

**Public Interest Litigation:  
Selected Issues and Examples**

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In 1976, Professor Abram Chayes of the Harvard Law School coined the phrase "public law litigation" to refer to the practice of lawyers in the United States seeking to precipitate social change through court-ordered decrees that reform legal rules, enforce existing laws, and articulate public norms.<sup>1</sup> Sometimes taking the class action form, public law cases often involved the restructuring of important government institutions, including public schools, mental hospitals, welfare agencies, and prisons, and affected many thousands of individuals. Although Professor Chayes limited his discussion to the United States, variegated forms of "cause lawyering" or "social activist" litigation also exist in the courts of many other countries, presenting localized strategies that draw on separate traditions and function within specific contexts.<sup>2</sup> In the courts of India and South Africa, of Israel and Nigeria, in international tribunals and before regional commissions, law and litigation are important mechanisms for enforcing human rights, extending public participation, improving

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<sup>1</sup> Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

<sup>2</sup> Sarat & Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Sarat & Scheingold eds., 1998).

economic conditions, encouraging grassroots empowerment, reforming laws and legal systems, and fostering government accountability -- aspects of what some commentators loosely refer to as "rule of law" values.

This note examines the rise around the world of public interest litigation and similar kinds of court actions that aggregate the claims of individuals or resolve contested questions in ways that affect broad numbers of individuals. Because U.S. courts provided an early and important locus for public interest litigation, the note first presents a case study of the U.S. as an interesting and influential example where such cases have been pervasive, looking, first, at public interest litigation as a political institution that requires professional structures, resource mobilization, and organizational adaptation; and, second, at the advantages and disadvantages of public interest litigation in the U.S. as a mechanism for systemic change. The note then provides a brief survey of public litigation in other countries, focusing on experiences that overlap with those in the U.S. and those that involve experiments not tried or never successfully achieved in the U.S. The worldwide emergence of public interest litigation, drawing on local practice and separate contexts, has not tracked the experience of the law and development movement, which some critics say relied too extensively on the U.S. as a model susceptible of easy transplant in other countries.<sup>3</sup>

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<sup>3</sup> Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AMER. J. OF COMP. L. 457 (1977).

### **A brief history of public law litigation in the U.S.**

Judicially-precipitated change, like social change generally, comes with no blueprint or template for future developments. Whether a strategy works for one issue or one cause carries no guarantee that it will work elsewhere. Indeed, an initial success in one venue may carry the seeds of its own defeat, as affected actors respond, adapt, and resist. The U.S. does not necessarily provide a model for cause lawyers in other nations, but it offers informative lessons of how situations have played out in one complex judicial system under specific and often nonreplicable conditions.

Commentators frequently date the emergence of public law litigation in the U.S. to the celebrated campaign that resulted in the decision in *Brown v. Board of Education*,<sup>4</sup> in which the U.S. Supreme Court declared unconstitutional a state's segregation of public school students by race. *Brown* included many procedural features since associated with public law litigation: the defendant was a public institution; the claimants comprised a self-constituted group with membership that changed over time; relief was prospective, seeking to reform future action by government agents; and the judge played a leadership role, complemented by the parties' efforts at negotiation. The literature distinguishes this form of litigation from the classical model of adjudication, which is conceptualized as a private, bipolar dispute marked by individual participation and the imposition of retrospective relief

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<sup>4</sup> 347 U.S. 483 (1954).

involving a tight fit between right and remedy.<sup>5</sup>

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<sup>5</sup> Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

*Brown* provided inspiration to a generation of lawyers who saw law as a source of liberation as well as transformation for marginalized groups. Courts, mostly federal but state as well, became involved in a broad range of social issues, including voting and apportionment, contraception and abortion, employment and housing discrimination, environmental regulation, and prison conditions. Prison reform litigation illustrates the extent of the judiciary's involvement in public law cases: after years of taking a "hands off" approach to prison conditions, courts imposed remedial decrees in 48 of the nation's 53 jurisdictions (the 50 states, the District of Columbia, Puerto Rico and the Virgin Islands).<sup>6</sup> More recently, private bar attorneys, operating under a different set of economic incentives from those of civil rights lawyers, have adapted the public law model to address the problems that result from mass torts, using court-ordered damages and broad injunctive decrees to shape and monitor future corporate behavior (while also, in some cases, earning large attorneys' fees).<sup>7</sup>

The identification of U.S. public law litigation as procedurally novel has provoked criticism that it is an illegitimate use of judicial power.<sup>8</sup> Other commentators, however, locate public litigation as well within the judiciary's historic

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<sup>6</sup> Feeley & Rubin, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998).

