

Protection of Fundamental Rights in Pakistan: A Study of the Development of Public Interest Litigation

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Abstract

Public Interest litigation is a new constitutional approach of adjudication for the protection of fundamental rights in Pakistan. The present research seeks to pose, and critically examine the question, that 'When, the PIL strategy having the feature of inquisitorial justice system, was originally encrypted in the adversarial justice system of Pakistan. It finds that although the PIL strategy in Pakistan was properly introduced in *Benazir Bhutto* (1988) and *Darshan Masih* (1990), it has its origins in early human rights judicial jurisprudence as developed by Superior Courts in the 1960s. Such development has the constitutional justification which however, is suggested to be exercised within the constructional parameters. Undoubtedly, such trend of exercising the discretionary PIL jurisdiction will ultimately ensure the justice for all, one of the prime objectives of the PIL. Though the development of PIL has been continued during the last three decades, it is still in developing stages and vague in Pakistan. It, therefore, needs to be made more comprehensible for the courts and other concerned.

Keywords: Fundamental Rights, PIL, Supreme Court, Public Benazir Bhutto, Darshan

I. Introduction

In a number of judgments¹ fundamental rights could not have been protected as required by 'social contract' theory based Constitution, 1973. Supreme Court as the custodian of the constitution including fundamental rights² is constitutionally obligated for the protection of these rights. It has always been conscious to such critical situations³ and determinedly mindful for a need of a new judicial jurisprudence assuring the protection of fundamental rights.⁴ The Supreme Court, hence, endeavored for a new approach instead of enduring the adversarial mode of adjudication for enforcing the fundamental rights. The purpose behind such transformation was in fact for evading of constitutional issues, lego-political predicaments, formalities of the 'Anglo-Saxon outgrowth,'⁵ and socio-economic inequalities impeding the access to justice. ⁶Accordingly, the Supreme Court effectively conceptualized the idea of PIL in *Benazir Bhutto* case (1988), though various scholars⁷ argue otherwise for PIL beginning in the case of *Darshan Masih*, 1990.⁸

¹ Federation of Pakistan v. Maulvi Tamiz-ud-Din, PLD 1955 SC 240; Abrar Hassan v. Government of Pakistan, PLD1976315; Syed Iqbal Haider v. Federation of Pakistan, 1998 SCMR 181; State v. Tariq Aziz MNA, 2000 SCMR 751; Zafar Ali Shah v. Pervez Musharaf, PLD 2000 SC 869; Tika Iqbal Muhammad v. General Musharaf, PLD 2008 S.C 178; Wajihuddin v. Chief Election Commissioner, PLD 2008 SC13.

² See, The Constitution, 1973, Third Schedule, Article 178, Article 184(3).

³ See, State v. Dosso, PLD 1958 SC 533, 541; State v. Zia-ur-Rehman, PLD 1973 SC 49.

⁴ See: Khurshid Iqbal, *The Right to Development in International Law, The Case of Pakistan* (London: Rutledge Taylor Francis Group, 2010), 157.

⁵ Benazir Bhutto v. Federation of Pakistan, PLD1988 SC 416, 488.

⁶ Werner Menski, Alam Ahmad Rafay and Raza Mehreen Kasuri, *Public Interest Litigation in Pakistan* (London: Platinum Publishing Limited, 2000), 22, 23.

⁷ Hassan Pervez and Azfar Azim, "Securing Environmental Rights through Public Interest Litigation in South Asia." *Virginia Environmental Law Journal Vol. 22(3)* (2004): 232.

⁸ Darshan Masih v. State, PLD 1990 SC 513.

PIL is a new constitutional approach of adjudication for the protection of fundamental rights in Pakistan.⁹ Though the development of PIL has been continued during the last three decades, it is still in developing stages and vague in Pakistan.¹⁰ It, therefore, needs to be made more comprehensible for the courts and other concerned while exercising this strategy of PIL for having its proper use. In this context Plato may rightly be referred who perceived that “One cannot incorrigibly use a term let alone preach about it unless it is known what that term refers to.”¹¹ Similar is the case of PIL in Pakistan. Furthermore, as the history shapes the present, there is a need for explaining and tracing out the origin of PIL for its proper use in the modern-day jurisprudence of human rights protection. So, the research undertaken seeks to pose, and critically examine the question, that ‘When, the PIL strategy having the feature of inquisitorial justice system, was originally encrypted in the adversarial justice system of Pakistan for the protection of fundamental rights?’

