Public Interest Litigation in India: A Critical Review

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Public Interest Litigation in India: A Critical Review

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Abstract: *Public interest litigation (PIL) has a vital role in the civil justice system in that it could achieve those objectives which could hardly be achieved through conventional private litigation. PIL, for instance, offers a ladder to justice to disadvantaged sections of society, provides an avenue to enforce diffused or collective rights, and enables civil society to not only spread awareness about human rights but also allows them to participate in government decision making. PIL could also contribute to good governance by keeping the government accountable.*

This article will show, with reference to the Indian experience, that PIL could achieve these important objectives. However, the Indian PIL experience also shows us that it is critical to ensure that PIL does not become a facade to fulfil private interests, settle political scores or gain easy publicity. Judiciary in a democracy should also not use PIL as a device to run the country on a day-to-day basis or enter the legitimate domain of the executive and legislature. The challenge for states, therefore, is to strike a balance in allowing legitimate PIL cases and discouraging frivolous ones. One way to achieve this balance could be to build in economic (dis)incentives in PIL and also confine it primarily to those cases where access to justice is undermined by some kind of disability.

Introduction

One of the overarching aims of law and legal systems has been to achieve justice in the society and public interest litigation (PIL) has proved to be a useful tool in achieving this objective. For example, PIL—in which the focus is not on vindicating private rights but on matters of general public

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interest—extends the reach of judicial system to disadvantaged sections of society. It also facilitates an effective realisation of collective, diffused rights for which individual litigation is neither practicable nor an efficient method.

Nevertheless, PIL has generally received peripheral attention in debates on civil justice reforms around the world.[1] This is not to suggest that the evolution of PIL in various jurisdictions has missed the attention of scholars.[2] To continue this tradition, this article aims to critically examine the evolution and development of PIL in India. The main objective of this examination is to highlight the dark side of PIL so that other jurisdictions could learn useful lessons from the Indian experience. The choice of India—a democracy of over 1 billion people governed by a common law system, rule of law and independent judiciary—for learning lessons in the area of PIL is an obvious one given the contribution of India to the PIL jurisprudence.

I begin this article with a review of the evolution of PIL, which could be traced to mid-1970s, and the debate about its appropriate label. An attempt is then made to divide the past PIL cases of more than 30 years into three broad phases to understand better the transformations that have taken place in the PIL jurisprudence over these years. Finally, I highlight the major variables which provided impetus to the development of PIL in India.

Although this article aims to highlight the dark side of PIL, it will not be fair if the positive contributions of PIL are not acknowledged. After all, the dark side could only be discussed in the backdrop of a bright side. The section on ''Positive contributions'', therefore, briefly highlights the positive contributions that the PIL project has made within and outside India. ''The dark side'' then offers critical insights into various aspects of PIL, which together constitute its dark side. Here again, before mapping these facets of the dark side, I will take readers to a quick tour of some recent PIL cases in India. The conclusion will sum up the discussion and also throw some light on how other jurisdictions could benefit from the Indian PIL experience.

Evolution of PIL in India

It should be noted at outset that PIL, at least as it had developed in India, is different from class action or group litigation. Whereas the latter

[1] See, for example, the attention that PIL has received in recent civil justice reforms in the UK, India and Hong Kong.

[2] S.P. Sathe, *Judicial Activism in India* (New Delhi: OUP, 2002); Upendra Baxi, ''Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India'' (1985) *Third World Legal Studies* 107; C.D. Cunningham, ''Public Interest Litigation in Indian Supreme Court: A Study in the Light of the American Experience'' (1987) 29 *Journal of Indian Law Institute* 494; Bhagwati J., ''Judicial Activism and Public Interest Litigation'' (1984) 23 *Columbia Journal of Transnational Law* 561; Christine M. Forster and Vedna Jivan, ''Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience'' (2008) 3(1) *Asian Journal of Comparative Law*; Parmanand Singh, ''Human Rights Protection through Public Interest Litigation in India'' (1999) XLV *Indian Journal of Public Administration* 731; Susan S. Susman, ''Distant Voices in the Courts of India Transformation of Standing in Public Interest Litigation'' (1994) *Wisconsin International Law Journal* 57; Helen Hershkoff, ''Public Interest Litigation: Selected Issues and Examples'', *http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf* [Accessed October 8, 2008].

is driven primarily by efficiency considerations, the PIL is concerned at providing access to justice to all societal constituents. PIL in India has been a part of the constitutional litigation and not civil litigation.[3] Therefore, in order to appreciate the evolution of PIL in India, it is desirable to have a basic understanding of the constitutional framework and the Indian judiciary.[4]

After gaining independence from the British rule on August 15, 1947, the people of India adopted a Constitution in November 1949 with the hope to establish a "sovereign socialist secular democratic republic".[5] Among others, the Constitution aims to secure to all its citizens justice (social, economic and political), liberty (of thought, expression, belief, faith and worship) and equality (of status and of opportunity).[6] These aims were not merely aspirational because the founding fathers wanted to achieve a social revolution through the Constitution.[7] The main tools employed to achieve such social change were the provisions on fundamental rights (FRs) and the directive principles of state policy (DPs), which Austin described as the "conscience of the Constitution".[8] In order to ensure that FRs did not remain empty declarations, the founding fathers made various provisions in the Constitution to establish an independent judiciary. As we will see below, provisions related to FRs, DPs and independent judiciary together provided a firm constitutional foundation to the evolution of PIL in India.

Part III of the Constitution lays down various FRs and also specifies grounds for limiting these rights. "As a right without a remedy does not have much substance",[9] the remedy to approach the Supreme Court directly for the enforcement of any of the Pt III rights has also been made a FR.[10] The holder of the FRs cannot waive them.[11] Nor can the FRs be curtailed by an amendment of the Constitution if such curtailment is against the

[3] The Indian Code of Civil Procedure though allows for class action: ord.1 r.8 of the Code of Civil Procedure 1908. Furthermore, s.91 of the Code provides: "In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted . . . with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act."

[4] See Sheetal B. Shah, "Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India" (1999) 32 *Vanderbilt Journal of Transnational Law* 435, 463.

[5] Constitution of India 1950 Preamble. Although the terms "socialist" and "secular" were inserted by the 42nd amendment in 1976, there were no doubts that the Constitution was both socialist and secular from the very beginning.

[6] Constitution of India 1950 Preamble.

[7] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Clarendon Press, 1966), p.27. "The social revolution meant, 'to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and social education'." (Austin, *Cornerstone of a Nation*, p.26, quoting K. Santhanam, a member of the Constituent Assembly.)

[8] Austin, *Cornerstone of a Nation*, p.50.

[9] M.P. Jain, "The Supreme Court and Fundamental Rights" in S.K. Verma and Kusum (eds), *Fifty Years of the Supreme Court of India—Its Grasp and Reach* (New Delhi: Oxford University Press, 2000), pp.1, 76.

[10] Constitution of India 1950 art.32.

[11] *Basheshar Nath v CIT* AIR 1959 SC 149; *Nar Singh Pal v Union of India* AIR 2000 SC 1401.

basic structure of the Constitution.[12] Some of the FRs are available only to citizens[13] while others are available to citizens as well as non-citizens,[14] including juristic persons. Notably, some of the FRs are expressly conferred on groups of people or community.[15] Not all FRs are guaranteed specifically against the state and some of them are expressly guaranteed against non-state bodies.[16] Even the ''state'' is liberally defined in art.12 of the Constitution to include,

> ''the Government and Parliament of India and the Government and the legislature of each of the states and all local or other authorities within the territory of India or under the control of the Government of India''.

The expression ''other authorities'' has been expansively interpreted, and any agency or instrumentality of the state will fall within its ambit.[17]

The DPs find a place in Pt IV of the Constitution. Although the DPs are not justiciable,[18] they are,

> ''nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws''.[19]

[12] The judiciary is the ''sole'' and ''final'' judge of what constitutes basic structure of the Constitution. Over a period of time, various provisions have been given the higher pedestal of basic structure or basic features of the Constitution, e.g. independence of judiciary, judicial review, rule of law, secularism, democracy, free and fair elections, harmony between FRs and DPs, right to equality, and right to life and personal liberty. See Mahendra P. Singh (ed.), *Shukla's Constitution of India*, 10th edn (Lucknow: Eastern Book Co, 2001), pp.884–97; Jain, ''The Supreme Court and Fundamental Rights'' in Verma and Kusum (eds), *Fifty Years of the Supreme Court of India*, pp.8–13.

