Note

LEGAL FOUNDATIONS OF PUBLIC INTEREST LITIGATION IN PAKISTAN: A CASE STUDY FROM 1988 TO 1999

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I. INTRODUCTION

Legal system in Pakistan witnessed a novelty almost a decade ago, which resulted in rapid growth and development of Public Interest Litigation (PIL). The concept of 'Public Interest Litigation' emerged in the United States of America in the early 1960's.[1] The main theme underlying this concept at that time was the attainment of civic justice. Pakistan, by virtue of its constitution, is an Islamic welfare state and the individuals have been conferred with certain fundamental rights under it.[2] Corresponding duties have been placed upon the government and its instrumentalities to further the environment of rights for the betterment of people and to reach out to the ideals of the State of Pakistan. In pursuance of these constitutional obligations, several steps should be gradually taken, to promote social justice, to eradicate social evils, and to create the atmosphere of opportunity and tranquility amongst these individuals.[3] The constitution of 1973 provides for a speedy, adequate and effective redress upon violation of the said constitutional rights.[4]

Public interest litigation, unlike the enforcement of right of one individual against another in the course of ordinary litigation, is intended to promote and vindicate public interest. Public interest demands that the

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[1] V.G. RAMACHANDRAN, LAW OF WRITS (1993).

[2] For details please see: THE CONSTITUTION OF PAKISTAN, 1973, Part II, Chapter 1.

[3] Id.

[4] Id at Article 199. Writ Jurisdiction provides the forum through which an aggrieved can directly approach the High Court. For original jurisdiction of The Supreme Court, please see Article 184(3) of The Constitution of Pakistan, 1973. It is evident from the fact that the number of writs filed in 1998 exceeds the number of Writs filed in 1968 by 15 times.

violation of constitutional or legal rights of a large number of people should not go unnoticed on the basis of being poor, ignorant or in a socially or economically disadvantaged position.[5]

Public interest litigation, as I understand, has its own particular dimensions in Pakistan. It is a rare combination of Islamic principles, judicial activism, interest of the public and human rights. It is not focused on a particular class of people, neither does it limit itself to the under privileged people. Its main thrust is upon removal of injustice and protection of fundamental rights regardless of a particular class of people, extending to the entire nation.

In this Note, I will proceed with the sole objective of identifying the inherent features of Pakistani PIL as opposed to United States, India or Bangladesh. I would conclude that courts in Pakistan have been reluctant to devise the rules in this respect through judicial precedents or by laying down procedural requirements. This is based on an assumptive corollary that superior courts are under a multifaceted obligation to safeguard the interest of the public, in whatever way possible. To legitimize and effectuate this position the courts often use the most powerful tool of Islamic Injunctions, both, as a ground of review and basis of relief. As a result we will see a variety of cases brought and decided in the name of public interest litigation.

In Part II of this Note, I will explain the term 'public interest litigation' as understood today, while making a comparison between its respective understanding in Pakistan and United States. I shall also attempt to trace the conceptual basis of PIL in both jurisdictions. For a better understanding of the concept of PIL, one has to be well aware of certain concepts of procedural law. This includes a brief discussion of the concept of locus standi in Part-III, and the framework within which the courts assume jurisdiction under ordinary circumstances, as well as in cases of public interest litigation. I will also discuss the concept of locus standi as understood in Pakistan with particular reference to PIL, comparing it to the historical common law concept. In Part IV, I attempt to examine the application of the concept of PIL by courts in Pakistan from 1988 to 1999, with particular reference to the circumstantial, social and political considerations of each case. I shall also assert the extension witnessed in Pakistani constitutional jurisprudence, brought about by the firm establishment of PIL. The case study bears evidence of the fact that denial of relief based on PIL has become a rare phenomenon and this approach of the courts has been misused by vested interests of different sectors of society. Here, the author's intent is not only to applause the judiciary for engineering the success of this form of litigation, but also to warn it against its inherent potential of being misuse.

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[5] A.S. CHAUDHURY, LAW OF WRITS (1996)

II. MEANING AND CONCEPT

Public interest litigation, as defined by the Council for Public Interest Law, U.S.A[6] is:

> "Public Interest Law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that the ordinary marketplace for legal service fails to provide such services to significant interests. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others."

Whereas, the Supreme Court of Pakistan in Miss Benazir Bhutto v. Federation of Pakistan[7] has defined PIL as under:

> "In order to acquire public importance, the case must obviously raise a question which is of interest to, or effects, the whole body of people or an entire community. In other words the case must be such as effecting the legal rights or liabilities of the public or the community at large, even though the individual who is the subject matter of the case, may be of no particular consequence."

On making a comparison of the two definitions, many commonalties can be found, but the most striking difference is that the American definition defines PIL as a protection for the under represented class, whereas the Pakistani case suggests the essential presence of community interest. The former definition, is sensitive to protect the under privileged groups, whereas the later focuses on the protection of non-self oriented interests. This reflects that, in Pakistan, the courts do not restrict the application of this concept to the under privileged class, rather acknowledge the loss likely to be suffered by the public at large due to the lack of vigilance and awareness. Hence, the courts take the position of safeguarding public at large through PIL. Moreover, a juxtaposed analysis of the two definitions would reveal that the pattern set by the Supreme Court of Pakistan while defining PIL holds conviction for the local social environment. It appears as if the whole community of people in Pakistan could be under represented as compared to the few less represented groups in the U.S.A. However, there is no such requirement that a PIL case must involve the community as a whole.

As mentioned earlier, the origins of public interest litigation in its present form can be traced to the era of civil unrest in America in the early 1960's.

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[6] See *Balancing The Scales of Justice – Financing Public Interest Law in America*, A report by THE COUNCIL FOR PUBLIC INTEREST LAW, FORD FOUNDATION U.S.A at pp. 6-7.

[7] PLD 1988 S.C 416.

