JUDICIAL ACTIVISM AND PUBLIC INTEREST LITIGATION IN INDIA AND
ISSUES INVOLVED

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INTRODUCTION

Public Interest Litigation: The term “Public Interest” means the larger interests of the public, general welfare and interest of the masses\(^2\) 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,\(^3\) and was initiated in Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v. Union of India,\(^4\) 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 Iyer J., enunciated the reasons for liberalization of the rule of Locus Standi in Fertilizer Corporation Kamgar Union v. Union of India,\(^5\) and the idea of ‘Public Interest Litigation’ blossomed in S.P. Gupta and others vs. Union of India.\(^6\)

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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1 LLM Scholar at Pondicherry University
2 Oxford English Dictionary 2nd Edn. Vol. XII
3 AIR 1976 SC 1455
4 AIR 1981 SC 298
5 AIR 1981 SC 344
6 AIR 1982 SC 149
reference to the review power of the Supreme Court under Article 32 and I (belts 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, 1875.

**STATEMENT OF PROBLEM**

As the Indian courts entertain the public interest litigation with sprit, the rule of locus standi has been relaxed and the number of cases increased which result in overburden on the courts which result in impact on delay in deciding normal cases.

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. How far judicial activism is utilizing by the judiciary under the power of judicial review within the preview of articles 32,136,226,227 of Indian constitution.
SCOPE OF STUDY

As per the complexities of the Indian judicial system it is very much important to study how public interest litigation awareness can be improved. Also study the overcome challenges facing by PIL and how judiciary will be made active and not over active, and by considering the right of people to file PIL in which cases and the problems discussed in this research this project could be very important to concern.

OBJECTIVES

1. To study the problems facing by PIL in India.
2. To study Relation between PIL and Judicial Activism and Emergence of PIL in India.
3. To study the role of judicial activism on environment jurisprudence in India.
4. To study the role of PIL in environment protection.
5. To study the phases of PIL.
6. To study the problems regarding the exercise of judicial activism through PIL.

HYPOTHESIS

1: What is the role of PIL in making public offices accountable and transparent?

2: What is the role of PIL and judicial activism in promoting social justices?

3: What is the role of judicial activism to relax the rule of locus standi in PIL?

4: How far judiciary is active in promoting public justices?
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 be 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\(^7\), “PUBLIC TRUST DOCTRINE” in Kamalnath Case\(^8\) 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.

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\(^7\) M.C. Mehta v Union of India AIR 1987 SC 965
\(^8\) M.C. Mehta v Kamal Nath (1998) 1 SCC 388
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" 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

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 wants 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.

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9 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.
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. 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.

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”. 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). These aims were not merely aspirational because the founding fathers wanted to achieve a social revolution through the Constitution. 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”.

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

10 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.”


12 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.

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

14 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.)

15 Granville Austin, Indian Constitution: Cornerstone of a Nation, p.50
substance’’,\textsuperscript{16} the remedy to approach the Supreme Court directly for the enforcement of any of the Part III rights has also been made a FR\textsuperscript{17}. The holder of the FRs cannot waive them\textsuperscript{18}. 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\textsuperscript{19} while others are available to citizens as well as non-citizens\textsuperscript{20} including juristic persons. Notably, some of the FRs are expressly conferred on groups of people or community\textsuperscript{21}. Not all FRs are guaranteed specifically against the state and some of them are expressly guaranteed against non-state bodies\textsuperscript{22}. 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”\textsuperscript{23}

The expression “‘other authorities’” has been expansively interpreted, and any agency or instrumentality of the state will fall within its ambit\textsuperscript{23}. The DPs find a place in Part IV of the Constitution. Although the DPs are not justiciable\textsuperscript{24}, they are, “nevertheless fundamental in the

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\item[\textsuperscript{16}] 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.
\item[\textsuperscript{17}] Art. 32 of the Indian Constitution.
\item[\textsuperscript{18}] Basheshar Nath v CIT AIR 1959 SC 149; Nar Singh Pal v Union of India AIR 2000 SC 1401.
\item[\textsuperscript{19}] 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).
\item[\textsuperscript{20}] See, for example, Constitution art.14 (right to equality); art.15 (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).
\item[\textsuperscript{21}] See, e.g. Constitution arts 26, 29 and 30.
\item[\textsuperscript{22}] 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.
\item[\textsuperscript{23}] 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.
\item[\textsuperscript{24}] 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.
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governance of the country and it shall be the duty of the state to apply these principles in making laws.”  

