

PROTECTING COMMUNITY RIGHTS: PROSPECTS FOR PUBLIC INTEREST LAWYERING IN MONGOLIA

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I. The Role of Public Interest Lawyers.....	567
II. Public Interest: Mining, Environment, and Human Rights in Mongolia.....	570
III. Legal Considerations for the Use of Public Interest Litigation in Mongolia.....	575
IV. Public Interest Litigation in Mongolia: Challenges and Opportunities for Growth.....	579
V. Conclusion	584

Across Asia, despite the diversity of the region, the challenges facing local legal activists often have key similarities, as do the strategies that are developed to meet those challenges. These commonalities suggest that a shared problems approach and a cross-regional exploration of country-specific tactics could provide valuable lessons to those working within their individual systems to protect citizens' rights. The legal strategies employed by public interest lawyers contain both technical elements that are often contingent on specific in-country legal mechanisms as well as more holistic elements that can translate beyond borders. Public interest lawyers also share a like-minded approach to what the law should and can do to protect its citizens as well as a common necessity to be innovative and creative about how they achieve the desired changes. When provided the opportunity to share experiences with others advocating for similar issues, lawyers can further develop strategies and approaches. The step towards effective legal activism is accelerated by bringing together lawyers who have successfully formulated strategies for protecting rights and challenging systemic injustice with lawyers who are still in the process of discovering the use

* The authors first met in 1990 at a public interest law conference in Budapest, Hungary, where they discussed the challenges facing Mongolia and the unique approaches that were delivered in response to those challenges. Several years later, the authors reconnected over the issue of sharing human rights strategies, particularly with regards to the mining industry and environmental issues in Mongolia.

of the justice system as an agent of change. This opportunity to share experiences facilitated reexamining approaches that were successful and that had the potential to grow and further develop.

In many Asian countries, achieving social justice remains challenging, and non-governmental organizations (NGOs) and public interest lawyers continue to employ various means and approaches in order to be agents of change. Public interest litigation (PIL) has become an important tool used to change and enforce policy practice in Asian countries, including Mongolia. Looking specifically at the legal community in Mongolia, this paper explores the potential benefits of sharing best practices, lessons learned, and effective strategies employed by public interest lawyers from different Asian countries as well as around the world. Despite the variety of legal systems, all public interest lawyers operate under the same general premise that rule of law is essential to the protection of rights and that the law is a useful tool in promoting the interests of all citizens. Building on this premise and recognizing the challenges NGOs face, the community of legal practitioners helps advance public interest efforts locally - by sharing and examining the effectiveness of different approaches.

I. THE ROLE OF PUBLIC INTEREST LAWYERS

With the rapid expansion over the past two decades of international assistance to lawyers and NGOs, the role of lawyers in shaping their countries' legal systems and ensuring respect for human rights is also expanding. Although most developmental assistance in the rule of law arena has not focused specifically on public interest law,¹ in Asia there are a growing number of lawyers, many emerging from donor-funded organizations, who redefine their roles based on their political or moral beliefs and values. Rejecting the role of law as the protector of the status quo, these lawyers embrace the law as a way of achieving social justice. Using their legal expertise and skills, they work both within the

¹ This has begun to shift. In some countries, donors are recognizing the value of impact litigation when resources are limited. For example, in Cambodia, after supporting basic legal services for several years, the United States Agency for International Development made a decision to support public interest litigation. See Dustin Roasa, *Democracy, Human Rights, and Governance*, USAID, <http://www.usaid.gov/cambodia/democracy-human-rights-and-governance> (last updated Jan. 3, 2014); *Cambodia Programs*, ABA, http://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/cambodia/programs.html (last visited Feb. 10, 2014).

legal system and beyond the courts in the communities that they serve to challenge injustice and hold governments and other powerful interests accountable. By engaging in a larger political struggle and elevating the lawyer's role beyond individual representation, these lawyers challenge the traditional concept of lawyers as actors within a system, and instead frame lawyers as architects of society at large. Outside of South Asia (with some exceptions)² this new role for lawyers remains relatively nascent. Many of these lawyers, who are either solo practitioners or as the only lawyer within an organization, operate without the benefit of peer learning. Even when these lawyers form associations, their learning is often limited to their own organizational or country-based experience.

Many of the public interest lawyers in Asia began as traditional legal service providers. However, the number of poor persons eligible for legal services and the limited impact the lawyers' representation provided, led them to become more critical in applying their skills to systemic problems. Many of them began taking cases that they believed best reflected the public's collective interest and began involving their clients more directly in the representation and the strategies employed.³ These lawyers sought to reconfigure justice to be more responsive on a large scale to the needs of marginalized populations, including women, factory workers, those dispossessed of their land, and communities suffering from environmental degradation.

