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Constitutional Jurisdiction of Public Interest Litigation Assuring Access to Justice in India

Abstract

The Indian Constitution provided a comprehensive regime to the constitutional courts for access to justice in the form of provisions of Public Interest Litigation. However, access to higher court for justice remained a dream for decades; until the higher judiciary decided to play an active role. Justice was meant for few who could afford it. However, judicial activism played a significant role to achieve the purpose of an easy, cheap and expedient access to the constitutional courts in case of breach of fundamental rights. The Courts gradually discovered their implied powers of Public Interest Litigation and opened their door for the poor and lower strata of the society to approach them directly or through their representatives. For such jurisdictional expansion, Article 32 of the Constitution for the Supreme Court of India and Article 226 for High Courts were interpreted in a way to empower the poor public for access to justice directly without any impediment. The constitutional provisions and the following judicial role helped achieve new set of principles of Public Interest Litigation, avoiding turning it into personal or political litigation.

Keywords: Public Interest Litigation, Access to Justice, Indian Constitution, Judicial Activism, Fundamental Rights.

1. Introduction

Public Interest Litigation is a kind of jurisdiction of constitutional courts of India that helped a lot develop and evolve umbra rights, guaranteed by the Constitution, discovering penumbra rights. The writer already explored the limits on unbridled jurisdiction regarding PIL in India, suggested by the Courts; the writer introduced the PIL in India as "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 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

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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."[1]

The study will also explain the constitutional frame work of India, which enabled the constitutional Courts of India to enhance access to justice for the poor masses, exploring the hidden treasure of right to life. The constitutional provisions will be examined to show the way India has extended to do away the traditional requirement of an aggrieved person. Lastly, it explains the factors, not only the infrastructure, which assured access to justice, on the issue of infringement of privilege to life.

2. Developments in India

After the Independence from British Raj in 1947, the Indian Judiciary was not only obliged to continue the legal system but it also persistently followed the British judicial traditions. Judges were mostly first appointed and then trained, during the Raj era; therefore, the Courts invariably believed that they were meant to find the law, rather than make the law, following the conventional common law myth. The other significant reason might be that the judges did not face any expediency to realize that they were also obliged to serve public interest of the Indian peoples.[2] Resultantly, for a long time, the rigid and inflexible principle of standing: 'aggrieved person' ruled the landscape of the Indian judicial review after the Independence. Facing the legitimacy crisis that the higher judiciary was serving the interests of elite of the society rather than socially and economically disadvantaged strata of the masses, the Indian Judiciary opted for judicial activism, disregarding the parochial approach.

In fact, common law is itself an obvious form of judicial activism, but the Courts stuck to the literal rule, during the judicial process of interpretation of the vires of written law.[3] However, "the evolution of the environmental right[s] in India is inextricably linked to the growth of judicial activism and public interest litigation".[4] The norms of PIL invariably are implied in judicial activism, which emerged in various shapes. Judicial activism as a notion is undefined, fungible, obviously restricted and formed by various diverse influences.[5] Judicial activism unleashed in the case of *Kesavananda Bharti*,[6] wherein the Supreme Court, with a razor-thin majority, opined that the amendment procedure of the Indian Constitution did not expressly imposed any restrictions to modify the Constitution by the Parliament under Article 368, inviting severe criticism, and it was labeled as an encroachment on the other organs of the state. The Courts embraced liberal and progressive approach, due to the plight and woes of little man of India. To address the issue, the Indian Judiciary, influenced by global changes of standing rules, needed to evolve new mechanism of perceiving the acute collective problems of the society. Such mood of the judiciary drew the attention towards two potential areas of flexibility. One was the expansion of constitutional prerogative which was ensured and the other was principle of locus standi, which was an obnoxious restriction to approach justice.[7] The relaxation of the standing

rule was a significant "departure from the usual rules of adversary judicial procedure and separation of powers".[8]

