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PUBLIC INTEREST LITIGATION IN INDIA AND PAKISTAN: INNOVATE APPROACHES TO REFUSE STANDING

A. Ullah,
South Asian University, New Delhi

ABSTRACT

Judicial system in the British India was adversarial, which required two litigant parties and an impartial judge to determine a legal issue. After independence, access to the higher courts was next to impossible for poor and disadvantaged people of India and Pakistan. To remove the procedural barriers, the Courts of both countries ventured to relax the rigid test of locus standi from an aggrieved party to a public spirited individual or a group fighting for social justice. Opening the flood gates of Public Interest Litigation risked its abuse, which was dubbed as Personal or Political Interest Litigation., the Indian Courts innovatively created new defense lines, insulating the new procedural phenomenon. The constitutional Courts of Pakistan went one step ahead of the Indian Courts and also closed their doors for abuse of the procedure.

Keywords: *Innovative Judicial Activism, Public Interest Litigation, New Remedy. Courts, Judicial System*

INTRODUCTION

The Indian Constitution did not envisage an express provision of Public Interest Litigation. Even it had not been defined in any Act of the Parliament. Owing to judicial activism, it emerged in the post emergency era, when the Courts started to assert themselves, filling the vacuum of administrative and legislative apathy, to address the issues of little man of India. The Indian Courts encountered the question of their legitimacy that they were available only to the people with heavy purses. Access to the Courts was reckoned as an expensive, time-consuming and complex process and unaffordable by the poor people. In circles of legal profession, it was utilized as a last resort to get remedy. In addition, the pre-requisite of judicial review to avail an alternative remedy was another

barrier to access the Courts in India. The Indian judiciary realized impediments in the way of access to justice gradually. While exploring and expanding Article 21 of the Constitution, it relaxed the procedural technicalities of *locus standi*. It also dispensed with formal method of filing a writ petition, exercising epistolary jurisdiction, taking *suo moto* actions and excepting representative applications by public spirited individuals and groups. The Courts created many exceptions to centuries old adversarial system of litigation and invented a number of new remedies. In detail, the development of all these phases will be analyzed.

This paper, particularly, focuses on the circumstances and situations, in which the higher courts of India and Pakistan, gradually realized that the great gateway, opened for the poor masses, was susceptible to abuse. Public Interest Litigation was dubbed as a Political Interest Litigation, sarcastically. Therefore, it is concentrated on how the Courts profoundly took measures to close their generous doors of justice for rich and busy bees, through Public Interest Litigation. The Supreme Court of India, in a recent case, wherein the appointment of an Advocate General was challenged, first summarized an earlier decided case, and then enriched the criteria to entertain the petitions in the style of Public Interest Litigation, with comprehensive guidelines. While alluding to various cases, *State of Uttaranchal v Balwant Singh Chauful* (2010) regarding Public Interest Litigation, the Court held that it was observed in *Gurpal Singh v State of Punjab* (2005) that 'the Court must be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved.' Moreover, it was also observed in the same case that "the court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions." Expanding and emphasizing on more cautious approach, the Court laid down very comprehensive guidelines. After defining, explaining origin, developments and evolution of Public Interest Litigation streamlined the principles. While appreciating glorious record, judicial creativity and craftsmanship of the Indian Courts, the Court issued the directions as: the Courts must encourage genuine and bona fide PIL and effectively discourage and curb the abuse filed for extraneous considerations; Instead of every individual judge devising his

own procedure, each High Court must frame a uniform policy; must check credentials of a petitioner; must be satisfied with the correctness of the contents of the petition, and to see that substantial public interest is involved. Moreover, larger public interest, gravity and urgency must be given priority, addressing the genuine public harm or public injury, and closing the doors for personal gain, private motive or oblique motive. If these measures do not work, then busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or other penal liabilities. The research paper mainly enlists the circumstances or factors, although not exhaustively, wherein the Courts refused to allow its abuse, for personal or other mala fide interests.