Gideon's case[8] is considered to be the precursor of public interest litigation.[9] In this case a letter was treated as a petition and admitted for regular hearing by the Supreme Court of United States of America, whereby the plea was admitted for regular hearing, ignoring the formalities of law and thus the start of a new concept was marked. Later in that period, numerous cases were fought pro bono publico in which issues such as civil liberties and racial discrimination were decided. However, according to Dr. Werner Menski,[10] "U.S style PIL was a surrogate private interest movement which lacked solid enough conceptual foundations to mature into the kind of PIL that we see in the South Asia today." He further comments that there is a conceptual difference between PIL in U.S and PIL in South Asia, "U.S style PIL is based on the western model of Jurisprudence," said Werner Menski, "which does not allow space for socio legal interpretations which include the perspective of religious and social authority."[11] Therefore, it leaves little doubt that the hallmark of Pakistan style PIL is the inclusion of such broadening factors in the interpretation of laws, creating thereby a room for the socio cultural legal perspective.

Though in latent manner Public Interest Litigation did exist much earlier, yet the year 1988 saw the first ever profundity of Public Interest Litigation in Pakistan. It was Benazir Bhutto Case that was explicitly referred to by the Supreme Court of Pakistan as public interest litigation. The credit of initiating the concept of Public Interest Litigation in Pakistan goes neither to the lawyers nor to any of the interest groups; in fact, it was the judges of the superior courts who assumed this task and provided relief to "little Pakistani's" in large numbers.[12] In doing so the courts relaxed the requirements of locus standi and various other procedural rules, and assumed jurisdiction even on news reports, telegrams and letters.

In legal connotation, the term locus standi denotes the right of a person to approach a court of law for the redress of a wrong perpetrated on him.[13] The traditional rule in regard to locus standi is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal rights or legally protected interests.[14] In other words, an aggrieved person can only move forum of justice in the traditional sense. It is feared that the strict observance of this procedural standard, which otherwise would

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[8] Gideon vs. Wain Wright, 372 N.S. 335.

[9] See Chaudhury at supra note 5.

[10] MENSKI, ALAM & KASURI RAZA, PUBLIC INTEREST LITIGATION IN PAKISTAN (2000) at p. 115.

[11] Id at p. 116.

[12] This term was originally used by Bhagawati J. in S.P. Gupta case 1982. It was adopted by the learned judge in Muntazima Committee case (PLD 1992 Kar. 54).

[13] Hameed Zulfiqar, *'Standing and Locus Standi – A study of recent developments in Pakistan and United States'*, 1996 PLD JOURNAL at p. 86.

[14] S.P Gupta vs. Union of India 1981 Supp. SCC 87 (219).

have been good if access to justice was ensured to all and sundry irrespective of the status and position, would amount to closing the doors of justice to the poor and deprived sections of the community. Thus by relaxing the conventional procedure and spaciously constructing the locus standi requirement, a new strategy for the promotion of public interest got evolved in Pakistan.[15] Moreover, procedural obstacles where necessary were overlooked to do substantive justice, especially where the major benefactors were socially and economically weaker. In this manner, Public Interest Litigation was used as a tool to provide justice to the growing number of people in Pakistan.

III. LOCUS STANDI

Although it is imperative to lay down guidelines defining the parameters regarding the right of an individual to bring an action under the auspices of PIL, yet it is a peculiarity of the PIL in Pakistan that no such requirements or rules exist. On the contrary, the judges take the task on themselves to decide such matters on a case-to-case basis, and this fact explains the presence of variety of cases decided as Public Interest cases in recent years. It may further be argued that it would no longer be beneficial for the cause of public interest litigation if such guidelines are framed or observed. The main emphasis is on the ends (public interest) rather than the means (procedure). It is an evident fact that public interest litigation is a retreat from formalism in law, especially where a matter of utmost importance is involved.

Elucidating the concept of broadening the rules of locus standi, Bhagwati, J. in S.P. Gupta's case[16] held that:

> "[A]ny member of the public having sufficient interest can maintain an action for judicial redress for public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objectives."

Similarly, in Benazir Bhutto case[17] the Supreme Court held that:

> "[I]n cases where there are violations of Fundamental Rights of a class or a group of persons who belong to the category as stated earlier and are unable to seek redress from the court, then the traditional rule of locus standi can be dispensed with, and the procedure available in public

[15] It must be noted that this is peculiar to the Pakistani and Indian style of PIL. The American concept of PIL gives more emphasis to the procedure rather than the right to sue.

[16] AIR 1982 S.C. 149.

[17] PLD 1988 S.C. 416, at p. 491.

> interest litigation can be made use of, if it is brought to the notice of the court acting bonafide."

Evidently, the traditional concept of locus standi has gone through a tremendous change. Under the earlier concept, all rights were not enforceable, in particular, rights, which were shared with the public, were hard to enforce. The courts were reluctant to let anyone come unless he had a particular grievance of his own, meaning thereby, that there was no concept of representative suits. However, demonstrably, the situation today is different. Denial of access to courts on grounds of locus standi now amounts to the denial of the constitutional promise.[18]

A plain reading of the Article 184(3)[19] of the Constitution of Pakistan shows that it is actually open-ended as it does not place any restrictions on who can or cannot make an application. In fact Article 184(3) essentially requires that the matter brought before the Supreme Court should be of public importance. In other words, original jurisdiction of the Supreme Court cannot be initiated unless the matter relates to public interest. The only requirement that the constitution lays down is that the person or body of persons bringing an action must act bonafide. As a matter of fact, whenever a petition relating to fundamental rights is brought before a court, no argument challenging locus standi should exist unless the case is manifestly mala fide[20]. As a result, the petitioner is presumed an aggrieved for the purposes of Article 199; therefore, it enables the court to examine the respondent's behavior to decide if there has been any violation of fundamental rights.[21]

For instance, in Ardeshir Cowasjee v. Multiline Associates,[22] a petitioner, who resided in the same locality as the respondent filed a writ petition under Article 199. The respondents had been permitted by the relevant government authorities to build a multi-story building. It was argued by the counsel for respondents that the petitioners had no locus standi as they were not aggrieved persons within the meaning of Article 199. The court observed that "rights may not, in many cases, be rights stricto senso or strict juristic rights but could be rights or even interests of an inferior nature, which, if not observed, could give rise to individuals."[23]

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[18] See generally THE CONSTITUTION OF PAKISTAN, 1973, Part II, Chapter 1. These provisions impose a duty on the State, among other things, to promote economic and social justice among the individuals.

