decisions from review and thus “contract out of the Constitution by incorporating a parastatal which it controls and then exercising statutory powers through it”.¹⁵³ Thus, if the joint venture company is unable to act by virtue of the equal shareholding between Namcor and Petroneft (where Namcor is controlled by its sole shareholder, the decision maker), then Petroneft, as the other 50% shareholder in the joint venture company must be recognised as having standing, to accord with the “broad and purposive approach to standing in constitutional matters eloquently set out in *Uffindell*”.¹⁵⁴

So in this case the Court took the view that standing should be viewed more widely in the context of constitutional challenges. The fact situation was somewhat analogous to that in the *Wood* case, because the affected party was essentially unable to act, in the same way as a person who is detained might find it impossible to bring a legal action. But the Court did not give any indication that this was a necessary criterion for taking a broader approach to standing.

In the case of *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and others*,¹⁵⁵ it was argued in the Supreme Court that the principle of *locus standi* should be extended in environmental cases in order to give the phrase ‘persons aggrieved’ in Article 18 of the Constitution a wider and more ‘constitutionally meaningful interpretation’ in the environmental context – with a ruling being requested on this issue despite the fact that it was not considered by the lower court.¹⁵⁶ However, the Supreme Court declined to consider the issue of standing because the dispute at hand had become moot. It was anticipated at the time that the question of *locus standi* in respect of environmental issues would arise between the same litigants in another similar application pending in the High Court, but this case did not proceed as expected with the result that the Namibian courts have as yet made no ruling on common law *locus standi* in environmental matters.

In another recent Supreme Court case of *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others*,¹⁵⁷ the Court held that the applicants had *locus standi* at common law, finding it therefore “unnecessary to consider the argument raised by the appellants concerning the scope of the phrase “aggrieved persons” in Article 25 of the Constitution”¹⁵⁸ – and thus at least leaving the door open to the possibility that it might entertain such arguments in some other case:

¹⁵⁰ Ibid, citing *Oshuunda CC v Blaauw* 2001 NR 203 (HC).

¹⁵¹ At para 61.

¹⁵² At paras 61-64.

¹⁵³ At para 65.

¹⁵⁴ At para 66.

¹⁵⁵ *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and others* 2011 (2) NR 469 (SC).

¹⁵⁶ At para 14

¹⁵⁷ *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC).

¹⁵⁸ At para 19.

[15] Should the first appellant not have standing at common law, the appellants argue that ‘aggrieved persons’ within the meaning of art 25 of the Constitution is a broader class of potential litigants than the class created by the common-law concept of ‘direct and substantial interest’.

[16] The ordinary common-law principle is that a litigant must have a direct and substantial legal interest in the outcome of the proceedings. A financial interest will not suffice. There are exceptions to this rule to prevent the injustice that might arise where people who have been wrongfully deprived of their liberty are unable to approach a court for relief. This line of authority cannot assist the first appellant.

[17] The first appellant argues that its freedom to contract is impaired by the tariffs and that therefore it has a legal interest in the outcome to the proceedings. For the purposes of this argument, the first appellant asserts, correctly, that the court must proceed on the assumption that the tariffs are void. The respondents seek to rebut this argument on the ground that the first appellant is seeking ‘to raise itself up by its own bootstraps’ by concluding an agreement with the second appellant that is unenforceable for the reason of the regulatory restriction on the second appellant. This argument is similar to the conclusion of the High Court that the first appellant has sought ‘to hitch-hike a ride on the back of the second appellant’ and ‘to approach the court through the backdoor’.

[18] I cannot agree. These proceedings will determine whether the contract entered into between the first and second appellants is void, so the outcome of the proceedings will determine the first appellant’s legal obligations vis-à-vis the second appellant. In my view, the first appellant thus does have a direct and substantial legal interest in the outcome of these proceedings. I have not overlooked the respondents’ argument that by entering into an agreement that will be unenforceable if these proceedings fail, the first appellant has created its own legal interest in the proceedings, but in my view there is nothing undesirable in such conduct. **In a constitutional State, citizens are entitled to exercise their rights and they are entitled to approach courts, where there is uncertainty as to the law, to determine their rights.** If the appellants are correct, and the tariffs are in conflict with art 21(1)(j) or art 18 of the Constitution, then their contract will be valid and they will have successfully vindicated their rights. If they are incorrect, then they will have obtained clarity on their legal entitlements. **The rules of standing should not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements.**

[19] I conclude, therefore, that the first appellant did have standing to launch these proceedings. This conclusion means that it is unnecessary to consider the argument raised by the appellants concerning the scope of the phrase ‘aggrieved persons’ in art 25 of the Constitution.¹⁵⁹

The current legal position was summarised by the High Court in the 2012 case of *Lameck and Another v President of Republic of Namibia and Others* as follows – although the *Lameck* case did not appear to require an expanded notion of standing:¹⁶⁰

This court has correctly stressed that a broad approach to standing should be adopted in constitutional challenges [citing *Uffindell t/a Aloe Hunting Safaris v Government of Namibia* 2009(2) NR 670(HC)] The Supreme Court has confirmed this approach [citing

¹⁵⁹ At paras 15-19 (emphasis added).

¹⁶⁰ *Lameck and Another v President of Republic of Namibia and Others* (A 54/2011) [2012] NAHC 31 (20 February 2012) at para 1: “The applicants are currently charged with offences which include contraventions of and the impugned provisions of [the Prevention of Organised Crime Act] and others relating to them as well as contraventions of [the Anti-Corruption Act] dependent upon the impugned definitions of that Act. This would in my view give them standing to challenge the coming into operation of [the Prevention of Organised Crime Act] and the provisions in [the Prevention of Organised Crime Act] and [the Anti-Corruption Act] raised in the charge sheet against them.”

The High Court's summary of the Supreme Court's position is perhaps somewhat overstated, but case law on this issue viewed as whole seems to signal a welcome move (albeit in fits and starts) towards a broader approach to standing in terms of the Namibian Constitution.

4. Standing under particular statutes

In addition to standing under the common law and the Constitution, an applicant may have standing – or may be deprived of standing – under the terms of a particular statute or rule.

The rule or statute may dictate which parties have *locus standi* to challenge particular actions or decisions. For instance, under section 50 of the Close Corporation Act 26 of 1988, a single member of a close corporation may institute proceedings against another member for breaching his fiduciary duty to the corporation on the corporation's behalf, but not in the corporation's name; only a majority of members may sue another member for breach of fiduciary duty in the corporation's name.¹⁶²

Alternatively, the rules might dictate under what circumstances a party has *locus standi*. For example, under Rule 48(1) of the High Court Act 16 of 1990, a party has *locus standi* to require the Taxing Master to justify his decision to permit an award of costs for a particular item, but only if the party in question objected to that item at the time of the taxation.¹⁶³

Recent Namibian legislation demonstrates a distinct trend towards liberalising standing for specific purposes. For example, the **Combating of Domestic Violence Act 4 of 2003** expressly provides that “any other person who has an interest in the well-being of the complainant” may obtain a protection order on behalf of a person in a domestic relationship. The individual with representative standing to seek a protection order includes, but is “not limited to a family member, a police officer, a social worker, a health care provider, a teacher, traditional leader, religious leader or an employer”.¹⁶⁴ Similarly, the **Maintenance Act 9 of 2003** permits any person who has an interest in the well-being of the beneficiary, “including but not limited to a relative, social worker, health care provider, teacher, traditional leader, religious leader or an employer” to seek a maintenance order,¹⁶⁵ and “a complainant, beneficiary, defendant or any person who is affected by a maintenance order or any other order, directive or notice” under the Act may make a complaint to the maintenance court.¹⁶⁶ Although not extending standing as broadly, the **Liquor Act 6 of 1998** permits parties other than those with a “direct and substantial interest” to lodge an objection to the granting of a license; section 28(1) allows objections by:

- (a) any resident, or group of residents, of the district in which the licensed business is or will be situated or conducted;
- (b) any person conducting a business of any kind in the district ... ; [and]
- (c) the local authority in whose area of jurisdiction the licensed business is or will be situated or conducted.¹⁶⁷

¹⁶¹ At para 1(emphasis added).The High Court's characterisation of the Supreme Court statement in the Trustco case fails to indicate that the paragraph cited is *obiter dicta*.

¹⁶² *Oshuunda CC v Blaauw and others* 2001 NR 230, 232 232J-233F, interpreting Close Corporation Act 26 of 1988, sections 50-51.

¹⁶³ See *Pinkster Gemeente van Namibia v Navolers van Chrisuts Kerk* SA 2002 NR 14 (HC) at 22E-23F.

¹⁶⁴ Combating of Domestic Violence Act 4 of 2003, section 4(2).

¹⁶⁵ Maintenance Act 9 of 2003, definition of “complainant” in section 1 read together with section 9.

¹⁶⁶ Liquor Act 6 of 1998, section 9(3).

¹⁶⁷ The result in *Macropulos v Mullinos* 1966 (1) SA 477 (W), makes clear that the groups permitted to challenge a licensing decision under the Liquor Act would not have common law *locus standi*.

If enacted by Parliament, the **Child Care and Protection Bill** (not yet tabled in Parliament at the time of writing) will continue this liberalising trend. In terms of the draft bill, those permitted to approach the children's court with a matter that falls within its jurisdiction include:

- (a) a child who is affected by or involved in the matter to be adjudicated;
- (b) anyone holding or exercising parental responsibilities and rights in respect of a child;
- (c) the care-giver of a child;
- (d) anyone acting in the interest of a child;
- (e) anyone acting on behalf of a child who cannot act in his or her own name;
- (f) anyone acting as a member of, or in the interest of, a group or class of children;
- (g) anyone acting in the public interest, including the Minister or an authorised representative of the Minister; and
- (h) the Children's Advocate [a government official who will be based in the Office of the Ombudsman] acting on behalf of a child or children generally.¹⁶⁸

5. Actions by multiple plaintiffs

The concept of a class action, where one or more plaintiffs litigate against a defendant not only on their own behalf but on behalf of other similarly-situated persons, does not exist in Namibia. However, the existing Rules of the High Court do contain a procedure for joinder.

The rules on joinder make it possible for any number of persons to be joined as plaintiffs, provided that the right to relief of the persons proposing to join as plaintiffs depends on the determination of substantially the same question of law or fact.¹⁶⁹ It is similarly possible for several defendants to be sued in a single action where the question between them and the plaintiff depends on the determination of substantially the same question of law or fact.¹⁷⁰

Joinder is inadequate as a means for access to justice by multiple individuals:

The cardinal difficulty with joinder ... is that it presupposes the prospective plaintiffs' advancing en masse on the courts. In most situations such spontaneity cannot arise either because the various parties who have the common interest are isolated, scattered and utter strangers to each other. Thus while the necessity for group action through joinder clearly exists, the conditions for it do not. It may not be enough for society simply to set up courts and wait for litigants to bring their complaints – they may never come. What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it.¹⁷¹

6. Standing of government actors to approach the courts

6.1 Attorney General

Article 79(2) of the Constitution of Namibia authorises the Supreme Court to “deal with matters referred to it for decision by the Attorney-General under this Constitution”. In turn,

¹⁶⁸ Draft Child Care and Protection Bill, dated 12 January 2012, section 47(2).

¹⁶⁹ Rules of the High Court, Rule 10(1).

¹⁷⁰ *Id* at Rule 10(3).

¹⁷¹ *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuzza and Others* 2001 (4) SA 1184 (SCA) at para 4 (footnotes omitted), quoting H Kalven, Jr and M Rosenfield, “The Contemporary Function of Class Suit” 1941 *University of Chicago Law Review* 684 at 687-8.

section 15 of the Supreme Court Act 15 of 1990 lays out the rules that apply when the Attorney General refers a constitutional issue to the Court. The Attorney-General may approach the Supreme Court directly as a court of first instance on constitutional questions.¹⁷² However, the Chief Justice or any other judge designated has the right to decide “whether the application is, by virtue of its urgency or otherwise, of such a nature as to justify the exercise of the court’s jurisdiction in terms of this section”.¹⁷³ This decision cannot be appealed.¹⁷⁴ If the Court exercises its jurisdiction, then “any party affected or likely to be affected” by the grant of jurisdiction “shall be informed of that decision by the registrar”.¹⁷⁵ Although the Supreme Court Act does not define “party” in this context, the term must refer to persons other than those normally considered parties to the case, because the Attorney-General will be the only party in the traditional sense.

When the Supreme Court exercises this jurisdiction, it may hear evidence, direct that the matter be heard by the High Court with such instructions as the Supreme Court may deem fit, or “give any other direction or make such order which in its opinion are in the circumstances of each case just or expedient”.¹⁷⁶

In practice, the Attorney-General has exercised this standing to refer matters to the Supreme Court only twice. First, in *Ex parte Attorney-General: In re Corporal Punishment*,¹⁷⁷ the Attorney-General requested that the Supreme Court determine whether the “imposition and infliction of corporal punishment by or on the authority of any organ of State contemplated by legislation” was unconstitutional per se, with respect to certain categories of people, with respect to “certain crimes or offences or misbehaviours” or with respect to procedures currently in place.¹⁷⁸ Later, in *Ex parte Attorney-General: In re The Constitutional Relationship Between the Attorney-General and the Prosecutor-General*,¹⁷⁹ the Attorney-General referred the question of the relationship between these two offices created by the Constitution. In particular, the Attorney-General asked:

Whether the Attorney-General, in pursuance of art 87 of the Constitution and in the exercise of the final responsibility for the office of the Prosecutor-General, has the authority:

- (i) to instruct the Prosecutor-General to institute a prosecution, to decline to prosecute
- (ii) or to terminate a pending prosecution in any matter
- (iii) to instruct the Prosecutor-General to take or not to take any steps which the Attorney-General may deem desirable in connection with the preparation, institution or conduct of any prosecution;
- (iv) to require that the Prosecutor-General keeps the Attorney-General informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority.

Two aspects of this system deserve comment. First, **the matters that the Attorney-General refers to the Supreme Court, unlike issues that come before the Court in normal cases, can be abstract and hypothetical.** In the corporal punishment case, for example, the Attorney-General did not ask whether state infliction of corporal punishment was unconstitutional with respect to a particular group or through the use of a particular method. Rather, the question was framed in the

¹⁷² Supreme Court Act 15 of 1990, section 15(1).

¹⁷³ Id at section 15(3).

¹⁷⁴ Id at section 15(4).

¹⁷⁵ Id at section 15(5).

¹⁷⁶ Id at sections 15(5), 20(a).

¹⁷⁷ *Ex parte Attorney-General: In re Corporal Punishment* 1991 NR 178 (SC).

¹⁷⁸ At 179 A-D.

¹⁷⁹ *Ex parte Attorney-General: In re The Constitutional Relationship Between the Attorney-General and the Prosecutor-General* 1998 NR 282 (SC).

abstract: Was corporal punishment ever constitutional? Was it unconstitutional with respect to *any* group? *Any* method? *Any* procedure? **The advantage of this system is that it permits the Supreme Court to consider the constitutionality of statutes or practices that might otherwise be insulated from constitutional review**, either because no individual with *locus standi* has been able to challenge them or because no individual could have *locus standi* to challenge them.

Yet the disadvantage flows precisely from this ability to review abstract questions. A court is well equipped to determine if a statute is per se constitutional without the need for precise facts: it can consider the statute and consider whether the statute, by its very terms, violates the Constitution. But **a court is probably not well equipped to assess the constitutionality of a statute or practice with respect to every group, method, and procedure if it concludes that the statute is valid on its face.** Life is infinitely variable, and the Supreme Court may not be able to imagine every possible way that, for example, corporal punishment may be inflicted. The concern stems from a situation in which the Supreme Court upholds a statute not only on its face, but as implemented, and a lower court is later confronted with a particular implementation of that statute that violates the Constitution but that the Supreme Court did not anticipate. The lower court would presumably be bound by the Supreme Court's conclusion, even though, in fact, the Supreme Court did not consider the particular factual situation at issue.

Second, **the Attorney-General has exercised his power to refer cases to the Supreme Court only twice. The office has not used this power at all in the last fourteen years.** Thus, although in theory it provides a means of challenging the constitutionality of government action, in practice it has remained nearly useless. It therefore does not serve as an adequate substitute for a broader standing regime.

Indeed, limitations to the efficacy of this tool seem inherent in the system. **The Attorney-General has only limited funding for all of the functions of the office, which must balance challenges to statutes against its other duties. Moreover, under the Constitution, the Attorney-General is a political appointee.**¹⁸⁰ He or she may therefore feel political pressure not to challenge legislation or government action that the ruling party supports. Also, the Attorney-General may simply not be aware of a problematic action or practice, or may not recognise that it is potentially unconstitutional.

These limitations show that, although the Attorney-General's power to approach the Court has the potential to be a useful avenue for application of the Constitution, Namibians need more opportunities to approach the courts directly to enforce the Constitution and protect their rights.

Schroeder and another v Solomon and 48 others¹⁸¹ confirms that private individuals lack the *locus standi* to institute such matters before the Supreme Court as a court of first instance. In this case, the applicants brought an "Application for Review" in the Supreme Court seeking review of a number of orders regarding litigation in the High Court. The Supreme Court considered the fact that the applicants instituted the proceedings in the Supreme Court in the first instance. It noted that Article 79(1) of the Constitution grants it jurisdiction to hear "matters referred to it for decision by the Attorney-General under this Constitution ...". **Pursuant to section 16 of the Supreme Court Act 15 of 1990, the Supreme Court also has jurisdiction to review the proceedings of other courts, administrative tribunals and authorities established by law, and may exercise this jurisdiction when an irregularity in those proceedings comes**

¹⁸⁰ See 1998 NR 282 (SC) at 288B.

¹⁸¹ *Schroeder and another v Solomon and 48 others* 2009 (1) NR 1 (SC).

to its notice regardless of whether the proceedings are subject to an appeal. Individuals, however, do not have the right to institute review proceedings in the Supreme Court as a court of first instance.¹⁸² Applying this framework, the Court held that the applicants lacked the right to institute the action for review in the Supreme Court.¹⁸³

The Court expressed particular concern regarding the practical burden such standing would entail:

It would place an unbearable burden on the limited resources of the Court and severely compromise its ability to dispense justice in an equal, just and fair manner if everyone dissatisfied with the fairness or reasonableness of judicial, quasi-judicial and administrative judgements or decisions by courts, administrative tribunals and other public authorities on account of alleged irregularities could at will institute review-proceedings in this Court – in the process bypassing all existing judicial structures often better suited to deal with those matters in the first instance.¹⁸⁴

The Court expressed similar concern regarding the burden placed on the respondents, although much of the criticism focused on the delays the proceedings had caused in the High Court and the apparent inability of the applicants to pay an award of costs: “The prejudice suffered by the 49 respondents who had to engage the applicants’ drastic claims against them in an impermissible application is evident. They had to invest their time and financial resources to oppose it.”¹⁸⁵

Nevertheless, **the Court took the opportunity to institute rules to permit it to exercise its own jurisdiction when applicants attempt to approach it seeking review under section 16.** Future applications purporting to seek review under section 16 would be treated as applications to the Court to exercise its own section 16 review jurisdiction.¹⁸⁶ The Court looked to section 15(2) as a possible procedural model. As noted above, section 15(2) provides that when the Attorney-General’s refers a matter to the Supreme Court, the matter “must be submitted by petition to the Chief Justice”.¹⁸⁷

Presented in that form, it would allow for the identification of the irregularities in the proceedings complained of; the grounds upon which the petitioner will seek a review of the proceedings; a concise statement of the facts which will be material to a review; the inclusion of pertinent transcriptions or attachments; the relief that the petitioner intends to move in the review application and, most importantly, the verification of the factual statements in petition on either oath or affirmation.¹⁸⁸

However, the Court also retained its jurisdiction to invoke its jurisdiction to review irregularities regardless of the manner in which an application for review is presented.¹⁸⁹

In determining whether to invoke its jurisdiction to review a matter in the first instance, the Court stated that it would do so “only when it is required in the interests of justice”.¹⁹⁰

¹⁸² At para 9. This is explicitly stated in section 16(2): “The jurisdiction referred to in subsection (1) may be exercised by the Supreme Court *mero motu* whenever it comes to the notice of the Supreme Court or any judge of that court that an irregularity has occurred in any proceedings referred to in that section, notwithstanding that such proceedings are not subject to an appeal or other proceedings before the Supreme Court: Provided that nothing in this section contained shall be construed as conferring upon any person any right to institute any such review proceedings in the Supreme Court as a court of first instance.”

¹⁸³ At para 10.

¹⁸⁴ Ibid.

¹⁸⁵ At para 15.

¹⁸⁶ At para 16.

¹⁸⁷ At para 17

¹⁸⁸ Ibid.

¹⁸⁹ At para 18.

¹⁹⁰ At para 20.

It would make this decision based on the facts and circumstances of the case in question, with a view to the following considerations:

whether or not – (a) the irregularities are also reviewable by other competent Courts or may be corrected in other available proceedings; (b) the irregularities relate to completed, uncompleted, interlocutory or ancillary proceedings; (c) considerations of urgency attach to the adjudication thereof; (d) the issues are important; (e) a public interest is at stake; (e) only an individual or a class of persons or a section of the community has been affected by the irregularity and the like, will be brought to bear on the Court’s ultimate decision.¹⁹¹

Applying these principles to the case at hand, the Court declined to invoke its review jurisdiction.¹⁹²

6.2 Ombudsman

Namibian Constitution Standing to approach the Ombudsman

Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened ... may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

Namibian Constitution, Article 25(2)

The Constitution of Namibia establishes the Ombudsman as an independent office subject only to the Constitution and the law.¹⁹³ **Under the Constitution and the Ombudsman Act 7 of 1990, the Ombudsman has the duty to investigate a range of issues:** (a) allegations or “apparent instances” of violations of fundamental rights and freedoms and abuses of power by government officials; (b) complaints about administrative bodies, the Public Service Commission, the defence force, the police force, and the prison service regarding fair administration and equal access; (c) complaints regarding the overuse and misuse of environmental resources and the destruction of ecosystems; (d) complaints about private individuals’ and institutions’ violating others’ fundamental rights and freedoms; and (e) complaints of official corruption.¹⁹⁴ Article 91(e) also requires the Ombudsman “to take appropriate action to call for the remedying, correction and reversal of instances specified in the preceding Sub-Articles through such means as are fair, proper and effective.”¹⁹⁵

To facilitate the execution of these duties, the Ombudsman is also granted investigative powers, including the right to enter premises, a right of access to books and documents as he or she deems necessary, the right to question individuals and the right to seize evidence.¹⁹⁶ Under the Act, the Ombudsman’s investigative duties expressly include any case in which there is reason to suspect that an act or decision of a government body violates a fundamental right or

¹⁹¹ Ibid.

¹⁹² At paras 23-29. As examples of other cases where the Supreme Court has refused to exercise its powers of review in terms of section 16 of the Supreme Court Act, see *S v Malumo and others* 2010 (2) NR 595 (SC) at paras 15-20 and *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and others* 2011 (2) NR 469 (SC) at paras 26-28.

¹⁹³ Namibian Constitution, Article 89.

¹⁹⁴ Namibian Constitution, Article 91(a)-(e); Ombudsman Act 7 of 1990, section 3(1)(a)-(e).

¹⁹⁵ Namibian Constitution, Article 91(e); see also Ombudsman Act 7 of 1990, section 5(1)(a)(ii).

¹⁹⁶ Ombudsman Act 7 of 1990, section 4(1)(b).

freedom; is in conflict with the common law; is “unreasonable, unjust, unfair, irregular, unlawful or discriminatory”; or is based on an incorrect interpretation of the law or the relevant facts.¹⁹⁷ The Ombudsman also has the broad authority to investigate when there is reason to suspect that the administration of any law by the state is being done in a manner that is “not in the public interest”.¹⁹⁸

The Ombudsman’s duties also include reporting to Parliament on matters investigated, including the underlying facts, the nature of the investigation, the nature of any deficiencies or violations of rights, actions taken to rectify such problems, and the outcome of such steps.¹⁹⁹

In terms of the Constitution, “[a]grieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened” have the right to approach the Ombudsman to seek legal assistance or advice, and the Ombudsman has the discretion to provide “such legal or other assistance as he or she may consider expedient.”²⁰⁰

After completing an investigation or inquiry under the Act, the Ombudsman may take appropriate action to remedy a violation of rights, including bringing proceedings seeking an interdict or “other suitable remedy” to terminate the illegal conduct or procedures, or an interdict against the enforcement of offensive legislation or regulation.²⁰¹ Yet, in practice, the Ombudsman works primarily by investigating claims of violations of rights and maladministration and intervening directly with public officials to redress complaints and establish mechanisms to prevent future abuses.²⁰² The Ombudsman’s Office has also identified and investigated particularly pressing human rights violations on its own initiative and followed up with reports and recommendations. For example, in 2006 the Ombudsman’s Office investigated conditions of police cells throughout Namibia, made findings, and submitted recommendations to the National Assembly in a Special Report.²⁰³ Alternatively, sometimes particular cases will lead to recommendations for broad-based remedies. For example, a particular case of racial discrimination caused the Ombudsman to provide detailed recommendations which would help to address and prevent such harms – including establishing an internal complaints mechanism, appointing individuals of both sexes and all races to all levels of institutional hierarchies, dealing with complaints in a timely manner, and training management, staff, and new hires on affirmative action, human rights and mutual respect.²⁰⁴

Despite these tools, the powers granted to the Ombudsman’s Office do not adequately ensure that human rights norms will be enforced. Firstly, a lack of resources prevents the Ombudsman’s office from fully investigating all the complaints it receives or resolving all of the cases brought to it; in each year between 2006 and 2010, over one-quarter of complaints brought to the Ombudsman’s office were left unresolved.²⁰⁵ The Office has specifically noted the challenges in dealing with complaints against the police and prison services,²⁰⁶ which account for a significant

¹⁹⁷ Id at section 3(2)(a).

¹⁹⁸ Id at section 3(2)(b).

¹⁹⁹ Id at section 6(1), (4).

²⁰⁰ Namibian Constitution, Article 25(2).

²⁰¹ Ombudsman Act 7 of 1990, section 5(1)(a)(ii)(dd)-(ee).

²⁰² See, for example, Office of the Ombudsman, *Annual Report* (2008) at 11-15.

²⁰³ John Walters, “The constitutional mandate of the Ombudsman,” in Nico Horn and Anton Boesl, eds., *Human Rights and the Rule of Law in Namibia* 121 (2d. ed. 2009) (hereinafter “Walters 2009”) at 126-27. The Ombudsman re-visited the police stations where the worst conditions had been found in 2008 and prepared a follow-up report.

²⁰⁴ Id at 123. This article does not specify the institution to which these recommendations applied.

²⁰⁵ Office of the Ombudsman, *Annual Report* (2010) at 31.

²⁰⁶ Walters 2009 at 125.

portion of all complaints.²⁰⁷ Upon receiving a case alleging assault against a prisoner by a guard or police officer, the Office refers the case to the Inspector-General, who in turn sends it to the Complaints and Discipline Unit of the Namibian Police for investigation. However, the Ombudsman's Office has stated that it "struggles to obtain any progress reports or information relating to the matter from that Unit".²⁰⁸ Moreover, the lack of an investigation independent of the police makes it difficult to assess the accuracy and efficacy of the results.

The Ombudsman is authorised to approach "a Court of competent jurisdiction" for "an interdict or some other suitable remedy" in respect of a complaint brought to it.²⁰⁹ The Ombudsman also has the power, in response to a specific complaint, to bring proceedings to challenge the validity of subordinate legislation or a regulation which is used to justify "the offending action or conduct" if that subordinate legislation or regulation appears to be "grossly unreasonable or otherwise *ultra vires*".²¹⁰ However, **the Ombudsman has no *locus standi* to approach the courts independent of acting to seek a remedy in respect of a specific complaint brought to the Office. This means that unless an aggrieved person approaches the Ombudsman for legal assistance, the perpetrator of an illegal or unconstitutional act may never be legally required to stop its violations.**

7. Mootness

Despite the rule that Namibian courts will not address issues that are "academic" or "hypothetical", Namibian case law contains little guidance regarding when a case will be rendered "moot" – ie when a court will decline to hear the merits of a case because the judicial resolution of a dispute that once existed between the parties will no longer have a practical effect or result due to changed circumstances. As the case law develops, however, Namibian courts should develop rules that ensure that its mootness doctrine does not exclude cases of broad public import where the rights of non-parties are threatened. Instead, the courts should either permit cases to continue when the issue remains live with respect to the public even if moot between the parties, or permit litigation when an issue is capable of repetition yet evading review.

The Namibian case most relevant to mootness issues suggests that Namibian courts will not dismiss cases where the particular relief sought in the case is no longer available, but deciding the legal issue would prove relevant in other cases. In *Namunjepo v Commanding Officer, Windhoek*,²¹¹ the applicants were prisoners who had been placed in restraints and who sought a declaratory order holding unconstitutional portions of the Prisons Act that authorised the use of restraints and directing the prison to remove their restraints. While the case awaited appeal to the Supreme Court, Parliament enacted new legislation that superseded the relevant sections of the Act and the prisoners' restraints were removed. Rather than deciding the issues had become abstract or academic, the Supreme Court allowed the litigation to proceed on the ground that determining the constitutionality of the use of restraints and the relevant sections of the Prisons Act would necessarily decide the question of liability in the pending civil case between the same parties.²¹² So here, the constitutional question remained a disputed issue, although in a different case.

²⁰⁷ Office of the Ombudsman, Annual Report (2010) at 35.

²⁰⁸ Walters 2009 at 125.

²⁰⁹ Ombudsman Act 7 of 1990, section 5(1)(a)(ii)(dd).

²¹⁰ Id at section 5(1)(a)(ii)(ee).

²¹¹ *Namunjepo v Commanding Officer, Windhoek Prison* 1999 NR 271 (SC).

²¹² At 275G-276B.

In contrast, in *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others*,²¹³ the Supreme Court declined to address an issue which had become moot even though it was likely to arise again in pending litigation between the same parties. In this case, the dispute concerned government permits issued to a mining company which authorised it to use existing boreholes and drill new boreholes on a specific farm, to obtain water for the construction of its mine. Three farms away, there was another farm used by Namib Plains for eco-tourism centred around wildlife dependent on naturally-occurring underground water. Namib Plains therefore objected to the issue of the permits. The High Court had dismissed the application by Namib Plains contesting the issue of the permits. During the hearing of the appeal, it emerged that the permits in question had been withdrawn, whilst new documents relating to water extraction had been issued leading to a new application in the High Court, citing the same respondents and challenging the new decision authorising the first respondent to extract water.

The Court asked counsel to make submissions on whether the Court should make a decision on the issues of urgency and *locus standi*, which were covered extensively in the parties' heads of argument, "seeing that these issues appear to have become academic" although the issue of *locus standi* in particular was likely to arise again in the new application.²¹⁴

Counsel for the appellant, Namib Plains, asserted that "the issue of *locus standi* particularly in environmental cases in this country, where environmental concerns and mining may clash, had not previously been addressed by our courts and that it would be in the public interests for those issues to be considered and decided in this Court even though the High Court did not deal with them".²¹⁵ They also argued that the resolution of this issue would have implications in respect of costs.

Counsel for respondents took the position that all of the issues relating to the disputed permits had become moot when the permits were withdrawn, arguing that "the Court should avoid expressing opinion on abstract positions of law".²¹⁶ Respondents asserted, with a different emphasis from the appellant, that "the *only* effect the determination of the issues of urgency and *locus standi* would have is on the issue of costs".²¹⁷

The Supreme Court declined to address the issue of standing, concluding that "counsel's constitutional arguments are thought-provoking but ... by insisting on the determination of the issue of standing that was evidently not decided by the court *a quo* and in the circumstances where there is no wrong precedent that stands to be corrected on that issue, what the appellant was seeking to achieve in this regard was to obtain an advisory opinion from this court".²¹⁸

It has not escaped us that the opinion will relate to an identical issue likely to arise between the same litigants in the application for review of the decision to issue fresh permits currently pending in the High Court. This court has over the years adopted the approach that a court should decide constitutional issues only when it is absolutely necessary. In this connection, we are inclined to reaffirm the approach of this court in *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) (1996 (4) SA 965; 1995 (11) BCLR 1540) at 184A-B that it should decide no more than what was absolutely necessary for the decision of a case. Constitutional issues in particular ought to be developed cautiously, judicially and pragmatically if they were to withstand the test of time. We were and remain of the firm view that, although the issue of

²¹³ *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and others* 2011 (2) NR 469 (SC).

²¹⁴ At para 13.

²¹⁵ At para 14.

²¹⁶ At para 15.

²¹⁷ *Ibid* (emphasis added).

²¹⁸ At para 16.

standing in environmental cases is undoubtedly an important matter about which not much has been said in our jurisprudence, it is not necessary in the circumstances where the substance of the original application for review has become moot to decide an issue on which the High Court has not made any ruling and with which it is likely to be seized in another pending matter.²¹⁹

The Court apparently declined to consider the issue of urgency for similar reasons.²²⁰

Due to the frequency with which Namibian courts cite to and are guided by South African cases, South African case law may provide guidance on how Namibian law will develop on this point. The term “mootness” “appears to have entered [South African] legal language after the introduction of the Constitution and the advent of constitutional democracy,”²²¹ although the connection between the Constitution and the concept of mootness is unclear.

In the South African Constitutional Court, a case is moot “if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law”.²²² Even if an issue is moot between the parties, however, “[i]t is by now axiomatic that mootness does not constitute an absolute bar to the justiciability of an issue”.²²³ **The Court has a discretion whether or not to hear a matter. The test is one of the interests of justice.**²²⁴ In particular, it may be in the interests of justice to hear a moot matter if the resulting order will have a “practical effect either on the parties or on others”.²²⁵ The Court has identified the following factors as “potentially relevant”: “the nature and extent of the practical effect that any possible order might have; the importance of the issue; the complexity of the issue; the fullness or otherwise of the argument advanced; and resolving disputes between different courts”.²²⁶

In *JT Publishing (Pty) Ltd & another v Minister of Safety and Security & others*,²²⁷ the Constitutional Court held that a challenge seeking to invalidate provisions of the Publications Act 42 of 1974 and the Indecent or Obscene Photographic Matter Act 37 of 1967 was moot because Parliament had already repealed the legislation, although the repeal had not yet been brought into effect. The Constitutional Court reasoned that:

there can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become. The repeal of the Publications Act has disposed altogether of the question pertaining to that. And any aspect of the one about the Indecent or Obscene Photographic Matter Act ... has been foreclosed by its repeal in turn. I therefore conclude that we should decline at this stage to grant a declaratory order on either topic.²²⁸

Notably, the issue in the case was moot not only between the particular parties, but with respect to society as a whole.

²¹⁹ Ibid. This case did not proceed in the High Court as expected.

²²⁰ At para 17.

²²¹ *Queens College Boys High School v MEC, Department of Education, Eastern Cape Government* [2008] ZAECHC 165 (21 October 2008) at para 13.

²²² *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 (2) SA 1 (CC) para 21, note 18.

²²³ *Van Wyk v Unitas Hospital and another* 2008 (2) SA 472 (CC), para 29.

²²⁴ Ibid, citing *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and another* 2005 (4) SA 319 (CC) at para 22.

²²⁵ *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 32.

²²⁶ Ibid (citations omitted). The Court cited *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 11 and *AAA Investments Pty (Ltd) v Micro Finance Regulatory Council and another* 2007 (1) SA 343 (CC) at para 27.

²²⁷ *JT Publishing (Pty) Ltd & another v Minister of Safety and Security & others* 1997 (3) SA 514 (CC).

²²⁸ At para 17.

In contrast, the Constitutional Court held that the dispute in *MEC for Education: Kwazulu-Natal and Others v Pillay*²²⁹ was not moot. In that case, a school had attempted to take disciplinary action against a student who refused to remove a nose stud that violated the school's Code of Conduct. The student's mother initially brought the matter to the Equality Court seeking an interdict against the school's disciplinary proceedings; she argued that the school's refusal to grant her daughter an exemption from the Code of Conduct was discriminatory because the student, who was Hindu and of Indian descent, wore the nose stud "as part of a long-standing family tradition and for cultural reasons".²³⁰ The Equality Court found no unfair discrimination against the student, but the High Court overturned this decision and found unfair discrimination by the school. By the time the Constitutional Court decided whether to grant the school and the other respondents leave to appeal against the High Court's decision in favour of the student, the National Department of Education had issued new guidelines on school uniforms, and the student was no longer enrolled at the school. The student's mother argued that the matter was therefore moot.

The Constitutional Court disagreed. First, it concluded that the new uniform guidelines did not alter the legal landscape because they were, after all, non-binding guidelines that left a school free to institute the same uniform rules that were at issue in the case.²³¹ Furthermore, even though the student was no longer enrolled at the school, the Court's decision would still have a practical effect:

As already noted, this matter raises vital questions about the extent of protection afforded to cultural and religious rights in the school setting and possibly beyond. The issues are both important and complex, as is evidenced by the varying approaches of the courts below as well as courts in foreign jurisdictions. Extensive argument has been presented, not only from the parties but from three *amici curiae*. There is accordingly no doubt that the order, if the matter is heard, will have a significant practical effect on the School and all other schools in the country, although it will have no direct impact on [the student]. It is therefore in the interests of justice to grant leave to appeal.²³²

Thus, although the case outcome could not grant the student any practical relief, the Court nonetheless decided the case because it was relevant to the rights of other South African students.

With respect to the South African Supreme Court of Appeal, the Supreme Court Act 59 of 1959 codifies the rule against adjudicating moot cases that will have no practical effect. Section 21A (1) of the Supreme Court Act provides:

When at the hearing of any civil appeal to the Appellate Division or any provincial or local division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.²³³

According to the South African Supreme Court of Appeal, this rule reformulates a long standing principle that courts should settle live controversies, rather than deciding "abstract, academic or hypothetical questions".²³⁴ It confers discretion on the Court to dismiss the case if the resulting

²²⁹ *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC).

²³⁰ At para 6.

²³¹ At paras 33-34.

²³² At 35.

²³³ The Constitutional Court lacks any comparable rule. *President, Ordinary Court Martial and Others v Freedom of Expression Institute and others* 1999 (4) SA 682 (CC) at para 13.

²³⁴ *Coin Security Group v SA National Union for Security Officers and others* 2001 (2) SA 872 (SCA) at para 7.

order or judgment will have no practical effect.²³⁵ However, a Court may exercise its discretion not to dismiss cases where questions of law which are likely to arise frequently are at issue.²³⁶

In the absence of such questions, the Supreme Court of Appeal has held that, when there is no longer any dispute or issue between the parties, “there is no ‘appeal’ that this Court has any discretion or power to deal with”.²³⁷ This situation arises when the dispute, by its very nature, is restricted to the particular facts or the particular parties; it would apply, for example, when parties have reached a settlement regarding the interpretation and application of a particular contract, the facts at issue in a case of delict, or a fact-based licensing determination. In *Radio Pretoria v Chairman, Independent Communications Authority of South Africa and another*,²³⁸ for instance, the Supreme Court of Appeal dismissed an appeal from a High Court order refusing to set aside a decision of the Independent Communications Authority of South Africa not to grant Radio Pretoria a temporary sound broadcasting license because the time period for which the appellant had applied for a temporary license had expired. The Supreme Court of Appeal concluded that the question of a temporary licence was “no longer a live issue” and that the question was “moot”.²³⁹ It stated further that “there is no clear indication that another case on identical facts will surface in the future”, and therefore any conclusion reached by the Court would have no practical effect.²⁴⁰

Namibian courts should consider developing doctrines that permit litigation to continue when the case addresses the legitimacy or constitutionality of laws or regulations that affect the rights of individuals beyond the particular parties to a dispute. They could continue to build on the result in the *Namunjepo* case and follow South Africa’s example by hearing matters that have become moot between the parties, but whose resolution would still have a practical effect for society as a whole.

Another approach would be to create an exception to mootness in cases in which “the alleged wrong has ceased but the wrong is capable of repetition, yet evading review”.²⁴¹ This exception has been developed in the United States in cases in which the very nature of the case makes it difficult for a court to review the legality of the challenged action – in other words, the wrong “evades review” – but the allegedly illegitimate action affects the rights of people beyond the plaintiff in the case and therefore may be repeated. For example, in *Dunn v Blumstein*,²⁴² a Tennessee statute required a one-year residence in the state and a three-month residence in the county in order to vote. A university student who primarily lived in a different state challenged the requirements as unconstitutional violations of the right to vote and the right to travel. By the time the case was decided, the student had met the residency requirements. The US Supreme Court, however, concluded that the appeal could go forward because the harm was capable of repetition yet evading review; the constitutionally infirm statute remained on the books and therefore infringed on the rights of other Tennessee students. Ultimately the Supreme Court held that this voting residency requirement violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution because it deprived some citizens of their right to vote and was not necessary to further a compelling state interest.

²³⁵ At para 8.

²³⁶ *Land and Landbontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) at para 7.

