JUDICIAL ACTIVISM AND PUBLIC INTEREST LITIGATION IN INDIA

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(1) INTRODUCTION

Public Interest Litigation: The term *"Public Interest"* means the larger interests of the public, general welfare and interest of the masses ((Oxford English Dictionary 2nd Edn.) Vol.Xll) and the word *"Litigation"* means *"a legal action including all proceedings therein, initiated in a court of law with the purpose of enforcing a right or seeking a remedy."* Thus, the expression **`Public Interest Litigation'** means *"any litigation conducted for the benefit of public or for removal of some public grievance."* In simple words, public interest litigation means. any public spirited citizen can move/approach the court for the public cause (or public interest or public welfare) by filing a petition in the Supreme Court under Art.32 of the Constitution or in the High Court under Art.226 of the Constitution or before the Court of Magistrate under Sec. 133 of the Code of Criminal Procedure, 1973.

The seeds of the concept of public interest litigation were initially sown in India by Krishna Iyer J., in 1976 in *Mumbai Kamgar Sabha vs. Abdul Thai (AIR 1976 SC 1455)* and was initiated in *Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v. Union of India (AIR 1981 SC 298)*, wherein an unregistered association of workers was permitted to institute a writ petition under Art.32 of the Constitution for the redressal of common grievances. Krishna lyer J., enunciated the reasons for liberalization of the rule of Locus Standi in *Fertilizer Corporation Kamgar Union v. Union of India (AIR 1981 SC 344)* and the idea of 'Public Interest Litigation' blossomed in *S.P. Gupta and others vs. Union of India, (AIR 1982 SC 149)*.

Judicial Activism: The expression *`Judicial Activism'* signifies the anxiety of courts to find out appropriate remedy to the aggrieved by formulating a new rule to settle the conflicting questions in the event of lawlessness or uncertain laws. The Judicial Activism in India can he witnessed with

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reference to the review power of the Supreme Court under Article 32 and I (belt Courts under Article 226 of the Constitution particularly in Public Interest Litigation.

Earlier, in England there were two kinds of courts namely. Equity Courts (Court of Chancery) and Common Law Courts. Equity Courts used to decide cases applying the principles of equity i.e. Justice, Equity and good conscience. Whereas the common law courts used to decide cases basing on common law i.e. the principles' rules evolved by the Judge; during judicial pronouncements. Hence the common law is also known as the *'Judge-made-law:' The* courts of Equity and Chancery played significant role in formulating the new rules of tort. The common law originated in England and was spread in British Colonies including India. In India, almost all laws have originated from the English Common law. In the absence of existing rules for relief in certain cases and predictive procedure, the courts of equity or chancery took the initiative to draw up new rules. 'The formulation of those new rules by the then courts to settle the conflicting positions that had arisen in certain cases was denoted as *'Judicial Activism'*. The equity court and common law courts were merged with the passing of the Judicature .Act, I875.

Judicial Activism in India: The doctrine of separation of powers was propounded by the French Jurist *Montesquieu*. It has been adopted in India as well since the executive powers are vested in the President, Legislative powers in the Parliament and State Legislative Assemblies and the judicial powers in the Supreme Court and subordinate courts. However, the adoption of this principle in India is partial and not total.

This is because even though Legislature and the Judiciary are independent yet Judiciary is entrusted with implementation of the laws made by the legislature. On the other hand, in case of absence of laws on a particular issue, judiciary issues guidelines and directions for the Legislature to follow.

The executive also encroaches upon judicial power, while appointing the judges of Supreme Court and High Courts. Similarly the Judiciary, by its review power examines the law passed by legislature and the legislature on the other hand intervenes in respect of impeachment of the President of India, who is a part of the Union Executive.