<sup>7</sup> Compare Parmet, *Tobacco, HIV, and the Courtroom: The Role of Affirmative Litigation in the Formation of Public Health Policy*, 36 HOUSTON L. REV. 1663 (1999), with Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U.L. REV. 413 (1999).

<sup>8</sup> See Horowitz, *THE COURTS AND SOCIAL POLICY* (1977).

competence and view it as a modern iteration of earlier adjudicative forms, such as trust and estate proceedings that span decades and involve innumerable parties and diverse interests.<sup>9</sup> In addition, even the strategic use of adjudication for social, economic, or political ends is not new: throughout the 19th and 20th centuries, and especially during the New Deal period, business groups self-consciously filed lawsuits to extend property rights and to resist regulatory changes. Finally, as the Legal Realists emphasize, the lack of any logical fit between right and remedy is not unique to public interest litigation, but rather a more general feature of modern constitutional law.

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<sup>9</sup> See Eisenberg & Yeazell, *The Ordinary and Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

The public law litigation that Professor Chayes described is, however, innovative in its substantive emphasis on the needs and interests of groups long excluded from conventional majoritarian politics -- those who, as Professor Robert Cover so aptly put it, are "not simply losers in the political arena, they are perpetual losers."<sup>10</sup> Although prisoners, women, the poor, immigrants, and African-Americans had previously asserted claims in courts (consider, for example, early challenges to all-white primaries, or to restrictions on the sale of property to designated races), public interest litigation after *Brown* was often generally perceived as part of a broader effort to use the tools and principles of legal liberalism as a way to change existing patterns of power and privilege.

#### **The theory and structure of public interest litigation**

Public interest litigation on behalf of marginalized groups and interests rests on three related theoretical accounts of law. First, public interest litigation draws from an anti-positivist perspective that questions the inevitable legitimacy of majoritarian outcomes.<sup>11</sup> Judicial intervention in this view may be justified by process-defects in the enactment process that structurally work to exclude or dilute the interests of affected groups. In addition, legislation may be suspect because of an

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<sup>10</sup> Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

<sup>11</sup> Ely, DEMOCRACY AND DISTRUST (1980).

inadequate deliberative process that ignores, distorts, or misstates the concerns of outsider groups; judicial review solves a public choice problem by ensuring due regard for those who would otherwise, to borrow from Mancur Olson, "suffer in silence."<sup>12</sup> Majoritarian laws may also be distrusted because they deviate from national normative commitments (whether constitutional or statutory) or because they lack what U.S. constitutionalists call "minimum rationality."<sup>13</sup>

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<sup>12</sup> Olson, *THE LOGIC OF COLLECTIVE ACTION* (1965).

<sup>13</sup> Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993).

Second, public interest litigation rests on a view of law that acknowledges the gap between "law on the books" and "law on the ground."<sup>14</sup> Even after a legislature or regulatory agency has adopted protections or proscriptions affecting a particular group, the formal provision may not be given effect because of evasion, indifference, or hostility. Judicial intervention is warranted on this basis to secure compliance with existing rules and standards.

Public interest litigation does not inevitably bridge the gap: court decrees may go unenforced because of political decision; failure of will; or a kind of slippage between text and action different from that found in the legislative arena.

Third, public interest litigation recognizes the expressive value of law and its constitutive relation to the customs and discourse of a civil society.<sup>15</sup> Public interest litigation on this view is part of what sociologists call the "new" social movements in which participants contest the terms of public meaning.<sup>16</sup> The very act of litigation affords a juridical space in which those who lack formal access to power become visible and find expression. Moreover, because courts are only one means for the enforcement of law, reform can be sustained only when it becomes second-nature and interwoven into discourse, low-level discretionary acts, and market

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<sup>14</sup> Upham, *Ideology, Experience, and the Rule of Law in Developing Societies*, PRESENTED AT THE UNRISD CONFERENCE IN BANGKOK, THAILAND, MAY 12-14, 2000 (Unpublished manuscript on file with the author at New York University School of Law).

<sup>15</sup> McCann, *Causal versus Constitutive Explanations (or, On the Difficulty of Being So Positive ...)*, 21 L. & SOC. INQUIRY 457 (1996).