2. Pioneering PIL Vision: Tracing the Origin

The PIL which properly emerged in 1988¹² its basis may be referred prior to this period both in juristic account and judicial jurisprudence. These two central forums have dynamically contributed for developing the idea of PIL in the adversarial legal system of the country and these efforts were, indeed, for ensuring the enforcement of human rights. The input of these two corners is contemplated, and appraised in the following sections.

2.1 Juristic Perception and Contribution

For tracing the origin of PIL, the juristic insight is of great significance on the basis of which in fact, *judicial dicta* emerged for the conceptualization of PIL. The trend of PIL developed over the decades through the endeavors of

⁹ Province of Punjab v. Muhammad Yaqoob, 1992 CLC 2065; Iqbal, The Right to Development in International Law, The Case of Pakistan. 157; Kong, Karen, “Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?” Civil Justice Quarterly Vol. 28 (3) (2009): 327.

¹⁰ Menski, et al., Public Interest Litigation in Pakistan, 71, 94.

¹¹ Plato, *Early Socratic Dialogues*, Trans. Trevor J Saunders (Penguin Books: 1987), 217.

¹² Benazir Bhutto v. Federation of Pakistan, PLD 1988 SC 416.

different corners. For such evolutionary occurrence of PIL, Werner Menski, a celebrated PIL scholar has comprehensively observed in realistic viewpoint. He articulates that, “Public interest litigation has never been a personalized crusade of one or two activists, lawyers or judge, it has always been a cooperative effort shared by many different agencies and participants in the system of formal adjudication”¹³ Justice Muhammad Haleem, the then Chief Justice of Pakistan, is referred the first who thought for the pattern of a justice system other than the adversarial. He asserted for a justice system countering socio-economic and lego-political problems.¹⁴ According to Menski, he, in fact carried on the PIL jurisprudence initiated earlier by Cornelius, the then CJP who is taken to be among the pioneers in this field in Pakistan.¹⁵ Muhammad Haleem developed the view that “we are passing through a phase of history when all citizens of the world are increasingly being drawn together.”¹⁶ He indeed focused the ‘massification’ of the society emerging from the economic activities of the industrial revolution affecting the social structure. Such societal alignment of society is termed as “basis of rights and interests.”¹⁷ In such context of ‘massification’, he averted that the judiciary should focus the “importance of considering the dispute settlement process as a method of resolving social conflict through the application of a system of flexible rules of law that should be meant to promote human welfare.”¹⁸ He was convinced of the practice of judicial activism for modernizing the ceremonial type of litigation into progressive adjudication for ensuring social justice for a common man.¹⁹ He pursued Indian and

¹³ Menski, et al., Public Interest Litigation in Pakistan, 108-109.

¹⁴ Muhammad Haleem, “Law, Justice and Society.” *The Pakistan Legal Decisions, Journal* (1986):205-212.

¹⁵ Menski, et al., Public Interest Litigation in Pakistan, 108.

¹⁶ Muhammad Haleem, “Address at Annual Dinner of the High Court Bar Association Rawalpindi. *Pakistan Legal Decisions*, (1987): 1.

¹⁷ Menski, et al., Public Interest Litigation in Pakistan, 27.

¹⁸ Haleem, “Address at Annual Dinner of the High Court Bar Association Rawalpindi”, 208.

¹⁹ Haleem, “Address at Annual Dinner of the High, 201-211.