Since the goal of public interest lawyers is societal change and the judicial system is only one avenue for seeking change, these lawyers - in addition to traditional legal strategies - often find themselves engaging with civil society or community groups with holistic strategies. These broader strategies incorporate realms beyond the scope of a typical

² In South Asia, particularly in India and Bangladesh, there is a longer history of successful public interest litigation. In India, the ability of nongovernmental organizations to take cases in the public interest without meeting traditional standing requirements has been a significant contributor to the development of these cases.

³ See generally Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3 (Austin Sarat & Stuart Scheingold eds., 1998; Austin Sarat & Stuart Scheingold *What Cause Lawyers Do For, and To, Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 1, 21, 25 (Austin Sarat & Stuart Scheingold eds., 2006); STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004); RICHARD J. WILSON & JENNIFER RASMUSSEN, PROMOTING JUSTICE: A PRACTICAL GUIDE TO STRATEGIC HUMAN RIGHTS LAWYERING 55-57, 63 (2001); Aubrey McCutcheon, *Contributing to Legal Reform in China*, in MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD 59, 63-65 (Mary McClymont & Stephen Golub eds., 2000).

traditional legal education, including the media, legal literacy, and community organizing—. Since these skills are not taught in law school, sharing practical expertise on these pseudo-legal skills is particularly valuable.

In examining how to best cultivate experiential sharing among lawyers, several key points are worth noting. First, public interest law in the region has traditionally focused on groups that have historically been denied access to governmental power structures. These groups include, but are not limited to the rural poor, low or unskilled workers, women, and other minority groups. Second, legal empowerment of the disenfranchised in society establishes a basis for social change and builds an expectation of accountability on behalf of the government. Finally, public interest lawyers are typically individuals who are morally invested in their efforts and often face significant challenges to their work and, on some occasions, their individual safety. Both governments and powerful private interests that benefit from challenged legal protections rightly see public interest lawyers as a threat to the status quo. This is because public interest lawyers are often able and willing to take cases on behalf of individuals who, for safety or other reasons, are unwilling or unable to file a claim on their own behalf. It is in cases such as these where issues of standing become critical.⁴

Based on these shared characteristics, there are a number of areas where public interest lawyers benefit from sharing their approaches, including but not limited to:

- educating the community on the role the public interest lawyer and the case itself can play for the needs and rights of marginalized groups;

- increasing the public's own power to advocate on its behalf through public interest work;

- translating public interest law into the establishment of government accountability;

- ensuring personal safety for the lawyer and his or her constituencies;

- analyzing how the political climate impacts their efforts and how to leverage various aspects of the political environment;

- learning about creative remedies and resolutions;

⁴ Standing is “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” BLACK’S LAW DICTIONARY 1536 (9th ed. 2009).

exploring the range of roles civil society can play in the case;
 identifying obstacles to rights realization and effective ways to address those obstacles; and,
 sharing holistic aspects of their legal strategy such as press campaigns, public education and community mobilization, and other innovative legal strategies.

II. PUBLIC INTEREST: MINING, ENVIRONMENT, AND HUMAN RIGHTS IN MONGOLIA

Mongolia is a country with immense natural resources and a history of appreciating its environmental wealth, which is rooted in its nomadic tradition.⁵ In the late 1990s, it was also a country in transition with little history of social activism or public participation in governance after decades of Soviet influence. Along with Mongolia's political transition came a shift in its economic focus. Traditionally based largely on nomadic herding,⁶ Mongolia's economy began to shift to one heavily reliant on mineral extraction. This significant change within the country created new challenges for the communities impacted as well as for human rights lawyers and activists poised to help the communities protect their rights. For centuries, nomadic herders had relied on Mongolia's abundant natural resources, but the mineral extraction began negatively impacting the land and the water that the herders require for their livelihoods. Mining often contaminates water, an essential resource for the herders. In addition to not having sufficient water for their animals, the herders and their children began to suffer from severe health problems that they believed were related to the mining and pollution in the water near the communities. With diminished ability to provide for their families by herding, many individuals chose to migrate to urban areas.

At the time, permits were required to relocate and often local authorities would refuse to issue the required permits making the

⁵ See generally *Mongolia Environment*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/EXTAPREGTOPENVIRONMENT/0,,contentMDK:20266325~menuPK:537827~pagePK:34004173~piPK:34003707~theSitePK:502886,00.html> (last visited Feb. 10, 2014).

⁶ See Slawoj Szynkiewicz, *Contemporary Mongol Concepts of Being Pastoralist: Institutional Continuity, Change and Substitutes*, in *CHANGING NOMADS IN A CHANGING WORLD 202* (Joseph Ginat & Anatoly M. Khazanov eds., 1998). Herding, unlike in some societies, holds social prestige. See *id.*

individuals and their dependents ineligible for social services - including access to education- in their new location. These rural populations had little understanding of the applicable law, their legal rights, and whether they were protected. However they understood that what was happening in their communities was damaging their way of life, potentially harming their children's health and killing their livestock.

