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A COMPARATIVE STUDY ON EVOLUTION OF JURISPRUDENCE OF PUBLIC INTEREST LITIGATION (PIL) IN INDIA, USA AND CANADA

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ABSTRACT

Public Interest Litigation (PIL) is considered as one of the significant legal innovations done by the judiciary and it plays a pivotal role in the modern constitutional democracies. It aids in protection of collective public rights, reshaping access to justice and judicial review. PIL helps the constitutional courts in addressing the issues effecting the rights of public at large, unlike the traditional litigation system where the party directly aggrieved only can participate in the court proceedings. It has become a tool for bringing out the social change in the society.

The evolution of PIL differs from country to country. As in India, the jurisprudence of PIL developed through the judicial activism, in USA the struggle for civil rights became the base of its origin and in Canada it developed from the approach of extending protection to the principle of access to justice. Hence, the article shall analyse and compare the evolution of jurisprudence of PIL among India, USA and Canada. Also, the article shall try to understand the approaches of these jurisdictions on PIL.

Therefore, the study aims to understand what are the best practices opted and what can be the potential reforms that can be done in the jurisprudence of PIL in these countries so that the challenges can be mitigated and the PIL can be used effectively across these jurisdictions.

Keywords: Public Interest Litigation (PIL), Public rights, Social change and Access to justice.

1. INTRODUCTION

The word PIL (Public Interest Litigation) refers to the litigation filed before the court of law for the protection of public interest at large, rather than the specific concerns of the individuals. It enables the NGO's, social activists, etc. to seek the judicial remedy on the behalf of those who would not be able to do it on their own. PIL has become a tool for bringing out the social change in the society. Therefore, it is considered as one of the significant legal innovations done by the judiciary and it plays a pivotal role in the modern constitutional democracies.

The historical evolution of PIL differs from country to country. In India, the development of PIL started from the 1970s, the instances such as *Hussainara Khatoon v State of Bihar (1979)*¹, where the Supreme Court allowed the socially concerned individuals to file petitions on behalf of the disadvantaged people. This decision liberalized the standing rule for the PIL where, the letters and postcards were treated as petitions. In USA, the PIL developed in the 20th century through the civil rights movements specially from the *Brown v Board of Education (1954)*² where the US Supreme Court held the racial segregation in schools must be abolished. However, the scope of PIL is limited to the litigants due to the strict criteria for establishing the locus standi under the Article III of the US Constitution, which requires to prove the direct harm or where there is statutory provisions for the "citizen suits". In Canada, concept of PIL there called as- Public Interest Standing, was developed through the cases *Thorson v Canada (1975)* and *Borowski v Canada (1989)*³, where the Canadian Supreme Court held that, the people can question the validity of laws even there is no direct injury caused to them, provided there was no other way to bring the matter to the court of law.

Hence, it can be said that PIL plays important role in making the justice accessible to all, strengthening the constitutional governance, and also in addressing the systematic injustices which other would go unaddressed. PIL promotes the judicial intervention in the matters that require the protection of rights of the underprivileged, where the executive and legislative actions are lacking, etc. Though the scope and working of PIL differs among the countries, but the ideas of PIL remains same, which is that the courts are not only the guardians of rights of the private party disputes but, also the protectors of public rights as a whole.

¹ *Hussainara Khatoon v State of Bihar (1979)* AIR 1369 (SC).

² *Brown v Board of Education of Topeka* 347 US 483 (1954).

³ *Thorson v Canada (Attorney General)* [1975] 1 SCR 138; *Borowski v Canada (Attorney General)* [1989] 1 SCR 342.

2. EVOLUTION OF PIL IN INDIA

The evolution of PIL in India is among the most important judicial innovations post-independence. A revolutionary change has been brought in the constitutional framework of India through the invention of PIL. In the earlier days the judiciary in India used to follow the strict “locus standi” rule which allowed only the person directly aggrieved by the action of state to approach the court and not otherwise. This approach limited the access to justice for the vulnerable and the marginalized individuals or groups of the society. However, in the late 1970s, a significant shift occurred to fulfil the constitutional promise of social and economic justice for the individuals. PIL, therefore had become the unique aspect of the constitutional law. It has progressively broadened the scope of judicial review and has helped in shaping the relationship between the government and the citizens of the nation.