[13] See, for example, Constitution art.15(2) (right of non-discrimination on grounds only of religion, race, caste, sex, place of birth or any one of them to access and use of public places, etc.); art.15(4) (special provision for advancement of socially and educationally backward classes of citizens or the scheduled castes and the scheduled tribes); art.16 (equality of opportunity in matters of public employment); art.19 (rights regarding six freedoms); art.29 (protection of interests of minorities).

[14] See, for example, Constitution art.14 (right to equality); art.15(1) (right of non-discrimination on grounds only of religion, race, caste, sex, place of birth or any one of them); art.20 (protection in respect of conviction of offences); art.21 (protection of life and personal liberty); art.22 (protection against arrest and detention); art.25 (freedom of conscience and right to profess, practice and propagate religion).

[15] See, e.g. Constitution arts 26, 29 and 30.

[16] Austin cites three provisions, i.e. Constitution arts 15(2), 17 and 23 which have been ''designed to protect the individual against the action of other private citizen'': Austin, *Cornerstone of a Nation*, p.51. However, it is reasonable to suggest that the protection of even arts 24 and 29(1) could be invoked against private individuals. See also Vijayashri Sripati, ''Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950–2000)'' (1998) 14 *American University International Law Review* 413, 447–48.

[17] See *Ajay Hasia v Khalid Mujib* AIR 1981 SC 487; *Pradeep Kumar v Indian Institute of Chemical Biology* (2002) 5 S.C.C. 111. In the application of the instrumentality test to a corporation, it is immaterial whether the corporation is created by or under a statute. *Som Prakash Rekhi v Union of India* AIR 1981 SC 212.

[18] The FRs are judicially enforceable whereas the DPs are unenforceable in the courts. For the relevance of this difference, see Mahendra P. Singh, ''The Statics and the Dynamics of the Fundamental Rights and the Directive Principles—A Human Rights Perspective'' (2003) 5 *Supreme Court Cases (Jour)* 1.

[19] Constitution art.37.

After initial deviation,[20] the Supreme Court accepted that FRs are not superior to DPs on account of the latter being non-justiciable: rather FRs and DPs are complementary and the former are a means to achieve the goals indicated in the latter.[21] The issue was put beyond any controversy in *Minerva Mills Ltd v Union of India* where the Court held that the, ''harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution''.[22] Since then the judiciary has employed DPs to derive the contents of various FRs.[23]

The founding fathers envisaged ''the judiciary as a bastion of rights and justice''.[24] An independent judiciary armed with the power of judicial review was the constitutional device chosen to achieve this objective. The power to enforce the FRs was conferred on both the Supreme Court and the High Courts[25] —the courts that have entertained all the PIL cases. The judiciary can test not only the validity of laws and executive actions but also of constitutional amendments. It has the final say on the interpretation of the Constitution and its orders, supported with the power to punish for contempt, can reach everyone throughout the territory of the country. Since its inception, the Supreme Court has delivered judgments of far-reaching importance involving not only adjudication of disputes but also determination of public policies and establishment of rule of law and constitutionalism.[26]

Judicial moulding of standing, procedure, substance and relief

Two judges of the Indian Supreme Court (Bhagwati and Iyer JJ.)[27] prepared the groundwork, from mid-1970s to early 1980s, for the birth of PIL in India. This included modifying the traditional requirements of locus standi, liberalising the procedure to file writ petitions, creating or expanding FRs, overcoming evidentiary problems, and evolving innovative remedies.[28]

[20] *State of Madras v Champakam Dorairajan* AIR 1951 SC 226.

[21] *CB Boarding & Lodging v State of Mysore* AIR 1970 SC 2042; *Kesvananda Bharti v State of Kerala* AIR 1973 SC 1461; *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789; *Unni Krishnan v State of AP* (1993) 1 S.C.C. 645. See also Rajiv Dhavan, ''Republic of India: The Constitution as the Situs of Struggle: India's Constitution Forty Years On'' in Lawrence W. Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia* (Seattle: University of Washington Press, 1992), pp.373, 382–383, 405 and 413–416.

[22] *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789, 1806.

[23] See the cases cited below in fnn.35–49. See also Jain, ''The Supreme Court and Fundamental Rights'' in Verma and Kusum (eds), *Fifty Years of the Supreme Court of India*, pp.65–76.

[24] Austin, *Cornerstone of a Nation*, p.175.

[25] Constitution of India 1950 arts 32 and 226.

[26] See, for an analysis of some of the landmark judgments delivered by the Apex Court during these years, Gobind Das, ''The Supreme Court: An Overview'' in B.N. Kirpal et al. (eds), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (New Delhi: OUP, 2000), pp.16–47.

[27] These two judges headed various committees on legal aid and access of justice during 1970s, which provided a backdrop to their involvement in the PIL project. See Jeremy Cooper, ''Poverty and Constitutional Justice: The Indian Experience'' (1993) 44 *Mercer Law Review* 611, 614–615.

[28] See Cooper, ''Poverty and Constitutional Justice'' (1993) 44 *Mercer Law Review* 611, 616–632; See Shah, ''Illuminating the Possible in the Developing World'' (1999) 32 *Vanderbilt Journal of Transnational Law* 435, 467–473; Vijayashri Sripati, ''Human Rights in India Fifty Years after Independence'' (1997) *Denver Journal of International Law and Policy* 93, 118–125.

Modification of the traditional requirement of standing was sine qua non for the evolution of PIL and any public participation in justice administration. The need was more pressing in a country like India where a great majority of people were either ignorant of their rights or were too poor to approach the court. Realising this need, the Court held that any member of public acting bona fide and having sufficient interest has a right to approach the court for redressal of a legal wrong, especially when the actual plaintiff suffers from some disability or the violation of collective diffused rights is at stake. Later on, merging representative standing and citizen standing, the Supreme Court in *Gupta v Union of India* held[29]:

> ''Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right . . . and such person or determinate class of persons is by reasons of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ.''

The court justified such extension of standing in order to enforce rule of law and provide justice to disadvantaged sections of society.[30] Furthermore, the Supreme Court observed that the term ''appropriate proceedings'' in art.32 of the Constitution[31] does not refer to the form but to the purpose of proceeding: so long as the purpose of the proceeding is to enforce a FR, any form will do.[32] This interpretation allowed the Court to develop epistolary jurisdiction by which even letters or telegrams were accepted as writ petitions.[33]

Once the hurdles posed by locus standi and the procedure to file writ petitions were removed, the judiciary focused its attention to providing a robust basis to pursue a range of issues under PIL. This was achieved by both interpreting existing FRs widely and by creating new FRs. Article 21—''no person shall be deprived of his life or personal liberty except according to the procedure established by law''—proved to be the most fertile provision in the evolution of new FRs.[34] ''Life'' in this article has been interpreted

[29] *Gupta v Union of India* (1981) Supp S.C.C. 87, 210. See also *PUDR v Union of India* AIR 1982 SC 1473; *Bandhua Mukti Morcha v Union of India* (1984) 3 S.C.C. 161.

[30] It is suggested that the way a judge applies the rule of standing corresponds to how she sees her judicial role in the society. Aharon Barak, ''Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy'' (2002) 116 *Harvard Law Review* 16, 107–108.

[31] ''The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights contained in this Part is guaranteed.'' Constitution of India 1950 art.32(1).

[32] Singh, *Constitution of India*, pp.278–279.

[33] See, for example, *Sunil Batra v Delhi Administration* AIR 1980 SC 1579; *Dr Upendra Baxi v State of UP* (1982) 2 S.C.C. 308.