[19] This article lays down that the Supreme can assume jurisdiction in a case where the question is of public importance and relates to the enforcement of Fundamental Rights.

[20] See Menski, supra note 10 at page 59.

[21] Id. at p.60

[22] PLD 1993 Kar. 237

[23] See Menski, supra note at page 91.

Consequently, the court accepted the locus standi of the petitioners and admitted the petition for hearing.

IV. CASE STUDY

A. Benazir Bhutto v. Federation of Pakistan[24]

This case is the precursor of Public Interest Litigation in Pakistan. Before the elections of 1988, Miss Benazir Bhutto, the president of the Pakistan People's Party, challenged the provisions of Political Parties Act (III of 1962) as violative of Article 17 of the Constitution.[25] The Act required the political parties to register themselves before they could contest the elections. The petition was brought under the Article 184(3) of the Constitution. The State raised a preliminary objection that the petitioner did not have the locus standi, meaning thereby, as construed at that time, that the petitioner was not an aggrieved person. For the first time in the history of constitutional set up in Pakistan, the Supreme Court allowed a suit to be filed by a person who merely made a bona fide representation without any direct personal interest. The judiciary was thus given an ideal opportunity to finally produce an authoritative judgment on a matter of public interest in relation to fundamental rights, which would lay down the grounds for the creation of a more effective and less restrictive framework for public interest litigation in Pakistan.[26]

The court not only granted the locus standi to the petitioner, but also accepted the petition by declaring the provisions of Political Parties Act, 1962 as void. The enforcement of fundamental rights for all citizens and public interest formed the grounds on which the locus standi was granted.

Therefore, for the first time in the legal history of Pakistan, the old restrictive requirements of locus standi were relaxed. The court stated that "in cases of violation of the fundamental rights of class or a group of persons who are unable to seek redress from a court the traditional rule of locus standi can be dispensed with. The procedure available in public interest litigation can be made use of, if it is brought to the notice of the court by persons acting bona fide."[27] Therefore, after considering the arguments in detail the court, rightfully, declared the provisions of Political Parties Act, 1962 as violative of the constitutionally guaranteed right to form a political party.

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[24] PLD 1988 S.C. 416.

[25] This article enumerates the Fundamental Right to the freedom of association and states, inter alia, that every citizen shall have the right to form associations or unions, subject to reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.

[26] See Menski, supra note 10 at page 39.

[27] PLD 1988 SC 416, at page 491.

Still, given the political and social structure of Pakistan, it is hard to state whether this decision as a matter of fact, apart from the points of law discussed and decided, beneficially affected the interest of public. It is true that rights of people at large were involved in this litigation, but it is equally true that it was essentially a case brought by a wealthy politician for the benefit of her own political party without much regard for the people at large. At some points the case seems to lose the objectivity or the real essence of PIL, and gives an impression that broadening the rules of the locus standi is what PIL is all about. Ideally, the court should have pointed out the conditions, which a public interest case has to qualify for the invocation of such abnormal jurisdiction. Moreover, the court very clearly jumped to conclusion by failing to determine as to whom is eligible to bring an action in such cases and the concept of a representative capacity. In the absence of such clear rules, any legal issue can be construed to have an effect on public at large. Instead, the court chose to rely on vague terms such as "matter should be of public importance" and "fundamental rights of the citizens at large". The effects of these lapses are evident to the extent that they allow the misuse of the doctrine, as seen in the later cases.

B. Stove Blast Case (1989)[28]

Oil stoves are widely used in Pakistan for cooking purposes. But the major drawback of these stoves is that due to low quality they blast very frequently, and as a result, a number of women die every year. In this case Justice Munir Khan of Lahore High Court took suo moto action against the manufacturers of oil stoves, on the basis of news reports. Inspired by Darshan Masih[29] and other cases, this is yet another case, which brings out a new dimension of the public interest litigation in Pakistan by taking suo motto action in the interest of justice. Previously, a telegram was converted into a regular petition by the Supreme Court (Darshan Masih Case) and in this case, the High Court following the newly set traditions by the Supreme Court, went on to take action on the basis of a news report. It was now clear that the judiciary has started to assert itself in the interest of rights of the people.

Dealing with the question of jurisdiction, Munir Khan J. stated that in order to secure the ends of justice and to protect the life, liberty, honor and property of citizens against cruelty, atrocities and highhandedness, the High Court has full authority to assume jurisdiction under Article 199 of the Constitution of Pakistan. Commenting on the manufacture of defective stove he observed:

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[28] This is an unreported case, the source of this case is: MANSOOR HASSAN KHAN, PUBLIC INTEREST LITIGATION IN PAKISTAN: GROWTH OF THE CONCEPT AND ITS MEANING IN PAKISTAN (1993)

[29] Id at p. 13

> "In our Islamic Republic as we claim ourselves to be, women in hundreds have died by stove bursts leaving behind thousands orphan children but the negligent and criminal action of the manufacturers of oil stoves enjoy immunity because of inaction on the part of the authorities entrusted with the administration of law."

In his judgment he devised a comprehensive procedure to be followed by authorities in case of a stove burst, including aid that should be provided to victim's family. He also ordered the authorities to make sure that oil stove manufacturers are registered and all measures regarding quality of stoves are taken. This case has strong implications on the socio legal structure of Pakistan, in the sense that, firstly, it brings out a very acute problem facing the women of average household, secondly, it addresses the problem through non-traditional means thereby, making the remedies available speedily and effectively.