Beginning in 2001 with the Onggi River Movement, these citizens formed groups to strengthen their ability to challenge the changes in their environment that resulted from the new mining industry. Other advocates formed similar grassroots organizations and they became known as the "River Movements."⁷ These community-based organizations (CBOs) developed creative tools for engaging the government on the issue of mining and environment degradation and became adept at incorporating the media into their strategies, but they had not yet incorporated more traditional legal approaches into their efforts.

The impact of mining on these communities became a focus of concern when in the early 2000s, Global Rights, the Mongolian nongovernmental organization Centre for Human Rights and Development (CHRD), and the Open Society Forum – Mongolia (MFOS) began to train lawyers and activists on the use of public interest strategies to promote human rights. During those trainings, several issues⁸ of concern came up, but none as frequently as the issue of mining's impact on the human rights of the nomadic communities. In conjunction with MFOS, who had recently published a guide to public interest law, CHRD and Global Rights hosted a workshop for interested lawyers and community activists on public interest advocacy. During the final session of the workshop, individuals were asked to identify issues

⁷ The Onggi River Movement was directly involved in the collaboration with CHRD and the head of the Onggi River Movement, Tsetsge Munkhbayar, participated in Global Rights' South African workshop. Tsetsge Munkhbayar continues to be active in the struggle to preserve Mongolia's environment and in 2007 won the Goldman Environmental Prize, a premier award for grassroots environmentalists.

The United Movement of Mongolia Rivers and Lakes (UMMRL) was established in July 2009. UMMRL is a coordinating body for seven civil society movements: Onggi River Movement, Toson Zaamar Movements, Salkhin Sandag Association, Angir Nuden Munduuhei, Khuder River Movement, Calling of Mountains & Rivers Movement and Nature Protection - Local Development.

⁸ Other issues included health risks associated with food imported from China and trafficking of persons.

that the group could work on moving forward and many chose the issue of mining and the protection of the rivers.

Each group developed a strategic plan that included how to engage the media, educate populations on their rights, preserve and collect information, and find allies, among other tactics. While the focus included using litigation in the public interest, these court challenges were only one aspect of a more comprehensive and holistic strategy to address the identified human rights violation. The workshop was designed to engage potential pro bono lawyers with human rights NGOs - such as CHRD, and CBOs - such as the River Movements, so that they could work together as issues arose. During the workshop examples from Asia, Africa, and North American of how lawyers, human rights advocates, and community leaders coordinate were shared.

Another follow-up session organized for the River Movements⁹ helped strengthen the connection between the lawyers and the communities most impacted by the mining. CHRD began to make field trips to the communities to gather data and to share information with the communities about their legal rights. As one herder explained to the lawyers: “we don’t have a chance to know what is happening and to say that we will not give up our land. They dig gold in our most beautiful places that have water and pasture. We have moved so many times and now we have no place to move.”¹⁰

In 2005, Global Rights brought advocates from CHRD and the head of the Onggi River Movement to a workshop¹¹ it was sponsoring in South Africa entitled “Strategies for Human Rights.” At the workshop, the Mongolia advocates explored legal activism as a potential avenue for promoting human rights and creating transformative change. The workshop focused on incorporating traditional litigation with less legally-centric strategies, such as community education and mobilization, research and scientific data collection, and grass-roots advocacy. The lawyers shared information about how they dealt with barriers associated

⁹ By this point, the Onggi River Movement had adopted four objectives: 1) creating sustainable community-based organizations that care about the environment, 2) informed and committed citizens who monitor and protect the environment, 3) transparent local government structures to ensure a healthy environment, and 4) interactive dialogue between CBOs and local government. These objectives merged well with the strategic goals that lawyers developed and strengthened the collaborative approach.

¹⁰ See *Fighting for Survival: Human Rights and Mining in Mongolia*, VOICES: GLOBAL RTS. MAG., Fall 2006, at 4.

¹¹ The workshop included participants from Burundi, India, Liberia, South Africa, and the United States of America.

with this work, including pressure from political actors or corporate representatives, geographic isolation of affected communities, and low levels of rights awareness within communities.¹² For a week, the lawyers shared advocacy tactics, discussed the challenges that they faced, and tested a tool designed to encourage holistic approaches and innovative responses to human rights issues. By the end of the workshop, the Mongolian advocates had developed a strategy for how to use the law to protect the communities living near the rivers and lakes impacted by the mining. In addition to the workshop, the Mongolian advocates participated in an exchange study tour.¹³

In May 2006, following the trip to South Africa and working in close collaboration with the River Movements, CHRD took the first ever case against a mining company which caused considerable damage to a local community. The case involved Mongol Gazar, Mongolia's biggest national mining company. CHRD lawyers achieved a major victory when a judge ruled in the Mongol Gazar case the mining company, holding that its license had been illegally issued and ordered the company to stop its mining activity in the area.¹⁴ This was the first case of its kind against the mining industry and took a year and a half of dedicated legal work, moving from court to court, to arrive at the final outcome: revocation of the company's mining license. The outcome received significant press and helped further raise the issue of mining and its impact on the traditional way of life in Mongolia. The company later resumed mining with a properly obtained license, but this court victory emboldened the human rights community in Mongolia, which continued to press for the rights of the River Movements.