[34] See Jain, ''The Supreme Court and Fundamental Rights'' in Verma and Kusum (eds), *Fifty Years of the Supreme Court of India*, pp.22–37, 51–52; Parmanand Singh, ''Protecting the Rights of the Disadvantaged Groups through Public Interest Litigation'' in Mahendra P. Singh, Helmut Goerlich and Michael von Hauff (eds), *Human Rights and Basic Need: Theory and Practice* (New Delhi: Universal Law Publishing Co Pvt Ltd, 2008), pp.305, 310–22; Sripati, ''Human Rights in India Fifty Years after Independence'' (1997) *Denver Journal of International Law and Policy* 93, 108–122.

to mean more than mere physical existence[35]; it ''includes right to live with human dignity and all that goes along with it''.[36] Ever-widening horizon of art.21 is illustrated by the fact that the Court has read into it, inter alia, the right to health,[37] livelihood,[38] free and compulsory education up to the age of 14 years,[39] unpolluted environment,[40] shelter,[41] clean drinking water,[42] privacy,[43] legal aid,[44] speedy trial,[45] and various rights of under-trials, convicts and prisoners.[46] It is important to note that in a majority of cases the judiciary relied upon DPs for such extension. The judiciary has also invoked art.21 to give directions to government on matters affecting lives of general public,[47] or to invalidate state actions,[48] or to grant compensation for violation of FRs.[49]

The final challenge before the Indian judiciary was to overcome evidentiary problems and find suitable remedies for the PIL plaintiffs. The Supreme Court responded by appointing fact-finding commissioners and amicus curiae.[50] As

[35] See, for the evolution of such an interpretation, *Kharak Singh v State of UP* AIR 1963 SC 1295; *Sunil Batra v Delhi Administration* (1978) 4 S.C.C. 494; *Olga Tellis v Bombay Municipal Corp* AIR 1986 SC 180; *Francis Coralie v Union Territory of Delhi* AIR 1981 SC 746; *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802; *Consumer Education & Research Centre v Union of India* (1995) 3 S.C.C. 42; *Bodhisattwa Gautam v Subhra Chakraborty* (1996) 1 S.C.C. 490; *Visakha v State of Rajasthan* AIR 1997 SC 3011. In some of these cases the Court has relied upon the observation of Justice Field in *Munn v Illinois* 94 US 113.

[36] *Francis Coralie v Union Territory of Delhi* AIR 1981 SC 746, 753.

[37] *Parmanand Kataria v* Union of India AIR 1989 SC 2039; *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) 4 S.C.C. 37.

[38] *Olga Tellis v Bombay Municipal Corp* AIR 1986 SC 180; *DTC Corp v DTC Mazdoor Congress* AIR 1991 SC 101.

[39] *Unni Krishnan v State of AP* (1993) 1 S.C.C. 645.

[40] See, for example, *Indian Council for Enviro Legal Action v Union of India* (1996) 3 S.C.C. 212; *Mehta v Union of India* (1996) 6 S.C.C. 750; *Vellore Citizens Welfare Forum v Union of India* (1996) 5 S.C.C. 647; *Narmada Bachao Andolan v Union of India* (2000) 10 S.C.C. 664.

[41] *Gauri Shankar v Union of India* (1994) 6 S.C.C. 349.

[42] *A.P. Pollution Control Board II v M V Nayudu* (2001) 2 S.C.C. 62.

[43] *Kharak Singh v State of UP* AIR 1963 SC 1295; *Govind v State of MP* AIR 1975 SC 1378; *Raj Gopal v State of Tamil Nadu* (1994) 6 SCC 632; *PUCL v Union of India* AIR 1997 SC 568; *X v Hospital Z* (1998) 8 S.C.C. 296.

[44] *Hoskot v State of Maharashtra* AIR 1978 SC 1548; *Hussainara Khatoon v State of Bihar* AIR 1979 SC 1369; *Khatri v State of Bihar* AIR 1981 SC 928; *Suk Das v Union Territory of Arunachal Pradesh* AIR 1986 SC 991.

[45] *Hussainara Khatoon (I) to (VI) v Home Secretary, Bihar* (1980) 1 S.C.C. 81; *Kadra Pahadiya v State of Bihar* AIR 1982 SC 1167; *Common Cause v Union of India* (1996) 4 S.C.C. 33 and (1996) 6 S.C.C. 775; *Rajdeo Sharma v State of Bihar* (1998) 7 S.C.C. 507 and (1999) 7 S.C.C. 604.

[46] *Sunil Batra v Delhi Administration* AIR 1978 SC 1675; *Prem Shankar v Delhi Administration* AIR 1980 SC 1535; *Munna v State of UP* AIR 1982 SC 806; *Sheela Barse v Union of India* AIR 1986 SC 1773.

[47] See, for example, *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802; *Upendra Baxi v State of UP* (1983) 2 S.C.C. 308 and (1986) 4 S.C.C. 106; *Visakha v State of Rajasthan* AIR 1997 SC 3011; *Basu v State of West Bengal* AIR 1997 SC 610.

[48] See, for example, *Kharak Singh v State of UP* AIR 1963 SC 1295; *Mithu v State of Punjab* AIR 1983 SC 473.

[49] *Rudul Sah v State of Bihar* (1983) 4 S.C.C. 141; *Bhim Singh v State of J & K* (1985) 4 S.C.C. 677; *Nilabati Behra v State of Orissa* (1993) 2 S.C.C. 746.

[50] See Ashok H. Desai and S. Muralidhar, ''Public Interest Litigation: Potential and Problems'' in Kirpal et al., *Supreme but not Infallible*, pp.159, 165–167. The Court also held that the power to appoint commissioners is not constrained by the Code of Civil Procedure or the Supreme Court Rules.

in most of the PIL cases there were no immediate or quick solutions, the Court developed ''creeping'' jurisdiction thereby issuing appropriate interim orders and directions.[51] The judiciary also emphasised that PIL is not an adversarial but a collaborative and cooperative project in which all concerned parties should work together to realise the human rights of disadvantaged sections of society.[52]

The debate over label: PIL or social action litigation?

Given that the birth of PIL in India was connected to the evolution of PIL in the United States, it was natural for scholars to draw comparisons between the US experience and the Indian experience.[53] One result of this comparison was that it was argued that PIL in India should be labeled as social action litigation (SAL).[54] Baxi was the key scholar who mooted for such indigenous labelling of PIL because of its distinctive characteristics.[55] He contended that whereas PIL in the United States has focused on ''civic participation in governmental decision making'', the Indian PIL discourse was directed against ''state repression or governmental lawlessness'' and was focused primarily on the rural poor.[56] Writing in the early 1980s, Baxi highlighted another contrast: that unlike India, PIL in the United States sought to represent ''interests without groups'' such as consumerism or environment.[57]

At least two comments could be made about the desire to designate PIL as SAL. First, the term ''social action'' probably implied the role that law could/should play in social engineering. However, considering that in PIL cases judges (rather than the legislature) play a key role and the law is judge-made law, one should not over-estimate what courts could deliver through PIL/SAL in a democracy.[58] No doubt, courts could help in providing an official recognition to the voices of minorities or destitutes that might be ignored otherwise, but it would be unrealistic to expect that they could achieve social transformation on their own.

Secondly, as we will note in the next section, the character of the PIL in India has changed a lot in the second phase in that now it is not limited to

[51] Baxi, ''Taking Suffering Seriously'' (1985) *Third World Legal Studies* 107, 122.

[52] See Sathe, *Judicial Activism in India*, pp.207–208, 235–237.

[53] See, e.g. Cunningham, ''Public Interest Litigation in Indian Supreme Court'' (1987) 29 *Journal of Indian Law Institute* 494.

[54] Baxi, ''Taking Suffering Seriously'' (1985) *Third World Legal Studies* 107; Bhagwati, ''Judicial Activism and Public Interest Litigation'' (1984) 23 *Columbia Journal of Transnational Law* 561.

[55] ''The PIL represents for America a distinctive phase of socio-legal development for which there is no counterpart in India; and the salient characteristics of its birth, growth and, possibly, decay are also distinctive to American history.'' Baxi, ''Taking Suffering Seriously'' (1985) *Third World Legal Studies* 107, 108.

[56] Baxi, ''Taking Suffering Seriously'' (1985) *Third World Legal Studies* 107, 109. For an excellent analysis, see Arun K. Thiruvengadam, ''In Pursuit of 'the Common Illumination of our House': Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia'' (2008) 2 *Indian Journal of Constitutional Law* (forthcoming, on file with author), pp.12–15.

[57] Baxi, ''Taking Suffering Seriously'' (1985) *Third World Legal Studies* 107, 109.