American progressive judicial jurisprudence concerning interpretative approach on substantive as well as procedural issues, and took the initiative in *Benazir Bhutto* case, 1988. He has demonstrated such judicial mind set earlier in 1986, for procedural changes in dispensation of justice by, “shifting attention from mechanical jurisprudence to human welfare oriented law.”²⁰ For this purpose as per view of Alam “... he wished to implement a system that would enable this form of public interest litigation to prosper. While doing so he was evidently aware that provisions of the constitution of Pakistan already had mechanism hidden in it for the achievement of this goal.”²¹ So, for replacing the adversarial type of justice with the liberal adjudication based inquisitorial justice system, he asserted that “While construing Article 184(3) the interpretive approach should not be ceremonious observance of the rules or usages of interpretation, but regard should be had for the object and purpose for which this Article is enacted.”²² Such judicial interpretative approach in term of judicial activism has been pursued by his successors as well who have contributed a lot for the development of PIL strategies in Pakistan. Among those Justices Mr. Muhammad Afzal Zullah, Dr. Mr. Nasim Hasan Shah, Mr. Sajad Ali Shah, Mr. Ajmal Mian, Mr. Saeed-u-Zaman Siddique, Mr. Iftikhar Muhammad Chaudhry, Mr. Tassaduq Hussain Jilani, Mr. Nasirul Mulk, Mr. Jawwad S. Khawaja, Mr. Mian Saqib Nisar and Mr. Asif Saeed Khan Khosa (CJPs as they then were) are the most important figures with the progressive judicial mindset for interpretation and delivering the justice as such. They have asserted in their different judicial verdicts for exercising discretionary PIL jurisdiction for the protection of fundamental rights. They all have emphasized for practicing the dynamic liberal interpretation of the law including the constitution for satisfying the societal changes with a view to ensuring the access to justice for all.

The Judges have been so positive for the advancement of PIL that even they argued for it in different seminars and conferences. The Quetta Judicial Conference 1991 which resulted in term of Quetta declaration was headed by

²⁰ Haleem, “Address at Annual Dinner of the High, 208.

²¹ Menski, et al, Public Interest Litigation in Pakistan, 29.

²² *Benazir v. Federation* (1988), 480.

Justice Mr. Muhammad Afzal Zullah, CJP, an active PIL exponent.²³ This conference indeed was the confirmation of judicial mind set as demonstrated in courts' decisions for ensuring the justice for all. This declaration planned the proposals for ensuring the protection of fundamental rights for all, particularly of deprived people. Though the judges concentrated the strategic legal planning for the further development of PIL among all strata of society, the analysts observed that they themselves were not clear about the concept of PIL.²⁴ This situation, in fact, has caused the lacunas in the perusal of constitutional limitations while exercising the discretionary PIL jurisdiction. Efforts for establishing and devolving for PIL strategies were not only on the part of the Bench. The Bar has also been similarly interested in such type of system. Supreme Court Bar Association contributed for the advancement of PIL through conducting the seminars and conferences. In the seminar 'Public Interest Litigation: Scope, Limitations, and Reforms' lawyers community recognized courts' interferences for protecting the fundamental rights where the government is not performing efficiently.²⁵ However, the participants rightly underlined for underpinning the principles on which PIL judicial jurisprudence can be developed properly. The exercising of judicial discretion was debated in detail. The participants identified that judicial judgments are devoid of the meaning and principles of PIL.

Public-spirited persons have also attempted for establishing associations functioning for the PIL. Like, in 1988, Pakistan Legal Aid Association was established for rendering legal services to the people deprived socio-economically. This organization focused "the desirability of shifting attention from mechanical jurisprudence to human welfare oriented law."²⁶ This forum was in fact, supplementing the PIL strategy in financial perspective with Bar's

²³ "The Quetta Declaration 1991", *Pakistan Legal Decisions Journal* (1991):126.

²⁴ Menski, et al., *Public Interest Litigation in Pakistan*, 71.

²⁵ Supreme Court Bar Association, "Public Interest Litigation: Scope, Limitations and Reforms," (Lahore: 2012).

²⁶ Muhammad Haleem, "Law, Justice and Society." *The Pakistan Legal Decisions, Journal*, I.

coordination. The Sheri-Citizens Better Environment was another organization formed in 1988. It has the aim to facilitate the people by providing them a platform for voicing effectively for the enforcement of environmental rights. The Acid Survivors Foundation Pakistan is another organization offering legal aid to the acid attacks victims. It was founded in 2006, with the collaboration of a U. K based Acid Survivors Trust International. In 2007 Legal Right Forum was formed for getting better the access to justice for all with a view to upholding the 'Rule of Law'. These organizations have had a great contribution in term of legal as well as financial aid to the deprived people for access to justice. The courts have also encouraged such activities. They have passed the order for free legal aid for the female petitioners,²⁷ though it is otherwise governmental domain. Such trend has contributed a lot for the improvement of the socio-economic justice for the marginalized female community. This idea was pursued from American jurisprudence encouraging the associations working in public interest background.