¹² See *Mongolia*, GLOBAL RIGHTS, http://www.globalrights.org/site/DocServer/Mongolia_Fact_Sheet.pdf?docID=5383, for more information on the work of Global Rights in Mongolia (last visited Feb. 10, 2014).

¹³ See *infra* Part IV.

¹⁴ See Byambajav Dalaibuyan, *Mobilizing Against Dispossession: Gold Mining and a Local Resistance Movement in Mongolia*, 5 J. CENTER FOR N. HUMAN. 13, 27 n.24 (2012). ("Opposing the decision of the district administration, the head of the movement brought the case to the administration court claiming that the decision breached the Law on Environmental Impact Assessment that stated that companies should conduct prior consultation with local citizens. The legal battle was long and the provincial court of Arhangai province denied the decision of the district administration in 2006, but by the time gold mining in Nariin Hamar Valley had already started. Furthermore, the Center for Human Rights and Development, an NGO which a lawyer for the local movement, organized what it called a 'strategic advocacy' campaign for the mining-affected local herders. In 2007, it revealed that the 'Mongol Gazar' company used water despite the adequate permit for water usage.")

As information was shared with the River Movements about their legal rights, communities began to coordinate and collaborate on how to more effectively fight for their rights. Mass protests in the capital, Ulaanbataar, began to occur. One group began a hunger strike in opposition to a mining license for copper in the Gobi while another protest concentrated on the Grand Khural's¹⁵ consideration of tax waivers for the mining companies. pressure from the movement increased. In response to the public outcry, the Mongolian President called for a National Forum on Mining and the Environment.¹⁶ The NGOs and activists advocated for the adoption of environmental impact assessments, the need for community consultations on mining licenses, and the use of negotiations to promote sustainable development. CHRD worked on developing and amending existing legislation and then joined forces with other NGOs to conduct legislative advocacy on these laws.

As the lawyers, NGOs, and River Movement began to have success, the mining industry began to pay increasing attention to the changes happening on the political level in Mongolia.¹⁷ In response to the growing political turmoil around the mining issues in Mongolia, donors, who had been supporting the lawyers' and NGOs' efforts, grew more cautious. Shortly afterwards, Global Rights lost its funding to provide technical and financial support to local NGOs, including its main partner CHRD, on the issue of human rights and mining in Mongolia. While Global Rights no longer had funding to provide direct technical assistance or financial support to CHRD, it continued to help CHRD by assisting in identifying pro bono experts and other funding opportunities in support of their public interest work for the River Movements. CHRD continues to work on the issues of environmental damage, human rights, and the mining industries in Mongolia and, in 2009, the Law on the Prohibition of Mineral Explorations in Water Basins and Forested Areas was adopted after intense advocacy. The issue of mining continues in Mongolia with groups like the United Movement of Mongolian Rivers

¹⁵ Mongolia's parliament.

¹⁶ See generally Aisha Bain, *Mining and Human Rights in Mongolia*, UPRISING (Sept. 14, 2006), <http://uprisingradio.org/home/2006/09/14/mining-and-human-rights-in-mongolia/> (explaining that pressure by civil society created a number of changes by the government).

¹⁷ The Mongolian government, which was reconsidering the tax advantages allowed to mining companies, came under significant pressure, including a visit by former U.S. Secretary of State James Baker, whose law firm represented one of the mining companies and who advocated on behalf of the mining industry.

and Lakes (UMMRL) challenging the government's failure to take responsibility for environmental damage.

III. LEGAL CONSIDERATIONS FOR THE USE OF PUBLIC INTEREST LITIGATION IN MONGOLIA

One common tool in some jurisdictions that public interest lawyers use to advance their legal and policy goals is PIL.¹⁸ In public interest cases, the plaintiff must have some grievance apart from the public's general grievance. That is, he or she must have suffered actual harm. This is a jurisprudential rule to avoid multiple proceedings on the same topic, prevent frivolous claims, and facilitate sufficient evidence gathering. However, in recent years, many countries, regardless of their legal systems, have liberalized the traditional standing rules for PIL in civil proceedings.¹⁹

For instance, in many countries, the catalysts for PIL are human rights and social justice NGOs, organizations whose missions are the promotion of specific rights. However, they often face significant shortcomings in the legal and institutional framework, including the ability to gain standing on behalf of the harmed group(s) in order to bring a case to court. The degree of the institutional accessibility to the court often controls the shape and prospects for using litigation as a public policy tactic. Different countries' experiences have demonstrated that liberalized standing rules for NGOs and public interest groups are the most essential factor in the development of PIL as an effective tool for policy changes that advance social justice.²⁰ When exploring how public interest can work inside Mongolia, public interest lawyers benefited from looking at the experiences in other countries.