[58] See Singh, ''Protecting the Rights of the Disadvantaged Groups through Public Interest Litigation'' in Singh, Goerlich and von Hauff (eds), *Human Rights and Basic Need*, pp.327–328.

espousing the interests of disadvantaged sections of society or to redressing state repression and governmental lawlessness. In fact, in the second phase, the focus of PIL in India has shifted from poor to the middle class and from redressing state exploitation of disadvantaged groups to pleas for civic participation in governance. Although there are still differences between how the PIL jurisprudence has unfolded in the United States and India, the distinction as to the subject-matter or the basic objective of the PIL is not that much as it used to be when an argument was made to label PIL as SAL.

The three phases of PIL

At the risk of over-simplification and overlap, the PIL discourse in India could be divided, in my view, into three broad phases.[59] One will notice that these three phases differ from each other in terms of at least the following four variables: who initiated PIL cases; what was the subject matter/focus of PIL; against whom the relief was sought; and how judiciary responded to PIL cases.

In the first phase—which began in the late 1970s and continued through the 1980s—the PIL cases were generally filed by public-spirited persons (lawyers, journalists, social activists or academics).[60] Most of the cases related to the rights of disadvantaged sections of society[61] such as child labourers, bonded labourers, prisoners, mentally challenged, pavement dwellers, and women. The relief was sought against the action or non-action on the part of executive agencies resulting in violations of FRs under the Constitution. During this phase, the judiciary responded by recognising the rights of these people and giving directions to the government to redress the alleged violations. In short, it is arguable that in the first phase, the PIL truly became an instrument of the type of social transformation/revolution that the founding fathers had expected to achieve through the Constitution.

The second phase of the PIL was in the 1990s during which several significant changes in the chemistry of PIL took place. In comparison to the first phase, the filing of PIL cases became more institutionalised in that several specialised NGOs and lawyers started bringing matters of public interest to the courts on a much regular basis. The breadth of issues raised in PIL also expanded tremendously—from the protection of environment to corruption-free administration, right to education, sexual harassment at the workplace, relocation of industries, rule of law, good governance, and the general accountability of the Government. It is to be noted that in this phase, the petitioners sought relief not only against the action/non-action of the executive but also against private individuals, in relation to policy matters,

[59] Dam divides SAL in three functional phases: creative, lawmaking and super-executive. Shubhankar Dam, "Lawmaking Beyond Lawmakers: Understanding the Little Right and the Great Wrong (Analyzing The Legitimacy of the Nature of Judicial Lawmaking in India's Constitutional Dynamic)" (200) 13 *Tulane Journal of International and Comparative Law* 109, 115–116. This division, however, does not fully explain the complexity of PIL, because it focuses only on one aspect of it.

[60] See Baxi, "Taking Suffering Seriously" (1985) *Third World Legal Studies* 107, 116–118.

[61] People could be disadvantaged for a variety of reasons, e.g. economic, social, political, cultural or educational.

and regarding something that would clearly fall within the domain of the legislature.[62]

The response of the judiciary during the second phase was by and large much bolder and unconventional than the first phase. For instance, the courts did not hesitate to come up with detailed guidelines where there were legislative gaps.[63] The courts enforced FRs against private individuals[64] and granted relief to the petitioner without going into the question of whether the violator of the FR was the state.[65] The courts also took non-compliance with its orders more seriously and in some cases, went to the extent of monitoring government investigative agencies[66] and/or punishing civil servants for contempt for failing to abide by their directions. The second phase was also the period when the misuse of PIL not only began but also reached to a disturbing level, which occasionally compelled the courts to impose fine on plaintiffs for misusing PIL for private purposes.[67]

It is thus apparent that in the second phase the PIL discourse broke new grounds and chartered on previously unknown paths in that it moved much beyond the declared objective for which PIL was meant.[68] The courts, for instance, took resort to judicial legislation when needed, did not hesitate to reach centres of government power,[69] tried to extend the protection of FRs against non-state actors, moved to protect the interests of the middle class rather than poor populace, and sought means to control the misuse of PIL for ulterior purposes.

On the other hand, the third phase—the current phase, which began with the 21st century—is a period in which anyone could file a PIL for almost anything. It seems that there is a further expansion of issues that could be raised as PIL, e.g. calling back the Indian cricket team from the Australia tour and preventing an alleged marriage of an actress with trees for astrological reasons. From the judiciary's point of view, one could argue that it is time for judicial introspection and for reviewing what courts tried to achieve through PIL. As compared to the second phase, the judiciary has seemingly shown

[62] For example, the constitutional validity of the new economic policies was challenged in *Delhi Science Forum v Union of India* (1996) 2 S.C.C. 405. Similarly, petitions were filed to direct the Indian Parliament to enact a uniform civil code under art.44 of the Constitution: *Sarla Mudgal v Union of India* (1995) 3 S.C.C. 635.

[63] *Vishaka v State of Rajasthan* AIR 1997 SC 3011; *Basu v State of West Bengal* AIR 1997 SC 610.

[64] See *Bodhisattwa Gautam v Subhra Chakraborty* AIR 1996 SC 922; *Vishaka v State of Rajasthan* AIR 1997 SC 3011; *Apparel Export Promotion Council v Chopra* AIR 1999 SC 625.

[65] See *Bodhisattwa Gautam v Subhra Chakraborty* AIR 1996 SC 922; *Mr X v Hospital Z* (2002) 8 S.C.C. 296; and *Mehta v Kamal Nath* (2000) 6 S.C.C. 213.

[66] Sathe, *Judicial Activism in India*, pp.221–222.

[67] *Janta Dal v Chowdhary* (1992) 4 S.C.C. 305; *Anand v Deve Gowda* (1996) 6 S.C.C. 734; *Raunaq International Ltd v IVR Construction Ltd* (1999) 1 S.C.C. 492.

[68] The handbook issued by the Indian Supreme Court reads: "[PIL] is meant for enforcement of fundamental and other legal rights of the people who are poor, weak, ignorant of redressal system or otherwise in a disadvantageous position, due to their social or economic background." *Supreme Court of India: Practice and Procedure—A Handbook of Information* (New Delhi: Supreme Court of India, 2007), p.41.

[69] See, for an analysis of judgments on misfeasance in public offices, Anil Divan, "The Supreme Court and Tort Litigation" in Kirpal et al., *Supreme but not Infallible*, pp.404, 426–430.

more restraint in issuing directions to the government. Although the judiciary is unlikely to roll back the expansive scope of PIL, it is possible that it might make more measured interventions in the future.

One aspect that stands out in the third phase deserves a special mention. In continuation of its approval of the government's policies of liberalisation in *Delhi Science Forum*, the judiciary has shown a general support to disinvestment and development policies of the Government.[70] What is more troublesome for students of the PIL project in India is, however, the fact that this judicial attitude might be at the cost of the sympathetic response that the rights and interests of impoverished and vulnerable sections of society (such as slum dwellers[71] and people displaced by the construction of dams)[72] received in the first phase. The Supreme Court's observations such as the following also fuel these concerns:

> ''Socialism might have been a catchword from our history. It may be present in the Preamble of our Constitution. However, due to the liberalisation policy adopted by the Central Government from the early nineties, this view that the Indian society is essentially wedded to socialism is definitely withering away.''[73]

It seems that the judicial attitude towards PIL in these three phases is a response, at least in part, to how it perceived to be the ''issue(s) in vogue''. If rights of prisoners, pavement dwellers, child/bonded labourers and women were in focus in the first phase, issues such as environment, AIDS, corruption and good governance were at the forefront in second phase, and development and free market considerations might dominate the third phase. So, the way courts have reacted to PIL in India is merely a reflection of what people expected from the judiciary at any given point of time. If the judiciary deviates too much from the prevailing social expectations, it might not command the public support that it requires to sustain PIL.

[70] It is suggested that in recent years the Supreme Court has been influenced by liberalisation and corporate business interests at the cost of human rights. See Jamie Cassels, ''Multinational Corporations and Catastrophic Law'' (2000) 31 *Cumberland Law Review* 311, 330; Parmanand Singh, ''State, Market and Economic Reforms'' in Parmanand Singh et al. (eds), *Legal Dimensions of Market Economy* (New Delhi: Universal Book Traders, 1997), pp.23, 30–31; Prashant Bhushan, ''Has the Philosophy of the Supreme Court on Public Interest Litigation Changed in the Era of Liberalisation?'', *http://www.judicialreforms.org/files/2%20Philosophy%20of%20SC%20on%20PIL%20-%20Prashant%20Bhushan.pdf* [Accessed October 8, 2008].