The Human Rights Commission of Pakistan has also contributed a lot for the deployment of the PIL strategy.²⁸ Such conferences, seminars, and organizations have "sought to stimulate" the PIL perception in Pakistan.²⁹ These events, indeed, have focused on "strategic legal planning in the field of PIL".³⁰

The contribution of legal scholars for the development of the PIL concept is worth mentioning. In this context of the writings of early days ³¹ deserves to be

²⁷ Fazal Jan v. Roshan Din, PLD 1990 SC 66.

²⁸ Human Rights Commission of Pakistan, Public Interest Litigation: Scope and Problems (Lahore: 2010). Accessed November 19, 2013. hrqp-web.org/hrqpweb/wp-content/pdf/ff/26.pdf. 23, 26.

²⁹ Menski, et al., Public Interest Litigation in Pakistan, 118.

³⁰ Menski, et al., Public Interest Litigation in Pakistan, 71.

³¹ Ali Ahmad Fazeel, "Address to the Bar and Bench." *Pakistan Legal Decisions, Journal I*(1987); Asif Saeed Khosa, "Suo Motu Exercise of Writ Jurisdiction," *Pakistan Legal Decision, Journal* (1993); Faqir Hussain, "Access to Justice." *Pakistan Legal Decisions, Journal* (1994); Syed Mushtaq Hussain, "Public Interest Litigation." *The Pakistan Legal*

mentioned. Particularly the literature authored by Muhammad Haleem, CJP³² before the judgment in *Benazir Bhutto* (1988) has had the great contribution for properly establishing the idea of PIL in judicial jurisprudence of Pakistan. This endeavour is carried on by the scholars of recent times.³³ They contemplated on different facets of PIL jurisprudence. The literature of foreign authors³⁴ has also contributed for advancing the PIL jurisprudence in Pakistan.

2.2 Judicial Versions and Verdicts

PIL is comparatively a new strategy of constitutional adjudication in Pakistan.³⁵ It, indeed, is the result of judicial review related constitutional interpretation and has been developed for ensuring the protection of

Decisions, Journal Section (1994; Rashid Akhtar Qureshi, "Public Interest Litigation-Prospects and Problems." *The Pakistan Legal Decisions, Journal* (1994).

³² The Challenge of Social Justice: The Third International Conference of Appellate Judges, New Delhi, India. (1984); The Advisory Jurisdiction of the International Court of Justice: Twelfth Conference of the World Peace Through Law Center, West Berlin, Federal Republic of Germany. (1985); The Development of Deep Sea Resources: Twelfth Conference of the World Peace Through Law Centre, West Berlin, Federal Republic of Germany. (1985) Management of Supreme Court: Law Asia Conference of the Chief Justices on Management of Courts, Penang, Malaysia. (1985). Etc.

³³ Naim Ahmed, *Public Interest Litigation: Constitutional Issues and Remedies* (Bangladesh: Legal Aid and Services Trust Dhaka, 1999); Menski et al, *Public Interest Litigation in Pakistan*, 2000; Hassan and Azfar "Securing Environmental Rights through Public Interest Litigation in South Asia." *Virginia Environmental Law Journal*, 232. Abdus Sattar Asghar, "Public Interest Litigation: A Tool to Protect Fundamental rights." *Pakistan Law Journal*, (2011); Maryam S. Khan "Genesis and Evaluation of Public Interest Litigation in Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization." Accessed November 20, 2016. ideaspak.org/wp-content/.../06/Public-Interest-Litigation-in-the-Supreme-Court.pdf

³⁴ Arun K. Thiruvengadam, "In Pursuit of the Common Illumination of our House: Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia." *Indian Journal of Constitutional Law* Vol. 2 (2008): 67-103.