<sup>16</sup> See Touraine, *An Introduction to the Study of Social Movements*, 53 Soc. RES. 749 (1985).

exchanges. Lawsuits can give what Professor Dan M. Kahan in a different context describes as "gentle nudges" for the internalization of changed social values by altering the terms of public discussion and giving voice to reform goals.<sup>17</sup>

The forms of public interest litigation in the U.S. flow from these three theoretical insights. One category of public interest litigation, the so-called "test" case, challenges the legality of existing laws and regulations or attempts to give new meaning to existing laws. A test case may be filed on behalf of a single individual, but the effect of stare decisis will give the judgment precedential effect in other lawsuits filed by other individuals. In addition, government agents or bureaucracies may feel obliged to conform their programs to a test-case ruling without further action by a court. A second form of action, the "structural reform suit," challenges deficiencies in the enforcement of existing laws, and seeks to regulate the defendant's future conduct through the imposition and monitoring of detailed judicial decrees that spell out in highly specific terms constitutional or statutory requirements. In practice, the line between the creation of "new" law and mere enforcement blurs: rights frequently have an indeterminate scope and are given content and acquire social meaning only through an on-the-ground process of implementation. Finally, both forms of action depend on declaratory relief: the

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<sup>17</sup> Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

judicial expression of a constitutional or statutory norm that informs and educates the other branches and the public at large.

### **Public law litigation as a political practice**

Public interest litigation is not only a form of legal practice; it also constitutes a political practice that affords marginalized groups and interests an entry point into contested issues. To carry out the work, lawyers must marshal institutional structures, organizational techniques, and resources, such as funds and personnel.<sup>18</sup> In the U.S., public interest litigation early on modeled itself on the NAACP's use of the public interest law firm, or legal defense fund, to design and pursue litigation. Influenced by this model, as well as by the decentralized volunteer membership structure of the American Civil Liberties Union, private foundations during the 1960s began to provide funds to establish formal organizations focused on systemic law-based reform efforts in a broad range of fields. At the same time, the federal government established a national agency, the Legal Services Corporation, to fund lawyers for the poor working in neighborhood offices that provided individual client service and also challenged government practices on a systemic, classwide basis. During this period, foundations, notably the Ford Foundation, also supported the establishment of innovative legal education programs, including university-based law clinics, with the goal of training a new generation of public interest lawyer. Private law firms undertook

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<sup>18</sup> See Oberschall, *SOCIAL MOVEMENTS: IDEOLOGIES, INTERESTS, AND IDENTITIES* (1993).

pro bono activities, and statutory measures allowing the payment of attorneys' fees to prevailing plaintiffs in specified public law cases created a financial incentive for lawyers, both private and not-for-profit, to undertake such work. Moreover, the federal government contributed to public law reform efforts by appearing as amicus curiae in private law suits or initiating its own compliance actions.

Over the last generation, this public interest infrastructure has evolved to meet changing political pressures: reduced federal funding for legal services work; government-imposed restrictions on the kinds of cases the publicly funded lawyers can undertake; reductions in the availability of court-ordered attorneys' fees; judicial appointments that largely oppose the substantive goals of public interest litigation; and the rise of conservative groups committed to using the courts for their own ideological ends.<sup>19</sup>

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<sup>19</sup> See Hershkoff & Hollander, *Rights into Action: Public Interest Litigation in the United States*, in *MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD* (McClymont & Golub eds., 2000).

Far from viewing public law litigation as a "silver bullet" that will effect immediate and sustainable change, lawyers instead regard it as a contributory factor to an incremental process that builds in complex ways and interacts with external conditions.<sup>20</sup> Many practitioners complement their court-centered work with such activities as community organizing, media outreach, public education, lobbying, and legislative and regulatory drafting. In the process, they promote the creation of consensus by forging alliances with mainstream as well as constituent groups, while also achieving greater visibility, credibility, and support. Their work includes transactional activities, including community development projects, the establishment of community non-profit groups, and grass-roots counseling centers, often at shelters or other service-provider sites, that educate the public and help to empower affected constituencies about their legal and political options. These new forms of "critical" practice also mediate some of the concerns that the traditional lawyer-client hierarchy presents.<sup>21</sup>

**The efficacy of public interest litigation to achieve social change in the U.S.**

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<sup>20</sup> Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697 (1993).

<sup>21</sup> See McCann & Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (Sarat & Scheingold eds., 1998).