[71] J. Venkatesan, ''Supreme Court Dismisses PIL against Demolition of Jhuggis'', *The Hindu*, May 13, 2006. See also Usha Ramanathan, ''Demolition Drive'' (2005) 40 *Economics & Politics Weekly* 2908; Usha Ramanathan, *Illegality and Exclusion: Law in the Lives of Slum Dwellers*, I.E.L.R.C. Working Paper 2004, available at *http:// www.ielrc.org/content/w0402.pdf* [Accessed November 2, 2008].

[72] *Narmada Bachao Andolan v Union of India* (2000) 10 S.C.C. 664. See also ''SC Declines to Stop Work on Dam Height'', *The Hindu*, May 9, 2006; Ramaswamy R. Iyer, ''Abandoning the Displaced'' in *The Hindu*, May 10, 2006.

[73] *State of Punjab v Devans Modern Brewaries Ltd* (2004) 11 S.C.C. 26 at [148].

Impetus for PIL

A number of factors contributed to the robust development of PIL in India.[74] The first factor has already been noted above, that is, the constitutional framework relating to FRs and DPs. It is clear that because of FRs and DPs, the Indian judiciary would have enjoyed a comparative advantage in anchoring PIL vis-à-vis courts of those jurisdictions (such as the United Kingdom and Australia) where there was no Bill of Rights.

Secondly, several constitutional provisions concerning the powers of the Supreme Court helped the Court in coming up with innovative and unconventional remedies, which in turn raised social expectations. For instance, a provision which allowed the Supreme Court to pass any order for ''doing complete justice'' proved more than handy in PIL cases.[75] The Constitution also provides that the law declared by the Supreme Court shall be binding on all courts[76] and that ''[a]ll authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court''.[77]

Thirdly, the rise of PIL corresponds to the extent and level of judicial activism shown by the Indian Supreme Court and High Courts.[78] Through its activism over the years, the Indian Supreme Court has arguably become the most powerful court in the world.[79] Some major instances of activism, which directly provided impetus to PIL are: introducing the due process requirement in art.21, despite its rejection by the Constituent Assembly[80]; employing DPs to create new FRs[81]; reading implied limitations in the form of basic feature on the power of Parliament to amend the Constitution[82]; declaring judicial review a basic feature of the Constitution[83]; and becoming, in effect, a self-appointed judiciary[84] with almost no real constitutional checks.[85] Because

[74] Desai and Muralidhar in Kirpal et al. (eds), *Supreme but not Infallible*, pp.159–162.

[75] ''The Supreme Court in the exercise of its jurisdiction may pass such decree or make such orders as is necessary for doing complete justice in any cause or matter pending before it.'' Constitution of India 1950 art.142(1).

[76] Constitution of India 1950 art.141.

[77] Constitution of India 1950 art.144.

[78] PIL ''is a result of judicial activism'': Jain, ''The Supreme Court and Fundamental Rights'' in Verma and Kusum (eds), *Fifty Years of the Supreme Court of India*, p.86.

[79] ''In the process, they rewrote many parts of the Constitution'': Baxi, ''Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India'' (1985) *Third World Legal Studies* 107, 115.

[80] *Maneka Gandhi v Union of India* (1978) 2 S.C.C. 248. See also T.R. Andhyarujina, ''The Evolution of Due Process of Law the Supreme Court in Kirpal et al., *Supreme but not Infallible*, p.193.

[81] See Jain, ''The Supreme Court and Fundamental Rights'' in Verma and Kusum (eds), *Fifty Years of the Supreme Court of India*, pp.22–37, 51–52; Sathe, *Judicial Activism in India*, pp.209–229.

[82] *Kesvananda Bharti v State of Kerala* AIR 1973 SC 1461; Raju Ramachandran, ''The Supreme Court and the Basic Structure Doctrine'' in Kirpal et al., *Supreme but not Infallible*, p.107.

[83] *Waman Rao v Union of India* AIR 1981 SC 271; *Sampath Kumar v Union of India* AIR 1987 SC 386; *Chandra Kumar v Union of India* AIR 1997 SC 1125.

[84] *S C Advocates on Record Association v Union of India* (1993) 4 SCC 441; *Presidential Reference, Re* AIR 1999 SC 1.

[85] The power of impeachment under Constitution art.124(4) has failed to deliver in the past. But recently, it has been proposed to establish National Judicial Council to probe complaints against judges of higher judiciary: ''Cabinet Nod to New Panel for Probing Judges'', *The Times of India*, October 9, 2008.

of these landmark decisions, the judiciary became almost untouchable and chartered its PIL path subject only to self-restraints.

Fourthly, a relatively weak executive at the Centre after the assassination of the then Prime Minister Mrs Indira Gandhi in 1984, the era of coalition governments since the 1990s, and the growing gap between the constitutional promise and reality provided a conducive environment for the growth of PIL. In other words, through PIL the judiciary tried to fill in a governance vacuum[86] and sought to do what the two branches of the government should have done but did not do.

Last but least, being a democratic country, the civil society in India easily grabbed the opportunity to participate in governance through PIL cases. Civil society also found that PIL could help them in highlighting social issues/causes much more quickly rather than achieving the same result through long social campaigns.

Positive contributions

As the positive contributions of PIL in India are well-known and well-documented,[87] only some of the main contributions are noted here briefly. The most important contribution of PIL, in my view, has been to bring courts closer to the disadvantaged sections of society such as prisoners, destitute, child or bonded labourers, women, and scheduled castes/tribes. By taking up the issues affecting these people, PIL truly became a vehicle to bring social revolution through constitutional means, something that the founding fathers had hoped.

Equally important is the part played by PIL in expanding the jurisprudence of fundamental (human) rights in India. As noted before, DPs are not justiciable but the courts imported some of these principles into the FRs thus making various socio-economic rights as important—at least in theory—as civil and political rights. This resulted in the legal recognition of rights as important as education, health, livelihood, pollution-free environment, privacy and speedy trial.

As we have seen before, in the second phase, the PIL became an instrument to promote rule of law, demand fairness and transparency, fight corruption in administration, and enhance the overall accountability of the government agencies. The underlying justification for these public demands and the judicial intervention was to strengthen constitutionalism—a constant desire of the civil

[86] See Surya Deva, "Who will Judge the Judges: A Critical Purview of Judicial Activism" (1997) 1 *Delhi University Law Journal* 30.

[87] See, e.g. Sathe, *Judicial Activism in India*, pp.195–248; Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" (1985) *Third World Legal Studies* 107, 111–132; Singh, "Protecting the Rights of the Disadvantaged Groups through Public Interest Litigation" in Singh, Goerlich and Michael von Hauff (eds), *Human Rights and Basic Need*; Sripati, "Human Rights in India Fifty Years after Independence" (1997) *Denver Journal of International Law and Policy* 93; C.M. Abraham, *Environmental Jurisprudence in India* (The Hague: Kluwer, 1999), pp.31–35.

society to keep government powers under check. This resulted in the judiciary giving directions to the government to follow its constitutional obligations.[88]

Through PIL, judiciary also triggered legislative reforms and filled in legislative gaps in important areas. Just to illustrate, the Supreme Court in the *Vishaka* case laid down detailed guidelines on sexual harassment at the workplace. Similarly welcome, were guidelines on arrest and detention laid down by the Court in *Basu*. To what extent these guidelines have been successful in achieving the intended objectives and whether courts were justified in acting like a legislature are moot points. Nevertheless, such guidelines, which were totally in consonance with the mandate of the Indian Constitution as well as various international covenants ratified by the Indian government, helped in enhancing sensitivity to these issues.

The Indian judiciary, courtesy of PIL, has helped in cooling down a few controversial policy questions on which the society was sharply divided. One could think of the controversy about the reservation of seats for SCs/STs and other backwards classes in employment or educations institutions, the government policies of liberalisation and privatisation, and the contested height of the Narmada dam as examples of this kind of contribution.

