

SCOPE & LIMITATIONS OF PUBLIC INTEREST LITIGATION IN INDIA

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Until the early 1970s, litigation in India was in its rudimentary form because it was seen as a pursuit for the vindication of private vested interests. During this time period, initiation and continuance of litigation was prerogative only to the individual aggrieved party. A complete change in the scenario in the 1980s with efforts taken by Justice P.N. Bhagwati and Justice V.R. Krishna Iyer was marked by attempts to bring wider issues affecting the general public at large within the ambit. As a result, the concept of public interest litigation has evolved through which legal remedies can be sought without investment of heavy court fees as required in private civil litigation. This article analyses the scope and the limitations of this juristic revolution in India.

The expression 'public interest' indicates something in which the general public or the community at large has some pecuniary interest, or some interest by which their legal rights or liabilities are affected.¹ The word 'litigation' means a legal action, including all legal proceedings initiated in a court of law with the purpose of enforcing a right or seeking a remedy.² So, lexically the expression 'public interest litigation' denotes a legal action initiated in a court of law for the enforcement of public interest where the rights of a certain group has been affected.³

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1. Black's Law Dictionary (7th Edn., West Group Publishers 2002)
 2. www.jurisdictionary.com
 3. www.explore-law.com

The concept of PIL first emerged in USA. In spite of drawing its lineage from there, over the march of years, the notion of PIL has surpassed various changes and modifications, to such an extent that it may be difficult for a common man to be acquainted with much with its origin. Under the caption 'Social Action Litigation'⁴, the Indian experience of the concept of PIL has held that the role of the judiciary is not only in preventing and remedying abuse & misuse of power, but also lies in eliminating exploitation and injustice.⁵ The apex judiciary in India, keenly alive to the demands of people of the country, has liberated itself from the shackles of western thought by making innovative use of power of judicial review. In this process, it has forged new tools, devised new methods and fashioned new strategies for the purpose of bringing justice for deprived groups.⁶

The seed of the concept of PIL was initially sown in India by Krishna Iyer, J. in 1976 (without assigning the terminology) in *Mumbai Kamgar Sabha v. Abdulbhai*,⁷ an industrial dispute with regard to the payment of bonus. After the germination of the seeds of the concept of PIL in the soil of our judicial system, this rule of PIL was nourished and developed by the Apex Court of this land by a series of outstand

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4. Coined by Prof. Upendra Baxi. He has contributed substantially to public interest litigation in the Indian Supreme Court and thereby enhanced democratization of access to judicial process and power by the disadvantaged groups in Indian society. He has also been among the forerunners of legal action and law reform in the area of violence against women, especially custodial violence.
 5. As stated in *Role of the Judiciary in Plural Societies* (published in 1987) by Justice P.N. Bhagwati under the caption "Social Action Litigation: The Indian Experience".
 6. *Ibid.*
 7. (1976) 3 SCC 832; AIR 1976 SC 1455

ing decisions. In *Fertilizer Corporation Kamgar Union v. Union of India*,⁸ the terminology 'public interest litigation' was first used by the learned judges.⁹ The rule, on gaining momentum, further blossomed and took its root firmly in the Indian Judiciary through *S.P. Gupta v. Union of India*.¹⁰

Tracing The Origin & Development of PIL

Public interest law has been a uniquely American development. The use of the term PIL to cover the efforts to provide legal representation goes back to the mid- 1960s.¹¹ The Council for Public Interest Law set up by the Ford Foundation in USA, in its Report,¹² has stated:

'Public Interest Law is the name that has been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in recognition that the ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include

8. AIR 1981 SC 344
9. Justice Krishna Iyer assigned the jargon 'public interest litigation' while delivering the judgment on behalf of learned Chief Justice P.N. Bhagwati and himself.
10. (1981) Supp. SCC 87; AIR 1982 Sc 149
11. See Heineman Book Review In Pursuit of the Public Interest, 84 Yale Law Journal 182 (1974) However, the various movements and programmes that contributed to shaping the underlying ideology of public interest law reach back to 1876, when the first legal aid office was established in New York City.
12. Balancing the Scales of Justice - Financing Public Interest law in America (A Report by the Council for Public Interest Law) 1976 p.6-7

the poor, environmentalists, consumers, racial and ethnic minorities, and others.'