After initial deviation, 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. 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.” Since then the judiciary has employed DPs to derive the contents of various FRs. The founding fathers envisaged “the judiciary as a bastion of rights and justice.” 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—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.
JUDICIAL MOULDING OF STANDING, PROCEDURE, SUBSTANCE, RELIEF

Two judges of the Indian Supreme Court (Bhagwati and Iyer JJ)\(^{33}\) 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\(^{34}\). 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\(^{35}\): “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\(^{36}\). Furthermore, the Supreme Court observed that the term “appropriate proceedings” in Art.32 of the Constitution\(^{37}\) does not refer to the form but to the

\(^{33}\) 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.


\(^{36}\) 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.

\(^{37}\) “The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights contained in this Part is guaranteed.”
purpose of proceeding: so long as the purpose of the proceeding is to enforce a FR, any form will do.\textsuperscript{38} This interpretation allowed the Court to develop epistolary jurisdiction by which even letters or telegrams were accepted as writ petitions.\textsuperscript{39} 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;\textsuperscript{40} it ‘‘includes right to live with human dignity and all that goes along with it’’.\textsuperscript{41}

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.\textsuperscript{42} As 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.\textsuperscript{43} The judiciary also emphasized that PIL

\textsuperscript{38} Shukla V.N., Singh M.P.(ed), Constitution of India, pp.278–279.

\textsuperscript{39} 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.


\textsuperscript{41} Francis Coralie v Union Territory of Delhi AIR 1981 SC 746, 753.

\textsuperscript{42} 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.

\textsuperscript{43} Baxi, ‘‘Taking Suffering Seriously’’ (1985) Third World Legal Studies 107, 122
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\textsuperscript{44}.

\textbf{PROBLEMS FACED BY PUBLIC INTEREST LITIGATION IN INDIA}

At the time of independence, court procedure was drawn from the Anglo-Saxon system of jurisprudence. The bulk of citizens were unaware of their legal rights and much less in a position to assert them. And as a result, there was hardly any link between the rights guaranteed by the Constitution of Indian Union and the laws made by the legislature on the one hand and the vast majority of illiterate citizens on the other. However, this scenario gradually changed when the post emergency Supreme Court tackled the problem of access to justice by people through radical changes and alterations made in the requirements of locus standi and of party aggrieved. Prior to 1980s, only the aggrieved party could personally knock the doors of justice and seek remedy for his grievance and any other person who was not personally affected could not knock the doors of justice as a proxy for the victim or the aggrieved party. Public Interest Litigation as it has developed in recent years marks a significant departure from traditional judicial proceedings. The court is now seen as an institution not only reaching out to provide relief to citizens but even venturing into formulation policy which the state must follow.

The splendid efforts of Justice P N Bhagwati and Justice V R Krishna Iyer were instrumental of this juristic revolution of eighties to convert the apex court of India into a Supreme Court for all Indians.

Public Interest Litigation (PIL) has been an invaluable innovative judicial remedy. It has translated the rhetoric of fundamental rights into living reality for at least some segments of our exploited and downtrodden humanity. Under trial prisoners languishing in jails for inordinately long periods, inmates of asylums and care-homes living in sub-human conditions, children working in hazardous occupations and similar disadvantaged sections.

\textsuperscript{44} See Sathe, \textit{Judicial Activism in India}, pp.207–208, 235–237.
But the development of Public Interest Litigation (PIL) in the country has very recently uncovered its own pitfalls and drawbacks.

1. The genuine causes and cases of public interest have in fact receded to the background and irresponsible PIL activists all over the country have started to play a major but not a constructive role in the arena of litigation. In a recent case the court while dismissing an ostensible PIL against the sale of a plot of land through public auction, held that the matter had not been raised in public interest at all, but to ventilate a private grievance. Of late, many of the PIL activists in the country have found the PIL as a handy tool of harassment since frivolous cases could be filed without investment of heavy court fees as required in private civil litigation and deals could then be negotiated with the victims of stay orders obtained in the so-called PILs. Just as a weapon meant for defense can be used equally effectively for offence, the lowering of the locus standi requirement has permitted privately motivated interests to pose as public interests. The abuse of PIL has become more rampant than its use and genuine causes either receded to the background or began to be viewed with the suspicion generated by spurious causes mooted by privately motivated interests in the disguise of the so-called public interests. Every matter of public interest cannot be the basis of a PIL, e.g. increase in the price of onions or in railway fares or the dilapidated condition of railway stations or the Red Fort or trains not running on time. Over the years, PIL has degenerated into Private Interest Litigation, Political Interest Litigation, and above all, Publicity Interest Litigation. Weakness for publicity affects judges, lawyers and litigants alike.