The formal formation of PIL in India happened through the relaxation of the principle of “locus standi.” The standing has been redefined by Justice PN Bhagwati in case of *S.P. Gupta v Union of India (1981)*⁴, he stated that, any member of the public acting bona-fide can bring the suit of action on behalf of those who are unable to do it for themselves because of poverty or disability⁵. The judgment made a clear remark that the goals of a welfare state cannot be achieved through the stringent laws of standing. This view was further extended in the case of *P.U.D.R. v. India*⁶ where Justice Bhagwati explained that PIL is a strategic arm of the legal aid which is there to promote and vindicate public interest for the underprivileged and poor ones.⁷ Even before the S.P. Gupta ruling, the liberalization of “locus standi” was foreshadowed in the leading of *Hussainara Khatoon v State of Bihar (1979)*, where the Supreme Court has developed “epistolary jurisdiction” granting access to the judicial forum for collective grievances, for the protection of fundamental rights by accepting letters or even post cards as writ petitions⁸ under Article 32 of the Indian Constitution⁹.

However, Prof. Baxi has emphasised on the more nuanced concept of PIL, by referring it as

⁴ S.P. Gupta v Union of India (1981) Supp SCC 87

⁵ S.P. Sathe, Judicial Activism: The Indian Experience, Washington University Journal of Law & Policy, Vol 6 (2001), Page- 74

⁶ People’s Union for Democratic Rights v Union of India (1982) 3 SCC 235

⁷ Ibid, Page- 75

⁸ Hussainara Khatoon v State of Bihar (1979) 1 SCC 136

⁹ Constitution of India 1950, Art. 32

“Social Action Litigation (SAL)¹⁰” to bring it in-line with the Indian context. He argued that SAL is more leant towards addressing the sufferings and systematic injustices, which is contrary to the American concept of PIL which focuses primarily on group interests or civic participation. SAL evolved through the judge-led and judge-induced phenomenon reflecting its dedication towards the judicial populism¹¹. Justice Bhagwati and Justice K. Iyer played vital role in advancing responsiveness of the legal system towards the marginalized and disenfranchised people¹².

After being firmly established in India, the PIL was used as an important tool for bringing out the social change through many landmark judgments. The scope of Article 21¹³ was expanded to include just and humane working conditions in the case of *People’s Union for Democratic Rights v Union of India (1982)*¹⁴. Similarly, the court intervened and abolished bonded labour in order to protect the rights of marginalized people of the society in the case of *Bandhua Mukti Morcha v Union of India (1984)*¹⁵. Not only this but, PIL’s dimension was expanded to include and advocate for the environmental concerns. In the case of *M.C. Mehta v Union of India (1986)*¹⁶, the court has established the principle of “absolute liability” as a response to the industrial disasters on the environment and people living there.

The current scenario of PIL in India reflects certain strengths and continuing challenges. The strengths include- i) democratization of access to justice; ii) liberalization of standing and hence thereby empowered the social activists, NGO’S, ordinary men bring up suit in the court of law concerning with the public rights or systematic issues; iii) expanding the scope of Article 21 of the Indian Constitution, etc. All this has resulted in a right based constitutional culture, where the socio-economic rights are enforced by the judiciary as a prominent exponent of this jurisprudential tool. However, the Supreme Court has cautioned, that the PIL must not be used as a tool for “publicity interest litigation” in case of *State of Uttaranchal v Balwant Singh Chauhal (2010)*¹⁷. Hence, there are several challenges which hinders the effective usage of PIL

¹⁰ Upendra Baxi, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, Third World Legal Studies Vol 4 (1985), Page- 108

¹¹ Ibid., Page- 111.

¹² Upendra Baxi, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, Third World Legal Studies Vol 4 (1985), Page- 115.

