

RATIONALE BETWEEN THE FUNDAMENTAL RIGHTS JURISDICTION AND PUBLIC INTEREST LITIGATION: A REVIEW ON SRI LANKAN CONTEXT

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Abstract

Public interest is a concept that is fundamental to a representative democratic system of government. Acting in the public interest is important to a good public administration.¹ According to Black's Law Dictionary,

*"Courts exist to promote justice, and thus to serve the public interest. [...] Every judge should at all times be alert in his rulings and in the conduct of the business of the court, so far as he can, to make it useful to litigants and to the community."*²

The concept of Public Interest Litigation originated in the United States of America in the 19th century. The phrase 'public law litigation' was prominently used by the American jurist, Abram Chayes (1922 – 2000) to describe the practice of attorneys or some public-spirited individuals who seek to bring in social changes through the court-ordered decree to reform the legal rules, enforce existing norms and articulate public norms.³

The term "Public Interest" means the larger interest of the public, general welfare, and interest of the masses. The word "litigation" means a legal action that includes all proceedings therein initiated in a court of law to enforce a right and seek a remedy. Hence, the expression "Public Interest Litigation" means any litigation for the benefit of the public.⁴

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¹ Chris Wheeler, The Public Interest We Know It's Important, But Do We Know What It Means, AIAL FORUM No. 48, p 12.

² Black's Law Dictionary 4th Ed. Rev. LX IX.

³ Abram Chayes, The role of the judge in Public Law Litigation, 89 Harvard Law Review, 1281 (May 1976).

⁴ Manvendra Singh Jadon, Sourabh Roy, The Role of Public Interest Litigation in Shaping Up the Public Policy

One of the main aims of 'law' is to achieve justice in society and Public Interest Litigation is one such tool developed by the judiciary to achieve this objective.⁵ Accordingly, public interest litigation is the use of the law to advance justice, equality and human rights, or raise issues of broad public concern.⁶ Today, Public Interest Litigation is widely used in India, South Africa, the USA, the UK and many other countries including Sri Lanka.

Keywords: Fundamental Rights, Public Interest Litigation, *Locus Standi*

The rationale behind Public Interest Litigation: enhancing *Locus Standi*

Generally, the right or ability to bring legal action to court rests with the aggrieved party. But Public Interest Litigation (PIL) creates an exception to the doctrine of *locus standi*. This permits any *bonafide* petitioner to bring matters of public interest before the court. The petitioner is not required to show that he or she was personally affected.⁷ According to this new approach, if any legal wrong is committed against a person or a class of persons who by reason of poverty or any other disability cannot approach the court of law, for justice, it is open to any public-spirited individual or organization to approach the court on their behalf. Thus, this approach of the courts has been taken up so that the constitutional objective of socio-economic

Regime in India: Over-Reaching or Justified and The Way Ahead, 3rd International Conference on Public Policy (ICPP3) June 28-30, 2017 – Singapore.

⁵ *ibid*.

⁶ <https://www.pilsni.org/about-public-interest-litigation> (Accessed on 5th December 2021).

⁷ Dr. Mario Gomez, Litigating to Change the Public Interest Litigation and Sri Lanka, <https://www.lawnet.gov.lk/>, (Accessed on 5th December 2021).

justice can be achieved for all.⁸ Accordingly, under Public Interest Litigation, one person can file a lawsuit on behalf of a class of persons or community.

In the Fertilizer Corporation Kamgar Union v Union of India case,⁹ the Indian Supreme Court held that "Public interest litigation is part of the process to participate in justice and 'standing' in civil litigation of that pattern must have liberal reception at the judicial doorsteps. Therefore, *Locus Standi* must be liberalized to meet the challenges of the time. *Ubi jus ibi remedium* must be enlarged to embrace all interests of public-minded citizens or organisations with serious concern for the conservation of public resources and the direction and correction of public power so as to promote justice in its triune facets".¹⁰ Also, in the People's Union For Democratic Rights v Union Of India case,¹¹ Justice P.N. Bhagawathi stated that "Public interest litigation is brought before the court, not to enforce the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and indicate public interest which demands that violations of constitutional or legal rights of a large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed".¹² Therefore, Public Interest Litigation can be identified as a judicial tool for ensuring social justice.