2. The framers of Indian constitution did not incorporate a strict doctrine of separation of powers but envisaged a system of checks and balances. Policy making and implementation of policy are conventionally regarding as the exclusive domain of the executive and the legislature. The power of judicial review cannot be used by the court to usurp or abdicate the powers of other organs. PIL in practice, however, tends to narrow the divide between the roles of the various organs of government and has invited controversy principally for this reason. The court has sometime even obliterated the distinction between law and
policy. The approach of the court in policy matters is to ask whether the implementation or non-implementation of the policy result in a violation of fundamental rights. In a leading case, the court explained how despite the enactment of Environment (protection) Act, 1986, there had been a considerable decline in the quality of environment. Any further delay in the performance of duty by the central government cannot, therefore, be permitted. The court, however, required the central government to indicate what steps it had taken thus far and also place before it the national policy for the protection of environment. The law and policy divide was obliterated in vishaka which was a PIL concerning sexual harassment of women at work place. A significant feature of this decision was the courts readiness to step in where the legislature had not. The court declared that till the legislature enacted a law consistent with the convention on the Elimination of All Forms of Discrimination against Women which India was a signatory, the guidelines set out by the court would be enforceable. However, in the Delhi Science Forum v Union of India where the government of India telecommunication policy was challenged by a PIL the court refused to interfere with the matter on the ground that it concerned a question of policy. PILs that have sought prohibition on sale of liquor or recognition of a particular language as the national language or the introduction of a uniform civil code have been rejected on the basis that these were matters of policy. The court may refuse to entertain a PIL if it finds that the issues raised are not within the judicial ambit or capacity. Thus, a petition seeking directions to the central government to preserve and protect the Gyanvapi Masjid and the Vsihwanath temple at Varanasi as well as the Krishna temple and Idgah at Mathura was rejected. Despite such observations the court has not adopted a uniform and consistent approach in dealing with its emerging role as policy maker. While in some cases, the court has expressed its reluctance to step into the legislative field, in others it has laid down detailed guidelines and explicitly formulated policy.

3. The flexibility of procedure that is a character of PIL has given rise to another set of problems. It gives an opportunity to opposite parties to ascertain the precise allegation and respond specific issues. The PIL relating to depletion of forest cover is a case in pint. The petition, as originally drafted and presented, pertained to the arbitrary felling of Khair trees in Jammu and Kashmir. The PIL has now been enlarged by the court to encompass all forests
throughout India. Individual States, therefore, will not be able to respond to the original pleading as such, since it may not concern them at all. The reports given by court appointed commissioners raise problems regarding their evidentiary value. No court can found its decision on facts unless they are proved according to law. This implies the right of an adversary to test them by cross-examination or atleast counter-affidavits. In such instances the affected parties may have misgivings about the role of the court.

4. In the political arena too, the debate over the limits of judicial activism, particularly in the field of PIL, has been vigorous. The attempt by the judiciary through PILs to enter the area of policy making and policy implementation has caused concern in political circles. A private members bill, entitled Public Interest Litigation (Regulation) Bill, 1996 was tabled in Rajya Sabha. According to it the PIL was being grossly misused. Moreover, PIL cases were being given priority over other cases, which had remained pending in the court for years. It was urged that if a PIL petition failed or was shown to be mala fide the petitioner should be put behind bars and pay the damages. Although the bill lapsed, the debate in parliament revealed some of the criticism and suspicion that PIL had begun to attract.

5. The credibility of PIL process is now adversely affected by the criticism that the judiciary is overstepping the boundaries of its jurisdiction and that it is unable to supervise the effective implementation of its orders. It has also been increasingly felt that PIL is being misused by the people agitating for private grievance in the grab of public interest and seeking publicity rather than espousing public cause. The judiciary has itself recognized and articulated these concerns periodically. A further concern is that as the judiciary enters into the policy making arena it will have to fashion new remedies and mechanisms for ensuring effective compliance with its orders. A judicial system can suffer no greater lack of credibility than a perception that its order can be flouted with impunity. This court must refrain from passing orders that cannot be enforced, whatever the fundamental right may be and however good the cause. It serves no purpose to issue some high profile mandamus or declaration that can remain only on paper. Although usually the Supreme Court immediately passes interim orders for relief, rarely is a final verdict given, and in most of the cases, the follow-up is poor.
To regulate the abuse of PIL the apex court has framed certain guidelines (to govern the management and disposal of PILs.) The court must be careful to see that the petitioner who approaches it is acting bona fide and not for personal gain, private profit or political or other oblique considerations. The court should not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain political objectives. At present, the court can treat a letter as a writ petition and take action upon it. But, it is not every letter which may be treated as a writ petition by the court. The court would be justified in treating the letter as a writ petition only in the following cases-