So far as Article 21 is concerned, the earth breaking case was ,[9] wherein the apex Court turned down the restrictive approach of the constitutional vires laid down in *A. K.* and opted for broad, progressive and open-minded method to emphasize the constitutional rights. Particularly, acknowledged a hidden substantive part to the phrase "liberty and life" in Article 21 provided wide defense of personal liberties against excessive provisions. For a long time, the Supreme Court persistently stuck to the principle of aggrieved party, refusing to relax the conservative approach apparent from the plain context of the constitutional provisions. The Supreme Court for the first time stated, if there was to be a relief, the Court must have constructed, by simple legal engineering.[10] However, in the subsequent case law, the Court lamented the typical continuous incorporation of the term: aggrieved person, used in a number of statutes. In the case of *M. V. Dabholkar*,[11] the Court, while deriving the support for this philosophy from academic and judicial opinion in England and America, opined that traditionally in adversarial system of adjudication, aggrieved party was a must, but public-oriented litigation better fulfilled the rule of law if it was to run close to the rule of life.

In another case of *Bar Council of Maharashtra (II*), the apex Court went on to emphasize on the recognition of such litigation that "in the days ahead, legal aid to the poor and the weak, public interest litigation and other rule-of law responsibilities will demand a whole new range of responses…"[12] The first case, which substantially changed the conventional trajectory of long-standing principle of locus standi: aggrieved person, was *Maharaj Singh*, [13] wherein the Court softened the procedural shackles. The Court observed that "the right to a remedy apart, a larger circle of persons can move the Court for the protection of defense or enforcement of a civil right…, even if they are not proprietarily or personally linked with the cause of action."[14] The phrase of PIL appeared second time in the case of *Fertilizer Corporation Kamgar Union*.[15] Prior to it, the case of *Sunil Batra (II),*[16] wherein the petitioner, a convict under death sentence, through a letter to one of the Judges of the Court, alleged that torture was practiced upon another prisoner by a jail warder, to extract money from the victim through his visiting relations. The letter was converted into a Habeas Corpus. It was an early example of epistolary activism, to welcome the rudimentary principles of the PIL. However; it was dubbed as a representative litigation, instead of public interest litigation, initially.[17] In the landmark case of *S.P. Gupta*, [18] the Court went on one step ahead, vindicating the rule of law, while opening its doors for the public-spirited citizens to challenge the abuse of power by the public functionaries.

The "epistolary jurisdiction" is a jurisdiction to treat letters from a victim or public-minded citizens as writ petitions. It must not be forgotten that the cause of justice can be allowed to be thwarted by any procedural technicalities; therefore, the letter by the public minded individual were treated as a writ petition and acted upon.[19] Some scholars have characterized this type of standing as 'representative standing' due to the fact that the petitioner was allowed to sue as a representative of another person or group of persons.[20]

From the study of case law, it may be summarized as: "the procedure for moving the Court by just addressing a letter on behalf of the disadvantaged class of persons, evolved into what is now popularly known as epistolary jurisdiction in Indian human rights jurisprudence".[21] The exercise of epistolary jurisdiction "was a major breakthrough achieved by the Supreme Court in bringing justice closer to the large masses of people".[22] Later, such jurisdiction was abused by the public, and the Courts developed a safe methodology to entertain letters or telegrams, either addressed to a Court or an individual Judge. There is an ample evidence of approaching the Courts by letters or telegrams sent by one of the victims or public spirited individuals from different walks of life.[23] The purpose of expansion of the restrictive standard of *locus standi* or the recognition of Article 21 as a repository of social, criminal, administrative and environmental rights, owing to judicial activism, was the plight and miseries of the poor people of India. Since the social problems led to the Public Interest Litigation, therefore, it was also known as Social Action Litigation. The focal point of new approach, adopted by the Indian Judiciary, was social justice. Since the Courts had to "justify their decision making within the framework of constitutional values'; therefore, it was 'nothing but another form of constitutionalism which is concerned with [sic] substantivization of social justice".[24] Even such activism of judiciary, removing limits on access to justice, has been labeled as social activism that means an "activism which is directed towards achievement of social justice".[25]