REFUSAL IN INDIA

The open-arm welcome of letters and applications, written by members of the society, or aggrieved persons, addressed to the Supreme Court, were bound to be abused by busybodies. Initially, even being conscious of the potential abuse, the Courts did not discourage such litigation; otherwise, it could be detrimental for a nascent evolution of novel phenomenon. The more principles of Public Interest Litigation developed, the more apprehensions of its abuse emerged; its abuse weighed out its utility. Avoiding strict principles of *locus standi*, like court fee and other formalities, it became a simple and cheap tool to harass the opponents, abusing the newly developed legal process, which was originally evolved to help address the plight of poor people of India. In a number of cases, the Courts faced frivolous and vexatious applications. Taking notice of such abuses, gradually they moved to filter the application process to access the Courts, addressing the weakness of Public Interest Litigation, as observed in *Susetha v Union of India* (2008). Otherwise, the traditional litigation would have suffered.

The abuse of Public Interest Litigation compelled the Higher Courts of India to streamline the sporadically evolved principles, which had built-in potential abuse. Therefore, to address the problem of abuse, the Courts, apart from other mechanisms, issued guidelines regarding the admittance of public interest litigation that "it is, therefore, necessary to lay down clear guidelines and to outline the correct parameters for entertainment of such petitions",

Like in the case of *Charan Lal Sahu v Union of India* (1988), the Courts required the applicants to inspire confidence before them and amongst the public, and be above suspicions. To avoid the rampant abuse of Public Interest Litigation, the Courts asked for self-restraint by the applicants, imposing civil restraint orders and discouraging them with exemplary fines or damages. The Indian Higher Courts refused to entertain the applications, letters or complaints in future, or did not let the people abuse the gateway, especially opened for the down-trodden people and victims of caste and class system of India. Especially the Courts closed their doors for Public Interest Litigation in the following situations.

2.1) No Breach of Fundamental Right

Article 32 obliges that original jurisdiction of the Supreme Court is only available in the case of breach of fundamental rights protected in the Constitution. The Indian Superior Judiciary, following the express constitutional provisions, always showed its reluctance to entertain writ petitions, which did not relate to violation of a fundamental right. Although the provisions of Article 32 do not specifically indicate who can move the Court, as was held in *Bandhua Mukti Morcha v Union of India* (1984) but it explicitly provides that invocation of the Supreme Court was confined to breach of fundamental rights. The Courts have been asked to exercise the extraordinary jurisdiction vigilantly and "must not allow its process to be abused for oblique considerations" (*Rajiv Ranjan Singh v Union of India* (2006). Similarly, the Supreme Court, while defining the boundary line of Public Interest Litigation, observed that it could only be benefited "to wipe out violation of fundamental rights" as was adjudged in *Kushum Lata vs Union of India* (2006).

2.2) Political Questions

Public Interest Litigation is sarcastically named as a Political or Personal Interest Litigation. Although the criticism did not help the Courts back down; however, where the political motives were sheer, the Courts did not let the process abused. Therefore, when it was invoked by the petitioners on the basis of a writ, earlier filed in the High Court of Patna, alleging a large scale misappropriation of public funds and forged accounts in a department of the State of Bihar, the Supreme Court inhibited to abuse the legal process, which raised politically motivated questions. In the Supreme Court, the petitioners alleged that the State's

government changed and the accused joined the government; therefore, they were influencing the government officials, investigation and were obstructing the course of justice. The Court refused to entertain the petitions as Public Interest Litigation and observed that it was available to the person who had sufficient interest in the matter; especially in criminal cases, the Court discouraged Public Interest Litigation by a third party. It opined in *Rajiv Ranjan Singh v Union of India* (2006) that it would not maintain a writ filed in the style of Public Interest Litigation "for personal gain or private profit or political motive, or any oblique consideration". The attempts to raise political issues, abusing public interest litigation, have persistently been discarded by the Higher Courts which was held in *Kushum Lata v Union of India* (2006). Recent case-law shows that frivolous litigation, raising political issues or politically motivated issues, pushed the Courts to retract from liberal approach to strict approach (Madhav Khosla, 2007).