²³⁷ *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) at para 7; see *Radio Pretoria v Chairman, Independent Communications Authority of South Africa and another* 2005 (1) SA 47 (SCA).

²³⁸ *Radio Pretoria v Chairman, Independent Communications Authority of South Africa and another* 2005 (1) SA 47 (SCA).

²³⁹ At para 15.

²⁴⁰ *Ibid.*

²⁴¹ Richard H Fallon Jr, Daniel Meltzer & David L Shapiro, *Federal Courts and The Federal System* (2003) at 207.

²⁴² 405 US 330 (1972).

Using similar reasoning, in *Roe v Wade*²⁴³ the US Supreme Court held that a challenge to a statute criminalising abortion was not moot even though the plaintiff was no longer pregnant by the time the case was heard. The Court emphasised the time-sensitive nature of the challenge and the delays inherent in litigating the case:

The normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. *Our law should not be that rigid.*²⁴⁴

As Namibian standards on mootness develop, the courts should consider recognising such an exception to account for the time-sensitive nature of certain cases, particularly those involving voting rights, prisoners' rights, and pregnancy. If Namibia adopts this exception, it should only require recurrence between the defendant and any member of the public, rather than recurrence with respect to the particular plaintiff. For example, early US cases recognising the exception required only the likelihood that the harm would recur with respect to another member of the public.²⁴⁵ This requirement would reflect that, although the issue had become moot with respect to the relief requested by the plaintiff, it was neither academic nor hypothetical: it could easily recur with respect to another party. Moreover, such a requirement would serve the purpose of ensuring that unconstitutional or illegitimate legislation does not remain on the books.

8. Common law standing and access to justice

It is our contention that **common law standing fails to provide adequate access to justice as guaranteed by the Namibian Constitution and Namibia's international agreements.**

Common law standing rules fail to recognise and account for the practical barriers that prevent low-income, poorly-educated and otherwise marginalised groups from accessing the courts. They thus transform the judicial system from a neutral institution capable of vindicating everyone's rights into a source of remedy only for persons with wealth. Moreover, the requirement of a direct and substantial interest can effectively insulate illegal State action from challenge. If a State institutes a law or policy that is *ultra vires*, for example, there may be no individual with common law *locus standi* to challenge the illegal action. As States take on broader public law duties and responsibilities, *locus standi* should similarly evolve to ensure that those duties can be enforced.

Scholars discussing foreign legal systems have identified several factors that prevent marginalised populations from accessing the courts. First, many people do not know their rights, and therefore cannot recognise when their rights are violated.²⁴⁶ Traditional standing rules, however, assume that an individual will be able to recognise a violation of his or her rights and file a case to prevent the violation or seek redress. Such rules incorrectly presuppose "that people are conscious of their rights" and are able to file suits to combat violations.²⁴⁷ Second, many low-income or marginalised populations fear or do not know how to use the courts, particularly if they perceive the courts as bastions protecting the rights of the privileged and the

²⁴³ 410 US 113 (1973).

²⁴⁴ At 125 (emphasis added).

²⁴⁵ See, for example, *Rosario v Rockefeller* 410 US 752 (1973) at 756, note 5; *Dunn v Blumstein* 405 US 330 (1972) at 333, note 2; *Southern Pacific Terminal Co v ICC* 219 US 498 (1911) at 515.

²⁴⁶ Geoff Budlender, "The Accessibility of Administrative Justice," 1993 *Acta Juridica* 128 at 131.

²⁴⁷ SP Sathe, "Judicial Activism: The Indian Experience," 6 *Washington University Journal of Law & Policy* 29 (2001) at 79.

wealthy.²⁴⁸ Third, the sheer expense of litigation keeps many potential plaintiffs out of court; people struggling to survive cannot afford to spend the little money they have filing law suits.²⁴⁹ Fourth, physical distance to the courts may compound other barriers. A person in a rural area whose rights are being violated may not be able to afford the transport to the nearest court to file a lawsuit, or the cost of living there during litigation. In combination, these factors exclude poor and uneducated people from using the courts to vindicate their rights.

As Cheryl Loots, a South African legal scholar, has recognised, “people whose fundamental rights are infringed may not practically be in a position to approach the court for relief. The reasons for this may be that the people affected are unsophisticated and impecunious, so that they do not know how to go about enforcing their rights and are not in a financial position to do so.”²⁵⁰ By requiring an individual to go to court to vindicate his or her own rights, traditional standing rules often prevent rights from being enforced at all.

Thus, seemingly neutral standing rules effectively favour the interests of the wealthy. In an unequal society, purportedly neutral standing rules result in substantial differences in citizens’ abilities to protect their rights. Justice Bhatwati of the Supreme Court of India noted such favouritism in a 1986 speech to the Commonwealth Lawyers’ Association. He commented that, for the first twenty-five years of India’s independence, the Court effectively excluded all but the wealthy, becoming “a sentinel of the interests of the propertied class rather than a protector of the rights of the poor and underprivileged”.²⁵¹ Despite the Indian Constitution’s guarantees of a wide and progressive array of rights designed to address poverty and inequality, traditional standing requirements kept the majority of Indians from using the courts to enforce those rights.²⁵² “In the light of the vast differences in wealth, status and literacy in India, insisting on the usual formal petition would effectively deny legal protection to those sections of the community which lack education, money, access to legal advice, and familiarity with the system.”²⁵³ Thus the first Indian case to recognise the right of any member of the public to approach the courts to protect another’s rights expressly stated that he could do so on behalf of a person or a “determinate class of persons [who,] by reason of poverty, helplessness or disability or socially or economically disadvantaged position [are] unable to approach the Court for relief”.²⁵⁴

Moreover, rules of *locus standi* that favour the wealthy are likely to lead to substantive holdings that do the same, if only because the wealthy are able to access courts and obtain

²⁴⁸ Geoff Budlender, “The Accessibility of Administrative Justice,” 1993 *Acta Juridica* 128 at 131; Cheryl Loots, “Standing to Enforce Fundamental Rights,” 10 *SAJHR* 49 (1994) (hereinafter “**Loots 1994**”) at 49 (“Fear of the judicial process is another barrier. Litigation is so emotionally traumatic, time consuming and costly that most people are afraid to get involved in it.”).

²⁴⁹ Kenneth E Scott, “Standing in the Supreme Court: A Functional Analysis,” 86 *Harvard Law Review* 645 (1973) at 673.

²⁵⁰ Loots 1994 at 49.

²⁵¹ Published in 2 *The Commonwealth Lawyer* 61 (1986) at 65 (quoted in Loots 1994 at 50).

²⁵² Id at 69 (quoted in Loots 1994 at 50).

²⁵³ David Feldman, “Public Interest Litigation and Constitutional Theory in Comparative Perspective,” 55 *Modern Law Review* 44 (1992) at 53-54; see *Lahore High Court of Pakistan in State v M.D. WASA* 2000 CLC 22 (Lah.) 471, 475: “The rationale behind public interest litigation in developing countries like Pakistan and India is the social and educational backwardness of its people, the dwarfed development of [the] law of tort, lack of developed institutions to attend to the matters of public concern, the general inefficiency and corruption at various levels. In such a socio-economic and political milieu, the non-intervention by Courts in complaints of matters of public concern will amount to abdication of judicial authority.” See also Dr Parvez Hassan & Azim Azfar, “Securing Environmental Rights Through Public Interest Litigation in South Asia,” 22 *Virginia Environmental Law Journal* 215 (2004) at 224: “The interlinking of environmental concerns with the rights of the most deprived sections of society makes it less likely that these groups will use the traditional method of litigation, which is expensive and cumbersome.”

²⁵⁴ *SP Gupta v Union of India* 1982 SC 149 at para 17; see *State of Himachal Pradesh v Student’s Parent, Medical College, Simla* [1986] LRC (Const) 208, SC at 213: “[I]t is vital for the maintenance of the rule of law that the obligations which are laid upon the executive by the Constitution and the law should be carried out faithfully and no one should go away with the feeling that the Constitution and the law are meant only for the benefit of a fortunate few and have no meaning for the large numbers of half-clad, half-hungry people of this country.” See also *Mehta v Union of India* [1989] LRC (Const) 885.

holdings which serve their interests whilst low-income litigants cannot. As one American scholar has noted, widespread access to justice is more likely to result in equal justice.²⁵⁵

There are also instances where individuals fear standing alone to challenge a government law or action – or even a family issue with rights implications. The political and social environment may discourage willingness to be singled out as an individual for the purpose of a legal challenge. In contrast, being part of a group represented by an organisation, for example, would be for some a more comfortable and secure avenue for asserting their legal rights.

Examples from foreign jurisdictions demonstrate that litigation brought by an individual or organisation on behalf of third parties who are unable to access the courts has proven successful at protecting the rights of marginalised groups. In Canada, for example, courts recognised the rights of farmworkers to bargain collectively due to public interest litigation brought on their behalf.²⁵⁶ In India, public interest litigation has been used to protect the rights and interests of marginalised populations such as children,²⁵⁷ rape survivors,²⁵⁸ pavement dwellers,²⁵⁹ bonded labourers,²⁶⁰ and migrant labourers,²⁶¹ amongst others. Litigation brought on behalf of prisoners has been particularly useful for protecting the rights of prisoners, leading to free legal services for defendants,²⁶² providing protection against abuse by the police,²⁶³ and battling inhumane prison conditions.²⁶⁴ Substantively, the Indian Supreme Court has vindicated the right to free education up to the age of fourteen,²⁶⁵ and recognised the right to human dignity²⁶⁶ as a result of public interest litigation.

Furthermore, forms of standing that permit cases to be brought on behalf of large numbers of similarly situated individuals can lead to more effective protection of substantive rights by permitting the consolidation of resources and a continuity and centralisation of strategy. Relevant forms of standing would include **representative standing**, which permits an individual to bring an action on behalf of another individual or group; **organisational standing**, which permits an organisation to bring an action on behalf of its members; **class actions**, which permit large numbers of individuals with common issues to consolidate their claims or defences into a single action lead by a representative party; and **public interest standing**, where any member of the public can mount a legal challenge in respect of a general public harm without showing special injury. By combining multiple claims on behalf of a large, diffuse set of disempowered plaintiffs, a representative can consider long-term strategy and ensure continuity in a way not permitted by “random, ad hoc cases”.²⁶⁷ This centralisation enables lawyers “to acquire specialised expertise, coordinate efforts on several fronts, select targets, and manage the sequence and pace of

²⁵⁵ Laura Friedlander, “Costs and the Public Interest Litigant,” 40 *McGill Law Journal* 55 (1995) at 2.

²⁵⁶ *Fraser v Ontario (Attorney General)*, 2008 O.J. No. 1219 (C.A.).

²⁵⁷ See, for example, *Laxmi Kant Pandey v Union of India* 1984 SC 469; *Sheela Barse v Secretary, Children’s Aid Society* 1987 SC 659.

²⁵⁸ See, for example, *Vishaka v State of Rajasthan* 1997 SC 3011 (holding that the failure to protect women from rape and gender-based violence violates the right to life guaranteed by Article 21 of the Indian Constitution).

²⁵⁹ See, for example, *Olga Tellis v Bombay Municipal Corp.* 1986 SC 180; *Ahmedabad Municipal Corporation v Nawab Khan, Gulab Khan* 1997 SC 152.

²⁶⁰ See, for example, *Bandhua Mukti Morcha v Union of India* 1984 SC 802; *People’s Union for Democratic Rights v Union of India* 1983 SC 1473.

²⁶¹ See, for example, *People’s Union for Democratic Rights v Union of India* 1982 S.C. 1473.

²⁶² See *MH Hoskot v State of Maharashtra* 1978 SC 1548.

²⁶³ See *Raghubir Singh v State of Haryana* 1980 SC 1087.

²⁶⁴ See *Upendra Baxi v State of Uttar Pradesh* (1983) 2 SCC 308; *Sunil Batra v Delhi Administration* 1978 SC 1675.

²⁶⁵ See *Unni Krishnan v State of Andhra Pradesh*. 1993 SC 2178.

²⁶⁶ See *Upendra Baxi v State of Uttar Pradesh* (1986) 4 SCC 106; *Francis Coralie Mullin v Administrator, Union Territory of Delhi* 1981 SC 746.

²⁶⁷ Marc Galanter & Jayanth K Krishnan, “‘Bread for the Poor’: Access to Justice and the Rights of the Needy in India”, 55 *Hastings Law Journal* 789 (2004) 796.

litigation, monitor developments, and deploy resources to maximise the long-term advantage of a client group”.²⁶⁸ Further, by consolidating court cases, collective proceedings permit courts to achieve justice for large numbers of plaintiffs at a discount rate; as the Indian court has noted, plaintiffs “in large numbers seeking remedies in courts through collective proceedings” can achieve justice as a group “instead of being driven to an expensive plurality of litigations”.²⁶⁹

This type of litigation also advances the goals and values of a participatory democracy by permitting the participation and involvement of socially and economically disadvantaged individuals who may be unable to assert their rights through the political process. Litigation brought through representative standing, organisational standing, or class action mechanisms “may provide a platform for projecting social values for those who do not have a formal access or voice in the policy making processes”.²⁷⁰ Thus, as noted in respect of India, large numbers of litigants acting through coordinated proceedings can be “an affirmation of participative justice in our democracy”.²⁷¹

The traditional standing requirement of a “direct and substantial interest” also creates two interrelated rule-of-law problems. First, it immunises some unlawful or unconstitutional conduct from judicial scrutiny because no single person has a sufficient interest to challenge it. Consider the facts of a seminal Canadian case that will be discussed below. In *Thorson v Attorney General of Canada*, the plaintiff challenged the Official Languages Act, which made both English and French the official languages of Canada, as *ultra vires* the Parliament of Canada.²⁷² The Attorney General challenged the plaintiff’s standing on the ground that he had not suffered “any special damage or damage that would set him apart from other taxpayers of Canada as a result of the enactment of the Official Languages Act”.²⁷³ This characterisation was correct: every Canadian citizen was, from a legal perspective, equally affected by the legislation, and no one had a legal interest that had been injured by it. This meant that, under common law rules of standing, no one could challenge the legislation.

Thus, the result of traditional standing rules is “the creation of ‘dead areas’ in which a legal norm exists but the public body is free to violate it without the possibility of judicial review”.²⁷⁴ Such a situation undermines the rule of law, which requires “that an individual should be able to apprise the Court of ... wrongdoing”.²⁷⁵ But an individual who cannot use the courts to enforce the law must simply trust the very government the law purports to bind. As the Indian Supreme Court has noted, the Courts “cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened”; where the public has no meaningful ability to approach the courts to stop or prevent violations, the law remains “merely a paper parchment, a teasing illusion and a promise of unreality”.²⁷⁶

²⁶⁸ Ibid.

²⁶⁹ *Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v Union of India and Ors* (1981) 2 SCR 185, 224-25.

²⁷⁰ Mr Justice RK Abichandani, *Managing Public Interest Litigation*, § 2.1.

²⁷¹ *Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v Union of India and Ors* (1981) 2 SCR 185 at 224-25.

²⁷² *Thorson v Attorney General of Canada* [1975] 1 SCR 138 at 141 (Judson J, dissenting).

²⁷³ Ibid.

²⁷⁴ Aaron Barak [former President of the Supreme Court of Israel], “Forward: A Judge on Judging: The Role of a Supreme Court in a Democracy” 116 *Harvard Law Review* 106 (2002) (hereinafter “**Barak**”) at 109.

²⁷⁵ PP Craig and SL Deshpande, “Rights, Autonomy and Process: Public Interest Litigation in India,” 9 *Oxford Journal of Legal Studies* 356 (1989) at 361.

²⁷⁶ *SP Gupta v Union of India* 1982 SC 149 at para 18.

Furthermore, both the Indian Supreme Court²⁷⁷ and the South African Constitutional Court²⁷⁸ have recognised that **common law *locus standi* rules developed to protect a narrow set of private law rights and thus fail to function properly in a legal context that imposes broader duties on the State.**

In a concurring opinion in *Ferreira v Levin*,²⁷⁹ Justice O'Regan of the Constitutional Court of South Africa addressed the inadequacy of common law standing. The petitioners in *Ferreira* sought an interdict against the enforcement of a section of the Companies Act that permitted a court or Master in a winding up proceeding to summon an individual and require that individual to answer any question put to him or her, notwithstanding that the answer might be incriminating. The answers to such questions could be used in evidence against the individual in a later criminal prosecution. The respondents contended that the applicants could not rely on their right to a fair trial to gain *locus standi* to challenge the provisions because they had not yet been accused of any crime. In her concurring opinion, Justice O'Regan justified expanded standing in terms of the expanded role of public law and the inadequacies of the common law system:

Existing common-law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous ... [I]t is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation.²⁸⁰

Thus both the type of the harm suffered and the forward-looking, institutional nature of the relief being sought rendered the traditional standing rules inadequate.

As public law has developed to impose new duties on the state and guarantee diffuse rights such as equality or the right to a free and universal education, so too must the law of *locus standi* evolve to provide a means of ensuring that the State fulfils those duties. Under common law standing rules, it would be virtually impossible for anyone to approach the court to argue that the State has failed to fulfil its duties of enacting policies to promote substantive equality or public welfare. The State can therefore neglect these duties with impunity. The Indian Supreme Court has recognised that rules of standing must evolve to reflect and vindicate the new categories of rights and duties guaranteed by the Indian Constitution:

There is also another reason why the rule of *locus standi* needs to be liberalised. Today we find that law is being increasingly used as a device of organised social action for the purpose of bringing about socio-economic change. The task of national reconstruction upon which we are engaged has brought about enormous increase in developmental activities and law is being utilised for the purpose of development, social and economic. It is creating more and more a new category of rights in favour of large sections of people and imposing a new category of duties on the State and the public officials with a view to reaching social justice to the common man. Individual rights and duties are giving place to meta-individual, collective, social rights and duties of classes or groups of persons.²⁸¹

²⁷⁷ At para 14.

²⁷⁸ See the discussion in the following paragraphs.

²⁷⁹ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC).

²⁸⁰ At 229.

²⁸¹ *SP Gupta v Union of India* 1982 SC 149 at para 19.

These rights require a new kind of litigation, including new rules of standing:

[Litigation to vindicate public rights] is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversarial character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. Public interest litigation is brought before the Court not for the purpose of enforcing the rights of one individual against another as happens in the case of ordinary litigation, but is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed.²⁸²

The individual approaching the court to assert that the state has failed in its duties to provide free and universal education or promote equality is not imposing new duties on the State or inflicting a personal political agenda on a government that has to weight multiple competing interests. Rather, it is ensuring the State fulfils obligations that the state has already voluntarily undertaken. In a State where the substantive law has been restricted to private interactions among individuals, common law *locus standi* may be justified. But in a country with a robust public law, where the State has voluntarily undertaken broad and diffuse obligations, standing law must develop to ensure that the State does not neglect those duties with impunity.

Indian case law provides a useful example of how public interest standing permits litigation to enforce public duties. In *People's Union for Civil Liberties v Union of India and Ors*,²⁸³ a case brought by petitioners invoking public interest standing, the Supreme Court of India recognised the right to food as a legal entitlement under Article 21 of the Indian Constitution, which guarantees the right to life, and Article 45, an aspirational Directive Principle articulating the duty of the State to raise the level of nutrition and the standard of living and to improve public health. As a means of enforcing these provisions, the Court issued a series of orders in the case requiring the state to take specific, tangible steps to fulfil its constitutional duty. For example, the 28 November 2001 interim order required that state government and union territories “implement the Mid-Day Meal Scheme by providing every child in every Government and Government assisted Primary Schools with a prepared mid-day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days” and mandated that “those Governments providing dry rations instead of cooked meals must within three months start providing cooked meals in all Government and Government aided Primary Schools”. The interim order of 7 October 2004 forced the government to increase government funding to feed children aged six and under from one rupee per child to two. Commentators note that the case, originally brought on behalf of the poor in a single Indian state, “has been expanded to apply to all state governments and to address larger, more complex issues of hunger, unemployment, and food security. To date, the litigation remains open, standing as one of the longest running *mandamus* cases of its kind”, and it has been described as being “remarkable for the tangible and ever growing positive effects that it has had on the lives of the poor and the hungry”.²⁸⁴

Whereas common law *locus standi* can permit the government either to shirk its duties or exceed its authority, broader forms of standing can provide a means for citizens and courts to ensure that the government functions accountably.

²⁸² *PUDR v India* A.I.R. 1982 SC 1473, 1476.

²⁸³ *People's Union for Civil Liberties v Union of India and Ors* Petition (Civil) No 196/2001, (Supreme Court of India, 2 May 2003).

²⁸⁴ Lauren Birchfield & Jessica Corsi, “The Right to Life is the Right to Food: *People's Union for Civil Liberties v Union of India & Others*”, 17 *Human Rights Brief* 15 (2010) at 15-16, available at www.wcl.american.edu/hrbrief/17/3corsi.pdf (last accessed 12 July 2012).

9. Public interest standing before international tribunals

International tribunals have increasingly recognised the rights of individuals and organisations to approach them, even when their own rights have not been violated. Certain international courts permit individuals to challenge State action on the grounds of constitutionality or illegality without alleging that any particular person's rights have been violated, while other tribunals allow a public interest litigant to assert a violation of another person's rights. These variations all demonstrate the necessity of public interest standing to protect and vindicate the rights of marginalised populations.

African Court on Human and Peoples' Rights

The Protocol establishing the African Court on Human and Peoples' Rights guarantees standing only to the African Commission on Human and Peoples' Rights, States Parties (under certain circumstances) and African Intergovernmental Organisations.²⁸⁵ The Protocol also permits individuals and NGOs with observer status before the African Commission to bring cases if the defendant state has accepted the Court's competence to hear such cases.²⁸⁶ In practice, however, as of October 2012, only five states had accepted the Court's competence for this purpose: Burkino Faso, Ghana, Malawi, Mali and Tanzania.²⁸⁷ So, even though the Protocol permits representative standing, because it does not limit standing to individuals or groups whose own rights have been violated, the condition of country acceptance means that this form of standing can rarely be used.

Furthermore, the Court retains the discretion to accept or reject the case brought by the individual or NGO, "taking into account" Article 56 of the African Charter, which governs the consideration of submissions to the African Commission.²⁸⁸ The requirements of Article 56 are that submissions –

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organisation of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity,
4. Are not based exclusively on news discriminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.²⁸⁹

²⁸⁵ Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights, Article 5(1).

²⁸⁶ Id at Articles 5(3), 34(6).

²⁸⁷ www.african-court.org/en/index.php/about-the-court/brief-history.

²⁸⁸ Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights, Article 5(3).

²⁸⁹ African Charter on Human and Peoples' Rights, Article 56.

African Court of Justice and Human Rights

In 2008, the African Union adopted a protocol which would merge the African Court on Human and Peoples' Rights with the Court of Justice of the African Union.²⁹⁰ This Protocol will come into force thirty days after instruments of ratification are deposited with the Chairperson of the Commission of the African Union by fifteen Member States;²⁹¹ as of August 2010, it had been signed by 22 member states but ratified by only three (Burkina Faso, Libya and Mali).²⁹²

Article 29 of the Statute annexed to the Protocol recognises the standing of a relatively wide array of bodies, allowing cases to be submitted on any issue or dispute by States Parties, the Assembly, the Peace and Security Council, Parliament, other authorised organs of the African Union and (under limited conditions) African Union staff members.²⁹³ Article 30 of the Statute opens up the Court to an expanded array of entities in respect of cases alleging a violation of human rights guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or "any other legal instrument relevant to human rights ratified by the States Parties concerned".²⁹⁴ These entities include:

- a) State Parties to the present Protocol;
- b) the African Commission on Human and Peoples' Rights;
- c) the African Committee of Experts on the Rights and Welfare of the Child;
- d) African Intergovernmental Organisations accredited to the Union or its organs;²⁹⁵
- e) African National Human Rights Institutions;²⁹⁶
- f) Individuals or relevant Non-Governmental Organisations accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol [which conditions this standing on the condition of country acceptance].²⁹⁷

The Statute of the African Court of Justice and Human Rights annexed to the Protocol specifies that the complaint may allege "any violation of a right";²⁹⁸ the complainant is not required to allege a violation of its own rights, thus permitting a form of representative standing. However, the illegality of a law or action alone does not seem sufficient to support standing: under the language of the Protocol, someone's rights must be violated.

²⁹⁰ Protocol on the Statute of the African Court of Justice and Human Rights, Articles 1-3. The African Court of Justice was established by the 2002 Constitutive Act of the African Union and the 2003 Protocol of the Court of Justice of the African Union, which came into force in 2010. However, it never came into existence and will now be superseded by the African Court of Justice and Human Rights.

²⁹¹ Id at Articles 8(2), 9(2).

²⁹² African Union, *List of countries which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights*, 6 August 2010, www.africa-union.org/. The Protocol has not yet come into force, nor has it been signed, ratified or acceded to by Namibia.

²⁹³ Statute of the African Court of Justice and Human Rights annexed to the Protocol, Article 29(1).

²⁹⁴ Article 30.

²⁹⁵ An African Intergovernmental Organization is defined in Article 1 of the Statute as "an organisation that has been established with the aim of ensuring socio-economic integration, and to which some Member States have ceded certain competences to act on their behalf, as well as other sub-regional, regional or inter-African Organisations".

²⁹⁶ National Human Rights Institutions are defined in Article 1 of the Statute as "public institutions established by a state to promote and protect human rights".

²⁹⁷ Article 30. Article 8(3) of the Protocol reads as follows: "Any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Article 30(f) involving a State which has not made such a declaration." African Non-Governmental Organizations are defined in Article 1 of the Statute as "Non-Governmental Organizations at the sub-regional, regional or inter-African levels as well as those in the Diaspora as may be defined by the Executive Council".

²⁹⁸ Article 30.

In May 2012, African justice ministers and attorneys-general approved draft amendments to the 2008 Protocol and the Statute appended to it. The primary purpose of the amendments is to extend the jurisdiction of the African Court of Justice and Human Rights to include criminal prosecution for various international crimes including genocide, war crimes, corruption, piracy, trafficking in persons, crimes against humanity and illicit exploitation of natural resources. These proposed amendments would alter the wording of section 30 on standing, but apparently without making any major substantive changes; their standing to bring actions would still be subject to Member State declarations authorising the Court's competency to hear such cases.²⁹⁹

African Commission on Human and Peoples' Rights

Under Article 55 of the African Charter on Human and Peoples' Rights, entities who are not States Parties may submit communications to the African Commission.³⁰⁰ The Commission decides by a simple majority whether to consider the communication.³⁰¹

In practice, the Commission has effectively developed a doctrine of public interest standing.³⁰² It has accepted communications from non-state third-parties such as national,³⁰³ international,³⁰⁴ and regional NGOs, as well as non-African nationals,³⁰⁵ brought on behalf of individuals whose rights have been violated by States Parties.

The party filing the communication does not need to have a personal right or interest that has been violated,³⁰⁶ nor does a victim of the violation need to be identified or to authorise the communication.³⁰⁷ In a 1994 decision, for example, the Commission stated that the "African Charter is distinctive in that, while it requires that communications indicate their authors, these authors need not be the victims or their families. This is a clear response to practical difficulties faced by individuals in Africa and the often serious or massive violations in Africa that may

²⁹⁹ The amended Article 30(f) would read as follows: "African individuals or African Non-Governmental Organizations with Observer Status with the African Union or its organs or institutions, but only with regard to a State that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly. The Court shall not receive any case or application involving a State Party which has not made a Declaration in accordance with Article 9(3) of this Protocol."

³⁰⁰ African Charter on Human and Peoples' Rights, art 55.

³⁰¹ Ibid. In order to be considered, communications relating to Human and Peoples' rights must (1) "[i]ndicate their authors even if the latter requests anonymity", (2) be "compatible with the Charter of the Organisation of African Unity or with the present Charter", (3) be written in a manner that does not use "disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity", (4) not be "based exclusively on news disseminated through the mass media", (5) be "sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged", (6) be "submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter", and (7) "not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter". Id at art 56.

³⁰² See Mariam Hamidu, *The open-door approach to locus standi by the African Commission on Human and Peoples' Rights in respect of its non-state complaints procedure: In need of reform?*, LLM dissertation, Faculty of Law, Universidade Eduardo Mondlane, Maputo, Mozambique, 2006, available at http://repository.up.ac.za/bitstream/handle/2263/1213/hamidu_m_1.pdf?sequence=1.

³⁰³ See, for example, *Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme v Islamic Republic of Mauritania*, Comm. No. 373/2009; *Civil Liberties Organisation v Nigeria*, Comm. No. 151/96; *Constitutional Rights Project v Nigeria*, Comm. No. 148/96.

³⁰⁴ See, for example, *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v Cameroon*, Comm. No. 290/2004; *Amnesty International v Zambia*, Comm. No. 212/98; *World Organisation Against Torture, Lawyers' Committee for Human Rights, Jehovah Witnesses, Inter-African Union for Human Rights v Zaire*, Comm. No. 25/89, 47/90, 56/91, 100/93.

³⁰⁵ *Maria Baes v Zaire* (2000) AHRLR 72 (ACHPR 1995).

³⁰⁶ See F Viljoen, "Admissibility under the African Charter" in M Evans and R Murray (ed) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 75, cited in [African Court – 10 Years on and still no justice] at 9.

³⁰⁷ See, for example, *Spilg and Mack (on behalf of Lehlohonolo Bernard Kobedi) v Botswana*, Communication 277/2003; *Union Interafricaine des Droits de l'Homme and Others v Angola*, Communication 159/96 (1997), (2000) AHRLR 18 (ACHPR 1997).

preclude individual victims from pursuing national or international legal remedies on their own behalf.”³⁰⁸ It reiterated this point in a 1996 case, and elaborated on the need for this rule:

Where the author of the communication is a non-governmental organisation ... and the situation is one of a series of serious or massive violations, it may be simply impossible for the author to collect the name of each individual victim. Article 56.1 requires only that the communications indicate their authors, not the names of all the victims, and the more massive the violation, the greater the likelihood that the victims will be numerous. There is thus no bar to the Commission considering communications with numerous unnamed victims ...³⁰⁹

It reiterated this point again in 2001, noting that the African Charter’s distinctive approach to communications “permits communications to be brought by a few individuals on behalf of many” and is “a rational response to the great difficulties that victims themselves may have in bringing communications, in ... circumstances of economic hardship and political repression ...”.³¹⁰ The Commission has also noted that “[t]his characteristic of the African Charter reflects sensitivity to the practical difficulties that individuals can face in countries where human rights are violated. The national or international channels of remedy may not be accessible to the victims themselves or may be dangerous to pursue”.³¹¹

The Commission originally restricted communications filed on others’ behalf to cases of serious or massive violations,³¹² but later eliminated that requirement.³¹³ In 1993, the Constitutional Rights Project, an NGO, brought a communication on behalf of seven men who had been sentenced to death by special tribunals under a decree that did not permit any appeal or review.³¹⁴ The communication argued that the prohibition of judicial review and the creation of the special tribunals violated the right to be tried by an impartial jury under article 7 of the African Charter.³¹⁵ The African Commission admitted this communication on behalf of others even though it did not allege that the violations were widespread or massive.

Subsequently, the Commission has accepted communications that did not identify victims, or that identified victims only collectively and hypothetically. In *Civil Liberties Organisation v Nigeria*,³¹⁶ for instance, the communication argued that a decree by the government of Nigeria that dissolved political parties, ousted the jurisdiction of the courts, and nullified the domestic effects of the African Charter violated the independence of the judiciary as guaranteed by Article 26 of the Charter and the right of Nigerians to seek redress in the courts under Article 7(1)(a) of the Charter. The communication, however, did not allege that these provisions had violated the rights of specific individuals; rather, they challenged the decrees on their very terms. Yet the African Commission heard the communication. In a separate communication brought by the same

³⁰⁸ *Krishna Achuthan on behalf of Aleke Banda*, Communication 64/92 / *Amnesty International on behalf of Orton and Vera Chirwa*, Communication 68/92 / *Amnesty International on behalf of Orton and Vera Chirwa v Malawi*, Communication 78/92 (October/November 1994) at para 24.

³⁰⁹ *World Trade Organisation Against Torture, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Temoins de Jehovah (WTOAT) v Zaire*, Communications 25/89, 47/90, 56/91, 100/93 (1996) at paras 51-52.

³¹⁰ *Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*, Communication 155/96 (October 2001) at para 41.

³¹¹ *Malawi African Association and Others v Mauritania*, Communications 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000) at para 78.

³¹² *World Trade Organisation Against Torture, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Temoins de Jehovah (WTOAT) v Zaire*, Communications 25/89, 47/90, 56/91, 100/93 (1996).

³¹³ See *Jean Yaovi Degli (on behalf of Corporal N Bikagni) v Togo*, Communications 83/92, 88/92, 91/93 (1995); *Constitutional Rights Project (in respect of Lekwot and six others) v Nigeria*, Communication 87/93, (2000) AHRLR 183 (ACHPR 1995).

³¹⁴ *Ibid* at para 1.

³¹⁵ *Ibid* at paras 3, 5.

³¹⁶ *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995).

NGO, *Civil Liberties Organisation (in respect of Bar Association) v Nigeria*,³¹⁷ the NGO challenged the government's creation of a new governing body of the Nigerian Bar Association. The Civil Liberties Organisation contended that the creation of this body by government decree violated Nigerian lawyers' freedom of association. The communication only identified victims generally, contending that lawyers' rights were violated. It did not identify specific individuals who did not want to obey the dictates of the new governing body. Again, the Commission accepted the communication.

The Commission has noted that it would be particularly unreasonable to require a communication to identify all victims in cases involving serious or massive violations. In *Malawi African Association and Others v Mauritania*,³¹⁸ the communications alleged that between 1986 and 1992 the government of Mauritania committed extensive and widespread violations against black ethnic groups. These included arresting and detaining individuals unlawfully, detaining them indefinitely in unhygienic conditions, committing extra-judicial executions, imposing a curfew and shooting violators on sight, enslaving approximately 100 000 black Mauritians, and forbidding black Mauritians from speaking their ethnic languages.³¹⁹ Although the communications identified only a few of the individuals whose rights were allegedly violated, the Commission accepted the communication. In doing so, it repeated a principle cited in earlier cases that "in a situation of grave and massive violations, it may be impossible to give a complete list of names of all the victims. It will be noted that article 56.1 demands simply that communications should indicate the names of those submitting and not those of all the victims of the alleged violations."³²⁰

The Commission will also hear communications from a State party in respect of violations of the Charter by another State party.³²¹

Before addressing any matter submitted to it, the Commission must ensure that local remedies have been exhausted unless it is "obvious" that "the procedure of achieving these remedies would be unduly prolonged".³²²

South African Development Community Tribunal

A natural or legal person may bring a "dispute" with a State before the Southern African Development Community Tribunal.³²³ The disputes may be referred to the tribunal "either by the natural or legal person concerned or by the competent institution or organ of the Community".³²⁴

The language of the Protocol establishing the Tribunal does not expressly address whether a natural or legal person may challenge the legality of a law or policy that has not specifically

³¹⁷ *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995).

³¹⁸ *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

³¹⁹ Id at paras 1-21.

³²⁰ Id at para 78.

³²¹ African Charter on Human and Peoples' Rights, art 47. A State party who has "good reasons to believe that another State party to this Charter has violated the provisions of the Charter" may use a written communication to draw the other State's attention to the matter. It must also address the communication to the Chairman of the Commission and the Secretary General of the African Union. The second state must reply with a written statement explaining the issue within three months of receiving the communication. If the issue is not settled between the States within three months of receipt of the original communication, either State has the right to submit the matter to the Commission through the Chairman. However, "if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned. Art 47-49.

³²² Id at art 50.

³²³ Protocol on Tribunal and Rules of Procedure Thereof, art 15(1).

³²⁴ Id at art 18.

harmed the person, or bring a suit on another's behalf. Thus far, the SADC Tribunal has directly addressed standing in only one case, *Tanzania v Cimexpan and others*,³²⁵ which did not address whether standing required a personal interest in the outcome of the case.

Case law, however, suggests that a personal interest will be required. In *Mike Campbell (Pvt) Ltd & 77 Others v Republic of Zimbabwe (Merits)*, for example, the applicants sued the state of Zimbabwe alleging that its land reform programme, which permitted the seizure and expropriation of certain land for redistribution, was being implemented in a manner that discriminated on the basis of race or country of origin.³²⁶ After permitting the intervention of seventy-seven farmers, the Tribunal considered a second application for intervention in *Nixon Chirinda and others v Mike Campbell (Pvt) Ltd and others*.³²⁷ The Tribunal held that it lacked jurisdiction over a case between the interveners and the original applicant because it had jurisdiction only over cases between private parties and states, not over cases between multiple private parties.³²⁸ However, it noted in *dicta* that it also could not hear the prospective interveners' case because the would-be interveners lacked a direct interest in the case:

There is an additional reason for rejecting the application. The applicants have not shown an interest of a legal nature which may be affected by our decision on the issues raised in the *Campbell case*. The main issues in the *Campbell case* are the denial of access to justice, racial discrimination and compensation. We fail to see how the interests of the applicants would be affected by our decision on these issues since the applicants have not adduced any evidence before us to the effect that they have indeed been denied access to justice and have suffered racial discrimination or loss.³²⁹

Although the requirements for *locus standi* and intervention are not necessarily the same, in many jurisdictions, including Namibia, they are identical. Therefore a rejection of intervention founded in part on a lack of legal interest may indicate that a natural or legal person must demonstrate a personal legal interest in the case in order to establish *locus standi* before the Tribunal.

Economic Community of West African States Community Court of Justice

The Community Court of Justice ("CCJ") of the Economic Community of West African States ("ECOWAS") has recognised the *locus standi* of plaintiffs who have not suffered injury where a public right has been breached and the matter is justiciable. In *SERAP v Federal Republic of Nigeria and Universal Basic Education Commission*,³³⁰ the plaintiff alleged the defendants had violated the right to quality education, the right to dignity, the right of peoples to their wealth and natural resources, and the right of peoples to economic and social development guaranteed by various articles of the African Charter of Human and Peoples' Rights.³³¹ The defendants contended that the plaintiff, a non-governmental organisation, lacked standing because it "failed to show that [it had] suffered any damage, loss or personal injury in respect of the acts alleged in the suit".³³²

³²⁵ Case No. SADC(T) 01/2009.

³²⁶ Case No. SADC (T) 09/2008 (unreported).

³²⁷ Ibid.

³²⁸ Case No. SADC (T) 09/2008 (unreported) at 4-5.

³²⁹ At 6.

³³⁰ ECW/CCJ/APP/08/08.

³³¹ At para 2.

³³² At para 21.

The Court recognised the *locus standi* of the plaintiff organisation.³³³ It noted that “authorities from around the globe” have held that, in human rights cases, “every spirited individual is allowed to challenge a breach of public right,” and therefore a plaintiff “need not be personally affected or have any special interest worthy of protection” in order to have standing.³³⁴ It also noted that “public international law in general ... is by and large in favour of promoting human rights and limiting the impediments against such a promotion”.³³⁵ Rather than demonstrating it had suffered damage, a plaintiff in a human rights case need only “establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable”.³³⁶

Common Market for Eastern and Southern Africa Court of Justice

Under the Treaty establishing the Common Market for Eastern and Southern Africa (“COMESA”),³³⁷ a person resident in a Member State may refer any act, regulation, directive, or decision of the Council of Ministers of the Common Market or a Member State to the Court of Justice on the ground it is “unlawful or an infringement of the provisions of [the] Treaty”.³³⁸ The Treaty does not require the person referring the law or legal action to have a personal interest in the subject matter of the case or to have been victimised by the challenged law or act; for example, an individual could challenge a law passed by a Member State solely on the ground that it was *ultra vires* of the Constitution.³³⁹

In addition to *locus standi* for individuals, the COMESA Treaty grants *locus standi* to Member States to refer another Member State or the Council to the Court on the ground that it has “failed to fulfil an obligation under this Treaty or has infringed a provision of this Treaty”.³⁴⁰ A Member State may also refer a law or legal action of the Council to the Court on the ground that it is *ultra vires*, unlawful, an infringement of the Treaty or a rule of law related to its application, or a misuse or abuse of power.³⁴¹ Thus the *locus standi* of Member States differs from that of individuals: an individual can refer an action of a Member State for being unlawful, but not for failing to fulfil an obligation under the Treaty, whereas for a Member State the converse is true. Further, a Member State can complain that a Council action is *ultra vires*, but an individual cannot.

East African Court of Justice

The Treaty for the Establishment of the East African Community permits individuals to refer cases to the East African Court of Justice without establishing a violation of their own rights or a

³³³ At para 31.

³³⁴ At para 33.

³³⁵ At para 34.