³⁵ Province of Punjab v. Muhammad Yaqoob, 1992 CLC 2065; Iqbal, The Right to Development in International Law, The Case of Pakistan, 2010, 157; Kong, 2009, 327.

fundamental rights. This concept, however, as Khan argues, has always been founded since early human rights judicial jurisprudence in Pakistan.³⁶

Though the PIL properly appeared in *Benazir Bhutto* case (1988), its vision is marked out back to the human rights protection litigation in earlier cases. It is asserted that PIL did exist prior to 1988, though it was not effectively persuaded as such. Though the cases were decided with the similar essence of guaranteeing the access to justice for all, the judgments were not given formal status of PIL. Raza has rightly argued that “Benazir Bhutto case (1988) simply gave a broader outlook and explicitly emphasized the Public Interest in its analysis of the constitution, compare to other cases of a similar nature that had been adjudicated upon in the past.”³⁷ In such PIL related cases, courts exercised the progressive interpretation. Among others,³⁸ are worth mentioning. In these cases procedural technicalities of adversarial justice system were relaxed just for ensuring the access to justice. In this case, Justice Kaikaus observed that, “I think the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it is essential to comply with them on the grounds of public policy... any system which by giving effect to the form and not to the substance defeats substantive rights... is defective to that extent.”³⁹ In another case court scrutinized the legislative actions in public interest perspective, and passed the judgment having the essence of PIL. Supreme Court of Pakistan relaxed the condition of an ‘aggrieved person’ in case,⁴⁰ and such relaxation was aligned with the current PIL strategy. As it was held by Hamood- ur- Rehman, CJP that, “It is clear ... that the right considered sufficient for maintaining a proceeding of this

³⁶ Hassan, Mansoor. “The Concept of Public Interest Litigation and its Meaning in Pakistan” *Pakistan Legal Decisions, Journal* (1992): 84, 92.

³⁷ Menski, et al., *Public Interest Litigation in Pakistan*, 86.

³⁸ *Muhammad Nour Hussain v. Province of East Pakistan*, PLD 1959 S.C 470.; *Imtiaz Ahmed v. Ghulam Ali*, PLD 1963 SC 382.

³⁹ *Imtiaz v. Ghulam* (1963), 400.

⁴⁰ *Fazal Din v. Lahore Improvement Trust*, Lahore, PLD 1969 SC, 223.

nature is not necessarily a right in the strict juristic sense but it is enough if the applicant discloses that he had personal interest in the performance of the legal duty which if not performed ... could result in the loss of some personal benefit or advantage or the curtailment of a privilege or liberty or franchise.”⁴¹

The Supreme Court persuaded the progressive interpretative approach in the judgment of another case of *Abul A'la* (1964).⁴² In this judgment, Justice Hamood-ur-Rehman observed that “I also find no difficulty in granting relief because of any defect in the form of the prayer in the petition. The prayer as framed in the petition is sufficiently wide and, in any event, the Court is not powerless to grant the relief that the justice of the cause requires to the same extent as if it had been asked for.”⁴³

The judgments in some of the important cases as referred above redressed the aggrieved persons in a way which in contemporary judicial jurisprudence may be granted under PIL strategy. The existence of such sort of judicial jurisprudence is also observed by the contemporary legal scholarship. Hence, in Raza’s viewpoint, “it can be proved that the public interest litigation did exist before 1988, but it was not necessarily acknowledged as such or given formal status.”⁴⁴

2.3 Pioneer Proper PIL Cases

By the revival of the constitutional and political order in 1985, a long Martial law imposed on 5th July, 1977 was left over and democracy was restored in Pakistan.⁴⁵ Accordingly, the judiciary became empowered to counter the issues concerning the protection of fundamental rights. The judiciary, therefore, having the influences from other jurisdictions predominantly of Indian judicial jurisprudence ⁴⁶ exercised the PIL strategy to facilitate the people for getting their rights enforced.⁴⁷ In this context the case of *Benazir*

⁴¹ Fazal Din v. Lahore Improvement Trust, Lahore, PLD 1969 SC, 231.

⁴² Abul ‘Alā Mawdūdī v. Government of West Pakistan, PLD 1964 S.C, 673.

⁴³ Abul ‘Alā Mawdūdī v. Government of West Pakistan, PLD 1964 S.C , 791.

⁴⁴ Menski, et al., Public Interest Litigation in Pakistan, 86.

⁴⁵ Revival of the Constitution of 1973, Order 1985

⁴⁶ Menski, et al., Public Interest Litigation in Pakistan, I.