The thrust of PIL in USA has been to ensure that citizens whose lives may be affected by governmental policies have a right to participate in the formulation of those policies by making courts and administrative agencies open and accessible to the views of citizens. The handful of PIL centres in operation handled issues relating to civil rights, civil liberties and problems of the poor.¹³ Later, the spectrum of issues expanded to include consumer protection, environmental protection, tax reform, health care, media access, corporate responsibility, education reform, employment benefits and manpower training.¹⁴ However, the scenario in USA has undergone a complete change as the very factors which led to the growth of PIL face several impediments.¹⁵

As contrasted to the American scene, the ideology and content of PIL in India has been initiated, developed and shaped by some

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13. New Study on the Role of US Foundations, by Bob Feldman, www.leftgatekeepers.com/articles
 14. Intellectual Engagement and Reflection on Values of Service and Commitment, www.law.duke.edu/publicinterest/programs.html.
 15.
 - a. The most difficult problem is financial instability caused by inflation and with drawal of private foundation support.
 - b. There has also been a steady loss of outstanding lawyers to private firms, the government, and law schools because those lawyers found the prospects for a great public interest career too uncertain and the economic burdens too great.
 - c. The interest in pro bono work by the lawyers has waned and it has come to be realised that pro bono services, by their very nature, can only be supplementary to the work of institutions that are entirely dedicated to performing public interest legal representation.

judges of the Supreme Court themselves. During the emergency period (1975-1977), state repression and governmental lawlessness was widespread. Thousands of innocent people including political opponents were sent to jails and there was complete deprivation of civil and political rights. The post emergency period provided an occasion for the judges of the Supreme Court to openly disregard the impediments of Anglo-Saxon procedure in providing access to justice to the poor. Notable two justices of the Supreme Court, Justice V.R. Krishna Iyer and P.N. Bhagwati recognised the possibility of providing access to justice to the poor and the exploited people by relaxing the rules of standing. In the post-emergency period when the political situations had changed, investigative journalism also began to expose gory scenes of governmental lawlessness, repression, custodial violence, drawing attention of lawyers, judges, and social activists. PIL emerged as a result of an informal nexus of proactive judges, media persons and social activists.¹⁶

PIL jurisdiction forged by the Supreme Court is an extension of its jurisdiction under Art. 32.¹⁷ PIL in India is centered essentially

16. Social Change and Public Interest Litigation in India, by Jasper Vikas Yadav.

17. Article 32 - Remedies for enforcement of rights conferred by this part:

1. The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

2. The Supreme Court shall have power to issue directions or orders, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any rights conferred by this part.

3. Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

around court actions with the liberalization of the rule of locus standi,¹⁸ so as to have the grievance placed before the court and then depend upon the ingenuity of the court to provide appropriate relief in the matter. PIL is not in the nature of adversary litigation,¹⁹ but it is a challenge and an opportunity to the government to make basic human rights meaningful to the deprived and vulnerable sections so as to assure them social and economic justice in consonance with the constitution.²⁰ The action of litigation is being initiated by some social action groups or other public spirited persons by writing letters to the judges of the Supreme Court and of the High Court, who have been converting the letters into writ petitions. There are no uniform PIL law firms, because of which PIL has not been institutionalized in India.²¹ PIL in India substantially differs from that in the United States.²² Professor Upendra Baxi has pointed out that American PIL was funded by government & private foundations and its focus was not so much on state repression or governmental lawlessness as on public participation in governmental decision making.²³ He therefore insisted that the Indian phenomenon described as PIL should be termed as 'Social Action Litigation'. However, PIL and SAL have been treated as synonymous

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18. Latin phrase meaning 'place to stand' or the right to be heard in a Court Law Dictionary (2nd Edn., Universal Book Stall, New Delhi 2000)
 19. Refer to Non-Adversarial Procedure of Justice under Procedure.
 20. HRIP paper on Public Interest Law, written by Mario Gomez, accessed from Public Interest Law Network on www.pili.org/lists/piln/archives
 21. A Report by S.Muralidhar, published in 545th seminar (Jan 2005) at International Environmental Law Centre (IELRC) accessed from www.ielrc.org/content
 22. Clark D. Cunningham, Public Interest Litigation in Indian Supreme Court: A study in the Light of American Experience, 29 JILI p.494 (1987)
 23. Baxi, Upendra, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India

primarily because of its acceptance and familiarity at the popular level. PIL has brought about radical metamorphosis in the nature of the judicial process by imbuing it with polycentric as well as legislative characteristics.

