INDIAN PUBLIC INTEREST LITIGATION
LOCATING JUSTICE IN STATE LAW

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I. INTRODUCTION

Such is the disillusionment with the state (formal) legal system that it is no longer demanded of law to do justice; if justice perchance is done, we congratulate ourselves for being fortunate. The Court is perceived as an arena for quibbling for men who can afford it while legality is feared as a complex notion that rents state power to legitimatise the taking away of something.

But then, we are informed by Marxists[1] that law in a liberal capitalist society was never meant to do justice; rather it is a political tool used by the dominant class to replicate prevailing economic relations or alter them to its advantage. State ideology views an individual both as an abstract self-determining personality voluntarily entering into transactions as well as an 'empirical being' constituted by a bundle of capacities - an alienable commodity. Empirical beings possess equal formal rights but since they are situated in different socio-economic classes and possess unequal resources and opportunities, the rights they enjoy are necessarily unequal. Individuals, under the illusion of neutrality of law, abide by abstract and supposedly impersonal rules applied by the state (an impersonal institution distinct from civil society possessing centralised authority and monopoly of violence; the purported impersonality being, of course, purely academic) that cater to the need of 'free market' for stability, predictability and security of ownership of property.

It was this concept of law that was 'gifted' to the colonies in order to 'civilise' the 'primitive natives', who were presumed to be living in barbaric and chaotic conditions without a history of their own. Since the 'primitive natives' were viewed as legal non-persons, law made the whole of the native society deviant, or always potentially deviant, never secure in any aspect from supervision, direction or correction'.[2] If we summon the audacity to analyse the Rule of Law from the stand-point of the colonised, it is apparent that law was an instrument of injustice. This was less evident in nascent western

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1. For Marxist approaches see generally M. Cain & A. Hunt, MARX AND ENGELS ON LAW (1979); T. Campbell, THE LEFT AND RIGHTS : A CONCEPTUAL ANALYSIS OF THE IDEA OF SOCIALIST RIGHTS (1983); H.Collins, MARXISM AND LAW (1982); P. Phillipps, MARX AND ENGELS ON LAW AND LAWS (1980).

2. P. Fitzpatrick, THE MYTHOLOGY OF MODERN LAW 111 (1992).

capitalist democracies being nourished by colonialism where abundant wealth assuaged social disharmony and conflict. However, with the gap between the 'haves' and 'have-nots' increasing even in Western societies today, the role of law in cementing prevailing economic relations has surfaced. Ironically, the first reaction in some countries[3] to administrative and legislative sclerosis was to approach the Court to undertake institutional reform. The Court's purported virtues of innocence of politics, of bureaucratic rigidity, of self-serving discretion and of partiality to dominant class interests captured the imagination of liberal thinkers who pleaded for judicial activism to cure institutional malaise. However, once the Court stepped out from behind the protective shield of the 'limits of the law', it made itself vulnerable to charges of corruption, nepotism and political bias. The loss of credibility forced it to return to its traditional impersonal role, but only after having underscored the need of locating the site of social reform outside the formal legal system.

The late 1970's marked a discernible shift from legal centralism to legal pluralism.[4] Having realised that social conduct was regulated by the interaction of normative orders (both formal and informal), notions of popular justice, community justice and distributive (social) justice (simplistically denoted in this article by the term 'informal justice') were sought to be institutionalised though outside the sphere of the formal legal system and in opposition to it. It was reasoned that 'just as health is not found primarily in hospitals...so justice is not primarily to be found in official justice-dispensing institutions'.[5] This approach unsettled several assumptions underlying the institution of law.

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3. For example, in the U.S., the notion of using state law as an instrument of social change was in early 1960's 'a sober manifestation of the movement of social reform based on progressive values - social meliorism, optimism and confidence in the efficacy of change introduced from the top of the social structure' (R. Gaskins, *Second Thoughts on 'Law As An Instrument of Social Change,'* 6/2 LAW AND HUMAN BEHAVIOUR 153 (1982)). This optimism was shortlived : by late 1970's, scholarly, journalistic and political commentary became increasingly skeptical of the legitimacy of judicial activism as a strategy to usurp administrative, legislative and policy functions. Moreover, the Court had, in its attempt to cure institutional malaise, itself started to exhibit the features of the very institutions it had set out to check.

4. Legal pluralism, the study of different social orders which interact to create what B. D. S. Santos (*Law: A Map of Misreading : Towards a Postmodern conception of law,* 14 JOURNAL OF LAW & SOCIETY 279 (1987)) terms as 'interlegality' that governs, in practice, the conduct of individuals, is not a new discipline: from early twentieth century onwards, the curious European mind has been baffled as to how the 'primitive natives' could possibly have maintained any form of social order without the 'civilising effect' of European colonial law. These studies, however, focussed on the impact of the introduction of European law in reshaping social orders in colonised societies by superimposing itself on 'customary, folk or indigenous' law, the latter being a construction of colonialism itself. Such law was a distorted interpretation of normative orders regulating the colonised society; the distortions occurring often by its very codification or at times by the 'repugnancy clause' (S.E. Merry, *Legal Pluralism,* 22/5 LAW & SOCIETY REVIEW 875 (1988)). For an account of the distortions created in the highly developed ancient Indian legal system, see M. Galanter, LAW AND SOCIETY IN MODERN INDIA 21-25 (1989).

5. M. Galanter, *Justice in Many Rooms : Courts, Private Ordering and Indigenous Law,* 19/2 JOURNAL OF LEGAL PLURALISM 17 (1981).

Health is not created solely by doctors, rather it flourishes in their absence. Doctors seem to restore health knowing that they have an imperfect understanding of what causes and sustains health; despite good intentions, the work of doctors may be inimical to health. The extension of this metaphorical logic to law reinforced the view that legal centralism was part of the problem perpetuating social wrongs rather than their solution.[6]

Proponents of informal justice view it as an alternative to state law; several states responded to this perception by sanctioning the establishment of alternative dispute resolution mechanisms such as community courts or neighbourhood courts. Such resolution of disputes takes into account the socio-economic context of the parties, thus bringing into consideration what was abstracted by state law. Procedures are flexible and are intended to aid resolution rather than insist on adherence to technical formalities.

Others share a less charitable view of informal justice as an alternative to state administered justice. Informal justice, it is alleged, is merely an agent of state law which fills in the inadequacies of legal formalism so as to prevent the undermining of state law.[7] It operates in a sphere delimited by state law, does what is denied to state law and at the same time conveys an impression of autonomy from and resistance to state law. Though informal justice is identified in opposition to state law; it is just as integral to it.[8]

The necessity of informal justice, whether as an alternative to state law or as its agent, to find its identity in opposition to state law stems from the nature of Anglo-Saxon law prescribing legal formalism. It was the failure of the formal legal system, modelled on Anglo-Saxon jurisprudence, to deliver justice that forced informal justice to take on a separate identity from state law. But then, there is nothing sacred about Anglo-Saxon law nor do there seem any compelling reasons why states, particularly former colonies, must necessarily retain Anglo-Saxon law as state law. Simply put, if state law is made to possess precisely those features which are denied to Anglo-Saxon law, notions of informal justice could be located within the formal legal system in contradistinction to outside it. In other words, there is nothing conceptually or jurisprudentially incoherent about such state law institutionalising the content of informal justice within the formal legal system rather than in opposition to it; such institutionalisation being possible, of course, only under specific cultural, ideological, political and socio-economic conditions.