⁴⁷ Iqbal, The Right to Development in International Law, The Case of Pakistan. 57.

Bhutto (1988), and thereafter *Darshan Masih* (1990) happened as the pioneer PIL cases which have been followed in huge number of judgments as delivered in PIL context.⁴⁸ These two cases emerged from two different sources of PIL. *Benazir Bhutto* (1988) resulted from a regular constitutional petition, whereas *Darshan Masih* (1990) was the outcome of the *suo motu* action. Nevertheless, both of these cases and their sources have the constitutional justification within provisions of Article 184(3), Constitution, 1973. These provisions include an effective and viable strategy termed as PIL for guaranteeing the fundamental rights properly.⁴⁹ In these cases, we find judicial jurisprudence concerning the growing trends of interpretative approach both in substantive as well as procedural matters as emerged in the context of PIL. Such cases are concerned either directly or indirectly with PIL matters. Though the *Benazir Bhutto* (1988) case was not primarily instituted as PIL case, however in due course of its hearing, the matter was adjudicated in the context of PIL. The Supreme Court extended the scope and meanings of fundamental rights⁵⁰ and relaxed the procedural formalities which eventually led the judgment to the development of the PIL strategy.⁵¹ It was a consensus judgment, and passed within the constitutional parameters pursuing the then existing *judicial dicta*. Hence, it has become a reasoned judgment confirming the standard as judicial precedent for PIL.

The *Darshan Masih* (1990) is another leading case wherein *suo motu* action was taken for the protection of the fundamental rights of bonded brick kilns

⁴⁸ Barkat Ali, "Constitutionality and Limitations of Public Interest Litigation in Pakistan: A Critical Appraisal." (International Islamic University, Islamabad, 2020), 534.

⁴⁹ Muhammad Nawaz Sharif v. President of Pakistan, PLD 1993 SC 473, 805.

⁵⁰ Justice A.K Badrul Huq, "Public Interest Litigation: Judges Perspective." Accessed November 20, 2016. http://www.hrpb.org.bd/images/front/Images/Justice_A.K.Badrul_Haque.pdf.

⁵¹ Gurdial Singh Nijar, "Public Interest Litigation: A Matter of Justice, An Asian Perspective," 2005, 16. Accessed August 27, 2013. <http://www.aseanlawassociation.org/9GAdocs/Malaysia.pdf>.

labourers. The court initiated the proceedings in term of PIL.⁵² The Court did away the adversarial procedures, and relaxed *locus standi* by assuming the epistolary jurisdiction; made the commission for fact-findings, and gave the relief in 'rolling review' terms. Subsequent to this case, number of *suo motu* actions was taken for safeguarding the fundamental rights. Among others, the major subject matters have been the child protection, corruption, environmental issues, law and order situation, public health, service matters, and women protection.⁵³

2.4. Conclusion

Both the juristic version and judicial insight have continuously asserted for expanding the scope of accessibility of justice for all concerning the protection of fundamental rights. Since, certain strategies evolved in different jurisdictions in background of their legal systems. Among those, the concept of PIL has been of great significance. The idea of PIL has its basis, though implied, in the constitutional law of Pakistan. The discretionary PIL jurisdiction has been construed from fundamental rights related constitutional provisions through progressive and proactive interpretation of the constitution. Though the PIL strategy in Pakistan was properly introduced in *Benazir Bhutto* (1988) and *Darshan Masih* (1990), it has its origins in early human rights judicial jurisprudence as developed by Superior Courts in the 1960s. The judiciary in certain earlier judgments had relaxed the procedural rules and made the liberal interpretation of the constitutional law. The juristic perception both of the earlier and contemporary jurists have an efficient contribution because of which indeed, *judicial dicta* emerged for the proper initiation of PIL. The trend of exercising the discretionary PIL jurisdiction will ultimately ensure the justice for all, one of the prime objectives of the PIL.

⁵² *Darshan Masih v. State* (1990), 591.

⁵³ Moeen H. Cheema and Ijaz Shafi Gilani, eds. *The Politics and Jurisprudence of the Chaudhry Court, 2005-2013* (Karachi: Oxford University Press, 2015), 84,342-357.