The pervasiveness of public interest litigation in the U.S. prompted Aryeh Neier to remark, "Since the early 1950s, the courts have been the most accessible and, often, the most effective instrument of government for bringing about the changes in public policy sought by social protest movements."<sup>22</sup> Revisionist commentators, however, question the impact of public interest litigation, pointing to the continued segregation of U.S. public schools, to the persistence of entrenched poverty, and to enduring opposition to gender equality and reproductive choice.<sup>23</sup> In theory, public law litigation can precipitate a number of important effects that involve policy formation, political mobilization, government monitoring, and legal enforcement. Litigation is an important participatory activity that complements and supports electoral politics; for marginalized groups, litigation sometimes offers the only, or least expensive, entry into political life at a given time. The shared act of litigation, the temporary coming together in the collective of a plaintiff-class, contributes to a sense of public purpose and builds social capital by encouraging trust and cooperation. In this view, litigation confers political endowments on groups that otherwise lack political clout; it confers legitimacy by including previously ignored or excluded interests in the broader social agenda. Moreover, although writers frequently refer to public law litigation as a form of top-down social engineering, in practice it makes use of local knowledge and

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<sup>22</sup> Neier, *ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE* (1982).

<sup>23</sup> See Rosenberg, *THE HOLLOW HOPE: USING THE COURTS TO ACHIEVE SOCIAL CHANGE* (1991).

on-the-ground adjustment in designing remedies and strategies for implementation. Litigation also contributes to the provision of public goods by holding government accountable to constitutional and statutory preferences, and by filtering out faction-dominated rent-seeking from public decision-making. Against critics who claim that structural reform injunctions violate the separation of powers, reformers argue that public law cases promote both accountability and transparency in government decision making.

In practice, commentators find it difficult to assess the impact of public interest litigation. Professor Peter Schuck of the Yale Law School divides the literature into a "trichotomy":

Those I shall call "strong-court" scholars believe that the courts are often effective reformers by reason of their unique institutional features, especially their relative independence from electoral and bureaucratic politics. "Court skeptics" hold that court-directed reform, although not inevitably doomed to failure, is highly problematic. They argue that the most significant effects of such efforts are likely to be unanticipated and often perverse. "Court fatalists" maintain that the effectiveness of social reform depends on factors that courts can perhaps reinforce, but to which they are otherwise either irrelevant

or epiphenomenal.<sup>24</sup>

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<sup>24</sup> Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763 (1993).

The literature shares no common definition of goals or of success; nor is there a general theory of the relation between judicial action and societal reform. Some analysts look for linear and instrumental approaches to causation; others emphasize the constitutive and radiating effects of legal decisions. Empirical studies are limited in design, fraught with methodological difficulty, and few in number. Moreover, public law litigation is not monolithic, and commentators frequently recite that its effects are uneven across institutions and regions. For example, Professor Michael J. Klarman of the Virginia School of Law contends that U.S. Supreme Court decisions had little effect in reforming the criminal law system's treatment of African Americans, yet "inaugurated a political revolution in the urban South" by its decision striking down the all-white party primary.<sup>25</sup>

Not surprisingly, public law cases provoke opposition, resistance, and unintended consequences, although the content and shape of these effects are difficult to predict. Well resourced groups can better attempt to overcome intransigence and resistance; underdeveloped efforts -- those lacking in personnel and outreach facilities -- are likely to find the barriers to change more formidable. Commentators express concern that a judicial decree may not adequately carry out a program of reform unless it reflects a social consensus in favor of reform or the affected agent has an

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<sup>25</sup> Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking* (University of Virginia School of Law Public Law and Legal Theory Research Paper Series, Working Paper No. 01-4, May 2001).

internal and independent reason to change. At the same time, we cannot say whether a government actor will undertake a process of self-reform unless pressed by the threat of litigation. A lawsuit can motivate other institutions to act by highlighting an issue of concern and by placing it on the public agenda, or by fostering alliances which, even in defeat, become important for later mobilization efforts. Finally, an individual's participation in litigation can itself be an empowering event that encourages further activity and changes in behavior.

#### **Public interest litigation in nations other than the U.S.**

Presenting at a conference in London in 1984, Dr. Rajeev Dhavan, now ex-officio trustee of the New Delhi-based Public Interest Legal Support and Research Centre, characterized public interest litigation as "a culture-specific phenomenon which was developed in America and confidently exported to the rest of the world."<sup>26</sup> Almost two decades later, the social technology of public interest litigation seems to have developed in many different countries, drawing on common background issues, but within specific conditions, taking different shape and assuming indigenous forms. Some commentators describe public interest litigation outside the U.S. as part of a "justice cascade," fostered by "the concerted efforts of small groups of activist lawyers who pioneered the

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<sup>26</sup> Dhavan, *Whose Law? Whose Interest?*, in PUBLIC INTEREST LAW (Cooper & Dhavan eds., 1986).