2.3) Mala fide

Although the Courts came down from the traditional higher pedestal of an 'aggrieved person' to the locus standi of any bona fide person, but they blocked the way to be accessed by mala fide people; particularly who were not with clean hands, or had not done equity themselves. In the case of *Bandhua Mukti Morcha* (1984), Bhugwati J, speaking on behalf of the majority, observed that anything which would impose the charges of breach of fundamental rights, sent by any bona fide person, had the potential of abuse of the process of law if accepted without any proof. Therefore, a satisfactory verification was necessary; particularly when a complaint was received by post. Without such reasonable checks, the apprehension of *mala fide* applications increased, which might cause coercion or blackmail or other oblique motive against a person named therein who held an honourable position in the society. He went on to say that only a vigilant Court could nip the unwanted *mala fide* applications in the bud, before summoning the respondent. Moreover, the discretion would always remain with the Court to decide whether an application needed verification or not. Similarly, in *Ramana Dayaram Shetty v International Airport Authority of India* (1979), the Court refused to give relief, when the petitioner, a third person, who had no real interest in the litigation, attempted to abuse the process just to deprive the respondent of his rights. The Supreme Court also warned not to trust a *mala fide* petitioner, saying in *Narmada Bachao Andolan v Union of India* (2000) that

these were some basic issues, which were required to be satisfied in the cases of public interest litigation.

2.4) Frivolous or Vexatious

In another case, a writ was filed in the Supreme Court by a petitioner contending that the grant of a special leave to appeal violated Article 21 of the Constitution. The Court observed also observed in *Sadhanantham v Arunachalam* (1980) that "we are thus satisfied that the bogey of busybodies blackmailing adversaries through frivolous invocation of Art.136 is chimerical." Similarly, the Court further emphasized in *Chhetrya Pardushan Mukti Sangharsh Samiti v State of U.P* (1990) that it was also the "duty of the Court, while protecting the fundamental rights, to protect the society from the so called protectors of the society". In a very recent case *Balwant Singh*, the Supreme Court stressed on the subordinate Courts that 'busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations.'

2.5) Abuse of Process for Private/Personal Benefits

In the case of *Subhash Kumar v State of Bihar* (1991), under Article 32, a writ petition was filed in public interest, alleging that West Bokaro Collieries and Tata Iron and Steel Company were polluting the river Bokaro by discharging slurry from their washeries into the river, which was a breach of Article 21 of the Constitution. The Supreme Court, in the same case, categorically restricted the right to public good, instead of personal agenda and succinctly opined that the Court should be approached "by person genuinely interested in the protection of society on behalf of the community. Public Interest Litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge and enmity." In *Ramsharan Autyanuprasi v Union of India* (1989), the petitioner stated that his right to life as enjoined under Article 21 of the Constitution had been infringed, but the Court did not agree with the contention. While differentiating between a public and private right, the Court observed that "Public Interest Litigation is an instrument for the administration of justice to be used properly in proper cases. Public Interest Litigation does not mean settling disputes between individual parties."

The Indian Courts are very vigilant to see whether PIL is abusing the process of law or just serving personal interest. If that is the case, the litigants are discouraged. The Supreme Court in *Rajiv Ranjan Singh v. Union of India* (2006) held that it should not become a source of abuse of process of law by disgruntled litigants, and that the litigation must be genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose true facts and approach the Court with clean hands. The Court unequivocally pointed out that "abuse of process of law is essentially opposed to any public interest." Also said that process should not be allowed to be "abused by a mere busybody or a meddlesome interloper or wayfarer or officious intervener without any interest or concern except for personal gain or private profit or other oblique' consideration." Moreover, It has also been observed *Godavarman Thirumulpad (98) v Union of India (2006)* that "a person acting bona fide alone can approach the court in public interest," and "the courts should not allow their process to be abused by a mere busybody or a meddlesome interloper or wayfarer or officious intervener without any interest or concern except for personal gain or private profit or other oblique' consideration." In *Joydeep Mukharjee v State of West Bengal* (2011), the Supreme Court observed that such jurisdiction "cannot be pressed into service where the matters have already been completely and effectively adjudicated upon not only in the individual petitions but even in the writ petitions raising larger question."