PROCEDURE

Liberalisation of Rule of Locus Standi

Locus standi is the right to be heard in a court. With the change in the character and functions of the State, the rule of locus standi has been liberalized. Under the relaxed rule, any member of the public having sufficient interest can maintain an action for judicial redress of a public injury suffered by an indiscriminate class of persons, provided that the petitioner acts *bona fide* and is not moved by an oblique motivation.²⁴ Representative non-political, non-profit and voluntary organizations who have a sufficient interest can maintain an action for judicial redress for public injury arising out of breach of public duty or violation of some provision of the Constitution.

The Supreme Court of India is the protector and guarantor of the fundamental rights of the people of India. The liberalization of the rule of *locus standi* came out of the following considerations.²⁵

To enable the Court to reach the poor and the disadvantaged sections of society who are denied their rights and entitlements,

To enable individuals or groups of people to raise matters of

24. Ashok Kumar Pandey v. State of West Bengal (2004) 3 SCC 349

25. M.C. Bhandari Memorial Lecture on Public Interest Litigation as Aid to protection of Human Rights by Justice A.S. Anand (2001) 7 SCC (Jour)1

common concern arising from dishonest or inefficient governance, and

To increase public participation in the process of constitutional adjudication

In *D.C. Wadhwa v. State of Bihar*,²⁶ the petitioner, a professor of political science who had done substantial research and deeply interested in ensuring proper implementation of the constitutional provisions, challenged the practice followed by the State of Bihar in repromulgating a number of ordinances without getting the approval of the legislature. The Court held that the petitioner as a member of public has 'sufficient interest' to maintain a petition under Article 32. The Court has however been careful not to liberalise the concept of 'standing' in criminal and service matters. In the *Janata Dal* case,²⁷ it was held that the lawyer petitioner was concerned with the private interest of the accused and therefore lacked locus standi to pursue the case as PIL. In *Panchhi v. State of U.P.*²⁸, the Court refused permission even to the National Commission for Women to intervene in a case of a death sentence awarded to a woman. This, the Court said, was for the obvious reason that under the CrPC, the National Commission for Women or any other organisation cannot have locus standi in the murder case. Similarly, in service matters, the Court has held that a third party cannot challenge the appointment of a person.²⁹ In the *Judges' Appointment and Transfer* case³⁰, the principal was elaborated and it has been reiterated in a number of cases. today, it is so well estab-

26. AIR 1987 SC 579

27. *Janata Dal v. H.S. Chowdhary* (1992) 4 SCC 305; AIR 1993 SC 892

28. *Panchhi v. State of U.P.* (1988) 1 SCC 177

29. *R.K. Jain v. Union of India* (1993) 4 SCC 119

30. *S.P. Gupta & Others v. Union of India*, Supra no.10

lished, that the 'standing' is, often not even challenged by the respondent. Although the Courts have permitted easy access in matters of PIL, they have to be careful to note that PIL cannot be maintained by officious interveners having no public interest except for personal gain either for themselves or for the glare of publicity.³¹

Relaxation of Procedural Requirements

In order to permit fuller access to Courts, PIL has been marked by a departure from procedural rules. The flexibility of PIL procedure can best be illustrated by what is termed as 'epistolary jurisdiction'. Taking cue from the American Supreme Court's decision in *Gideon v. Wainwright*³², where a post card from a prisoner was treated as a petition the Supreme Court has said that a public-spirited person could move the Court even by writing a letter.

Some judges have been strong protagonists of PIL, on the Bench and outside it. As a result, the Court has accepted numerous letters and telegrams as petitions. Such a practice would result in conferring a privilege on the complainant to have a judge or forum of his own choice, which is clearly subversive of the judicial processes. The danger of such case of access leading to the apprehension that a litigant could indulge in forum-shopping and address a particular judge was expressed in *Bandhua Mukti Morcha* case.³³ *'When the jurisdiction of the Court is invoked, it is the jurisdiction of the entire Court... No such communication or petition can properly be addressed to a particular judge. Which judge or judges will hear the case is ex*

31. In *Subhash Kumar v. State of Bihar* (1991) 1 SCC 598 at 598-605, the Supreme Court observed that a personal grudge or enmity could not invoke PIL.