strategies,"<sup>27</sup> and U.S. human rights groups and foundations remain important to the development of public interest practice in other nations.<sup>28</sup> But it is also important not to lose sight of the indigenous forces and extraordinary variegation that currently mark public interest litigation around the world. As Professor Frank Upham emphasizes, public law litigation in Japan "evolved in directions largely different from .... our Western models."<sup>29</sup> Similarly, Professor Clark Cunningham describes public interest litigation in India as "a phoenix: a whole new creature arising out of the ashes of an older order."<sup>30</sup> Indeed, the Ford Foundation's Global Law Programming Learning Initiative, reporting on the law-related work of its grantees around the world, should dispel any idea that public interest litigation is any longer confined to the U.S., dependent on U.S. legal concepts, or constrained by U.S. organizational forms.<sup>31</sup>

The context of public law litigation varies from place to place. In some countries, such as Russia, lawyers and activists do

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<sup>27</sup> Lutz & Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trial in Latin America*, 2 CHI. J. INT'L L. 1 (2001).

<sup>28</sup> Dezelay & Garth, *Constructing Law Out of Power: Investing in Human Rights as an Alternative Political Strategy*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Sarat & Scheingold eds., 2001). For example, in the last five years, the Ford Foundation has sponsored two symposia on public interest litigation, one in Oxford, England and the other in Durban, South Africa, and reports that "[w]ith these seminars the concept of public interest law was introduced to a select number of activists and lawyers in Eastern Europe and Russia." (e-mail from Dmitry Shabelnikov, The Ford Foundation, Moscow Office, dated Aug. 31, 2001).

<sup>29</sup> Upham, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987).

<sup>30</sup> Cunningham, *Public Interest Litigation in Indian Supreme Court: A Study in Light of American Experience*, 29 J. OF THE INDIAN L. INST. 495 (1987).

<sup>31</sup> McClymont & Golub eds., *MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD* (2000).

not use the term "public interest litigation," but their law-based activities -- such as university based law clinics; assistance to prisoners and the poor; and environmental work -- are connected to the concept. Professors Sarat and Scheingold caution that "providing a single, cross-culturally valid definition of the concept is impossible."<sup>32</sup> One common thread remains that identified twenty years ago by Dr. Dhavan: the practice

is part of the struggle by, and on behalf of, the disadvantaged to use "law" to solve social and economic problems arising out of a differential and unequal distribution of opportunities and entitlement in society. In an effort to procure "justice between generations" it is also concerned with preventing the present and future needless exploitation of human, natural and technological resources.<sup>33</sup>

Public interest litigation also treats interests, such as consumer concerns, that otherwise may not receive adequate political attention.

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<sup>32</sup> Sarat & Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (Sarat & Scheingold eds., 1998).

<sup>33</sup> Dhavan, *Whose Law? Whose Interest?*, in *PUBLIC INTEREST LAW* (Cooper & Dhavan eds., 1986).

Just as one cannot generalize from the U.S. experience, so conditions that are effective in one locale may prove insufficient -- or counterproductive -- in another. In some nations, legal liberalism and "rule of law" values have been necessary conditions for public interest litigation, although elsewhere cause lawyering flows from indigenous practice and professional norms, fostering a broader project for democratic reform.<sup>34</sup> Social, economic, and political conditions create different pressures and opportunities for public interest litigation, which is further affected by the nature of the existing legal regime,<sup>35</sup> the independence and prestige of the judicial system,<sup>36</sup> and forms of professional organization.<sup>37</sup> Governments also differ considerably in their support of non-governmental groups pursuing public interest litigation. In some countries and on some issues, courts will be able to help forge a social consensus in favor of reform; elsewhere, courts will be disabled from precipitating change unless the public already displays some measure of receptivity to reform. Even where formal structures for judicial review are in place, courts in transitional or developing countries may lack the confidence, credibility, or capacity to secure enforcement or respect of their decisions.

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<sup>34</sup> Lev, *Lawyers' Causes in Indonesia and Malaysia*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (Sarat & Scheingold eds., 1998).

<sup>35</sup> *Symposium: Lawyering in Repressive States*, 20 L. & Soc. INQUIRY 339 (1995).

<sup>36</sup> Vyas, *The Independence of the Judiciary: A Third World Perspective*, *THIRD WORLD LEGAL STUDIES*--1992.

<sup>37</sup> Dias, Luckham, Lynch, & Paul eds., *LAWYERS IN THE THIRD WORLD: COMPARATIVE AND DEVELOPMENTAL PERSPECTIVES* (1981).