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6. C.D.Cunningham, *Why American Lawyers should go to India : Retracing Galanter's Intellectual Odyssey*, 16/4 Law & Social Enquiry 794 (1991).

7. S. Hedge, *Limits to Reform : A Critique of the Contemporary Discourse to judicial reform in India*, 29 (2) Journal of Indian Law Institute 161 (1987).

8. P.Fitzpatrick, *Supra* note 2 at 169.

Public Interest Litigation (referred to PIL for the sake of brevity), in the form it exists today in India, offers precisely such a paradigm of law which locates the content of informal justice within the formal legal system. PIL is a non Anglo-Saxon jurisprudence that directs the Court to transcend the traditional judicial function of adjudication in order to provide remedies for social wrongs. Since its inception in 1979, it has been used to mould state law into an instrument of socio-economic justice by discarding from the formal legal system precisely those elements which induce legal formalism and 'neutrality' of law.[9]

Current literature on informal justice and its impact on the transformation of the state focuses on issues such as the challenge of informal justice to state monopoly of production and distribution of law and justice and the 'trivialisation' or 'relativization' of 'official' formal law by informal justice. Questions are raised as to whether notions of informal justice are part of the expansion or retraction of state in form of civil society. Given that the very possibility of locating the notion of informal justice within state law alters the terms of the debate, an attempt has been made in this article to analyse the jurisprudence of Indian PIL and the judicial role entailed by it. Such an analysis would be invaluable in evaluating the premises underlying the conceptualisation of informal justice.

Several developing states (like Malaysia and Philippines) have made efforts to incorporate Indian PIL in their formal legal system; such efforts have been only partially, if at all, successful. PIL is unique to India. Hence, any study on PIL must first appreciate the political and socio-economic milieu of the country. Accordingly, the second section of this article presents an overview of Indian PIL while describing the legal, political, economic and social conditions in which it evolved. The third section evaluates the jurisprudence of PIL with its strengths and limitations.

II. An Overview Of Public Interest Litigation

A. Evolution Of PIL

Before 1979, the Indian Supreme Court professed to be a neutral umpire resolving disputes litigated before it. In other words, it moulded itself into the traditional judicial role prescribed by Anglo-Saxon jurisprudence. As it functioned on the Anglo-Saxon model, it adopted the adversarial system of litigation; insisted on observance of procedural technicalities such as locus

9. A. Hingorani, *Public Interest Litigation*, Hindustan Times (27 January 1994).

standi and adhered to traditional rules of practice evolved in public interest such as res judicata and laches. Further, the Court,[10] like any other Anglo-Saxon Court, swung in its approach to justicing between positivism and natural law tradition. Starting on a positivist note in 1950;[11] it suscribed to natural law school of thought by 1967;[12] only to return to positivism by 1976[13] and then adopt the natural law approach by 1978.[14]

On 8 and 9 January 1979, the Indian Express published two articles by Rustamji, a member of the National Police Commission, which were based on his tour note highlighting the plight of undertrial prisoners languishing in various jails in Bihar for cruelly long periods of time for no crime other than their poverty. The tour note reported that many prisoners had been languishing in jail for over ten years without trial for simple offences like ticketless travel. There were cases where children had been born and brought up in jail. Then there were cases where witnesses or victims of a crime had been put in jail for decades in order to facilitate their presence during trial. Women who had complained of rape were being sent to jail so that they may be easily available as witnesses. There were girls and children who had been imprisoned because the Ashram where they had lived had to be closed down; they were now kept in jail in 'protective custody' : tearful, unwilling and positively wanting no protection at all.[15]

Nirmal Hingorani, a Supreme Court lawyer, happened to read the second article. He and his lawyer - wife, Kapila Hingorani, were 'so shocked by the depiction of the horror of the situation as to move the Supreme Court for *habeas corpus*, something which neither the Express nor Rustamji expected to happen'.[16] The Supreme Court Registry, duty bound, took objection to the petition, *Hussainara Khatoon v. State of Bihar*,[17] filed under Art. 32 of the Constitution by Kapila Hingorani as a citizen of the country and officer of the

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10. It may be noted that most of the decisions are referred to as having been laid down by the 'Court' rather than with reference to the Judges constituting the Bench. This approach has been adopted purely for the sake of clarity; it should not be construed as suggesting that the Judges of the Supreme Court shared identical views and perceptions on various legal issues. Secondly, the focus throughout the article shall be on the Supreme Court decisions since they are, by virtue of Art. 141 of the Constitution, the law of the land. No doubt High Court decisions merit attention; however, due to paucity of space, they shall be referred to only when necessary.

11. A.K.Gopalan v. State of Madras, A I R 1950 SC 27.

12. Golak Nath v. State of Punjab, A I R 1967 SC 1643.

13. A D M Jabalpur v. Shivkant Shukla, A I R 1976 SC 1207.

14. Maneka Gandhi v. Union of India, A I R 1978 SC 597; Sunil Batra v. Delhi Administration, A I R 1978 SC 1675.

15. K. Hingorani, N. Hingorani & A. Hingorani, *The Evolution and Development of Public Interest Litigation : An Analysis*, LAW ASIA'93 (15 September 1993).

16. U. Baxi, *The Supreme Court Under Trial : Undertrials and the Supreme Court*, 1 S C C 35 (1980); *A lawyer's shock at undertrial's plight*, INDIAN EXPRESS (7 February 1979).

17. A I R 1979 SC 1360, 1369, 1377.

Court in public interest noting that she did not have the power of attorney to approach the Court nor was she the next friend of the prisoners and thus had failed to comply with the relevant Supreme Court Rules.[18] However, it agreed, on request, to place the matter before the Court accompanied by an office report recording its objections. The Court entertained the petition that led to a chain of proceedings which resulted in the immediate release of over 40000 undertrial prisoners on personal or no bond. The Court, while declaring that it was a 'crying shame' on the judicial system which permits such incarceration of the poor and expressing its anger and anguish at the 'shocking state of affairs' that betrayed 'complete lack of concern for human values'[19] read a right to speedy trial as an integral and essential part of the fundamental right to life and liberty enshrined in Art. 21 of the Constitution. Relying on the unenforceable[20] Directive Principle of State Policy contained in Art. 39A of the Constitution, which obliges the State to secure the operation of the legal system to promote justice and to provide free legal aid, it held that every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty or indigence has a right to a lawyer at state expense. It warned the State that if it fails to provide legal services at state expense to such persons, 'the trial may itself run the risk of being vitiated as contravening Art. 21'.[21] Nor could the State avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The Court justified its affirmative action by reasoning that it was its own constitutional obligation, 'as guardian of the fundamental rights of the people, as a sentinel on the *qui vive*',[22] to enforce the fundamental right of the accused to speedy trial by issuing necessary directions to the State which may include positive action. The Court declared that it was high time that public conscience is awakened and that it is realised that the impoverished [23]

> have always come across 'law for the poor' rather than 'law of the poor'. The law is regarded by them as something mysterious and forbidding - always taking away something from them and not as positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. It is, therefore, necessary that we should inject equal

18. A. Loomba, *Fight Against Appalling Injustice to Undertrials*, NEW AGE 4 (11 February 1979).

19. *82000 Undertrials Awaiting Justice*, INDIAN EXPRESS (5 February 1979).