(i) It is only where the letter is addressed by an aggrieved person or
(ii) A public spirited individual or
(iii) A social action group for enforcement of the constitutional or the legal rights of a person in custody or of a class or group of persons who by reason of poverty, disability or socially or economically disadvantaged position find it difficult to approach the court for redress. Even though it is very much essential to curb the misuse and abuse of PIL, any move by the government to regulate the PIL results in widespread protests from those who are not aware of its abuse and equate any form of regulation with erosion of their fundamental rights.

In his recent write up, Mr. Soli Sorabji, the former Attorney General while applauding the liberalization of the rule of locus standi by the Supreme Court of India benefiting under-trial prisoners languishing in jail for inordinately long periods, inmates of asylums and care homes living in sub-human conditions, children working in hazardous occupation and similar disadvantaged persons, has lamented that PIL is being abused with increasing frequency and that over the years. He made the following suggestions:

i. Reject dubious PIL at the threshold, and in appropriate case with exemplary costs,

ii. In cases where important projects or socio-economic regulations are challenged after gross delay, such petitions should be thrown out at the very threshold on the ground of latches. Just because a petition is termed as PIL does not mean that ordinary principles applicable to litigation will not apply. Latches is one of them. In the U.K., for enabling an applicant seeking an order of
judicial review the applicant has to satisfy the test of sufficient interest in the matter to which the application relates. For satisfying this test an applicant need not have a direct legal or financial interest but a mere busy body will not have sufficient interest. It is, however, not necessary that applicants interest should be different from that of an ordinary member of the public. An applicant having no personal connection with the dispute, in the traditional sense of locus standi, may be allowed standing, if in its discretion, the court considers the case to be of sufficient public importance. The courts have held in the U.K. that standing should usually be considered along with the merits of the case and not as a preliminary issue.

**THE ONTARIO LAW REFORM COMMISSION REPORT**

On the law of Standing, 1989, recommended that any person should be able to commence a proceeding unless a party satisfies the Court that there exist factors against proceeding that outweigh the factors in favour of the proceedings. The factors to be considered by the court would include:

i. whether the issue is trivial;

ii. In case where the applicant does not have a personal, proprietary or pecuniary interest the number of people affected;

iii. Whether another reasonable and effective method exists to raise the issues that are sought to be litigated;

iv. Whether another proceeding has been instituted against the same opponent in which the same issues arise and the interests of the applicant could be met by intervening in those proceedings and it is reasonable to expect the applicant to do so;

v. whether to proceed would be unfair to persons affected.

Public Interest Litigants fear that implementation of these suggestions will sound the death-knell of the people friendly concept of PIL. However, it cannot be denied that PIL activists should be responsible and accountable. It is also notable here that even the Consumers Protection Act, 1986 has been amended to provide compensation to opposite parties in cases of frivolous complaints.
made by consumers. PIL requires rethinking and restructuring. Overuse and abuse of PIL will make it ineffective. PIL has translated the rhetoric of fundamental rights into living reality for at least some segments of our exploited and downtrodden humanity. Under trial prisoners languishing in jails for inordinately long periods, inmates of asylums and care-homes living in sub-human conditions, children working in hazardous occupations and similar disadvantaged sections. Hence, any change to improve it further should be encouraged and welcomed.

ROLE OF PIL IN ENVIRONMENT PROTECTION

The Indian judiciary adopted the technique of public interest litigation for the cause of environmental protection in many cases. The Supreme Court & High Courts shaded the inhibitions against refusing strangers to present the petitions on behalf of poor and ignorant individuals. The basic ideology behind adopting PIL is that access to justice ought not to be denied to the needy for the lack of knowledge or finances. In PIL a public spirited individual or organization can maintain petition on behalf of poor & ignorant individuals.

In the area of environmental protection, PIL has proved to be an effective tool. In Rural Litigation and Entitlement Kendra vs. State of U.P. 45 the Supreme Court prohibited continuance of mining operations terming it to be adversely affecting the environment.

In Indian Council for Enviro-Legal Action vs. Union of India 46, the Supreme Court cautioned the industries discharging inherently dangerous Oleum and H acid. The court held that such type of pollution infringes right to wholesome environment and ultimately right to life.