³³⁶ Ibid. The CCJ has also held that a plaintiff need not exhaust local remedies. Neither the Protocol on the ECOWAS Community Court of Justice nor the Supplementary Protocol to the Protocol on the ECOWAS Community Court of Justice require exhaustion of local remedies. In *Hadijatou Mani Koraou v Republic of Niger*, Case No. ECW/CCJ/JUD/06/08 (2008) (unreported), the Court reasoned that it could not read a requirement of exhaustion of local remedies into the texts of the relevant treaties. At para 53. It therefore concluded that no such requirement applied. At para 49.

³³⁷ Treaty establishing the Common Market for Eastern and Southern Africa, 5 November 1993 (hereinafter “COMESA Treaty”).

³³⁸ COMESA Treaty, Article 26.

³³⁹ See Henry Onoria, “*Locus Standi* of Individuals and Non-state entities Before Regional Economic Integration Judicial Bodies in Africa,” 18 *African Journal of International & Comparative Law* 143 (2010) at 157. The person referring the matter does not have to be a citizen of a Member State, but this person must first exhaust local remedies in the national courts or tribunals of the Member State. The Court appears to apply this requirement stringently; in *Republic of Kenya & Another v Coastal Aquaculture*, the Court held that the applicant lacked *locus standi* even though it had litigated in domestic Kenyan courts for five years without resolving the case. COMESA Reference No. 3/2001 [2003] 1 EA 271.

³⁴⁰ Id at Article 24(1).

³⁴¹ Id at Article 24(2).

special interest in the proceedings. Under the Treaty, three groups may refer cases to the Court of Justice. First, a member of the community called a Partner State³⁴² may refer a case for adjudication if it “considers that another Partner State or an organ or institution of the Community has failed to fulfil an obligation under this Treaty or has infringed a provision of this Treaty”.³⁴³ A Partner State may also refer the legality of any law or legal action to the Court to determine if it is *ultra vires* or unlawful, an infringement of the Treaty or a rule related to its application, or a misuse or abuse of power.³⁴⁴

Second, if the Secretary General of the East African Community “considers that a Partner State has failed to fulfil an obligation under this Treaty or has infringed a provision of this Treaty, the Secretary General shall submit his or her findings to the Partner State concerned”.³⁴⁵ The Partner State may then submit its observations on the findings.³⁴⁶ If the Partner State fails to submit observations to the Secretary General within four months or if the observations are “unsatisfactory,” the Secretary General must refer the matter to the Council, which, in turn, will decide whether it should resolve the matter or whether the Secretary General should refer it to the Court.

Third, any person resident in a Partner State may refer the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community to the Court for adjudication.³⁴⁷ Yet an individual only has the right to challenge the law or legal action on the ground it is unlawful or an infringement of the Treaty;³⁴⁸ unlike a Partner State, a person may not refer a law or legal action on the ground it is *ultra vires*, an infringement of a rule related to the Treaty’s application, or a misuse or abuse of power.

The Treaty thus grants individuals a version of public interest standing, since a person has *locus standi* to challenge an action as illegal without showing a personal interest in the outcome of the litigation. In *East African Law Society & 4 Others v Attorney General of the Republic of Kenya & 3 Others*,³⁴⁹ the Court apparently granted such standing on behalf of the public interest. The plaintiffs in the case were four bar associations who sought declarations that amendments of the Treaty were made in violation of Articles 38 and 150 of the Treaty and therefore had no effect.³⁵⁰ The defendants argued that the plaintiffs lacked *locus standi* because they had not disclosed “the nature of the specific injury that was personal to them and which has been infringed under the Treaty”.³⁵¹

Although the Court noted that, under a traditional view of *locus standi*, “only ... one who has a more particular or peculiar interest of his own beyond that of the general public[] can access the Court to have his rights vindicated”.³⁵² However, it recognised that many courts have somewhat relaxed this rule. Citing cases from India, the United Kingdom, and Tanzania, the Court granted *locus standi* to the plaintiffs in terms that seem to recognise a form of public interest standing:

³⁴² Treaty for the Establishment of the East African Community, Article 3(1). Currently, the Partner States are Uganda, Kenya, and Tanzania. *Id.* at Article 3(1).

³⁴³ *Id.* at Article 28(1).

³⁴⁴ *Id.* at Article 28(2).

³⁴⁵ *Id.* at Article 29(1).

³⁴⁶ *Ibid.*

³⁴⁷ *Id.* at Article 30(1). This right is subject to the limitations on the Court’s jurisdiction under Article 27. As in the case of the COMESA treaty, the person need not be a citizen of a Partner State.

³⁴⁸ *Ibid.*

³⁴⁹ EACJ Reference No 3/2007 (unreported).

³⁵⁰ At 2.

³⁵¹ At 5-6.

³⁵² At 6.

The applicants ... are Bar Associations in their respective Partner States and have a duty to promote adherence to the rule of law. We are ... satisfied that the applicants are genuinely interested in the matter complained of, that is, the alleged non-observance of the Treaty by the Respondents. We therefore hold that the applicants have *locus standi* to make this application.³⁵³

Inter-American Commission on Human Rights

Article 23 of the Rules of Procedure of the Inter-American Commission on Human Rights permits representative standing. Article 23 provides that any person, group of persons or “nongovernmental entity legally recognized in one or more of the Member States of the Organization of American States” may submit petitions to the Commission. Yet, the petitions may not challenge action as merely illegal, but must involve alleged violations of a human right recognised in one of a range of inter-American human rights instruments. Thus, mere illegality is insufficient for a person, group, or NGO to establish standing; there must be a victim whose rights the applicant seeks to enforce. Nonetheless, the Rules of Procedure expressly allow that the person, group or NGO submitting the petition may submit “on their behalf or on behalf of third persons.” Notably, the Rules of Procedure do not require the plaintiff to have consulted the victim of the alleged violation before filing or obtained his or her permission to file.

Inter-American Court of Human Rights

Unlike the other international courts discussed above, the Inter-American Court of Human Rights does not entertain complaints by individuals or NGOs. Under Article 61(1) of the American Convention on Human Rights, only States Parties and the Inter-American Commission on Human Rights have the right to submit a case to the Court.³⁵⁴ In addition, the Court’s jurisdiction only extends to cases against States which have recognised the Court’s interpretation and application of the Convention as binding, either “unconditionally, on the condition of reciprocity, for a specified period, or for specific cases”.³⁵⁵

10. Standing in foreign jurisdictions

This section will give some examples of various forms of public interest standing from a selection of other jurisdictions, focusing in particular on South Africa, Canada, India and the UK – all of which have been cited as influential examples in Namibian jurisprudence. This section will focus first on general forms of public interest standing, and then on jurisdictions which provide instructive examples of class action legislation in particular.

³⁵³ At 7. Unlike the COMESA and Southern African Development Community treaties, the Treaty for the Establishment of the East African Community does not require that a person exhaust local remedies before bringing a case to the Court. In *Prof Peter Anyang’ Nyong’o & 10 Others v Attorney General of Kenya & 2 Others*, EACJ Reference No 1/2006 (unreported), the Court expressly held that Article 30 of the Treaty conferred on residents of Partner States a right of direct access to the Court to challenge illegal actions of Partner States or Community organs. At 19. In turn, this right of direct access forbade a requirement that plaintiffs exhaust local remedies before approaching the Court. At 21.

³⁵⁴ American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No 36, 1144 U.N.T.S. 123, *entered into force* Jul. 18, 1978, art 61(1).

³⁵⁵ American Convention on Human Rights, art 62.

10.1 South Africa

Provisions on standing in the Constitution of South Africa

Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Article 34

Enforcement of rights

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 –

- f. anyone acting in their own interest;
- g. anyone acting on behalf of another person who cannot act in their own name;
- h. anyone acting as a member of, or in the interest of, a group or class of persons;
- i. anyone acting in the public interest; and
- j. an association acting in the interest of its members.

Article 38

Article 38 of the Constitution of South Africa, quoted above, provides for standing for five groups “alleging that a right in the Bill of Rights has been infringed or threatened”: “anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members”. Case law illuminates what these standing provisions mean in practice.

Article 38(a) – “anyone acting in their own interest”

Article 38(a) guarantees that “anyone acting in their own interest” has standing to approach a court alleging a violation of the Bill of Rights. Although this language appears merely to reiterate standing under the common law, Judge Clive Plasket of the High Court has argued in an academic paper that Article 38(a) actually expands common law *locus standi*:

[F]irst, it concerns more than standing, acting as it ... does as an adjunct to s 34, the fundamental right of access to court; secondly, because s 38 displays a deliberate bias towards enhanced access to court and because it applies to anyone acting in their own interest, rather than anyone who has a direct and substantial interest in the subject matter of the litigation, individual standing in constitutional cases is broader than the common law equivalent.³⁵⁶

Elaborating, Judge Plasket discusses *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others*³⁵⁷ in support of his interpretation. In that case, applicants challenged a provision of section 417 of the Companies Act 61 of 1973, which stated that an examinee may be required to answer questions “notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him”. The

³⁵⁶ Judge Clive Plasket, “Representative Standing in South African Law” (report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007) at 12-13 (citation omitted) (hereinafter “**Plasket 2007**”).

³⁵⁷ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 (1) SA 984 (CC).

applicants argued that the provision violated the right against self-incrimination. The respondents contended that the applicants lacked standing under section 7(4)(b)(i) of the interim Constitution³⁵⁸ because they had not yet incriminated themselves and the evidence had not yet been tendered against them at trial.³⁵⁹ In his partially concurring opinion, Justice Chaskalson rejected this argument, noting that “[a] witness who genuinely fears prosecution if he or she is called upon to give incriminatory answers cannot be said to lack an interest in the decision on the constitutionality of this section”.³⁶⁰ He ultimately concluded that because “the impugned section of the Companies Act has a direct bearing on the applicants’ common law rights, and non-compliance with this section has possible criminal consequences, they had sufficient standing in my view to secure a declaration from this court as to the constitutionality of the section”.³⁶¹

Article 38(b) – “anyone acting on behalf of another person who cannot act in their own name”

Article 38(b) of the Constitution creates a form of representative standing, allowing “anyone acting on behalf of another person who cannot act in their own name” to approach the courts and seek relief. Determinations of whether to permit representative standing seem to have focused primarily on the ability of the represented class or group to approach the court to act in their own name.

Maluleke v MEC, Health and Welfare, Northern Province, one of the first cases addressing standing under this provision, illustrates the dangers of ignoring the effects of education and socio-economic status on standing issues. In that case, the government of the Northern Province suspended the benefits of 92 046 pension beneficiaries whose records did not comply with statutory requirements; the purpose of the suspension was to identify fraudulent or “ghost” pensioners.³⁶² The applicant filed suit, seeking to represent the interests of all pensioners whose benefits had been suspended.³⁶³ Judge Southwood denied representative standing, concluding that “[t]here is no evidence to identify any of the some 92 000 beneficiaries, let alone to show that they cannot act in their own name[s]”.³⁶⁴

In his paper, Judge Plasket identified the shortcomings of ignoring the well-known economic realities of a prospective class or group: “One hardly needs screeds of sociological evidence to know that most people affected by the decision were, from a practical point of view, unable to litigate on their own behalf. So notorious are the socio-economic conditions of the majority of South Africans that a court could take judicial notice of this fact.”³⁶⁵ Indeed, Judge Plasket pointed out, the Constitutional Court had done just that in *Mohlomi v Minister of Defence*³⁶⁶ (a case which raised no standing issues); there, the Constitutional Court considered the constitutionality of a six-month statute of limitations for suits against the state as opposed to the normal three-year statute of limitations. Justice Didcott expressly noted that the Court must consider the case –

against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the

³⁵⁸ Section 7(4)(b)(i) of the interim Constitution was the equivalent of the current Article 38(a).

³⁵⁹ At para 162.

³⁶⁰ At para 163 (Chaskalson J).

³⁶¹ At para 166 (Chaskalson J).

³⁶² *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T) at 371C, 371F-G.

³⁶³ At 369G-H.

³⁶⁴ At 374B-C.

³⁶⁵ Plasket 2007 at 17.

³⁶⁶ *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.³⁶⁷

Concerns about socio-economic disadvantage were cited by the High Court in *Ngxuza and others v Permanent-Secretary, Department of Welfare, Eastern Cape and another*,³⁶⁸ where the applicants sought to institute proceedings on the basis of representative, class action or public interest standing in terms of s 38(b), (c) and (d) of the Constitution. The applicants sought to represent the interests of some 100 000 people in the province whose disability grants had been cancelled without a hearing, which arguably infringed their constitutional right to just administrative action.³⁶⁹ As a starting point to a consideration of the question of standing, the Court (citing *Mohlomi*) considered the “social context” of the grantees:³⁷⁰

A large proportion of the people living in this province is poor. Many of them live in rural areas, far from the access to lawyers that well-off urban people take for granted. Roads are often in a poor condition (I take judicial notice of that) and public transport is not always easily available. If and when they do get to a lawyer they will be told that the legal aid system provided by the State is in dire straits and that they might not find the necessary financial assistance to enable them to take an unhelpful and unresponsive public administration to court.

It is against this background that the issues of standing, rights and remedies should be determined.³⁷¹

The Court distinguished the *Ngxuza* case from *Malueke* on the ground that there was evidence that many people in similar circumstances as the applicants were “unable to individually pursue their claims because they are poor, do not have access to lawyers and will have difficulty in obtaining legal aid”, rendering them effectively unable to act in their own names.³⁷² He also noted that the names of all the persons affected by the administrative decision in question were known to the respondents, meaning that there would be no problem in identifying the affected group.

The Court also noted at the outset that it is necessary to take a broad view of questions of standing in public law litigation, to ensure that public power is exercised accountably. He noted that public law litigation differs from litigation between individuals in several ways: “A wide range of persons may be affected by the case. The emphasis will often not only be backward-looking, in the sense of redressing past wrongs, but also forward-looking, to ensure that the future exercise of public power is in accordance with the principle of legality.”³⁷³

The Court addressed and dismissed several common concerns which apply to all forms of representative standing:

- (1) **“the ‘floodgates’ argument – that the courts will be engulfed by interfering busybodies rushing to court for spurious reasons”**:³⁷⁴ The Court noted that this is improbable, citing reasons eloquently set forth by Pickering J in a case on representative standing in an environmental case: “I am not persuaded by the argument that to afford *locus standi* to a

³⁶⁷ At para 14.

³⁶⁸ *Ngxuza and others v Permanent-Secretary, Department of Welfare, Eastern Cape and another* 2001 (2) SA 609 (E).

³⁶⁹ At 615D-E, 617H, 621I.

³⁷⁰ At 619F.

³⁷¹ At 621F-I.

³⁷² At 622J-623B.

³⁷³ At 619C-D.

³⁷⁴ At 623H.

body such as the first applicant in circumstances such as these would be to open the floodgates to a torrent of frivolous or vexatious litigation against the State by cranks or busybodies Should they be tempted to do so, I have no doubt that an appropriate order of costs would soon inhibit their litigious ardour.”³⁷⁵ Furthermore, this concern could be addressed by a procedural requirement that an applicant seek leave from the court before proceeding on a representative basis.³⁷⁶

- (2) **“the ‘classification’ difficulty” – “the determination of a common interest sufficient to justify class or group or representative representation”, as opposed to a common interest which is “broad and vague”:**³⁷⁷ This concern could be also addressed by a procedural requirement that an applicant seek the court’s leave to proceed on behalf of the group in question, based on an assessment of the facts of the specific case at hand.³⁷⁸ In the *Ngxuza* case, the requirement of common interest was clearly met; the applicants “and those they seek to represent have this in common: their social benefits were all allegedly discontinued in the same unlawful manner by the respondents”.³⁷⁹
- (3) **“the ‘different circumstances’ argument” – the objection that a respondent might defend against different members of the represented class differently:**³⁸⁰ The Court concluded that this issue “does not really impinge on standing but relates to the merits of the representative claim”; the grant of representative standing does not imply that the respondent must mount a uniform defence to the claims of every member of the represented group.³⁸¹
- (4) **“the ‘res judicata’ difficulty – that some members of the group may not wish to associate themselves with the representative litigation”:**³⁸² This concern can be addressed by requiring the representative party to give “sufficient notice to all affected” so that they may opt out of the action if they wish.³⁸³
- (5) **“the ‘practical impossibility’ argument – that it is impossible for the Court to deal with cases involving thousands of people and that it would adversely affect public administration if scarce resources have to be used to defend such cases in Court”:**³⁸⁴ This is not a question that a court should be asking in determining standing; if a group’s rights have been violated, it is inappropriate “for either the judicial or administrative arms of government to say that it will be difficult to give them redress” and therefore deny them access to the courts. Administrative bodies can avoid such litigation by respecting the principle of legality, and if courts must “act in new and innovative ways” to accommodate such groups of people, “then so be it”.³⁸⁵

Another set of general principles articulated by the Court in this case was: “(1) that only those who wish to be involved in the case are; (2) that those who wish to be involved are given the chance to make the representations they may wish to make; and (3) that the party

³⁷⁵ At 624B-D, citing *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South African and others* 1996 (3) SA 1095 (Tk) at 1106E-G.

³⁷⁶ At 624D.

³⁷⁷ At 623H, 624F.

³⁷⁸ At 623H.

³⁷⁹ At 624F-G.

³⁸⁰ At 623I, 624G-H.

³⁸¹ At 624G-H.

³⁸² At 623I.

³⁸³ At 624 I-J.

³⁸⁴ At 623J-624A.

³⁸⁵ At 625A-B

presenting the case adequately represents future interests”. However, the Court noted that these concerns do not “militate against a broad views of standing”, but at most “require safeguards to ensure the broadest and most effective representation in and presentation of public interest litigation”.³⁸⁶ After considering these factors, the Court concluded that the applicants had standing to act on behalf of others under section 38(b) (as well as standing to act as a class under section 38(c) and public interest standing under section 38 (d)).³⁸⁷

The High Court in *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and others*,³⁸⁸ like South African courts in previous cases, took a practical view of the ability of a group to represent itself. The Court granted the applicant standing to represent the interests of residents whose water supply had been cut off, reasoning that “the people affected by the alleged discontinuation of the water supply are mostly indigent and are unable to individually pursue their claims because of that fact. They are effectively unable to act in their own name.”³⁸⁹ Again, the Court focused on the social, economic, and educational circumstances and asked if the group was, in practice, able to access the courts and represent its own interests.

Article 38(c)-“anyone acting as a member of, or in the interest of, a group or class of persons”

The Constitution grants standing to “anyone acting as a member of, or in the interest of, a group or class of persons”. According to the Supreme Court of Appeal, the essence of a class action is that –

one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it.³⁹⁰

This feature distinguishes class actions from representative standing on behalf of a group.

Although the South African Law Reform Commission has proposed legislation to regulate class actions, the Parliament of South Africa has not yet enacted such legislation. Case law, however, has clarified the requirements and features of class actions in South Africa law.

The Supreme Court of Appeal has held that a court should recognise a class when:

- (1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants, through their legal representatives ... will fairly and adequately protect the interests of the class.**³⁹¹

Case law has also indicated that, in class actions, “access to court should not be restricted by the application of over-technical rules of procedure”.³⁹²

In *Beukes v Krugersdorp Transitional Local Council and another*,³⁹³ the applicant challenged local authorities’ levying “flat rate” charges in township areas, as opposed to “higher, user-based,

³⁸⁶ At 619D-F.

³⁸⁷ At 625D.

³⁸⁸ *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and others* 2002 (6) SA 66 (T).

³⁸⁹ At para 27.

³⁹⁰ *Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuzo and others* 2001 (4) SA 1184 (SCA) at para 4.

³⁹¹ Id at para 16.

³⁹² Plasket 2007 at 21.

charges ... in formerly white areas”.³⁹⁴ He included with his founding papers the names, addresses, and telephone numbers of 120 people on whose behalf he purported to act.³⁹⁵ The respondents contended that the class was not accurately defined because the listed class did not provide affidavits to support the application, they did not claim they were being treated unreasonably, and there was no claim that the applicant or listed people were white or that they paid the challenged charges.³⁹⁶ The Court dismissed these concerns, invoking the spirit of the new constitutional dispensation:

In the present case, the founding papers proceed explicitly from the averment that the Applicant as well as the listed persons live in “white areas”, and that they are for this reason affected unfairly by the [the local authority’s] discriminatory rates policy. From this it seems to be plain that the group or class of persons as a member of whom and in whose interests the applicant is acting are those ratepayers of Krugersdorp within the [the local authority’s] authority who do not enjoy the benefit of “flat rate” municipal charges. It would run counter to the spirit and purport of the interim Constitution to require that persons who identify themselves as members of a group or class as a member of whom and in whose interest a litigant acts, should reiterate with formalistic precision the complaint with which they associate themselves. Even more contrary to the spirit and purport would be to require that they attest to their status or that they put in affidavits joining in the litigation. [The respondent’s] contention that no unnecessary restrictions should be placed on the application of s 7(4)(b)(iv) [the provision of the interim Constitution analogous to the current section 38(c)], and that it should be read so as to avoid obstructions on its invocation, seems to me to be correct.³⁹⁷

The Court also interpreted the founding papers with a generous dose of common sense: if a group lives in the former “white areas” and agrees to be appended to the complaint, one could assume they complained about the difference in municipal charges that served as the basis of that complaint.

In *Ngxuza and others v Permanent-Secretary, Department of Welfare, Eastern Cape and another*³⁹⁸, discussed in the section above, the High Court found that applicants representing approximately 100 000 persons who had been denied disability pensions through administrative re-organising qualified for class action standing, amongst other forms of representative standing. The issue of class action standing went to the Supreme Court of Appeal, which issued a judgment that serves as the leading case on class actions in South Africa.³⁹⁹

The judgement, by Cameron J, set out the rationale for allowing class actions:

... The issue between the members of the class and the defendant is tried once. The judgment binds all, and the benefits of its ruling accrue to all. The procedure has particular utility where a large group of plaintiffs each has a small claim that may be difficult or impossible to pursue individually. The mechanism is employed not only in its country of origin, the United States of America, where detailed rules governing its use have developed, but in other countries as well. The reason the procedure is invoked so frequently lies in the complexity of modern social structures, and the attendant cost of legal proceedings:

³⁹³ *Beukes v Krugersdorp Transitional Local Council and another* 1996 (3) SA 467 (W).

³⁹⁴ At 471D-E. The applicant claimed standing to sue on the basis of section 7(4)(b)(iv) of the interim Constitution, which recognised class action standing in the same as section 38(c) of the current Constitution. At 472E.

³⁹⁵ At 472G-J.

³⁹⁶ At 473F-G, 474A.

³⁹⁷ At 474E-H.

³⁹⁸ *Ngxuza and others v Permanent-Secretary, Department of Welfare, Eastern Cape and another* 2001 (2) SA 609 (E).

³⁹⁹ *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA).

Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all.

It is precisely because so many in our country are in a “poor position to seek legal redress”, and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice, that both the interim Constitution and the Constitution created the express entitlement that “anyone” asserting a right in the Bill of Rights could litigate “as a member of, or in the interest of, a group or class of persons”.⁴⁰⁰

In the case before it, the Court found that the **four “quintessential requisites for a class action”** were present: **“(1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants through their legal representatives ... will fairly and adequately protect the interests of the class.”**⁴⁰¹

The Court also noted that some elements of hearsay evidence are necessary in respect of class actions, and found this acceptable: “Few class actions could be maintained without some element of hearsay. Indeed, if first-hand evidence could be obtained from all those sought to be included, they could as readily be joined, and the need for class proceedings would fall away.”⁴⁰²

***First Rand Bank Limited v Chaucer Publications (Pty) Limited*, Traverso DJP cited three procedural safeguards distilled from the *Ngxuza* case and suggested that these be followed as standard guidelines even though not yet institutionalised:**

- (a) That **leave must be sought from the High Court** to embark on a representative basis prior to actually embarking on that road.
- (b) The **determination of a common interest sufficient to justify a class action takes place prior to the institution of the proceedings.**
- (c) That it be a **requirement that the representing party give sufficient notice to all the affected parties** so that they may associate or disassociate themselves from the proposed litigation.⁴⁰³

More recently, in *Trustees, Children’s Resource Centre Trust and others v Pioneer Foods (Pty) Ltd and others; Mukaddam and others v Pioneer Foods (Pty) Ltd and others*,⁴⁰⁴ four South African public interest organisations⁴⁰⁵ attempted to launch a class action against bread makers claiming damages on behalf of all consumers in the Western Cape, South Africa who had been injured by the bread makers’ illegal price-fixing; a related case was brought on behalf of bread distributors who had been affected. The consumer class action was presented as an “opt out” class, meaning that all consumers will be bound by any judgment unless they elect not to be part of the class action. The bread distributors’ class action was presented on an “opt in” basis, meaning that only bread distributors that elect to join the class action will be bound by any

⁴⁰⁰ At paras 5-6 (footnotes omitted), quoting H Kalven, Jr and M Rosenfield “The Contemporary Function of Class Suit”, 1941 *University of Chicago Law Review* 684 at 686.

⁴⁰¹ At para 16.

⁴⁰² At para 17.

⁴⁰³ *First Rand Bank Limited v Chaucer Publications (Pty) Limited* 2008 (2) SA 592 (C) at para 26 (emphasis added).

⁴⁰⁴ *Trustees, Children’s Resource Centre Trust and others v Pioneer Foods (Pty) Ltd and others; Mukaddam and others v Pioneer Foods (Pty) Ltd and others* 25302/10, 25353/10 [2011] ZAWCHC 102 (7 April 2011).

⁴⁰⁵ The organisations were the Black Sash, the Congress of South African Trade Unions, the Children’s Resource Centre and the National Consumer Forum.

judgment. Those that elect not to be part of the class actions, by opting out or in as the case may be, would be free to pursue their own damages claims against the bread producers.⁴⁰⁶

Recognition of this class of injured consumers – which amounted to virtually the entire public – was motivated as follows:

Bread is part of the staple diet of very many South Africans. A very large number of South Africans – some say of the order of 50% – live in poverty. For such people, a small increase in the bread price, which they pay on a daily basis, can have a very material impact on their ability to obtain sufficient food for themselves and their families. It is not for nothing, I submit, that one of the colloquial ways of referring to a state of poverty and hunger is “*living below the breadline*”.

... [S]ection 27(1)(b) of the Constitution provides that everyone has the right to have access to sufficient food, and section 28(1)(c) provides that every child has the right to basic nutrition [T]his at the very least places a negative obligation on persons such as the respondents to desist from preventing or impairing the right of access to sufficient food, and children’s rights to basic nutrition. The unlawful conduct which resulted in an unlawful increase in the bread price had that result.⁴⁰⁷

The Western Cape High Court dismissed the application to certify the consumer class, citing several problems: (1) The description of the class as bread consumers “who were prejudicially affected by bread prices” in consequence of the respondents’ alleged unlawful actions, is insufficient for members of the public to decide whether they are members of the class or not, for purposes of deciding whether or not to opt out of the action – and this problem would persist even if the class were limited to persons whose constitutional rights have been affected by the price-fixing.⁴⁰⁸ (2) Section 38 applies to constitutional standing, and not all bread consumers in the country who were allegedly prejudicially affected by bread prices in consequence of the respondents’ alleged unlawful acts can claim a threat or infringement to of their constitutional rights to access to sufficient food and (in respect of children) basic nutrition – including “corporate entities such as companies operating hotels, restaurants and the like” as well as “millions” of others.⁴⁰⁹ (3) It is not clear during what periods and in which parts of the country the allegedly unlawful acts of the respondents may have affected the price of bread, which complicates the “parameters of the intended damages action”.⁴¹⁰ The High Court concluded that the applicants had not made out a case for an identifiable class of persons in respect of section 38 of the Constitution.⁴¹¹ However, the Court also considered whether “a class action should be made available in South African law in non-Bill of Rights matters and in particular for damages claims, by developing the common law” – accepting, without deciding that this is possible, since the issue was not argued in the papers before the Court.⁴¹² However, the Court again found that the applicants had not sufficiently identified a class of persons who would be bound by the result for this approach to the case.⁴¹³

⁴⁰⁶ Adv Chris Shone, “The Bread Case”, Institute for Accountability in Southern Africa, available at www.ifaisa.org/The_Bread_Case.html.

⁴⁰⁷ At para 68, quoting founding affidavit.

⁴⁰⁸ At paras 73-77.

⁴⁰⁹ At paras 73, 76.

⁴¹⁰ At paras 78-79.

⁴¹¹ At para 80.

⁴¹² At paras 81-82.

⁴¹³ At paras 83-84. The applicants also attempted to certify a class of all affected bread distributors, many of which were small businesses. The Court found that no case had been made out for a violation of the Constitutional right to choose a trade, occupation or profession, and that, assuming that there was a right to bring a class action for damages at common law, it was not satisfied that common questions of law or fact applied in respect of all the members of the intended class. At 110-122.

The Court also refused to certify the class of bread distributors as it was “not satisfied that this is a case where common questions of law or fact arise in respect of all the members of the intended class”.⁴¹⁴

Both classes of applicants appealed this decision. In November 2012, the Supreme Court of Appeal refused certification of the class of bread distributors on the ground that the case could proceed by means of joinder since the pool of potential plaintiffs was probably no larger than 100; although a joint action might involve administrative inconvenience, this could be overcome if all the claims were ceded to a single plaintiff:

The only advantage that was advanced on the appellants’ behalf for proceeding by way of a class action in such cases, instead of a joint action or one that is brought in reliance upon a cession of claims, was that an action brought through representation would immunise them against personal liability for costs. That does not seem to me to be a good reason for allowing a class action. On the contrary, the potential for personal liability for costs will often serve as a salutary restraint upon frivolous actions that are brought oppressively for the purpose of inducing defendants into financial settlements, which is one of the dangers to be avoided in certifying class actions ... Although I do not close the door to an ‘opt in’ class action in my view the circumstances would need to be exceptional before one would be allowed, and nothing exceptional has been shown in this case.⁴¹⁵

In a separate judgement dealing with the appeal regarding the consumer class, the Supreme Court of Appeal set forth clear guidelines for class actions in South Africa, ruling that the issue of class certification of the bread consumers should return to the High Court for re-consideration after additional information had been provided.⁴¹⁶ The Court held a class action should require certification by the court at the outset, before the issue of summons.⁴¹⁷ Certification requires an objectively identifiable class; a cause of action raising a triable issue; common issues that can appropriately be dealt with in the interests of all members of the class; and representatives which are suitable to conduct the litigation on behalf of the class.⁴¹⁸ If these guidelines are met, then class actions will be allowed in non-constitutional rights matters as well as constitutional ones.⁴¹⁹

The Court also discussed at length the difficult question of how to approach the question of remedy in such a case. The applicants had made the novel proposal that any damage awards would be kept in a trust and distributed to feeding schemes, since it would be impractical to distribute damages awards to individual members of the class action group given the small amounts of money involved and the large number of claims.⁴²⁰ However, the Court found that, although such remedies have been authorised by statute in other jurisdictions, it would be step too far for a court to introduce such a mechanism by way of development of the common law. Furthermore, a remedy that does not aim to compensate the members of the proposed class in any way would be purely punitive. Therefore, the Court ruled that the applicants would, at the outset, have to identify appropriate procedures for distributing damages to the members of the

⁴¹⁴ At para 118.

⁴¹⁵ *Mukaddam v Pioneer Food* (49/12) [2012] ZASCA 183 (29 November 2012) at paras 13-14 (footnotes omitted).

⁴¹⁶ *Children’s Resource Centre Trust v Pioneer Food* (50/12) [2012] ZASCA 182 (29 November 2012).

⁴¹⁷ At para 23-ff.

⁴¹⁸ At paras 23-48. See also Fatima Schroeder, “Bread finding opens door for class action, *Business Report*, 1 December 2012. The Court’s judgement elaborates on each of these criteria.

⁴¹⁹ At para 18: “[I]t would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate circumstances, merely because of the claimants’ inability to point to the infringement of a right protected under the Bill of Rights. The procedural requirements that will be determined in relation to the one type of case can equally easily be applied in the other. Class actions are a particularly appropriate way in which to vindicate some types of constitutional rights, but they are equally useful in the context of mass personal injury cases or consumer litigation.”

⁴²⁰ Amanda Visser, “Bread class action hits new snag”, *Business Day*, 8 November 2012; “Bread appeal looking positive”, *The Voice of the Cape*, 9 November 2012.

class – which could be accomplished by way of a targeted price reduction for a period, or through some other method of distribution that will be likely to benefit, directly or indirectly, the members of the class.”⁴²¹

The consumer applicants were given two months to supplement their court papers, after which the bread producers will have a month to respond.⁴²²

A number of other class actions are pending in South Africa – including a case concerning occupational diseases of mineworkers, a case involving inflated fertiliser prices resulting from anti-competitive conduct by producers and a case by the New Economic Rights alliance against four major banks alleging that South Africa’s lending system is fraudulent. It has been reported that some of these class action suits are awaiting the outcome of the class certification in the “bread case” before proceeding.⁴²³

The following are some other class actions which have been allowed in South Africa, illustrating the range of important issues which have been adjudicated through this mechanism:

- **Constitutional right to dignity:** In three consolidated cases dealing with the residency rights to alien spouses of South African citizens and permanent residents, one applicant was found to have standing to act on behalf of “all persons permanently and lawfully resident in South Africa who are married to alien spouses”.⁴²⁴ These cases challenged provisions of the Aliens Control Act 96 of 1991 which affected the rights of the alien spouses to remain in South Africa. The Constitutional Court confirmed the High Court’s holding that that these provisions infringed the applicants’ right to dignity, in particular because the law provided that an immigration permit could be granted to the spouse of a South African citizen who was in South Africa at the time only if that spouse was in possession of a valid temporary residence permit. Accordingly, if the alien spouse did not have such a permit, the couple would either have to separate until the application for the permit was processed or the South African spouse would have to leave the country with the alien spouse. The order granted by the Constitutional Court provided relief to all members of the class of similarly-situated persons.⁴²⁵
- **Constitutional right to dignity, freedom of movement and to choose a profession or occupation freely:** In a case challenging rule and regulations of the National Soccer League requiring professional footballers to register with this body and to comply with certain rules regarding transfer between clubs or ceasing to play professionally, the individual applicants was found to have standing to bring the case on behalf of “professional footballers and potential professional footballers”. The Court found that the rules and regulations in question essentially treated players as goods and chattels, violating the most basic values underlying the Constitution, and therefore invalid.⁴²⁶
- **Constitutionality of primogeniture under customary law:** Three separate cases challenging the constitutionality of section 23 of the Black Administration Act 38 of 1927 (which mandates

⁴²¹ At paras 80-87.

⁴²² At para 92. An appeal against the lower court’s refusal to certify a second class of bread consumers in four other provinces was dismissed on the basis that there was a lack of sufficient commonality given the higher degree of variation of the price-fixing activities in those areas. At paras 50-61.

⁴²³ See, for example, “Bread battle not over”, VOC Webmaster, 1 November 2012; “Discussion with Charles Abrahams: Class action suit on 100 years of mineworker neglect”, *Amandla!*, 11 November 2012; “Hausfeld LLP Announces the Filing of Three Major Class Actions on Behalf of South African Miners”, press release, 21 August 2012, available at www.hausfeldllp.com/; “Farmers take on Sasol in class action with help of agricultural union”, International Law Office, 18 February 2010; “Class action lawsuit against four major South African banks and Reserve Bank”, *Class Action News Today*, 23 July 2012; “Lawsuit against the Banks”, New Economic Rights Alliance, 21 July 2012, available at www.newera.org.za/class-action-lawsuit-against-the-banks/.

⁴²⁴ *Dawood and Another v Minister of Home Affairs and others; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others* 2000 (1) SA 997 (C) at 1067H-1030F.

⁴²⁵ *Id* on appeal, 2000 (3) SA 936 (CC).

⁴²⁶ *Coetzee v Comitis and others* 2001 (1) SA 1254 (C); class standing discussed at para 17.

inheritance in terms of customary law in certain circumstances) and the customary law principle of primogeniture were consolidated in the Constitutional Court. In one of them, the South African Human Rights Commission and the Women's Legal Centre Trust sought to challenge these laws in their own interest as well as that of the public, requesting wider relief than that sought in the other two similar cases. The Women's Legal Centre Trust was also acting in the interests of a group or class of people. This standing was not disputed.⁴²⁷

- **Constitutional right to water:** In a case concerning the parameters of a municipality's duty to provide water, the applicants were found to have standing to act on behalf of members of their household, as well as other similarly affected residents of the affected community. The argument that all water services authorities and all residents of the community should be joined as parties was rejected as being cumbersome, impractical, and unnecessary.⁴²⁸
- **Victims' right to give input on the granting of pardons:** In a case concerning applications for pardon brought under a special dispensation for political crimes, the question was whether the victims of the crimes that fell within this category were entitled to a hearing on the pardon issue. The Court held that the NGOs representing the litigants had standing on at least two grounds – litigating in the public interest under section 38(d) of the Constitution and in the interests of a group of victims under section 38(c) of the Constitution. The Court found that the victims whose interests the NGOs represented were unable to seek relief themselves because they were unaware that applications for pardons affecting them were being considered. The process followed by the President made no provision for the victims to be made aware of the applications for pardons, nor to be given the opportunity to make representations. The Court found in favor of the NGOs, concluding that that “the decision to exclude victims of [political] crimes in respect of which pardons were sought under the special dispensation process was irrational. The victims of these crimes are entitled to be given the opportunity to be heard before the President makes a decision to grant pardon under the special dispensation.”⁴²⁹

The case of *Vumazonke v MEC for Social Development, Eastern Cape and Three Similar Cases*,⁴³⁰ although not tried as a class action, included an important observation on the utility of class actions:

The problem may be summarised in this way: notwithstanding that literally thousands of orders have been made against the respondent's department over the past number of years, it appears to be willing to pay the costs of those applications rather than remedy the problem of maladministration and inefficiency that has been identified as the root cause of the problem. **In the absence of a class action or similar representative litigation (which may have its own difficulties – and limitations – when it comes to forging appropriate remedies to compel administrative reform), the courts are left with a problem that they cannot resolve while they grant relief to the individuals who approach them for relief, they are forced to watch impotently while a dysfunctional and apparently unrepentant administration continues to abuse its power at the expense of large numbers of poor people, the very people ‘who are most lacking in protective and assertive armour’ and**

⁴²⁷ The three cases were heard together, by direction of the Chief Justice, since they are all concerned with intestate succession in the context of customary law. See *Bhe and others v Magistrate, Khayelitsha, And Others (Commission For Gender Equality As Amicus Curiae)*; *Shibi v Sithole and others*; *South African Human Rights Commission and another v President of the Republic of South Africa and another* 2005 (1) SA 580 (CC); standing is noted at para 30.

⁴²⁸ *Mazibuko and others v City of Johannesburg and others (Centre on Housing Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 (W); *City of Johannesburg and Others v Mazibuko and others* 2009 (3) SA 592 (SCA), 2010 (4) SA 1 (CC); *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC).

⁴²⁹ *Albutt v Centre for the Study of Violence and Reconciliation and others* 2010 (3) SA 293 (CC) at paras 32-35, 74.

⁴³⁰ *Vumazonke v MEC for Social Development, Eastern Cape and Three Similar Cases* 2005 (6) SA 229 (SE) at para 10 (emphasis added and citations omitted). In this case, the applicants had applied for social assistance and had either received no response to the applications or received responses only shortly before the cases were to be heard in Court. The administrative failings of the department infringed the human rights of large numbers of people to have access to social assistance, to just administrative action and to human dignity. The Constitution placed a duty on the judiciary to remedy such infractions, but the Court was mindful of the limits on the institutional competence of the courts to enforce administrative efficiency.

whose needs ‘must animate our understanding of the Constitution’s provisions’. What escalates what I have termed a problem into a crisis is that the cases that are brought to court represent only the tip of the iceberg.

Despite the lack of legislation governing class actions in South Africa, the draft legislation proposed by the South African Law Reform Commission (SALRC) may provide useful guidance. The SALRC defined a class action 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”.⁴³¹ It is used in cases where joinder “is not possible or appropriate”.⁴³²

A class action requires a court to certify the class according to a predetermined set of criteria.⁴³³ The certification of the class need not identify each class member individually, but may identify them by description, such as “all the purchasers of a particular model of car during a certain period of time”.⁴³⁴ The purpose of the class action is to foster “both judicial economy and social utility – the courts will no longer be inundated with numerous claims relating to a common subject matter, and individual plaintiffs with claims too small for individual pursuit are provided access to the courts”.⁴³⁵

The SALRC offered recommendations regarding the regulation of virtually every aspect of the class action. First, it recommended that class action legislation should require the class to be certified or approved by a competent judge before the litigation may proceed. Certification screens out individuals attempting to abuse the process; “shields the defendant from an unreasonable burden of complex and costly litigation”; functions as “a counter-balance to other reforms that might be seen as favourable to class members” and protects absent class members.⁴³⁶ However, it also noted arguments that certification is unnecessary, particularly if plaintiffs are required to opt in to the class individually.⁴³⁷ Ultimately, it recommended the following criteria for certification:

- (a) evidence of the existence of an identifiable class of two or more persons;
- (b) the existence of a prima facie cause of action;
- (c) issues of fact or law which are common to the claims or defences of individual members of the class;
- (d) the availability of a suitable representative or representatives to represent the interests of the class; and
- (e) whether, having regard to all relevant circumstances, a class action would be the appropriate method of proceeding with the action.⁴³⁸

It further recommended that a court be permitted to decertify the class – and thus end the litigation as a class action – if the criteria for certification are no longer met at any time during the litigation.⁴³⁹

With respect to the identity of the class representative, the SALRC recommended that the governing legislation should permit a person who is not a member of the class to serve as a

⁴³¹ South African Law Commission (as the South African Law Reform Commission was then known), *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law, Report* (1998) at para 8.