20. Art. 37 of the Constitution provides, inter alia, that the Directive Principles of State Policy contained in Part IV of the Constitution, which primarily are social and economic rights, are not enforceable in any Court but nevertheless are fundamental in governance of the country and it shall be the duty of the State to apply them in making laws.

21. *Supra* note 14 at 1381.

22. *Id.* at 1376.

23. *Id.* at 1375.

justice into legality.

The characteristics of PIL have crystallized as a reaction to the difficulties faced by the Court in its attempt to 'inject equal justice into legality'. For example, the Court in the present case, while requesting petitioner to prepare charts of thousands of prisoners placing them in different categories,[24] directed the state counsel to assist her as she has 'undertaken this public interest litigation as a matter of public duty and her resources are, therefore, bound to be limited'.[25] Thus was established the collaborative nature of PIL where there is a co-operative effort on the part of the petitioner, the State and the Court to secure observance of the constitutional or legal rights of the vulnerable sections of the community and to reach social justice to them.

Hussainara Khatoon's case set the pattern which was adopted by the Court in subsequent cases. In addition to the non-adversarial nature of this litigation and absence of the traditional lis, other characteristics of PIL exemplified by *Hussainara Khatoon's* case include the typical sprawling and amorphous structure of parties to the litigation; the active role of the Judge; the releasing of the petitioner from the burden of proving the alleged facts; the acceptance of press reports as the basis of petitions; the grant of immediate and interim remedial relief once a *prima facie* case is made out; the reliance on unenforceable Directive Principles of State Policy contained in Part IV of the Constitution to read new rights into Fundamental Rights guaranteed under Part III of the Constitution, particularly into the right to life and personal liberty guaranteed under Art. 21; the relaxation of the rule of *locus standi* to confer standing on any person, acting *bona fide*, to approach the Court for the vindication of rights of the disadvantaged sections of society or, as subsequently held, for the vindication of diffuse rights.

Hussainara Khatoon's case led to perhaps the most horrifying PIL case of *Anil Yadav v. State of Bihar*.[26] On 28 September 1980, Kapila Hingorani received a letter from a lawyer in Bhagalpur District of Bihar stating that many suspected criminals have been blinded by the police 'through acid put into their eyes after apprehension (arrest)'.[27] Allowing the writ petition filed on the basis of this letter, the Court deputed its Registrar to visit Bhagalpur to investigate whether the contents of the letter were true. It was found that at least 33 persons

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24. It is shocking to note that there were undertrials who had been in prison for periods longer than the maximum term for which they could have been sentenced, if tried and convicted; those accused of multiple offences, who had suffered imprisonment for longer periods of time than they would have even if it is presumed that the State would have been able to secure their conviction in all offences and the maximum sentences would have been imposed for each offence and such sentences would have run consecutively rather than concurrently as is the usual practice.

25. *Supra* note 17 at 1378.

26. A I R 1982 SC 1008. See also Khatri v. State of Bihar, AIR 1981 SC 928, 1068.

27. A. Sethi. *Her Crusade Against Tyranny*, PROBE INDIA 22 (February 1981).

had been blinded by the police using needles and acid and that the burnt eyes would then be bandaged with acid soaked cotton and left to rot. The sheer horror of the situation shook the Court. The confirmation by the medical doctor of the agent and mode of blinding spurred it to declare that it would 'shock the conscience of mankind'.[28] and that it shows to what depths of depravity the administrators of law can sink in Bihar. In judgements seething with anger and anguish, the Court condemned the policemen for having perpetrated what it aptly described as 'a crime against the very essence of humanity'. It, through interim orders,[29] quashed the trial of the blinded prisoners and directed the State of Bihar to bring them to New Delhi, fund their medical treatment and formulate a scheme for their rehabilitation. It ordered the speedy prosecution of the guilty policemen and doctors involved in the 'barbaric act for which there is no parallel in civilised society'. Astonished that no legal representation had been provided to the blinded prisoners simply because they did not ask for it, the Court reiterated that the State is under a constitutional mandate under Art. 39A of the Constitution to provide free legal aid. It imposed a positive constitutional obligation on every Magistrate and Sessions Judge throughout the country to inform each accused brought before them of his right to free legal aid as otherwise[30]

> even this right to free legal services would be illusionary for an indigent accused.. It is common knowledge that about 70% of the people in rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. It would make a mockery of legal aid if it were to be left to a poor, ignorant and illiterate accused to ask for free legal service.

Anil Yadav's case established another aspect of non- adversarial nature of PIL; that is, of investigative litigation. In PIL actions, the Court shoulders the responsibility of investigating into facts; a function performed in *Anil Yadav's* case by the Supreme Court Registrar.

The insensitivity and callousness of the State Government came to light when it was discovered that it had been aware of the blindings before the Court had been moved; it did not deem it fit to intervene as the police were, in its

28. *Supra* note 26 at 1009.

29. Each blinded was given, at the instance of the Court, Rs 15,000 by the State and Rs 15,000 from the Prime Minister's Relief Fund. They were also awarded expenses incurred for their travel, medical and vocational training. The Court, by its order dated 8.5.1990, directed the quashing of prosecution against the blinded and the release of those convicted. It also awarded a monthly pension for life of Rs 500 to each blinded which has been increased to Rs 750 from 1.4.1995 onwards.

30. Khatri v. State of Bihar, AIR 1981 SC 928, 931.

opinion, doing a good job in containing crime.[31] 'It is reported that at least two sub-inspectors, who were among the 15 suspended (subsequently), were given gallantry awards for 'outstanding service'.[32] Indians were already aware of the criminalisation of politics; a trend that was institutionalised during the Emergency in 1975. Nomination of known criminals by invariably every political party to stand in elections, nurturing of armed hoodlums and goondas to capture votes, rampant corruption pervading the political structure from top to bottom and the almost invincible nexus between the politicians, the police and hardened criminals had become so systemic over the period of time that it had assumed (and still assumes) the visage of being natural in politics. *Anil Yadav's* case was a painful reminder of this grim reality. Its impact in conscientising the public and the Court was stupendous. When the Court indicated its willingness to check administrative sclerosis and governmental lawlessness, it was stormed by petitions from all sections of society. An immediate consequence of the lowering of the barriers between the Court and the common man was the energising of social activists, journalists and a handful of lawyers and legal academicians into action, who now ceaselessly strove to expose governmental lawlessness. To illustrate, three journalists seeking to expose a thriving market in women actually bought a woman and filed a petition praying for the prohibition of this practice.[33] Newspaper or magazine articles pertaining to children put in jail notwithstanding the law prohibiting imprisonment of children;[34] employment of children in carpet industries in violation of labour laws;[35] bonded child labour;[36] inhuman conditions in Children Remand Homes[37] workers of slate pencil manufacturing industries dying at a young age due to accumulation of soot in their lungs in absence of safety measures;[38]

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31. *Bihar Govt. Turned Blind Eye to Blindings,* TIMES OF INDIA (3 December 1980). The unrepentant attitude of the State Government was evident in Court, when it, contesting the submission of the petitioner for compensation as being implicit in violation of Art. 21, argued that even if the blindings had been done by the police and there was violation of the constitutional right enshrined in Art. 21, the State could not be held liable to pay compensation to the person wronged. For the first time since its inception, the Court had to consider whether its power to enforce fundamental rights was merely injunctive in nature or also remedial. Accepting the argument of the petitioner, it ruled that it was prepared to forge new tools and devise new remedies" for the vindication of fundamental rights (see *supra* note 30 at 930).

