Has The Philosophy Of The Supreme Court On Public Interest Litigation Changed In The Era Of Liberalisation?

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The foundations of public interest litigation were laid in the late 70s with cases like the Ratlam Municipalities case. The scope and breadth of public interest litigation were expanded in the Eighties from the initial environmental concerns, to concerns like bonded labour, child labour, the rights of detenues, inmates of various asylums, the rights of the poor to education, to shelter and other essential amenities which would enable them to lead a life of dignity. Article 21 was expansively interpreted to include all these ri ghts and the rule of Locus Standi was relaxed to enable any public spirited citizen to move the courts on behalf of a person or persons who may not have the social or financial capacity to move the courts themselves. Subsequently, in the early Nineties the courts also took up as public interest litigation, cases involving corruption in high places and the accountability of public servants.

This new activism on the part of the courts naturally created serious rumblings of discontent in the political and bureaucratic establishments which charged that the courts were going beyond their normal role and were assuming extra constitutional powers. The political establishment also threatened from time to time to curb the powers of the courts with regard to public interest litigation by legislation. However, since this activist role of the courts gained increasing public support, the political establishment desisted from such legislative misadventures. However, the charges of usurpation of extra constitutional powers by the activist courts, continued to be made by all sections of the ruling establishment. Unfortunately however, these charges appear to have struck a sympathetic chord among a significant section of the court, as appears from some of their pronouncements recently. There is now a large body of cases decided in the last decade where the court has not only betrayed a lack of sensitivity towards the rights of the poor and disadvantaged sections of society, but has also made gratuitous and unmerited remarks regarding abuse of public interest litigation. This decade has also been the decade of “economic reforms” as they are called. Several public interest cases were filed during this period challenging alleged

perversions, corruption and other illegalities involved in the implementation of the new economic policies. Almost all these cases were dismissed. In several of them, the court hinted at and made remarks suggesting an abuse of public interest litigation. Since I had myself been involved in many of these cases as a lawyer, I thought that it would be interesting to investigate whether one could see a change in the philosophy of the Supreme Court with regard to public interest litigation during the era of economic reforms. This is what I have set out to do briefly, in this presentation. The results are quite illuminating and indeed, distressing.

In BALCO Employees Union Vs Union of India (2002 Vol 2 SCC 343), where the employees union of the government company had challenged its disinvestment on various grounds including the arbitrary and non transparent fixation of its reserve price, the Supreme Court while dismissing the petition went on to make the following observations:

“There is, in recent years, a feeling which is not without any foundation that public interest litigation is now tending to become publicity interest litigation or private interest litigation and has a tendency to be counter-productive.” "PIL is not a pill or a panacea for all wrongs. It was essentially meant to protect basic human rights of the weak and the disadvantaged and was a procedure which was evolved where a public spirited person filed a petition in effect on behalf of such persons who on account of poverty, helplessness or economic and social disabilities could not approach the court for relief. There have been, in recent times increasing instances of abuse of PIL. Therefore there is a need to re-emphasise the parameters within which PIL can be resorted to by a petitioner and entertained by the court."

The court in this case refused to consider the petition of Mr B. L. Wadhera, a lawyer known for having taken up many serious public interest cases, on the ground that he was not directly affected by the disinvestment of Balco. It went on to observe, "it will be seen that whenever the court has interfered and given directions while entertaining PIL, it has mainly been where there has been an element of violation of article 21 or of human rights or where the litigation has been initiated for the benefit of the poor and the underprivileged who are unable to come to court due to some disadvantage. In those cases also it is the legal rights which were

secured by the courts. We may, however, add that public interest litigation was not meant to be a weapon to challenge the financial or economic decisions which had been taken by the government in exercise of their administrative power. No doubt a person personally aggrieved by such decisions which he regards as illegal, can impugn the same in the court of law, but, a public interest litigation at the behest of a stranger could not to be entertained. Such a litigation cannot per se be on behalf of the poor and the downtrodden, unless the court is satisfied that there has been violation of article 21 and the persons adversely affected are unable to approach the court. The decision to disinvest and the implementation thereof is purely an administrative decision relating to the economic policy of the State and challenge to the same at the instance of a busybody cannot fall within the parameters of public interest litigation. On this ground alone, we decline to entertain the writ petition filed by Shri B. L. Wadhera".

This effectively meant that a citizen could not challenge by way of PIL, the loot of the public exchequer, unless he was personally affected. It is significant that these observations were made in a case involving a challenge to an element of the so-called "economic reforms" of the government. It will be seen that the Supreme Court has almost without exception negated all challenges to any element of the economic reforms package of the government, even when such challenges were based on specific violation of law or evidence of corruption.