32. (1963) 372 U.S. 335

33. *Bandhua Mukti Morcha v. Union of India* (1981) 3 SCC 161 at p. 229

clusively a matter concerning the internal regulation of the business of the Court...'

On 1 December 1988, the Supreme Court, on its administrative side, issued a notification on what matters could be entertained as PIL.³⁴ Under this notification, letter petitions falling under certain categories alone would be ordinarily entertained.³⁵ The notification also set out matters that ordinarily were not to be entertained as PIL, such as landlordtenant disputes, service matters, admission to educational institutions etc. The notification also laid down the procedure wherein the petition would first be screened in the PIL Cell only after which it would be placed before a judge for his directions.

Suo Motu Intervention by Judges

The Court has allowed informality of processes by permitting judges to take cognizance of matters *suo motu* (on their own). Take for example Justice Thakkar, as a judge of the Gujarat High Court, converted a letter to the editor in a newspaper by a widow mentioning her plight because of the non-payment of the provident fund family pension after her husband's death, and ordered a show cause notice to be issued without any further formalities to the Regional Provident Fund Commissioner. The arrears were paid just after the first hearing.³⁶

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- 34. Guidelines for Entertaining Letters/petitions as Public Interest Litigation, accessed from Parivesh News letter on www.cpcb.nic.in/legislation/PIL/Newsletter
 - 35. These include matters concerning bonded labour, neglected children, petitions from prisoners, petitions against police, petitions against atrocities on women, children and SCs & STs. Petitions pertaining to environmental matters, adulteration of drugs and food, maintenance of culture & heritage, and other matters of public importance could also be entertained.
 - 36. Accessed from www.gujarathighcourt.nic.in/Articles/judimech.htm

However, the dangers of *suo motu* action are in plenty.³⁷ The judge cannot know the motivation of a person in writing a letter to the editor. He has no means of verifying the veracity of the contents of the letter, before he commences the proceedings. These letters would increase further if once it is known that the courts act upon them and they could be written with all sorts of motives. Some letters may move one judge while it may not have the same effect on another judge. Moreover, there can be no limits whatsoever, except perhaps the judge's own notion of right and wrong. Looking at the other side of the coin,³⁸ *suo motu* interventions are directed to check a continuing abuse of power by the executive. It is fully justified whenever there is an allegation of atrocity or torture in police custody or jail, because both these institutional processes fall within the direct oversight of the judiciary. However, if *suo motu* intervention is to be vested with the Court, it must be done in specific terms.

Non-Adversarial Procedure of Justice

In the adversarial system, courtroom procedures are based on historical precedents, statutes and Case laws. When two parties cannot agree on their respective rights & obligations, the system provides each side with an equal opportunity to present its case to an independent & impartial judge. In contrast, the non-adversarial system requires careful investigation and fact finding by the judges themselves so as to ensure the veracity of the petitioner in the dispute. The system is so designed to permit the truth to emerge despite the nature of

37. Jurisdiction of the Supreme Court, Accessed from www.indiancourts.nic.in/indian_jud.htm

38. Ibid.

the case and the economic strength of the parties.³⁹

The British rule bequeathed to India a colonial legal heritage. The Anglo-Saxon model of adjudication insisted upon observance of procedural technicalities such as *locus standi* and adherence to adversarial system of litigation. The result was that the courts were accessible only to the rich and the influential people. The marginalized and disadvantaged groups continued to be exploited and denied basic human rights.

Justice Bhagwati's reasons for disapproval of the adversarial procedure for PIL matters are that it sometimes leads to injustice where the parties are not evenly balanced in economic or social strength.⁴⁰ Similarly, Justice R.S. Pathak concedes that the role of the court in civil litigation is that of a passive neutral umpire, whereas in PIL, it is more assertive and it assumes a more positive attitude in determining facts. Though he makes no direct observations on the adversarial procedure of justice, his general observations would suggest that he supports the side-tracking of the adversarial procedure in appropriate cases.⁴¹

In the words of the Supreme Court in *People's Union of Democratic Rights v. Union of India*,⁴² 'We wish to point out with all the emphasis at our command that public interest litigation....is a totally different kind of litigation from the ordinary traditional litigation which

39. Adversarial and Inquisitorial Systems Compared, by Francesco Parisi, Accessed from www.law.gmu.edu/faculty/papers/docs.pdf

40. 'PIL'-The Panacea for Many an Ill; Heart of the Matter, by Fathima Razik Cader, Accessed from www.dailynews.lk.htm

41. www.whattheysay.com

42. AIR 1982 SC 1475

is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief.'