32. A. Sethi, *supra* note 27 at 24.

33. Comi Kapoor, Aswini Sarin & Arun Shourie v. State of Madhya Pradesh, Writ Petition No. 2229 of 1981. Unreported.

34. Yugal Kishore v. Chief Commissioner, Chandigarh, Writ Petition No. 7465-7466 of 1981. Unreported. Vijay Kumar v. The Chief Commissioner, Chandigarh, Writ Petition No. 7467 of 1981. Unreported.

35. Workmen of Carpet Industries in the District of Mirzapur, U.P. v. State of Uttar Pradesh, Writ Petition No. 2115 of 1985.Unreported.

36. Aman Hingorani v. Union of India & Ors, Writ Petition No. 166 of 1995.Unreported.

37. Momin Ali v. Shukla, Writ Petition No. 1965-68 of 1984.Unreported.

38. Workmen of Slate Pencil Manufacturing Industries v. State of Madhya Pradesh, Writ Petition No. 5143 of 1980. Unreported.

sexual exploitation of tribal girls in public units;[39] the suffering of 25 million people from fluorosis caused by drinking polluted water in absence of potable water;[40] the inhuman conditions prevailing in Ranchi, Agra and Gwalior Mental Asylums[41] and hundreds more of such articles have formed the basis of PIL actions. In 1982, a petition,[42] which was filed on basis of an UNDP report stating that due to lack of iodine in diet, about 60 million people are suffering from goitre and another 300 million are potential victims, resulted in the Court successfully requiring 18 states and the National Capital Territory of Delhi to produce iodised salt. Similarly, details of the barbaric conditions of detention at the Agra Protective Home for Women collected by two law professors;[43] a social activist's discovery of undertrial children at Kanpur Central Jail who were being supplied to convicts for their sexual gratification and of a boy named Munna who was in agony because 'after the way he was used, he was unable to sit ;[44] the information collected by a women's organization on the practice of *Devdasi* in Karnataka[45] led to other PIL actions.

One of earliest PIL actions which impinged on policy issues was *Kamlesh v. Union of India*[46] which was filed in 1981 on behalf of victims of dowry crimes after randomly picking up 11 cases registered with the police. The petition prayed for ensuring speedy prosecution of those accused of such crimes as they often enjoyed political and police patronage, and that prolonged investigation and time consuming trials have resulted in great agony, frustration and a feeling of helplessness to the victims of torture.[47] The Court reviewed the stage at which investigation had progressed in the specified cases and 'suggested' the setting up of Special Police Cells to deal exclusively with crime against women. It required the petitioner to collaborate with the Commissioner of Police, Delhi in evolving a scheme which prescribed guide-lines as to what needs to be done to check dowry crimes and 'recommended' the submitted scheme to the executive for its consideration while introducing legislation in

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39. Radhini v. Union of India, Writ Petition No. 760 of 1987. Unreported.

40. Aman Hingorani v. Union of India & Ors, Writ Petition No. 436 of 1992.Unreported.

41. R C Narain v. State of Bihar, 1986 (Supp) S C C 576; A I R 1995 SC 208; Aman Hingorani v. Union of India, A I R 1995 SC 215; Kamini Devi through Aman Hingorani v. Union of India & Ors, A I R 1995 SC 204.

42. Residents of Well Defined Goitre Endemic Area v. State of Jammu & Kashmir, Writ Petition No. 5047 of 1982.Unreported.

43. Upendra Baxi v. State of Uttar Pradesh, 1981 (3) SCALE 1136.

44. Munna v. State of Uttar Pradesh, A IR 1982 SC 806.

45. Guavavva v. State of Karnataka, Writ Petition No. 476-487 of 1983.Unreported.

46. Writ Petition No. 8145 of 1981. Unreported. See K. Hingorani, *Legal Struggle for Women*, 30 RELIGION AND SOCIETY 74 (1983).

47. J. Kapoor, *The Guilty Shall be Punished*, FEMINA (23 May- 7 June 1982).

Parliament to deal with the dowry menace; needless to say, these suggestions and recommendations were duly complied with.

Many more such cases[48] can easily be listed and shall be referred to subsequently. It will, at present, suffice to note that though PIL has taken a distinct shape, its contours are still being defined by cases being brought before the Court. The norms of PIL have emerged over the years and are still developing. The next sub- section summarises the main features of PIL teased out from various cases.

B. The Jurisprudence Of Public Interest Litigation

As Art. 32 of the Constitution vests original jurisdiction in the Supreme Court to enforce fundamental rights, the jurisprudence of PIL revolves on the language of this constitutional provision; or rather on what is not prohibited by it.

Art. 32 provides that

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

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

The Court interpreted 'appropriate proceedings' in Art. 32(1) to mean appropriate not in terms of any form of proceeding but with reference to the purpose of the proceedings. Hence, even a letter, postcard or telex to the Court could be considered as appropriate proceedings and the Court may convert it into a writ petition (this has come to be known as epistolary jurisdiction of the Court).

Similarly, there is no limitation in Art. 32(1) as to who may move the Court for the enforcement of a fundamental right. Thus, any member of society, acting pro bono publico, has the standing to do so in view of the socio-economic reality in India. The Court has, at times, even acted suo moto on the basis of news paper reports.

In consonance with its interpretation of Art. 32(1), the Court held the language of Art. 32(2) reflects the anxiety of the Constitution-makers not to allow any technicality stand in the way of the enforcement of the fundamental rights. Hence, the Court reasoned that not only did it have the power to issue

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48. This must not be taken to suggest that the Court will entertain every matter relating to policy issues. In Sachidanand Pandey v. State of West Bengal, AIR 1987 SC 1471 the Court ruled that while it may review a policy decision to examine whether appropriate considerations have been taken into account, it will not attempt to nicely balance relevant considerations as that is the decision of the concerned authority.

the five traditional writs, but also to issue any order or direction in the nature of the five writs which it considered appropriate with reference to the purpose of the proceeding. The remedial approach taken by the Court stems from this interpretation of its powers under Art. 32(2) which are meant to facilitate the discharge of its constitutional obligation under Art. 32(1) to enforce fundamental rights. Further, Art. 142 empowers the Supreme Court to pass any decree or make any order as is necessary for doing complete justice in any cause or matter pending before it.