Mongolia has restricted standing rules despite the emergence of the public interest movement by the burgeoning civil society. This has limited lawyers' ability to use case strategies, but it has not halted the growing public interest movement in Mongolia. As Mongolian lawyers

¹⁸ In private litigation in Mongolia, only the person aggrieved can file a case in the court. The plaintiff must demonstrate to the court sufficient connection to and harm from the law or action being challenged.

¹⁹ See MAURO CAPPELLETTI & J.A. JOLOWICZ, PUBLIC INTEREST PARTIES AND THE ACTIVE ROLE OF THE JUDGE IN CIVIL LITIGATION 142-47 (Mauro Cappelletti ed., 1975) (discussing the examples of Germany, Italy, Ghana, and Tanzania).

²⁰ See JOHN E. BONINE, STANDING TO SUE: THE FIRST STEP IN ACCESS TO JUSTICE (1999), available at <http://www2.law.mercer.edu/elaw/standingtalk.html>.

consider how to expand their public interest efforts, several of them considered how standing rules were applied in other countries.

Mongolian lawyers have considered India's liberalized standing rules for PIL as a standard. India is one of the pioneers of liberalized standing rules for PIL,²¹ and the technique has had considerable success there. In India, the PIL mechanism is a judicially-created response to violations of human rights that emerged out of a long struggle for civil rights in India.²² Created by a series of Supreme Court decisions in the 1970s and 1980s, the goal of PIL is to "promote and vindicate public interest which demands that violations of constitutional or legal rights of . . . people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed."²³ It is viewed as an effective judicial technique to ensure the realization of constitutional rights and to hold the state accountable for constitutional and legal violations which adversely affect the poor and other marginalized or underrepresented groups. The purpose is to make judicial system more reformatory and responsive to the needs of public and to pave the way for social change.²⁴ Indeed, it has been an innovative strategy in the judicial system to defend the rights of citizens, and it has opened up the possibility of access to justice for disadvantaged groups. In addition, PIL is viewed as a vehicle to influence public policy in favor of disadvantaged.²⁵

The key factor for PIL's successful development in India is the Supreme Court's recognition of third party standing for public interest groups. In a 1982 case, the Court held:

[W]here 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

²¹ Susan B. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WISC. INT'L L.J. 57, 59 (1994).

²² *Id.* at 58-59.

²³ People's Union for Democratic Rights v. Union of India, (1983) 1 S.C.R. 456, 457 (India).

²⁴ See generally ARUN RAY MOHAPATRA, PUBLIC INTEREST LITIGATION AND HUMAN RIGHTS IN INDIA (2003).

²⁵ NAIM AHMED, PUBLIC INTEREST LITIGATION: CONSTITUTIONAL ISSUES AND REMEDIES 154-55 (1999).

the legal wrong or injury caused to such person does not go unredressed and justice is done to him.²⁶

As a result, any member of the public can submit an application for redress to the court on behalf of another person or class of persons. Under Indian law this can be done by simply writing a letter to the court, which the court will convert into a writ petition.²⁷

Indian PIL has several other notable features. First, it is limited to constitutional rights and can only be brought against the state, not against private parties.²⁸ The courts, however, have taken a broad view of what constitutes "the state." In addition to the constitution's stipulation that it includes national, state, and "all local or other authorities within the territory of India or under the control of the Government of India,"²⁹ courts have included other entities that carry out government functions or "public functions closely related to government functions"³⁰ as potential defendants in a PIL. In addition, PIL in India is "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" rather than an adversarial proceeding.³¹ The Indian court's liberalization of the standing provided an opportunity for a large mass of people to be represented by NGOs.

This progressive standing rule has become an especially important mechanism for a large population of poor and disadvantaged people that lack access to the courts. The new standing rule is not only designed to improve access to justice for the poor, but also to enforce individual rights. The proactive approach of the judiciary played an

²⁶ *Gupta v. President of India*, (1982) 2 S.C.R. 365 (India).

²⁷ The Supreme Court granted this "epistolary jurisdiction" in the *Gupta* case, explaining that "procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities." *Id.*

²⁸ Avani Mehta Sood, *Gender Justice Through Public Interest Litigation: Case Studies from India*, 41 VAND. J. TRANSNAT'L L. 833, 840 (2008).

²⁹ INDIA CONST. art. 12.

³⁰ *Mehta v. Union of India*, (1987) 1 S.C.R. 819, 835 (India). In an earlier case, the Supreme Court listed factors that should be taken into consideration when determining whether a private entity is an "agency or instrumentality" of the state. These include "whether there is any financial assistance given by the State, and if so, what is the magnitude of such assistance whether there is any other form of assistance, given by the State, and if so, whether it is of the usual kind or it is extraordinary, whether there is any control of the management and policies of the corporation by the State and what is the nature and extent of such control, whether the corporation enjoys State conferred or State protected monopoly status and whether the functions carried out by the corporation are public functions closely related to governmental functions." *Shetty v. The Int'l Airport*, (1979) 3 S.C.R. 1014, 1041 (India).