The inability of the vast masses of our people to produce relevant evidence before the Court is too well-known, and so is their difficulty of getting competent legal representation and genuine concern for the same is natural, but then the Court must make a rational assessment on whether it is in a position to adopt non-adversarial procedure in all PIL matters.

Appointment of Commissions

A difficulty often faced by a genuine PIL petitioner is lack of access to information even where he has a genuine grievance. In the past, the Supreme Court has appointed a District Judge, a Professor of Law, a Journalist, an Officer of the Court, an Advocate or a Social Scientist as Commissioners. In environmental matters, the Court has relied upon Expert bodies like the CPCB⁴³ and the NEERI⁴⁴ to study the situation and submit a report to the Court. Justice Bhagwati, in the *Bandhua Mukti Morcha*⁴⁵ case, has held that the Order XXVI of CPC and Order XLVI of the Supreme Court Rules, 1966 which lay down that the commission can be appointed only for the purpose of examining witnesses, making legal investigations and examining accounts are not exhaustive and do not detract from the inherent power of the

43. Central Pollution Control Board. *M.C. Mehta v. Union of India* (1986) 2 SCC 176

44. National Environmental Engineering Research Institute, Nagpur, *S. Jagannath v. Union of India* (1997) 2 SCC 87.

45. *Supra* no.10

Supreme Court to appoint a commission for the ends of justice. These commissions have been appointed to propose remedial relief and monitor its implementation. Thus, the Court in *Indian Council for Enviro-Legal Action v. Union of India*.⁴⁶ appointed NEERI as an expert body to study the situation of ground water and soil pollution. The Court has also drawn upon empirical data and expert studies to decide whether pavement dwellers' right to life and livelihood would be affected by their eviction.⁴⁷ Likewise, the Court relied upon the opinion of experts to dismiss a PIL challenging dairy imports from Ireland on the ground that they were radioactively contaminated by the leak from the Chernobyl nuclear plant.⁴⁸

However, in cases where there are rival contentions of expert bodies, the Court will not intervene. Where the question concerned the seismic potential of the Tehri dam site, the Court stated that it did not have the expertise to give a final opinion on the matter.⁴⁹ The Court could only investigate and adjudicate if the government was not conscious of the inherent dangers. The use of commissions has enabled the Court to check the facts alleged by the petitioner as well as the State after a proper scrutiny without affecting its role as an adjudicator.

Judicial Activism and PIL

The judicial process has become more participatory and democratic. While under the traditional paradigm, a judicial decision was

46. (1996)3 SCC 212; AIR 1996 SC 1466

47. *Olga Tellis v. Bombay Municipal Corporation* (1985)3 SCC 545

48. *Dr. Shiva Rao Santaram Wagle v. Union of India* (1988)2 SCC 115

49. *Tehri Bandh Virodhi Sangharsh Samiti v. State of U.P.* (1992) Supp 1 SCC 44

binding on the parties in personam, the judicial decision under PIL bound not only the parties to the litigation but also all those similarly situated. PIL and judicial activism go hand in hand as the concept of PIL itself is the result of judicial activism.⁵⁰

Judicial activism in the area of human rights and environmental law has been facilitated in considerable measure by PIL. In the sphere of human rights, the Court's concern is exemplified by its interference with the rights of detenus & undertrials, police excesses including arbitrary arrests, custodial violence & extra-judicial killings, conditions in prisons & custodial institutions and the rights of the victims of crime.

In the first PIL on prisoner's rights, *Hussainara Khatoon v. State of Bihar*,⁵¹ the attention of the Court was drawn to the incredible situation of Bihar undertrials who had been detained pending trial for periods far in excess of the maximum sentence for the offences they were charged with. The Court not only proceeded to make the right to speedy trial the central issue of the case but also passed an order of general release of undertrials that had undergone detention beyond such maximum period.