As stated earlier, the Judicial Activism in India can he witnessed with reference to the review power of the Supreme Court under Art. 226 of the Constitution particularly in public interest litigation cases. The Supreme Court played crucial role in formulating several principles in public interest litigation cases. For instance, the principle of *"ABSOLUTE LIABILITY"* was propounded in *Oleum Gas Leak case*[2], *"PUBLIC TRUST DOCTRINE"* in Kamalnath Case[3] etc.

Further, the Supreme Court gave variety of guidelines in various cases of public interest litigation. E.g. Ratlam Municipality Case, Taj Trapezium Case, Ganga Pollution Case etc.

(2) RELATION BETWEEN PUBLIC INTEREST LITIGATION AND JUDICIAL ACTIVISM AND THE EMERGENCE OF PIL IN INDIA

Public interest litigation or social interest litigation today has great significance and drew the attention of all concerned. The traditional rule of *"Locus Standi"* that a person, whose right is infringed alone can file a petition, has been considerably relaxed by the Supreme Court in its recent decisions. Now, the court permits public interest litigation at the instance of the so-called "***PUBLIC-SPIRITED CITIZENS"***[4] for the enforcement of Constitutional and Legal rights. Now, any public spirited citizen can move/approach the court for the public cause (in the interests of the public or public welfare) by filing a petition:

1. In the Supreme Court under Article 32 of the Constitution of India;
2. In the High Court under Article 226 of the Indian Constitution
3. In the Court of Magistrate under Section 133 of the Code of Criminal procedure

[2] M.C. Mehta v Union of India AIR 1987 SC 965

[3] M.C. Mehta v Kamal Nath (1998) 1 SCC 388

[4] They are people of this country who do not have direct interest at stake in the PIL filed before a Court but work *Pro Bono Publico*, i.e. in the larger interests of the public and for their general welfare in good faith. Noted public-spirited citizens in India who have represented mass interests before the Supreme Court and other High Courts are *M,C. Mehta* and *Subhas Dutta*

Justice Krishna Iyer in the *Fertilizer Corporation Kamgar Union* case enumerated the following reasons for liberalization of the rule of Locus Standi:-

1. Exercise of State power to eradicate corruption may result in unrelated interference with individuals' rights.
2. Social justice wan ants liberal judicial review administrative action.
3. Restrictive rules of standing are antithesis to a healthy system of administrative action.
4. Activism is essential for participative public justice.

Therefore, a public minded citizen must be given an opportunity to move the court in the interests of the public.

Further, Bhagwati J., known as one of the pro-poor and activist judges of the Supreme Court in *S.P. Gupta vs. Union of India. (AIR 1982 SC 149)* popularly known as *"JUDGES TRANSFER CASE"*, firmly established the validity of the public interest litigation. Since then, a good number of public interest litigation petitions were filed.

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 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.[5] 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[6]. 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''.[7]Among others, the Constitution aims to

[5] 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.''

[6] 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.

[7] Although the terms ''socialist'' and ''secular'' were inserted

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).[8] These aims were not merely aspirational because the founding fathers wanted to achieve a social revolution through the Constitution.[9] 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''.[10]

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'',[11] the remedy to approach the Supreme Court directly for the enforcement of any of the Pt III rights has also been made a FR.[12] The holder of the FRs cannot waive them.[13] Nor can the FRs be curtailed by an amendment of the Constitution if such curtailment is against the basic structure of the Constitution. Some of the FRs are available only to citizens[14] while others are

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by the 42nd amendment in 1976, there were no doubts that the Constitution was both socialist and secular from the very beginning

[8] These values are expressly declared in the Preamble and form the essence of the Indian Constitution, the Indian Legal System and the Indian Polity.

[9] 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.)

[10] Granville Austin, Indian Constitution: *Cornerstone of a Nation*, p.50

[11] 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.

[12] Art. 32 of the Indian Constitution.