Political pressures may deter a court from staking out a principled position vis-a-vis the other branches of government or the military; on the other hand, as the South African experience suggests, public interest lawyers may achieve surprising victories even within repressive legal systems.<sup>38</sup> Legalist approaches have uneven effects on economic development and resource allocation. Public attitudes toward law vary; where law has previously been used as a despotic tool, those seeking reform may be wary of lawyers and court-centered approaches. Finally, pressures and opportunities change over time: writing about Colombia in 1981, for example, one commentator saw "little reason to believe the judiciary or government attorneys would be very receptive to innovative forms of legal advocacy,"<sup>39</sup> yet today women's groups in that country successfully deploy the *tutela*, a judicial procedure with no exact equivalent in common law systems, as a tool to stop domestic violence and to press feminist reforms.<sup>40</sup>

### **Marshalling resources for public interest litigation**

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<sup>38</sup> Ellmann, *IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY* (1992).

<sup>39</sup> Lynch, *Legal Roles in Colombia*, in *LAWYERS IN THE THIRD WORLD: COMPARATIVE AND DEVELOPMENTAL PERSPECTIVES* (Dias, Luckham, Lynch, & Paul eds., 1981).

<sup>40</sup> Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombia Constitutional Court*, 30 *U. MIAMI INTER-AMER. L. REV.* 253 (1998).

Members of marginalized groups -- women, the poor, ethnic groups (whether minority or majority) -- frequently lack access to legal resources, and an important component of public law work involves strategies to increase access to the legal system, allowing individuals not only to know their rights, but also to appreciate law's transformative possibilities.<sup>41</sup> The availability of lawyers, professional organizations, and other resources play an important strategic role in how public interest litigation is carried out in other nations and how extensive it is as a practice.

Non-governmental organizations are only just emerging in some countries; China's first NGO legal aid center opened in 1992.<sup>42</sup> In Korea, changes in the bar examination quota generated a larger pool of lawyers available to do pro bono activity; some lawyers became affiliated with NGOs and others formed their own public law groups (for example, in 1988 Lawyers for a Democratic Society -- Minbyun in Korean abbreviation -- was established to provide lawyers for human rights cases).<sup>43</sup> In some places, local lawyers explicitly model themselves on U.S. style public interest law firms and also partner with U.S. organizations (as, for example, the Environmental Foundation, Ltd. in Sri Lanka and its work with the U.S.-based

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<sup>41</sup> *Symposium Report, Public Interest Law: Worldwide Strategies*, in PUBLIC INTEREST LAW AROUND THE WORLD, REPORT OF A SYMPOSIUM HELD AT COLUMBIA UNIVERSITY IN MAY, 1991 WITH DESCRIPTIONS OF PARTICIPATING LEGAL ORGANIZATIONS FROM TWENTY COUNTRIES, COLUM. HUM. RTS. L. REV. (1992).

<sup>42</sup> Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT'L L.J. 211 (1999).

<sup>43</sup> Yoon, *Public Interest Lawyering: The Korean Experience*, SYMPOSIUM ON LEGAL AID AND PUBLIC INTEREST LAWYERING IN EAST AND SOUTHEAST ASIAN COUNTRIES, Japan Foundation, Tokyo (Dec. 17-18, 1999) (Unpublished manuscript on file with the author at New York University School of Law).

Environmental Defense Fund).<sup>44</sup> In Malaysia, law firms work within non-governmental organizations<sup>45</sup>; local law groups in other countries work together with international human rights organizations and sometimes foreign NGOs assist local groups by providing lawyers for specific lawsuits.<sup>46</sup> These different organizational structures, combining endogenous and exogenous interests, raise complex questions, as Professor Benedict Kingsbury has emphasized, involving accountability and representation within the advocacy community itself.<sup>47</sup>

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<sup>44</sup> Wirth, *Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues*, 100 YALE L.J. 2645 (1991).

<sup>45</sup> Harding, *Public Interest Groups, Public Interest Law and Development in Malaysia*, THIRD WORLD LEGAL STUDIES--1992.

<sup>46</sup> Ellmann, *Cause Lawyering in the Third World*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Sarat & Scheingold eds., 1998).

<sup>47</sup> Kingsbury, *Representation in Human Rights Litigation*, HUMAN RIGHTS DIALOGUE (Spring 2000).