2.6) Cheap Fame

Excessive abuse of Public Interest Litigation convinced the Courts to guard the generously opened floodgates. The famous case of *Narmada Bachao Andolan v Union of India* (2000) reversed the clock and the Courts vehemently opposed its extravagant use for ulterior motives; particularly for the sake of cheap popularity and media attraction. Although the Court went far away to criticize the abuse of Public Interest Litigation, but it seemed more self-restraint for the Court itself, instead of any restraint order imposed on the busybodies. All in all, the Supreme Court unequivocally observed in the same case that "Public Interest Litigation should not be allowed to degenerate to becoming Publicity Interest Litigation or Private Inquisitiveness Litigation." While in *TN Godavarman Thrumulpad v Union of India* (2006), the Supreme Court cautioned the other Courts to be extraordinarily cautious of frivolous and vexatious litigation. It also observed in the same case that the Courts must be conscious that

"behind the beautiful veil of public interest, an ugly private malice, vested interest and/or publicity-seeking is not lurking". Moreover, it asserted that focal point of such litigation should be to address a genuine public wrong or public injury, but not be exploited by the people with motives of publicity or personal vendetta. In the instant case, the Court also condemned such busybodies as their driving force was to win notoriety or cheap popularity.

2.7) Contempt of Court

In the famous case of *Charan Lal Sahu v Union of India* (1988), the petitioner, in an application of Public Interest Litigation, alleged that the working of the Judges of the apex Court was very ambivalent; that the Court had become a constitutional liability without having control over the illegal acts of Government; that the Court was sleeping over the issues. The Court took its serious notice and foiled the attempt to malign the Court, through the mechanism of Public Interest Litigation.

2.8) Mega Projects

In the case of *Tehri Bandh Virodhi Sangarsh, v State Of U.P. (1990),* the petitioners filed a writ petition in public interest under Article 32 of the Constitution, alleging that in preparing the plan of Tehri Dam Project, the safety aspect had not been taking into consideration. Moreover, the construction of the Dam had potential of environmental hazards and ecological disaster, due to apprehension of seismic location. The Supreme Court refused to interfere where the domain of expertise totally belonged to the government and a balance had to be struck between economic development and environment. Extreme complex questions of science and engineering were kept out of the Court's jurisdictions; however, the Court showed its willingness to intervene where the government was not conscious to the inherent danger or did not apply its mind to the safety of the Dam.

2.9) Scarcity of Resources

The Indian Constitutional Courts showed their limits when they encountered the question of state liability directly connected with the condition of availability of resources. The Supreme Court was approached by a petitioner in *Nalla Thamby Thera v Union of India* (1984), a

commuter of the Indian Railways filed a writ of Mandamus under Article 32 of the Constitution so as not to violate Articles 19 and 21 of the Constitution. Due to the scarcity of resources, the Court was reticent to give relief or issue any directions. The Court observed that it would not be prudent to give any directions where availability of resources had a cumbersome liability, priorities of expenditure and question of expertise was a material one. In the cases where resources were involved, it was recognized as a domain of government to decide.

3) REFUSAL IN PAKISTAN

3.1) No Breach of Fundamental Right

No doubt, the constitutional provisions are unequivocal that the extraordinary jurisdiction of judicial review, whether of the Supreme Court or the High Courts, is limited to breach of fundamental rights. The Supreme Court, for the first time, considered the question of Public Interest Litigation in the landmark case of *Benazir Bhutto v. Federation of Pakistan* (1988). The jurisdiction of the Supreme Court and the High Courts can only be invoked in the case of violation of a fundamental right. However, it may be "confined to the enforcement of the Fundamental Rights of an individual which are infracted or extends to the enforcement of the rights of a group or a class of persons whose rights are violated". The Court allowed every *bona fide* person to approach the Court, when a fundamental right is breached, on behalf of the people who were "unable to seek relief from the Court for several reasons", held in The in-depth study of the cases, regarding public interest litigation, reflects that the Courts went beyond the infraction of explicit fundamental rights and even encompassed the enforcement of human rights, which did not come strictly under the gambit of fundamental rights (S. M. Hussain, 1994). Nonetheless, when a petitioner failed to identify the breach of a particular fundamental right, the Supreme Court refused to give relief (S. M. Hussain, 1994). On the other hand, the Supreme Court, in a *suo moto* case, presumed the breach of Article 9 of the Constitution, addressing the issue of nuclear dumping hazardous for the Marine life, in *Human Rights Case* (1994). In the case of Mohammad *Saifullah Khan v Federation of Pakistan* (1989), the Supreme Court also barred the invocation of jurisdiction of Supreme Court under Art. 184(3), wherein there was no allegation of infringement of a fundamental right.