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

[14] 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).

available to citizens as well as non-citizens,[15] including juristic persons. Notably, some of the FRs are expressly conferred on groups of people or community.[16] Not all FRs are guaranteed specifically against the state and some of them are expressly guaranteed against non-state bodies.[17] 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.[18] The DPs find a place in Pt IV of the Constitution. Although the DPs are not justiciable,[19] 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''.[20]

After initial deviation,[21] 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.[22] The issue was put beyond any

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[15] 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).

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

[17] 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.

[18] 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 1981SC 212.

[19] The Fundamental Rights are judicially enforceable whereas the Directive Principles 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 SCJ 1.

[20] Constitution art.37

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

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’’.[23] Since then the judiciary has employed DPs to derive the contents of various FRs.[24]

The founding fathers envisaged ‘‘the judiciary as a bastion of rights and justice’’.[25] 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[26] —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.[27]

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[22] *CB Boarding & Lodging v State of Mysore* AIR 1970 SC 2042; *Kesavananda 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.

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

[24] Jain M.P., ‘‘The Supreme Court and Fundamental Rights’’ in Verma and Kusum (eds), *Fifty Years of the Supreme Court of India*, pp.65–76.

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

[26] Constitution of India 1950 arts 32 and 226

[27] 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.

(3) JUDICIAL MOULDING OF STANDING, PROCEDURE, SUBSTANCE, RELIEF

Two judges of the Indian Supreme Court (Bhagwati and Iyer JJ.)[28] 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, liberalizing the procedure to file writ petitions, creating or expanding FRs, overcoming evidentiary problems, and evolving innovative remedies.[29] 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. Realizing 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 *Judges Transfer* case held[30]: *''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.[31] Furthermore, the Supreme Court observed that the

[28] 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.

[29] 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.

[30] *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.

[31] 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.

term ‘‘appropriate proceedings’’ in Art.32 of the Constitution[32] 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.[33] This interpretation allowed the Court to develop epistolary jurisdiction by which even letters or telegrams were accepted as writ petitions.[34] 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 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, livelihood, free and compulsory education up to the age of 14 years, unpolluted environment, shelter, clean drinking water, privacy, legal aid, speedy trial, and various rights of under-trials, convicts and prisoners. 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, or to invalidate state actions, or to grant compensation for violation of FRs. 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.[37] As in most of the

[32] ‘‘The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights contained in this Part is guaranteed.’’

[33] Shukla V.N., Singh M.P.(ed), *Constitution of India*, pp.278–279.

[34] 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.

[35] *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.

PIL cases there were no immediate or quick solutions, the Court developed ''creeping'' jurisdiction thereby issuing appropriate interim orders and directions.[38] The judiciary also emphasized that PIL is not an adversarial but a collaborative and cooperative project in which all concerned parties should work together to realize the human rights of disadvantaged sections of society.[39]

(4) 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.[40] 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.

The First Phase:

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). Most of the cases related to the rights of disadvantaged sections of society 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 recognizing the rights of these people and giving directions to the government to redress the alleged violations. In short, it is

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[37] 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.

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

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

[40] 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.

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:

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 institutionalized in that several specialized NGOs and lawyers started bringing matters of public interest to the courts on a much regular basis. The breadth of issues which were 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 and regarding something that would clearly fall within the domain of the legislature. 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. The courts enforced FRs against private individuals and granted relief to the petitioner without going into the question of whether the violator of the FR was the state. The courts also took non-compliance with its orders more seriously and in some cases, went to the extent of monitoring government investigative agencies 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.

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. The courts, for instance, took resort to judicial legislation when needed, did not hesitate to reach centres of government power, 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.

The Third Phase:

*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 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 liberalization in *Delhi Science Forum*, the judiciary has shown a general support to disinvestment and development policies of the Government.[41] 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 and people displaced by the construction of dams) received in the first phase. The Supreme Court's observations such as the following also fuel these concerns:[42] ''*Socialism might have been a catchword from our history. It may be present in the Preamble of our Constitution. However, due to the liberalization 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.*''

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 ''issues 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

[41] It is suggested that in recent years the Supreme Court has been influenced by liberalization 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].