In Balco itself, the challenge to the selloff of the PSU, was based inter alia on a completely non transparent and arbitrary valuation of the company conducted in less than a week by a valuer of immovable property having no experience in the valuation of companies. It had been pointed out that the valuation of the captive power plan ts of the company alone were worth more than the price at which it was being sold. The court however refused to examine this challenge by saying that the valuation was done by one of the known methods of valuation.

In CITU Vs. State of Maharashtra, where the validity of the Enron power project had been challenged on the ground that it was being set up in violation of section 29 of the Electricity Supply Act, that the project would be ruinous to the finances of the State Electricity Board,

and that there was adequate circumstantial evidence of corruption in the sanction of the project, the court restricted the challenge only to examine the accountability of the public servants involved in the sanction of the project. It refused to examine the challenge to the project itself on the ground that they did not think it to be in public interest to go into the validity of a project which had been substantially set up and against which several previous challenges had been rejected by the courts. This was said despite the fact that the construction of phase 2 of the project (which was more than twice the size of phase 1) had not even commenced at the time, and that none of the previous challenges to the project were based on the grounds and material on which the CIT U challenge was based. One of the grounds, on which CITU had challenged the project was that under section 29 of the Electricity Supply Act, it was only the Central Electricity Authority which had the power to examine and grant technical and economic approval to the project. In this case, when the CEA was finding the cost of power from this project too high, the Finance Ministry told the CEA not to examine the financial aspects of this project and proceed to grant only technical approval. This is how the project came to be approved which went on to supply power to the State Electricity Board at a cost of upto Rs 27 per unit, as a result of which the supply from the project had to be stopped, leading to claims of thousands of crores by Enron in an arbitral tribunal in London.

In State of Karnataka Vs. Arun Kumar Agrawal, (2000 1 SCC 210) the Karnataka High Court had ordered a CBI investigation into the circumstances in which a 1000 MW power project had been approved in Karnataka. The series of highly suspicious circumstances found by the High Court which warranted such investigation were among others:

A. That the financial capacity of the company, Cogentrix, which had been approved to set up this project was such that no reasonable person could think that it was capable of executing such a project. Its paid-up capital was only 130,000 US$, as against a project cost of over $1 billion. Its debt equity ratio was 19.2 is to 1 as against the norm of 2:1.
B. That Cogentrix had falsely claimed in its techno economic feasibility report that General Electric Co would be its technical partner in order to ride piggyback on the technical experience of GE.

C. That China Light and Power which was subsequently brought in as a partner by Cogentrix had shown an amount of 191 million Hong Kong dollars as development costs in India (through its Hong Kong subsidiary, CLP international) though they did not have any ongoing project in India and had not shown how and on what these costs had been incurred. This Hong Kong subsidiary was subsequently shut down and another subsidiary by the same name was opened in the British Virgin Islands, a known tax haven for money-laundering.

D. That though the requirement for power in Karnataka would mainly be in the Bangalore area, and that is why originally the application of Cogentrix was for setting up a 500 MW plant in Bangalore and another 500 MW plant in Mangalore. Later however, they were allowed to set up the entire 41 1000 MW plant in Mangalore, necessitating expensive transmission of power by the State authorities from Mangalore to Bangalore.

E. That though the original permission for setting up the plant was given on the basis that Cogentrix would sell this power privately to whoever was willing to purchase it from them at mutually negotiated rates, thereafter the State Electricity Board entered into the power purchase agreement with Cogentrix to purchase the entire power at very high rates.

The Supreme Court however made short shrift of the elaborate High Court judgment, holding that, "Thus none of the 13 circumstances noticed by the High Court can be characterised as giving rise to any suspicion, much less the basis for investigation by a criminal investigating agency."

In Centre for Public Interest Litigation versus Union of India (2000 8 SCC 606), the Supreme Court dismissed the plea for an independent investigation into the government's decision to sell off developed offshore gas and oilfields from ONGC to a private joint venture. The challenge was based on a large number of facts and circumstances suggesting corruption in the deal such as:

A. The government's own estimates of the oil and gas deposits kept arbitrarily varying at different points of time and the deal was evaluated at the lowest of such estimates.