¹³ Constitution of India 1950, Art. 21

¹⁴ *People’s Union for Democratic Rights v Union of India (1982) 3 SCC 235*

¹⁵ *Bandhua Mukti Morcha v Union of India (1984) 3 SCC 161*

¹⁶ *M.C. Mehta v Union of India (1986) 2 SCC 176*

¹⁷ *Uttaranchal v Balwant Singh Chauhal (2010) 8 SCC 335*

it includes- i) inconsistency of the judicial responses where the legitimate causes been overlooked; ii) leads to judicial over reach where the judiciary some times over rides it jurisdictional powers and enters into the functions of legislature; iii) excessive admission of PIL causes overburdening on the courts and results in delay in justice, etc. Nevertheless, PIL or SAL remains important to the Indian society despite of the challenges it carry.

3. EVOLUTION OF PIL IN USA

The evolution of PIL in the USA is related with the nation's constitutional framework and the judicial philosophy under Article III of the US Constitution, where the court is allowed to decide only the real "cases or controversies." The term PIL is not used in US as it is prevalent in India instead, it existed as an idea which has been used since long to describe a litigation which aims to address the collective rights and systemic justice. The jurisprudence of PIL begun with the civil rights movement in the USA and it has expanded to various areas though the landmark judgments and still growing today.

The PIL's development can be traced back from the civil rights movement in the 1950s and 1960s in the US. The most transformative decision in *Brown v Board of Education (1954)*¹⁸ where the US Supreme Court held that, racial segregation in public schools shall be unconstitutional as per the Equal Protection clause of Fourteenth Amendment. This historic ruling transcended the individual rights by establishing a strong precedent for the use of litigation as a weapon of social change. The NACCP Legal Defense Fund, deliberately challenged the segregationist laws and practices through the litigations. Resultantly, the Courts become arenas for enforcing the equality and constitutional rights for the marginalized communities. The PIL's scope was expanded to include consumer rights, prisoners' rights, environmental protection, etc. The environmental movement of 1970 has brought new energy to the PIL, where the Sierra Club challenges the regulations that were harmful for the environment, hence the Congress promoted this development by inserting Section- 304¹⁹ of the clean Air Act, 1970 which allows private persons to enforce environmental standards. Consumer protection has become the key area of focus for the PIL where the public interest law firms represent groups against the unfair practices and misconduct in the corporate field. Concurrently, through the case of *Wolff v McDonnell (1974)*²⁰ the prisoners rights become

¹⁸ *Brown v Board of Education* 347 US 483 (1954)

¹⁹ Clean Air Act 1970, 42 USC § 7604

²⁰ *Wolff v McDonnell* 418 US 539 (1974)

focus of constitutional litigation, as supreme court upheld their rights subject to due process of law.

The development of PIL in US has been shaped by many judicial decisions. The Supreme Court in *Sierra Club v Morton (1972)* has denied the standing to Sierra club because it failed to establish a specific injury to its members²¹. The ruling highlighted growing conflict between the limitations of standing under Article III and the wide public concerns, this ruling was further upheld by the Court in *Lujan v Defenders of Wildlife (1992)* stating that, the plaintiff must show the specific injury caused to them rather than the general interest in the environmental protection²². Despite these rulings, the judgement of *Roe v Wade (1973)*, upheld the woman's right to abortion on the ground of right to privacy reflects the capacity of litigation to influence social policy by broadening the constitutional rights²³. Furthermore, provision for class suits under R.23 of the Federal Rules of Civil Procedure, emerged as an important tool for the use of PIL, as it allows the large groups for seeking collective remedy for systemic harms, discrimination, etc. The law suits in modern federal litigation does not arise from the disputes between the private parties instead it arises from the vindication of the constitutional principles and the statutory policies. For the reason, the emerging model can be called as "*Public Law Litigation*".²⁴