On a theoretical level, PIL has helped the Indian judiciary to gain public confidence and establish legitimacy in the society. The role of an independent judiciary in a democracy is of course important. But given that judges are neither elected by public nor are they accountable to public or their representatives ordinarily, the judiciary in a democracy is susceptible to public criticism for representing the elite or being undemocratic and anti-majoritarian. Therefore, it becomes critical for the judiciary to be seen by the public to be not only independent but also in touch with social realities.

One positive contribution of PIL in India, which has extended outside the Indian territory, deserves a special mention. The Indian PIL jurisprudence has also contributed to the trans-judicial influence—especially in South Asia—in that courts in Pakistan, Sri Lanka, Bangladesh and Nepal have cited Indian PIL cases to develop their own PIL jurisprudence.[89] In a few cases, even Hong Kong courts have cited Indian PIL cases, in particular cases dealing with environmental issues.[90] Given that the civil society that is following the development of PIL in China is familiar with the Indian PIL jurisprudence,[91] it is possible that Indian PIL cases might be cited even before the Chinese courts in the future.

[88] For example, art.45 of the Constitution had originally provided that that state shall provide "free and compulsory" education to all children up to the age of 14 years "within a period of ten years from the commencement of the Constitution". Failure of state to do so even after 42 years lead to the judicial recognition of right to education as a FR in *Mohini Jain v State of Karnataka* (1992) 3 S.C.C. 666 and *Unni Krishnan v State of Andhra Pradesh* (1993) 1 S.C.C. 645. See also the obligation to enact the Uniform Civil Code under art.44 and the Supreme Court judgments in *Mohd Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945 and *Sarla Mudgal v Union of India* AIR 1995 SC 1531.

[89] See generally Jona Razzaque, "Linking Human Rights, Development, and Environment: Experiences from Litigation in South Asia" (2007) 18 *Fordham Environmental Law Review* 587.

[90] See, e.g. *Society for Protection of the Harbour Ltd v Town Planning Board* [2003] HKEC 849.

[91] China Labour Bulletin, *Public Interest Litigation in China: A New Force for Social Justice* (Research Reports, October 10, 2007).

It should be noted that this trans-judicial influence is an example of a *second tier* trans-judicial influence—the *first tier* being Indian courts relying on the US judicial decisions to establish the PIL jurisprudence in the 1970s. Generally what we see is the first tier trans-judicial influence in that common law courts of former colonies (such as India and Hong Kong) cite and rely heavily on the judgments of the US and UK courts.[92] The second tier trans-judicial influence is a welcome addition in the sense that it might help in fostering learning dialogues (not one-way influence) among courts at the horizontal level rather than at a vertical level.

The dark side

PIL has, however, led to new problems such as an unanticipated increase in the workload of the superior courts, lack of judicial infrastructure to determine factual matters, gap between the promise and reality, abuse of process, friction and confrontation with fellow organs of the government, and dangers inherent in judicial populism.[93] Before elaborating these problems, let me take readers to a quick tour of some recent PIL cases that would offer an indication of this dark side.

A quick tour of some recent PIL cases

In the last three decades, the Indian Supreme Court and High Courts have been approached through PIL to redress a variety of issues, not all of which related to alleged violation of FRs. The judiciary, for instance, has addressed issues such as[94]: the constitutionality of the Government's privatisation[95] and disinvestment policies,[96] defacing of rocks by painted advertisements,[97] the danger to the Taj Mahal from a refinery,[98] pollution of rivers,[99] relocation of industries out of Delhi,[100] lack of access to food,[101] deaths due to starvation,[102] use of

[92] For example, one scholar has found that about 25% of all Indian Supreme Court judgments have relied on the foreign law: Adam M. Smith, "Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case" (2006) 24 *Berkeley Journal of International Law* 218, 240.

[93] See Desai and Muralidhar in Kirpal et al., *Supreme but not Infallible*, pp.176–183; Upendra Baxi, "The Avatars of Indian Judicial *Activism*: Explorations in the Geographies of [In]justice" in Verma and Kusum (eds), *Fifty Years of the Supreme Court of India*, pp.156, 161–165; and generally Arun Shourie, *Courts and their Judgments—Premises, Perquisites, Consequences* (New Delhi: Rupa & Co. 2001).

[94] See also above fnn.37–49.

[95] *Delhi Science Forum v Union of India* (1996) 2 S.C.C. 405.

[96] *Balco Employees Union v Union of India* AIR 2001 SC 350; *Centre for Public Interest Litigation v Union of India* AIR 2003 SC 3277.

[97] See "SC's 5-cr Message: You Can't Get Away", *The Indian Express*, September 24, 2002.

[98] *M.C. Mehta v Union of India* (1996) 4 S.C.C. 750.

[99] *Almitra H. Patel v Union of India* AIR 2000 SC 1256.

[100] *M.C. Mehta v Union of India* (1996) 4 S.C.C. 351.

[101] *PUCL v Union of India* (2001) (7) S.C.A.L.E. 484; *PUCL v Union of India* (2004) (5) S.C.A.L.E. 128.

[102] *Kishen Pattnayak v State of Orissa* (1989) Supl.(1) S.C.C. 258.

environment-friendly fuel in Delhi buses[103] and regulation of traffic,[104] out-of-turn allotment of government accommodation,[105] prohibition of smoking in public places,[106] arbitrary allotment of petrol outlets,[107] investigation of alleged bribe taking,[108] employment of children in hazardous industries,[109] rights of children and bonded labours,[110] extent of the right to strike,[111] right to health,[112] right to education,[113] sexual harassment in the workplace,[114] and female foeticide and infanticide through modern technology.[115]

Although a review of the above sample of PIL cases may surprise those who are not familiar with PIL in India, it should be noted that in all the above cases the judiciary did actually entertain the PIL and took these cases to their logical conclusion. But there have been instances of more blatant misuse of the process of PIL. For instance, the courts were approached to call back the Indian cricket team from Australia after the controversial Sydney test match.[116] PILs were initiated to regulate the treatment of wild monkeys in Delhi and the practice of private schools to conduct admission interviews for very young children.[117] A PIL was also filed in the Supreme Court to seek ban on the publication of allegedly obscene and nude photographs in newspapers.[118] Some so-called public-spirited lawyers knocked at the door of the courts against: (i) Richard Gere's public kissing of an Indian actress, Ms Shilpa Shetty; (ii) an alleged indecent live stage show on New Year's Eve; and (iii) the marriage of former Miss World, Ms Aishwarya Rai, with a tree to overcome certain astrological obstacles in her marriage.[119]

More recently, the PIL discourse was employed to request the Indian government to send technical experts to work with the Nepal government in

[103] *M.C. Mehta v Union of India* AIR 2002 SC 1696.

[104] *M.C. Mehta v Union of India* (1997) 8 S.C.C. 770.

[105] *Shiv Sagar Tiwari v Union of India* (1996) 6 S.C.C. 558.

[106] *Murli Deora v Union of India* (2001) 8 S.C.C. 766.

[107] *Common Cause v Union of India* (1996) 6 S.C.C. 530.

[108] *Vineet Narain v Union of India* (1996) 2 S.C.C. 199.

[109] *M.C. Mehta v State of Tamil Nadu* AIR 1997 SC 699.

[110] *Narendra Malava v State of Gujarat* (2004) (10) S.C.A.L.E. 12; *PUCL v State of Tamil Nadu* (2004) (5) S.C.A.L.E. 690.

[111] *CPM v Bharat Kumar* AIR 1998 SC 184; *T.K. Rangarajan v State of Tamil Nadu* AIR 2003 SC 3032.

[112] *Parmanand Kataria v Union of India* AIR 1989 SC 2039; *Paschim Banga Khet Mzdoor Samity v State of West Bengal* (1996) 4 S.C.C. 37; *Kirloskar Bros Ltd v ESIC* (1996) 2 S.C.C. 682; *Air India Stat. Corp v United Labour Union* (1997) 9 S.C.C. 377.

[113] *Mohini Jain v State of Karnataka* (1992) 3 S.C.C. 666; *Unni Krishnan v State of Andhra Pradesh* (1993) 1 S.C.C. 645.

[114] *Vishaka v State of Rajasthan* AIR 1997 SC 3011; *Apparel Export Promotion Council v A.K. Chopra* AIR 1999 SC 625.