⁴³² Id at para 5.3.1.

⁴³³ Id at paras 2.4.3; 5.3.1.

⁴³⁴ Id at para 5.2.4.

⁴³⁵ Id at para 2.3.1.

⁴³⁶ Id at para 5.5.5.

⁴³⁷ Id at para 5.5.6.

⁴³⁸ Id at para 5.6.2.

⁴³⁹ Id at para 5.7.3.

representative “ideological plaintiff”.⁴⁴⁰ It noted concerns that permitting an ideological plaintiff might negate the difference between a class action and a representative action in the public interest, that it might impair individual freedom of choice and that it might lead to attorneys making false promises to class members in order to rack up legal fees.⁴⁴¹ In the SALRC’s opinion, however, the high rates of poverty and low levels of education in South Africa tended to counsel towards permitting the use of an ideological plaintiff; poor, uneducated people are often unable to enforce their own rights, and the ideological plaintiff would function as a means of allowing them to do so.⁴⁴² Ultimately, the SALRC proposed three criteria for determining whether to permit someone to serve as a class representative: “the suitability of the nominee to adequately represent the best interests of the members of the class; any conflict of interest between the representative and the members of the class; and the ability of the representative to make satisfactory arrangements with regard to the funding of the class action and the satisfaction of any order as to costs or for security for costs”.⁴⁴³

Yet the SALRC proposed no procedures for certification, recommending that courts be given wide discretion to determine their own procedures.⁴⁴⁴ Similarly, it recommended that courts “be given broad general management powers exercisable either on the application of a party or class member or on the court’s own motion”.⁴⁴⁵ Considering regulations in use in other jurisdictions, the SALRC reasoned that courts must “take a much more active role in managing the conduct of class actions than they would do in ordinary actions”, due to the “complexity of most class actions and the fact that the rights and obligations of those not before the court are being determined”.⁴⁴⁶

Although the SALRC recommended that class members and prospective class members should generally be provided with notice, it proposed the court should have “the discretion to make opt-in, opt-out or no notice orders”.⁴⁴⁷ The SALRC noted that class members must be notified of the existence of the proceedings in order to determine whether to join the class and to avoid disputes over whether a particular prospective class member would be bound by the judgment of the case under the principle of *res judicata*.⁴⁴⁸ A “strict interpretation of the notion of the fair trial” requires that all class members be notified, because it is unfair to bind class members without giving them the opportunity to opt out of the class or litigate their own claims.⁴⁴⁹ On the other hand, one scholar has argued that individualistic notions of right to a fair trial should “be reconsidered as an individualistic notion of a procedurally fair trial should give way to, or be integrated with, a social or collective concept of due process, since this is the only possible way to assure judicial vindication of the new rights”.⁴⁵⁰ In particular, representation through the class action is likely the only way the class member will be able to have a hearing at all because most people will not be able to access the courts individually.⁴⁵¹ Moreover, the SALRC considered that although notice must be effective, its cost “should not be disproportionate either to the other costs of the litigation or to the benefits of a successful result”.⁴⁵²

⁴⁴⁰ Id at para 5.4.15.

⁴⁴¹ Id at paras 5.4.2, 5.4.6.

⁴⁴² Id at para 5.4.3.

⁴⁴³ Id at para 5.4.7 (citations omitted).

⁴⁴⁴ Id at para 5.8.5.

⁴⁴⁵ Id at 5.9.4.

⁴⁴⁶ Id at 5.9.2.

⁴⁴⁷ Id at 5.10.24.

⁴⁴⁸ Id at 5.10.3.

⁴⁴⁹ Id at 5.10.5.

⁴⁵⁰ Id at 5.10.5, citing Wouter De Vos, “Reflections on the Introduction of a Class Action in South Africa,” 1996 *Journal of South African Law* 639 at 654.

⁴⁵¹ Id at 5.10.5.

⁴⁵² Id at 5.10.3.

The SALRC recommended that courts be given discretion to determine when the outcome of a proceeding would bind class members.⁴⁵³ One method of addressing the issue of who is bound by a class judgment is an opt-in procedure. Under an opt-in rule, litigants must decide whether to join the class; litigants who do not opt in to the class will not be bound by the judgment. The major justification for this rule is that it is unfair to bind people by the outcome of a lawsuit they did not know about and did not affirmatively decide to join.⁴⁵⁴ Advocates of an opt-in approach argue that an opt-out procedure, where the potential litigant is bound unless he or she chooses *not* to participate, “presupposes a significant level of sophistication by class members to know that their rights are being determined and to assess whether their interests are being adequately addressed in the proceedings”.⁴⁵⁵ Although an opt-in procedure may require the same level of sophistication regarding whether to join the litigation, it avoids the unfair result of binding litigants by the outcome of litigation they did not knowingly join and better protects individual liberty to choose whether or not to litigate.⁴⁵⁶

Advocates of an opt-out procedure contend that an opt-in procedure assumes that the decision not to join a proceeding “reflects a deliberate, informed decision by an individual class member not to participate in the litigation” – an assumption that may be unfounded “because many of the psychological and social barriers to bringing individual actions could underlie a failure to opt in”, meaning that such a requirement could stymie access to justice goals.⁴⁵⁷

Ultimately, the SALRC concluded that courts should generally order that their judgments bind all members of a class.⁴⁵⁸ Nonetheless, its proposed rule grants courts the discretion to adopt no-notice or opt-in procedures in appropriate cases.⁴⁵⁹

Similarly, the SALRC recommended giving discretion to the court to determine whether to award damages individually or in the aggregate. Aggregate awards may be justified if the court can determine the total amount of damage caused by a defendant without knowing the exact amount to pay to individual plaintiffs. The SALRC offered the example of a “consumer claim where a public utility has overcharged its customers for services over a specified period”. It recommended that the proposed act address the disposal of any undistributed residue of the aggregate award, giving courts the option of using the assistance of a commissioner for this purpose, as well as discretion to determine how an award should be distributed.⁴⁶⁰

Under the SALRC recommendations, class members would be neither entitled to nor liable for the expenses of the action.⁴⁶¹ If class plaintiffs won, the defendants would be liable for the class representative’s costs on party and party scale; the representative would be liable for his or her own attorney and client costs, and the class would be entitled to no costs. If the class plaintiffs lost, the class members would not be liable for any costs. The losing representative would be liable for his own costs on an attorney and client basis, and for the defendant’s costs on a party and party basis.⁴⁶² The SALRC also recommended permitting contingency fee arrangements in class actions.⁴⁶³

⁴⁵³ Id at 5.11.8.

⁴⁵⁴ Id at 5.11.2.

⁴⁵⁵ Id at 5.11.2.

⁴⁵⁶ Id at 5.11.3, note 188.

⁴⁵⁷ Id at 5.11.3.

⁴⁵⁸ Id at 5.11.4.

⁴⁵⁹ Id at 5.11.8.

⁴⁶⁰ Id at 5.13.5.

⁴⁶¹ Id at 5.17.1.

⁴⁶² Id at 5.17.1.

⁴⁶³ Id at 5.18.6.

The SALRC proposed that a representative's decision to settle, discontinue, or abandon a class action should require the approval of the court. Although it was argued that a plaintiff acting in the public interest would be unlikely to abandon a class action which could be of use to the public, it was nonetheless conceded that a representative might overlook arguments or avenues for success.⁴⁶⁴

The SALRC also proposed that the certification of a class action "should suspend limitation periods for all class members until the member opts out, the member is excluded from the class, or the action is decertified, dismissed, abandoned, discontinued or settled".⁴⁶⁵

Article 38(d) – "anyone acting in the public interest"

"Anyone acting in the public interest" has standing to redress a violation of the Bill of Rights under Section 38(d) of the Constitution. The Constitutional Court first granted public interest standing in *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO and others*, discussed above.⁴⁶⁶ In a concurring judgement, Justice O'Regan listed a non-exclusive set of factors relevant "to determining whether a person is genuinely acting in the public interest", and thus whether public interest standing should be granted – including:

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.⁴⁶⁷

The judgement noted, however, that the factors "will need to be considered in the light of the facts and circumstances of each case".⁴⁶⁸

*Lawyers for Human Rights and others v Minister of Home Affairs and another*⁴⁶⁹ affirmed this dictum, and emphasised the importance of ensuring that a litigant is genuinely acting in the public interest and that the case is objectively in the public's interest.⁴⁷⁰

A public interest litigant need not allege that any person's rights have been threatened or infringed; this litigant need only allege that the challenged rule or conduct is objectively in breach of a right enshrined in the Bill of Rights.⁴⁷¹ Thus, standing to act on behalf of the public interest would provide standing in cases where no one would have common law standing.

The lack of a requirement that anyone have common law standing provides the key difference between this type of standing and representative standing. Representative standing is used to assert that another person's rights have been violated, where that individual cannot approach the court. For example, in a case claiming that pension benefits have been illegally terminated, the representative would act on behalf of the injured pensioners. In contrast, standing in the public

⁴⁶⁴ Id at 5.20.3.

⁴⁶⁵ Id at 5.22.6.

⁴⁶⁶ In section 9.1.1.

⁴⁶⁷ *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO and others* 1996 (1) SA 984 (CC) at para 234 (O'Regan J); see also *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and another* 2006 (6) SA 103 (CC) at para 20.

⁴⁶⁸ At para 234.

⁴⁶⁹ *Lawyers for Human Rights and others v Minister of Home Affairs and another* 2004 (4) SA 125 (CC) at para 17.

⁴⁷⁰ At para 18.

⁴⁷¹ *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO and others* 1996 (1) SA 984 (CC) (O'Regan J) at 235.

interest would be appropriate when the applicant alleged that government action was *ultra vires*, but not that it violated anyone's individual rights. An applicant who wished to challenge a government decree establishing an official language, for example, might seek to challenge this rule in the public interest.

An applicant should be granted public interest standing "as long as the issue is a real, and not merely an academic, one".⁴⁷² In *Port Elizabeth Municipality v Prut NO and Another*, a municipality wanted to write off service charges owed from what were formerly "so-called coloured, Indian and black areas", while collecting rates from former white areas. It sought a declaration of rights regarding the constitutionality of this policy in general, not merely as against a particular group.⁴⁷³ Writing for the High Court, Judge Melunsky read the relevant case law to indicate that "a Court should be slow to refuse to exercise its jurisdiction in terms of the said section where a decision will be in the public interest and where it may put an end to similar disputes".⁴⁷⁴ It granted standing in the case, reasoning "that it is clearly in the public interest to have clarity on whether the municipality's decision to write off more than R26m discriminates unfairly against other service-charge debtors or ratepayers. Furthermore a decision once given in this application will not be academic: it will have an effect on all persons in the position of the two respondents".⁴⁷⁵

In *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another*, Judge Froneman reiterated that "whether litigants will be accorded public interest standing, regardless of their own interest in the matter, depends on whether the matter is of purely academic interest or not".⁴⁷⁶

Yet in *Lawyers for Human Rights and others v Minister of Home Affairs and another*, the Court considered that the key question is whether the action will be objectively beneficial to the public, stating that although it is generally not in the public interest to bring a matter of purely academic interest, this is not an "invariable principle".⁴⁷⁷

In *Albutt v Centre for the Study of Violence and Reconciliation and others*⁴⁷⁸ the Court held that the NGO which brought the case had public interest standing in respect of the rights of certain crime victims; "as civic organisations concerned with victims of political violence, they have an interest in ensuring compliance with the Constitution and the rule of law". The Court also noted that public interest standing "is much broader than the other grounds of standing contained in s 38 [of the Constitution]".⁴⁷⁹

Article 38(e) – "an association acting in the interests of its members"

Section 38(e) of the South African Constitution grants standing to "an association acting in the interest of its members" when its members rights have been violated. Judge Plasket's article states that, "[i]n line with the generous approach to the interpretation of the Constitution's standing

⁴⁷² Plasket 2007 at 27.

⁴⁷³ *Port Elizabeth Municipality v Prut NO and Another* 1996 (4) SA 318 (E) at 320H-321H.

⁴⁷⁴ At 325E.

⁴⁷⁵ At 325J-326B.

⁴⁷⁶ *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another* 2001 (2) SA 609 (E) at 625F-G.

⁴⁷⁷ *Lawyers for Human Rights and others v Minister of Home Affairs and another* 2004 (4) SA 125 (CC) at para 18.

⁴⁷⁸ *Albutt v Centre for the Study of Violence and Reconciliation and others* 2010 (3) SA 293 at para 34; this case concerned the right of victims to be heard on the issue of the President's potential pardon of persons who claimed that they were convicted of offences committed with a political motive.

⁴⁷⁹ At para 34.

provisions generally, the term ‘association’ should not be narrowly construed”.⁴⁸⁰ He cites an argument that “association” should be read to include “unincorporated associations, associations incorporated at common law, statutory associations and partnerships” and “associations created specifically ‘to serve as vehicles for the institution of particular legal proceedings in the interest of their founding members’”.⁴⁸¹

According to Judge Plasket, section 38(e) has “been the subject of little controversy”. He cites as examples *Transvaal Agricultural Union v Minister of Land Affairs and another*⁴⁸² and *Premier, Mpumalanga and another v Executive Committee, Association of State-Aided Schools: Eastern Transvaal*.⁴⁸³ In *Transvaal Agricultural Union*, the Constitutional Court accepted without apparent controversy that the applicant, “a body established to represent the interests of its members who are farmers,” had *locus standi* to challenge provisions of the Restitution of Lands Act 22 of 1994 that had allegedly violated its members’ rights.⁴⁸⁴ In *Premier, Mpumalanga and another*, the respondent, the Executive Committee, Association of State-Aided Schools: Eastern Transvaal, had brought the original application “acting in the interest of its members, about one hundred governing bodies of State-aided schools”. The respondent had “challenged the second applicant’s decision to terminate bursaries paid to certain pupils on the grounds that it was procedurally unfair and unjustifiable” and therefore in breach of the Constitution.⁴⁸⁵ In both cases, the Courts permitted standing.

In *Justice Alliance of South Africa v President of Republic of South Africa and others, Freedom Under Law v President of Republic of South Africa and others, Centre for Applied Legal Studies and another v President of Republic of South Africa and others*⁴⁸⁶ the Court heard three separate applications by four interest groups challenging the constitutionality of the law that authorised the process by which the President of the Republic of South Africa extended the term of office of the Chief Justice for five years. If the law was found to be valid, then the litigants contested the constitutionality of the conduct of the President in the process of extending that term of office. The four groups were: Justice Alliance of South Africa, a voluntary association with legal capacity, Freedom Under Law, a non-profit company, the Centre for Applied Legal Studies, which was institutionally part of the University of the Witwatersrand and the Council for the Advancement of the South African Constitution, an association with legal capacity. All the applicants claimed standing in the public interest, in the interest of their members or in their own interest as associations acting in the interests of their members under Article 38(e). They relied on various constitutional and democratic concepts, including “the protection of the Constitution; the protection and advancement of the understanding of and respect for the rule of law and the principle of legality; the protection of the administration of justice and the independence of the judiciary; the promotion, protection and advancement of human rights; the strengthening of constitutional democracy; the promotion of social justice and equality; public accountability and open governance” – and their standing was accepted without debate.⁴⁸⁷

⁴⁸⁰ Plasket 2007 at 32.

⁴⁸¹ Ibid, quoting Trengove, ‘Procedure’, Juta’s Seminar on Constitutional Litigation, Procedure and Practice, March 1995, at 8.

⁴⁸² *Transvaal Agricultural Union v Minister of Land Affairs and another* 1997 (2) SA 621 (CC).

⁴⁸³ *Premier, Mpumalanga and another v Executive Committee, Association of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC).

⁴⁸⁴ 1997 (2) SA 621 (CC) at paras 1, 13.

⁴⁸⁵ 1999 (2) SA 91 (CC) at para 3.

⁴⁸⁶ *Justice Alliance of South Africa v President of Republic of South Africa and others, Freedom Under Law v President of Republic of South Africa and others, Centre for Applied Legal Studies and another v President of Republic of South Africa and others* (2011) (5) SA 388 (CC).

⁴⁸⁷ At para 17

In *Centre for Child Law v Minister for Justice and Constitutional Development and Others*,⁴⁸⁸ Constitutional standing was asserted by the Centre for Child Law, an organisation whose main objective was to establish and promote child law and to uphold the rights of children in South Africa. The Centre brought the application in its own interest, on behalf of all 16- and 17-year-old children at risk of being sentenced under the new Criminal Law Amendment Act, and in the public interest. The amendment in question made minimum sentences applicable to offenders who were aged 16 and 17 at the time they committed the offence. The Centre's standing to challenge the provisions in question was disputed in the High Court, with the government raising the related objection that the application was "purely academic and without any factual basis".⁴⁸⁹ The High Court found that "while the Centre did not allege that the rights of any specific child were threatened, the rights of all 16 and 17 year old children are threatened".⁴⁹⁰ Since the new law subjected them to the minimum sentencing regime, the High Court found that the Centre "does not require a set of facts; the facts speak for themselves" since courts would be compelled to apply the law to any child in the relevant age group convicted of certain serious offences.⁴⁹¹ The High Court concluded that the Centre therefore did not have a merely academic or hypothetical interest, and was acting in the public interest and on behalf of all 16 and 17 year olds and therefore had legal standing. The High Court went on to hold that applying minimum sentences to 16 and 17-year-olds negates the Constitution's principles that children should be imprisoned only as a last resort and for the shortest appropriate period of time. The decision of the High Court regarding the Centre's standing was not challenged in the Constitutional Court, and Cameron J writing for the majority accepted the decision of the High Court on this point as well as endorsing its substantive finding.

It should be noted that in many of the recent South African cases, multiple forms of standing under Article 38 have been simultaneously asserted and accepted by the courts.

Locus standi at common law

Because the South African Constitution addresses only standing to bring cases alleging a violation of the Bill of Rights, common law standing persists in South African law but seems to be acquiring a broadened application in light of the underlying constitutional dispensation.

In *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and others*,⁴⁹² the High Court extended standing to an environmental organisation seeking to enforce section 39 of Decree 9 (Environmental Conservation) of 1992. The law in question created a conservation area along one province's coast within which clearing land and erecting structures were forbidden except with a special permit; in practice, however, the government had not enforced the law, and people were building holiday houses in what should have been conservation areas. Although the Ministry of the Environment ultimately conceded that the applicant had *locus standi*, the Court nonetheless considered in *dicta* the question of standing in terms of the need to prevent illegal State conduct from being immunised from challenge:

⁴⁸⁸ *Centre for Child Law v Minister for Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC).

⁴⁸⁹ At para 8.

⁴⁹⁰ *Ibid.*

⁴⁹¹ At para 9.

⁴⁹² *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and others* 1996 (3) SA 1095 (T).

I may mention that in my opinion there is also much to be said for the view that, in circumstances where the *locus standi* afforded persons by s 7 of the Constitution is not applicable and where a statute imposes an obligation upon the State to take certain measures in order to protect the environment in the interests of the public, then a body such as the first applicant, with its main object being to promote environmental conservation in South Africa, should have *locus standi* at common law to apply for an order compelling the State to comply with its obligations in terms of such statute.⁴⁹³

The Court noted that “there would be ‘a grave *lacuna* in our system of law if a pressure group ... or even a single public-spirited taxpayer were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped’”.⁴⁹⁴

A later case invoked a similar justification for expanded public interest standing under the common law. The applicants in *McCarthy v Constantia Property Owners’ Association*⁴⁹⁵ were members of a voluntary association which had been granted servitudes that effectively limited the size of a shopping mall development. The voluntary association later agreed with the developer to permit development in violation of the servitudes. The individual applicants sought to enforce the servitudes which vested in the association, and the respondents claimed that these individual applicants lacked standing. The Court reasoned that, as property owners and members of the association, the applicants all clearly had “a direct and substantial interest in ensuring that the primary asset of the association, the asset which allows for a protection of the environment, must be dealt with in a responsible fashion. Were the servitude in favour of the first respondent to be breached fundamentally it could have a detrimental effect upon the rustic character of the suburb, the preservation of which is the major objective of the first respondent.”⁴⁹⁶

In justifying this extension of common law *locus standi*, the Court considered several provisions of the Constitution of South Africa. It noted, but did not rely on, section 38 of the Constitution, which “radically extended the common-law rule of standing” for disputes arising under the Bill of Rights.⁴⁹⁷ It also indicated that section 29 of the Constitution, which protects the right to a protected environment, may also require broader common law standing provisions in environmental cases.⁴⁹⁸ Furthermore, the Court noted that “the Constitution clearly envisages a generous regime of access to courts”, “purports to protect the environment” and extends the application of the Bill of Rights to include the exercise of private power.⁴⁹⁹ The Court reasoned that laws of standing should change in response to the growth of public law and the Constitution’s “generous regime of access to the courts”.⁵⁰⁰

Similarly, in *Kruger v President of the Republic of South Africa and Others*,⁵⁰¹ although section 38 of the Constitution of South Africa was not directly applicable, the Court (relying on the *Ferreira* case discussed above) adopted a generous approach to common law standing based on analogies to the Constitutional approach. This case was brought by an attorney specialising in personal injury cases, to challenge the validity of certain amendments to the Road Accident

⁴⁹³ At 1105A-B.

⁴⁹⁴ At 1105I-J, quoting *R v Inland Revenue Commissioners: Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 644C.

⁴⁹⁵ *McCarthy v Constantia Property Owners’ Association* 1999 (4) SA 847 (C).

⁴⁹⁶ At 854D-E.

⁴⁹⁷ At 854H.

⁴⁹⁸ At 854I.

⁴⁹⁹ At 855B-E.

⁵⁰⁰ At 855B.

⁵⁰¹ *Kruger v President of the Republic of South Africa and Others* 2009 (1) SA 417 (CC).

Fund. The Court stated that, although the applicant might not have been able to establish standing under “the restricted rules of standing operative at common law”, it was “persuaded that an expanded understanding of what constitutes a direct and personal interest should be adopted in this case” to advance legal certainty and the administration of justice.⁵⁰²

Statutory extensions to locus standi

Various South African statutes have extended standing in particular contexts. For example, the **National Environmental Management Act 107 of 1998** provides for broad standing by private actors to enforce environmental laws:

Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act ... or any other statutory provision concerned with the protection of the environment or the use of natural resources –

- (a) in that person’s or group of persons own interest;
- (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
- (d) in the public interest; and
- (e) in the interest of protecting the environment.⁵⁰³

Although this law does not explicitly provide for organisational standing, the standing “in the interest of protecting the environment” seems to provide an avenue for litigation by interested organisations.

Another recent example is the **Consumer Protection Act 68 of 2008**, which gives standing to allege that a consumer’s rights in terms of the statute have been infringed to “a person acting as a member of, or in the interest of, a group or class of affected persons” or “a person acting in the public interest, with leave of the Tribunal or court, as the case may be”.⁵⁰⁴ The law also makes provision for accredited consumer protection groups to initiate actions to protect the interests of “a consumer individually or of consumers collectively”.⁵⁰⁵

A similar example can be found in the **Companies Act 71 of 2008**, which gives standing under the statute to a person “acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interests of its members” as well as a person “acting in the public interest, with leave of the court”.⁵⁰⁶

Thus, there appears to be a trend in South Africa toward expanding access to the courts in respect of matter of public law.

⁵⁰² At paras 23-26.

⁵⁰³ National Environmental Management Act 107 of 1998, section 32(1).

⁵⁰⁴ Consumer Protection Act 68 of 2008, section 4(1).

⁵⁰⁵ Id at section 78.

⁵⁰⁶ Companies Act 71 of 2008, section 157(1).

10.2 India

Constitution of India Right to Constitutional Remedies

- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
- (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
- (3) Without prejudice to the powers conferred on the Supreme Court by clauses (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).
- (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Article 32

Standing in the Supreme Court of India is governed by Article 32 of the Constitution of India, which guarantees “the right to move the Supreme Court by appropriate proceedings” for the enforcement of fundamental constitutional rights.⁵⁰⁷

The leading Supreme Court case on public interest standing in India is *SP Gupta v President of India and Ors*.⁵⁰⁸ The Minister of Law had sent a circular to the chief ministers of the states asking them to convince judges in their states to consent to be reappointed to other locations; the ultimate goal was to limit the number of judges working within a given area who originated from that area, and thus combat parochial tendencies. The government had also instituted a policy of making short-term, rather than permanent, judicial appointments. Several law societies and advocates’ groups attacked the circular and the policy as being unlawful infringements on judicial independence. The government challenged their standing on the grounds that only individual judges, and not such associations, had suffered any injury, and consequently the associations lacked standing to sue.

The Supreme Court embarked upon a comprehensive overview of the development of standing in India and other jurisdictions, – noting that India already recognised representative standing in certain circumstances:

[I]t must now be regarded as well settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the Court on account of some disability or it is not practicable for him to move the Court for some other sufficient reasons, such as his socially or economically disadvantaged position, some other person can invoke assistance of the Court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go unredressed and justice is done to him

It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of

⁵⁰⁷ Constitution of India, Art 32, § 1

⁵⁰⁸ *SP Gupta v President of India and Ors* 1982 SC 149.

poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.⁵⁰⁹

The Court then considered whether there was a broader form of public interest standing which could be used to address general public injury:

[T]here may be cases where the State or a public authority may act in violation of a constitutional or statutory obligation or fail to carry out such obligation, resulting in injury to public interest or what may conveniently be termed as public injury as distinguished from private injury. Who would have standing to complain against such act or omission of the State or public authority? Can any member of the public sue for judicial redress? Or is the standing limited only to a certain class of persons? Or there is no one who can complain and the public injury must go unredressed[?]

... [I]f no specific legal injury is caused to a person or to a determinate class or group of persons by the act or omission of the State or any public authority and the injury is caused only to public interest, the question arises as to who can maintain an action for vindicating the rule of law and setting aside the unlawful action or enforcing the performance of the public duty. If no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it. The Courts cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened. The view has therefore been taken by the Courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. **The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper but who has sufficient interest in the proceeding.**⁵¹⁰

The Court found that there were sound legal and policy reasons to recognise such standing, noting that “restrictive rules about standing are in general inimical to a healthy system of administrative law”.⁵¹¹ Furthermore, as law is increasingly used to advance social and economic development, rights and duties are extending to large groups of persons with a view to bringing “social justice to the common man”. Such developments make the usual paradigm of litigation between two opposing parties “entirely inadequate”.⁵¹²

For example, the discharge of affluent in a lake or river may harm all who want to enjoy its clean water; emission of noxious gas may cause injury to large numbers of people who inhale it along with the air, defective or unhealthy packaging may cause damage to all consumers of goods and so also illegal raising of railway or bus fares may affect the entire public which wants to use the railway or bus as a means of transport. In cases of this kind it would not be possible to say that any specific legal injury is caused to an individual or to a determinate class or group of individuals. What results in such cases is public injury and it is

⁵⁰⁹ At paras 16-17; see also *Bandhua Mukti Morcha v Union of India* 1984 SC 802 at para 17.

⁵¹⁰ At para 18 (emphasis added).

⁵¹¹ Ibid.

⁵¹² At para 19.

one of the characteristics of public injury that the act or acts complained of cannot necessarily be shown to affect the rights of determinate or identifiable class or group of persons: public injury is an injury to an indeterminate class of persons. In these cases the duty which is breached giving rise to the injury is owed by the State or a public authority not to any specific or determinate class or group of persons, but to the general public. In other words, the duty is one which is not correlative to any individual rights. Now if breach of such public duty were allowed to go unredressed because there is no one who has received a specific legal injury or who was entitled to participate in the proceedings pertaining to the decision relating to such public duty, the failure to perform such public duty would go unchecked and it would promote disrespect for the rule of law. It would also open the door for corruption and inefficiency because there would be no check on exercise of public power except what may be provided by the political machinery, which at best would be able to exercise only a limited control and at worst, might become a participant in misuse or abuse of power. It would also make the new social collective rights and interests created for the benefit of the deprived sections of the community meaningless and ineffectual.⁵¹³

The Court issued a two-prong holding: (1) “We would, therefore, hold that **any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law** and seek enforcement of such public duty and observance of such constitutional or legal provision.”⁵¹⁴ (2) “[C]ases may arise where there is undoubtedly public injury by the act or omission of the State or a public authority but such act or omission also causes a specific legal injury to an individual or to a specific class or group of individuals. In such cases, a member of the public having sufficient interest can certainly maintain an action challenging the legality of such act or omission, but if the person or specific class or group of persons who are primarily injured as a result of such act or omission, do not wish to claim any relief and accept such act or omission willingly and without protest, the member of the public who complains of a secondary public injury cannot maintain the action, for the effect of entertaining the action at the instance of such member of the public would be to foist a relief on the person or specific class or group of persons primarily injured, which they do not want.”⁵¹⁵

The Court found that both points were satisfied in the case before it. The challenged circular and policy did not cause any specific legal injury to a particular or to a determinate class of individuals, but it arguably caused general public injury “by prejudicially affecting the independence of the judiciary”. The lawyers bringing the case clearly had “a special interest in preserving the integrity and independence of the judicial system” as “equal partners with the Judges in the administration of justice”. The petitioners were not “bystanders or meddlesome interlopers”, but organisations with special interest in the subject matter in question.⁵¹⁶

The standing recognised in the *Gupta* case can be viewed as a category of representative standing, where petitioners with a special interest in an issue bring an action on behalf of the general public interest. Or, as one commentator points out, “such standing could be termed ‘citizen standing’ to distinguish it from representative standing. A petitioner under citizen standing sues not as a representative of others but in his own right as a member of the citizenry to whom a public duty is owed”.⁵¹⁷

⁵¹³ Ibid.

⁵¹⁴ At para 22 (emphasis added).

⁵¹⁵ At para 24 (emphasis added).

⁵¹⁶ At para 25.

⁵¹⁷ Clark D Cunningham, “Public Interest Litigation in Indian Supreme Court: A Study in Light of American Experience,” 29 *Journal of the Indian Law Institute* 494 (1987) at 501.

The Court's requirement that the action must be brought by the persons who are primarily injured (if there is such a group) protects the personal autonomy of the victims of the violation.⁵¹⁸ Under this approach, if an NGO sued the government on behalf of a group of people living in an informal settlement, but the residents decided not to object to the government's action, the NGO would not be permitted to pursue the case.

Like the Constitutional Court in South Africa, the Indian Supreme Court in *Gupta* required that the litigant must have a genuine, good faith interest in the issue in order to be granted public interest standing; if an individual acts "for personal gain or private profit or out of political motivation or other oblique consideration", then the Court must reject the application.⁵¹⁹ In a later case, the Court reiterated that it would not intercede "at the instance of a meddlesome interloper or busybody".⁵²⁰

The question of locus standi "is of immense importance in a country like India where access to justice being restricted by social and economic constraints, it is necessary to democratise judicial remedies, remove technical barriers against easy accessibility to Justice and promote public interest litigation so that the large masses of people belonging to the deprived and exploited sections of humanity may be able to realise and enjoy the socioeconomic rights granted to them and these rights may become meaningful for them instead of remaining mere empty hopes."

SP Gupta v Union of India 1982 SC 149 at para 13

The subsequent case of *Wadhwa State of Bihar*⁵²¹ reiterated that there is general public interest standing to challenge laws as unconstitutional even if no one's rights have been violated. The Governor of Bihar had repeatedly used his executive powers to promulgate ordinances without replacing them with Acts of Legislature. He was permitted to promulgate ordinances when the legislature was not in session and immediate action was required, but here he had been manipulating the system to avoid the normal legislative process. Petitioners challenged the legislation, but none could allege any individualised harm, or an interest in the legislation greater than that of any other citizen. Nonetheless, the Supreme Court concluded that every citizen had the right to insist that the laws under which he lived were enacted constitutionally, and therefore every citizen had standing to sue.⁵²²

Substantive rules restrict both representative standing and standing on behalf of the public interest. First, claims invoking these forms of standing may only be brought against the State.⁵²³ Yet the Supreme Court has interpreted "the State" broadly. Article 12 of the Constitution of India defines the State to include "all local or other authorities ... under the control of the Government of India." In turn, the Supreme Court has defined "other authorities" to include entities in charge of "public functions closely related to government functions".⁵²⁴ Thus, the Supreme Court has held the State liable for private contractors' violations of workers' rights. At the same time, it has sometimes treated a private actor as the State, applying its holdings

⁵¹⁸ *Gupta* at para 24.

⁵¹⁹ At para 17.

⁵²⁰ *Bandhua Mukti Morcha v India* 1984 SC 802.

⁵²¹ *Wadhwa State of Bihar* 1987 SC 579.

⁵²² Other examples include *Lakshmi Kant Pandey v Union of India* 1984 SC 469; *Rural Litigation and Entitlement Kendra, Dehra Dun v State of UP* 1985 SC 652.

⁵²³ Avani Mehta Sood, "Gender Justice Through Public Interest Litigation: Case Studies From India," 41 *Vanderbilt Journal of Transnational Law* 833 (2008)(hereinafter "**Sood**") at 840.

⁵²⁴ See *MC Mehta v Union of India* (1987) 1 SCR 819 at 832, 835.

regarding the right to healthcare to private healthcare providers.⁵²⁵ Second, claims invoking public interest standing must arise under the Constitution.⁵²⁶ Third, the growth of standing provisions “does not involve the recognition or creation of any vested rights on the part of those who initiate the proceedings”.⁵²⁷ As a consequence, a petitioner may not withdraw a public interest action once other stakeholders have become involved. In *Sheela Barse v Union of India*, the Court denied the petitioner’s motion to withdraw stating that “[t]he ‘rights’ of those who bring the action on behalf of others must necessarily be subordinate to the ‘interest’ of those for whose benefit the action is brought”.⁵²⁸

Unlike in South Africa, the recognition of representative standing and standing on behalf of the public interest in India have transformed procedures, remedies and judges’ roles in public interest litigation. First, **litigants invoking public interest standing do not necessarily have to formally file founding papers to begin an action.** Even before the *Gupta* case discussed above, the Supreme Court had begun to exercise “epistolary jurisdiction,” responding to letters or even news reports as founding papers in a case. Thus in *Sunil Batra v Delhi Administration*,⁵²⁹ decided before *Gupta*, a prison inmate wrote a letter to Justice Krishan Iyer regarding the torture of a fellow prisoner. The justice responded, leading to the Court’s first decision regarding prisoner’s rights.⁵³⁰ In the *Gupta* case, the Supreme Court made a strong statement on the need to ensure that procedural formalities do not access to justice to marginalised groups:

Where the weaker sections of the community are concerned, such as under-trial prisoners languishing in jails without a trial inmates of the Protective Home in Agra or Harijan workers engaged in road construction in the Ajmer District, who are living in poverty and destitution, who are barely eking out a miserable existence with their sweat and toil, who are helpless victims of an exploitative society and who do not have easy access to justice, this Court will not insist on a regular writ petition to be filed by the public spirited individual espousing their cause and seeking relief for them, This Court will readily respond even to a letter addressed by such individual acting *pro bono publico*. It is true that there are rules made by this Court prescribing the procedure for moving this Court for relief under Article 32 [of the Constitution] and they require various formalities to be gone through by a person seeking to approach this Court. But it must not be forgotten that procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities. The Court would therefore unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in the exercise of its dispensing power and treat the letter of the public minded individual as a writ petition and act upon it.⁵³¹

In 1994, the Supreme Court commenced a hearing regarding pollution in reaction to a newspaper report.⁵³² The Supreme Court has justified epistolary jurisdiction as a means to ease the expense and burden for public interest litigants seeking to approach the Court on another’s behalf: “it would not be right or fair to expect a person acting *pro bono publico* to incur expenses out of his own pocket for going to a lawyer and preparing a regular writ petition for being filed”.⁵³³

⁵²⁵ See, eg, *Consumer Education and Research Centre v Union of India* (1995) 1 S.C.R. 626; *Parmanand Katara v Union of India* (1989) 3 SCR 997.

⁵²⁶ Sood at 840.

⁵²⁷ *Sheela Barse v Union of India* (1988) Supp. 2 SCR 643 at 11.

⁵²⁸ Ibid.

⁵²⁹ 1978 SC 1675.

⁵³⁰ SP Sathe, “Judicial Activism: The Indian Experience,” 6 *Washington University Journal of Law and Policy* 29 (2001) at 73.

⁵³¹ *SP Gupta v President of India and Ors* 1982 SC 149 at para 17.

⁵³² See Kelly D Alley, “Legal Activism and River Pollution in India,” 21 *Georgetown International Environmental Law Review* 793 (2009) at 803, citing *News Item v Central Pollution Control Board and Others*, Supreme Court of India at Writ Petition (Civil) No 725 of 1994.

⁵³³ *Bandhua Mukti Morcha v India* 1984 SC 802 at 814.

Another procedural transformation is that public interest proceedings are non-adversarial; “there is no trial, witnesses are not examined or cross-examined, and the governmental respondents are expected to work together with the petitioners to address the issue at hand”.⁵³⁴ The Supreme Court has described public interest litigation as “essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them”.⁵³⁵ The Court has justified this variance from the adversarial procedure in terms of the goal of substantively enforcing constitutional rights:

Strict adherence to the adversarial procedure can sometimes lead to injustice, particularly where the parties are not evenly balanced in social or economic strength If we blindly follow the adversarial procedure in their case, they would never be able to enforce their fundamental rights and the result would be nothing but a mockery of the Constitution.⁵³⁶

It has further reasoned that the State or public authority should be required to participate collaboratively with the public interest litigant because the government “should be as much interested in ensuring basic human rights, constitutional as well as legal, to those who are in a socially and economically disadvantaged position, as the petitioner who brings the public interest litigation before the court”.⁵³⁷

Abandoning adversarial procedures has led the court to expand and reshape its role in litigation. Rather than being a “passive, disinterested umpire or onlooker”, it has taken on “the organisation of the proceedings, moulding of the relief and ... supervising the implementation This wide range of responsibilities necessarily implies correspondingly higher measures of control over the parties, the subject matter and the procedure.”⁵³⁸

Thus the Court no longer merely finds facts in public interest cases, but employs third parties to investigate them. To further these investigations, the Court may convene a committee of experts on a particular subject.⁵³⁹ *Bandhua Mukti Morcha v Union of India*,⁵⁴⁰ for example, dealt with bonded labourers allegedly being held at quarries. When the Court received the petition, it sent two lawyers to the quarries, and later followed up with a ‘socio-legal investigation’ funded primarily by the State government. It justified its power to appoint a commission or an investigating body in public interest cases as being implied and inherent under Article 32 of the Constitution. When the Court uses these “socio-legal commissions,” evidence is often collected *ex parte*, and is thus immune from cross-examination.⁵⁴¹

Similarly, the Court has adopted a broad leeway to fashion remedies which attempt to rectify past wrongs and to provide forward-looking relief.⁵⁴² In *Laxmi Kant Pandey*, for example, the Court drafted regulations to govern foreigners’ adoptions of Indian children.⁵⁴³ Similarly, in

⁵³⁴ Sood at 940 (citation omitted).

⁵³⁵ *People’s Union for Democratic Rights and others v Union of India and others* 1983 SCR (1) 456 at para 1.4.

⁵³⁶ *Bandhua Mukti Morcha v India* (1984) 2 SCR 67 at para 13.

⁵³⁷ See *PUDR*, 1982 SC at 1477-78.

⁵³⁸ *Sheela Barse v. Union of India* (1988) Supp. 2 SCR 643 at 12.

⁵³⁹ Sood at 842.

⁵⁴⁰ 1984 SC 802.

⁵⁴¹ Jamie Cassels, “Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?” 37 *American Journal of Comparative Law* 495 (1989) (hereinafter “Cassels”) at 500.

⁵⁴² See *MC Mehta v Union of India*, (1987) 1 SCR 819, P 7 (“The power ... is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed.”).

⁵⁴³ *Bandhua Mukti Morcha v Union of India* 1984 SC 469.