Fundamental Rights Jurisdiction in Sri Lanka

Fundamental rights are guaranteed by judicial protection under Chapter 3 of the 2nd Republic Constitution of Sri Lanka, 1978. Under Articles 17 and 126 of the Constitution, the Supreme Court holds jurisdiction over the protection of fundamental rights. In terms of Article 126 (2)

of the Constitution, where any person alleges that any fundamental right or language relating to such person has been infringed or is about to be infringed by an executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month apply to the Supreme Court by way of a petition in writing, addressed to such Court praying for relief or redress in respect of such infringement.¹³ However, in the *de facto* scenario, the Supreme Court has been able to enhance the *locus standi* and the time bar for the fundamental right litigation through judicial activism. Thus, the developments of fundamental rights jurisdiction have created avenues to improve the practice of Public Interest Litigation in Sri Lanka. As a tool of activism on the part of interested persons, fundamental rights cases have led the Supreme Court to issue orders and make pronouncements on matters which hitherto were in the policymaking sphere.¹⁴

Public Interest Litigations: Sri Lankan Context

Although the Constitution of Sri Lanka does not expressly prescribe Public Interest Litigation, starting from the case of Wijesiri v. Siriwardena,¹⁵ the judiciary of Sri Lanka, have time to time, expanded the rules of standing and practices regarding Public Interest Litigation.¹⁶ According to Dr Mario Gomez, there are two myths about Public Interest Litigation in Sri Lanka. The first is that Public Interest Litigation is not possible under the domestic legal framework. The second is that Public Interest Litigation does not take place. Both these statements are wrong and reflect an incomplete understanding of Public Interest Litigation in this country.¹⁷ He argues that Public Interest Litigation can and does take place especially in Fundamental Rights and Writ jurisdiction.

⁸ Mr K.G. Balakrishnan, Chief Justice of India, 'Judicial Activism under the Indian Constitution', Trinity College Dublin, Ireland – October 14, 2009.

⁹ 1981 AIR 344.

¹⁰ Ibid, p.3.

¹¹ 1982 AIR 1473.

¹² Ibid, p.3.

¹³ Article 126 (2) - *Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by*

an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement.

¹⁴ Rajiv Goonetilleke, Public Interest Litigation: A Species of Direct Democracy and Good Governance.

¹⁵ 1982 1 Sri L R, 181.

¹⁶ Dinesha Samararatne, A Critical Assessment of Public Interest Litigation in Sri Lanka.

¹⁷ Dr. Mario Gomez (n.7).

Enhancing the *Locus Standi* of Fundamental Rights Jurisdiction

As discussed above, most Public Interest Litigation lined up with Writ and Fundamental Rights in Sri Lanka.

Although Article 126(2) of the constitution creates a narrow approach on *Locus Standi* for Fundamental Rights jurisdiction, by delivering the Sriyani Silva v. Iddamaligoda¹⁸ judgement, Supreme Court permitted related parties to petition the court, especially in instances when the affected person was incarcerated or dead.¹⁹ The Court pointed out that it would be futile to give rights to persons and deny those rights on the basis that they cannot be enforced as the person was dead. The most important development in fundamental rights that has taken place, is the ability of third parties to bring actions on a wide variety of matters on the basis that it affects their rights and the rights of the public at large.²⁰ This approach has created a wide path to Public Interest Litigation in Sri Lanka.