[115] *CEHAT v Union of India* AIR 2001 SC 2007; *CEHAT v Union of India AIR* 2003 SC 3309.

[116] PIL in SC for recalling the Indian cricket team from Australia, *Chenni Online http://archives.chennaionline.com/cricket/Features/2008/01news952.aspx* [January 16, 2008].

[117] "PIL and Indian Courts" in *Combat Law* (November–December 2007), Vol.6:6.

[118] "Apex Court Dismisses PIL Seeking Ban on Obscenity in Papers" in *The Indian Express*, December 13, 2006. Although the Court dismissed the petition, it still asked the government to, "examine suggestions for amending the Press Council of India Act to rein in publications indulging in such alleged unacceptable practices".

[119] "Chased by the Moral Brigade" in *Rediff News*, October 3, 2007.

strengthening the Bhimnagar barrage to prevent recurrence of flood[120] and to challenge the constitutional validity of the Indo–US civil nuclear agreement.[121]

The dark side

It seems that the misuse of PIL in India, which started in the 1990s, has reached to such a stage where it has started undermining the very purpose for which PIL was introduced. In other words, the dark side is slowly moving to overshadow the bright side of the PIL project.

Ulterior purpose: public in PIL stands substituted by private or publicity

One major rationale why the courts supported PIL was its usefulness in serving the public interest. It is doubtful, however, if PIL is still wedded to that goal. As we have seen above, almost any issue is presented to the courts in the guise of public interest because of the allurements that the PIL jurisprudence offers (e.g. inexpensive, quick response, and high impact). Of course, it is not always easy to differentiate ''public'' interest from ''private'' interest, but it is arguable that courts have not rigorously enforced the requirement of PILs being aimed at espousing some public interest. Desai and Muralidhar confirm the perception that:

> ''PIL is being misused by people agitating for private grievances in the grab of public interest and seeking publicity rather than espousing public causes.''[122]

It is critical that courts do not allow ''public'' in PIL to be substituted by ''private'' or ''publicity'' by doing more vigilant gate-keeping.

Inefficient use of limited judicial resources

If properly managed, the PIL has the potential to contribute to an efficient disposal of people's grievances. But considering that the number of per capita judges in India is much lower than many other countries and given that the Indian Supreme Court as well as High Courts are facing a huge backlog of cases,[123] it is puzzling why the courts have not done enough to stop non-genuine PIL cases. In fact, by allowing frivolous PIL plaintiffs to waste the time and energy of the courts, the judiciary might be violating the right to speedy trial of those who are waiting for the vindication of their private interests through conventional adversarial litigation.

A related problem is that the courts are taking unduly long time in finally disposing of even PIL cases. This might render ''many leading judgments

[120] ''SC Bench Sneers at PIL Filed to Srrengthen Bhimnagar Barrage'' in *The Times of India*, September 3, 2008.

[121] ''SC to hear N-Deal PIL Tomorrow'' in *Deccan Herald*, August 12, 2008.

[122] Desai and Muralidhar in Kirpal et al., *Supreme but not Infallible*, p.181.

[123] Marc Galanter and Jayanth K. Krishnan, ' ''Bread for the Poor': Access to Justice and the Rights of the Needy in India'' (2004) 55 *Hastings Law Journal* 789, 790 (fn.2).

merely of [an] academic value''.[124] The fact that courts need years to settle cases might also suggest that probably courts were not the most appropriate forum to deal with the issues in hand as PIL.

Judicial populism

Judges are human beings, but it would be unfortunate if they admit PIL cases on account of raising an issue that is (or might become) popular in the society. Conversely, the desire to become people's judges in a democracy should not hinder admitting PIL cases which involve an important public interest but are potentially unpopular. The fear of judicial populism is not merely academic is clear from the following observation of Dwivedi J. in *Kesavnanda Bharathi v Union of India*:

> ''The court is not chosen by the people and is not responsible to them in the sense in which the House of People is. However, *it will win for itself a permanent place in the hearts of the people* and augment its moral authority *if it can shift the focus of judicial review* from the numerical concept of minority protection *to the humanitarian concept of the protection of the weaker section of the people*.''[125]

It is submitted that courts should refrain from perceiving themselves as crusaders constitutionally obliged to redress all failures of democracy. Neither they have this authority nor could they achieve this goal.

Symbolic justice

Another major problem with the PIL project in India has been of PIL cases often doing only symbolic justice. Two facets of this problem could be noted here. First, judiciary is often unable to ensure that its guidelines or directions in PIL cases are complied with, for instance, regarding sexual harassment at workplace (*Vishaka* case) or the procedure of arrest by police (*D.K. Basu* case). No doubt, more empirical research is needed to investigate the extent of compliance and the difference made by the Supreme Court's guidelines.[126] But it seems that the judicial intervention in these cases have made little progress in combating sexual harassment of women and in limiting police atrocities in matters of arrest and detention.

The second instance of symbolic justice is provided by the futility of over-conversion of DPs into FRs and thus making them justiciable. Not much is gained by recognising rights which cannot be enforced or fulfilled. It is arguable that creating rights which cannot be enforced devalues the very notion of rights as trump.[127] Singh aptly notes that,

[124] Singh, ''Protecting the Rights of the Disadvantaged Groups through Public Interest Litigation'' in Singh, Goerlich and von Hauff (eds), *Human Rights and Basic Need*, p.326.

[125] *Kesavnanda Bharathi v Union of India* (1973) 4 S.C.C. 225, 948–949 (emphasis added), as quoted in Baxi, ''Taking Suffering Seriously'' (1985) *Third World Legal Studies* 107, 112. Baxi also mentions how Bhagwati J. ensured that PIL letters accepted as writ petitions came to his court: ''Taking Suffering Seriously'' (1985) *Third World Legal Studies* 107, 120.

[126] Sathe, *Judicial Activism in India*, pp.244–245.

[127] ''Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals,

> "a judge may talk of right to life as including right to food, education, health, shelter and a horde of social rights without exactly determining who has the duty and how such duty to provide positive social benefits could be enforced".[128]

So, the PIL project might dupe disadvantaged sections of society in believing that justice has been done to them, but without making a real difference to their situation.

Disturbing the constitutional balance of power

Although the Indian Constitution does not follow any strict separation of powers, it still embodies the doctrine of checks and balances, which even the judiciary should respect. However, the judiciary on several occasions did not exercise self-restraint and moved on to legislate, settle policy questions, take over governance, or monitor executive agencies. Jain cautions against such tendency:

> "PIL is a weapon which must be used with great care and circumspection; the courts need to keep in view that under the guise of redressing a public grievance PIL does not encroach upon the sphere reserved by the Constitution to the executive and the legislature."[129]

Moreover, there has been a lack of consistency as well in that in some cases, the Supreme Court did not hesitate to intrude on policy questions but in other cases it hid behind the shield of policy questions.[130] Just to illustrate, the judiciary intervened to tackle sexual harassment as well as custodial torture and to regulate the adoption of children by foreigners, but it did not intervene to introduce a uniform civil code, to combat ragging in educational institutions, to adjust the height of the Narmada dam and to provide a humane face to liberalisation-disinvestment polices. No clear or sound theoretical basis for such *selective intervention* is discernable from judicial decisions.[131]

It is also suspect if the judiciary has been (or would be) able to enhance the accountability of the other two wings of the government through PIL. In fact, the reverse might be true: the judicial usurpation of executive and legislative functions might make these institutions more unaccountable, for they know that judiciary is always there to step in should they fail to act.

to have or to do." Ronald Dworkin, *Taking Rights Seriously*, 2nd Indian Reprint (New Delhi: Universal Law Publishing, 1999), p.xi.

[128] Singh, "Protecting the Rights of the Disadvantaged Groups through Public Interest Litigation" in Singh, Goerlich and von Hauff (eds), *Human Rights and Basic Need*, p.322.

[129] Jain, "The Supreme Court and Fundamental Rights" in Verma and Kusum (eds), *Fifty Years of the Supreme Court of India*, p.86. See also Sathe, *Judicial Activism in India*, p.308; Avani Mehta Sood, "Gender Justice through Public Interest Litigation: Case Studies from India" (2008) *Vanderbilt Journal of Transnational Law* 833, 847–850.