In the case of *Mukesh Advani*,[26] the phrase of "Social Action Litigation' appeared first time in a judgment of the Supreme Court, wherein, an advocate addressed a letter to Judges of the Supreme Court, depicting the horrified plight of bonded labor from Tamil Nadu, working in stone quarries. Entertaining the complaint, the Supreme Court treated the letter "as part of social action litigation… as a writ petition under Article 32 of the Constitution."[27] Apart from similar pre-requisites, four fundamental differences of Public Interest Litigation with conventional requirements of judicial review can be traced from the series of case law, which helped remove barriers in the way of access to justice. The first noteworthy difference is that Public Interest Litigation almost dispensed with the requirement of standing rule that only an aggrieved person or a man adversely affected by an order of a public authority could sue.[28] Therefore, the traditional emphasis on who knocked the door of Courts shifted to what wrong was committed by public authority, on the ground of justifiability. The second significant difference is that it waives the condition of formal method of access to Courts, to put their grinding mill of justice into operation.[29] The exercise of "epistolary jurisdiction" is its best example. It can be rephrased as: the relaxation of standing rule in Public Interest Litigation which is an exception to the traditional adversarial system of litigation. No Court fee, no special way of drafting and no special place of registry to file a petition are the characteristics of this dimension of public interest litigation. The *Judges Appointment and Transfers* case[30] formalized and strengthened it. The liberalized method of maintainability opened floodgates of letters, and the Supreme Court approximately registered more than 23,000 PIL letters over a fifteen-month period between 1987 and 1988.[31]

The third difference is that the nature of Public Interest Litigation is inquisitorial rather than adversarial.[32] The exemption from the traditional requirements of

procedure unleashes a novel method of litigation, different from adversarial. Being unequal parties in Public Interest Litigation, the victim, who is usually poor and socially disadvantaged, is not expected to produce best technical and expensive evidence, like in environmental pollution cases, or to deny the professionally presented evidences or affidavits by the wrongdoers.[33] The last contrast is that Public Interest Litigation differs with normal litigation with a reference to the nature of remedies available under it. The conventional remedies available in judicial review, whether under common law or the Constitution, proved to be insufficient to address the issue of protection of public interest. It ushered the Indian Courts to the creation or discovery of unusual methods of redress. The new nature of remedy was not a once time final remedy, but the Courts went to create a series of remedies, with continuous monitoring, by the Courts themselves or the commission of experts or citizens appointed by them, also known as ' continuous mandamus' orders.[34] To achieve sustainable results, the Indian Courts opted for, while responding to new demands of justice, "to pass a forward-looking and wide-reaching decree, whose enforcement might be well monitored through the relevant committees".[35] Deep scholarly study of the evolution and developments of Public Interest Litigation in India shows that it can be divided into four stages,[36] mostly developed due to expansion of right to life. The first stage[37] starts from its birth to the late 70's. The case law[38] on public interest litigation concentrates on the relaxation of standing rule. It can be labeled as a period of reorganization of the rights of voiceless people through the public spirited souls of the society. The second stage abandoned the formalism of filing the writ petitions. It transformed the conventional method of approaching the Courts in the name of public interest. It emerged in early 80's, when the Courts became receptive to be accessed in any form whether by a letter, a telegram or a fax. Such relaxation is popularly known as an "epistolary jurisdiction". [39] The third stage, due to the exploitation of 1st and 2nd stage developments, the Courts showed their concerns, and came out to oppose and criticize those unqualified developments. R.S. Pathak J observed, while lamenting public interest litigation, saying "whenever a Court breaks new grounds, the development and recognition of new rights is often accompanied by the birth of problems surfacing also for the first time". [40] Now, the Indian Courts, responding to the exploitation and criticism, evolved a special mechanism to access the Courts.