[42] State of Punjab v Devans Modern Breweries Ltd (2004) 11 SCC 26

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.

(5) PROBLEMS REGARDING THE EXERCISE OF JUDICIAL ACTIVISM THROUGH PUBLIC INTEREST LITIGATION

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.

(1) *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.*’’[43] It is critical that courts do not allow ‘‘public’’ in PIL to be substituted by ‘‘private’’ or ‘‘publicity’’ by doing more vigilant gate-keeping.

(2) *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 is facing a huge backlog of cases, it is puzzling why the courts have not done enough to stop non-genuine PIL cases. In fact, by allowing frivolous PIL plaintiffs to

[43] Upadhyay Videh, *Public Interest Litigation in India: Concepts, Cases, Concerns*, LexisNexis Butterworths, New Delhi, 2007

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 merely of an academic value''[44]. 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.

(3) *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 and this is clear from the observation of Dwivedi J. in *Kesavananda Bharati v State of Kerala:*[45] *''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*.''

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.

(4) *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[46]) or the procedure of arrest by police (*D.K. Basu* case[47]). No doubt, more empirical research is needed to investigate the extent of compliance and the difference made by the Supreme Court's guidelines. But it seems that the

[44] Ibid
[45] AIR 1973 SC 1461
[46] Vishaka v State of Rajasthan AIR 1997 SC 3011
[47] D.K..Basu v State of West Bengal AIR 1997 SC 610

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 DPSPs into FRs and thus making them *justiciable*. Not much is gained by recognizing 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. Singh aptly notes that, ''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''. 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.

(5) *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. Prof. M. P. Jain cautions against such tendency:[48] *''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.''*

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. 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 liberalization-disinvestment polices. No clear or sound theoretical basis for such *selective intervention* is discernable from judicial decisions.

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.

[48] Prof. Jain M.P., *Indian Constitutional Law*, Volume 2, 6th edn., LexisNexis Butterworths Wadhwa, Nagpur, 2010

(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:[49] ''*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 victimized and the disadvantaged groups*.'' If civil society and disadvantaged groups lose faith in the efficacy of PIL, that would sound a death knell for it.

Based on the above problems, certain solutions need to be devised and implemented by the Judiciary to ensure that the sanctity of Judicial Activism in the country is kept intact and at the same time interests of all classes of stakeholders are addressed in a proper and judicious manner.

(6) SUGGESTIONS TO CORRECT AN *"OVER-ACTIVIST"* JUDICIARY

Major steps need to be taken in order to prevent an "*over-activist"* judiciary from transgressing its limits. Some of these can be explained as follows: Public interest litigation, or PIL as it is conveniently called, has become a major and prominent segment of the jurisdiction of the Supreme Court and 21 High Courts in India. Whilst its necessity and utility in upholding the rule of law is undoubted, its extravagant and unprincipled use at times by courts has brought PIL into controversy

(1) *Relaxation must be procedural*

Much of the misapplication of the PIL jurisdiction can be avoided, if it is remembered that PIL is basically the application of the well settled principles of judicial review by courts of actions of government and public authorities, with the modification of courts allowing the petitioner(s) applicant to approach the court on behalf of other persons, who themselves are unable to come to the court because of ignorance of their rights or the difficulty and cost of litigation. In such cases,