The Constitution, vide Art. 226, vests concurrent writ jurisdiction in the High Courts to enforce fundamental rights and 'for any other purpose'. Since the interpretation of the language of Art. 32 applies equally to that of Art. 226, the High Court too can entertain PIL for the enforcement of fundamental rights. As the writ jurisdiction of the High Court under Art. 226 is wider than that of the Supreme Court under Art. 32, PIL can also be entertained by the High Court 'for any other purpose', that is, for the enforcement of any legal right.

The three aspects of PIL, namely the epistolary jurisdiction, relaxation of the strict rule of locus standi and the remedial nature of PIL shall now be discussed, though in the reverse order.

(i) Remedial Nature Of PIL

The Court in a PIL action, expressly departs from Anglo-Saxon jurisprudence and the 'impartial' judicial role entailed by it. Not only has it rejected in PIL actions the principles of neutrality underlying adjudication but has sought to transcend the judicial function of adjudication in order to provide remedies for social wrongs. The Court, while observing that the Constitution is a document of social revolution which casts an obligation on the judiciary to transform the *status quo ante* into a just human order, has ruled that the judiciary has to become an arm of the socio- economic revolution. It cannot remain content to act merely as an umpire; rather it must be functionally involved to bring socio- economic justice within the reach of the common man. The Court reasoned that Anglo-Saxon concept of justicing where 'the business of a Judge is to hold his tongue until the last possible moment and try to be as wise as he is paid to look'[49] may be all right for a stable society but not for a society pulsating with urges of gender justice, worker justice, minorities justice and equal justice between chronic unequals. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge does not adopt

49. S. P. Gupta v. Union of India, AIR 1982 SC 149, 196.

a positive and creative role. The Court asserted that though its reasoning may conflict with a formalistic and doctrinaire view of equality before the law, it would almost always conform to the principle of equality before the law in its total magnitude and dimension, since the 'equality clause' in the Constitution did not speak of formal equality but embodied the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic differentials.

Several cases [50] before 1979 established that the unenforceable Directive Principles of State Policy contained in Part IV of the Constitution are to be used as a standard while judging the reasonableness of a restriction imposed on a fundamental right; for, a law enacted for the purpose of giving effect to the Directive Principles could not be said to be unreasonable or against public interest. However, since 1979 the Court has adopted three distinct strategies to enforce the non- justificiable Directive Principles in its attempt to use law as an instrument of social and distributive justice:

(1) By reading the aspirations of unenforceable Part IV into enforceable fundamental rights thereby widening the ambit of the specified fundamental rights to include new rights. Obvious examples of this strategy are the *Hussainara Khatoon's* case and *Anil Yadav's* case where the Court relied on the Directive Principle contained in Art. 39A to read a right to free legal aid into the right to life guaranteed under Art. 21. Similarly in *Bandhua Mukti Morcha v. Union of India,*[51] the Court ruled that right to live with human dignity enshrined in right to life under Art. 21 derives its 'life breath' from Part IV, and in particular from Articles 39(e)(f), 41 and 42, and therefore, includes the minimum requirements that must exist in order to enable a person to live with human dignity, such as protection of the health and strength of workers - men and women - just and humane conditions of work and maternity relief. Significantly, the Court bolstered its approach in the said case by ruling that though the State cannot be ordered enforce Part IV made expressly un-justificable by Art. 37 of the Constitution, it can be directed to enforce existing legislation enacted in pursuance of Part IV since the non enforcement of such legislation would amount to violation of Art. 21. As India is a welfare state, legislation already exists on most matters. Hence, the Court circumvented the bar under Art. 37 by enforcing not Part IV, but laws enacted to give effect to

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50. For example see State of Bombay v. Balsara, AIR 1951 SC 318; State of Bihar v. Kameshwar Singh, AIR 1952 SC 352; Bijay Cotton Mills v. State of Ajmer, AIR 1955 SC 33; Mohd. Hanif Qureshi v. State of Bihar, AIR 1958 SC 731; Pathak v. Union of India, AIR 1978 SC 803. In C.B. Board & Lodging v. State of Mysore, AIR 1970 SC 2042 and Keshavananda Bharati v. State of Kerala, AIR 1973 SC 1461 the Court ruled that Part III and Part IV are meant to complement and supplement each other; they together form the 'conscience of the Constitution'.

51. AIR 1984 SC 802.

Part IV.

(2) By recognising a right to be a fundamental right if it has independent existence from Part IV. For example, in *State of Bombay v. Bharatiya,*[52] the Court recognised a right to equal pay for equal work as being implicit in the equality clause contained in Art. 14, notwithstanding the inclusion of this right in Part IV {Art. 39(d)}. The Court reasoned that Part III and Part IV are complementary, and not exclusionary, of each other and hence the inclusion of a right in one does not necessarily exclude its existence in the other.

(3) By holding that a time-bound Directive Principle itself matures into a fundamental right on expiry of the prescribed period. For example, Art. 45, provides, *inter alia*, that the State shall endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory primary education. The Court, in *Unnikrishnan v. State of Andhra Pradesh,*[53] ruled in 1993 that the passage of 44 years - more than four times the period stipulated in Art. 45 - 'converts' the unenforceable obligation created by Art. 45 into an enforceable fundamental right to free and compulsory primary education.

Given that PIL is a remedial jurisprudence, the Court departs from the adversarial system of litigation. The non-adversarial nature of PIL has two aspects : collaborative and investigative.

As stated earlier, PIL is a collaborative effort of the petitioner, the Court and the State to secure the constitutional and legal rights of the poor and to ensure observance of social and economic rescue programmes, legislative and executive, framed for their benefit. It is the constitutional duty of the executive under Art. 256 to enforce the laws enacted by the legislature. Thus, PIL 'helps' the executive discharge its constitutional obligations by providing it 'an opportunity' to examine whether the poor are actually receiving their socio-economic entitlements. Hence, when the Court entertains PIL, it does not, atleast ostensibly, do so in a 'confrontational mood or with a view to tilting at executive authority or seeking to usurp it'; rather it is merely 'assisting' the executive in the realisation of its constitutional obligations.

It is to 'assist' the State that the Court, as mentioned earlier, takes an active role in investigating into facts. The rationale for this investigative function stems from the need to evolve a new procedure which enables 'the poor and the weak to bring the necessary material before the Court for the purpose of securing enforcement of their fundamental rights'.[54]

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52. (1993) 1 S C C 539.
53. (1993) 1 S C C 645.
54. *Supra* note 51 at 815.

The Court has resorted to different mechanisms to perform the investigative function that vary from deputing the Registrar of the Court or District Court Judges and Magistrates to constituting Commissions at state expense. Experts or specialists like sociologists, doctors, psychiatrists, scientists, scholars or journalists may be appointed on the Commission if the Court deems it necessary. The veracity of the reports of such Commissions are open to challenge, but not their evidentiary value. While the facts alleged invariably prove to be true, the Court may, in case of disputed facts, constitute another Commission to perform the investigative function. In addition to fact-finding missions, the Commissions have been used for other functions such as to propose remedial relief and monitor its compliance and, in rare instances, to actually decide factual issues on authority delegated by the Court.[55] Significantly, senior government officials are often appointed on the Monitoring or Management Committees. Apart from its immense educative value, this involves the State in providing relief to the poor and thus facilitates the smooth implementation of the Court's directions.