Although this procedural infrastructure was less complex than the ordinary procedure of judicial review, even then, it was pregnant with red tape restrictive approach, e.g. to wait and affirm the authenticity of such calls by letters, telegrams or faxes. In the fourth stage of its developments, Public Interest Litigation has almost tuned to be on the model of private rights oriented litigation. When we classify the developments of public interest litigation with, reference to its nature, regarding Article 21, particularly emerging environmental rights, then it comes out in three forms: creative, legislative and administrative.[41] The first phase shows the creation and discovery of implicit rights, not expressly provided in the Indian Constitution. The right to life, protected under Article 21 of the Constitution, is a focal point of this phase. In fact, increasing ambit of Article 21 got impetus when the Supreme Court of India energized the Directive Principles, seemingly dead due to their non-enforceability. It articulated that "Part III and Part IV of the Constitution together constitute the commitment to social revolution and they

together are the conscience of the Constitution … *The two paths are like the two wheels of a chariot, one no less important than the other*".[42] The premise was enough for the Courts to carry it forward. The judicial approach revealed that fundamental rights were harmonious with Directive Principles of State Policy, "like two wheels of a chariot, one no less important than the other".[43] Apart from Directive Principles of State Policy, there were other constitutional provisions like Article 51A (g), which imposed a responsibility on citizens to protect and improve the environment. The horizon of these implicit rights was expanded to assimilate right to live with human dignity,[44] right to livelihood,[45] right to education,[46]and right to health and medical care of workers, owing to the PIL.[47] It is in this expansive vein that the Courts extended Article 21 to cover an environmental right that is a 'right of enjoyment of pollution-free water and air'.[48] It would be hard to say that there is any exception to the judicial supervision to control the environmental regime. The second phase, wherein right to life protected under Article 21, set off when the Courts, due to legislative passivism of the Union and the States legislatures incorporated newly developed and internationally recognized principles of polluter pays,[49] public equity[50] and precautionary principle.[51] In *M.C. Mehta***,**[52] the well-known principle of absolute liability was discarded, established in *Rylands v Fletcher*.[53] The judicial intervention, in form of law making, is believed to be a violation of a settled principle of legislative deference. Such activism, on the judicial part, is labeled as a counter majoritarian approach by few judges.

The third phase triggered from the early 90's,[54] the Supreme Court of India started to interfere in the pure administrative function of the Executive ignoring the legal presumption of an administrative autonomy. To enforce the law is a function of the Executive provided under the "Doctrine of Separation of Powers" and the provisions of Indian Constitution, but activist role of the Judiciary overshadowed them. The increasing adoption of executive role by the Judiciary was dubbed as "creeping jurisdiction".[55] Inept, oblivious, corrupt and inefficient performance of the public authorities left no room for the Judiciary to encroach the waived area of administrative powers to vindicate rule of law with its orders, instructions, guidelines and supervising commissions. It ordered the authorities, regarding the environmental rights, to print books to create environmentally conscience community,[56] to take classes in the educational institutions[57] and to run campaigns on the media,[58] rebuking all the antagonistic arguments, and opined that the Courts were to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to provide them social justice.[59] The variety of the rules of Public Interest Litigation, while touching and unfolding the secret world of right to life under Article 21, could not solve all the problems of life like jobs, health, social security, education; however, it provided a new hope for the people, and showed up the Higher Judiciary as a liberal forum of accountability.