C. Khadim Hussain v. Borstal Jail Bahawalpur (1989)[30]

In this case the court, taking suo motu action released a minor, Khadim Hussain, from Bahawalpur Jail. The boy, under seven years of age, was arrested by the police, kept in illegal confinement and tortured. A case was registered against him u/s 109/55 Cr.P.C. in consequence of which he was sent to jail. A welfare trust publicized this issue in the press. Subsequently Justice Munir Khan took suo moto action and ordered the release of the minor from the Jail on the ground provided in section 82 PPC, by virtue of which, a minor under 7 years of age cannot be arrested for any offence.[31]

D. Darshan Masih alias Rehmatay vs. State (1990)[32]

This case, in essence is a true PIL case, which changed the whole idea of distributive justice under the constitutional jurisprudence of Pakistan. For the first time the Supreme Court was able to disregard formalities or the procedural aspects of law in order to do complete justice. Formally, in Benazir Bhutto case the emphasis was on the locus standi of the petitioners, while in Darshan Masih case the court while exercising its powers under Article 184(3) converted a telegram into a petition and admitted it for regular hearing. On 30th July 1988 (during the summer vacations) the Chief Justice of the Supreme Court received the following message:

> "Chief Justice Supreme Court of Pakistan, Rawalpindi we plead for protection and bread for our family we are brick and kiln bonded laborers. We have been set at liberty through the court. And now three

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[30] See Crl/M/No 288/1989/BWP.

[31] This section of The Pakistan Penal Code states that "nothing is an offence which is done by a child under seven years of age."

[32] PLD 1990 S.C. 513.

> amongst us have been abducted by our owners. Our children and women are living in danger. We have filed complaint. No action taken. We are hiding like animals without protection or food. We are afraid and hungry. Please help us. We can be contacted through counsel Asma Jehangir. Our state can be inspected. We want to live like human beings. The law gives no protection to us.
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> Darshan Masih (Rehmatay) and 20 companions with women and children Main Market, Gulberg, Lahore."[33]

In this case, as it is clear, the matter of bonded labor practices was brought to the notice of Supreme Court. Under this practice, laborers of brick kiln industry are hired by giving an advanced sum (peshgi). These laborers are then required to work for the employer until the debt has been repaid. Often these bhatta mazdoors (laborers) are unable to repay the debt despite working for years under inhumane conditions. Consequently, they are not allowed to leave the premises of the brick kiln and are even kept in chains.

Action by the Supreme Court was divided in two parts; firstly, enforcing the Fundamental Rights of the citizens the Supreme Court released all the 21 detenus, and secondly, the Supreme Court devised long term measures for the prevention of bonded labor in the brick kiln industry.[34]

The then Chief Justice of Pakistan, M. A. Zullah considered it necessary to clarify the procedural aspects of the case and stated:

> "True a telegram has never been earlier made the basis by the Supreme Court of Pakistan for action, as in this case; but, there is ample support in the Constitution for the same i.e. Article 184(3). The question of procedural nature relating to the entertainment of proceedings and/or cognizance of a case under this provision, have been dealt with in the case of Miss Benazir Bhutto (PLD 1988 SC 416). The acceptance of a telegram in this case is covered by the said authority as also by the due extension of the principles laid therein.[35] Such extension would depend upon the facts and circumstance of each case and nature of public interest involved and importance thereof."

The court also decided that kiln owners could not use unlawful means for the recovery of Peshgi's but can solely make use of the procedure given in the C.P.C for the recovery of debt. This provided relief to whole community of bhatta mazdoors (brick kiln workers) as they all had similar problems and most of them were made to work forcefully.

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[33] PLD 1990 S.C. at page 519.

[34] See Khan, supra note 28.

[35] For instance, earlier in the judgment the Chief Justice stated that by virtue of Article 187 the Supreme Court is under an obligation to do complete justice, as also to enforce and protect the Fundamental Rights of citizens.

Clearly, the court didn't rely on ambiguous justifications to give legitimacy to their decision. The court expressly declared the whole community of brick kiln workers as the class of persons affected by the illegal practice, then construed their right to have access to justice under the newly developed system to approach the court for redressal.

It was essentially a case involving the Fundamental Rights of citizens who were indigenous, illiterate and without any formal means to access the courts. It brought to the forefront the issue of "access to justice and the poor people". It provided a means for a long line of subsequent cases, which were, fought pro bono publico, for restoring the rights of the people who lacked the means and awareness to get their voice heard in the echelons of justice.

E. Zarina Case (1990)[36]

This was yet another perfect class action case, in which the police on charges of Zina arrested a woman Zarina. The woman was pregnant at the time of arrest and later delivered a child in the jail. During the proceedings of the case she went to the court carrying the baby with her. Later she filed bail application in LHC and the bail was granted. The judge while granting the bail stated that it is virtually impossible to keep a pregnant woman or a woman who was breast-feeding in jail. He based his statement on the principles of Islamic Law.

Later on, the learned judge took suo moto action and ordered the release of 70 under trail women prisoners who were either pregnant or breast-feeding their babies.

Here, again the judiciary was able to provide relief to a large group of people who were either disadvantaged or unrepresented, and made it a perfect precedent for public interest litigation.

F. Shirin Munir v. Government of Punjab (1990)[37]

This case is another perfect example of a class action case in which the Supreme Court interpreted the equality clause,[38] so as to make it a provision for positive discrimination for women.

A number of girl students cleared their F.Sc. (Pre-Medical) examination with credit. They obtained marks, which would have entitled them on merit to admission in one of seven medical colleges. There were in all 1085 seats

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[36] This is an unreported case. It has been quoted from: MANSOOR HASSAN KHAN, PUBLIC INTEREST LITIGATION IN PAKISTAN: GROWTH OF THE CONCEPT AND ITS MEANING IN PAKISTAN (1993).