Some of the early PILs had witnessed the award of compensation by the Court to the victims of human rights violations. This principle was reiterated in *D.K. Basu v. Union of India*⁵² a case where the Court declared that:

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50. Sathe S.P., *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press, New Delhi 2002) at p. 246
51. (1980) 1 SCC 81: AIR 1979 SC 1360
52. *D.K. Basu v. Union of India* (1997) 1 SCC 416 : AIR 1997 SC 610

*'Award of compensation for established infringement of the indefeasible rights guaranteed under Art 21 is a remedy available in public law since the purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be preserved and protected.'*⁵³

PIL's contribution has been significant in the sphere of environmental law. M.C. Mehta was a pioneer in bringing a large number of issues to the Court concerning environmental and ecological degradation.⁵⁴ The Court's engagement with these matters has resulted in activating the statutory machinery established under various environmental laws. The dangers of liberalization, globalization and industrialization have paved way for the judiciary towards the formulation of new doctrines and principles for the protection of the environment. Some of these doctrines have been borrowed from the field of public international law and Roman law and have been altered to suit the Indian requirements.

53. Ibid at 439

54. Leak of Oleum gas from a factory in Delhi- (1987)1 SCC 395 Pollution in Delhi- (1996) 8 SCC 750

The danger to the Taj Mahal from the Mathura refinery - (1996) 4 SCC 351

Regulation of Traffic in Delhi - (1987) 8 SCC 770

Degradation of the Ridge area in Delhi (1987) 1 SCC 395

55. The World Commission on Environment and Development (WCED) in its report titled Our Common Future, has suggested that the environmental cost of economic

Amongst the principles, the polluter pays principle⁵⁵ has been applied in the cases concerning shrimp farms⁵⁶, tanneries⁵⁷, chemical industries in Rajasthan⁵⁸ & Andhra Pradesh, and distillery units in Tamil Nadu,⁵⁹ each of which were found discharging untreated effluents into water bodies and soil. The other principle the Court has evolved is the precautionary principle which enjoins the State to anticipate the dangers of the use of hazardous technology. In *Vellore Citizens' Welfare Forum v. Union of India*⁶⁰, the Court was dealing with the problem of pollution caused by over 900 tanneries operating in five districts in Tamil Nadu. The Court noticed that the leather industry was a major foreign exchange earner and Tamil Nadu's export of finished leather accounted to 80% of the country's export of that commodity. Nevertheless, the Court pointed out that the leather industry 'has no right to destroy the ecology, degrade the environment and pose a health hazard. It cannot be permitted to expand or even continue with the present production unless it tackles by itself the problem of pollution created by the said industry.' The Court then drew upon the concept of sustainable development, balancing ecology and development, which had become a part of customary international law.

activity shall be internalized by the enterprises. The Organisation of Economic Cooperation and Development (OECD) agreed to base their environmental policies on 'Polluter Pays Principle' and it was recommended as an essentially economic efficiency measure to internalise environmental costs.

- 56. *S. Jagannath v. Union of India*, Supra no.41
- 57. *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 SCC 687
- 58. *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212
- 59. *In Re Bhavani River-Shakti Sugars Limited* (1998) 6 SCC 335
- 60. Supra no. 58

The Court's activism in the environmental field has however attracted criticism. For instance, when the Court ordered the closure of industries, it neither heard all the industries affected nor their workmen before passing the order. This has resulted in these parties approaching the Court with a series of interlocutory applications, taking up an inordinate amount of the Court's time, even while leaving the aggrieved parties dissatisfied.⁶¹ Thus, the excessive judicial activism has paved way for limitations and challenges in the area of public interest litigation.