A crucial aspect of the remedial nature of PIL is the flexibility introduced in the adherence to procedural laws. For example, in a subsequent application filed in *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*[56] the Court held that every technicality in procedural law is not available as a defence when a matter of great public importance is before the Court for consideration and therefore overruled the defence of *res judicata*. Another divergence from procedural law is the usual exemption granted to the petitioners in PIL actions from paying Court Fee. Further, once a PIL action is initiated in the Court, it cannot be withdrawn for the simple reason that the petitioner is not *dominus litis*. The 'rights' of those who bring the action on behalf of others must necessarily be subordinate to the 'interests' of those for whose benefit the action is brought.[57]

It may be recalled that the remedial powers under Art. 32(2) include the grant of compensation to the aggrieved persons. Such grant of compensation would not preclude the aggrieved from bringing a civil suit for damages. Though the question of compensation under Art. 32 arose first in *Anil Yadav's* case, the first case in which compensation was actually awarded was *Rudul Sah*

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55. Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180. This action was filed on behalf of Bombay pavement and slum dwellers who pleaded that eviction from pavements and slums would, in the absence of legal housing, result in the deprivation of their right to livelihood under Art. 21. During interim proceedings, the Court appointed a High Court officer to determine whether specific dwellings were obstructing traffic and whether they were built after the effective date of the Court's interim stay on eviction. The finding of this officer was to be binding on the parties for the purpose of implementing the Court's interim orders.

56. AIR 1988 SC 2187, 2195.

57. Sheela Barse v. Union of India, AIR 1988 SC 2211.

v. State of Bihar,[58] an offshoot of *Hussainara Khatoon's* case. Rudul Sah was arrested in 1953 on the charge of murder and was acquitted by the Sessions Judge in 1968, to be released on further orders. These orders never came for over 14 years after his acquittal. By the time Rudul Sah was released in 1982, he had spent 29 years in prison for a crime he never committed. The Court awarded a compensation of Rs 35,000 holding that it is 'some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield'.[59]

Finally, without being exhaustive, the remedial nature of PIL has resulted in separation of the 'remedy' granted from the 'right' violated. In PIL actions, immediate remedial relief is granted through interim orders even before the final determination of rights. This stands in sharp contrast to the Anglo-Saxon model where interim injunctive relief is limited to preserving status quo pending final decision, though Courts have recently developed a broader discretion to order affirmative action on a preliminary finding of probability of success on merits. [60]

The rationale for the Court to grant immediate interim relief stems from the necessity of circumventing delay. It will be readily accepted that lack of personnel, resources and space (and in the lower courts, even furniture and stationary) have a part to play in delaying relief to a litigant, at times, for decades. The need for such a strategy is exemplified by the fact that though the Court in *Hussainara Khatoon's* case had granted immediate interim relief in 1979 to the undertrials, the case was finally disposed off only on 4 August 1995 with directions to each High Court to collect statistical information on undertrials in jails within their jurisdiction and implement the guidelines laid down by the Supreme Court.

The divergence from the Anglo-Saxon model becomes more marked when the Court prescribes system-wide reform instead of granting individual relief. To illustrate, in *R.C. Narain v. State of Bihar,*[61] the complaint pertained to inhuman conditions existing in the Ranchi Mental Hospital, Bihar resulting in the death of a mentally ill patient every two days. The Court, after perusing reports of Commissioners appointed by it, first sought to grant specific reliefs regarding the management of the hospital - it ordered that the allocation of funds for provision of meals for each patient be increased from Rs 3.50 to Rs 10 per day; that adequate supply of drinking water be supplied to the hospital; that all

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58. AIR 1983 SC 1086.

59. *Id.* at 1089.

60. C. D. Cunningham, *Public Interest Litigation in Indian Supreme Court : A Study in Light of the American Experience*, 29 JOURNAL OF INDIAN LAW INSTITUTE 494, 511 (1987).

61. R. C. Narain v. State of Bihar, 1986 (Supp). S C C 576; AIR 1995 SC 208.

patients in the hospital be provided with blankets and mattresses within 15 days and so on so forth. On reports that the conditions at the hospital are not improving, the Court, by its Order dated 8.9.1994, 'legislated' Rules to run the hospital which also provided for the constitution of an autonomous Management Committee to govern the hospital. The State Government was required to promulgate these Rules and the Union Health Secretary was directed to periodically report to the Court on the new set-up. Similar Rules have been 'legislated' by the Court to govern Agra Mental Asylum and Gwalior Mental Asylum.[62] In *Sheela Barse v. State of Maharashtra,*[63] in response to the complaint of custodial violence to five women in the Bombay city jail, the Court issued guide-lines applicable to the whole State of Maharashtra requiring that only police women be used to guard or interrogate women suspects; that pamphlets be distributed to the prisoners on their right to bail; that free legal aid be provided by the collaboration of the State with district legal aid committees and so on so forth. Another example is *Laxmikant Pandey v. Union of India*[64] where the relief claimed was that private agencies should be barred from arranging foreign adoptions as a magazine article had reported that 'some Indian children sent abroad for adoption ended up as beggars or prostitutes'.[65] However the Court issued notice to the Union of India and two major public child welfare agencies to[66]

> assist the Court in laying down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents, and if so, the procedure to be followed for that purpose, with the object of ensuring the welfare of the child.

The Court, after allowing intervention by private adoption agencies, soliciting views of experts and the State, reviewing legislation and policies adopted by other jurisdictions and studying sociological materials, issued binding comprehensive guide-lines detailing the procedure to govern the adoption of Indian children.

In *M. C. Mehta v. Union of India,*[67] the petitioner pleaded that Kanpur Municipality and tanneries be restrained from discharging sewage and untreated effluents into the river Ganges resulting in severe pollution of the river, and that the authorities be ordered to enforce the Water (Prevention and Control of Pollution) Act 1974. The Court directed that all tanneries must install effluent

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62. Aman Hingorani v. Union of India, AIR 1995 SC 215; Kamini Devi through Aman Hingorani v. Union of India & Ors, AIR 1995 SC 204.
63. Sheela Barse v. State of Maharashtra, AIR 1983 SC 378.
64. AIR 1984 SC 469.
65. C. D. Cunningham, *supra* note 56 at 514.
66. *Supra* note 64 at 471.
67. AIR 1988 SC 1037.

treating equipment or, in the alternative, close down. Further, it held that the financial capacity of the tanneries to install such equipment was irrelevant; for, 'just like an industry which cannot pay minimum wages to its workers cannot be allowed to exist, a tannery which cannot set up a primary treatment plant' cannot be permitted to operate.[68] The municipal authorities were directed to comply with the statutory provisions. In addition, the Court addressed specific problems causing pollution such as removal of waste from dairies at the municipal corporation's expense, increase in the capacity of sewers in labour colonies or provision of public latrines and urinals. It held that it was the duty of Central Government to direct all educational institutions throughout India to teach for one hour in a week lessons relating to the protection and improvement of the natural environment and to distribute text books to the educational institutions free of cost.[69]

These cases are typical of what has been described as the 'creeping jurisdiction' of the Court that enables it 'creep' into the arena reserved for the executive or legislature and hijack their functions. The creeping jurisdiction of the Court has been subjected to severe criticism, as will be discussed in the next Section.