B. An SP of the anticorruption unit of the CBI had filed a source information report to the effect that the deal involved a loss of thousands of crores to the public exchequer and

recommending that an FIR be registered so that a regular investigation could be commenced and searches and seizures made. However, instead of registering an FIR, the SP was transferred out of the CBI soon after he made this report, and the file on which he made the report was made to disappear. The CBI went on to file a false affidavit in the High Court, denying the existence of the file on which the SP's note had been made.

C. The CBI had in another case being investigated by it recorded the statement of the private secretary of the Minister of petroleum who had signed the deal, that the Minister had received Rs. Four crores from Reliance Industries, one of the joint venture partners to whom the oilfields had been sold.

D. Various high officials of the Ministry of petroleum and ONGC who were involved in the evaluation of this deal left their jobs and joined Reliance immediate ly thereafter.

E. The CAG had submitted a report on this deal pointing out that:

i) the government had not studied the comparative economics of running the gas fields and oilfields through the ONGC versus giving them to a private joint venture.

ii) The estimates of gas and oil deposits kept arbitrarily varying at different points of time.

iii) Though the deal was evaluated on certain claimed levels of operating expenses by the joint venture, the operating expenses were not capped in the contract, leading to a situation whereby the operating expenses actually claimed by the joint venture in the first few years of operation were higher than those of the ONGC.

iv) The royalties and cess payable to the government of India by the joint venture on the extraction of oil and gas were frozen for the duration of the contract, though the JV was allowed to sell the oil and gas at the international market prices prevailing at any point of time.

However, despite the above host of highly suspicious circumstances surrounding the deal, the re port of the CAG, and the report of the SP of the CBI, the Court did not think it fit to even order an investigation in the matter, though it castigated and passed strictures against the CBI for the loss of the file containing the SPs report and their false affidavits filed in the High Court.

In Delhi Science Forum versus Union of India (AIR 1996 SC 1356), the petitioners had challenged the award of telecom licences to private companies on various grounds, including that one of the companies HFCL which had made by far the highest bids in nine circles had a very small net worth which made it ineligible. It however sought to make up its net worth by entering into a joint venture with a foreign company which had a minor equity in the joint-venture, but 90% of its net worth. The petitioners also challenged the decision of the government to place a cap of three circles for any single company, which effectively allowed HFCL to vacate its other six circles, where it was by far the highest bidder, without the penalty of 50 Crores per circle which it would have otherwise had to pay since it could not have possibly paid the licence fees of all 9 circles. Again the court dismissed the challenge by saying that the matter had been cleared by the tender Evaluation committee and there were no allegations of malafides against it. All other challenges were repelled on the ground that they amounted to challenges to the economic policies of the government.

In Union of India Vs. Azaadi Bachao Andolan, (2003 8 SCALE 287) the High Court had struck down a government circular which compelled the IT authorities to exempt post box companies registered in Mauritius as "offshore companies", from taxation in India on the ground that such a direction violated the IT Act and prevented the IT authorities from lifting the corporate veil of these post box companies in order to examine their real place of residence. The Supreme Court however reversed the High Court decision, holding that the government could in terms of its economic policies grant a tax holiday to foreign companies in order to attract foreign investment. It gave short shrift to the argument that this would violate the Income Tax Act under which non resident companies are taxable on their domestic income and that any change in the tax regime would have to be done by means of a Finance Act passed by Parliament and could not be made by the executive alone.

The Oil companies case (CPIL Vs. UOI 2003 Supp 1 JT 515) is the only case to my knowledge in which the Supreme Court has allowed a challenge to any purported implementation of the new economic policy. It held here that the government oil companies nationalized by Acts of Parliament which specifically mandated the companies to remain

government companies could not be privatized without amending the Acts and thus taking the approval of Parliament.

So we see that barring the exception of the oil companies case, the court dismissed all other petitions challenging any executive act taken under the cover of economic reforms. While it may be possible to take the view that all these decisions are technically correct, it is difficult not to get the feeling that the Courts decisions were influenced by its own approval of the new policies of liberalisation, privatisation and globalisation. Indeed, the court in Balco went on to say that, "lastly, no ex parte relief by way of injunction especially with respect to public projects and schemes or economic policies or schemes should be granted. It is only when the court is satisfied for good and valid reasons, that there will be irreplaceable and irretrievable damage that an injunction be issued after hearing all the parties. Even then the petitioner should be put on appropriate terms such as providing an indemnity or an adequate undertaking to make good the loss or damage in the event the PIL filed is dismissed." A similar proposition, virtually restraining the court from granting any interim orders in PILs challenging any "development projects", was also laid down by the court in Raunaq International (1999 1 SCC 492). Obviously, if a public interest petitioner is asked to give a bank guarantee or even an undertaking that he will make good the loss that may occur to the government or any other person because of an interim order obtained in his petition, in the event of his petition eventually being dismissed, no interim order can never be granted in a PIL. No petitioner, especially one who moves the court in public interest, can be held responsible for the vagaries of the court. Different judges have completely different views on even matters of law. The Narmada matter for example came to be heard and decided by a different bench from that which had originally stayed the construction of the Dam. Even the bench which eventually dismissed the petition and allowed the construction to proceed had continued the stay order in various hearings. Could or should the NBA have been saddled with any loss occasioned to the government or the project authorities or the contractors on account of the stay order which stopped the construction for four years? It would completely stultify PILs, if such a pernicious view is allowed to prevail.