3.2) Not of Public Importance

Unlike the jurisdiction of Indian Supreme Court, which is restricted to the breach of fundamental rights only, the jurisdiction of the Supreme Court of Pakistan, in addition, is tagged with the condition that fundamental right must be of public importance. While defining the contours of the phrase 'public importance' used in Article 184(3) of the Constitution in the case of *Mohammad Saifullah Khan v Federation of Pakistan* (1989), , the Supreme Court observed that the issue raised must be of such a nature that might negatively affect the whole body of people or an entire community. It must touch the legal rights or liabilities of the public or the community at large. In the same case of fundamental right of public importance, the apex Court said that the personal loss of the petitioner would be immaterial. In another case of Public Interest Litigation, the Supreme Court also opined that 'public importance' was a *sine qua non* of the Article 184(3) of the Constitution. It also defined that "the adjective of 'public' necessarily implied a thing belonging to people at large, a nation, a state or a community as a whole".

3.3) Political Questions

The first case of Public Interest Litigation was instituted by a wealthy and influential politician, Benazir Bhutto, the chairperson of Pakistan People's Party, wherein, the provisions of the Political Parties Act 1962 were challenged. Although the petition was admitted, under Article 184(3) of the Constitution, in the nature of public interest litigation, but it was severely criticized as being against the very nature of Public Interest Litigation, which was only meant for poor, helpless and disadvantaged class of the society. Professor Menski lamented that it was easy in Pakistan, for the people with money and power, to use the Public Interest Litigation techniques for their own political interests (Menski, 2000). A longstanding practice of the Courts has been to live with self-restraint and they mostly denied the jurisdiction, not bestowed by the Constitution (*State v Zia ur Rahama, 1973*). Recently, when two well-known politicians, Qazi Hussain and Imran Khan, challenged the amendment of election rules by the Election Commission of Pakistan, regarding eligibility of the incumbent President for his re-election, the Supreme Court scolded the petitioners that they were using the Court's shoulders to address political questions, under Article 184(3) of the Constitution. Particularly, Javed

Iqbal J blamed the politicians for letting the Court carry the entire burden (Nasir Iqbal, 2007).

3.4) Mala-fide

In *Benazir Bhutto v. Federation of Pakistan* (1988)., the Supreme Court, while liberalizing the strict limits of *locus standi*, stipulated that the doors of the Court were opened in Public Interest Litigation, if it was brought to the Court by a person acting *bona fide*. The High Court of Balochistan in *Abdul Haq Baloch v Government of Balochistan* (2007), while dismissing the petitions, held that Public Interest Litigation had been exhaustively dealt with by the Superior Courts. It was the duty of the Court to put checks on it, whether it was applied by a bona fide petitioner or was for any personal gain or private motive.

3.5) Frivolous or Vexatious

In the case of *M.D. Tahir v federation of Pakistan* (1995), an advocate under Article 199 of the Constitution challenged the legality, propriety and justification of the expenditures incurred on tours of President of Pakistan to the USA and that of Prime Minister of Pakistan to perform Haj-i-Baitullah. The Lahore High Court showed its abhorrence to frivolous and vexatious litigation and declared that such attempts were to block the Court to spend their precious time on the deserving cases. The Court also held in the instant case that the filing of such petitions, with the sole object of petitioners' own aggrandizement for getting their names published in the newspapers and to malign/blackmail the Government in power/Authorities, needed to be discouraged. In addition, the Court opined that unfettered right could not be given in the sweat name of Public Interest Litigation, to file frivolous writs for personal gains.