(ii) Relaxation Of Strict Rule Of *Locus Standi*

The rule of *locus standi* has been liberalised in two directions : representative standing (for example, *Hussainara Khatoon's* case) and citizen standing (for example, *M. C. Mehta's* case). The former enables any member of society, acting bona fide, to move the Supreme Court under Art. 32 or the High Court under Art. 226 on behalf of a person or a determinate class of persons who, by reason of poverty, helplessness, disability or socially and economically disadvantaged position, is unable to approach the Court for the enforcement of constitutional or legal rights.

The Court, in *S.P.Gupta's case*,[70] noted that the task of national reconstruction has brought about an enormous increase of developmental activities which require the active intervention of the State and public authorities resulting in increased imposition of public duties on them. In case of a breach of a public duty causing a public injury, the act or acts complained of

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68. *Id.* at 1045.

69. *Id.* at 1127. The Central Government was also 'requested' to consider the desirability of observing a 'Keep the town (or city or village) week' in every town, city and village throughout India at least once a year during which all citizens including members of the Government, legislatures and the judiciary would be requested to co-operate with the local authorities in order to create national consciousness on environment pollution.

70. *Supra* note 49 at 31.

cannot necessarily be shown to affect the rights of any determinate or identifiable class of persons; for example, in case of environmental pollution. In order to protect such 'diffuse, collective and meta-individual' rights of the public at large and to provide redress for the breach of the public duties owed to them, the Court ruled that any member of the public, acting *bona fide*, has standing to approach the Supreme Court or the High Courts. This standing has now come to be known as citizen standing. Interestingly, the Court, in *S.P. Gupta's* case upheld the standing of practising lawyers to challenge a governmental policy to transfer High Court Judges since undermining of judicial independence would result in loss of faith in the rule of law and consequently in the democratic institutions of government.

In *Chaitanya Kumar .v. State of Karnataka*,[71] traditional litigation had been initiated against the Chief Minister of Karnataka by unsuccessful applications of the bottling of arrack liquor rights alleging nepotism and corruption; however, this action was withdrawn by the applicants for reasons best known to them. Subsequently, two person filed a PIL action in the High Court as citizens of Karnataka and successfully claimed an interest in seeing that public business was conducted lawfully; an indictment in this action resulted in the resignation of the Chief Minister.

The distinction between citizen standing and representative standing becomes relevant insofar the latter, unlike the former, need not necessarily relate to the breach of a collective right resulting into a public injury. An action brought through representative standing may relate to a collective right of a determinate class of persons (*Hussainara Khatoon's* case) or simply to a particular right of an individual (*Rudul Sah's* case).[72]

It is relevant to note that most PIL analysts consider the expanded concept of locus standi to be the distinguishing feature of Indian PIL from other public interest actions; some commentators[73] even consider it to be the core of Indian

71. (1986) 2 S C C 594.

72. The Court, however, observed in S P Gupta's case that as a matter of prudence and not of law, Courts should, as far as possible, encourage actions relating to collective or diffuse rights rather than individual rights if effective legal aid is present.

73. See J. Cottrell, *Third Generation Rights and Social Action Litigation,* in Adelman & Paliwala (ed.), LAW AND CRISES IN THE THIRD WORLD 102 (1993). This notion resulted in confusing PIL actions with cases falling under the traditional exceptions in common law to the strict rule of *locus standi.* For example, in Maharaj Singh v. State of Uttar Pradesh, A I R 1976 SC 2602 where the issue pertained to the competence of the State to carry an appeal against the dismissal of the suit in absence of the statutory body vested with the suit estate, and in Mumbai Kamgar Sabha v. Abdulbhai, A I R 1976 SC 1455 where the objection related to technical deficiencies and misdescriptions in drafting pleadings, the Court liberally construed the rule of locus standi in order to prevent injustice being caused to the appellant. Since these matters did not relate to fundamental rights nor were they remedial in nature and nor could they have been filed under the writ jurisdiction of the Court, the paradigm in which the Court functioned was necessarily Anglo-Saxon and hence these matters were not PIL actions. Again, Ratlam Municipality v. Vardichand, A I R 1980 SC 1622, where the Court upheld the complaint of the residents of a locality who moved the Magistrate under Section 133 of the Code of Criminal Procedure to require the Municipality to remove the nuisance caused by the existence of drains, pit and public excretion by humans, the matter was not moved under the writ jurisdiction of the Court and hence cannot be characterised as a PIL matter.

PIL. While the relaxation of the strict rule of locus standi is certainly an important feature of PIL, it is doubtful whether it can be considered as its core - rather it is a necessary corollary of the remedial nature of PIL and has evolved in the absence of any restriction in Art. 32 in respect of the person who may move the Court for the vindication of fundamental rights of another person.

(iii) Epistolary Jurisdiction

The doors of the Court were effectively barred to large masses of people who, on account of poverty and ignorance, could not utilise the judicial process. The Court has overcome this difficulty by evolving the epistolary jurisdiction; that is, by holding that a letter to the Court informing it of the infringement of a constitutional right could constitute appropriate proceedings so as to activate the judicial process under Art. 32 or Art. 226. However, the Court will treat such a letter as a writ petition only if it is addressed by or on behalf a person or class of persons for enforcement of a constitutional or legal right of the weaker sections of society or for the enforcement of diffuse and collective rights.

The spurge of litigation after the evolution of epistolary jurisdiction is a measure of the Court becoming a Court for the common man. Some High Courts are reported to receive 50 to 60 PIL letters per day while the Supreme Court received 23,772 letters in fifteen months from 1.12.1987 to 31.3.1988 .[74] At the Chief Justices Conference in 1987 at New Delhi, it was resolved that the Supreme Court and each High Court would have a PIL cell dealing exclusively with PIL matters. The PIL cells in the Supreme Court and in most High Courts have been in existence for some years now. These cells screen the letters received, winnow out frivolous or inappropriate matters and prepare the files for the Chief Justice, which are then assigned in the ordinary way.

Before concluding this sub-section on the jurisprudence of PIL, it would be useful to bring out the distinctiveness of PIL by comparing it with class action used in most common law countries to vindicate public interest. It is unfortunate that at times, even Indian commentators[75] confuse PIL with class action. PIL is not class action; class action exists in India too as representative action (not to be confused with representative standing) under Order 1 Rule 8 Code of Civil Procedure. PIL is distinct from class action (and representative action

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74. J. Cassels, *Judicial Activism and Public Interest Litigation in India : Attempting the Impossible?* 37 THE AMERICAN JOURNAL OF COMPARATIVE LAW 495, 508 (1989).