Cause lawyers also work with non-lawyers in creative ways that overcome some of the hierarchy associated with professional relations. In Zimbabwe, for example, paralegals staff legal literacy programs in poor rural areas, helping individuals to develop self-reliant strategies for reform.<sup>48</sup> Similarly, in the Philippines, the legal services NGO Sentro ng Alternatibong Lingap Panlegal (Saligan) has worked effectively with volunteer paralegals on land reform issues affecting coconut farmers.<sup>49</sup> In India, the Supreme Court took the lead by allowing volunteer social activists -- lay and legal -- to represent the interests of the poor in judicial proceedings. By expanding locus standi -- the doctrine that governs who may file a claim in court -- and creating epistolary jurisdiction -- allowing the court to entertain a letter written on behalf of a disadvantaged person as a petition that commences an investigation of conditions and, if appropriate, the start of a lawsuit -- the judiciary facilitated a public law practice that draws on that nation's tradition of volunteerism.<sup>50</sup>

### **Varieties of social cause lawyering**

Cause lawyers work strategically in many different venues.

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<sup>48</sup> Manase, *Legal Services in Rural Areas: The Zimbabwean Experience*, THIRD WORLD LEGAL STUDIES--1992.

<sup>49</sup> Golub, *Nonlawyers as Legal Resources for Their Communities*, in MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD (McClymont & Golub eds., 2000).

<sup>50</sup> Cottrell, *Courts and Accountability: Public Interest Litigation in the Indian High Courts*, THIRD WORLD LEGAL STUDIES--1992; Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 29 THE REVIEW, INTERNATIONAL COMMISSION OF JURISTS 37 (1982); Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. OF TRANSNAT'L L. 561 (1985).

The availability of multiple advocacy sites provide claimants with alternative points of entry into contested issues, expanding network affiliations, affording media exposure, and encouraging support for shared values. Strategies and venues change over time: the Child Poverty Action Group in England, established in 1965, during the 1980s combined individual advocacy with information centers and test case litigation.<sup>51</sup> Moreover, law-related NGOs have had to adapt to political transitions and regime shifts; in Argentina, the Center for Legal and Social Studies changed its agenda as the country moved from military to civilian rule.<sup>52</sup>

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<sup>51</sup> Smith, *How Good are Test Cases?* in PUBLIC INTEREST LAW (Cooper & Dhavan eds., 1986).

<sup>52</sup> Shifter, *Weathering the Storm: NGOs Adapting to Major Political Transitions*, in MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD (McClymont & Golub eds., 2000).

Probably the bulk of public interest litigation, as in the U.S., takes place in the domestic courts and local commissions of the home country. For example, over the last decade the Israeli Supreme Court has ruled on important human rights issues concerning such matters as freedom of religion, treatment of children, and equality. Most recently, the Israeli Court ordered the Israeli Secret Service to stop using interrogation methods that amounted to torture under both the Basic Law's principles of Dignity and Liberty and the Torture Convention ratified by Israel.<sup>53</sup> Cause lawyers also work outside their domestic judicial systems, drawing on international norms and treaties that might not receive a warm reception in their home courts. One category of cause lawyering involves "transnational public law litigation," lawsuits filed in foreign (usually U.S.) courts on behalf of non-domestic citizens and government groups. Often the lawyers are from the U.S.; defendants are foreign governments or corporations alleged to have violated international human rights law<sup>54</sup> -- typified by the \$1.5 billion lawsuit filed in New York federal court against Texaco on behalf of 30,000 indigenous and settler residents in the Northern Ecuadoran Amazon region.<sup>55</sup> Another category of cause lawyering outside a domestic court system involves "supranational adjudication," cases carried out in the two dozen regional or

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<sup>53</sup> Zilbershats, *Update on Human Rights Decisions in Israel*, JUSTICE, no. 26 (Winter 2000).

<sup>54</sup> Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

<sup>55</sup> Kimerling, *The Story from the Oil Patch: The Under-Represented in Aguinda v. Texaco*, HUMAN RIGHTS DIALOGUE (Spring 2000).

international tribunals that have emerged worldwide since World War II.<sup>56</sup> Finally, cause lawyering can take place outside conventional Western legal sites (as, for example, the Madaripur Legal Aid Association's use of mediation).<sup>57</sup>

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<sup>56</sup> Helfer & Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

<sup>57</sup> Golub, *From the Village to the University: Legal Activism in Bangladesh*, in MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES (McClymont & Golub eds., 2000).