The activism of the Supreme Court in the last decade is most evident is environmental cases, particularly cases involving the urban environment or deforestation. Thus, the court has taken sweeping and bold steps to move polluting industries out of Delhi, to improve the air quality of Delhi by forcing commercial vehicles to convert to CNG, and to stop deforestation across the country. But it must be noted that in a number of cases where the cause of the environment was pitted against “development projects”, such as large dams, or even hotels and housing colonies, the cause of the environment gave way to the interest of such development. It is important to note that in many of these cases, the legal soundness of the case was also evident from the fact that some of the judges gave dissenting judgements or that the court went against the advice of its own expert committees.

In Narmada Bachao Andolan versus union of India (2000 10 SCC 664), despite the strong dissenting judgement of Justice Bharucha, pointing out that the Sardar Sarovar project was proceeding without a comprehensive environmental appraisal and without even the necessary environmental impact studies having been done, as was evident from the documents of the government itself, the majority judges still went on to approve the project and allowed it to go on without any comprehensive environmental impact assessment which was necessary even according to the governments own rules and notifications. The underlying reasons and ideology behind the subordination of the cause of the environment to the cause of "development", is also evident from the majority judgement. There are several passages in the majority judgement, extolling the virtues of the kind of development brought in by large dams. The judgement even goes on to gratuitously emphasise the myth that the Bhakra dam was responsible for the green revolution in the country. This, despite the fact that the court had specifically restrained the Narmada Bachao Andolan from making any submissions on the pros and cons of large dams. The court also goes on to make disparaging remarks against the NBA as being an anti development organisation.

The same subordination of environmental interests to the cause of “development” is evident in the Supreme Court's judgement in the Tehri Dam case (N.D. Jayal Vs. UOI, 2003 7 SCALE 54), where the governments own expert committee known as the Hanumantha Rao committee had given an elaborate report pointing out a series of violations of the conditions

on which environmental clearance to the project had been given by the Ministry of environment. The committee had pointed out that a number of studies which were necessary to evaluate the environmental impact of the project had not been conducted and had recommended these be immediately conducted. However, despite this, though Justice Dharmadhikari held that in order to ensure compliance with the conditions of environmental clearance, it was necessary to constitute an independent expert committee which would monitor the compliance and further construction of the Dam could only proceed on the green signal of this expert committee, the majority judgement did not even bother to ensure compliance with the conditions of environmental clearance of the project. Again, the judgement makes remarks extolling the virtues of development projects like such large dams.

This attitude showing the Court favouring "development" over the rights of oustees or the environment is most clearly evident in the manner in which the court has sought to push the Mega project called "Interlinking of rivers". Consider the circumstances. On Independence Day last year, a paragraph was added in the President's speech to the effect that the problems of floods and drought can perhaps be solved by interlinking the rivers. This paragraph was enough for a lawyer appointed by the Supreme Court as amicus curiae (to assist the court) in the Yamuna pollution case to file a short application praying that the court should direct the government to take up this project. As if on cue, the bench headed by the then Chief Justice B.N. Kripal issued notices to all the States and the Centre. On the next day of hearing, which was the day before the retirement of the then Chief Justice, an order was passed which is now effectively being treated by the government as a direction by the court to undertake this project and complete it within the shortest possible time. The order noted that only the Union of India and the State of Tamil Nadu had filed responses to the notice issued by the court. It stated that the Union of India pointed out that the project would cost Rs 5,60,000 crores, would take 43 years, and would need the consent of the States. The State of Tamil Nadu had filed an innocuous affidavit, virtually saying nothing. The court noted that no other State had filed any affidavit and therefore it could be assumed that none had any objection to the implementation of this project! After orally noting, that funds cannot be any constraint for the government for a project in national interest, the court observed in its order that the project should be completed within 10 years! It also went on to advise the government that in

case consent was not forthcoming from the States, the government should consider passing a legislation to obviate consent of the States for this project.