[37] PLD 1990 S.C. 295

[38] Article 25 of the Constitution, this Article deals with the equality of citizens and states that: "(1) All citizens are equal before law and are entitled to equal protection of law. (2) There shall be no discrimination on the basis of sex alone."

for admission to the medical colleges. After excluding the reserved seats for additional categories numbering 227, there were left 858 open seats, of which 677 were allocated, to the boys and 181 seats were allocated to the girls. As the girls were required to compete within their own quota, the last girl entitled to get admission was required to secure 820 marks in the session 1986-87. On the other hand, the boys competing on merit within their allocated seats could get admission on as low a mark as 731. Thus, the appellants regarded this as discrimination against them, and the breach of their constitutionally guaranteed right of equality.

Shafi ur Rahman, J. accepting the claim of the appellants granted them relief and removed fixation of all quotas, which were detrimental to the interest of women in educational institutions that were run on co-education basis. He stated that:

> "No discrimination on the ground of sex alone can be permitted except on the ground of reasonable and intelligible classification. Such classification in our society permits the present, establishment of educational institutions exclusively for the females or exclusively for the males. However, where co-education is permitted and the institution is not reserved for one sex alone, the fixation of number on the ground of sex would directly be opposed to the requirement of Article 25(2) unless it is justified as a protective measure for women and children under Article 25(3). In other words the number of girl students can be fixed as the minimum but not as the maximum particularly so where on merit they are likely to get more than the fixed number of seats."[39]

This judgment provided relief not only to the appellants but also to the whole female community. A clear message was now passed by the Supreme Court that discrimination against women in all spheres of life has to be done away with. It went as far as saying on the contrary, that a positive discrimination in favor of women was allowed, and possibly, desirable as well. Now, apart from providing access to people who do not have the means to do so, this case added affirmative action into its several dimensions.

G. Shehla Zia v. Wapda (1994)[40]

Between 1990 and 1994 a lot of stereotype public interest litigation took place. But the year 1994 saw a very unusual and remarkable case brought before the Supreme Court. In this case the Supreme Court went on to extend the definition of right to life, and invariably, determined the minimum environmental standards of any given venture for the safety of the public at large. In this case, a letter was written to the Chief Justice bringing to the notice of the court, the construction of a grid station in a residential area. It

[39] PLD 1990 S.C. 295. pp. 311&312

[40] PLD 1994 S.C. 693

was contented that due to the hazardous electro magnetic emissions from the grid, the lives of the residents of the locality were essentially in danger.

The Supreme Court found that the letter raised two questions.[41] Firstly, whether any government agency had a right to endanger the life of citizens by its actions without the latter's consent and, secondly, whether zoning laws vest rights in citizens which could not be withdrawn or altered without the citizens' consent. The Supreme Court decided to convert the letter into a regular petition, since in its opinion the jurisdiction of the court could be invoked under article 184 of the Constitution. In addition to this, a large number of people throughout the country could not make such representation or may not like to make it due to ignorance, poverty and disability.

The most important question before the court was, the extent and meaning of the right to life as guaranteed by the Constitution. Deliberating on this issue, Saleem Akhtar, J. stated:

> "Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word 'life' is very significant as it covers all facets of human existence. The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity legally and constitutionally."[42]

Finally, the Supreme Court reached the conclusion that where life of citizens is degraded, the quality of life is adversely effected and health hazards are created affecting a large number of people due to pollution and environmental degradation. Thus, the Supreme Court in exercise of its jurisdiction under Article 184(3) of the Constitution may grant relief to the extent of stopping the functioning of such units, which create pollution and ecological degradation.[43] This time the beneficiaries of PIL were not poor or ignorant people who were unable to access courts; but were residents of a posh locality in the capital of Pakistan who were being denied their rights by an executive authority. Had the Supreme Court in earlier cases laid parameters with regard to class of people who can claim the benefit of the PIL, this case would probably not have been decided this way. Yet, it is a very remarkable addition to both environmental law and human rights of the citizens. In Pakistan, it follows, that not only the poor and illiterate have

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[41] Id at page 694

[42] Id at page 712

[43] It is interesting to note that the Indian Supreme Court made a similar decision in 1987, in which it held that the slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should be regarded as amounting to violation of Article 21 (right to life) of the Constitution. For more details, see T. Damodhar Rao vs. The Special Officer, Municipal Corporation of Hyderabad, AIR 1987 AP 171

problems regarding access to justice, but also the well to do and educated people. The question remains, whether the superior courts should indulge in devising short cuts to solve the never-ending issues, or should they work on simply improving the judicial system of Pakistan, which would to a larger extent take care of most of the problems. Consequently, once people have confidence in the judicial system and its working, they would no longer have to write letters to the chief justice or hope for early action on preferential basis. It would be needless to say that these measures to some extent undermine the utility of normal litigation process. My intention is not to undermine the development of PIL, but to bring out the possible drawbacks that come with the package, with the hope that they can be avoided.

H. Al – Jehad Trust v. Federation of Pakistan (1996)[44]

In this case it became quite apparent how the judiciary started using the term "public interest" to validate and legitimize its pronouncements against other branches of government. The fact that it had little nexus with the public interest litigation as taken literally, did not hamper the courts. Looking at the other side of the border, one would come to the conclusion that this is a common feature of PIL in South Asia, where the superior courts are not reluctant in using it as a weapon to ensure its independence.