People's Union for Civil Liberties v India, the right-to-food case discussed above, the Court issued specific orders regarding the caloric and protein requirements per child to be provided at the mid-day school meal and the amount of money per child to be allocated, and mandated that the government provide cooked rather than dry foods.⁵⁴⁴

The Court has also exercised its remedial powers to treat defendants as a single class and issue orders accordingly.⁵⁴⁵ In *MC Mehta v Union of India*,⁵⁴⁶ for example, the Court published newspaper notices inviting industries and municipal authorities to appear in litigation concerning river pollution in the Ganga; the final order affected numerous parties who had not appeared in the litigation. In general, the Indian Court has not restricted itself to the relief requested by parties, but has crafted its own remedies based on the requirements of the particular case.⁵⁴⁷

After fashioning remedies, the courts have broad powers to monitor implementation of those remedies. Courts “often hold numerous hearings, issue series of interim orders with elaborate directions, collect regular affidavits from respondents to gauge compliance, and then issue new directives as needed”.⁵⁴⁸ Thus in the *Mehta* case,⁵⁴⁹ the Court required a chemical plant to meet a stringent set of conditions before it reopened after a gas leak. It ordered safety and training improvements based on recommendations of four technical teams. The court required an independent committee to visit the plant on a bi-weekly basis, and it further ordered the government inspector to visit every week. Finally, it required the company and its managers “to deposit security to guarantee compensation to any who might be injured as a result of the enterprise’s activity”.⁵⁵⁰

The Court has justified these broad remedial powers under Article 32. Article 32(1) states that a party may move the Supreme Court to enforce a right using any “appropriate” proceeding. The Supreme Court has interpreted “appropriateness” in terms of the purpose of public interest litigation, rather than form, reasoning that to insist on a rigid and formal interpretation in a country struggling against “poverty, illiteracy, deprivation and exploitation” would be to render access to the courts a “rope of sand” useless to most citizens.⁵⁵¹

Article 32(2) contains an open-ended list of the types of writs the Court may issue. The Court has interpreted this provision as evidence of “the anxiety of the Constitution makers not to allow any procedural technicalities to stand in the way of enforcement of fundamental rights”.⁵⁵² It has concluded that this provision gives the Supreme Court “power to enforce the fundamental rights in the widest possible terms”,⁵⁵³ and enables the Court to issue “whatever direction, order or writ may be appropriate in a given case for enforcement of a fundamental right”.⁵⁵⁴

⁵⁴⁴ *People's Union for Civil Liberties v. India*, writ petition 196/2001 (Interim Order of 20 April 2004), available at www.righttofoodindia.org/orders/apr2004.html.

⁵⁴⁵ Cassels at 500.

⁵⁴⁶ *MC Mehta v Union of India* (1987) 4 SCC 463.

⁵⁴⁷ See SP Sathe, “Judicial Activism: The Indian Experience,” 6 *Washington University Journal of Law and Policy* 29 (2001) at 67, 80-82; Susan D Susman, “Distant Voices in the Courts of India: Transformation of Public Interest Litigation,” 13 *Wisconsin International Law Journal* 57 (1994) (hereinafter “*Susman*”) at 90.

⁵⁴⁸ Sood at 845.

⁵⁴⁹ See 1987 SC 965; 1987 SC 982.

⁵⁵⁰ Cassels at 506.

⁵⁵¹ *Bandhua Mukti Morcha v India* 1984 SC 802 at 813-15.

⁵⁵² At para 7.

⁵⁵³ Ibid.

⁵⁵⁴ At para 7.

10.3 Canada

The Supreme Court of Canada has articulated the following test to determine whether a court should grant public interest standing:

First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?⁵⁵⁵

Canada first recognised public interest standing in three cases referred to as the “standing trilogy”: *Thorson v Attorney General (Canada)*⁵⁵⁶; *Nova Scotia Board of Censors v MacNeil*,⁵⁵⁷ and *Minister of Justice of Canada v Borowski*.⁵⁵⁸

In *Thorson*, the Court addressed concerns that denying public interest standing could insulate certain laws from constitutional challenge. The plaintiff in this case challenged the Official Languages Act,⁵⁵⁹ which made both French and English the official languages of Canada, as *ultra vires* of Parliament.⁵⁶⁰ He attempted to assert standing as a taxpayer, but the Attorney General challenged his standing on the ground that he had not suffered “any special damage or damage that would set him apart from other taxpayers of Canada”.⁵⁶¹ **The Supreme Court noted that the statute was declaratory: it created no offences, imposed no penalties, and laid no duties upon members of the public.**⁵⁶² Under the common law, no individual could gain standing to challenge the Act, and thus it was immunised from constitutional challenge unless the Court exercised its discretion to grant standing to represent the public interest.⁵⁶³

The Court noted two issues which were key to determining whether it should exercise its discretion to permit such standing.⁵⁶⁴ The first was the justiciability of the issue the plaintiff sought to raise. The second was the nature of legislation being challenged – specifically “whether it involves prohibitions or restrictions on any class or classes of persons who would be particularly affected by its terms beyond any effect upon the public at large”. If so, the Court may decide that a member of the public is “too remotely [a]ffected to be accorded standing”. In contrast, when “all members of the public are affected alike” and the issue is justiciable, the Court may exercise its discretion to grant standing to a member of the public and thus avoid immunising legislation from judicial review.⁵⁶⁵ Applying these standards to the case at hand, the Court granted standing and permitted the case to proceed, effectively recognising standing to represent the public interest.⁵⁶⁶

In *MacNeil*, the Court expanded public interest standing to cases where constitutional issues arise under regulatory statutes. The plaintiff sought to challenge the “wide powers exercisable by the Nova Scotia Board of Censors” under the *Theatres and Amusements Act*.⁵⁶⁷ In analysing

⁵⁵⁵ *Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 236 at para 37 (emphasis added).

⁵⁵⁶ [1975] 1 SCR 138.

⁵⁵⁷ [1976] 2 SCR 265.

⁵⁵⁸ [1981] 2 SCR 575.

⁵⁵⁹ 1968-69 (Can), c 54.

⁵⁶⁰ *Thorson v Attorney General (Canada)* [1975] 1 SCR 138 at 141 (Judson J, dissenting).

⁵⁶¹ *Ibid.*

⁵⁶² At 151.

⁵⁶³ At 152.

⁵⁶⁴ At 161.

⁵⁶⁵ At 161.

⁵⁶⁶ At 163.

⁵⁶⁷ *Nova Scotia Board of Censors v MacNeil* [1976] 2 SCR 265 at 268. The name of the Nova Scotia Board of Censors was “changed by 1972 (N.S.), c. 54 to the Amusements Regulation Board of Nova Scotia”. At 268.

whether public interest standing was appropriate, the Court emphasised that the parties apparently did not dispute “that a serious, a substantial constitutional issue had been raised by the respondent’s declaratory proceeding”.⁵⁶⁸ It also observed that, unlike in *Thorson*, **there were members of the public who were directly regulated by the statute** – “film exchanges, theatre owners and cinematograph operators and apprentice”.⁵⁶⁹ **Yet none of these potential parties would “have an interest similar to that of the members of the public”**.⁵⁷⁰ Consequently, the Court concluded that the only way for the public’s interest to be represented would be if the Court granted standing to a member of the public, such as the plaintiff.⁵⁷¹ It therefore granted the plaintiff standing, thus recognising public interest standing in the context of so-called regulatory statutes rather than just declaratory statutes.

In *Borowski*, the Supreme Court again considered the question of whether there was a practical alternative means to bring the issue before the Court. The plaintiff, a member of the public, sought public interest standing to challenge sections of the Criminal Code that legalised abortion, on the ground that they violated the right to life guaranteed by the Canadian Bill of Rights.⁵⁷² The challenged sections provided that laws prohibiting actions intended to “procure the miscarriage of a female person” did not apply to specified medical professionals and women using their services;⁵⁷³ in short, the law legalised abortions performed by such medical professionals. In addressing the question of the plaintiff’s standing, the Court reasoned that “it is difficult to find any class of person directly affected or exceptionally prejudiced by [the statute] who would have cause to attack the legislation”.⁵⁷⁴ Anyone with a direct interest in the legislation, such as doctors performing abortions, women seeking abortions, or hospitals where abortions were performed would be protected by the legislation and therefore would have no reason to attack it.⁵⁷⁵ Considering the decisions in *Thorson* and *Nova Scotia Board of Censors* regarding when public interest standing was appropriate, the Court concluded:

[T]o establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.⁵⁷⁶

Applying this test to the facts of the case, it decided that “the respondent has met this test and should be permitted to proceed with his action”.⁵⁷⁷

***Minister of Finance of Canada v Finlay*⁵⁷⁸ extended public interest standing from cases arising under the Constitution and the Canadian Charter of Rights and Freedoms to cases**

⁵⁶⁸ Ibid.

⁵⁶⁹ At 270.

⁵⁷⁰ Ibid.

⁵⁷¹ At 271.

⁵⁷² *Minister of Justice of Canada v Borowski* [1981] 2 SCR 575 at 587-590.

⁵⁷³ At 587-589.

⁵⁷⁴ At 596.

⁵⁷⁵ Ibid. The Court also reasoned:

The husband of a pregnant wife who desires to prevent an abortion which she desires may be said to be directly affected by the legislation in issue in the sense that by reason of that legislation she might obtain a certificate permitting the abortion if her continued pregnancy would be likely to endanger her life or health and thus prevent the abortion from constituting a crime. However, the possibility of the husband bringing proceedings to attack the legislation is illusory. The progress of the pregnancy would not await the inevitable lengthy lapse of time involved in court proceedings leading to a final judgment. The abortion would have occurred, or a child would have been born long before the case had been finally terminated, perhaps in this Court. (At 597.)

⁵⁷⁶ At 598.

⁵⁷⁷ Ibid.

⁵⁷⁸ *Minister of Finance of Canada v Finlay* [1986] 2 SCR 607.

arising under legislation. The plaintiff argued that the federal government should withdraw funding from Manitoba's disability pension scheme because the scheme did not conform to federal funding requirements.⁵⁷⁹ Although he received a pension, he lacked common law standing because his entitlement was determined by provincial law and would not be affected by a withdrawal of federal funding.⁵⁸⁰

In resolving the case, the Supreme Court concluded that the test for determining public interest standing addressed the major arguments raised against such standing. It noted concerns that public interest litigation would consume scarce judicial resources; that meddlesome busybodies would file unnecessary litigation; that "in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government".⁵⁸¹ It concluded, however, that the criteria for determining whether to grant public interest standing would address these concerns: The requirements that a litigant **raise a serious issue** and **have a genuine interest** in the subject matter address concerns regarding the allocation of resources and would eliminate mere busybodies.⁵⁸² The requirement that there be **no other reasonable and effective means of bringing the litigation** would ensure that the courts would not hear public interest cases when contending points of view could better present the issues.⁵⁸³

In practice, the first two prongs of the public interest standing test have been relatively uncontroversial and easy to meet. **The Supreme Court has held that raising a serious issue as to invalidity means presenting only a "reasonable cause of action".**⁵⁸⁴ A motion to strike on the basis of a lack of reasonable cause of action will succeed only in "the clearest of cases" where it is "plain and obvious" or "beyond reasonable doubt" that there is no reasonable cause of action.⁵⁸⁵

Next, a plaintiff must demonstrate a "genuine interest" in the validity of the legislation. **The genuine interest requirement helps ensure that public interest litigants have "experience and expertise with respect to the underlying subject-matter of the litigation that will inform their written and oral submissions" and prove useful to the Court.**⁵⁸⁶ The applicant must also demonstrate "a degree of involvement with the subject-matter of the application for judicial review that is sufficient to make it an appropriate body to institute [the] proceeding".⁵⁸⁷

An NGO focused on a particular area of concerns seems able to meet these requirements. In *Sierra Club of Canada v Canada (Minister of Finance)*,⁵⁸⁸ for example, the federal trial court granted standing to an environmental NGO seeking judicial review of the Minister's refusal to subject the sale of two nuclear reactors to China to a full environmental assessment. In considering the genuine interest requirement, the Court concluded that the Sierra Club had the necessary degree of involvement with the subject matter because its interest "stems from its concern with the protection of the environment," and is thus "intimately linked to its corporate objectives". Further, the Court held the Sierra Club had the necessary experience and expertise

⁵⁷⁹ At paras 5-8.

⁵⁸⁰ At para 26.

⁵⁸¹ At para 36.

⁵⁸² At para 38. Similarly, the justiciability requirement discussed in *Thorson* would address concerns about the proper role of the courts. At para 37.

⁵⁸³ At para 39.

⁵⁸⁴ *Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 236 at para 38.

⁵⁸⁵ *Fraser v Ontario (Attorney General)* 2008 OJ No 1219 (CA) at para 54.

⁵⁸⁶ *Sierra Club of Canada v. Canada (Minister of Finance)* [1999] 2 FC 211 at para 52.

⁵⁸⁷ At para 55.

⁵⁸⁸ At para 91.

despite its limited work regarding the export of nuclear reactors, because it could draw on the experience of affiliated organisations.

The third prong of the test to determine public interest standing, however, seems to provide the most troubling stumbling block. The plaintiff in *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*,⁵⁸⁹ for example, lost on this ground. The plaintiff was an organisation representing the interests of member churches.⁵⁹⁰ The Council sought public interest standing to challenge a statute altering the procedures for determining refugees. The Supreme Court reviewed the organisation's standing to raise four claims:

- that requiring detainees to obtain counsel within 24 hours from the making of a removal order violated the Charter;
- that provisions temporarily excluding claimants from having claims considered violated the Charter;
- that allowing the removal of a claimant within 72 hours did not leave enough time to consult with counsel and violated the Charter; and
- that the provisions permitting the removal of a claimant with a right to appeal within 24 hours if a notice of appeal is not filed in that time violated the Charter.⁵⁹¹

On review, the Supreme Court held that the Council had failed to establish there was no other reasonable and effective means of bringing the issue before the court. The Court reasoned that **“[t]he whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant”**.⁵⁹² Provisions restricting public interest standing must be strictly enforced, lest the Court open the floodgates to “the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations”.⁵⁹³

In the case at hand, the Court reasoned that there was another reasonable and effective means to bring the issues before it: the refugees themselves had standing.⁵⁹⁴ It rejected the Council's argument that, in practice, refugees would not be able to challenge the legislation, pointing to the nearly 33 000 claims for refugee status brought in the first fifteen months after the Act was passed.⁵⁹⁵ The Court also rejected the Council's argument that “the imposition of a 72-hour removal order against refugee claimants undermines their ability to challenge the legislative scheme”.⁵⁹⁶ It reasoned that removals could be enjoined and that, in practice, it often took months for refugee cases to be heard.⁵⁹⁷ Finally, the Supreme Court asserted that “refugee claimants [were] challenging the legislation”,⁵⁹⁸ although the judgment does not clarify the source of this fact or if the challenges brought by refugees included the issues raised by the Council. Nevertheless, the Court denied public interest standing.

Unlike earlier decisions, **the Court's reasoning here seems to emphasise the theoretical ability of a private litigant with common law standing to act over practical realities.** For example,

⁵⁸⁹ *Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 236 at para 2.

⁵⁹⁰ Ibid.

⁵⁹¹ At paras 4-5.

⁵⁹² At para 36.

⁵⁹³ At para 35.

⁵⁹⁴ At para 40.

⁵⁹⁵ Ibid.

⁵⁹⁶ At para 41.

⁵⁹⁷ Ibid.

⁵⁹⁸ At para 42.

the Court reasoned that refugee claimants could challenge the allegedly unconstitutional provisions. But a refugee claimant who has accessed a court would have little motivation to challenge a 72-hour removal period on the ground that it denied other refugees access to the courts;⁵⁹⁹ indeed, that refugee might lack the standing to do so. Furthermore, the Court did not consider whether language barriers or the refugees' socio-economic status might present practical barriers that would prevent them from filing suit.⁶⁰⁰

The trend of focusing on the nature of the statute rather than the practical realities of the plaintiff continued in *Hy and Zel's v Ontario*.⁶⁰¹ Two retail stores and the employees of one store challenged a law requiring store closures on specific holidays, on the ground that it violated the rights to equality and freedom of religion.⁶⁰² The Court denied public interest standing, reasoning that the plaintiffs failed to prove there was no reasonable and effective means for those more directly affected by the law to challenge the legislation, particularly given that the applicants presented virtually no original factual evidence to support their claims; the Court noted that Charter decisions should not be made in a factual vacuum.⁶⁰³ The Court also focused on the nature of the legislation itself, rather than the practical likelihood another party would challenge the legislation, finding that the Act would raise any particular difficulties that would deter challenges from persons whose own religious rights had been violated. It differentiated the case from *Borowski*, where "the nature of the legislation ... was such that no party directly affected could reasonably be expected to challenge the legislation". In contrast, the legislation at issue did not "discourage challenge".⁶⁰⁴

A public interest plaintiff does not meet the third prong of the test merely by showing it is the best party to bring the issue before the court. As stated in *Downtown East Side Sex Workers United Against Violence Society v Attorney General (Canada)*,⁶⁰⁵ "the test is not whether granting public interest standing to a proposed litigant would be 'the most reasonable and effective way to bring litigation challenging the constitutionality of the criminal provisions'; rather, the test, in its third component, is whether there is no other reasonable and effective way to bring the issue before the court".⁶⁰⁶

Thus, one scholar claims that the final prong of the public interest standing test has evolved into a "no other effective means" test,⁶⁰⁷ citing *Canadian Bar Association v British Columbia*⁶⁰⁸ as an example. In that case, the Supreme Court of British Columbia denied public interest standing to the Canadian Bar Association to sue "on behalf of people living on low incomes as defined by Statistics Canada Low Income Cut-offs" to challenge the alleged inadequacies of civil legal aid in British Columbia.⁶⁰⁹

The Court held that the Canadian Bar Association had failed to show there was no other reasonable and effective means to bring the issues before the court. First, the Court distinguished

⁵⁹⁹ June Ross, "Public Interest Standing Takes a Back Seat," 3 *Constitutional Forum* 100 (1991-1992) at 103.

⁶⁰⁰ Cf *Vriend v Alberta* [1998] 1 SCR 493 at para 47 (mentioning the socio-economic vulnerability of private litigants as a potential concern).

⁶⁰¹ *Hy and Zel's v Ontario* [1993] 3 SCR 675.

⁶⁰² At paras 1-7.

⁶⁰³ At paras 16-19. Although the store owners and their employees could be prosecuted if the store remained open on the holidays, the Court concluded that they lacked private standing because they had not alleged that their own rights had been violated. At paras 5, 20.

⁶⁰⁴ At para 19.

⁶⁰⁵ *Downtown East Side Sex Workers United Against Violence Society v Attorney General (Canada)* 2008 BSCS 1726.

⁶⁰⁶ At para 85.

⁶⁰⁷ Carissima Mathen, "Access to Charter Justice and the Rule of Law," 25 *National Journal of Constitutional Law* 191 (2009) at 193.

⁶⁰⁸ *Canadian Bar Association v British Columbia* 2006 BCSC 1342.

⁶⁰⁹ At paras 4-5.

Finlay and the standing trilogy on the ground that they all involved situations in which no litigant with private standing could challenge the statutes at issue. In *Thorson*, *Borowski*, and *Finlay*, the very nature of the statute precluded individual private standing.⁶¹⁰ In *MacNeil*, the case concerning the powers of the Nova Scotia Board of Censors, there could be individuals with standing at private law, but they would have to violate the statute to gain such standing; the Court took that to mean “that citizens should not have to deliberately expose themselves to criminal or regulatory charges in order to challenge legislation”.⁶¹¹ It also expressly rejected the plaintiff’s argument that the no reasonable and effective means test could be met by demonstrating that the practical social and economic circumstances of the individuals with private law standing would prevent them from litigating.⁶¹² Although the holding did not create binding precedent, **the Court’s reasoning indicates that the third prong will only be met when the very nature of the statute at issue precludes private law standing.**

Another practitioner and academic has asserted that the Canadian Supreme Court has turned to other procedural devices to avoid opening up the courts too broadly. For example, although the plaintiff in *Borowski* obtained standing, the case was later dismissed due to mootness.⁶¹³ In the judgment holding the case moot, the Court expressed “concerns for an adversarial context, judicial economy, and the proper law-making function of the courts” that echoed concerns voiced in *Finlay* and *Canadian Council of Churches*.⁶¹⁴

Although not restricted to cases involving public interest standing, one concern raised by critics is the appropriateness of using litigation to enforce the Canadian Charter of Rights and Freedoms. In particular, some critics have “expressed concern as to whether the courtroom is the right venue in which to consider the polycentric issues of broad social policy that Charter litigation frequently involves”.⁶¹⁵ Others have contended that courts in Charter cases “are wrongfully usurping the role of the legislatures”,⁶¹⁶ and that such intrusion into the realm of the legislature is undemocratic.⁶¹⁷ Such criticisms, however, fail to recognise that democracy encompasses more than just majority rule:

[S]uch criticism is dependent upon an impoverished conception of democracy ... [D]emocracy demands a deep commitment to individual rights and freedoms; there must be some mechanism, free from political influence that binds government to its guarantee to uphold those rights and freedoms. This is the role of judicial review. It enhances democracy by ensuring that elected legislatures do not forsake the rights of the few in order to satisfy the interests of the many.⁶¹⁸

Moreover “numerous restrictions,” such the requirement of justiciability, “limit the capacity of the judiciary to dictate policy issues to the legislature”.⁶¹⁹ For example, rights under the Charter are not unlimited but are “subject to such *reasonable* limits as can be demonstrably justified in a free and democratic society”.⁶²⁰

⁶¹⁰ At para 61.

⁶¹¹ At para 62-63.

⁶¹² At para 66.

⁶¹³ See *Borowski v A-G Canada* [1989] 1 SCR 342.

⁶¹⁴ H. Scott Fairley, “Is the Public Interest Falling From Standing? Two Recent Comments From The Supreme Court of Canada,” 11 *The Philanthropist* 29 (1993) at 34.

⁶¹⁵ Frank Iacobucci, “The Charter: Twenty Years Later,” 21 *Windsor Yearbook of Access to Justice*. 3 (2002) at 6.

⁶¹⁶ *Vriend v Alberta* [1998] 1 SCR 493 at para 130 (summarising criticism).

⁶¹⁷ Frank Iacobucci, “The Charter: Twenty Years Later,” 21 *Windsor Yearbook of Access to Justice*. 3 (2002) at 19.

⁶¹⁸ *Ibid.*

⁶¹⁹ *Ibid.*

⁶²⁰ *Ibid.*

10.4 United Kingdom

An applicant for judicial review in the United Kingdom must demonstrate “sufficient interest in the matter to which the application relates”.⁶²¹ An applicant does not need a direct legal or financial interest, and the applicant does not need an interest that is unique, different from, or greater than, the interest of any other member of the public.⁶²² The court will, however, exclude a “mere busybody”.⁶²³ Courts have broadly interpreted the sufficient interest test.⁶²⁴

Courts in the United Kingdom first recognised a form of taxpayer or ratepayer standing in *R v Greater London Council; Ex Parte Blackburn*.⁶²⁵ A ratepayer sought an order forbidding a local council from permitting showings of pornographic films. The respondents challenged the ratepayer’s standing on the ground that he was affected differently from other residents. Lord Denning noted that if such a ratepayer lacked standing, then no one would actually have standing to sue. He reasoned that illegal government action should not be immunised from challenge:

I regard it as a matter of high constitutional principle that if there is a good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty’s subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate.⁶²⁶

Standing to sue was granted.

The House of Lords similarly recognised taxpayer standing to challenge government action in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses*.⁶²⁷ A group of printing industry workers had failed to pay the taxes due on earnings for casual labour. The Inland Revenue Commissioners agreed not to investigate taxes left unpaid for years before 1977-78. The plaintiff, an organisation of small business owners, contended that the agreement was illegal and exceeded the Revenue’s authority.⁶²⁸ The House of Lords recognised the organisation’s standing. Ostensibly, the members’ businesses had suffered special damage, but one commentator has stated that such an assertion “could hardly be made while keeping a straight face”.⁶²⁹ Lord Wilberforce’s reasoning emphasised the rule of law problem of immunising unlawful conduct from challenge: “It would, in my view be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer were prevented by outdated technical rules of *locus standi* from bringing the matter to court to vindicate the rule of law and get the unlawful conduct stopped.”⁶³⁰

⁶²¹ Sec. 31(37) of Supreme Court Act 1981(UK); see also Ordinance 53 r 3(5) of the rules of the Supreme Court (UK).

⁶²² See *R v Secretary of State for Foreign & Commonwealth Affairs; Ex parte Ree-Mogg* [1989] 1 All ER 1047; *R v Her Majesty Treasury; Ex parte Smedley* [1985] 1 All ER 589.

⁶²³ *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses* [1981] UKHL 2 at 13.

⁶²⁴ Tembeka Ngcukaitobi, “The Evolution of Standing Rules in South Africa and their Significance in Promoting Social Justice,” 18 *South African Journal of Human Rights* 590 (2002) at 598.

⁶²⁵ *R v Greater London Council; Ex Parte Blackburn* [1976] 1 WLR 550.

⁶²⁶ At 559.

⁶²⁷ *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses* [1981] 2 All ER 93; [1982] AC 617, [1981] UKHL 2.

⁶²⁸ [1981] UKHL 2 at 1.

⁶²⁹ John E Bonine, “Standing to Sue: The First Step in Access to Justice”, lecture (1999) at 5.

⁶³⁰ [1982] AC 617 at 644E-G.

Courts in the United Kingdom have also recognised “organisational standing,” ie standing to sue to represent the interests of the organisation’s members or clients.⁶³¹ In determining whether to grant standing, courts consider factors including “the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any other responsible challenger, the nature of the breach of duty against which relief was sought and the prominent role of the applicants” with respect to the subject matter of the litigation.⁶³²

In *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte World Development Movement Ltd*, for example, the Court granted standing to an organisation that provided aid to the developing world to challenge a subsidy that would help build a dam in Malaysia. Similarly, in *R v Inspectorate of Pollution, ex parte Greenpeace*, a court granting standing to the environmental group Greenpeace to challenge a nuclear power plant’s construction on the basis that Greenpeace was a “responsible and respected body with a genuine concern for the environment [that could] effectively represent the interests of its 2500 members”.⁶³³

The jurisprudence regarding ratepayer and organisational standing has emphasised protecting the rule of law and ensuring that the State fulfils its positive duties. In *Ex parte Richard Dixon*,⁶³⁴ for example, Justice Sedly wrote:

Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say, misuses of public power; and the courts have always been alive to the fact that a person or organization with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well-placed to call the attention of the court to an apparent misuse of public power.⁶³⁵

Critics, however, have emphasised the need to reject frivolous public interest claims. In *Re Argentine Reductions (UK) Ltd*, for example, Sir Robert Megarry noted that courts should not admit people wishing to meddle in others’ concerns in order to interfere or proclaim a favourite doctrine.⁶³⁶ However, courts may use their power to declare individuals vexatious litigants who may not proceed without the permission of the court, and their authority to strike out vexatious and frivolous claims, to control and eliminate unmeritorious public interest actions.⁶³⁷

10.5 Israel

The Supreme Court of Israel has “adopted the view that when the claim alleges a major violation of the rule of law (in its broad sense), every person in Israel has legal standing to sue”.⁶³⁸ In an article for Harvard Law Review, Justice Aharon Barak, former president of the Supreme Court of Israel, has identified two types of public interest standing in Israel. First, the courts will grant standing to any individual for the “review of officials’ behaviour that is illegal but does not necessarily violate the rights of any particular individual”, a form of

⁶³¹ See, eg, *R v General Council of the Bar, ex p Percival* [1990] 3 All ER 137; *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

⁶³² See Tembeka Ngcukaitobi, “The Evolution of Standing Rules in South Africa and their Significance in Promoting Social Justice,” 18 SAJHR 590 (2002) at 599.

⁶³³ *R v Inspectorate of Pollution, ex parte Greenpeace, Ltd. (No. 2)* [1994] 4 All E R 329.

⁶³⁴ *R v Somerset County Council and ARC Southern Ltd, ex parte Dixon* [1997] Env LR 111 at 121, CO/3410/96 (High Court of Justice, QB Division, Crown Office) (20 April 1997).

⁶³⁵ At 121.

⁶³⁶ *Re Argentine Reductions (UK) Ltd* [1975] 1 WLR 186 at 190, as cited in Justice RK Abichandani, “Managing Public Interest Litigation” at 6.2.

⁶³⁷ Justice RK Abichandani, “Managing Public Interest Litigation” at 6.2.

⁶³⁸ Barak at 108.

standing on behalf of the public interest.⁶³⁹ Accordingly, courts have granted standing to address questions such as whether the Attorney General properly exercised his discretion in deciding not to seek a particular indictment⁶⁴⁰ and whether the government negotiated a peace agreement when it did not have the confidence of Parliament.⁶⁴¹

The second set of cases involves a version of representative standing, or cases involving “a person whose right has been harmed, but who refrains from suing. The recognition that another party may sue – in most cases, human rights groups operating in the country – allows the court to review the legality of the harm suffered”.⁶⁴² Justice Barak’s examples of this kind of standing include the standing of the Israel Women’s Network to enforce provisions requiring boards of directors to include both men and women,⁶⁴³ and the standing of a citizen watchdog group to petition regarding the fair administration of the law.⁶⁴⁴

In his article, Justice Barak also addressed – and dismissed – concerns that recognition of broad forms of standing would “open the floodgates” because, in Israel’s experience, such fears have proved groundless.⁶⁴⁵

10.6 Uganda

Constitution of Uganda Provisions on standing

Any person or organisation may bring an action against the violation of another person’s or group’s human rights.

Article 50(2)

A person who alleges that –

- a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
- b) any act or omission by any person or authority,

is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.

Article 137(3)

Article 50(2) of the Constitution of Uganda provides for broad representative standing: “Any person or organisation may bring an action against the violation of another person’s or group’s human rights.”

The High Court of Uganda applied this provision in *The Environmental Action Network Ltd v The Attorney General and National Environmental Management Authority*.⁶⁴⁶ The applicant

⁶³⁹ Id at 106.

⁶⁴⁰ HC 935/89, *Ganor v Attorney General*, 44(2) PD 485.

⁶⁴¹ HC 5167/00, *Weiss v Prime Minister*, 55(2) PD 455.

⁶⁴² Barak at 107.

⁶⁴³ HC 453/94, *Israel Women’s Network v Gov’t of Israel*, 48(5) PD 501.

⁶⁴⁴ HC 6673/01, *Movement for Quality Gov’t v Minister of Transp.*; HC 932/99, *Movement for Quality Gov’t v. Chairman of Appointments Review Comm.*, 53(3) PD 769; HC 3073/99, *Movement for Quality Gov’t v. Minister of Educ.*, 44(3) P.D. 529; H.C. 6972/96, *Movement for Quality Gov’t v. Attorney General*, 51(2) PD 757; HC 2533/77, *Movement for Quality Gov’t v Gov’t of Israel*, 51(3) P.D. 46.

⁶⁴⁵ Barak at 108.

⁶⁴⁶ HC Misc Appl 39 of 2001 (Uganda) (unreported) at 5-6.

organisation filed suit complaining that second-hand smoke due to public smoking violated non-smokers' rights to life and a clean and healthy environment. The respondents contested the organisation's standing, claiming that "the applicant cannot claim to represent the Ugandan Public".⁶⁴⁷ The Court noted that "Article 50 of the Constitution does not require that the applicant must have the same interest as the parties he or she seeks to represent or for whose benefit the action is brought".⁶⁴⁸ It further observed that Article 50(2) expressly permits an organisation such as the Environmental Action Network to file a case to enforce another's human rights. Citing to cases from Uganda and foreign jurisdictions holding that an organisation has standing to sue on a third party's behalf even if its own interests were not infringed, the Court recognised the applicant's *locus standi*.

In another case, *Batu Ltd v TEAN*, the High Court implicitly recognised standing on behalf of the public interest and class action mechanisms as well, finding that the only difference between the South African provisions (Section 38 of the South African Constitution) and the Ugandan provision (Article 50(2) of the Ugandan Constitution) is "that the former is detailed and the latter is not".⁶⁴⁹

Despite the imperative language of Article 50(2), in *Kukungwe Issa & 4 Others v Standard Bank & 3 Others*,⁶⁵⁰ the Commercial Court stated that the question of whether to recognise public interest standing is a matter of judicial discretion. Four members of Parliament "filed an action seeking to restrain the sale of what they believed to be public property". The Court held that it should exercise its discretion to permit public interest standing where the applicant has shown that he or she is a Ugandan citizen, that the applicant has a "sufficient interest" in the matter and is not a "mere busybody", that the issues raised have "sufficient public importance", and that the issues involve a "high constitutional principle". The applicant must also show what it has done "to protect and preserve the matter at stake" and that these attempts have proven fruitless.⁶⁵¹

In addition to Article 50(2), **Article 137(3) of the Constitution of Uganda (quoted in the box above) allows for *locus standi* on behalf of the public interest when a constitutional issue is at stake.** This provision appears to allow any person to challenge any action by a private person or the government as unconstitutional. However, Article 37(1) limits the jurisdiction of the Constitutional Court to the interpretation of the Constitution, and Courts have held that cases seeking to enforce the Constitution or gain redress for a constitutional violation must be brought under Article 50(2).⁶⁵²

⁶⁴⁷ At 7.

⁶⁴⁸ At 8.

⁶⁴⁹ *Batu Ltd v TEAN*, High Court Misc Application No. 27 of 2003 (Arising from Misc Application No. 70 of 2002).

⁶⁵⁰ *Kukungwe Issa & 4 Others v Standard Bank & 3 Others* High Court Misc Application No. 394 of 2004 and 395 of 2004.

⁶⁵¹ Philip Karugaba, "Public Interest Litigation in Uganda Practice and Procedure Shipwrecks and Seamarks" (2005), presented at Judicial Symposium for Environmental Law at 13.

⁶⁵² *Ismail Serugo v Kampala City Council*, Constitutional Appeal No 2 of 19.

10.7 Kenya

Kenyan Constitution

Enforcement of Bill of Rights

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.

Article 22

Enforcement of this Constitution

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.

Article 258

The new Constitution of Kenya, promulgated in August 2010, provides in Article 22 (quoted above) for broad *locus standi* to challenge violations of the Bill of Rights. Like the Constitution of South Africa, the Kenyan Constitution provides for standing to sue on one's own behalf, representative standing, class actions, standing on behalf of the public interest, and organisational standing. And, like Article 38 of the Constitution of South Africa, the ambit of Article 22 of the Kenyan Constitution is restricted to enforcement of the Bill of Rights.

However, Article 258 of the Kenyan Constitution (quoted above) provides identical *locus standi* in respect of cases “claiming that the Constitution has been contravened or is threatened with contravention”. Thus any individual or any of these groups or representatives can sue arguing that a law or action of the government or a private party violates the Constitution without establishing that any particular person has been harmed.

Even before the advent of the new Constitution, the Kenyan courts had expanded *locus standi* to permit representative standing. In *Priscilla Nyokabi Kanyua v Attorney General and another*,⁶⁵³ for example, the plaintiff challenged the Interim Independent Electoral Commission's exclusion of prisoners from the voter roles for the referendum on the new Constitution, but did not allege that her own constitutional rights had been violated. The High Court noted that that *locus standi* traditionally required a legal interest in the subject matter before the Court, and thus had “shackled public law litigants”. An earlier Kenyan case,⁶⁵⁴ however, had established that “what gives *locus standi* is a minimal personal interest and such

⁶⁵³ *Priscilla Nyokabi Kanyua v Attorney General and another* [2010] eKLR.

⁶⁵⁴ *Albert Ruturi & Another v. Minister for Finance and Others*, (2002) 1 K.L.R. 61 (Kenya).

interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population”. Further, individuals who are “unsophisticated and indigent” may not be able to enforce their own rights, and therefore a representative should have standing to sue on their behalf. The Court consequently granted the plaintiff standing.

10.8 Tanzania

In *Mtikila v Attorney General*,⁶⁵⁵ the Tanzanian High Court held: “In matters of public interest litigation this Court will not deny standing to a genuine and bona fide litigant even where he has no personal interest in the matter ... standing will be granted on the basis of public interest litigation where the petition is *bona fide* and evidently for the public good and where the Court can provide an effective remedy”. In reaching this conclusion, the Court considered the particular conditions of the country, including the history of one-party politics and repression.⁶⁵⁶ It concluded:

Given all these circumstances, if there should spring up a public-spirited individual and seek the Court’s intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing.⁶⁵⁷

10.9 Chile

Chilean law recognises the *accion de amparo*, ie, an action to enforce constitutional rights. A plaintiff alleging that a constitutional right has been violated may go directly to a court to enforce the right. In Chile, environmental lawyers have used the *accion de amparo* to determine the features and boundaries of the environmental guarantees in the country’s constitution.⁶⁵⁸ In the *Trillium* case,⁶⁵⁹ for example, the Court recognised standing to enforce environmental rights. The plaintiffs challenged a decision by the National Commission on the Environment (CONAMA) to approve the environmental report of a forestry project despite the negative recommendation of its regional technical committee. The majority of the Supreme Court of Chile recognised their standing, reasoning that because all Chilean citizens shared the right to a healthy environment, any Chilean could sue to protect the environment even if he or she had not suffered injury.⁶⁶⁰

10.10 Argentina

Argentinean courts have recognised *accion difusas* (diffuse, or people’s, legal actions). The basis of the *accion difusas* is Article 33 of the Constitution, which protects human rights, and the principles of Roman Law, which state that all citizens have duties to protect the “*dominio público*” (public domain). In 1981, Dr Alberto Kattan, a noted public interest lawyer, first attempted to use this theory of standing in a case filed to protect penguins. Although he initially failed, he was granted standing to sue the government in a later case challenging a permit authorising the hunting and capture of dolphins. He later brought suits for historical preservation,

⁶⁵⁵ Civ Case No 5 of 1993.

⁶⁵⁶ John E. Bonine, Lecture “Standing to Sue: The First Step in Access to Justice” (1999) at 9.

⁶⁵⁷ Civ Case No 5 of 1993.

⁶⁵⁸ Oliver A Houck, “A Case of Sustainable Development: The River God and the Forest at the End of the World,” 44 *Tulsa Law Review* 275 (2008) at 305-306; James R May & Erin Daly, “Vindicating Fundamental Environmental Rights Worldwide,” 11 *Oregon Review of International Law* 365 (2009) at 392-93.

⁶⁵⁹ *Trillium Case*, Decision No. 2.732-96, at 8, Supreme Court, 19 March 1997 (Chile), available at www.elaw.org/node/1310.

⁶⁶⁰ The dissent disagreed, contending that the plaintiffs lacked *locus standi* because they had only a “diffuse interest”, common to all, part of living in modern society, and no excuse for opening the courthouse door”.

banning Agent Orange, prohibiting tobacco advertising on the grounds that tobacco is a toxic substance, and prohibiting sales of pharmaceuticals in Argentina that are prohibited in their country of origin.⁶⁶¹

10.11 United States

Although the United States Constitution grants broader individual standing than Namibian law, the United States nonetheless requires that a person suffer a particularised injury different from the rest of society before he or she may approach the courts.⁶⁶² It therefore does not permit representative standing; ratepayer standing; standing to sue on behalf of the public interest; or organisational standing, although organisations may sue to protect their own interests. **Class actions, however, are permitted.**

Federal Rule of Civil Procedure 23 governs class actions. **Rule 23(a) establishes four criteria for all class actions:**

- (1) the class is so **numerous** that joinder of all members is impracticable;
- (2) there are **questions of law or fact common to the class**;
- (3) the **claims or defences of the representative parties are typical** of the claims or defences of the class; and
- (4) the **representative parties will fairly and adequately protect the interests of the class.**⁶⁶³

All members of the class must have *locus standi*.

In addition to meeting the requirements of Rule 23(a), **a class action may only be maintained if it fits into one of three categories.**

In the first category, individual actions would risk obtaining “inconsistent or varying adjudications” that would establish “incompatible standards of conduct” for the party opposing the class, or the determination of one class member’s claim would effectively dispose of other class members rights or impair their ability to protect their interests.⁶⁶⁴

Class actions in this category are tried together to ensure that a party’s legal rights are not lost or compromised due to separate actions. Consider, for example, an instance where an industrial process in a factory made workers sick. If the workers sued separately, the factory could be ordered in one case to install new technology to make the process safer and in another to use an entirely different process. It could not possibly comply with both orders, therefore the workers’ claims should be tried as a class. Alternatively, consider various survivors of an airplane crash suing the airline, alleging that the airline’s negligence caused the crash. If one survivor or his family sued and lost on the issue of whether the airline was at fault, it would substantially impede the ability of other survivors or their families to sue successfully.

⁶⁶¹ John E. Bonine, Lecture “Standing to Sue: The First Step in Access to Justice” (1999) at 5-6; John E. Bonine, “Public Interest Environmental Lawyers: Global Examples and Personal Reflections,” 10 *Widener L. Rev.* 451 (2004) at 468, 472. See *Kattan v Federal State (Secretary of Agriculture)* (1983) (the dolphin case).

⁶⁶² The following criteria are required to establish standing to sue in the United States:

[T]he plaintiff must have suffered an “injury in fact” – an invasion of a legally-protected interest which is (a) concrete and particularized and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely “speculative”, that the injury will be redressed by a favourable decision.

Lujan v Defenders of Wildlife 504 US 555 (1992) at 561 (internal quotations and citations omitted).

⁶⁶³ Federal Rule of Civil Procedure 23(a) (emphasis added).