Relation between Public Interest Litigation and Fundamental Rights Matters

In the Bulankulame v. Secretary Ministry of Industrial Development²¹ case, it was the first significant incident that merged Fundamental Rights and Public Interest Litigation. The petition was filed by a group of people resident in Eppawela, North Central Province, challenging the government's decision to agree with a foreign mining company to mine a greater part of the rock (phosphate) in the area. The petitioners argued that such mining affected their rights, their environment, and the national interest. The Respondents argued that the petitioners had no standing to bring such an action.²² One of the objections of the Respondents was that the application was in the nature of Public Interest Litigation and should be dismissed since the Constitution does not permit this form of litigation. The Supreme Court rejected this argument. The Court noted that the petitioners were not disqualified from

litigating the matter, merely because it dealt with the collective rights of the Sri Lankan public, and the rights they claimed were shared with many others.²³ Accordingly, the court held that the petitioners had sufficient standing as it affected their lives.

In the Judgement, the Supreme Court held that:

*"The individual petitioners have the standing to pursue their rights in terms of Articles 17 and 126(1) of the Constitution. They are not disqualified on the alleged ground that it is a "public interest" litigation. The court is concerned with the rights of individual petitioners even though their rights are linked to the collective rights of the citizens of Sri Lanka, rights they share with the people of Sri Lanka."*²⁴

Thus, the Bulankulame v. Secretary Ministry of Industrial Development case can be identified as the first step to the effective implementation of Public Interest Litigation in Sri Lanka.

In Jayantha Adikari Egodawele v. Dayananda Dissanayake, Commissioner of Elections,²⁵ the Supreme Court permitted the petitioner to proceed with a petition on the basis that the petitioner's fundamental rights were infringed as others could not freely express their franchise. The Supreme Court has adhered to the same stance in the case of Thavaneethan v. Dayananda Dissanayake, Commissioner of Elections and Others.²⁶

In Jayantha Adikari Egodawele v. Dayananda Dissanayake, Commissioner of Elections, the Supreme Court observed that:

"The citizen's right to vote includes the right to freely choose his representatives through a genuine election which guarantees the free expression of the will of the electors: not just his own. Therefore, not only is a citizen entitled to vote at a free, equal and secret poll, but he also has the right to a genuine election guaranteeing the

¹⁸ [2003] 1 Sri.L.R.

¹⁹ Rajiv Goonetilleke, (n.14).

²⁰ Ibid, p.88.

²¹ [2000] 3 Sri.L.R.

²² Rajiv Goonetilleke, (n.14).

²³ Dr. Mario Gomez (n.7).

²⁴ [2000] 3 Sri.L.R. p. 244.

²⁵ Supreme Court Minutes of April 3rd 2001.

²⁶ [2003] 1 Sri L.R.

free expression of the will of the entire electorate to which he belongs. The freedom of expression, of like-minded voters, when exercised through the electoral process is a collective one, although they may not be members of any group or association.”²⁷

Initially, the Supreme Court allowed the individuals or groups of individuals to file the petitions in the face of Public Interest Litigation, if their rights enjoyed together with others had been infringed.

However, this gateway was expanded by the Supreme Court in its judgment in Environmental Foundation Ltd. V. Urban Development Authority.²⁸ In this case, the Supreme Court allowed a corporate body acting in public interest, to petition the court in respect of the proposed privatization of the management of the Galle Face Green.

In this case, the Supreme Court held that:

“The word ‘persons’ as appearing in Article 12(1) should not be restricted to ‘natural’ persons but extended to all entities having legal personality recognized by law.”²⁹

In Sugathapala Mendis and Another v. Chandrika Kumaratunga and Others, also known as the Waters Edge Case;³⁰ a fundamental rights petition was filed, challenging the decision of the government to acquire land for a public purpose and thereafter to sell such land to a private entrepreneur. In this case, the Supreme Court emphasized that:

“As regards, locus standi petitioners in such public interest litigations have a constitutional right given by Article 17 read with Article 12 and 126 to bring forward their claims. Petitioners to such litigation, cannot be disqualified on the basis that their rights happen to be ones that extend to the collective citizenry of Sri Lanka.”³¹

Vasudeva Nanayakkara v. Choksy and others,³² is one of the landmark judgements

delivered by the Supreme Court in the nature of Public Interest Litigation. In this case, the petitioner was a politician and a social activist. He filed a fundamental right petition challenging the privatization of Lanka Marine Services Limited, a state sector profit-earning corporation without the approval of the Cabinet of Ministers.