The present PIL model of USA shows both the strengths and weaknesses. One of the major strengths is the legacy of constitutional litigation under which the laws and practices that violates the fundamental rights are being challenged before the court. The leading example for this would be the case of *Obergefell v Hodges (2015)*, where the court established right to marry as a constitutional right for the same-sex couples, which makes it a landmark judgment towards the marriage equality²⁵. Additionally, the statutory provisions for the citizen suits specially in the area of environment law acts as a formal tool for public interest claims, allowing the advocacy groups to make the government responsible and holding the polluters accountable. However, the model faces certain challenges as well like- the limitation of the standing doctrine remains a considerable barrier due to which the redressability of cases including climate change or general social justice issues remains excluded and the large

²¹ *Sierra Club v Morton* 405 US 727 (1972)

²² *Lujan v Defenders of Wildlife* 504 US 555 (1992)

²³ *Roe v Wade* 410 US 113 (1973)

²⁴ Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harv L Rev 1281, Page No. 1284

²⁵ *Obergefell v Hodges* 576 US 644 (2015)

systemic public problems remains unaddressed as the constitutional framework does not allow the courts to become a forum for generalized grievances. Another major shortcoming is that judiciary hesitates to enter into the matters involving broad policy implications.

4. EVOLUTION OF PIL IN CANADA

PIL in Canada evolved from the gradual efforts by the judiciary to maintain balance between access to justice and to prevent overburdening of the courts. Unlike India and the USA, Canada has opted a middle path for the PIL. PIL in Canada is based upon the doctrine of “public interest standing (PIS)” which determines who can bring the suits related to public and constitutional matters.

The Canadian Court initially followed the restrictive approach that is the common law principle of standing, which requires the plaintiffs to show direct interest in the suit. However, the court realized if this would be the scenario some issues of constitutional importance would remain unaddressed. This approach started to shift in the 1970s. The first turning point came with the judgment of *Thorson v Canada*, in which the Supreme court allowed the taxpayer to challenge the validity of the tax legislation even without having any direct harm by holding that, otherwise the constitutionality of the law would not be able to be questioned²⁶. The approach was further expanded with the cases like- i) *Nova Scotia Board of Censors v McNeil (1976)*, where the challenge to the cinema censorship regulations by the citizen was allowed by the court recognizing that, stringent restrictions on standing would thwart access to justice²⁷ and, ii) *Minister of Justice v Borowski (1981)*, where the court allowed the petitioner to pursue the constitutional claims regarding the abortion law even though the petitioner was not directly affected²⁸. These early cases marked the beginning of the more liberal approach and established the foundation of PIS in Canada. It leads to the shifting of Canadian court from the stringent personal interest to the recognition of broader public issues.

Over the year, the doctrine of Public Interest Standing (PIS) in Canada was refined in 1992 through the case of *Canadian Council of Churches v Canada (1992)*, the court provided the structured three-part test for the PIS which includes –

- i) Whether the case raises serious justiciable issue?

²⁶ *Thorson v Canada (AG)* [1975] 1 SCR 138

²⁷ *Nova Scotia Board of Censors v McNeil* [1976] 2 SCR 265

²⁸ *Minister of Justice v Borowski* [1981] 2 SCR 575

- ii) Whether the plaintiff had genuine interest in the issue? and,
- iii) Whether there was any other reasonable and effective way to bring the issue to the court or not?²⁹

The test allowed the addressing of public interest claims along with the conservation of the judicial resources. The court's decision in the landmark case of *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society* (2012), here the Supreme court emphasised on the 3-test principle and held that, standing must be used purposefully to ensure access to justice, specially for the vulnerable groups who are unable come forward due the apprehension of fear, stigma and disadvantage³⁰. In the case the court has opted a liberal and more flexible approach in favour of standing by allowing the sex workers advocacy organization to challenge the provisions of prostitutions governed by the criminal code. The judicial approach to the public interest standing shifted significantly through the SWUAV decision, it marked the watershed moment as it increased access to justice and advanced the democracy under the Canadian Charter.³¹

In the present times the PIS in Canada combines the judicial discretion with the structured and flexible framework. This approach helps in balancing the access to justice and separation of powers. The decisions like *SWUAV*³², highlights the growing concerns of the courts towards the systemic challenges and constitutional rights of the marginalized people, and therefore PIL for them serves as a tool for social change. Yet, the Pil in Canada faces several challenges like the 3-part test reflects the elements of the earlier private law paradigm, expensive cost of continuing the PIL may also hinder the access to justice, etc. Instead, it can be said the PIS in Canada can be seen as a living doctrine that can uphold the constitutional rights for the citizens and ensure accountability of the government.