Perhaps the argument of safeguarding independence of judiciary would justify the use of this doctrine in this way. Simply put, courts now claim that independence of judiciary is necessarily a public interest issue, and any member of the public in the name of public interest litigation may question any threat to the same.[45] Under the present case, some appointments of Judges in the Superior Courts were challenged on the ground that they were made in contravention of the procedure and guidelines laid down by the Constitution. Since the petitioners were a body of lawyers, and they were bringing up the case in the name of public interest; the petitioners contended that they had the locus standi to file the petition. They also contended that being members of the legal fraternity they were under an obligation to protect the independence of judiciary. The court while accepting the arguments of the petitioners held that:

> "…. [N]ot only a practicing advocate but even a member of the public is entitled to see that the three limbs of the State, namely, the Legislature, the Executive and the Judiciary act not in violation of any provision of the Constitution, which affect the public at large."[46]

The court further declared that the petitioner has rightly invoked the jurisdiction of the Supreme Court under Art. 184(3) of the Constitution as

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[44] PLD 1996 SC 324

[45] PLD 1996 SC 324 at page 419

[46] Ibid. at page 419

the question of interpretation of the Articles of the Constitution relating to the Judiciary, which was of public importance, was involved. The court after considering the arguments of both sides came to a conclusion that the process of appointments of the judges of the superior courts effectively related to the independence of the judiciary. The court accepted that it had no power to strike down a constitutional provision, but it declared that it could change the effect of a provision through interpreting the same in a different and more desirable way.[47] In its order the Supreme Court reached the consensus that the requirement of "consultation" in the Constitution should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play.[48]

By holding that "the opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive"[49] the Supreme Court, changed a well established practice of appointments of the judges of superior courts in the name of independence of judiciary. To legitimize it further and to reinforce its decision, the court took the help of the "Doctrine of Public Interest".

As we have seen in this case, and shall also see in later cases, the dynamics of the public interest litigation kept on changing with each coming year. It was a continued effort on part of the judiciary to solve various problems and issues under public interest doctrines. It seems as if the courts then started to assert their newly acquired tool to provide justice to common people. It also brings out another aspect of the Pakistani system of government that more often than not the government or the executive has failed to come up to the expectations of the people. Therefore, it becomes obvious how the judiciary has taken the task to itself. This task was not too difficult for the judiciary, as it already had the power to review administrative actions on various grounds. Growing numbers of Pakistani's now started to bring their grievance through this newly discovered method of approaching the court, where more stress was given on the essence rather than the form of the law. It was not foreseen, however, that judiciary cannot be given the mandate to remove each and every flaw in the society. In our socio legal context there are a number of limitations that would counter any such move by the judiciary, of which the primary one is the economic condition. Therefore without actually being noticed the thrust of judicial activism came to a halt for a moment.

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[47] Ibid. at page 373

[48] It is a constitutional requirement that the Chief Justice of the High Court must be consulted before appointments in that High Court are made. See Article 177(1) of the Constitution of Pakistan.

[49] PLD 1996 SC at page 365

I. Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan (1998)[50]

This is a continuation of the trend laid down by the Supreme Court in Al-Jehad Trust case, whereby constitutional issues were to be decided by the Supreme Court in the name of public interest. These cases do not fall plainly under the category that relates to fundamental rights of common man. This is not class action litigation. It is an extension of the usual doctrine of public interest. In this case fourteenth amendment to the Constitution was challenged in the Supreme Court of Pakistan. This amendment relates to floor crossing of the members of the legislature and to some extent to their right to express their views against policy of the political party to whicl they belong. It was known as the anti-defection law.

The petitioners, a professional body of lawyers, prayed that the A ticle 63-A of the Constitution be declared void on account of inconsistency with the fundamental rights and thus the basic structure of the Constitution. In the plea, the petitioners submitted that Article 63-A[51] was not an anti-defection law, but was, in fact, anti-dissent[52] and therefore violative of Articles 2-A, 19, 55, 63, 66, 68 and 95 of the Constitution. Despite the fact that none of the petitioners were members of the parliament, nor were they able to prove a direct effect on their fundamental rights, the Supreme Court still allowed the petitions to be taken up to discuss the issue at length. The Supreme Court stated that this court has been liberal in entertaining constitutional petitions, which involved questions of public importance with reference to the enforcement of any of the fundamental rights conferred by Chapter 1 of Part II of the Constitution.[53]

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[50] PLD 1998 S.C. 1263

[51] "(1) If a member of a Parliamentary Party defects, he may be means of a notice in writing addressed to him by the Head of the Political Party or such other person as may be authorized in this behalf by the Head of the Political Party, be called upon to show cause...

Explanation--- A member of a House shall be deemed to defect from a political party if he, having been elected as such, as a candidate or nominee of a political party, or under a symbol of political party or having been elected as such, as a candidate or nominee of a political party, and having become a member of a political party after such election by means of a declaration in writing

(a) commits a breach of party discipline which means a violation of the party constitution, code of conduct and declared policies, or
(b) votes contrary to any direction issued by the Parliamentary Party to which he belongs, or
(c) abstains from voting in the House against party policy in relation to any Bill."

[52] According to this law, Members of Parliament's opinion should reflect the policy of the ruling party; failure to observe this provision entails a penal action. See clause (a) (b) and (c) of Article 63A

[53] See at page 1300

Even though the court asserted its right to check the validity of any constitutional amendment on the touchstone of the fundamental rights and the doctrine of basic structure, yet the court adopted the most convenient way to resolve the dispute. In other words the petitions were disposed off without resolving the controversy clearly and effectively. Surprisingly, the court came to the conclusion, despite apparent discrepancies, that article 63-A of the Constitution is not violative of any provision of the Constitution. However, in order to avoid future unnecessary litigation and to provide guideline, the Supreme Court clarified the following points:

> (i) "That paragraph (a) to be read in conjunction with paragraph (b) and (c) to Explanation to clause (1) of Article 63A of the Constitution. It must, therefore, follow as a corollary that a member of a House can be disqualified for a breach of party discipline in terms of said paragraph (a) when the alleged breach of party discipline in terms of said paragraph (b) and (c) to the Explanation to clause (1) of Article 63A of the Constitution and that the breach complained of occurred within the House.
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> (ii) That paragraph (a) to Explanation to clause (1) of Article 63A of the Constitution is to be construed in such a way that it should preserve the right of freedom of speech of a member in the House subject to reasonable restrictions as are envisaged in Article 66 read with Article 19 of the Constitution."[54]

However, the Supreme Court concluded that Article 63A of the Constitution would not include the conduct of the member of the parliament outside the house. Despite laying a claim to have resolved the issue to avoid future unnecessary litigation, the Supreme Court failed to come up with an effective solution and on the contrary adopted a way between. This observation is based on the fact that the leader of the Party still remains the person who will decide what will constitute a "reasonable conduct" according to party policies. Thus, in fact, a restriction is placed on the member's right to speak freely for his/her constituents. Therefore, despite being called a public interest case by the Supreme Court itself; it failed to save the interest of the public.