³¹ *People's Union for Democratic Rights v. Union of India* (1983) 1 S.C.R. 456, 458 (India).

enormous role in the development of PIL in India and became a form of judicial activism.

However, despite its success and popularity, PIL has shortcomings in India. It encourages vexatious litigants to file unmeritorious charges in large numbers thus allowing them to abuse the court process and cause further delays in the administration of justice. In addition, PIL sometimes leads to judicial and executive confrontations due to policy conflicts.

PIL is a very new concept in Mongolia. Nevertheless, there have been many attempts and efforts by Mongolian NGOs in the recent past to pursue PIL in various areas. One such case is the freedom of movement case. This case is an examples of a successful PIL in which protecting the constitutional rights of the disadvantaged brought about major changes in policy and institutional practice. This case, which established the right of citizens to travel and to freely choose their place of residence, was litigated in the administrative court in 2000 by the National Human Rights Commission with the involvement of NGOs. The case was against the local municipal of Mongolia's capital city Ulan Bataar, which issued a fee for new residents to the city. As a consequence, this fee created a barrier to obtaining registration for newly migrant citizens and further deprived them of their rights to receive social services and rights to employment. In 2003, the Supreme Court upheld the decision of the district court that found a violation of constitutional rights and invalidated the decision of the local municipal. After the court decision, similar fees of the other big cities were revoked.

There are many other PIL cases that did not result in a court victory, but played important roles in highlighting problems or injustices that existed in Mongolia's legislation. These cases prompted policy makers to reexamine public policy and enact measures to address the needs demonstrated by these cases. For example, in 2005 CHRD filed a case on a private gold mining company's breach of duty for failure to conduct environmental restoration after the mining exploration and for causing environmental damage. Despite the fact that the overwhelming majority of companies fail to meet their restoration obligations, this case was the first ever public interest case on behalf of local community that charged a company with breach of duty for failure to restore the

environment.³² However, the case was dismissed on the grounds that there were no regulations for calculating the environmental damages. CHRD continued to pursue the case and advocated successfully for the establishment of regulations for environmental damages, which were enacted by the Ministry of Environment in 2008.

IV. PUBLIC INTEREST LITIGATION IN MONGOLIA: CHALLENGES AND OPPORTUNITIES FOR GROWTH

The standing rules are very restrictive in Mongolia, both in civil and administrative proceedings. Third party standing is not allowed unless the party can also claim direct harm. Article 65 of the Civil Procedure Code defines the parties to a dispute as a party who is directly harmed or has suffered damage. Furthermore, Article 6.1 of the Administrative Law explicitly connects harm with standing in administrative proceeding.

Under these circumstances, NGOs have limited opportunity to file a PIL without a plaintiff who has suffered actual harm. Therefore, they must find an individual who has standing and persuade him or her to pursue a claim. However, there is always a high risk that the selected individuals will drop the claim altogether or pursue their litigation against a private party. Moreover, civil litigation, reparations, and compensation for damages are not significant in either law or practice. In most cases, including PIL cases, lawyers have demanded significant reparations, but the courts have only awarded nominal amounts. In addition, there is no provision for class action or multiple litigants, despite many incidents of a group of citizens or a whole community suffering damages.

One of the biggest challenges of PIL in Mongolia and is meeting clients' expectation of immediate reparation for harm. A successful PIL depends on selecting a suitable client with a case that has precedential value and that demonstrates the existing problem. In PIL, there is a risk that clients will feel they are being used simply to gain a favorable outcome for society. Public interest lawyers should ensure that they are not attempting to change the system at the expense of individuals so as to avoid this moral dilemma.

³² In 2010, the Supreme Court ordered the government to enforce existing laws. Felicity Barringer, *Mongolia as Minegolia? Paying the Price*, N.Y. TIMES (Feb. 15, 2012), http://green.blogs.nytimes.com/2012/02/15/mongolia-as-mine-golia-paying-the-price/?_r=0.

For example, in the early 2000s, the discovery of the wealth of natural resources available in Mongolia created a rapid influx of corporations seeking to extract those resources.³³ Although Mongolia had protective regulations that required community participation in decisions about how companies operated on communal land, often the community was unaware of the law or one individual would “represent” the community and approve the company’s plans. Lawyers strategized on how to challenge these agreements so that the natural resource extraction would benefit the communities as a whole. In doing so, the Mongolian lawyers developed their approach using the knowledge they learned from South African lawyers.

In an exchange visit³⁴ to South Africa, several Mongolian public interest lawyers, including lawyers at CHRD, met with the Legal Resources Centre’s³⁵ environmental lawyers. During those exchanges, the South African lawyers shared the challenges they faced in similar circumstances. When they filed the cases to challenge the corporations’ right to the natural resources on communal land in South Africa, the corporations would identify the lead plaintiff and negotiate with him or her to dismiss the case thereby leaving others in the community without recourse. The lawyers then had to find new plaintiffs and refile the case; wasting valuable time and resources.³⁶ To eliminate this problem, lawyers at LRC identified children within the community to be the primary plaintiffs, and then asked the court for the right to represent those children’s interests. While this approach was not adopted in Mongolia, the exchange helped the Mongolian lawyers consider alternate, creative means of addressing the challenge of community representation.