5. COMPARATIVE ANALYSIS OF INDIA, USA AND CANADA

Evolution of PIL has taken place differently in India, USA and Canada, which reflects their constitutional structure and judicial philosophy. In India PIL became the tool of judicial activism in the 1980s that allowed the courts to entertain petitions filled by the social activists

²⁹ Canadian Council of Churches v Canada (Minister of Employment and Immigration) [1992] 1 SCR 236

³⁰ Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society [2012] 2 SCR 524

³¹ Dana Phillips, 'Public Interest Standing, Access to Justice, and Democracy under the Charter: Canada (AG) v Downtown Eastside Sex Workers United Against Violence' (2013) 22 Constitutional Forum constitutionnel, Page- 27

³² Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society [2012] 2 SCR 524

and NGOs specially for the enforcement of the fundamental rights and welfare policies without being barred by the stringent locus standi principle. Contrary to India, the USA follows the locus standi principle more strictly under Article III of the US Constitution, requiring the petitioner to prove the direct harm, which makes the scope of PIL limited in USA. Whereas, Canada developed a middle path for PIL by developing the doctrine of “public interest standing” through the judicial pronouncements where the court allows litigants of public interest to present the case which involves the matters of constitutional importance or the serious public issues even if there is no direct interest involved.³³

The scope of PIL in India is comparatively broad. The courts in India have compensated for the legislative and executive inaction by dealing with cases related to environment degradation, prison reforms, enforcement of fundamental rights, etc. In USA, the Scope is more limited because of the strict standing principle, which required to show the personal injury caused, as held in the case of *Lujan v Defenders of Wildlife*³⁴. The Canadian approach for PIL is comparatively flexible, as the court has allowed to file suit for clanging the constitutional provisions in case of *Thorson v. Attorney General of Canada*³⁵, this case highlights the country’s adaptability to promote access to justice in matters of public law.

Therefore, it can be said, that the judiciary had played an important role in all the three jurisdictions for the evolution of jurisprudence of Public Interest Litigation. PIL in India is used to address the systemic flaws. Whereas, in USA the courts continued to be conservative and focused exclusively on the individual standing. In Canada the doctrine of public interest standing was developed in order to achieve balance between access to justice and frivolous litigations.

Despite the development done, there persist some common challenges for these jurisdictions in the effective application of PIL, which include- misuse of PIL for the political and personal agendas, lack of institutional capacity for handling the growing number of PIL cases and responsibility of the courts to ensure that there is no abuse of PIL through frivolous suits.

³³ Thorson v Attorney General of Canada [1975] SCR 138.