⁶⁶⁴ Federal Rule of Civil Procedure 23(b)(1).

In the second category of class action, “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole”.⁶⁶⁵ For example, in *Wal-Mart Stores, Inc v Dukes*⁶⁶⁶ Justice Scalia writing for a unanimous Court held that “one possible reading of this provision is that it applies only to requests for such injunctive or declaratory relief and does not authorise the class certification of monetary claims at all”.⁶⁶⁷ However, the Court declined to apply that interpretation and went on to note that “the key to the (b)(2) class is the [indivisible] nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all the class members or as to none of them”.⁶⁶⁸ In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgement would provide relief to each member of the class. It does not authorise class certification when each class member would be entitled to an individualised award of monetary damages.

The third category requires both that shared or common questions of law or fact “predominate over any questions affecting only individual members” and that the class action mechanism is “superior to other available methods for fairly and efficiently adjudicating the controversy”. Issues relevant to determining these questions include:

(A) the class members’ interests in individually controlling the prosecution or defence of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.⁶⁶⁹

This third category does not require that the class members all assert identical claims, issues, or defences, but only that they share common questions of law or fact. Consider a case in which several large corporations who all sold milk conspired to lessen competition at the market place. Plaintiffs might include both competitors and purchasers of milk, who would assert different claims. Yet their cases would share the common question of whether the defendants had engaged in the conspiracy.

Unlike in the case of joinder, class members participate in the litigation exclusively through the actions of the representative party, subject to their right to opt out or adjudicate individual issues.⁶⁷⁰ **Thus a class member will normally be bound by the judgment.**⁶⁷¹ **However, an absentee class member will not be bound if he or she can demonstrate that this would violate his or her constitutional right not to be deprived of property without due process of law.** Therefore a class member will not be bound if he or she can demonstrate the

⁶⁶⁵ Federal Rule of Civil Procedure 23(b)(2).

⁶⁶⁶ *Wal-Mart Stores, Inc v Dukes* (2011) 603 F. 3d 571, 131 S. Ct. at 2557 (2011). In this case, three current or former Wal-Mart employees sought to be representatives of a class of approximately 1.5 million women in a lawsuit alleging that Wal-Mart discriminated against them on the basis of their sex by denying them promotions and equal pay. The Supreme Court (reversing the judgment of the Court of Appeals) held that the certification of the class under Rule 23(b)(2) was improper because the case included claims for backpay. The Court held that claims for monetary relief may not be certified under Rule 23(b)(2) “where the monetary relief is not incidental to the injunctive or declaratory relief”. The Court held that Rule 23(b)(2) does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant or when each class member would be entitled to an individualized award of monetary damages.

⁶⁶⁷ At 2557.

⁶⁶⁸ Ibid.

⁶⁶⁹ Federal Rule of Civil Procedure 23(b)(3).

⁶⁷⁰ Charles Alan Wright et al, *Federal Practice & Procedure*, § 1789.1 “Effect of a Judgment in a Class Action – Constitutional Requirements”.

⁶⁷¹ Id, citing *National Treasury Employees Union* 990 F.2d 1271 (DC Cir. 1993) at 1283; *Keene v US* 81 FRD 653 (DWWa) at 659.

representation of the class was inadequate⁶⁷² or that the class representative failed to give adequate notice.⁶⁷³ A class member will not be bound by a judgment, for example, if the notice received failed to notify the plaintiff that claims like his or hers were being tried.⁶⁷⁴ The requirements in Rule 23 are designed to meet these constitutional standards.⁶⁷⁵

In order for a class action to proceed, the class must first be certified by the court as meeting the criteria just described. A certification order must define the class and its “claims, issues, or defences”, and appoint class counsel.⁶⁷⁶ The court must determine whether to certify the class at “an early practicable time after a person sues or is sued as a class representative”.⁶⁷⁷ A certification order or denial of certification may be appealed.⁶⁷⁸ A class may be divided into subclasses, and “an action may be brought or maintained as a class action with respect to particular issues”.⁶⁷⁹

For the first two categories of class actions, the court may “direct appropriate notice” to class members, leaving significant discretion to the court.⁶⁸⁰ With respect to the third category, however, the court must provide “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort”. The notice must state “in plain, easily understood language”:

(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defences; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).⁶⁸¹

The requirements for class action judgments similarly split along categorical lines. With respect to the first two categories, the judgment must “include and describe” the class members.⁶⁸² For the third category, the judgment must specify the people to whom notice was directed, “who have not requested exclusion, and whom the court finds to be class members”.⁶⁸³

The court has extensive discretion to issue orders regarding how the action is conducted. It may issue orders that “determine the course of proceedings,” particularly to prevent repetition or needless complication and may require notice at any stage of the “proposed extent of the judgment,” or of the opportunity to participate in the action.⁶⁸⁴ The court may also “impose conditions on the representative parties or on intervenors”; “require that the pleadings be amended to eliminate allegations about representation of absent persons”; and, generally, deal with procedural matters.⁶⁸⁵

⁶⁷² See, eg, *Hesse v Sprint Corp.* 598 F.3d 581 (9th Cir. 2010); *Pelt v Utah* 539 F.3d 1271 (10th Cir. 2008) at 1284.

⁶⁷³ See, eg, *Crawford v Honig* 37 F.3d 485 (9th Cir. 1994); *Anderson v John Morrell & Co.* 830 F.2d 872 (8th Cir. 1987); *Wright v Collins*, 766 F.2d 841 (4th Cir. 1985).

⁶⁷⁴ *Twigg v Sears, Roebuck & Co.* 153 F.3d 1222 (11th Cir. 1998).

⁶⁷⁵ Charles Alan Wright et al, *Federal Practice & Procedure*, § 1789.1 “Effect of a Judgment in a Class Action – Constitutional Requirements.”

⁶⁷⁶ Federal Rule of Civil Procedure 23(c)(1)(B). “An order that grants or denies class certification may be altered or amended before final judgment.”

⁶⁷⁷ Rule 23(c)(1)(A).

⁶⁷⁸ Rule 23(f).

⁶⁷⁹ Rule 23(c)(4)-(5).

⁶⁸⁰ Rule 23(c)(2)(A).

⁶⁸¹ Rule 23(c)(2)(B).

⁶⁸² Rule 23(c)(3)(A).

⁶⁸³ Rule 23(c)(3)(B).

⁶⁸⁴ Rule 23(d)(1)(A)-(B).

⁶⁸⁵ Rule 23(d)(1)(C)-(E).

Settlement, voluntary dismissal or compromise of a class action that will bind class members requires court approval, which will only be granted after a hearing and a finding that the agreement is “fair, reasonable, and adequate”.⁶⁸⁶ **Class members have the right to object.**⁶⁸⁷

The court must also direct “reasonable notice” to class members who would be bound by the proposal.⁶⁸⁸ The parties seeking approval must notify the court of any agreement made in conjunction with the proposal;⁶⁸⁹ this requirement presumably attempts to protect against representative parties’ settling the class action unfavourably to the class in exchange for a pay-off or other personal benefit. For the third category of class actions, the court may permit class members a second opportunity to opt out before approving the settlement, voluntary dismissal, or compromise.⁶⁹⁰

The court must appoint class counsel, unless an applicable statute provides otherwise.⁶⁹¹ Class counsel has a duty to fairly and adequately represent the interests of the class.⁶⁹² In determining and appointing class counsel, the court must consider –

- (i) the work counsel has done in identifying or investigating potential claims in the action;
- (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.⁶⁹³

It may also consider other issues relevant to “counsel’s ability to fairly and adequately represent the interests of the class”; order potential class counsel to provide relevant information and “propose terms for attorney’s fees and nontaxable costs”; include orders regarding attorney’s fees and nontaxable costs; and make further related orders.⁶⁹⁴ If more than one person meeting the requirements applies to be class counsel, “the court must appoint the applicant best able to represent the interests of the class”. The court may also appoint an interim class counsel to act in the putative class’s interests before it has determined whether to certify the class.⁶⁹⁵

10.12 Ontario

In Ontario, class actions are governed by the Class Proceedings Act 1992. This statute allows a member of a plaintiff class to commence proceedings on behalf of that class; it also permits a defendant to multiple proceedings, or any party to a proceeding against multiple defendants, to file motions asking for an order certifying the opposing parties as a class and appointing a class representative.⁶⁹⁶ Thus a corporation being sued by multiple individuals for selling a defective product that injured the plaintiffs could file a motion to have all the cases against it consolidated into a single class action.

As in the United States, a court must certify the class. The court shall certify the class if the pleadings or notice of application state a cause of action; two or more persons would be members of the class; the class members’ claims or defences “raise common issues”; a class action would be the “preferable procedure for resolution of the common issues”; and the class

⁶⁸⁶ Rule 23(e)(2).

⁶⁸⁷ Rule 23(e)(5).

⁶⁸⁸ Rule 23(e)(1).

⁶⁸⁹ Rule 23(e)(3).

⁶⁹⁰ Rule 23(e)(4).

⁶⁹¹ Rule 23(g).

⁶⁹² Rule 23(g)(2), (4).

⁶⁹³ Rule 23(g)(1)(A).

⁶⁹⁴ Rule 23(g)(1)(B)-(E).

⁶⁹⁵ Rule 23(g)(3).

⁶⁹⁶ Class Proceedings Act, 1992, SO 1992, c 6, section 2-4.

representative can “fairly and adequately represent the interests of the class”, has a plan that demonstrates a “workable method of advancing the proceeding” and notifying class members, and does not have a conflict of interest with other class members on common issues.⁶⁹⁷ The Act defines “common issues” to include common, though not necessarily identical, questions of fact or law.⁶⁹⁸ However, if a subclass shares common issues that are not shared with the rest of the class and the court considers that they must be separately represented in order to protect their interests, the court will require an adequate representative for the subclass.⁶⁹⁹ Parties to a motion for certification must file affidavits providing their best information about the number of members of the class.⁷⁰⁰ The Act also expressly provides that “[a]n order certifying a class proceeding is not a determination of the merits of the proceeding”.⁷⁰¹

The certification order must “describe the class”; identify the representative parties; state the claims and defences the class asserts; identify the relief the class seeks; state the class’s common issues; and state both the manner in which prospective class members may opt out of the class and the date by which they will be required to do so.⁷⁰² If the court has certified a subclass, then the certification order must meet these same criteria with respect to the subclass.⁷⁰³ The court may amend the certification order on a party or class member’s motion.⁷⁰⁴ If these criteria for certification have not been met, the court may, on a party’s motion, amend the certification order, decertify the class or make “any other order it considers appropriate”.⁷⁰⁵

Although a court may refuse to certify a class because the class fails to meet these criteria, the Act proscribes the court from refusing to certify for certain particular reasons. A court may not refuse certification “solely” because relief in a claim for damages would require individual assessment; because the “relief claimed relates to separate contracts involving different class member”; because different class members seek different remedies; because the parties do not know the number or identity of class members; or because there is a subclass.⁷⁰⁶

If the court refuses to certify the action as a class proceeding, it may nonetheless permit the actions to continue.⁷⁰⁷

The court has broad powers to manage the class action. It “may make any order it considers appropriate” and “impose such terms on the parties as it considers appropriate”.⁷⁰⁸ Under the Act, however, issues common to a class or subclass must be determined together, while separate issues shall be determined separately.⁷⁰⁹

The court has discretion to permit individual class members to participate in order to ensure the fair and adequate representation of the class’s interests or for “any other appropriate reason”.⁷¹⁰ Class members, however, do not seem to have the right to participate individually if the court

⁶⁹⁷ Id at section 5(1).

⁶⁹⁸ Id at section 1.

⁶⁹⁹ Id at section 5(2).

⁷⁰⁰ Id at section 5(3).

⁷⁰¹ Id at section 5(5).

⁷⁰² Id at section 8(1).

⁷⁰³ Id at section 8(2).

⁷⁰⁴ Id at section 8(3).

⁷⁰⁵ Id at section 10(1).

⁷⁰⁶ Id at section 6.

⁷⁰⁷ Id at section 7.

⁷⁰⁸ Id at section 12. It may also stay a proceeding related to the class action “on such terms as it considers appropriate.” Id at section 13.

⁷⁰⁹ Id at section 11.

⁷¹⁰ Id at section 14(1).

does not permit them to do so. The court has the power to decide the manner and terms, including the terms as to cost, of class member participation.⁷¹¹

The representative party must notify other class members of the class proceedings.⁷¹² The court must make an order setting out the requirements of notice after considering cost; the relief sought; the size of class members' individual claims; where class members reside; and "any other relevant matter".⁷¹³ If the court considers it appropriate to dispense with notice, it may do so.⁷¹⁴ Further, the court may order any party to provide notice at any time "to protect the interests of any class member or party or to ensure the fair conduct of the proceeding".⁷¹⁵ Any form of notice required under the act must be approved by the court.⁷¹⁶

In order to meet the requirements of the Act, the notice must include specific information. It must include the names and addresses of the representative parties, a description of the proceeding, and the relief claimed.⁷¹⁷ It must state the manner in which a class member may opt out of the proceeding and the time by which he or she must do so.⁷¹⁸ It must explain that the judgment in the case would bind class members and "describe the right of any class member to participate in the proceeding".⁷¹⁹ It must also explain the potential financial consequences of the proceeding; summarise any agreement between the representative parties and their attorneys with respect to fees and costs; describe any counterclaims including the relief sought; and provide an address where class members may inquire about the proceedings – as well as any other information considered appropriate by the court.⁷²⁰

Additional rules apply if individual issues must be individually adjudicated.⁷²¹

The Act expressly provides that the court may determine "the aggregate or a part of a defendant's liability to class members and give judgment accordingly" if three criteria are met – monetary relief is claimed on behalf of some or all class members, all issues of fact and law other than those relevant to monetary relief have been determined, and the liability to the class members can "reasonably be determined without proof by individual class members".⁷²² The court may also apply this provision such that individual class members can share the award "on an average or proportional basis" if it would be impractical or inefficient to determine the award to the class members on an individualised basis.⁷²³

The Act also provides procedures and time limits for apportioning the defendant's liability. If any portion remains undistributed after a set time, the court may order that the residue "be

⁷¹¹ Id at section 14(2).

⁷¹² Id at section 17(1).

⁷¹³ Id at section 17(3).

⁷¹⁴ Id at section 17(2).

⁷¹⁵ Id at section 19.

⁷¹⁶ Id at section 20.

⁷¹⁷ Id at section 17(6)(a).

⁷¹⁸ Id at section 17(6)(b).

⁷¹⁹ Id at section 17(6)(f)-(g).

⁷²⁰ Id at section 17(6)(c)-(e), (h)-(i).

⁷²¹ After the common issues have been decided in favour of the class, if individual class members still need to resolve individual issues, the representative parties must notify those class members. The rules regarding the content of the notice order and the means of delivery of the notice apply to notice to class members regarding individual issues. The notice must inform the class member that common issues have been decided in the class's favour and that he or she may be entitled to further individual relief. It must also explain how to establish an individual claim; inform the individual that failure to follow these steps will mean that he or she may not assert an individual claim except with the leave of the court; provide an address to which the class member may direct enquiries; and provide any other information the court considers appropriate. Id at section 18.

⁷²² Id at section 24(1).

⁷²³ Id at section 24(2)-(3).

applied in any manner that may reasonably be expected to benefit class members” if it is satisfied that a “reasonable number of class members who would not otherwise receive monetary relief would benefit from the order”.⁷²⁴ It may make such an order even if the order also benefits people who are not members of the class or people “who may otherwise receive monetary relief as a result of the class proceeding”.⁷²⁵ The court may order an award for the aggregate, or part, of the defendant’s liability to the benefit of individual class members either “in a lump sum, forthwith or within a time set by the court” or “in instalments, on such terms as the court considers appropriate”.⁷²⁶

Judgments on issues common to the class must identify the common issues; name or describe the class members; state common claims or defences; and specify the relief.⁷²⁷ **The judgment binds class members who have not opted out with respect to the common issues, claims or defences, and relief identified in the certification order.**⁷²⁸ It does not bind a person who has opted out of the class proceeding.⁷²⁹

The Act provides for various avenues of appeal by representative parties or class members. In general, a representative party has the right to appeal court orders in a class action. The Act also expressly provides that a representative party may appeal from an order certifying, refusing to certify or decertifying a class.⁷³⁰ If a representative party does not appeal or seek leave to appeal under these provisions, a class member may make a motion to the court asking to act as a class representative in order to appeal.⁷³¹ Any party may appeal from a judgment on common issues or from an order regarding aggregate assessment on common issues.⁷³² If a representative party does not appeal, a class member may ask the Court of Appeal for leave to act as a representative party for the purposes of filing such appeals.⁷³³

An agreement between an attorney and a representative party regarding fees and disbursements must be in writing and be approved by the court. The agreement must (a) state the terms under which fees and disbursements will be owed; (b) estimate the expected fee; and (c) state the method by which payment shall be made.⁷³⁴ It is enforceable only if approved by the court on the attorney’s motion.⁷³⁵ If no agreement is approved by the court, the court will determine the amount owing.⁷³⁶ The Act also permits contingency fee agreements in class actions.⁷³⁷

⁷²⁴ Id at section 26(4). The Court may make such an order regardless of whether all class members can be identified and whether the exact amount of their shares can be determined. Id at section 26(5). In contrast “[a]ny part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court”. Id at section 26(10).

⁷²⁵ Id at section 26(6).

⁷²⁶ Id at section 26(8).

⁷²⁷ Id at section 27(1).

⁷²⁸ Id at section 27(3).

⁷²⁹ Id at section 27(2).

⁷³⁰ Id at section 30(1)-(2).

⁷³¹ Id at section 30(4).

⁷³² Id at section 30(3).

⁷³³ Id at section 30(5). Various rules also permit and apply to appeals from individual awards. See id at section 30(6)-(11).

⁷³⁴ Id at section 32(1).

⁷³⁵ Id at section 32(2). “Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.” Id at section 32(3).

⁷³⁶ Id at section 32(4).

⁷³⁷ Id at section 33(1).

10.13 Zimbabwe

Constitution of Zimbabwe

Enforcement of protective provisions

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

Article 24(1)

Draft Constitution of Zimbabwe Constitutional Select Committee (COPAC) 19 July 2012

Enforcement of rights

- (1) Any of the following persons, namely –
 - (a) anyone acting in their own interests;
 - (b) anyone acting on behalf of another person who cannot act for themselves;
 - (c) anyone acting as a member, or in the interests, of a group or class of persons;
 - (d) anyone acting in the public interest;
 - (e) any association acting in the interests of its members;is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed and the court may grant appropriate relief, including a declaration of rights and an award of compensation.
- (2) The fact that a person has contravened a law does not debar him or her from approaching a court for relief under subsection (1).
- (3) The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1) and those rules must ensure that –
 - (a) the right approach the court under subsection (1) is fully facilitated;
 - (b) formalities relating to the proceedings, including their commencement, are kept to the minimum;
 - (c) no fee may be charged for commencing the proceedings;
 - (d) the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities; and
 - (e) a person with particular expertise may, with the leave of the court, appear as a friend of the court.
- (4) The absence of rules referred to in subsection (3) does not limit the right to commence proceedings under subsection (1) and to have the case heard and determined by a court.

Article 4.37

Article 24(1) of the current Zimbabwe Constitution gives a person standing to approach the Supreme Court to seek redress for a contravention of the Declaration of Rights, in a situation where a right has been, is being or is likely to be contravened in relation to himself or herself – with an exception to cover cases brought on behalf of a person who is detained. The Supreme Court has held that this provision does not give a person the right to approach the Supreme Court “either on behalf of the general public or anyone else. The applicant must be able

to show a likelihood of itself being affected by the law impugned before it can invoke a constitutional right to invalidate that law.”⁷³⁸

The 1993 case of *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and others* appeared to signal broadening interpretation of this Article. In this case, the Supreme Court allowed a human rights organisation to challenge the constitutionality of the death sentence. The Court noted that the organisation’s “avowed objects” were “to uphold human rights, including the most fundamental right of all, the right to life”, and that it was “intimately concerned with the protection and preservation of the rights and freedoms granted to persons in Zimbabwe by the Constitution”. It also noted that the submission it made was not frivolous and concerns a question of constitutional rights. These factors appeared to persuade the Court that the organisation was an appropriate body to assert the claim in question, and it concluded that it would be wrong for the Court “to fetter itself by pedantically circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves; especially as they are not only indigent but, by reason of their confinement, would have experienced practical difficulty in timeously obtaining interim relief from this Court”.⁷³⁹ However, in a subsequent case, the Supreme Court clarified that “the concession was made on the basis that the people, on whose behalf the application was made, were in custody”.⁷⁴⁰

In *Retrofit (Pvt) Ltd v PTC and another*,⁷⁴¹ a company asserted *locus standi* to litigate a case concerning freedom of expression, which was allegedly being hampered by shortcomings in the nation’s landline telephone service and the absence of a mobile cellular telephone service. The Court held that the litigant had no right to assert a constitutional challenge on behalf of the general public or anyone else, but nevertheless had *locus standi* on the basis that the challenged monopoly hinder the freedom of expression of everyone, including the company which sought to bring the application.⁷⁴² Thus, this case did not really expand constitutional standing.

The 2006 case of *Law Society of Zimbabwe v Minister of Justice Legal and Parliamentary Affairs and another* surveyed the jurisprudence on Article 24(1) and summarised the position as follows:

Locus standi to bring a constitutional application to the Supreme Court in the first instance must be found within the four corners of s 24 of the Constitution. It is not sufficient to simply establish that the applicant has an interest in the matter. The applicant has to go further and establish that the Declaration of Rights has been or is likely to be contravened in respect to itself.⁷⁴³

The Supreme Court has noted that standing to approach the Supreme Court under Article 24 is actually narrower than ordinary common law standing, stating that “[i]n a constitutional application in the High Court all that a litigant is required to show to establish *locus standi* is a substantial interest in a matter”.⁷⁴⁴

⁷³⁸ *United Parties v Minister of Justice, Legal and Parliamentary Affairs and others* 1997 (2) ZLR 254 (S) at 258 B-E.

⁷³⁹ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and others* 1993(4) SA 239 (ZS) at 246H-247A (Gubbay CJ), citing *Deary NO v Acting President and others* 1979 RLR 200 (GD) at 203A-D. The four condemned prisoners whose lives were at stake had in any even joined in the application by this stage of the proceedings.

⁷⁴⁰ *Law Society of Zimbabwe v Minister of Justice Legal and Parliamentary Affairs and another* (50/0) [2006] ZWSC 16; SC16/06 (11 July 2006) (unpaginated).

⁷⁴¹ *Retrofit (Pvt) Ltd V Ptc and another* 1996 (1) SA 847 (ZS).

⁷⁴² At 854A-855E.

⁷⁴³ *Ibid.* See also *Movement for Democratic Change v Minister of Justice, Legal and Parliamentary Affairs* (124/07) [2007] ZWSC 88 (26 September 2007).

⁷⁴⁴ *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe and others* (162/2001) [2003] ZWSC 65; SC128/02 (25 September 2003) at text following note 2.

Standing to assert a violation of fundamental constitutional rights is set to be expanded substantially if the relevant provision in the Draft Constitution is enacted as it stands in 2012. This provision, Article 4.37 (quoted in the box above), appears to be modelled on the analogous South African provision and would thus apply a wide range of forms of public interest standing. It would, moreover, explicitly remove the concept of “dirty hands” as a bar to constitutional litigation, by stating that “[t]he fact that a person has contravened a law does not debar him or her from approaching a court for relief ...”.⁷⁴⁵

Zimbabwe allows class actions in terms of the Class Actions Act 10 of 1999, which bears many similarities to the bill proposed in 1998 by the South African Law Reform Commission (discussed above).⁷⁴⁶ In one current example of the use of this mechanism, a group of married women led the Zimbabwe Women Lawyers Association, have initiated a class action challenging a procedure that compels them to adopt their husbands’ surnames as a precondition to acquiring official documents such as passports, or registering the birth of their children – despite the fact that Zimbabwean marriage law allows married women to keep their own surnames if they wish.⁷⁴⁷

One interesting innovation in the Zimbabwe law is the establishment of a Class Action Fund designed “to provide financial assistance in the form of grants of funds towards expenses, or as security for costs, to persons who intend instituting class actions”.⁷⁴⁸ The Fund’s assets come from reimbursements or payments from successful class action plaintiffs as well as government funding or private donations.⁷⁴⁹

11. Criticisms of public interest standing

Despite the wide use of various forms of public interest standing across a variety of jurisdictions and legal systems, it nonetheless has its critics. In particular, critics argue that permitting any form of public interest standing inevitably leads to policy-making by judges, which lies outside both the institutional competence and the constitutional purview of the judiciary. Furthermore, many fear that permitting “mere busybodies” to institute actions would flood the courts with frivolous litigation and compromise the autonomy of potential parties who chose not to sue. Critics also argue that private law litigants will present the best, most effective arguments and provide necessary concrete, particularised facts. Experience from foreign jurisdictions, however, demonstrates that some of these criticisms are spurious, and the examples of other jurisdictions can instruct Namibia on how to shape procedural rules on public interest standing in order to negate or minimise potential deleterious effects. Key criticisms and their counter-arguments will be explored one by one in this section.

Judicial policy-making

Critics have argued that public interest litigation inevitably entails judicial policy-making, which lies outside the courts’ constitutional function and violates the separation of powers.

In India, for example, legislators have charged the courts with “judicial over-activism” and “judicial despotism”, contending that “[t]hrough Public Interest Litigation, the courts can decide

⁷⁴⁵ Zimbabwe Constitution, Article 4.37(2).

⁷⁴⁶ See *Petho v Minister of Home Affairs, Zimbabwe, and Another* 2003 (3) SA 131 (ZS) for an example of its application.

⁷⁴⁷ “Zimbabwe women begin class action over enforced name change”, *LegalBrief Today*, 1 December 2012, accessed at www.legalbrief.co.za/article.php?story=20030925122719999.

⁷⁴⁸ Class Actions Act 10 of 1999, section 14(2).

⁷⁴⁹ Id at section 15.

anything under the Sun ... So, judicial activism has gone to such an extent that they are always interfering in the functioning of this House.”⁷⁵⁰ Indian critics have argued that even if the executive or legislature fail to fulfil their constitutional duties, this does not justify courts in overstepping their judicial roles:

If one organ fails, it does not give license to another organ to take over. If the Judiciary fails, will it give a license to Parliament tomorrow to issue judgments or will the Executive tomorrow go and sit on the Bench or come here to Parliament to pass Bills? ... You cannot upset the entire scheme of things which has been set by the founding fathers of our Constitution.⁷⁵¹

In particular, judicial policymaking also raises antidemocratic concerns. In most jurisdictions, judges are not elected and therefore should not be setting policy in the place of democratically elected leaders.⁷⁵² Indeed, public interest litigation raises the possibility that judges will replace democratically legitimate legislation with policies based on their personal viewpoints or theories.⁷⁵³

It is also argued that judges lack the capacity to weigh competing interests and make complex policy decisions. This alleged incapacity can take two forms. Judges may ostensibly lack the training, competence, and expertise to make broad-based policy decisions. Furthermore, the very nature of litigation may restrict judicial ability to craft policy. In litigation, judges consider only a few issues in a restricted factual context. They may not have the opportunity to consider the variety of interests, projects, and groups that must be balanced when, for example, a legislature sets a budget. Courts may therefore craft policies based on incomplete information. In India, critics have worried that the Supreme Court will use its jurisdiction to “regulate virtually every area of life, even those already subject to legislation”.⁷⁵⁴ The “logical extension could mean the taking over of the total administration of the country from the executive by the Court”.⁷⁵⁵

One scholar argues that judicial criticism of the executive and legislative branches can prevent, rather than encourage, these branches from fulfilling their constitutional obligations.

When one branch of government openly criticizes another branch, tension is created between the two. The tension is based on embarrassment and resentment and is not constructive. The Administration increasingly resents the courts because of the criticism and what it considers to be an alienation of the people. By publicly criticizing the Administration, the court reinforces the people’s distrust towards the administration.⁷⁵⁶

It is also argued that judicial encroachment on legislative and executive purview might cause the courts to lose credibility, ultimately undermining their efforts at reform.⁷⁵⁷ Policymaking “without necessary technical inputs or competence, [may result] in unsatisfactory orders that have ... passed beyond ‘judicially manageable standards’”.⁷⁵⁸ Consequently, courts may craft policies that fail to

⁷⁵⁰ Sabha Debates, Fourteenth Series, Vol. XXXI, Twelfth Session, 2007/1929 (Saka), No. 13, Dec. 3, 2007/Agrahayana 12, 1929 (Saka) (statement of Shri Varkala Radhakrishnan (Chirayinkil), quoted in Sood at 849.

⁷⁵¹ Id (statement of Shri V. Kishore Chandra S. Deo), quoted in Sood at 849-50).

⁷⁵² Sood at 847.

⁷⁵³ Arguably, however, judicial policy-crafting in the public interest context will lead to more informed policies than private law litigation: the public interest litigant is more likely to have experience with and expertise on the subject matter and will be more interested than the private litigant in presenting evidence and crafting policy, rather than indicating his or her own narrow interests.

⁷⁵⁴ See Susman at 80.

⁷⁵⁵ Shri Krishna Agrawala, *Public Interest Litigation in India* (1986), as quoted in Cassels at 513).

⁷⁵⁶ J Mijin Cha, “A Critical Examination of the Environmental Jurisprudence of the Courts of India,” 10 *Albany Law Environmental Outlook Journal* 197 (2005) at 218 (internal citation omitted)

⁷⁵⁷ Id at 210; Sood at 848; Public Interest Litigation Should Not Become Political Interest Litigation, *Times*, 28 Dec 2000.

⁷⁵⁸ Sood at 848, citing BN Srikrishna, “Skinning a Cat,” 8 *Supreme Ct Cases* (2005) at J-21.

effect the intended change, inflict unintended consequences, or worse, exacerbate the very problem the court intended to solve. Failed policymaking efforts may ‘boomerang’, undercutting the courts’ credibility and making it more difficult for them to institute future reforms.

Yet the other branches of government can limit any potential overreach. Limits on jurisdiction can help prevent courts from exceeding the judicial sphere. For example, the Canadian Supreme Court has concluded that a case must be justiciable before it is heard by the courts, thus addressing concerns that the courts may overstep their constitutionally-assigned role.⁷⁵⁹

Furthermore, substantive law limits both the rights the courts can recognise and the nature of the relief they can grant. If a US plaintiff, for example, sued a state government alleging that public schools were constitutionally required to provide a free lunch to all children, the plaintiff would lose regardless of whether he or she had standing because the US Constitution does not recognise the right to food. In contrast, the Indian Supreme Court could issue a series of orders on school feeding schemes only because the Constitution of India recognised a right to food in the first place. A court can only legitimately craft policy to implement or enforce a recognised legal right, and it must craft that policy to fit the shape and nature of the right itself. Because the legislature both grants those rights and shapes them, it has significant control over when a court can grant interdicts that shape public policy and over the nature of issues a court can justifiably address.

The legislature and executive can also prevent judicial encroachment by fulfilling their constitutionally-mandated roles. As already noted, societies need public interest litigation in large part because the Constitution places duties on the State and the State fails to fulfil those duties. Litigation gives citizens a tool to force the state to do so, but neither the litigant nor the court has created those duties: the Constitution has. Thus a court is only justified in stepping into a policy-making role if the Constitution has mandated a State duty *and* the State has failed to fulfil it. By undertaking their duties responsibly, the other branches can prevent judicial overreaching.

For example, consider the Namibian government’s obligations under Article 95 of the Constitution to “actively promote and maintain the welfare of the people by adopting ... policies” aimed at particular goals. Under Article 95(a), the State has an obligation to adopt policies aimed at “enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society,” including providing maternity and related benefits and ensuring “the implementation of the principle of non-discrimination in remuneration of men and women”. When faced with evidence that demonstrated that girls were being kept out or withdrawn from schools at significantly higher rates than boys, resulting in fewer employment opportunities and lower wages as adults, the State would have an obligation under Article 95(a) to adopt policies aimed at rectifying the inequality. Note that the State does not have an obligation to *fix* the inequality, and thus Article 95(a) does not impose an unreasonable or impossible standard on the State. The State does, however, have a duty to actively try and fix the inequality. If the State utterly failed to do so, and a court in a public interest action ordered the State to implement a policy to encourage girls to remain in school, such as providing a subsidy to families with a child in school or eliminating contributions to school development funds, it would not be infringing on the province of the

⁷⁵⁹ *Minister of Finance of Canada v Finlay* [1986] 2 SCR 607 at para 37.

State. Rather, it would be requiring the State to fulfil the duties mandated by the Constitution and abdicated by the State itself.⁷⁶⁰

Floods of litigation by “busybodies”

A second concern repeatedly raised regarding public interest litigation is that litigation will be brought by the “mere busybody,” ie someone with no genuine interest in the litigation who sues essentially to make trouble.

Courts have expressed concern that permitting public interest litigation will “open the floodgates,” overwhelming courts with such cases and preventing the proper allocation of judicial resources to private law cases.

Justice Khalid of the Indian Supreme Court has argued that public interest cases are “filed without any rhyme or reason”:

It is, therefore, necessary to lay down clear guidelines and to outline the correct parameters for entertainment of such petitions. If courts do not restrict the free flow of such cases in the name of Public Interest Litigations, the traditional litigation will suffer and the courts of law, instead of dispensing justice, will have to take upon themselves administrative and executive functions.⁷⁶¹

Delays in litigation in overwhelmed courts would hurt public interest litigants as well as private litigants.⁷⁶² Also, if informal mechanisms to approach the courts cause a flood of litigation, the informal procedures intended to help the disadvantaged may be lost; in India, for example, “due to the ballooning use of [public interest litigation], the success of public interest litigation actions is increasingly dependent upon the filing of formal writ petitions that are strategically timed and supported by robust data, comprehensive legal arguments, and a well-coordinated advocacy movement”.⁷⁶³ The days in which poorly educated litigants could easily access the courts without legal assistance through a letter, newspaper, or informal petition have ended.

However, in most jurisdictions, the flood of litigation caused by the interfering busybody seems more a figment of the imagination than a legitimate concern. Judges in judicial systems with robust public interest litigation have dismissed the concern as absurd. In *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and others*,⁷⁶⁴ Judge Pickering wrote that the “meddlesome crank and busybody with no legal interest in a matter whatsoever, mischievously intent on gaining access to the court in order to satisfy some personal caprice or obsession, is, in my view ... more often a spectral figure than a reality”.⁷⁶⁵ Discussing public interest litigation in Israel, Justice Barak wrote that “[f]ears that the court would be ‘flooded’ with frivolous lawsuits have proven groundless”.⁷⁶⁶

⁷⁶⁰ Article 101 of the Namibian Constitution states that the “principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles.” This limitation would not seem to prevent a court from requiring that the state fulfil its duty to adopt policies aimed at the stated issues.

⁷⁶¹ See Kelly D Alley, “Legal Activism and River Pollution in India,” 21 *Georgetown International Environmental Law Review* 793 (2009) at 802 (quoting from Jagga Kapur, *Preface in I Supreme Court on Public Interest Litigation* at XI).

⁷⁶² See J Mijin Cha, “A Critical Examination of the Environmental Jurisprudence of the Courts of India,” 10 *Albany Law Environmental Outlook Journal* 197 (2005) at 210, citing Rajkumar Deepak Singh, *Response of Indian Judiciary to Environmental Protection: Some Reflections*, 39 *Indiana Journal of International Law* 447 (1999) at 449, 458-59.

⁷⁶³ Sood at 885.

⁷⁶⁴ 1996 (3) SA 1095 (Tk).

⁷⁶⁵ At 1106G-H.

⁷⁶⁶ Barak at 108.

A number of scholars have agreed. For example, June Ross, considering public interest litigation in Canadian courts wrote, “No such flood has ever been pointed to by the courts, and the potential for a flood has been often doubted.”⁷⁶⁷ Similarly, Kenneth Scott, a scholar discussing possible public interest litigation in the American system, argued that the “idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the court room”.⁷⁶⁸

Moreover, public interest litigation can actually use judicial resources more efficiently than private litigation. Representative actions or class actions consolidate numerous cases with common issues and save resources by permitting coordination among plaintiffs and the pooling of information. They also permit the more efficient use of judicial resources because the court can decide the issue once for all the parties, rather than re-litigating the same issue repeatedly.⁷⁶⁹ Public interest litigation thus allows for justice at a bargain rate.

Yet permitting public interest standing will surely encourage more litigation. Indeed, permitting new forms of litigation is one of its goals. Rather than dismissing public interest standing out of hand, Namibia should recognise ways to restrict the flow to meritorious cases, gaining the benefits of public interest litigation without allowing the courts to be overburdened.

The normal costs of litigation will serve as a useful deterrent to frivolous litigants. “[T]he demands and practical costs of litigation would appear to encourage litigants initiating suit with no forethought – with no motivation to achieve a just result – to kick their habit.”⁷⁷⁰ In addition to court costs, litigants must pay their own attorneys’ fees and disbursements and risk paying those of the opposing party, not to mention investing significant time and energy researching and preparing a case.⁷⁷¹ The Canadian Supreme Court agreed in *Thorson*, and noted that the Courts could intervene to use costs to control the flood of busybodies if it were to get out of hand:

I do not think that anything is added to the reasons for denying standing, if otherwise cogent, by reference to grave inconvenience and public disorder The Courts are quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs; and as a matter of experience, *MacIlreith v Hart* [a previous case recognizing ratepayer standing] does not seem to have spawned an inordinate number of ratepayers’ actions to challenge the legality of municipal expenditures.⁷⁷²

Echoing that reasoning, Judge Reed, a trial judge of the Canadian Federal Court, once noted that she found it difficult to believe “that a host of trivial issues will be brought before the courts by public interest groups”, and pointed out “that private interest litigation is not without its fair share of triviality at times”.⁷⁷³ The South African High Court has expressed a similar confidence in its ability to control a flood of litigation, noting that if busybodies were tempted to flood the courts with frivolous or vexatious litigation, “an appropriate order of costs would soon inhibit their litigious ardour”.⁷⁷⁴

⁷⁶⁷ June Ross, “Standing in Charter Declaratory Actions” 33 *Osgood Hall Law Journal* 151 (1995) at 156.

⁷⁶⁸ Kenneth E Scott, “Standing in the Supreme Court: A Functional Analysis,” 86 *Harv. L. Rev.* 645 (1973) at 674.

⁷⁶⁹ Cf Susman at 82-84.

⁷⁷⁰ Russell Binch, “The Mere Busybody: Autonomy, Equality and Standing,” 40 *Alberta Law Review* 367 (2002) at 369; see also TA Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (1986) at 179 (“[I]t seems unlikely, given the usual disincentives to litigation, that plaintiffs would be particularly likely to rush into litigation concerning minor public wrongs but be more restrained with respect to minor private ones.”).

⁷⁷¹ Kenneth E Scott, “Standing in the Supreme Court: A Functional Analysis,” 86 *Harvard Law Review* 645 (193) at 673.

⁷⁷² [1975] 1 SCR 138 at 145.

⁷⁷³ *Grant v Canada (AG)* [1995] 1 FC 158 at 197.

⁷⁷⁴ *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and others* 1996 (3) SA 1095 (Tk) at 1106G-H.

Namibia can easily employ procedural mechanisms to limit any feared litigation flood, particularly by developing appropriate criteria for public interest standing. In Canada, the Supreme Court has held that the “judicial concern about the allocation of scarce judicial resources and the need to screen out the mere busybody [are] addressed by the requirements ... that there be a serious issue raised and that a citizen have a genuine interest in the issue”.⁷⁷⁵ Such mechanisms will screen out cases that are truly frivolous or brought by plaintiffs who cannot competently represent the interests at stake, whilst permitting legitimate challenges to unconstitutional or illegal actions by publicly-motivated plaintiffs. As the Supreme Court has noted, such challenges *are* “an appropriate use of scarce judicial resources”.⁷⁷⁶

Personal autonomy

Concerns about the “mere busybody” are related to worries about personal autonomy: If a person’s rights are violated, that person should have the right to decide whether or not to sue. When he or she chooses not to, litigation by a third party on his behalf – even if it is meant to be for his benefit – violates his personal autonomy: “If I have a personal interest in the dispute, a tangible stake, then I seem to have both a moral and a legal right to involve myself. It does not count as sufficient reason for either legal or moral action that I believe the action will help some person who does not want the “‘benefit’.”⁷⁷⁷ Third parties should not have the right to decide what is in someone’s best interests.