[49] Prof. Sathe S.P., *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, Oxford University Press, UK, 2003

the court relaxes the strict rule of locus standi of the applicant and also relaxes procedural formalities. It may even entertain a letter addressed to the court by a complainant. PIL was devised as a means for redressing the basic rights of generally the poor and marginalized sections of the society, who were unable to get judicial help on their own. It must also be borne in mind that public interest litigation is not something unique to India. Other jurisdictions such as South Africa, Canada and USA[50] also have public interest litigation, though it is not described as such. It is, therefore, important to note that except for procedural relaxations, the PIL jurisdiction should not exceed the permissible limits and parameters of judicial review by the court over the actions or omissions of government, legislatures or public bodies, or transcend the basic separation of powers underlying the Constitution. Judicial review in a democratic constitution must also not supplant the normal processes of representative self-government, in which the representatives of the people make choices and policies which may not be ideal or correct, but which can be set right by the people themselves. What is not within the bounds of judicial review by courts cannot be within their reach because it comes under the description of public interest litigation before it. PIL jurisdiction is, therefore, not a unique jurisdiction by which courts can transcend their limitations to act as a body to set right actions of the government, which are believed to be wrong or could be improved. Once this basic foundation of PIL is kept in mind, the parameters of intervention in PIL are easily grasped and its misapplication can be seen and avoided.

(2) *Judicial Activism not PIL:*

Another misconception is equating PIL with judicial activism in India. Judicial activism is not PIL. A court can be judicially active or inactive irrespective of PIL. Judicial activism is a word of many shades. No person today subscribes to Bacon's[51] view that judges must only declare the law and do not make law. Such a view was rightly described as a fairy tale by a distinguished English judge Lord Reid. Judges do and must make law but not in the manner of legislatures. There is much scope for creative judicial activism in the interpretative functions of judges, on the choices inherent

[50] For instance in the USA it is known as Class Action or Social Action Litigation or Social Interest Litigation.

[51] Sir Francis Bacon is a renowned English Jurist and Philosopher who became famous for his views on the role of judiciary and the judges in a country.

in their function and in the gaps in legal rules, as has been done by superior courts in several countries for many years. The Indian Supreme Court's own creative jurisprudence of the inviolability of the basic structure of the Constitution in 1973 and the importation of non-arbitrariness in the fundamental Right of Equality, and of due process of law in the right to personal liberty in *Maneka Gandhi's case* in 1978[52], are stellar examples of how judicial function can be creative. Regrettably, this kind of creative judicial activism in Indian courts seems to have become dormant and displaced by a poor substitute of routine judicial correction and monitoring of governmental functions by courts in PIL. Judicial activism is equated with PIL mainly because it is a most convenient vehicle for bringing public grievances before courts and because the courts' orders in PIL are far-reaching and some times sensational. Once these fundamentals of judicial review are borne in mind by courts in exercising PIL jurisdiction, it can be a useful judicial process for the benefit of the public, particularly of the poor, the indigent and marginalized sections of society, whose fundamental rights are to be protected by court orders. It is the historic and constitutional duty of courts to safeguard and enforce the basic liberties and rights of individuals. A court is strongest and least vulnerable, when it grounds its interventions in enforcing the basic rights of individuals against authority. No question of the court breaching the separation of powers can arise, as it carries out its constitutional function of protecting the basic rights of individual in such cases.

(3) *Judicial Activism not Judicial Adventurism*

The origins of PIL were in such unexceptional interventions in 1970, as when the court ordered the release of bonded labourers and stopped inhuman working conditions in stone quarries and in mental asylums etc. Correctly, this jurisdiction should have been named *SAL*[53] or *SOCIAL ACTION LITIGATION* to gather its true import. It is also the court's legitimate function to enforce the law, not of each and every infraction, but in those cases where its disregard has grave consequences to the public. No question of the court overreaching its powers can arise in such cases. In matters relating to environment, where irreversible damage may be done unless the

[52] Maneka Gandhi v Union of India AIR 1978 SC 597

[53] The American equivalent of Public Interest Litigation

actions of the authorities are immediately corrected, the court may take prompt corrective measures, but not take over the administration itself or supplant the law. However, over the years, the true objective of PIL as originally conceived has been lost sight of, and it believed to be general jurisdiction for correcting government action or inaction, regardless of constraints of established principles of judicial review. As the court cannot disregard the law in judicial review or disregard the fundamental separation of powers underlying the Constitution to appropriate executive or legislative powers, PIL orders cannot disregard law; take over the administration by government or by public authorities, in the name of improving governance or preventing misuse of power. It is this aspect of misplaced judicial activism, which a bench of two judges of the Supreme Court in *Aravalli Golf Club case* [54] recently criticized in rather strong words of reprimand. The judgment was timely and has brought misplaced judicial activism into focus, but in the process it did not advert to the permissible scope of judicial intervention.