There are other legal and institutional factors that hinder the further development of PIL, including the legal system of the country, lack of an enabling legal environment, and institutional shortcomings.

³³ See *supra* Part II.

³⁴ The exchange visit was supported by Global Rights (formerly the International Human Rights Law Group) with funding from the U.S. Agency for International Development.

³⁵ Legal Resources Centre (LRC) is a South African NGO that was instrumental in its creative use of the law to challenge Apartheid. Since the political transition in South Africa, LRC has continued to “seek creative and effective solutions by using a range of strategies. These include impact litigation, law reform, participation in partnerships and development processes, education, and networking within South Africa, the African continent and at the international level.” *About Us*, LEGAL RESOURCES CENTRE, <http://www.lrc.org.za/about-us> (last visited Feb. 10, 2014).

³⁶ Conversation with Lawyers at the Legal Resource Centre, in Pretoria, S. Afr.

Mongolia adopted the civil law system at the beginning of the eighteenth century under the influence of Russia. As in any other civil law country, codified laws and rules are the main sources for court decisions and courts do not set precedents for further reference. This distinction in the legal system is a significant factor for the development of PIL by creating an environment conducive to PIL development in common law system.

There are major differences in the role of courts between the two systems. In a common law system, such as India and the United States, the court has a broad role in setting public policy. However, in a civil law system the court has a limited social and political role and does not create public policy or social regulation through the litigation of private controversies. Since cases play an important role in setting precedent in the common law system, PIL has a significant advantage in the common law system that it lacks in the civil law system. In civil law systems, courts apply the law in a more rigid manner to the facts of the case before them, and the implications of the ruling do not extend beyond that specific case.³⁷ In contrast, in common law systems courts interpret and apply the law in the context of specific circumstances, but the way the courts interpret and apply the law in one case can be controlling in future cases.

Moreover, there is a significant procedural difference between civil and common law systems. The civil law procedure is a formalistic system in which rules of procedure are defined in detail and there is little room for judicial discretion in procedural matters. Therefore, court decisions are made with strict reference to laws, and courts defer to the legislative branch on policy matters. This has the advantage of consistency and clear characteristics over generality. However, under the common law system judicial procedure is more flexible which gives the court the opportunity to interpret and apply procedural rules and regulations. In this system, PIL, like other forms of litigation, will be able to take advantage of this flexibility by employing different strategies. Ultimately, this can lead to a better chance of success.

³⁷ To some extent, courts in a civil law system have a role in interpreting and applying the law to particular circumstances. See Alec Stone, *The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe*, 19 POL'Y STUD. J. 81, 81 (1990), and Martin Vranken, *Statutory Interpretation and Judicial Policy Making: Some Comparative Reflections*, 12 STATUTE L. REV. 31, 31 (1991), for a discussion of the role of courts in policy-making in civil law systems.

In a few civil law countries, including Mongolia, there is an increasing tendency for judges to look to past decisions for guidance and to exercise more discretion in decision-making. Under these circumstances, judicial decisions can potentially serve as models for future cases, especially in an area such as human rights where courts have limited expertise. Even if a decision has no legal effect on subsequent cases, as is usually the case in civil law systems, the precedent may inspire other judges to issue similar decisions.

Furthermore, there is much controversy about whether class action litigation is suitable in a civil law system. Despite the skepticism of many scholars, there are many practical examples of class action litigation in civil law systems, although Canada³⁸ and Brazil are the only civil law countries that have developed a sophisticated system of class action suits. However, there is still a distinction between civil law systems and common law systems due to substantive differences in the laws and procedures, but not in the development and strategies employed in a class action lawsuit.

Unlike India, the Supreme Court of Mongolia does not have jurisdiction over cases involving violations of constitutional rights. Rather, the Constitutional Court of Mongolia, a hybrid court, has jurisdiction over constitutional cases and it exercises supreme oversight and issues rulings on decisions and actions. The constitutional court examines matters on its own initiative, on the basis of petitions and on information from a citizen or at the request of the Parliament, the president, the Prime Minister, the Supreme Court, or the Prosecutor General.³⁹

The constitutional court's jurisdiction is limited to reviewing whether enacted laws or legal acts are consistent with the Constitution; however, violations of the Constitution cannot be brought to the constitutional court. For example, the environmental damage case cannot be brought directly to the constitution court as a violation of environmental rights, but the relevant laws or regulations that triggered (or allowed) the environmental damage can be reviewed. Therefore, the constitutional court might not be the most appropriate venue for achieving broad changes through PIL. But this jurisdictional limitation does not completely exclude all potential PIL cases, as some issues of

³⁸ While Canada's legal system is primarily based on a common law system, Quebec maintains a civil law system.