In this judgement, the Supreme Court held that:

“where the executive being the custodian of the Peoples power act ultra vires and in derogation of the law and procedures that are intended to safeguard the resources of the State, it is in the public interest to implead such action before Court.”³³

Environment Justice and Public Interest Litigation in Sri Lanka

Although the Constitution of Sri Lanka does not accept environmental rights, the Supreme Court has interpreted in many judicial decisions, that Environmental Rights is a Fundamental Right. Public Interest Litigation play a vital role in environmental justice in Sri Lanka.

Bulankulame v. Secretary Ministry of Industrial Development, is the prominent judgement delivered by the Supreme Court which accepted ‘Environmental Rights’ as fundamental rights of those entitled in the present generation and future generations. In this case, Justice Amarasinghe quoted the Rio declaration³⁴ and stated that:

“Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”

Ravindra Gunawardena Kariyawasam Vs. Central Environment Authority and Others (Chunnakam Power Plant Case),³⁵ is a landmark judgement in Sri Lankan judicial history, which recognized the ‘Right to be Free from Degradation of the Environment’ as a

²⁷ Dr. Mario Gomez (n.7).

²⁸ SCFR 47/2004.

²⁹ [2009] 1 SRIL.R. p.124.

³⁰ [2008] 2 Sri LR.

³¹ Ibid, p.340.

³² [2008] 1 Sri L.R.

³³ Ibid, p.181.

³⁴ Principle 1, Rio De Janeiro Declaration.

³⁵ SCFR Application No. 141/2015.

Fundamental Right. The Petitioner was Dr Ravindra Gunawardena Kariyawasam. He is the chairperson of the 'Centre for Environment and Nature Studies' a non-profitable environmental research institute. Dr Kariyawasam filed a fundamental right petition on behalf of the residents in Chunnakam and alleged that the disposal of petroleum wastage of a thermal power station in the area had caused massive environmental pollution. After carefully considering all the arguments before the court, the Supreme Court held that the respondents have violated the fundamental rights guaranteed under Article 12 (1) of the Constitution, to the residents of the Chunnakam area and the petitioner as a member of the public.³⁶ This judgement emphasized the government's duty to protect nature and conserve its riches as a national trust. Accordingly, the Chunnakam case is one of the significant judgements which underlined the 'Public Trust Doctrine'.

Accordingly, Public Interest Litigation are lighting the path of environmental justice by its wide range of light.

Conclusion

As discussed above, Public Interest Litigation is used as a prominent legal instrument that ensures the rights of citizens. The approach for Public Interest Litigation, makes a wider avenue to reach justice. Also, Public Interest Litigation strengthens the rule of law and democracy in a country.

Through Public Interest Litigation, an Individual affected by an administrative or policy decision, can petition the Supreme Court by way of a Fundamental Rights Application and an individual may petition the court on a matter that affects him and others who have sufficient interest to do so. Also, even a corporate body can act in the public interest on a matter in which it is concerned with.³⁷

Public Interest Litigation has been able to change the conservative idea of judicial activism. It affirms that the judiciary has an inalienable responsibility to protect the rights of the people. It also fills the gap, between

administrative actions and the interest of the people. Upon this exercise, it is being said without any doubt that Public Interest Litigation plays a very critical role in the justice redressal mechanism which emphasizes the path of justice to the marginalized classes of the society which also includes a section of people who are not even aware of the rights provided to them by the Constitution.³⁸

³⁶ Ibid, p.61.

³⁷ Rajiv Goonetilleke, (n.14).

³⁸ Manvendra Singh Jadon & Sourabh Roy, (n.4).