This understanding of personal autonomy, however, fails to consider the political and social realities of many Namibians. Personal autonomy arguments assume “a detached, self-sufficient, independent or atomistic individual, primarily engaged in pursuing his self-interest; a being who is fundamentally egocentric, living in competition and in fear of other individuals”.⁷⁷⁸ In other words, they assume that each person works individually to protect his own interests and is able to protect those interests successfully in practice; thus a decision not to enforce those rights is a conscious choice that should be respected. This understanding of autonomy, however, “is valid only if all members of society have the resources with which they can engage in the bargaining process”.⁷⁷⁹ **But, as courts in India, South Africa, and Canada have observed, many marginalised citizens cannot, in practice, approach the courts and are excluded from the political process due to expense, lack of education, ignorance of their rights, unfamiliarity with court systems, distance, and bias. When power imbalances prevent people from using the courts and political systems, failure to approach the courts reflects this power imbalance rather than an individual choice.**⁷⁸⁰ As a result, these foreign jurisdictions developed public interest standing in

⁷⁷⁵ [1986] 2 SCR 6077 at 38.

⁷⁷⁶ June Ross, “Public Interest Standing Takes a Back Seat,” 3 *Constitutional Forum* 100 (1991-1992) at 164.

⁷⁷⁷ Lea Brilmayer, The Jurisprudence of Article III Perspectives on the Case or Controversy Requirement,” 93 *Harvard Law Review* 297 (1979) at 313. See also the discussion in Russell Binch, “The Mere Busybody: Autonomy, Equality and Standing,” 40 *Alberta Law Review* 367 (2002) at 370-71 (citations omitted): “[T]he decision of ‘the plaintiff who is most directly and obviously interested’ should be binding on others. If A’s rights are infringed by B’s actions, and A decides not to sue, then why should we grant C standing to commence proceedings against B arising out of B’s infringement of A’s rights? Craig contends that our natural reaction would be that ‘if the person directly affected [A in our example] does not choose to challenge the act then no-one should be able to do so’; ‘there may well be cases in which the interest which the law chooses to protect are content with the situation. If this is so a stranger should not be allowed to raise a possible cause of invalidity What Craig and Cromwell appear to be implicitly acknowledging is the worth of personal autonomy, individual self-determination and critical self-definition. If the individual chooses not to sue, then a well-meaning but bothersome public interest litigant should not be allowed to take up the cause.’”

⁷⁷⁸ Russell Binch, “The Mere Busybody: Autonomy, Equality and Standing,” 40 *Alberta Law Review* 367 (2002) at 373 (internal quotation omitted).

⁷⁷⁹ *Id.* at 373.

⁷⁸⁰ *Id.* at 377. “Litigation is an expensive occupation, and few are willing to commence proceedings. Simply because some individuals have the resources to exercise their capacity for autonomous decision-making before the courts does not mean that

part to counter the socio-economic power imbalances that favoured wealthy citizens' access to the courts and excluded marginalised populations.

In jurisdictions where educational and socio-economic detriments effectively prevent marginalised populations from enforcing their rights, public interest litigation may better respect the personal autonomy of those populations. "To be an autonomous person, one must have a reasonable chance of acting on one's decisions."⁷⁸¹ If an autonomous person's rights are violated, for instance, he or she must have a legal means of enforcing those rights if he or she so chooses. In certain circumstances, acting as a member of a group is a more effective means for individuals to act on their desires.⁷⁸² If a person cannot afford to go to court as an individual when his or her rights are violated, public interest litigation may provide the only means of enforcing those rights and gaining redress.

Yet we must not dismiss the potential risks to personal autonomy out of hand. **Some represented parties may genuinely not want to participate in the litigation even when fully informed.** Further, they may understand potential negative consequences of the litigation that representative plaintiffs may not recognise. **Regulation for public interest litigation must therefore require plaintiffs to attempt to notify represented parties about the litigation and permit them to opt out if they choose.**

Further, public interest litigation can reflect the autonomy of the represented parties only if the public interest or representative plaintiff considers their desires and acts on them competently. The representative must therefore be both genuine and adequate, particularly if the class or group is bound by *res judicata*.⁷⁸³ Foreign jurisdictions have identified procedural mechanisms to ensure proper representation. In South Africa,⁷⁸⁴ Canada,⁷⁸⁵ and India,⁷⁸⁶ a litigant seeking to act in the public interest or on another's behalf must act genuinely. This requirement is designed to screen out the mere busybody. In the *Finlay* case, the Canadian Supreme Court concluded that the requirement of genuineness combined with the 'serious issue' requirement would together screen out busybodies,⁷⁸⁷ and the Indian Supreme Court has stated that it would screen out cases brought "by a person or a body of persons to satisfy his or its personal grudge and enmity".⁷⁸⁸ Similarly, in the case of representative standing, all three jurisdictions require either that the represented parties be unable to represent their own interests or there is no other reasonable and effective means of bringing the issue before the court. This requirement assumes that parties who have the capacity to file cases but do not approach the Courts have made a conscious decision that should be respected; public interest litigants will

we all have the same capacity to realize such self-direction. It cannot be said that we are realizing our true self-direction when we only have one choice, that being to decline to pursue disputes through the courts. As Raz observes, autonomy can only be exercised if the person has an 'adequate range of options.' Autonomy cannot be assumed in conditions of no, or little, choice. Inactivity, therefore, does not necessarily mean contentment. If I would litigate had my financial circumstances been other than they are, then my decision not to litigate is not determinative of the issue of the relativity of *ultra vires*. We cannot merely assume that an absence of vocal complaint can *only* mean a positive affirmation of the infringement of my interests and rights. Rather, there exists a whole host of possibilities and probabilities, resources permitting and time constraints prohibiting, that serve to question whether we should accord due respect to individual inaction in all cases." Id at 378-79 (citations omitted).

⁷⁸¹ Id at 377 (internal quotation omitted).

⁷⁸² Id at 380.

⁷⁸³ See J Mijin Cha, "A Critical Examination of the Environmental Jurisprudence of the Courts of India," 10 *Albany Law Environmental Outlook Journal* 197 (2005) at 210 ("individuals that are not public-minded may abuse the liberal standing rules and file petitions with the judiciary for personal gains.").

⁷⁸⁴ See *Lawyers for Human Rights and others v Minister of Home Affairs and another*, 2004 (4) SA 125 (CC) at para 17.

⁷⁸⁵ See *Minister of Finance of Canada v Finlay* [1986] 2 SCR 607 at para 38

⁷⁸⁶ *Subhash Kumar v. State of Bihar* 1991 1 SCR 5, 10, Writ Petition No. 381 of 1998 (Jan. 9, 1991) at 4*.

⁷⁸⁷ See *Minister of Finance of Canada v Finlay* [1986] 2 SCR 607 at para 38.

⁷⁸⁸ *Subhash Kumar v State of Bihar* 1991 1 SCR 5, 10, Writ Petition No. 381 of 1998 (Jan. 9, 1991) at 4*.

only be granted representative standing when the represented parties cannot approach the Court on their own behalf.

Representative standing will be insufficiently direct and concrete

Critics also contend that litigants with private, common law standing are best situated to litigate issues. This criticism takes two forms. **First, critics contend that a personal stake in the litigation will ensure that the plaintiff hones the best, most effective arguments for his or her case, thereby allowing the court to make the best decision;** “a court should have the benefit of the contending views of the persons most directly affected by the issue”.⁷⁸⁹ The United States Supreme Court, for example, has stated that the requirement of a “personal stake in the outcome of the controversy” exists “to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions”.⁷⁹⁰

Even if true in general, **this argument fails to address the context in which public interest litigation occurs.** A system needs public interest standing (a) to challenge the unconstitutional or unlawful behaviour of the government which no individual has common law standing to challenge or (b) to represent the interests of marginalised individuals who are unable to access the courts in practice. **The choice is therefore not between a public interest litigant and the potentially superior private law litigant. It is between permitting the public interest litigant to sue and leaving the wrongs to persist unchallenged.**⁷⁹¹

Moreover, courts can ensure the best possible arguments by requiring that the public interest litigant demonstrate a genuine interest in the issue before the court. In Canada, for example, this requirement encompasses two prerequisites: that the litigant have “an experience and expertise with respect to the underlying subject-matter of the litigation that will inform their written and oral submissions”⁷⁹² and that the litigant demonstrate “a degree of involvement with the subject-matter of the application for judicial review that is sufficient to make it an appropriate body to institute [the] proceeding”.⁷⁹³ The first prong ensures that the litigant understands the factual background and underlying issues and is capable of researching and uncovering the necessary facts and developing the best possible argument; the second guarantees that the litigant legitimately cares about the subject matter and will invest the time, energy, and money necessary to see the litigation to its completion.

The second element of the “best litigant” criticism is that litigation by a plaintiff with common law standing will necessarily include the concrete, particularised facts necessary for

⁷⁸⁹ See *Minister of Finance of Canada v Finlay* [1986] 2 SCR 607 at para at 39.

⁷⁹⁰ *Baker v Carr* 369 US 186 (1962) at 204; see also *Susman* at 77 (“While jettisoning standing as an impediment to justice, the Court has had to adjust for the loss of standing’s benefits, among them its role in honing arguments for adversarial proceedings.”).

⁷⁹¹ In *Finlay*, the Canadian Supreme Court expressed this very point: “The judicial concern that in the determination of an issue a court should have the benefit of the contending views of the persons most directly affected by the issue ... is addressed by the requirement affirmed in *Borowski* that there be no other reasonable and effective manner in which the issue may be brought before a court. In *Thorson*, *McNeil* and *Borowski* that requirement was held to be satisfied by the nature of the legislation challenged and the fact that the Attorney General had refused to institute proceedings although requested to do so. In *Borowski*, the majority and the minority differed essentially, as I read their reasons, on the question whether there was anyone with a more direct interest than the plaintiff who would be likely to challenge the legislation. Here it is quite clear from the nature of the legislation in issue that there could be no one with a more direct interest than the plaintiff in a position to challenge the statutory authority to make the federal cost-sharing payments ... I am accordingly of the view that the respondent meets the requirement that there should be no other reasonable and effective manner in which the issue of statutory authority raised by the respondent’s statement of claim may be brought before a court.” [1986] 2 SCR 607 at para 39.

⁷⁹² *Sierra Club of Canada v Canada (Minister of Finance)* [1999] 2 FC 211 at section D (2)(ii)(b) of judgement.

⁷⁹³ *Ibid.*

litigation and avoid abstract determinations of rights. In India, for example, “[a]ccepting cases from well-meaning bystanders unlikely to be personally familiar with the facts, on behalf of indigent and often illiterate parties in interest, placed the fact-finding burden on the courts themselves”.⁷⁹⁴ Not every Indian Court fulfils that responsibility adequately. For example, some courts with fewer resources, such as the Madras High Court, “routinely order that the police department investigate allegations of police brutality, and that agencies accused of other constitutional offences investigate themselves”.⁷⁹⁵ Allowing institutions to investigate charges against themselves will not usually result in an unbiased set of facts from which the court can draw its conclusions.

But the premise of this argument fails in the context of standing to represent the public interest. Consider, for example, the official languages case from Canada. In that case, a litigant was granted standing on behalf of the public interest to challenge illegal or unconstitutional action that violated no one’s rights and thus was immunised from challenge based on private law standing. In this type of case, the very nature of the statute deprives the court of particularised facts because it does not violate any individual’s rights. As a result, the challenge to the statute will necessarily be that the statute is illegal or unconstitutional on its face or by its very terms, and the primary focus will be on the law itself, rather than on the position of the parties.⁷⁹⁶ For example in *Edmonton Journal v Alberta (AG)*,⁷⁹⁷ a newspaper publisher challenged the constitutionality of a law prohibiting the publication of material in court documents. The Supreme Court of Canada addressed the issue by considering the terms of the statute; more specific facts were not necessary. **In short, when standing to represent the public interest is validly granted – ie, when there is no other way to challenge an action because no one has private law standing – facts are, by definition, unnecessary.**

In contrast, in the case of representative or class actions, facts are both necessary and available. In these cases, facts are available with respect to each member of the class or the represented group. **The real question is therefore whether the representative will be as motivated to research, investigate and document these facts as well as a litigant with a private interest. But surely a dedicated public interest organisation working simultaneously with a number of represented plaintiffs can gather and marshal facts at least as well as individuals working alone – particularly when those individuals are poor, uneducated, unfamiliar with the court system, or marginalised by society.**

Representative standing might weaken popular movements

Critics of public interest standing have asserted that relying on litigation to advance a cause can actually weaken popular movements by channelling resources and energy away from community organising, public outreach and education and government advocacy. One scholar has noted, for example, that although some advocates praised the Supreme Court of India’s order that buses in Delhi must be converted to compressed natural gas, “this rise in judicial power might be at the expense of other environmental improvements, including much needed funding for [existing government ministries and structures], and the strengthening of inspection, monitoring, and enforcement structures”.⁷⁹⁸

⁷⁹⁴ Susman at 80.

⁷⁹⁵ Id at 81.

⁷⁹⁶ June Ross, “Standing in Charter Declaratory Actions,” 33 *Osgood Hall Law Journal* 152 (1995) at 157.

⁷⁹⁷ *Edmonton Journal v Alberta (AG)* [1989] 2 SCR 1326.

⁷⁹⁸ Armin Rosencranz & Michael Jackson, “The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power,” 28 *Columbia Journal of Environmental Law* 223 (2003) at 245.

In the case of *Bandhua Mukti Morcha v Union Of India & Ors*, Justice Pathak writing in dissent expressed the concern that “interference by the Courts in public interest litigation as a series of quixotic forays in a world of unyielding and harsh reality, whose success in the face of opposit[ion] bolstered by the inertia and apathy of centuries is bound to be limited in impact and brief in duration”.⁷⁹⁹

While perhaps true in some instances, **strategy is a determination for social justice movements to make for themselves. The courts have no authority to decide what strategy best serves a movement, and questions about appropriate standing should not take this factor into account.**

12. Detailed recommendations

12.1 Continued development of common law

Constitutional standing

The judicial development of a liberalised approach to constitutional standing in Namibia is welcomed, and we hope that subsequent jurisprudence will continue to develop this concept in a way that will promote access to justice for all Namibians.

Mootness

Namibian courts should consider developing doctrines that permit litigation to continue when a particular dispute has become moot, but the case addresses the legitimacy or constitutionality of laws or regulations that affect the rights of individuals beyond the particular parties to the dispute. The courts could build on the result in *Namunjepo*⁸⁰⁰ and follow South Africa’s example by hearing matters that have become moot between the parties, but whose resolution would still have a practical effect for society as a whole, or cases where the issue is by its nature capable of repetition yet evading review.

In such cases, the courts should require recurrence only between the defendant and any member of the public, rather than recurrence with respect to the particular plaintiff. This approach would reflect that, although the issue had become moot with respect to the relief requested by the plaintiff, it was neither academic nor hypothetical but could easily recur with respect to another party. This approach could be particularly important when dealing with time-sensitive matters which are, because of their nature, inherently difficult to litigate without running into the problem of mootness.

12.2 Law reform on standing

We recommend that Namibia introduce a statute to reform the common law on standing, so as to permit representative standing, public interest standing and class actions. In determining which forms of expanded standing to adopt, policymakers should consider the type of litigation they wish to encourage and the particular challenges Namibia faces with respect to access to the courts – including poverty and inequality, limited judicial resources and public ignorance about the law.

⁷⁹⁹ *Bandhua Mukti Morcha v Union of India & Ors* 1984 SC 802.

⁸⁰⁰ *Namunjepo v Commanding Officer, Windhoek Prison* 1999 NR 271 (SC).

Representative standing

We suggest Namibia permit representative standing, or standing to protect and represent another's interests. Namibian law already recognises a limited form of this standing: a litigant has standing to sue to protect the liberty interests of another if he can establish that the individual is not able to come to court to protect his own interests.

Despite the utility of this form of standing, Namibia should **require a representative party to seek leave from the court in its founding papers before proceeding on a representative basis.**

In order to gain the court's approval, **the representative litigant must first demonstrate that the represented parties all share a right, interest or cause of action that the representative will seek to vindicate in the case;** in other words, they should all have suffered the same harm. This requirement ensures that litigants are able to benefit from the continuity and centralisation permitted by public interest litigation by effectively combining their cases.

Second, Namibia should follow the examples of Canada, South Africa, and India and **require courts to consider whether the representative has a genuine interest in the subject matter of the litigation.** This requirement should first address whether the representative legitimately cares about the issue and truly endeavours to fight for the represented parties' interests. A representative's history of working on the issue that is the subject matter of the litigation or on behalf of the represented parties would be strong evidence in favour of a court's holding that the representative met this requirement. Other factors to consider should include whether the represented parties have been consulted or informed regarding the litigation and given an opportunity to opt out (where this is practical).

A third element courts should consider is whether the representative has the capacity to represent the parties in question well. In particular, the court should consider whether the public interest litigants have the experience and expertise with respect to the issues or underlying subject matter in the case to vigorously represent the interests of the represented parties in the case. The court might also consider whether the representative has demonstrated a plan to fund the litigation, including paying attorneys.

A fourth requirement should be that it is not practical for the represented parties to bring individual actions on their own. This requirement is necessary to respect the liberty of those with direct and substantial interest in the litigation by forbidding representative standing in cases when those with common law standing have could have elected to sue but voluntarily chose not to do so. In addressing this question, the court should consider the potential litigant's practical ability to bring and sustain a lawsuit considering issues including the potential litigant's level of education, socio-economic status, knowledge of their rights and physical distance from courts and legal assistance. In South Africa and India, the representative must demonstrate whether the *individuals* are able to act on their own behalf. In contrast, the Canadian analysis focuses on whether there is another reasonable and effective means of bringing the *issue* before the court. We suggest the former approach for two reasons: First, this approach focuses the analysis on the practical realities of bringing an issue before the court, and second, it prioritises providing a remedy to the representative parties rather than just the question of whether the issue can be litigated.

It is necessary to consider whether to permit this type of litigation only against the State or against private interests as well. India permits representative standing, but only against the State. On the other hand, Indian courts have interpreted the idea of "the State" broadly to include private actors fulfilling State functions. Canada does not expressly restrict its representative standing rules

to cases against the State, but the Charter and Constitution only apply to the State, and only the State can pass laws that, under *Finlay*, can be challenged through public interest litigation. But the environmental example demonstrates why standing to sue private actors can be important.

In our opinion, there is no need to limit representative standing to cases against State actors, or to cases involving constitutional rights; we propose that representative standing be permitted in suits against both private actors and the state and to vindicate all forms of rights. Although South Africa and India restrict the rights one can vindicate through representative standing, Canada permits public interest standing against private actors and does not restrict the rights that it can be used to enforce. The justifications for public interest standing discussed in this paper – including lack of access to the courts and the resulting inability of certain populations to protect their rights; the benefits of continuity and centralisations; permitting the participation of groups often excluded from the political process; addressing “dead areas” where government action is protected from judicial review; and ensuring the state fulfills its responsibilities – apply equally to legislative measures as to the Constitution. Although they do not all apply in litigation against private actors, representative standing could nonetheless prove crucial to adjusting for power imbalances between, for example, a wealthy corporation and the employees it injures. These factors argue against restricting representative standing to particular categories of cases.

Public interest standing

We further propose that Namibia recognise standing to represent the public interest. Under this form of standing, a litigant may challenge the legality or constitutionality of government action without demonstrating that the action violated anyone’s rights. Rather, the litigant must only show that legislation or a state policy violates the Constitution or is otherwise unlawful by its terms or on its face. This form of standing addresses the rule of law problem that arises when certain legislation or government action is immunised from legal challenge because no one has standing to bring a case.

Foreign jurisdictions permit this form of standing. It is expressly permitted under the Constitution of South Africa. In Canada, it is in practice also permitted when there is no litigant who has traditional standing to bring a claim. For example, in *Finlay*, the federal government’s action was alleged to be illegal, but no individual was directly harmed by it. Because there was, by definition, no other “reasonable and effective” means to bring the issue before the court, the Supreme Court granted the plaintiff public interest standing. In the United Kingdom, this form of standing is essentially permitted under ratepayer standing: Any ratepayer has standing to challenge illegal government action as long as there is no one who is better situated to do so.

If it chooses this form of standing, Namibia will have to determine if it wishes to permit standing to challenge any statute on its face or if it wants to restrict this type of standing to situations in which, due to the nature of the illegality, no private litigant can bring the case. Note that this latter type of standing would not include instances when, in fact, there was no litigant who had common law standing, but would be restricted to cases in which no private litigant *could* have common law standing by the nature of the illegality.

This choice would have an impact on the remedies possible. If public interest standing were permitted only when no litigant could possibly have common law standing, then the only available remedy would be a declaration that the law or policy was illegal or unconstitutional and an interdict against the enforcement of the law. There would be no one to whom the court could give a remedy. On the other hand, if Namibia permitted standing to challenge any law as unconstitutional,

then a wider array of remedies would be available, but this might also raise administrative difficulties in respect of remedies.

To avoid being too restrictive, we recommend that a law reform on standing should permit public interest standing to challenge the validity of any law or policy on its face, without having to show particular harm to any individual and without having to show that it would be impossible for an individual litigant to bring such a challenge.

Class actions

We recommend that Namibia should authorise class actions. Although in certain contexts a lawsuit brought as a class action could alternatively be brought as a representative suit or a public interest suit, class actions seem more effective at gaining particular redress for a specific, identifiable group of individuals.

The law cannot ignore the needs of the mass-oriented society of today which is characterised by mass production and mass supply of goods and services by huge corporate enterprises mass transport and an all powerful government that is involved in all spheres. These activities generate events that can cause similar harm to large numbers of people. These people can only obtain effective access to justice through a collective remedy such as class action.

Professor Wouter de Vos

Is a Class Action a Classy Act to Implement outside the Ambit of the Constitution?
inaugural lecture as reported in "Bring law to govern class actions" *surges scholar*

University of Cape Town Faculty of Law

13 August 2012

available at www.law.uct.ac.za/news/archives/?id=8206&t=dn

The justifications for class actions reflect the advantages of combining numerous similar or identical actions into a single case. First, **"numerosity and commonality seek to promote judicial efficiency",⁸⁰¹ permitting courts to provide relief to numerous plaintiffs without expending the resources to litigate claims separately.** This efficiency can permit courts to handle cases on a scale far larger than it could handle normally. A class of even fifty plaintiffs can make joinder impracticable in terms of time and expense. Each plaintiff would need to retain its own counsel, or would need to be consulted on each decision of a shared counsel. Each plaintiff could file separate, even conflicting motions. Each counsel would need to be served separately. Such unduly complex litigation would not only be time-consuming and expensive, but unnecessary in cases where the plaintiffs all make essentially the same claim.

Class actions also allow parties to pool resources and information and thus correct power imbalances and organisational barriers that may work in favour of a single defendant. Permitting a plaintiffs' class action "enables plaintiffs to exploit the 'economies of scale' the defendant already naturally enjoys from treating separate claims as a single litigation unit."⁸⁰² "The defendant can make a large investment in the litigation of the common questions, and then use the fruits of that investment in each of the individual cases. But no plaintiff has an incentive to match the defendant's investment, if the cases are litigated separately (or in batches comprising a subset

⁸⁰¹ James M Fraser, "Opt-in Class Actions Under the FLSA, EPA, and ADEA: What Does it Mean to be 'Similarly Situated'?" 38 *Suffolk University Law Review* 95 (2004) at 103.

⁸⁰² Bruce Hay & David Rosenber, "'Sweetheart' and 'Blackmail' Settlements in Class Actions: Reality and Remedy," 75 *Notre Dame Law Review* 1377 (2000) at 1383.

of the whole).”⁸⁰³ By permitting plaintiffs to combine their resources, class action mechanisms level the playing field.

In theory, a group of plaintiffs could collaborate without a class action mechanism, but the reality of organising a large, diverse group of individuals without centralised leadership are more challenging. Joining these cases without a class action device presents substantial transaction costs: someone must locate all the plaintiffs; the group must decide who will make strategic decisions and how, as well as how to resolve disagreements; and the plaintiffs must determine how the litigation will be funded. The latter issue in particular creates the risk of free-riders: any plaintiff may try to avoid contributing in order to benefit for free from the group’s investment on common questions of law or fact.⁸⁰⁴ These benefits are particularly potent in cases that involve “negative value” claims, such as those that are widespread but too small in value for it to be economically worthwhile for any single litigant to proceed individually because the costs of litigation will outweigh the potential reward. “Such cases must proceed as a class action or not at all.”⁸⁰⁵

We recommend that the Law Reform and Development Commission should initiate legislation allowing and regulating class actions, with the components discussed below.

Definition of class action

We propose the following definition of class action: **A class action is an action instituted by or against a class of persons whose claims, issues, or defences share common issues of fact or law and whose interests are represented in the litigation by a representative approved by the court. The class must be certified by the court before the class action may proceed.**

Ideological plaintiffs

One issue to be considered is whether to permit “ideological plaintiffs,” or plaintiffs who are not members of the class and do not have common law *locus standi*. In the United States and Ontario, ideological plaintiffs are not permitted in class actions. In contrast, the South African Law Reform Commission proposals would permit ideological plaintiffs.

The SALRC supported the proposal to permit ideological plaintiffs because many South African are “unsophisticated, poorly educated and indigent and therefore unable to enforce their rights on their own.”⁸⁰⁶ However, comments to the working paper pointed out that unsophisticated class members may be lied to or tricked into participating in litigation that does not ultimately protect their interests, particularly in cases involving monetary damages,⁸⁰⁷ or roped into litigation in which they do not wish to participate.⁸⁰⁸ Permitting ideological plaintiffs may also stir up litigation for wrongs that potential plaintiffs have voluntarily chosen to let lie.

We propose that Namibia permit ideological plaintiffs in class actions. Although we recognise the concerns regarding personal autonomy, additional burdens on the courts, and possible exploitations, we consider that the access to justice concerns in Namibia are sufficiently severe to

⁸⁰³ Id at 1383-84.

⁸⁰⁴ Id at 1387.

⁸⁰⁵ Maureen A Weston, “Universes Colliding: The Constitutional Implications of Arbitral Class Actions,” 47 *William & Mary Law Review* 1711 (2006) at 1726-27.

⁸⁰⁶ South African Law Commission (as the South African Law Reform Commission was then known), *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law*, Report (1998) at 5.4.3.

⁸⁰⁷ Id at 5.4.6.

⁸⁰⁸ Id at 5.4.3.

justify ideological plaintiffs. That said, courts must be vigilant in policing representative plaintiffs to ensure that they are suitable, and that they fairly and adequately represent the interests of the class. We believe that a certification process can be applied to ensure that the class representation is appropriate.

Certification

We recommend that judicial certification of the class be required.⁸⁰⁹ Not every foreign jurisdiction that permits class actions requires certification. Perhaps the strongest argument against certification is that it adds an unnecessary additional step that acts as a barrier to accessing justice. However, certification can help ensure that the class qualifies before court resources are wasted and the opposing party undertakes the burden of costly complex litigation. It can also help protect the interests of the class by ensuring that the representative can fairly and adequately represent their interests and has made the funding arrangements necessary to continue the litigation to completion. The SALRC also noted that certification can help to protect the interests of absent class members.⁸¹⁰

Criteria for certification

We propose the following criteria for certification:

- a class of plaintiffs or defendants consisting of **at least two or more persons whose claims, issues, or defences share common issues of law or fact**;
- **a representative or representatives who can fairly and adequately represent the interests of the class**;
- in the case of a plaintiffs' class, the **existence of a cause of action** as revealed by the application for certification or the pleadings in the case;
- a demonstration by the representative or representatives that he, she, or it has a **workable method to advance the proceedings on behalf of the class**;
- whether, having regard to all relevant circumstances, **a class action would be the most appropriate method of proceeding with the action, and thus superior to joinder**.

Although we recommend a numerosity requirement, the law should not specify how many members a class must have. The court should rather consider the facts and circumstances of the particular case to determine whether a class action would be the appropriate method of proceeding with the litigation. In particular, a court should not certify a class action if joinder would be a superior method of combining the causes of action. In cases with a small number of putative class members or in cases where individual issues predominate, joinder will likely be the superior method of proceeding.

The class's claims, issues or defences must share common questions of fact or law. Several benefits derive from allowing litigants with common issues to combine their cases: parties who

⁸⁰⁹ If Namibia adopts a certification requirement, it must also determine the procedure for certification. In the United States, the representative institutes the action on behalf of the prospective class before certification. "At an early practicable time after a person sues or is sued as class representative," the court must decide whether to certify the class. The SALRC proposed instead a two-step structure. Under the proposed rules, the representative would apply to the court to institute a class action; the application would have to be supported by an affidavit. After the court certified the class, then the litigation would truly begin. It was argued that this process was more compatible with South African procedure, would "obviate the possibility of a class action being launched inappropriately in order to frighten the defendant into an early settlement", and would ensure that the court was provided with evidence to evaluate questions relevant to certification such as the suitability of the representative. Id at 5.5.7-5.5.8, quoting Wouter De Vos, "Reflections on the Introduction of a Class Action in South Africa", 1996 *Journal of South African Law* 639 at 645.

⁸¹⁰ Id at 5.5.5.

otherwise could not afford to hire counsel and access the courts can pool their resources on common issues; the court can more efficiently adjudicate a number of cases at one time; the resolution of a class member's claim or defence earlier in time will not effectively decide the cases of other class members who have not yet had the opportunity to adjudicate their claims; the opposing party will not be confronted with contradictory orders as a result of separate litigation; and the opposing party can benefit from the finality at the end of the case, rather than wondering if it will be confronted with more litigants. None of these benefits will accrue if the class does not share common issues. Therefore, class actions should not be permitted without clear commonality; a further question that must be considered is whether common questions must predominate over individual issues.

Certification should require a suitable representative who can fairly and adequately represent the interests of a class. A representative who takes the lead in conducting the litigation and making decisions as to its course is a necessary requirement: someone must organise the case and make decisions on the class's behalf. The representative must fairly and adequately represent the class's interests in order to protect the rights of class members, particularly those who are absent. This requirement is necessary to ensure the representative does not advance his or her interests at the expense of the class. Further, we suggest that the rules should require that the representative present a workable plan for the litigation, including its funding. This requirement should not be overly stringent; a representative need not present all the evidence that will be required to make a case at trial, nor will he or she be required to reveal trial strategy to the opposing party. But in order to avoid wasting the time and resources of the court and the opposing party, it is necessary for the representative to demonstrate consideration of how he or she will present the case and how the litigation will be funded.

Finally, we recommend that a plaintiff class be required to state a cause of action on the founding papers and affidavit. This requirement is probably redundant of those required by the rules of the High Court, but it should be clear that using the class action mechanism does not relieve plaintiffs of this requirement. Furthermore, it should be clear that the judge should not be evaluating the merits of the case in the course of certification. Rather, a class need only use the founding papers and affidavit to state facts that, if true, would establish a cause of action. The court may dismiss any case that is frivolous or vexatious or fails to state a cause of action.

Decertification

The court should have discretion to decertify a class either on the motion of a party or on the court's own initiative if, at any time, the criteria for certification are no longer met. The requirements for certification exist to protect class members and ensure that the class action mechanism is an appropriate way for the litigation to proceed. If the criteria are no longer met, the class action should generally not continue. In certain cases, however, it may not be necessary for the court to decertify the class immediately. If the class representative drops out, for example, it may be possible to find a new representative; decertifying the class immediately after the first representative disappears may actually generate unnecessary work for the parties by requiring the class to reinitiate the case. Immediate decertification could also prevent the class from accessing the court.

Requirements of the certification order

Following many of the requirements of the Ontario provincial rules, we propose that the certification order should:

- identify the **class representatives**;
- identify or describe the **class members**;
- describe the **common claims, issues and defences asserted by the class**;
- identify the **relief sought** by the class in the case of a plaintiffs' class;
- state the manner in which prospective class members may **opt out or opt in** to the class, as applicable, and the **date** by which they must do so; and
- identify an **address and telephone number** to which class members may direct enquiries regarding the class action.

If the class includes a subclass, the certification order must set out the same information for the subclass. The certification order may be amended as necessary on a party's motion or on the court's initiative.

These requirements are intended to clarify for both the prospective class and the opposing party or parties the nature and dimensions of the class action: what issues are in dispute, who is a member of the class, what relief they seek, and how prospective class members choose not to participate. This information should help all parties understand the scope of the litigation and thus build their cases appropriately without including extraneous information. Issues not included in the class certification may not be heard as common issues; parties not included in the description of the class may not assert common issues before the court.

Requirements for a class representative

A potential class representative should be required to demonstrate that he or she can fairly and adequately represent the interests of the class and has no conflict of interests with class members on shared issues. An ideological plaintiff should not be able to recover monetary relief as part of the class. If an attorney both initiates the litigation as an ideological plaintiff and functions as a representative party, the court must approve any funding arrangement with respect to attorneys' fees. These rules all aim to ensure that the class representative can protect the class's interests and is not tempted to promote his own interests in exchange for compromising those of the class. In the case of multiple individuals vying to represent the class, the court should consider who can best represent the class's interests, given each potential representative's proposal for the conduct and funding of the litigation.

The rules should provide for a means for individual class members to complain that the representative party is not suitable or does not fairly and adequately represent their interests. The court should be able to conduct a hearing on this issue where it considers arguments from the representative party and class members. On a showing of good cause, the court may dismiss the representative party and appoint a new representative party; decertify the action; or split the class into separate actions. Class members dissatisfied with the performance of the representative party should also be able to opt out of the class, even if the date by which they must do so has already passed.

Procedures for managing the class action

We recommend that Namibia should follow the trend of foreign jurisdictions by giving courts broad powers to manage the procedures of a class action. The court should have the power to make any order it considers appropriate to ensure the fair and timely determination of issues, claims and defences in a class action. In the absence of an order to the contrary, however, normal procedural rules applicable to the court in which litigation is being conducted should apply.

We believe that the atypical nature of class action litigation justifies these broad procedures. A class action aggregates numerous claims, issues and defences such that normal rules of procedure may disrupt the litigation, create unnecessary delay or fail to adequately protect the rights and interests of class members who are not involved in the litigation on a day-to-day basis. The court's management of the litigation should be aimed at balancing the goals of adjudicating the class issues in a timely and efficient manner and protecting the due process and fair trial rights of class members.

Subclasses and individual issues

Namibia should permit subclasses which share common sub-issues, claims or defences to litigate their issues collectively within the class action. The requirements discussed *supra* for the class representative and the certification and decertification of the class will apply to the subclass.

Class members who wish to assert individual claims, issues or defences separate from or in addition to those asserted by the class could also litigate those claims, issues or defences as part of the class action litigation, if the court finds this appropriate.

Issues common to the class should be determined together. Issues common to a subclass should be determined together, but separately from issues common to the class. Individual issues should be determined individually. **Common issues should be determined first unless there is a compelling reason to do otherwise.** For example, if a subclass must have a single issue decided in order to determine if they are, in fact, members of the larger class, that issue should be decided before the issues common to the class as a whole.

Notice

The representative party must notify class members that a class action has been instituted. As in Ontario, **the court should make an order establishing the requirements of notice,** including its cost, the size of the class, the relief sought, where class members reside or can be contacted, and any other matter relevant to the litigation. The court must also ensure that class members are notified by the representative party about the judgment and any relief obtained, and may order notice by the representative party regarding developments in the litigation at any time in order to protect the interests of any class member or party or to ensure the fair conduct of the proceeding. The court may order notice be effected by any appropriate means.

Under the proposed rules, notice should include, at minimum, the names of the representative parties, a means by which they may be contacted, the nature of the proceeding, and the relief claimed. It must explain the binding effect of the judgment, whether the class member must opt in or opt out of the proceeding, and how and by what date a prospective class member must opt in or opt out of the proceeding. The notice should also include an explanation of the possible financial consequences of the action, including class members' liability for attorneys' fees and costs. The notice should be written in language and terms chosen to ensure that class members understand the information communicated by the notice. The notice should include this information in order to ensure that parties know about the litigation and are adequately informed when deciding whether to opt in or opt out of the class. Finally, the notice must also include a phone number and address to which a prospective class member may direct enquiries about the litigation. In determining the content of the notice and the method of service, the court should consider the following factors, as recommended by the SALRC:

- (a) the extent to which the members of a class might be prejudiced by being bound by a judgment given in an action which may not have come to their attention;
- (b) the size of the class;
- (c) the probable general level of education and understanding of class members;
- (d) the possibility of identifying members of the class;
- (e) the type of relief claimed;
- (f) where the claim is for monetary relief, the size of each class member's claim;
- (g) the likelihood of class members enforcing their claims individually; and
- (h) any other relevant factor.⁸¹¹

If a class member can demonstrate that the notice that he or she received was inadequate under the rules, he or she will not be bound by the judgment in the class action. The rules proposed for notice to class members would apply to notice to members of a subclass as well.

Notice is necessary to ensure that class members are able to make informed judgments about their participation in the proceedings, to protect their own interests, and to access relief they are awarded in the litigation. Binding litigants without informing them of the class action or of their right to opt out of the proceedings would violate their right to a fair trial and to due process. On the other hand, practical difficulties may make actual notice to all class members impossible. Requiring such notice would thus stymie the access to justice goals of the class action mechanism. The rules proposed here seek to balance protecting the individual due process, fair trial, and liberty interests of individual class members with the goals of promoting access to justice and providing prospective class members with means to protect their substantive rights.

Binding effect of the judgment

We recommend that courts be given discretion to determine the binding effect of the judgment in a class action, particularly whether an “opt-in” or “opt-out” procedure will be applied.

An opt-in procedure means that the judgment will not bind the members of the class unless the class member has received notice as specified above and followed the procedure to opt-in to the class. The advantage of this procedure is that it ensures that no class member will be bound by the outcome of the litigation unless he or she wants to be; it thus most fully protects the due process rights and liberty interests of the class members. In practice, however, the decision not to opt in does not necessarily represent a “deliberate, informed decision by an individual class member not to participate in the litigation.”⁸¹² Lack of education and the sheer difficulty in finding and communicating with class members means that individuals may not have a practical opportunity to be notified of the class action and opt in; they may thus be deprived of a judgment that could have been to their benefit.

In contrast, an opt-out procedure risks binding class members who did not receive adequate notice or did not understand the notice. The SALRC noted that critics “argue that opting out presupposes a significant level of sophistication by class members to know that their rights are being determined and to assess whether their interests are being adequately addressed in the proceedings.”⁸¹³ Class members may end up bound by a judgment in litigation in which they did not truly choose to participate.

⁸¹¹ Id at 5.10.2.

⁸¹² Id at 5.11.3.

⁸¹³ Id at 5.11.2.

Following the proposals of the SALRC, we recommend that generally courts should follow an opt-out procedure: the judgment in a class action will bind members of the class with respect to the opposing party under *res judicata* unless they opt out of the proceeding. Class members must be notified as described above. However, a class member who opts out of the proceeding will not be bound by its judgment, nor may he or she rely on its judgment in litigation with another class member. For example, suppose a class sues a manufacturer alleging a product sold by the manufacturer is defective. The class loses. A class member who opted in to the litigation may not now sue the manufacturer. A class member who opted out of the litigation may. However, if the class member who opted out has a separate dispute with someone who opted in, and the liability of the manufacturer is at issue, the class member who opted out may not rely on the judgment in the preceding case.

However, in certain cases, circumstances may make an opt-in proceeding preferable. For example, in a case where effective notice to class members is uncertain, a court may decide that it is unfair to bind class members because there is a high probability they have not been informed of the litigation or their rights. **We therefore recommend that courts have discretion to issue an order regarding the binding effect of the judgment in a particular class action case which is appropriate to the circumstances of that case. Such a decision should be included in the notice to class members.**

Statutes of limitations

We propose that Namibia follow the SALRC recommendations and the current Ontario statute and suspend applicable limitations periods once a class action is filed until a class member either opts out or is excluded from the certified class; the class proceeding is abandoned or discontinued with the court's approval; the class is settled with the court's approval; or the class action is dismissed.

We propose this rule first because many of the justifications for limitations periods do not apply when a class action is begun, but not finalised with respect to the class or the particular plaintiff. For instance, one justification for limitations periods reflects the concern that evidence and witness testimony will disappear or grow stale and unreliable with time. If a representative has filed a class action within the limitations period, however, both parties should be gathering evidence and locating witnesses within a reasonable period of time. If the class action later stops or fails, the gathering of evidence should not have been seriously injured by the delay. Two related justifications of limitations periods are that plaintiffs should not be permitted to sit on their rights and that defendants should be able to gain final resolutions about their liability with respect to potential plaintiffs within reasonable periods of time. In the cases we consider here, however, the plaintiff has not sat on his or her rights: a class action has been filed on his or her behalf to protect those rights. In turn, the class action has notified the defendant that the plaintiff is pursuing his or her rights and that the defendant will have an obligation to defend.

Allowing the limitations period to run while the uncompleted class action is pending or being litigated seems unfair to the class members. Class members have pursued their rights in a timely fashion. In many cases, the limitations period may expire while the class litigation is still pending or ongoing. If the limitations period were not suspended during whilst the plaintiff continued to participate in the class action, the plaintiff would be forced to file a second, independent suit in order to ensure that his or her rights will be protected. This requirement is unreasonable because a class member cannot reasonably be expected to predict that a class will later be decertified or that the representative will abandon the case – and also go to the additional

trouble and expense of initiating a separate lawsuit. Furthermore, such a lawsuit would be redundant and the advantages of combining numerous lawsuits with common issues into a single class action would be lost.