In a recent case of *Khurram Khan v Government of Punjab (2009),* the High Court re-emphasized that there was no "right to indulge in frivolous litigation without any genuine cause of action and the necessity of seeking redress of some real grievance", cautioning "that certain minimum conditions must be satisfied before the courts shall lend assistance to such litigant asking for relief."

3.6) Private Rights

Like India, the Courts in Pakistan as well have been vigilant to distinguish between public and private rights. They also vehemently guarded that no personal right or vendetta be allowed under the guise of Public Interest Litigation. In the case of *Farough Ahemad Siddiqi v Province of Sindh* (1996), wherein a license of alcohol production was challenged by a journalist against the M/S Beach Brewery, in style of Public Interest Litigation under Article 199 of the Constitution, the Sindh High Court, while dismissing the petition, observed that such litigation was permissible under the law, but it could not be made a cloak to hide personal interest and to pursue private vendetta.

3.7) Cheap Fame

The Courts equally discouraged to fulfil the desire of cheap popularity and fame through media. Since Public Interest Litigation is concerned with the protection of public interest, therefore, society at large is curious to know about the proceedings and its initiator. True demand of information by the people invites its abuse by the potential publicity seekers. Being conscious of the fact, the Courts condemned and rebuffed such efforts. M.D. Tahir, an advocate, used to file frivolous and vexatious writs in the style of Public Interest Litigation, but the Courts discouraged him to continue his practice. In *M.D. Tahir v federation of Pakistan* (1995), the Court categorically opined that the filing of such petitions, with the sole object of petitioners' own aggrandizement, for getting their names published in the newspapers and to malign/blackmail the Government in power/Authorities was an act needed to be condemned.

3.8) Writ by a Third Party

Public Interest Litigation has also been restricted to Article 184(3) of the Constitution of Pakistan. The Sindh High Court, in *Democratic Workers' Union C.B.A. v State bank of Pakistan* (2002), refused to entertain a writ petition, filed by a collective bargaining agent, in the style of Public Interest Litigation. The Court pointed out that the suffering of a substantial number of people did not account to public at large and stipulated that the Court would not exercise its jurisdiction in respect of a petition wherein the petitioner sought violation of Fundamental Rights of

a large section or a large number of people without specifying the personal grievance or injury suffered by him. Similarly, in another case, when a bona fide petitioner could not prove his personal loss under Article 199 of the Constitution, he was not allowed to agitate his grievance as *'pro bono publico'* as held in *Javed Ibrahim Paracha v Federation of Pakistan* (2004).

3.9) When Law is Followed Properly

The Court also turned down the applications, in the style of Public Interest Litigation, wherein law was applied properly; transparency and meritocracy was observed; independent people were appointed to judge among various potential participants. In the case of *Pakistan Institute of Human Rights v State* (2005), wherein artists were to be nominated for participation in an exhibition, the Court observed that there was no question of Public Interest Litigation when the authorities had adopted transparent formula/criteria for the selection of the participants in the exhibition.

4) CONCLUSION

Both Indian and Pakistan Judiciary generously opened their door for expedient and less expensive justice, but the generosity and leniency was abuse, for various reasons. Therefore, they evolved a safety mechanism, to discourage such cheater or misrepresenters. Since both Supreme Court of India and Pakistan are equipped to do complete justice, therefore the factors, taken into consideration to welcome or refuse Public Interest Litigation, while expanding the horizons of Article 21 of the Indian Constitution and Article 9 of the Pakistan Constitution, are almost akin to each other, with few exceptions. The other significant difference is that, while entertaining Public Interest Litigation petitions on the violation of right to life, there is no condition under Article 32 of the Indian Constitution that human right to life must be of a public importance. Contrary to the Indian Constitution, the Constitution of Pakistan stipulates that the breach of fundamental right must be of a public importance. So, it is an additional factor for the Supreme Court of Pakistan to refuse its Public Interest Litigation jurisdiction, if the breach of a fundamental right would not be of public importance.

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