J. Sardar Farooq Ahmad Khan Leghari v. Federation of Pakistan (1999)[55]

Most recent and most notable case in terms of granting effective relief to the whole nation, in this case the Supreme Court declared illegal the suspension of fundamental rights under Article 233(2). This is essentially a case that involved the interest of the whole nation, and, fortunately, the

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[54] See at page 1444
[55] PLD 1999 SC 57

Supreme Court rose to the occasion. In the present case the President passed the first order under clause (2) of Article 233 of the Constitution on 28-5-1998. This provided that the right to move any court including a High Court and the Supreme Court for the enforcement of all fundamental rights conferred by Chapter 1 of Part II of the Constitution was suspended. In addition to this, all proceedings pending in a Court which were for the enforcement or involving determination of any question as to the enforcement of any of the said rights, shall remain suspended for the period during which the said proclamation was in force.

After that on 13-7-1998 the president passed another order under the same provisions of the Constitution as above. This provided that in the order (i.e. the Order of 28th May, 1990) in the third paragraph for the words "all the fundamental rights conferred by Chapter I of Part II" shall be subs ituted with, "the fundamental rights provided for in Articles 10, 15, 16, 17, 18, 19, 23, 24 and 25." The wording of clause (1) of Article 233 of the Constitution indicates that it is not mandatory that whenever a Proclamation of Emergency is issued under clause (1) of Article 232 of the Constitution, an order under the above clause is to follow. The use of the words "for the enforcement of such of the fundamental rights ... ... " as may be specified in the order shows that the President is required to apply his mind to the question, whether any order under above clause is warranted and if it is, then to what extent? These orders were passed under Articles 232 and 233 of the constitution, which empowers the President, to impose emergency in the whole or any part of the country and to suspend the fundamental rights of the citizens, if the specific circumstances exist.[56]

Due to national security reasons, the government claimed that it couldn't give the specific details of the causes of imposition of emergency. However, it based the said act on the threat from India at that time to wage a war against Pakistan. The petitioners asserted that this was certainly no justification for suspension of fundamental rights conferred by the Constitution. On the other hand, the government claimed that the Supreme Court does not have the jurisdiction to examine the validity of imposition of emergency.[57] However, following its practice,[58] the Supreme Court refused to accept this argument. It held that "It is a well settled principle of law that notwithstanding any ouster clause in the Constitution or any other statute, the courts do have jurisdiction to undertake judicial review in the case of a

[56] Article 32 (1): If the President is satisfied that a grave emergency exists in which the security of Pakistan, or any part thereof, is threatened by war or external aggression, or by internal disturbance beyond the power of a Provincial Government to control, he may issue a Proclamation of Emergency.

[57] Article 236 of the Constitution states that once the President has imposed Emergency, it would not be called in question in any court of law

[58] See generally Pir Sabir Shah Case, PLD 1993 S.C.

proclamation which is without jurisdiction or corum non-judice or malafide."[59]

After going through the material which was shown to the Judges in the chambers, the Supreme Court was satisfied as to the imposition of emergency under Article 232(1) of the Constitution. However, the learned court found out that the President was not justified in taking away the fundamental rights of the people through his order. Consequently, the Supreme Court declared the said order, insofar as the suspension of fundamental rights was concerned, as illegal and without lawful authority.[60] It also reserved its right to re-examine the present emergency at any subsequent stage.[61] As we can see, this is a case in which the rights of the people at large were actually affected. The application of judicial authority was not based on extension of the definitions of fundamental rights, and therefore in essence it was a public interest litigation case.

K. Sheikh Liaquat Hussain v. The Federation of Pakistan (1999)[62]

This is yet another case concerning the fundamental rights of the citizens at large and the independence of judiciary. To counter the appalling increase in terrorism in the province of Sindh, and to provide a platform for effective and speedy enforcement of laws in such cases; the then government established military tribunals under Ordinance XII of 1998. A large number of cases involving terrorist activities, which were pending in the courts, were transferred to these tribunals. The procedure of trial in these tribunals was quick and effective. This was certainly a drastic step, as it was now difficult for the accused to use the formalities of laws in his favor wrongfully. Not very surprisingly, this step created a stir in the legal and political circles, with many people questioning the fairness and impartiality behind this decision. The federal government justified the establishment of military tribunals under Article 245 of the Constitution, which places an obligation on the armed forces to act in aid of civil power when called upon to do so.

This Ordinance was challenged through five constitutional petitions, four of the petitioners were politicians and one was a leading journalist. The plea taken by the petitioners was that the impugned ordinance was against the role allocated to the judicature under Article 175 and creates a parallel judicial setup. Moreover, it was contended that establishment of military court is also violative of inalienable right of a citizen to be tried by a court working under the hierarchy of judicial system provided under the Constitution. In reply to the submissions made by the petitioners the learned

[59] PLD 1999 SC 57 at page 63
[60] Id at page 65
[61] Id at page 65
[62] PLJ 1999 SC 1153

Attorney General contended, interalia, that the present cases do not raise any question of pubic importance with reference of fundamental rights of the petitioners, which represent political parties.[63] In other words the locus standi of the petitioners with respect to the relief claimed was questioned, keeping in view the fact that the provisions of the impugned ordinance directly affected none of the petitioners. Furthermore, it was submitted that the military tribunals were established under Article 245 of the Constitution that empowers the federal government to call the armed forces to aid civil authority and the same was under the scheme of the Constitution.