Aggregate awards

We propose that courts should be permitted to assess damages to a plaintiff class either individually or in aggregate. An aggregate award would assess the total damage to the plaintiff class but leave the division of that award to another mechanism such as negotiation among class members or a commissioner's assessment. The use of aggregate awards appears common throughout jurisdictions with class action mechanisms.

As an example, consider the recent bread price-fixing case in South Africa. In that case, bread makers are (at the time of publication) being sued by a class for fixing prices, thus illegally driving up bread prices. The court may be able to assess the total amount of additional profit the bread companies derived from the price-fixing scheme, and thus the total damages to the class. But in such cases it would be difficult to identify precisely every member of the class and to assess their relief individually; presumably the class would include every person who has purchased bread made by the companies, and the amount of damages would depend on how much bread they had purchased during the relevant time period, what the price of bread would have been had the market functioned normally, and perhaps even how much bread consumers were prevented from buying due to the artificial prices. Rather than assessing damages individually, the court may assess them in the aggregate and establish a mechanism for individuals to claim damages from a common fund. The SALRC also cites the case of a public utility overcharging its customers as a case in which aggregate assessment may be appropriate: "the court may be able to calculate the total amount which the defendants should repay their customers, but it may not be able to quantify how much would be paid to each since the size of the class and the identity of its members (other than the representative) are not known."⁸¹⁴

In contrast, consider again the example of an airline crash that kills the passengers. In that case, the passengers' family members may sue the airline as a class action because all their claims share the issue of whether the airline is at fault for the crash. However, it may be preferable for the court to evaluate damages on an individual basis: First, the class is limited and identifiable, unlike in cases where aggregate damages are preferable. Second, the damages due to surviving family members will probably depend on complicated factual issues concerning each deceased.

If the court provides for an aggregate award, it should provide instructions regarding the assessment of individual awards from the aggregate and the distribution of those awards. It may require the defendant to pay the plaintiffs directly, or to pay into the court or another appropriate depository; it may order full payment at once, or payments in instalments. It should also be allowed to make any other appropriate order as to the distribution of the award. Any final rules regarding aggregate awards should also provide for the disposal of any unclaimed portion of the aggregate.

Appeals

A class representative may appeal court orders or the final judgment in the action just as a normal plaintiff can. Any party may also appeal an order regarding certification, decertification, or the refusal to certify. The normal procedures for appeals should apply. **If the representative**

⁸¹⁴ Id at 5.13.2.

party fails to appeal from an order or judgment on issues relevant to a particular class member, the class member may apply to the court for leave to act as the class representative for the purposes of filing an appeal. A class member may also appeal judgments or orders on issues, claims, or defences relevant to him or her as an individual. These rules also apply to subclasses.

Liability for costs

We propose that, as a general rule, costs should follow the event. As applied to a class action, this rule would require the representative of a losing class to pay the defendant's costs on a party-and-party basis and his or her own attorney's costs on an attorney and client basis. The class itself will not be liable for or entitled to costs. If the class wins, the class representative may recover his or her party and party costs from the defendant, but will usually be liable for his or her own attorney and client costs.

The SALRC proposed a rule allowing courts to order class members who opt in to contribute to or, as appropriate, provide security for costs.⁸¹⁵ We hesitate to recommend a similar rule. On the one hand, distributing costs among numerous class members may enhance access to justice by reducing the cost to any single class member. Furthermore, such a rule would apply only to classes where class members affirmatively opted in. On the other hand, we are concerned that plaintiffs may opt in to the class action without fully understanding their liability for costs. We do not recommend applying such a rule in Namibia. In the case of a relatively small and clearly-defined class, the class members and the class representative could enter into an appropriate private agreements regarding cost-sharing.

We also note that if Namibia elected to adopt contingency or conditional fees, such fees should be permitted in class actions, with court approval. In granting such approval, the court must be satisfied that the contingency or conditional fees are in the best interests of the class.

Court approval to settle, abandon, or discontinue class actions

We recommend that Namibia follow other jurisdictions and require court approval before a representative may settle, abandon, or discontinue a class action. The SALRC reported that one response to its working paper argued “that it is unlikely that a plaintiff acting in the public interest would be inclined to settle a public interest action to the detriment of the public concerned,” but conceded “that the representative might overlook important aspects relating to the public interest or misconceive what the public interest demands”.⁸¹⁶ Furthermore, not every representative will be acting only in the public interest; some will also have a stake in the litigation. Such representatives may be tempted by settlement offers that would completely compensate them, or even grant them a windfall award, to the detriment of the rest of the class. Requiring court approval protects non-representative class members' interests.

Courts with jurisdiction to hear class actions

We propose that jurisdiction to try class actions be limited to cases which originate in the High Court.

⁸¹⁵ Id at 5.17.5.

⁸¹⁶ Id at 5.20.3.

13. Conclusion

These proposals are intended to spur greater access to the courts, particularly to protect the interests of poor, uneducated or otherwise marginal groups. By allowing broader forms of standing, Namibia can ensure that marginalised populations are not excluded from the justice system due to ignorance of the law, distance from courts and inability to fund litigation. We believe that the proposed liberalisation of standing would improve access to justice whilst ensuring that public interest litigants do not overwhelm the courts. In our view, the proposed reforms would help to promote the rule of law in Namibia.

APPENDIX A

SOUTH AFRICA **Public Interest and Class Actions Bill** **proposed by South African Law Reform Commission, 1998**

To make provision for the institution of public interest and class actions; to regulate the conduct of public interest and class actions; and to provide for matters connected therewith.

TO BE INTRODUCED BY THE MINISTER OF JUSTICE

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

CHAPTER 1: DEFINITIONS

Definitions

1. In this Act, unless the context otherwise indicates –

“**action**” means any proceeding instituted in a court, whether by way of summons or notice of motion;

“**certify**” means to permit an action to be maintained as a class action, but does not mean to approve the merits of the action except to the extent provided for by section 6(2) of this Act;

“**class action**” means 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 certified as a class action in terms of section 6 of this Act;

“**common issues**” means common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

“**court**” means the Supreme Court of Appeal, the Constitutional Court of South Africa, the High Court of South Africa, the Land Claims Court, the Labour Court, and any other court designated by the Minister in terms of section 15 of this Act;

“**Legal Aid Board**” means the Legal Aid Board established in terms of section 2 of the Legal Aid Act, 1969;

“**legal practitioner**” means a practising advocate or practising attorney;

“**members of a class**” means two or more persons with a common interest in the class action;

“**Minister**” means the Minister of Justice;

“**person**” includes an association of persons, whether vested with legal personality or not;

“public interest action” means an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative’s own interest;

“representative” means a person designated by the court as the representative of the plaintiffs or defendants in a public interest action or class action.

CHAPTER 2: PUBLIC INTEREST ACTIONS

Instituting a public interest action

2. (1) Any person may institute action in a court claiming by way of a public interest action relief 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.

(2) 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.

(3) The court may give directions to the representative as to the appropriate person or persons to be served as respondents.

(4) Unless the court holds otherwise, judgment in a public interest action shall not be binding on the person or persons in whose interest the action is brought.

The representative in public interest actions

3. (1) If the court is satisfied that it is proper that the action should proceed by way of a public interest action, it shall appoint as the representative a person who, in the court’s opinion, is suitably qualified to represent the public interest in the matter concerned.

(2) The court may at any stage before judgment *mero motu* or on application of any interested party remove any representative and appoint another suitably qualified representative on good cause shown.

Costs

4. (1) In a public interest action the court shall not make an order as to costs or order the representative to provide security for costs unless special circumstances apply.

(2) The court may authorise a public interest action and appoint the representative subject to the rendering or making available of legal aid by the Legal Aid Board.

CHAPTER 3: CLASS ACTIONS

Instituting a class action

5. Any person, whether a member of the class concerned or not, may apply to a court for leave to institute or defend an action as a class action.

Certification

6. (1) No action shall proceed as a class action unless the court has certified the action as a class action.

(2) In deciding to certify an action as a class action, the court may take into account-

(a) evidence of the existence of an identifiable class of persons;

(b) the existence of a *prima facie* cause of action;

(c) issues of fact or law which are common to the claims or defences of individual members of a class;

- (d) the availability of a suitable representative or representatives to represent the interests of the members of the class;
 - (e) the interests of justice; and
 - (f) whether, having regard to all relevant circumstances, a class action would be the appropriate method of proceeding with the action.
- (3) The court may *mero motu* or on application of any interested party withdraw the certification order at any stage before judgment if the criteria in subsection (2) are no longer met.
- (4) The court which certifies an action as a class action may give directions as to the appropriate court in which the action should be prosecuted.
- (5) The court shall not be precluded from certifying an action as a class action merely by reason of the fact that there are issues pertaining to the claims of all or some of the members of the class which will require individual determination, or that different class members seek different relief.
- (6) The refusal of the court to certify an action as a class action shall be subject to appeal.

The representative in a class action

7. (1) The court which certifies an action as a class action shall appoint one or more persons as representative or representatives of the class.
- (2) The court may appoint the applicant, or any other suitable person, as representative in a class action.
- (3) When appointing a person as the representative the court shall take into account –
- (a) the suitability of that person adequately to represent the best interests of the members of the class;
 - (b) any conflict or potential conflict of interest between the representative and the members of the class;
 - (c) the ability of the representative to make satisfactory arrangements with regard to the funding of the class action and the satisfaction of any order as to costs, or for security for costs; and
 - (d) the ability of the representative to manage the class action.
- (4) A representative appointed by the court shall conduct the class action in the best interests of the members of the class concerned and in accordance with the directions of court.
- (5) The court may at any stage before judgment *mero motu* or on application of any interested party remove any representative and appoint another suitably qualified representative on good cause shown.

Notice in class actions

8. (1) The court which certifies an action as a class action may give directions to the representative with regard to –
- (a) the giving of notice of the action to the members or potential members of the class concerned;
 - (b) the form which such notice should take;
 - (c) the way in which such notice is to be communicated to the members of the class.
- (2) In considering the question whether notice should be given to the members of a class and, if so, what directions are appropriate in respect thereof, the court shall take into account–
- (a) the extent to which the members of the class might be prejudiced by being bound by a judgment given in an action which may not have come to their attention;
 - (b) the potential size of the class;
 - (c) the general level of education and development of the members of the class;
 - (d) the ease with which members of the class can be identified;
 - (e) the type of relief claimed;

- (f) where monetary relief is claimed, the amount of the claim of each member of the class;
 - (g) the difficulties likely to be encountered by members of the class in enforcing their actions individually;
 - (h) any other relevant factor.
- (3) The court may –
- (a) require from those members of the class who do not wish to be bound by the judgment written notice of their exclusion as members of the class;
 - (b) require from those members of the class who wish to be bound by the judgment written notice of their inclusion as members of the class; or
 - (c) order that no notice to members of the class is necessary.

Procedure in class actions

9. (1) The court in which the class action is prosecuted shall –
- (a) give directions as to the procedure to be followed in the conduct of the class action;
 - (b) delineate the common issues to be decided in the class action;
 - (c) determine whether there are individual issues that require separate adjudication and, if so, give directions as to the procedure to be followed in order to adjudicate such issues;
 - (d) determine, where the claims are for damages or any other form of monetary relief, whether the individual claims of the members of the class should be assessed as one aggregate amount or whether the claims of the members of the class should be proved individually;
 - (e) determine how any aggregate award is to be distributed among the members of a class, appoint a person responsible for the administration of such distribution, and give directions as to matters incidental thereto.
- (2) Any member of a class who stands to be bound by a judgment in a class action may apply for leave to intervene in the action in order to protect his or her own interests or the interests of the class or any section thereof.

Conduct of a class action

10. (1) The court in which the class action is prosecuted may first give judgment on the common issues and then adjudicate the individual issues.
- (2) The court may order consolidation of actions where a number of claims are based on substantially the same cause of action.
- (3) Judgment of the court in respect of a class action shall be binding on the members of the class, unless the court is of the opinion, after consideration of the factors listed in section 8(2), that members of the class may be significantly prejudiced by the fact that they will be bound by a judgment given in a class action which may not have come to their notice.

Costs

11. (1) In a class action the court shall not order the representative to provide security for costs unless special circumstances apply.
- (2) The court may –
- (a) authorize a class action and appoint the representative subject to the rendering or making available of legal aid by the Legal Aid Board;
 - (b) order those members of the class who elected to give written notice in terms of section 8(3)(b) to contribute towards costs and, where appropriate, to provide security for costs.

(3) When an award is made in a class action in respect of which funds have been made available by the Legal Aid Board the court may order the representative or any member of the class to contribute a percentage of the award to the Legal Aid Board.

Contingency fees

12. (1) Subject to the Contingency Fees Act 66 of 1997, a legal practitioner may make an arrangement in writing with the appointed representative stipulating for the payment of fees or fees and disbursements, in respect of a class action commenced under this Act only in the event of success in the action.

(2) For the purpose of this section, success in the action includes a judgment in favour of some or all members of the class on the questions of fact or law common to such members or a settlement that benefits some or all members of the class.

CHAPTER 4: GENERAL

Appointment of commissioner

13. (1) In a public interest action or a class action the court may appoint a commissioner for the purpose of –

- (a) collating evidence;
- (b) making a recommendation, including a recommendation relating to individual issues or the individual assessment of monetary claims in a class action.

(2) The commissioner shall report his or her findings or recommendation to the court.

(3) The findings or recommendation of the commissioner shall be subject to review by the court.

Settlement, abandonment, and discontinuance

14. An action commenced under this Act shall not be settled, abandoned or discontinued without the prior approval of the court first being obtained, and upon such terms and conditions, including notice or otherwise, as the court considers proper.

Designation of court by Minister

15. The Minister may designate by way of notice in the Gazette those courts in which public interest actions and class actions may be instituted.

Short title

16. This Act shall be called the Public Interest and Class Actions Act, 19...

APPENDIX B

ONTARIO, CANADA Class Proceedings Act 1992 (as amended)

Contents

1. Definitions
2. Plaintiff's class proceeding
3. Defendant's class proceeding
4. Classing defendants
5. Certification
6. Certain matters not bar to certification
7. Refusal to certify: proceeding may continue in altered form
8. Contents of certification order
9. Opting out
10. Where it appears conditions for certification not satisfied
11. Stages of class proceedings
12. Court may determine conduct of proceeding
13. Court may stay any other proceeding
14. Participation of class members
15. Discovery
16. Examination of class members before a motion or application
17. Notice of certification
18. Notice where individual participation is required
19. Notice to protect interests of affected persons
20. Approval of notice by the court
21. Delivery of notice
22. Costs of notice
23. Statistical evidence
24. Aggregate assessment of monetary relief
25. Individual issues
26. Judgment distribution
27. Judgment on common issues
28. Limitations
29. Discontinuance, abandonment and settlement
30. Appeals
31. Costs
32. Fees and disbursements
33. Agreements for payment only in the event of success
34. Motions
35. Rules of court
36. Crown bound
37. Application of Act

1. Definitions

In this Act,

“common issues” means,

- (a) common but not necessarily identical issues of fact, or
- (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

“court” means the Superior Court of Justice but does not include the Small Claims Court;

“defendant” includes a respondent;

“plaintiff” includes an applicant.

2. Plaintiff’s class proceeding

(1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class.

Motion for certification

(2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff.

Idem

(3) A motion under subsection (2) shall be made,

- (a) within ninety days after the later of,
 - (i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and
 - (ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or
- (b) subsequently, with leave of the court.

3. Defendant’s class proceeding

A defendant to two or more proceedings may, at any stage of one of the proceedings, make a motion to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative plaintiff.

4. Classing defendants

Any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant.

5. Certification

- (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
 - (a) the pleadings or the notice of application discloses a cause of action;
 - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
 - (c) the claims or defences of the class members raise common issues;
 - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
 - (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

- (a) would fairly and adequately represent the interests of the subclass;
- (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and
- (c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class.

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.

6. Certain matters not bar to certification

The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

- 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
- 2. The relief claimed relates to separate contracts involving different class members.
- 3. Different remedies are sought for different class members.
- 4. The number of class members or the identity of each class member is not known.
- 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

7. Refusal to certify: proceeding may continue in altered form

Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,

- (a) order the addition, deletion or substitution of parties;
- (b) order the amendment of the pleadings or notice of application; and
- (c) make any further order that it considers appropriate.

8. Contents of certification order

- (1) An order certifying a proceeding as a class proceeding shall,
 - (a) describe the class;
 - (b) state the names of the representative parties;
 - (c) state the nature of the claims or defences asserted on behalf of the class;
 - (d) state the relief sought by or from the class;
 - (e) set out the common issues for the class; and
 - (f) specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out.

Subclass protection

(2) Where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, subsection (1) applies with necessary modifications in respect of the subclass.

Amendment of certification order

(3) The court, on the motion of a party or class member, may amend an order certifying a proceeding as a class proceeding.

9. Opting out

Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

10. Where it appears conditions for certification not satisfied

(1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.

Proceeding may continue in altered form

(2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties.

Powers of court

(3) For the purposes of subsections (1) and (2), the court has the powers set out in clauses 7 (a) to (c).

11. Stages of class proceedings

- (1) Subject to section 12, in a class proceeding,
- (a) common issues for a class shall be determined together;
 - (b) common issues for a subclass shall be determined together; and
 - (c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 24 and 25.

Separate judgments

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

12. Court may determine conduct of proceeding

The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

13. Court may stay any other proceeding

The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

14. Participation of class members

(1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

Idem

(2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

15. Discovery of parties

(1) Parties to a class proceeding have the same rights of discovery under the rules of court against one another as they would have in any other proceeding.

Discovery of class members with leave

(2) After discovery of the representative party, a party may move for discovery under the rules of court against other class members.

Idem

- (3) In deciding whether to grant leave to discover other class members, the court shall consider,
- (a) the stage of the class proceeding and the issues to be determined at that stage;
 - (b) the presence of subclasses;
 - (c) whether the discovery is necessary in view of the claims or defences of the party seeking leave;
 - (d) the approximate monetary value of individual claims, if any;

- (e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered; and
- (f) any other matter the court considers relevant.

Idem

(4) A class member is subject to the same sanctions under the rules of court as a party for failure to submit to discovery.

16. Examination of class members before a motion or application

(1) A party shall not require a class member other than a representative party to be examined as a witness before the hearing of a motion or application, except with leave of the court.

***Idem**

(2) Subsection 15 (3) applies with necessary modifications to a decision whether to grant leave under subsection (1).

17. Notice of certification

(1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section.

Court may dispense with notice

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

Order respecting notice

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

- (a) the cost of giving notice;
- (b) the nature of the relief sought;
- (c) the size of the individual claims of the class members;
- (d) the number of class members;
- (e) the places of residence of class members; and
- (f) any other relevant matter.

Idem

- (4) The court may order that notice be given,
 - (a) personally or by mail;
 - (b) by posting, advertising, publishing or leafleting;
 - (c) by individual notice to a sample group within the class; or
 - (d) by any means or combination of means that the court considers appropriate.

Idem

- (5) The court may order that notice be given to different class members by different means.

Contents of notice

- (6) Notice under this section shall, unless the court orders otherwise,
 - (a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;
 - (b) state the manner by which and time within which class members may opt out of the proceeding;
 - (c) describe the possible financial consequences of the proceeding to class members;
 - (d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;
 - (e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;
 - (f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;
 - (g) describe the right of any class member to participate in the proceeding;
 - (h) give an address to which class members may direct inquiries about the proceeding; and
 - (i) give any other information the court considers appropriate.

Solicitations of contributions

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements.

18. Notice where individual participation is required

(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section.

Idem

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

Contents of notice

- (3) Notice under this section shall,
- (a) state that common issues have been determined in favour of the class;
 - (b) state that class members may be entitled to individual relief;
 - (c) describe the steps to be taken to establish an individual claim;
 - (d) state that failure on the part of a class member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;
 - (e) give an address to which class members may direct inquiries about the proceeding; and
 - (f) give any other information that the court considers appropriate.

19. Notice to protect interests of affected persons

(1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

Idem

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

20. Approval of notice by the court

A notice under section 17, 18 or 19 shall be approved by the court before it is given.

21. Delivery of notice

The court may order a party to deliver, by whatever means are available to the party, the notice required to be given by another party under section 17, 18 or 19, where that is more practical.

22. Costs of notice

(1) The court may make any order it considers appropriate as to the costs of any notice under section 17, 18 or 19, including an order apportioning costs among parties.

Idem

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass.

23. Statistical evidence

(1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

Idem

(2) A record of statistical information purporting to be prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity.

Notice

(3) Statistical information shall not be admitted as evidence under this section unless the party seeking to introduce the information has,

- (a) given reasonable notice of it to the party against whom it is to be used, together with a copy of the information;

- (b) complied with subsections (4) and (5); and
- (c) complied with any requirement to produce documents under subsection (7).

Contents of notice

(4) Notice under this section shall specify the source of any statistical information sought to be introduced that,

- (a) was prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada;
- (b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public; or
- (c) was derived from reference material generally used and relied on by members of an occupational group.

Idem

- (5) Except with respect to information referred to in subsection (4), notice under this section shall,
 - (a) specify the name and qualifications of each person who supervised the preparation of statistical information sought to be introduced; and
 - (b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced.

Cross-examination

(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information.

Production of documents

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure.

24. Aggregate assessment of monetary relief

(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.

Idem

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

- (a) the use of standardized proof of claim forms;

- (b) the receipt of affidavit or other documentary evidence; and
- (c) the auditing of claims on a sampling or other basis.

Time limits for making claims

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section.

Idem

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court.

Extension of time

- (9) The court may give leave under subsection (8) if it is satisfied that,
 - (a) there are apparent grounds for relief;
 - (b) the delay was not caused by any fault of the person seeking the relief; and
 - (c) the defendant would not suffer substantial prejudice if leave were given.

Court may amend subs. (1) judgment

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so.

25. Individual issues

(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
- (c) with the consent of the parties, direct that the issues be determined in any other manner.

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

Idem

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

- (a) dispense with any procedural step that it considers unnecessary; and
- (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

Time limits for making claims

(4) The court shall set a reasonable time within which individual class members may make claims under this section.

Idem

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

Extension of time

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5).

Determination under cl. (1)(c) deemed court order

- (7) A determination under clause (1) (c) is deemed to be an order of the court.

26. Judgment distribution

(1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate.

Idem

- (2) In giving directions under subsection (1), the court may order that,

- (a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;
- (b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and
- (c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court.

Idem

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant.

Idem

(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.

Idem

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined.

Idem

- (6) The court may make an order under subsection (4) even if the order would benefit,
 - (a) persons who are not class members; or
 - (b) persons who may otherwise receive monetary relief as a result of the class proceeding.

Supervisory role of the court

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate.

Payment of awards

- (8) The court may order that an award made under section 24 or 25 be paid,
 - (a) in a lump sum, forthwith or within a time set by the court; or
 - (b) in instalments, on such terms as the court considers appropriate.

Costs of distribution

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate.

Return of unclaimed amounts

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court.

27. Judgment on common issues

- (1) A judgment on common issues of a class or subclass shall,
 - (a) set out the common issues;
 - (b) name or describe the class or subclass members;
 - (c) state the nature of the claims or defences asserted on behalf of the class or subclass; and
 - (d) specify the relief granted.

Effect of judgment on common issues

- (2) A judgment on common issues of a class or subclass does not bind,
 - (a) a person who has opted out of the class proceeding; or
 - (b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).

Idem

- (3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,
- (a) are set out in the certification order;
 - (b) relate to claims or defences described in the certification order; and
 - (c) relate to relief sought by or from the class or subclass as stated in the certification order.

28. Limitations

(1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

- (a) the member opts out of the class proceeding;
- (b) an amendment that has the effect of excluding the member from the class is made to the certification order;
- (c) a decertification order is made under section 10;
- (d) the class proceeding is dismissed without an adjudication on the merits;
- (e) the class proceeding is abandoned or discontinued with the approval of the court; or
- (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

Idem

(2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

29. Discontinuance, abandonment and settlement

(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

30. Appeals: refusals to certify and decertification orders

(1) A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding.

Appeals: certification orders

(2) A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court.

Appeals: judgments on common issues and aggregate awards

(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

Appeals by class members on behalf of the class

(4) If a representative party does not appeal or seek leave to appeal as permitted by subsection (1) or (2), or if a representative party abandons an appeal under subsection (1) or (2), any class member may make a motion to the court for leave to act as the representative party for the purposes of the relevant subsection.

Idem

(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3).

Appeals: individual awards

(6) A class member may appeal to the Divisional Court from an order under section 24 or 25 determining an individual claim made by the member and awarding more than \$3,000 to the member.

Idem

(7) A representative plaintiff may appeal to the Divisional Court from an order under section 24 determining an individual claim made by a class member and awarding more than \$3,000 to the member.

Idem

(8) A defendant may appeal to the Divisional Court from an order under section 25 determining an individual claim made by a class member and awarding more than \$3,000 to the member.

Idem

(9) With leave of the Superior Court of Justice as provided in the rules of court, a class member may appeal to the Divisional Court from an order under section 24 or 25,

- (a) determining an individual claim made by the member and awarding \$3,000 or less to the member; or
- (b) dismissing an individual claim made by the member for monetary relief.

Idem

(10) With leave of the Superior Court of Justice as provided in the rules of court, a representative plaintiff may appeal to the Divisional Court from an order under section 24,

- (a) determining an individual claim made by a class member and awarding \$3,000 or less to the member; or
- (b) dismissing an individual claim made by a class member for monetary relief.

Idem

(11) With leave of the Superior Court of Justice as provided in the rules of court, a defendant may appeal to the Divisional Court from an order under section 25,

- (a) determining an individual claim made by a class member and awarding \$3,000 or less to the member; or
- (b) dismissing an individual claim made by a class member for monetary relief.

31. Costs

(1) In exercising its discretion with respect to costs under subsection 131 (1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

Liability of class members for costs

(2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims.

Small claims

(3) Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court.

32. Fees and disbursements

(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

Determination of fees where agreement not approved

- (4) If an agreement is not approved by the court, the court may,
- (a) determine the amount owing to the solicitor in respect of fees and disbursements;
 - (b) direct a reference under the rules of court to determine the amount owing; or
 - (c) direct that the amount owing be determined in any other manner.

33. Agreements for payment only in the event of success

(1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

Interpretation: success in a proceeding

- (2) For the purpose of subsection (1), success in a class proceeding includes,
- (a) a judgment on common issues in favour of some or all class members; and
 - (b) a settlement that benefits one or more class members.

Definitions

(3) For the purposes of subsections (4) to (7),
“base fee” means the result of multiplying the total number of hours worked by an hourly rate;
“multiplier” means a multiple to be applied to a base fee.

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

Motion to increase fee by a multiplier

- (5) A motion under subsection (4) shall be heard by a judge who has,
- (a) given judgment on common issues in favour of some or all class members; or
 - (b) approved a settlement that benefits any class member.

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

Idem

- (7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,
- (a) shall determine the amount of the solicitor’s base fee;
 - (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
 - (c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

Idem

- (8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee.

Idem

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding.

34. Motions

- (1) The same judge shall hear all motions before the trial of the common issues.

Idem

(2) Where a judge who has heard motions under subsection (1) becomes unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

Idem

(3) Unless the parties agree otherwise, a judge who hears motions under subsection (1) or (2) shall not preside at the trial of the common issues.

35. Rules of court

The rules of court apply to class proceedings.

36. Crown bound

This Act binds the Crown.

37. Application of Act

This Act does not apply to,

- (a) a proceeding that may be brought in a representative capacity under another Act;
- (b) a proceeding required by law to be brought in a representative capacity; and
- (c) a proceeding commenced before this Act comes into force.

38. Omitted (provides for coming into force of provisions of this Act).

39. Omitted (enacts short title of this Act).

APPENDIX C

ZIMBABWE

Class Actions Act 10 of 1999

as amended by General Laws Amendment (No 2) Act 14 of 2002

ARRANGEMENT OF SECTIONS

PART I

PRELIMINARY

Section

1. Short title and date of commencement.
2. Interpretation.

PART II

CLASS ACTION PROCEEDINGS

3. Application for leave to institute class action.
4. Right of Attorney-General to institute class action.
5. Appointment of representative.
6. Security for costs.
7. Notice of class action.
8. Directions as to procedure in class action.
9. Appointment of commissioner.
10. Leave to intervene in class action.
11. Effect of judgment in class action.
12. Form of award of damages in class action.
13. Settlement, withdrawal, etc.

PART III

CLASS ACTIONS FUND

14. Establishment and object of Class Actions Fund.
15. Composition of Fund.
16. Administration of Fund.
17. Terms of office and conditions of service of Board members.
18. Termination of membership of Board member.
19. Financial year of Fund.
20. Books of account and audit of Fund.
21. Financial assistance in prosecuting class actions.

PART IV

GENERAL

22. Act not to derogate from other laws.
23. Act to apply to previous causes of action.
24. Class action proceedings before the Supreme Court.

TO provide for the institution and prosecution of legal proceedings by or on behalf of classes of persons and to provide for matters connected therewith or incidental thereto.

[DATE OF COMMENCEMENT: 20th October 2000.]

ENACTED by the President and the Parliament of Zimbabwe.

PART I PRELIMINARY

1. Short title and date of commencement

- (1) This Act may be cited as the Class Actions Act [Chapter 8:17].
- (2) This Act shall come into operation on a date to be fixed by the President by statutory instrument.

2. Interpretation

In this Act –

“Board” means the Board of Trustees of the Fund, constituted in terms of subsection (2) of section sixteen;

“class action” means any form of legal proceedings, whether an action or an application, instituted by a representative or the Attorney-General on behalf of a class of persons, and any reference to “plaintiff” and “defendant” shall be construed accordingly;

“Fund” means the Class Action Fund established by subsection (1) of section fourteen;

“Minister” means the Minister of Justice, Legal and Parliamentary Affairs or any other Minister to whom the President may, from time to time, assign the administration of this Act;

“representative” means a person appointed by the High Court in terms of section five to be the representative of a class of persons.

PART II CLASS ACTION PROCEEDINGS

3. Application for leave to institute class action

(1) Subject to this section, the High Court may on application grant leave for the institution of a class action on behalf of any class of persons.

(2) An application for the institution of a class action –

- (a) may be made by any person, whether or not he is a member of the class of persons concerned; and
- (b) shall be made in the form and manner prescribed in rules of court.

(3) The High Court shall grant leave in terms of subsection (1) if it considers that in all the circumstances of the case a class action is appropriate, and in determining whether or not this is so the court shall take into account –

- (a) whether or not a prima facie cause of action exists; and
- (b) the issues of fact or law which are likely to be common to the claims of individual members of the class of persons concerned; and
- (c) the existence and nature of the class of persons concerned, having regard to –
 - (i) its potential size; and
 - (ii) the general level of education and financial standing of its members; and
 - (iii) the difficulties likely to be encountered by the members enforcing their claims individually; and
- (d) the extent to which the members of the class of persons concerned may be prejudiced by being bound by any judgment given in the class action; and
- (e) the nature of the relief claimed in the class action, including the amount or type of relief that each member of the class of persons concerned might claim individually; and
- (f) the availability of a suitable person to represent the class of persons concerned; and
- (g) any other relevant factor.

(4) The High Court may grant leave of subsection (1) notwithstanding that –

- (a) the claims of individual members of the class of persons concerned involve different issues of fact or law; or

- (b) the relief sought by individual members of the class of persons concerned may require individual determination; or
- (c) members of the class of persons concerned seek different forms of relief.

4. Right of Attorney-General to institute class action

(1) If it appears to the Attorney-General to be necessary or desirable to do so in the public interest, he may institute a class action, subject to this Act, without obtaining the leave of the High Court in terms of section three.

(2) In deciding whether or not to institute a class action in any case, the Attorney-General shall pay due regard, inter alia, to the matters referred to in paragraphs (a) to (e) of subsection (3) of section three.

5. Appointment of representative

(1) Where the High Court grants an application under section three for leave to institute a class action it shall appoint the applicant or any other suitable person to be the representative of the class of persons concerned in the class action.

(2) In making an appointment for the purpose of subsection (1), the High Court shall have regard to –

- (a) the suitability of the appointee to represent the best interests of all the members of the class of persons concerned; and
- (b) any conflict of interest between the appointee and the members of the class of persons concerned; and
- (c) the ability of the appointee to make satisfactory arrangements to pay for the class action and to pay any order of costs that may be made.

6. Security for costs

(1) When granting leave to institute a class action or at any time thereafter, the High Court may order the representative concerned to provide security for costs.

(2) Where the Attorney-General has instituted a class action, the High Court may at any stage in the proceedings order a person who has obtained leave to be joined as a party to the action in terms of section ten to provide security for costs.

7. Notice of class action

(1) Where –

- (a) the High Court has granted leave to institute a class action, the representative shall cause a notice specifying the matters referred to in subsection (2) to be given to members of the class of persons concerned in such manner and within such period as the court shall specify;
- (b) the Attorney-General has instituted a class action, he shall cause a notice specifying the matters referred to in subsection (2) to be given to members of the class of persons concerned in such manner and within such period as may be prescribed in rules of court.

(2) A notice referred to in subsection (1) shall specify –

- (a) the cause of action giving rise to the class action, with sufficient detail to enable the circumstances giving rise to the action to be identified; and
- (b) the nature of the relief being sought in the class action; and
- (c) the class of persons concerned in the class action, with sufficient detail to enable the members to identify themselves with the intended action;

and shall advise members of the class concerned that –

- (i) each member of the class concerned will be bound by the class action and its results unless the member notifies the Registrar of the High Court, within a period fixed by the court or rules of court, as the case may be, and specified in the notice, that he wishes to be excluded from the action; and
- (ii) each member of the class concerned has the right to apply for leave to intervene in the class action in order to protect his interests in terms of section ten.

(3) A failure on the part of a member of a class of persons concerned in a class action to receive notice in terms of this section shall not –

- (a) invalidate the class action; or
- (b) prevent the member from being bound by the class action and its results.

8. Directions as to procedure in class action

At any stage in a class action, the High Court may –

- (a) give directions as to the procedure to be followed in the conduct of the class action;
- (b) delineate the common issues to be decided in the class action;
- (c) determine whether there are individual issues that require separate determination and, if so, give directions as to the procedure to be followed in determining them, including a direction for further hearings or the appointment of a commissioner to inquire into the issues and report to the court;
- (d) where the claims are for damages or any other form of monetary relief, determine whether the claims of individual members of the class of persons concerned should be assessed as one aggregate amount or whether the claims should be proved individually; and
- (e) give any other directions that may be necessary for the proper conduct or determination of the class action.

9. Appointment of commissioner

(1) At any stage in a class action, the High Court may appoint a commissioner to do any one or more of the following things –

- (a) to determine particular issues;
- (b) to assess individual monetary claims;
- (c) to gather and collate any evidence;
- (d) to report to the High Court on any of the matters referred to in paragraphs (a) to (c).

(2) A commissioner appointed in terms of subsection (1) shall perform the duties for which he is appointed subject to the directions of the High Court.

10. Leave to intervene in class action

(1) The High Court may, on application by the member concerned, order a member of a class of persons who will be bound by a judgment in a class action to be joined as a separate party in the action to protect his individual interests.

(2) An order in terms of subsection (1) may be made subject to such terms and conditions, whether as to the payment of costs or otherwise, as the High Court may fix.

11. Effect of judgment in class action

The judgment of the court in a class action shall be binding on all members of the class of persons concerned, other than a member who has advised in terms of the notice published in terms of section seven that he wishes to be excluded from the action.

12. Form of award of damages in class action

(1) Where the High Court awards damages in a class action, the court may –

- (a) award damages in an aggregate amount to be distributed amongst the members of the class of persons concerned; or
- (b) make separate awards in respect of individual members of the class of persons concerned; or
- (c) direct individual members of the class of persons concerned to prove their claims for damages; or
- (d) may make such other award as the court considers appropriate in the circumstances.

(2) In making an award referred to in subsection (1), the High Court may make orders directing –

- (a) that the moneys payable in terms of the award shall be paid to the representative in the class action, or to a trustee or some other suitable person who shall hold the moneys for the members of the class of persons concerned;
- (b) how the moneys shall be disbursed to members of the class of persons concerned, whether on proof of their claims to the satisfaction of the holder of the moneys, or on an average basis to be determined by the holder of the moneys, or on some other basis;

- (c) that the holder of the moneys shall be required to account to the High Court or the Master of the High Court as to his distribution;
- (d) the holder of the moneys to furnish security to the satisfaction of the Master of the High Court for the proper administration of the moneys;
- (e) how any surplus moneys shall be re-allocated to members of the class of persons concerned or repaid to the defendant;
- (f) the payment of additional amounts by the defendant in the event of the award proving insufficient to meet the plaintiffs' claims.

13. Settlement, withdrawal, etc.

No class action instituted in terms of this Act shall be settled, withdrawn, compromised or discontinued without leave of the High Court and except upon such terms and conditions, including notice being given to members of the class of persons concerned, as the court may determine.

PART III CLASS ACTIONS FUND

14. Establishment and object of Class Actions Fund

(1) There is hereby established a fund, to be known as the Class Actions Fund, the management and control of which shall, subject to this Act, vest in a Board of Trustees on behalf of the Minister.

(2) Subject to this Act, the object of the Fund shall be to provide financial assistance in the form of grants of funds towards expenses, or as security for costs, to persons who intend instituting class actions.

15. Composition of Fund

The Fund shall consist of –

- (a) reimbursements or payments by successful plaintiffs under section twenty-one; and
- (b) any moneys that may be payable to the Fund from moneys appropriated for the purpose by Act of Parliament; and
- (c) any moneys that the Fund may obtain, with the approval of the Minister, by way of donations, loans or other financial assistance; and
- (d) any other moneys that may accrue to the Fund, whether in terms of this Act or otherwise.

16. Administration of Fund

(1) Subject to this Act, the Fund shall be administered by a Board of Trustees on behalf of the Minister.

(2) The Board of Trustees shall consist of –

- (a) a chairman, who shall be appointed by the Minister after consultation with the Judicial Service Commission and who shall be a person who is or is qualified to be a judge of the Supreme Court or the High Court; and
- (b) the Attorney-General; and
- (c) the Secretary of the Ministry for which the Minister is responsible; and
- (d) two registered legal practitioners appointed by the Minister.

17. Terms of office and conditions of service of Board members

(1) A member of the Board shall hold office for such period, not exceeding three years, and on such terms and conditions, including terms and conditions for the payment of fees and allowances, as the Minister may fix.

(2) A member of the Board shall be eligible for reappointment on the expiry of his term of office.

18. Termination of membership of Board member

The Minister may require a member of the Board referred to in paragraph (a) or (d) of subsection (2) of section sixteen to vacate his office if the member –

- (a) has been guilty of conduct which renders him unsuitable to continue to hold office as a member; or
- (b) is mentally or physically incapable of efficiently performing his duties as a member; or
- (c) is absent from three consecutive meetings of the Board without good cause.

19. Financial year of Fund

The financial year of the Fund shall be the period of twelve months ending on the 31st December in each year.

20. Books of account and audit of Fund

(1) The Board shall ensure that proper accounts and other records relating thereto are kept in relation to all the transactions of the Fund.

(2) The accounts of the Fund shall be audited by the Comptroller and Auditor-General, who shall have all the powers conferred upon him by section 9 of the Audit and Exchequer Act [Chapter 22:03] as though the assets of the Fund were public moneys.

21. Financial assistance in prosecuting class actions

(1) Any person who intends instituting a class action or who has been appointed a representative in a class action may apply to the Board for financial assistance in proceeding with the action.

(2) The Board may grant a person referred to in subsection (1) assistance in the form of –

(a) a grant of funds towards the expenses of the class action concerned; or

(b) security for costs in the class action concerned;

on such terms and conditions as the Board may fix, including terms and conditions relating to –

(i) reimbursement of the Fund; or

(ii) payment by plaintiffs in the class action of a proportion of any damages they may be awarded in the action.

(3) Any term or condition referred to in paragraph (ii) of subsection (2) shall be enforceable at the instance of the Board in all respects as if it were a contract between the Board and each individual plaintiff concerned, whether or not the plaintiff was himself a party to the application for assistance under subsection (1).

(4) The Board may waive reimbursement or payment under a term or condition fixed in terms of subsection (2) if the Board considers that such reimbursement or repayment would cause undue hardship.

PART IV GENERAL

22. Act not to derogate from other laws

This Act shall be construed as additional to, and not as derogating from, any other law under which a person may bring any proceedings on behalf of another.

23. Act to apply to previous causes of action

Subject to the Prescription Act [Chapter 8:11], this Act shall apply in respect of any cause of action which may have existed but had not been enforced before the date of commencement of this Act.

24. Class action proceedings before the Supreme Court

The Supreme Court shall have the same powers as the High Court under Part II of this Act in relation to any application in terms of section 24 of the Constitution or any other constitutional question, and the provisions of Part II shall apply, mutatis mutandis, to the institution and prosecution of any class action in the Supreme Court under this Act.