[130] Desai and Muralidhar in Kirpal et al. (eds), *Supreme but not Infallible*, pp.176–179.

[131] One possible explanation could be: "Where, however, the PIL challenges an existing policy backed by powerful political forces, and established in the name of economic development, the Court's grasp of its fundamental rights mission becomes more unsteady." "PIL and Indian Courts" in *Combat Law* (November–December 2007), Vol.6:6.

Overuse-induced non-seriousness

PIL should not be the first step in redressing all kinds of grievances even if they involve public interest. In order to remain effective, PIL should not be allowed to become a routine affair which is not taken seriously by the Bench, the Bar, and most importantly by the masses:

> ''The overuse of PIL for every conceivable public interest might dilute the original commitment to use this remedy only for enforcing human rights of the victimised and the disadvantaged groups.''[132]

If civil society and disadvantaged groups lose faith in the efficacy of PIL, that would sound a death knell for it.

Checking the dark side

One might ask if the dark side of PIL is so visible, why has something not been done about this by the government or the judiciary? An attempt to curb the misuse of the PIL was made, though not strictly on the part of the Government, in 1996 when a private member Bill was introduced in the Rajya Sabha, the Upper House of the Indian Parliament. The Public Interest Litigation (Regulation) Bill had proposed that petitioners filing frivolous PIL cases should be ''put behind bars and pay the damages''.[133] However, the Bill—which raised concerns of interfering with judicial independence—could not receive the support of all political parties. As the Bill lapsed, this attempt to control the misuse of PIL failed.

On the other hand, the judiciary too is well-aware of the problems associated with PIL and has responded to the dark side of PIL in two ways. First, the Indian Supreme Court as well as High Courts have tried to send strong messages on a case-to-case basis whenever they noticed that the process of PIL was misused. In some cases, the courts have gone to the extent of imposing a fine on plaintiffs who abused the judicial process.[134] On a few occasions, the Supreme Court also expressed its displeasure on how the High Courts have admitted PIL cases.[135]

The second, and a more systematic, step that the Supreme Court has taken was to compile a set of ''Guidelines to be Followed for Entertaining Letters/Petitions Received by it as PIL''. The Guidelines, which were based on the full-court decision of December 1, 1988, have been modified on the orders/directions of the Chief Justice of India in 1993 and 2003. The Guidelines provide that ordinarily letter/petitions falling under one of the following 10 categories will be entertained as PIL:

[132] Singh, ''Protecting the Rights of the Disadvantaged Groups through Public Interest Litigation'' in Singh, Goerlich and von Hauff (eds), *Human Rights and Basic Need*, p.328.

[133] Desai and Muralidhar in Kirpal et al., *Supreme but not Infallible*, p.180.

[134] *Janta Dal v H.S. Chowdhary* (1992) 4 S.C.C. 305; *S.P. Anand v H.D. Deve Gowda* (1996) 6 S.C.C. 734; *Raunaq International Ltd v IVR Construction Ltd* (1999) 1 S.C.C. 492.

[135] ''In our view, in the facts and circumstances as recited above [filing a writ petition after 23 years], the writ petition was clearly not maintainable being barred by laches and negligence. The High Court ought not have entertained the writ petition much less granting such relief unknown to law.'' *Zila Parishad Aurangabad v Mirza Mahamood* Unreported February 28, 2008 Civil Appeal No.4065 of 2002.

(1) bonded labour matters;
(2) neglected children;
(3) non-payment of minimum wages;
(4) petitions from jails complaining of harassment, death in jail, speedy trial as a fundamental right, etc.;
(5) petitions against police for refusing to register a case, harassment by police and death in police custody;
(6) petitions against atrocities on women, in particular harassment of bride, bride-burning, rape, murder, kidnapping, etc.;
(7) petitions complaining harassment or torture of persons belonging to scheduled caste and scheduled tribes;
(8) petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wildlife and other matters of public importance;
(9) petitions from riot-victims; and
(10) family pensions.

The Guidelines also prescribe that petitions related to certain matters—such as related to landlord-tenant matters, service matters and admission to educational institutions—will ''not'' be admitted as PIL.[136] The PIL Cell has been entrusted the task of screening letters/petitions as per these Guidelines and then placing them before a judge to be nominated by the Chief Justice of India. As noted before, in view of the epistolary jurisdiction developed by the courts, PIL petitions need not follow the required format; a mere postcard could suffice. However, in order to balance this exceptional power/procedure, the Guidelines were amended in 2003 to provide that it,

> ''may be worthwhile to require an affidavit to be filed in support of the statements contained in the petition whenever it is not too onerous a requirement''.[137]

Despite the twin-strategy employed by the judiciary to curb the misuse of PIL, it seems that still many frivolous PIL cases reach before the courts. For example, while hearing a bunch of PILs seeking guidelines on premature release of convicts serving life imprisonment in various prisons, the Supreme Court recently expressed its frustration on the misuse of the PIL device. Noting that around 95 per cent PILs are frivolous, the Court observed that PIL has become a ''nuisance'' and that time has come to impose a ''penalty'' on those who file PIL for frivolous reasons.[138]

One possible explanation why it has proved difficult to curb the misuse of PIL could be that because the very notion of PIL is based on flexibility (i.e. relaxing the general procedures as to standing, form and evidence), it is not easy

[136] Supreme Court of India, *Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation*, p.3.
[137] Supreme Court of India, *Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation*, p.2.
[138] ''PILs becoming nuisance, time to slap penalty: SC'' in *The Indian Express*, January 29, 2008.

for the courts to keep the door open and at the same time stop busybodies at the gate. For instance, the judiciary might not like to roll-back the PIL project so as to lose its power to intervene as guardian of the interests of disadvantaged sections or to make the Government accountable in selected cases.[139] It might prefer a situation in which no single genuine PIL case is excluded, even if that results in some non-serious PIL cases being entertained. This approach is arguably reflected in the broad ambit of the above Guidelines, which seem more like facilitating rather than curtailing PIL cases. This perhaps also explains why, for example, the Supreme Court Rules do not yet deal with the PIL cases.

Conclusion

PIL has an important role to play in the civil justice system in that it affords a ladder to justice to disadvantaged sections of society, some of which might not even be well-informed about their rights. Furthermore, it provides an avenue to enforce diffused rights for which either it is difficult to identify an aggrieved person or where aggrieved persons have no incentives to knock at the doors of the courts. PIL could also contribute to good governance by keeping the government accountable. Last but not least, PIL enables civil society to play an active role in spreading social awareness about human rights, in providing voice to the marginalised sections of society, and in allowing their participation in government decision making.

As I have tried to show, with reference to the Indian experience, that PIL could achieve all or many of these important policy objectives. However, the Indian PIL experience also shows us that it is critical to ensure that PIL does not become a back-door to enter the temple of justice to fulfil private interests, settle political scores or simply to gain easy publicity. Courts should also not use PIL as a device to run the country on a day-to-day basis or enter the legitimate domain of the executive and legislature.

The way forward, therefore, for India as well as for other jurisdictions is to strike a balance in allowing legitimate PIL cases and discouraging frivolous ones. One way to achieve this objective could be to confine PIL primarily to those cases where access to justice is undermined by some kind of disability. The other useful device could be to offer economic disincentives to those who are found to employ PIL for ulterior purposes. At the same time, it is worth considering if some kind of economic incentives—e.g. protected cost order, legal aid, pro bono litigation, funding for PIL civil society, and amicus curie briefs—should be offered for not discouraging legitimate PIL cases.[140] This is important because given the original underlying rationale for PIL, it is likely that potential plaintiffs would not always be resourceful.

[139] "The need is to prevent misuse of PIL and not to criticise the process. And this is *what the courts will have to do so that misuse of PIL is prevented and proper use of it has not to be blunted*." J.S. Verma J., "The Constitutional Obligation of the Judiciary" (1997) 7 *Supreme Court Cases (Jour)* 1.

[140] See Peter Cashmen (Commissioner, Victoria Law reform Commission), *The Cost of Access to Courts*, a paper presented at the conference on "Confidence in the Courts" (Canberra, February 2007), pp.48–64, *http://law.anu.edu.au/nissl/Cashman.pdf* [Accessed November 2, 2008].