The court, while accepting the arguments put forward by the petitioners, came to the conclusion that insofar as the Ordinance No. XII of 1998 allows the establishment of the military tribunals for trails of civilians charged with offences mentioned in S. 6 and the schedule to the above ordinance is unconstitutional, without lawful authority and of no legal effect. This is yet another case in which the court conveniently disregarded the requirements of locus standi and granted relief to persons of whom none was directly affected by the impugned ordinance. The importance of this case with regard to the public interest doctrine is two fold, firstly, that the court knowingly allowed the petitioners to bring a case in a representative capacity and thereby broadened the rules of locus standi available in such cases. Secondly, the court took serious notice of establishment of any judicial forum that is not under control of superior judiciary and outside the structure provided by the Constitution as envisaged in Article 175(1) of the Constitution. The court went on to declare the said establishment as a violation of fundamental rights of citizens to be tried by an independent and impartial civil court.[64] Regarding the locus standi of the petitioners Siddiqui J. opined that:

> "[I]t is not necessary that infraction of any Fundamental Right of petitioner/individual must be established. Question of infringement of Fundamental Right of individual is relevant in proceedings under Article 199 of Constitution with reference to his locus standi to maintain proceedings. In contradistinction to proceedings under Article 199 of Constitution, question of locus standi of petitioner is hardly of any significance in a petition filed under Article 184(3) of Constitution. Stress in proceedings under Article 184(3) of Constitution is more on 'public importance' of question raised in the proceedings."

The learned judge also referred to Manzoor Illahi v. Federation of Pakistan[65] in which the expression 'public importance' was defined in a similar fashion as early as 1975, in the following words:

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[63] Ibid. at page 1268
[64] Id, Per Saiduzzaman Siddiqui at page 1281
[65] PLD 1975 SC 66

> "[I]t refers to something which is to be shared or participated in or enjoyed by the public at large, and is not limited or restricted to any particular class of the community. In order to acquire public importance the case must obviously raise a question that is of interest to or affects the whole body of people or an entire community. In other words the case must be such as gives rise to questions affecting the legal rights or liabilities of the public or the community at large, even though the individual, who is the matter of the case, may be of no particular consequence."

V. TRACING TRENDS OF PUBLIC INTEREST LITIGATION FROM THIS CASE STUDY

PIL in Pakistan found its basis in the prevailing social issues creating grievances in the general public. Early period of PIL marks its importance in social context where rulings like that of Khadim Hussain v. Borstal Jail Bahalwapur (1989), Stove Blast Case (1989), Darshan Masih's Case (1990), Shehla Zia's Case (1994) were given by the courts. PIL essentially connoted a direct interest of the public.

Within six years of the introduction of PIL, the courts lost their reservations and inhibitions to a greater extent. As they were more familiarized with the concept of PIL, a new era of judicial activism commenced. This novel outlook enabled the courts to drift away from legal formalism for serving public interest. The technicalities were done away with in the name of justice. This statement may be substantiated by the case Shehla Zia v. Wapda (1994) where the court acquired epistolary jurisdiction converting a letter into a plaint. Words and expressions were given comprehensive and wider meanings making them multidimensional in an effort to cover as many situations as possible.

With its increasing popularity PIL became a tool in the hands of lawyers to invoke justice even in the cases indirectly linked with public interest. This is clearly observable in cases like Al Jehad Trust, Wukla Mahaz Barai Tahafuz -e-Dastoor etc. where constitutional issues were sought to be resoled in the garb of PIL. However, in the latter case mentioned, the court made it clear that it will not be manipulated in the name of public interest. Thus, in the Wukla Mahaz Case, despite the fact that the apex court admitted the issue as that of public importance, it could not give a ruling to safeguard public interest. This is an evidence of the fact that courts do not rise above the law even in cases of public interest.

Nevertheless, the decision of Supreme Court in the Wukla Mahaz case did not create any negative trends. Later rulings like that of Farooq Leghari case and Liaquat Hussain have recognized the potential of PIL to acquire effective relief nationwide. In addition to this, the issue of locus standi was further relaxed, rather the requirement of locus standi was reduced to an insignificant character in cases brought under Article

184(3), where the relevant criterion for seeking relief is that the issue between the parties must be one of public importance.

However, the courts failed to fulfill the utmost requirement of devising procedural rules for the prevention of abuse of this doctrine. This leads to a controversial debate that excessive judicial activism may lead to arbitrary dispensation of justice keeping in view the social, economic and political context of Pakistan.

VI. CONCLUSION

Public interest litigation has now been firmly established as an integral part of the constitutional jurisprudence of Pakistan. The superior courts in Pakistan no longer think twice before taking a liberal view of the constitutional provisions in order to ensure open doors of access to justice to all. The public interest litigation holds a bright potential for the future growth. It also provides for a balancing power against executive or private excesses and injustices to a large number of people in the country. However, the potential for misuse cannot be overlooked. As we have seen in some cases, the doctrine of public interest was invoked where there was no direct nexus between the issue in question and the rights of the people at large, and was merely a struggle between the powerful politicians and executive authorities for there private vested interests. In order to avoid such misuses, the Supreme Court shall devise some rules under which these kinds of cases can be brought to the superior courts. Furthermore, the public interest litigation in Pakistan has evolved another very interesting dimension: the courts now have power to implement the human rights of the individuals in extended and newly developed forms, which many a times goes out of the parameters created by the relevant provisions of the constitution. Consequently, this type of litigation also provides a room for development of the law of fundamental rights as contained in the constitution. It is, therefore, hoped that this unique combination of Islamic principles, human rights, public interest and judicial activism will continue to grow in the positive direction allowing the individuals to live freely and without fear of injustice in the society.