(4) *Displacing Government Administration*

It is true that there is a misconception not only in the public but also in courts about the function of judiciary under the Constitution, particularly when PIL is employed. It appears that the public has developed a syndrome of routine recourse to the courts for every perceived failure of government and the courts on their part have come to believe that it is their judicial duty to intervene in such failures by making orders for correcting or improving the government. There is a vast catalogue of such micro-managing orders made by the Supreme Court itself, which cannot be justified by any principle of judicial review. They include orders for making roads in hilly areas, wearing of helmets and seat belts to avoid accidents in cities, cleanliness in housing colonies, disposal of garbage, control of traffic, control of unmanned railway crossings, prevention of pollution of rivers, action plans to control and prevent menace of monkeys in cities, control of breeding of animals in zoos, measures to prevent ragging of students, collection and storage of blood in blood banks, control of noise and banning of fire crackers[55]. At times, committees set up and empowered

[54] Divisional Manager, Aravali Golf Club & Anr. Vs. Chander Hass & Anr (2008) 1 SCC 683

[55] In pursuance of most of these orders, the bodies controlling and regulating the respective activities have made laws for example, after ragging was declared a criminal offence as a result of a PIL filed before the Supreme Court in 2001,

by courts have effectively displaced government's administration in those areas. Such PIL petitions are filed in the Supreme Court in its original jurisdiction under the Article 32 of the Constitution. Article 32 is for enforcing fundamental rights. It is hard to find any genuine enforcement of any fundamental right in such PIL petitions. The petitions make a formal invocation of Article 14 in its liberal interpretation of non-arbitrariness or of Article 21 in its vast expanse of a right to life. Article 32 seems to have lost its meaning for all practical purposes.

At times, matters beyond the judicial sphere and competence of the court have been entertained. In 1993, the Supreme Court even ordered that provision of food of 1200 calorific value should be supplied to hostages in an ongoing military operation in Kashmir. The court has professed to monitor a highly technical engineering scheme of interlinking of rivers in India and of genetic modified foods. In the field of higher education, the court's interventions have created a maze of complex regulations by successive cases, familiar only to lawyers, and baffling to educationists, parents and students. The court's scheme for admissions in private medical colleges in the Unnikrishnan case in 1993, which was in distinguishable from legislation, prevailed for nine years before it suffered an inglorious end, when the court itself struck it down as "unconstitutional" in *T.M.A. Pai's case in 2002*[56], causing considerable confusion in admissions in professional colleges. Following upon the *Aravalli Golf Club case*[57], a larger Bench of the Supreme Court is shortly to consider the parameters of PIL. This is not new. Way back in 1983, a Bench of the court had made reference to a larger Bench, but nothing came of it. If the fundamental premise of public interest litigation (or more appropriately, social action litigation), coupled with the premise that PIL cannot go beyond the limitations of judicial review and must give due recognition to the separation of powers under the Constitution, is borne in mind, a formulation of the instances where PIL may or may not used, seems unnecessary. It may even be counterproductive, as it is never good to distill judicial power by enumeration. For such matters, Justice Oliver Wendell Holmes once said, *"We need to have education in the obvious"*.

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the UGC (University Grants Commission) which administers higher education in India adopted and brought into force the *2009 Regulations to curb the Menace of Ragging in Higher Educational Institutions.*

[56] (2002) 8 SCC 481

[57] Supra n. 54