³⁹ Constitution of Mongolia, art. 66.1.

noncompliance with the Constitution can be successfully addressed in the court depending on the nature of the case. For example, in environmental cases, any official decision or legal act can be brought to the constitutional court and could potentially create a change in policy if the case is successful.

Another institution relevant to PIL is the National Human Rights Commission of Mongolia, which was established in 2000. The Commission's mandate is to investigate human rights violations and to provide recommendations for redress. It is not part of the judicial system nor does it have authority to settle private and public disputes but it can play an important role in an overall public interest strategy by drawing public attention to an issue and gathering important data.

The most appropriate institution for PIL in Mongolia is the administrative court, established in 2004. The administrative court is a specialized court that has jurisdiction over cases involving a breach of administrative law or misconduct by public officials, which could provide an additional avenue for litigation to address abuses because human rights violations often occur due to faulty actions by public officials. A citizen or a number of citizens whose common rights were violated can individually or collectively bring a lawsuit to this court. A "collective case" differs from a class action in that individuals nominate and authorize a person to be a representative of their interests and only this authorized person can pursue in the case.⁴⁰

Judicial independence is an important factor for the success of PIL, especially when PIL involves cases related to government and public officials. Judicial independence, transparency, and accountability are "serious and persistent concerns" in Mongolia.⁴¹ In Mongolia, the judicial branch has always been viewed as a tool of the government, a perception inherited from the communist regime, rather than as an independent organ. This traditional mentality persists. In addition, there is increasing public distrust of the courts with a common perception that court decisions serve private interests and the interests of judges' acquaintances, political party, and organizations instead of the public interest.⁴² For example, several PIL cases that have recently been brought involving environmental damage by mining companies are languishing

⁴⁰ Law on Administrative Courts, art. 22 (Mong.).

⁴¹ Ctr. for Citizens' Alliance & ICSFD Ulaanbaatar Secretariat, State of Civil Society in Mongolia: CIVICUS Civil Society Index Report for Mongolia 54 (2004–2005).

⁴² *Id.* ("In the public opinion, courts routinely favour wealthy people (89%), high public officials (91%) and friends and relatives (86%) . . .").

in the court without any further progress; since there is no clear reason for the delay, there is speculation that the main reason for the delay is that the cases involve the government or high officials. There is growing interest in PIL by the Mongolian NGO sector, and human rights NGOs have filed an increasing number of cases – primarily on environmental rights. Yet the concept of PIL is still new among Mongolian NGOs and lawyers alike. According to a survey of NGOs, approximately seventy percent of NGOs responded that they are not familiar with PIL, and only twenty percent of the respondent NGOs have ever been involved in public interest-type litigations.⁴³ In addition, most lawyers are not familiar with PIL, and most NGOs do not have lawyers on staff. Furthermore, although Mongolia has a large number of lawyers, traditionally the profession has not cooperated with NGOs, and a pro bono culture remains nascent.

In a legal system where standing is restricted the role for lawyers in PIL is crucial, yet the Mongolian legal sector frequently lacks the capacity to meaningfully contribute in the PIL context. Although litigation remains one effective tool for achieving systemic change, litigation alone cannot achieve broad goals without other supportive strategies to accompany the legal efforts. One lesson that is clear from examining PIL in other countries is that NGOs pursuing PIL cases must employ a more holistic approach involving different strategies such as media and public campaigns. However, in Mongolia as in other countries, NGOs often lack the human and financial resources to do so.

V. CONCLUSION

Incorporating a holistic approach into PIL should play an essential role in addressing legal problems and social justice issues in Mongolia. The development of PIL will bring many advantages and benefits to Mongolia that are critical to promoting the social justice, such as:

promoting laws and institutions that more effectively protect the rights of people and prevent future violations;

enforcing legal and institutional changes;

using laws and regulations that are otherwise never used or ignored;

⁴³ The survey was conducted among 25 NGOs and lawyers in Mongolia in March, 2008.

substantiating and redefining laws and regulations to better address problems;

broadening the court's role in public policy;

compelling resistant governmental authorities, agencies, and public institutions to take action;

ensuring accessibility to courts, particularly for poor and disadvantaged people, which will serve to empower them; and

raising awareness of public interest issues and inspiring pressure for change among the general public, potentially changing public opinion and thereby making progress toward a more just society.

The most urgent need to facilitate the growth of PIL in Mongolia is liberalized standing requirements in both civil and administrative procedures in public interest cases. This will allow NGOs to act on any critical human rights issue on behalf of harmed groups. Long term, increased judicial independence, civil society capacity-building, and involvement of lawyers are also important steps to take full advantage of the PIL mechanism.

To this end, Mongolian public interest lawyers will continue to benefit from experience- and knowledge-sharing with their counterparts both regionally and around the globe. Underlying these exchanges is the belief that public interest lawyers can significantly strengthen their efforts by sharing information, by forming local and regional alliances to assist each other in their legal efforts, and by creating a sustainable movement for reform.