Frame-Work in India

The founding fathers of the Indian Constitution did not visualize incorporating express provisions to create an exception in the adversarial system of litigation regarding access to Higher Courts in their extraordinary jurisdiction. The lack of express authority in the Constitution caused judicial inertia and, for a long time,

the poor people of India were kept at arm's length to access to justice. The Indian constitutional frame work, regarding the original jurisdiction of the Supreme Court, is laid down under Article 32 of the Constitution, which is now a part of "Basic Structure of the Constitution".[60] Similarly, Article 226 of the Constitution enumerates the jurisdiction of High Courts with reference to judicial review of a law and an administrative action, violating any fundamental right. It explicitly states that the Supreme Court can directly be approached in the case of breach of any Fundamental Right. However, the Article is silent on the mode and eligibility of a person to access the Court.

Alike, Article 226 of the Constitution empowers the High Courts concurrently to take judicial review of a law or an administrative action and issue appropriate orders or writs. The Constitutional provisions of both Articles were lamented as insufficient and were severely criticized as a tool of rich people, which priced out the poor people,[61] because the literal interpretation closed down doors of justice for the disadvantaged people. Nevertheless, the Supreme Court, while differentiating between Article 32 and 226, opined that the right under Article 32 "can be [62]exercised for the enforcement of fundamental rights only, the right conferred by Article 226 can be exercised not only for the enforcement of fundamental rights but for any other purpose". Eventually, the realization of need to embrace pragmatic approach to social justice compelled the Courts to open its doors for the little man of India; particularly, in the cases of environmental hazards, under Article 32.[63] Encompassing all previous developments, Bhagwati J, in his treatise, comprehensively unfolded the reasons and necessity to change the track of constitutional history that any member of the public or bona fide social organization, espousing the cause of the poor and downtrodden, must be enabled to move the Court by just writing a letter.[64] Since Article 32 is silent on the mode and eligibility of a person to access the Court, therefore, the Supreme Court was of the view that "the provisions of Article 32 do not specifically indicate who can move the Court… [therefore] it is plain that a petitioner may be anyone in whom the Law recognizes a standing to maintain an action of such nature."[65] Even the Court was not complacent with the powers enumerated under Article 32; rather it held that express powers were just an illustration, instead of encircling all its powers of hearing and adjudication. The Court said that "Article 32 speaks of the Court's power… by way of illustration only. They do not exhaust the content of the Court's power under Article 32".[66]

To entertain the petitions, in the form of Public Interest Litigation, the Supreme Court is more empowered than the High Courts under Article 142, which confers on it the jurisdiction to do complete justice. The liberal approach of the Indian Courts is unabatedly serving the cause of poor people and protecting interests of public. The zeal of the Indian Judiciary never faded to welcome the issues of disadvantaged people, raised by any bona fide member of the society. The Supreme Court, while entertaining an application as public interest litigation recently under Article 32 of the Constitution observed that Judiciary might step in where it will find the actions on the part of the Legislature or the Executive were illegal or unconstitutional, but the same by itself would not mean that public interest litigation… should be converted into an adversarial litigation.

However, Public Interest Litigation is severely criticized as an encroachment on the powers of other fundamental organs of the state: Legislature and Executive; disregarding of the doctrine of separation of powers. Although the Supreme Court dispelled the view and observed that the Court passed any orders in Public Interest Litigation "not with a view to mocking at legislative or exhaustive authority or in a spirit of confrontation but with a view to enforcing the Constitution and the law".[67]

3. Conclusion

India after its Independence had to live with the law, conventions and judicial practices of the Raj, in accordance with the Independence Act 1947. However, after successfully framing its own Constitution, even the provisions which provided extended jurisdiction to the constitutional Courts of India remained unexplored due to British judicial legacy, regarding access to justice. As time passed, the Indian Judiciary did not showed obliviousness. Exploring its jurisdiction under the provisions of the Constitution, the Supreme Court under Article 32 and the High Courts under Article 226, less expensive and expedient access to justice was made available to the disadvantaged people of India, removing the shackles of adversarial system and introducing new principles of Public Interest Litigation. Although opening doors for access to justice, under the provisions of Public Interest Litigation were abused initially by politicians, busy bees and greedy of public fame, but gradually the Courts laid down new rules to discourage such abuse.

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