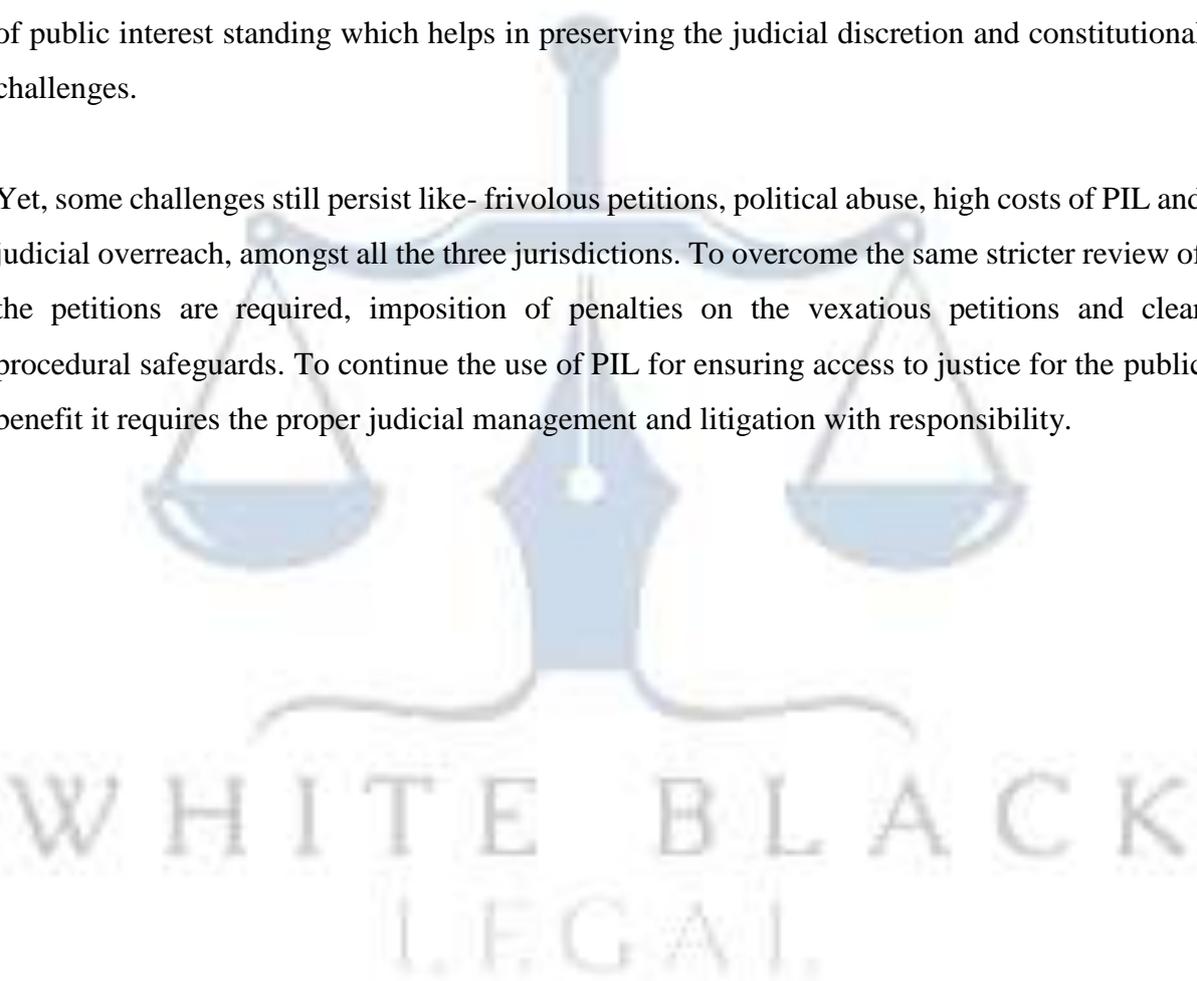
³⁴ Lujan v Defenders of Wildlife, 504 U.S. 555 (1992).

³⁵ Thorson v Attorney General of Canada [1975] SCR 138.

6. CONCLUSION

Through the comparative study of PIL from all the three countries, India, USA and Canada shows different approaches for enhancing access to justice and constitutional accountability. The most liberal approach is followed by India as it allows the marginalized individuals to address their issues through the relaxation of the locus standi and judicial activism. The strict principle of standing is followed in USA making the approach narrower with an emphasis on the individual harm and permitting the use of PIL primarily through the class actions or statutory citizen suits. The Canada has taken a balanced approach by developing the doctrine of public interest standing which helps in preserving the judicial discretion and constitutional challenges.

Yet, some challenges still persist like- frivolous petitions, political abuse, high costs of PIL and judicial overreach, amongst all the three jurisdictions. To overcome the same stricter review of the petitions are required, imposition of penalties on the vexatious petitions and clear procedural safeguards. To continue the use of PIL for ensuring access to justice for the public benefit it requires the proper judicial management and litigation with responsibility.



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