



## Judicial Activism and Public Interest Litigation

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### Abstract:

*Judicial activism expanded mainly because of Public Interest Litigation (PIL). Until the emergence of PIL, justice was a remote reality for the socially and economically backward sections of society. The traditional rule of 'locus standi' (the right to file a petition in a court) was that judicial remedy could be sought only by those who had suffered some legal wrong. The Supreme Court relaxed the strict rule of locus standi, because the poor masses have neither the means nor the will to approach the court of law. According to the changed rule, any public-spirited individual or institution can move the court on behalf of the poor, the exploited and the oppressed. The Court has only to satisfy itself that the person or the institution is acting in good faith, and not out of vengeance or personal gain. The PIL led to the so-called 'epistolary jurisdiction' also i.e. the court could recognize even a postcard or a letter written to it as a writ petition.*

**Keywords:** Constitution, Judicial Activism, Public Interest Litigation (PIL), Supreme Court in India, Locus standi

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 interest of the public or public welfare) by filling 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 Kangar Union case enumerated the following reasons for liberalization of the rule of Locus Standi :-

4. Exercise of State power to eradicate corruption may result in unrelated interference with individuals' rights
5. Social justice warrants liberal judicial review administrative action
6. Restrictive rules of standing are antithesis to a healthy system of administrative action
7. 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 the 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 social constituents. PIL in India has been a part of the constitutional litigation and not civilian 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<sup>1</sup>. 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”<sup>2</sup>. Among others, the Constitution aims to secure to all its citizens justice (social, economic and political), liberty (of thoughts, expression, belief, faith and worship) and equality (of status and of opportunity).<sup>3</sup> These 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”.<sup>4</sup>

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”<sup>5</sup>, the remedy to approach the Supreme Court directly for the enforcement of any of the Pt III rights has also been made a FR.<sup>6</sup> The holder of the FRs cannot waive them.<sup>7</sup> 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 while others are available to citizens as well as non-citizens, including juristic persons. Notably, some of the FRs are expressly conferred on groups of people or community.<sup>8</sup> Not all FRs are guaranteed specifically against the state and some of them are expressly guaranteed against non-state bodies. 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 the ambit. The DPs find a place in Pt IV of the Constitution. Although the DPs are not justiciable, 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”.<sup>9</sup>

<sup>1</sup> See Sheetal B. Shah, “Illuminating the Possible in the Developing World: Guaranteeing the Human Rights to Health in India” (1999) 32, *Vanderbilt Journal of Transnational Law* 435, 463.

<sup>2</sup> 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.

<sup>3</sup> These values are expressly declared in the Preamble and form the essence of the Indian Constitution, the Indian Legal System and the Indian Polity.

<sup>4</sup> Granville Austin, *Indian Constitution: Cornerstone of a Nation*, p.50.

<sup>5</sup> 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

<sup>6</sup> Art. 32 of the Indian Constitution.

<sup>7</sup> *Bheshar Nath v CIT* AIR 1959 SC 149; *Nar Singh Pal v Union of India* AIR 2000, SC 1401.

<sup>8</sup> See, e.g. Constitution arts 26, 29 and 30.

<sup>9</sup> Constitution art. 37

After initial deviation,<sup>10</sup> 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.”<sup>11</sup> Since then the judiciary has employed DPs to derive the contents of various FRs.<sup>12</sup>

The founding fathers envisaged “the judiciary as a business of rights and justice”<sup>13</sup>. An independent judiciary armed with the power of judicial review was the constitutional device chosen to achieve its objective. The power to enforce the FRs was conferred on both the Supreme Court and the High Courts<sup>14</sup> - the courts that have entertained all the PIL cases. The judiciary can test only the validity of laws and executive action 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.

### **1. Problems Concerning the Exercise of Judicial Activism through Public Interest Litigation**

It seems that the misuse of PIL in India, which started in the 1900s, 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. Almost any issue is presented to the courts in the guise of public interest because of the allurements that 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 requirements 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 garb of public interest and seeking publicity rather than espousing public causes.”<sup>15</sup> 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 Court 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 following 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”<sup>16</sup>. 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 issue in hand as PIL.

<sup>10</sup> *State of Madras v Champakam Dorairajan* AIR 1951 SC 226.

<sup>11</sup> *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789, 1806.

<sup>12</sup> 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.

<sup>13</sup> Austin, *Cornerstone of a Nation*, p. 175.

<sup>14</sup> *Constitution of India* 1950 arts 32 and 226

<sup>15</sup> Upadhyay Vidya, *Public Interest Litigation in India: Concepts, Cases, Concerns*, LexisNexis Butterworths, New Delhi, 2007.

<sup>16</sup> *Ibid*

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 observations of Dwivedi J. in *Kesavananda Bharati v State of Kerala*:<sup>17</sup> "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 concepts 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*<sup>18</sup>) or the procedure of arrest by police (*D. K. Basu case*<sup>19</sup>). 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 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 fatality 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 section of the 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 power, 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<sup>20</sup>. "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 policies. No clear or sound theoretical basis for such selective intervention is discernible 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

<sup>17</sup> AIR 1973 SC 1461

<sup>18</sup> *Vishaka v State of Rajasthan* AIR 1997 SC 3011

<sup>19</sup> *D. K. Basu v State of West Bengal* AIR 1997 SC 610

<sup>20</sup> Prof. Jain M. P., *Indian Constitutional Law*, Volume 2, 6<sup>th</sup> edn. LexisNexis Butterworths Wadhwa, Nagpur, 2010.

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.

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:<sup>21</sup> “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 interest of all classes of stakeholders are addressed in a proper and judicious manner.

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<sup>21</sup> Prof Sathe M. P., *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, Oxford University Press, UK, 2003.