Limitations & Controversies⁶²

The Law and Policy Divide

The framers of the Indian Constitution did not incorporate a strict doctrine of separation of powers but envisaged a system of checks and balances. Policy-making and implementation of policy are conventionally regarded as executive domain of the executive and the legislature, with the judiciary enforcing the law. The Supreme Court has itself held that 'the Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.'⁶³ The power of judicial review cannot be used by the Court to

61. See the Orders in *M.C. Mehta v. Union of India* (1997) 11 SCC 227, 312 & 327

62. Public Interest Litigation: Problems and Potential, by Ashok H. Desai & S. Muralidhar, Accessed from www.ielrc.org/content/pdf

63. *Ram Jawaya Kapur v. State of Punjab* (1955) 2 SCR 225 at 235

'usurp or abdicate the powers of other organs.'⁶⁴ PIL tends to narrow the divide between the role of the various organs of the government and has invited controversy principally for this reason. The law and policy divide was obliterated in *Vishaka v. State of Rajasthan*⁶⁵, a PIL concerning the sexual harassment of women at the workplace. A significant feature of this decision was the Court's readiness to step in where the legislature had not. The Court has not adopted a uniform and consistent approach in dealing with its emerging role as a policy-maker. While in some cases, the Court has expressed its reluctance to step into the legislative field, in others, it has laid detailed guidelines and explicitly formulated policy.

Problems of Procedure

The flexibility of procedure that is a characteristic of PIL has given rise to another set of problems. The Court, which operates in an adversarial framework, requires delineation of issues in a legally manageable form. One method by which the Court has tackled this is to require the *amicus curiae* appointed by it to file, on the basis of a letter petition, a properly constituted writ petition.⁶⁶ The reports given by court-appointed commissioners raise problems regarding evidentiary value. No court can found its decisions on facts unless they are proved according to law. This implies the right of an adversary to test them by cross-examination or at least counter affidavits. The Court has been very attentive to the procedural questions about epistolary jurisdiction

64. *Fertilizer Corporation Kangar Union v. Union of India* (1981) 1 SCC 568 at 584

65. *Vishaka v. State of Rajasthan* (1997) 6 SCC 241

66. This happened in *Baljit Malik v. Delhi Golf Club* (1998) Supp 4 SCC 524, where one of the co-authors who assisted the Court as *amicus curiae* drew up a petition on the basis of a letter sent by the petitioner.

and about the issues they raise.⁶⁷ It is a basic postulate of the rule of law that the law must be certain and not become vulnerable to the preilections of individual judges. However, in the area of PIL, the differences in the perceptions of individual judges in the Supreme Court are clearly discernible.

The Resistance of Legislators

In the political arena too, the debate over the limits of judicial activism, particularly in the area of PIL, has been vigorous. The attempt by the judiciary through PILs to enter the area of policy-making and policy implementation has caused concern in the political circles. A private member's bill, entitled 'Public Interest Litigation (Regulation) Bill, 1996' was tabled in the Rajya Sabha. The Statement of Objectives and Reasons stated that although the objective of PIL was to benefit the poorer sections of the society, it was being misused. Moreover PIL cases were given more priority over other cases, which had remained pending in the courts for years. Although the Bill lapsed, the debate in the Parliament revealed some of the criticism and suspicion that PIL had begun to attract.

Problem of Abuse of Processes

It has been increasingly felt that PIL is being misused by people agitating for private grievances in the garb of public interest and seeking publicity rather than espousing public causes. When a petition is filed as PIL, the Court must satisfy itself that the party which has brought the litigation is litigating bona fide for public good because in many cases, PIL has been used as a cloak for attaining the private ends. If

67. Sudipt Majumdar v. State of Madhya Pradesh (1983) 2 SCC 258

the Courts do not restrict the free flow of cases in the name of PIL, the traditional litigation would suffer and the courts of law, instead of dispensing justice, will have to take upon themselves administrative and executive functions.

Conclusion

It would be appropriate to conclude by quoting Cunningham, "Indian PIL might rather be a Phoenix: a whole new creative arising out of the ashes of the old order". The change in Indian judicial system is both substantial and structural. It has radically altered the traditional judicial role so as to enable the court to bring justice within the reach of the common man.

Despite the problems of judicial unpredictability and the feeling that the constitutional balance may be affected, it has to be acknowledged that the far-reaching judgements in a plethora of cases have provided desperately needed relief and exposed executive failings. Bearing in mind the power and importance of PIL in making the Constitution a living reality for a large number of citizens, it is important to view these criticisms as indicators of the safeguards and checks that the Court must build into PIL jurisprudence.

PIL is still in experimental stage. Many deficiencies in handling this kind of litigation are likely to crop up. But these deficiencies can be removed by innovating better techniques. We may end with the hope once expressed by Justice Krishna Iyer, 'The judicial activism gets its highest bonus when its order wipe some tears from some eyes.'