Cause lawyering has contributed in immeasurable ways to encouraging legal reforms, educating the judiciary and other branches of government, documenting abusive practices, implementing laws, and bridging some of the gap in resource allocation among different groups. As in the U.S., the systemic effects of such work are difficult to gauge and have not been comprehensively analyzed. Some groups assume that resources would be better applied to more enduring forms of political practice: the residents of Umm El-Fahem, a Palestinian town in central Israel, rejected litigation in challenging expropriation of their land.<sup>58</sup> Anecdotal evidence suggests that in some places at least, even where lawsuits fail in the short term, they can make a difference to long term change. For example, in Chile, the Vicariate of Solidarity filed unsuccessful habeas corpus petitions over many years seeking the release of political prisoners; with the return to civilian rule, their lawsuits provided important documentation of abuse and torture, contributing to investigations by the National Commission on Truth and Reconciliation.<sup>59</sup> In their work, cause lawyers in other nations draw variously from indigenous sources, existing national practices, models established in the U.S. and elsewhere, international human rights law, and internal motivation.<sup>60</sup> Indeed,

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<sup>58</sup> Esmeir & Rosenberg, *Resisting Litigation in Umm El-Fahem*, HUMAN RIGHTS DIALOGUE (Spring 2000).

<sup>59</sup> Hershkoff & McCutcheon, *Public Interest Litigation: An International Perspective*, in MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD (McClymont & Golub eds., 2000).

<sup>60</sup> For a survey, see PUBLIC INTEREST LITIGATION IN SOUTH ASIA: RIGHTS IN SEARCH OF REMEDIES (Hossain, Malik, & Musa eds., 1997).

public interest litigation in other nations reveals many strategic approaches and legal theories not presently utilized in the U.S., and lawyers here can learn from these other experiences. For example, U.S. constitutional law draws a firm line between negative and positive rights; between state action and private conduct; and between the justiciable and merely political. Cause lawyers elsewhere, however, draw on different jurisprudential traditions that afford alternative approaches to important matters such as discrimination by non-government entities, as well as affording important bases for affirmative claims to essential goods such as health care or education. The Indian Supreme Court's decisions involving bonded labor, for example, draw on a concept of dignity and freedom from expropriation from which the court derived a right to humane employment conditions.<sup>61</sup> Similarly, public law work before the South African Supreme Court builds on constitutional provisions that recognize the relevance of material economic conditions to liberty and autonomy.<sup>62</sup> Finally, international law recognizes indigenous people as distinct groups with rights to land and cultural integrity in ways that are suggestive for improved approaches in the U.S.<sup>63</sup>

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<sup>61</sup> Craig & Deshpande, *Rights, Autonomy and Process: Public Interest Litigation in India*, 9 OXFORD J. OF LEGAL STUD. 356 (1989).

<sup>62</sup> Sachs, *Social and Economic Rights: Can They Be Made Justiciable*, 53 SMU L. REV. 1381 (2000).

<sup>63</sup> Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, in PEOPLES' RIGHTS (Alston ed., 2001) (forthcoming); Anaya & Williams, Jr., *The Protection of Indigenous People's Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUMAN RTS. J. 33 (2001).

### Concluding observations

Professor John P. Kotter of the Harvard Business School emphasizes how hard it is for corporations to reinvent themselves; some transformation efforts fail, and many fall in the middle. "The most general lesson," he writes, "... is that the change process goes through a series of phases that, in total, usually require a considerable length of time. Skipping steps creates only the illusion of speed and never produces a satisfying result."<sup>64</sup> We do not know whether this lesson can be generalized to the realm of public law litigation and its use as a method of policy reform. But social change, like any sustained transformation, demands the long perspective. Even though a particular lawsuit may fail to secure relief or be slow in its implementation, litigation may nevertheless be an important step in a series of backward-and-forward steps toward reform, not because one step clearly follows from another but because -- to borrow from Albert O. Hirschman's theory of unbalanced growth -- "one thing leads to another." Rather than viewing the relationship between public law cases and social change as straightforward or linear, perhaps Hirschman's image of multiple on-off connections -- sometimes working together, sometimes working apart, more aptly tells the story.<sup>65</sup>

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<sup>63</sup> Kotter, *Leading Change: Why Transformation Efforts Fail*, Harv. Bus. Rev. 59 (1995).

<sup>64</sup> Hirschman, *A PROPENSITY TO SELF-SUBVERSION* (1995); *A BIAS FOR HOPE: ESSAYS ON DEVELOPMENT AND LATIN AMERICA* (1971); Ellerman, *Hirschmanian Themes of Social Learning and*

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*Change*, World Bank, Working Papers-Governance, Corruption, Legal Reform, Working Paper No. 2591 (April 12, 2001)  
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