In another case M.C. Mehta vs. Union of India 47 the Supreme Court held that air pollution in Delhi caused by vehicular emissions violates right to life under Art. 21 and directed all commercial vehicles operating in Delhi to switch to CNG fuel mode for safeguarding health of the people.

45 AIR 1985 SC 652
46 AIR 1996 SC 1446
47 AIR 2001 SC 1948
In *Church of God (Full Gospel) in India vs. KKR Majestic Colony Welfare Association*\(^{48}\) the Supreme Court observed that noise pollution amounts to violation of Art.21 of the Constitution.

In landmark case *Vellore Citizens' Welfare Forum vs. Union of India*\(^{49}\) the Supreme Court allowed standing to a public spirited social organization for protecting the health of residents of Vellore. In this case the tanneries situated around river Palar in Vellore (T.N.) were found discharging toxic chemicals in the river, thereby jeopardizing the health of the residents. The Court asked the tanneries to close their business.

In this manner, our judiciary has used the tool of PIL quite effectively for the cause of environmental protection. But the judiciary has shown wisdom in denying false petitions seeking to advance private interests through PIL as evident from the decision of the Supreme Court in *Subhash Kumar vs. State of Bihar*\(^{50}\). Hence, PIL has proved to be a great weapon in the hands of higher courts for protection of environment & our judiciary has certainly utilized this weapon of PIL in best possible manner.

**PHASES OF PUBLIC INTEREST LITIGATION**

At the risk of over-simplification and overlap, the PIL discourse in India could be divided, in my view, into three broad phases.\(^{51}\) 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.

\(^{48}\) AIR 2000 SC 2773
\(^{49}\) AIR 1996 SC 2715
\(^{50}\) AIR 1991 SC 420
\(^{51}\) 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
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 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.
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. 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

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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?”

displaced by the construction of dams) received in the first phase. The Supreme Court’s observations such as the following also fuel these concerns:53 ‘‘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 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.

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.’’\textsuperscript{54} 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 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’’\textsuperscript{55}. 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 \textit{Kesavananda Bharati v State of Kerala}:\textsuperscript{56} ‘‘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.

\textsuperscript{54} Upadhyay Videh, Public Interest Litigation in India: Concepts, Cases, Concerns, LexisNexis Butterworths, New Delhi, 2007
\textsuperscript{55} \textit{Ibid}
\textsuperscript{56} \textit{AIR} 1973 SC 1461

\textbf{Journal On Contemporary Issues of Law (JCIL) Vol. 3 Issue 1}
\textit{ISSN 2455-4782}
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\textsuperscript{57}) or the procedure of arrest by police (D.K. Basu case\textsuperscript{58}). 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 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:\textsuperscript{59} “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.

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

\textsuperscript{57} Vishaka v State of Rajasthan AIR 1997 SC 3011
\textsuperscript{58} D.K..Basu v State of West Bengal AIR 1997 SC 610
\textsuperscript{59} Prof. Jain M.P., Indian Constitutional Law, Volume 2, 6th edn., LexisNexis Butterworths Wadhwa, Nagpur, 2010
importantly by the masses.\textsuperscript{60} “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.

CONCLUSION

The judicial activism manifested in the strategy of PIL paves the way for the participation of public spirited and enlightened people in India's development process and displays the potentiality of the legal system to offer justice to the poor and the oppressed. The strategy has brought to light many medieval practices still prevalent in India such as relief to prisoners, plight of women in protective homes, victims of the flesh trade and children of juvenile institutions and exploitation of the bonded and migrant labourers, untouchables, tribal etc. The attempt has been made to show how in taking up such cases, the Supreme Court is emerging as the guardian of the rights and liberties of the victims of repression, cruelty and torture. Hence the Supreme Court of India in its activist role vis-a-vis PIL has taken a goal-oriented approach in the interest of justice by simplifying highest technical and anachronistic procedures. By enlarging the scope of Article 32 and by accelerating the process of socio-economic revolution, it has brought justice to the doorstep of the weak, the unprivileged and exploitative section of society and therefore, has revolutionised constitutional jurisprudence in the 1980's.

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

\textsuperscript{60} Prof. Sathe S.P., Judicial Activism in India: Transgressing Borders and Enforcing Limits, Oxford University Press, UK, 2003
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 marginalized 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. This is important because given the original underlying rationale for PIL, it is likely that potential plaintiffs would not always be resourceful.
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