All this for a project which would require funds equal to the total irrigation budget of the country for the next 44 years, if the Ninth Plan expenditure is any guide. And all this without hearing any interested party, not even the States, without any discussion or debate whatsoever, without completing even feasibility studies, leave aside the question of social, environmental, economic or optimality assessments! Such is the casual nonchalance with which this country is being pushed to a course which would have unparalleled and unprecedented, financial, social and environmental consequences.

In TATA Housing Development Company Vs. Goa Foundation (2003 7 SCALE 589), the court went against the report of its own expert committee in allowing the construction of a housing colony on land which had been held by the committee to be forest land. The court held that the committee had wrongly classified this land as forest land, by holding that the committee had deviated from its own norms. The court also relied on the reports of some other private experts filed by the Tata Housing development Company. Without entering into an elaborate discussion of the merits of this judgement, it may only be noted, that such microscopic examination of a report of the courts own expert committee has never been done at the instance of a poor or weak petitioner. For example, the court did not critically examine or interfere with the report and recommendations of the Centrally empowered committee appointed by the court, regarding fishing by poor local fishermen in the Jambudvip islands. The courts orders ba sed on the committee's report had effectively deprived hundreds of poor fishermen of their livelihood who were using the Jambudvip islands.

The period of economic reforms also appears to have coincided with an apparently decreased sensitivity of the courts to the rights of the poor. This is evident from the attitude that the court has displayed towards slum dwellers, oustees and workmen. In Almitra Patel Vs. Union of India, (2000 3 SCC 575) the court while adversely commenting upon the governments policy to rehabilitate slum dwellers, remarked that, “ the promise of free land, at the

taxpayers cost, in place of a jhuggi, is a proposal which attracts more land grabbers. Rewarding an encroacher on public land with the free alternative sites is like giving a reward to a pickpocket." This, despite that the court was aware of the fact that most of the dwellers live in sub human conditions and do not have access to other houses, and the court had earlier repeatedly pronounced that the right to shelter and housing is a fundamental right of every citizen of the country.

In Ekta Vs. Union of India, the Supreme Court refused to stop the eviction of slum dwellers in Calcutta who had been living in those slums for the last more than 30 years, despite the fact that they had no other access to housing nor were they being offered any alternative place to go by the government. This was a case where the High Court had ordered the eviction on the ground that the slums were a public nuisance. In Azaadi Bachao Andolan versus union of India, (2003) the Supreme Court even refused to examine the question whether the Land Acquisition Act in so far as it allowed compulsory acquisition of land from persons who are dependent upon that land for their livelihood is violative of their fundamental rights, since the Act does not obligate the government to provide them with alternative land or an alternative means of livelihood. The challenge to the validity of the Act was made in the circumstances that the monetary compensation given under the Act does not enable the oustees to recover what they lose by their displacement as a result of compulsory acquisition of the land, and that they are in effect deprived of their livelihood by such compulsory acquisition.

The recent decision of the Supreme Court (T.N. Rangarajan Vs. State of Tamil Nadu), holding that there is neither any fundamental nor legal nor any moral right to strike on the part of workmen, (which not only goes against the Statute where this right has been recognized, but also against several earlier judgements) has further strengthened the perception among a significant class of poor and disadvantaged sections of society, that despite its expansive pronouncements on the ambit of fundamental rights under Article 21 of the Constitution, the ideology of the Supreme Court has during this phase of "reforms", shifted decisively in favour of the rich and powerful sections of society.

The above cases provide more than anecdotal evidence for the propositions that, a) The Supreme Court as an institution has frowned upon challenges to any action of the executive taken in the purported furtherance of "economic reforms", even when such challeges were based on violations of Statute and evidence of corruption, and b) The court appears to have diluted its interpretation of Article 21, in the recent past. At the very least, it has often not acted to enforce the rights that it had declared earlier in favour of the poor and the weak.

In these circumstances, it is indeed tempting to argue that the recent drawing back of the court in PIL, and the fears expressed by it of the possible abuse of PIL is because the court has in fact bought the ideology underlying the economic reforms- an ideology which venerates the virtues of the free market and undermines the role of the State in providing education, jobs, and the basic amenities of life to its citizens. Such an ideology runs counter to the Court's earlier expansive interpretation of Article 21. This hypothesis does seem to offer the simplest explanation for the above decisions of the Court.