75. S. Sorabjee, *Class Actions in Public Interest - The Indian Perspective*, 33 INDIAN ADVOCATE 22, 25 (1991).

in India) inasmuch it requires the Court to transcend the traditional function of adjudication to provide remedies for social wrongs; it lacks a lis; it can be maintained even if the plaintiff has no personal stake in the matter but is any member of the public acting pro bono - it can be maintained without a power of attorney; it is not adversarial in nature; it enables the Judge to play an active role and even develop legal issues not directly raised in the original action; it enables the Court to take action on the basis of newspaper reports or letters or to act suo moto; it entails flexibility of procedural law; it is not prescribed by statute and has evolved under the writ jurisdiction of the Court and therefore can only be filed in the Supreme Court and High Courts. Class action is, on the other hand, litigated within the traditional Anglo-Saxon model; it requires the Judge to be a neutral umpire in the action involving a *lis*; it cannot be maintained if the plaintiff does not have a personal stake in the matter; it is adversarial in nature; it requires the Court to consider only those legal issues which are raised before it; it mandates that the Court must observe procedural technicalities such as issuing notice to all the community members; it is prescribed by statute and must be filed in the first instance in the trial court and requires development of detailed evidentiary evidence at that level.

III. Evaluating Indian Public Interest Litigation

A jurisprudence, like an ideology, always has a strong inclination to endorse itself. By trivialising its weaknesses or lacunas and highlighting its strengths and potentialities, it tends to obscure the presence of vital conditions necessary for its very existence and sustenance. PIL is no exception to this general rule. While most of the weaknesses and lacunas of PIL as perceived by some PIL analysts are unjustified, PIL is indeed circumscribed by numerous limitations and pre-requisites without appreciating which it could soon be unceremoniously buried in history books as judicial aberration. But before discussing these, it would be necessary to consider the judicial role entailed by PIL and permitted by the Constitution.

A. Judicial Role : Umpire Or Empire?

The dominant understanding of the judicial function in common law jurisdictions is that the Judge does not make law; rather he applies the existing law. In other words, the essence of the judicial function is adjudication, not legislation nor administration. Thus, the judiciary, being limited by the doctrine of separation of powers, must respect the autonomy of the legislature and the executive.

Not surprisingly, the main plank of criticism directed against PIL by a cross section of Indian Judges, lawyers, scholars, social activists and, needless

to say, politicians stems from this perception of the judicial role - a role that is guided by voices from the grave rather than being moulded by wants and needs of society. It is asked : is it legitimate for the Supreme Court to 'usurp' the powers of the executive and legislature? Does not the 'creeping jurisdiction' of the 'power-hungry' Court negate the doctrine of separation of powers? This indignation about the deviance of the Court from the traditional role is shared by others who allege that political and ideological limitations on judicial activism will anyway render PIL ineffective as a remedial strategy. Rather, it is argued, PIL is merely a strategy adopted by the Court to retrieve the legitimacy[76] it lost during Emergency due to its infamous decision in *ADM Jabalpur v. Shivkant Shukla*[77] that would have put even hard-core positivists to shame.

Let us consider these criticisms under three headings: PIL as a power usurping strategy; political and ideological limits on PIL and PIL as an institution-legitimatizing strategy.

(i) PIL As A Power-Usurping Strategy

The doctrine of separation of powers has a pleasing and somewhat mechanistic appearance suggesting some objective invisible hand which holds the Constitution in perpetual equilibrium. It is presumed that there can exist crystal clear demarcation of institutional roles or of adjudication and legislation, notwithstanding the burgeoning literature to prove to the contrary. Even a careless student of jurisprudence is aware of the pitfalls in accepting the superficial distinction between Kelsen's norm creation and norm application; for, the very 'application' of a general and abstract norm by a Judge to the facts of a particular case results in the 'creation' of a new, specific and individuated norm.[78] Ronald Dworkin brilliantly argues that while both legislation and adjudication are political decisions, the legislature ought to justify its decision in terms of 'policy', that is, to advance 'some collective goal of the community as a whole' and the Court ought to justify its decision in terms of 'principles', that is to secure 'some individual or group rights'.[79] But he himself admits that his distinction between principles and policies can be collapsed by 'construing policy as stating a principle'.[80]

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76. S. Hegde, *supra* note 7 at 162.
77. AIR 1976 SC 1207.
78. H. Kelsen, GENERAL THEORY OF LAW AND STATE 113-114 (1961).
79. R. Dworkin, TAKING RIGHTS SERIOUSLY 82-83 (1977).
80. See U. Baxi, *On how not to judge the Judges : Notes towards evaluation of the judicial role,* 25 JOURNAL OF INDIAN LAW INSTITUTE 211, 229 (1983).

Theory aside, is not the entire evolution of common law a shining example of judicial law-making; unless, of course, the Judge or, to quote Blackstone, 'the living oracle of law' had developed a highly specialised pipeline directly to the Creator. Are not 'precedents' or 'rules of statutory construction' illustrations of Judge-made law ? Hence, even if at a prescriptive level, Judges ought not to make law, at an empirical level, Judges have and will continue to make law. No amount of intellectual gymnastics can change this finding. It would be relevant to quote the Supreme Court on the issue of judicial law-making : [81]

> The Court must do away with 'childish fiction' that law is not made by the judiciary. The Court under Art. 141..is enjoined to declare law. The expression 'declared' is wider than the words 'found' or 'made'. To declare is to announce an opinion. Indeed, the latter involves the process, while the former expresses the result. Interpretation, ascertainment and evolution are parts of the process, while that interpreted, ascertained or evolved is declared as law.

Happily, most common law jurisdictions today accept[82] that judicial decisions are not babies brought by constitutional storks. It is conceded that the Judges legislate, even if only interstitially; though whether the entire common law tradition can be characterised as mere interstitial or molecular legislation is a questionable proposition.

Having noted that the traditional judicial role is as mythical as the neutrality of law, let us consider the Indian situation.

The critics, while relying on their notions of the judicial role to condemn the Court for negating the doctrine of separation of powers, erroneously presume that the said doctrine is strictly applicable to India. The Court has ruled in *Ram Jawaya v. State of Punjab*[83] as far back as in 1955 that the Constitution does not envisage a strict application of the doctrine of separation of powers. On the contrary, it provides for an independent judiciary having extensive jurisdiction over the acts of the legislature and the executive.[84]

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81. D.T.C. Transport Corporation v. D.T.C. Mazdoor Congress (1991) 1 S C C (Supp). 600.

82. See generally H.J. Abraham, THE JUDICIAL PROCESS 338 (1980); M.Berlins & C. Dyer, THE LAW MACHINE (1986); R.N. Clinton, *Judges must make law : A realistic appraisal of the judicial function in a democracy*, 67 IOWA LAW REVIEW 711 (1982) ;D.Forte, THE SUPREME COURT IN AMERICAN POLITICS (1972); J.A.G.Griffiths, THE POLITICS OF THE JUDICIARY (1978); S.C. Halpern & C.M. Lamb, SUPREME COURT ACTIVISM AND RESTRAINT (1982); W. F. Murphy & C.H.Pritchell, COURT, JUDGES AND POLITICS (1961); M.Rebell, *Judicial Activism and the Court's new role*, 12/4 SOCIAL POLICY 24 (1982).

83. A I R 1955 SC 549.

84. See Chandra Mohan v. State of Uttar Pradesh, A I R 1967 SC 1987. Nor can such a constitutional scheme negate the characterisation of India as a democracy. The Preamble to the Constitution states 'We the People of India...enact and give to ourselves this Constitution...'. Hence if the people of India have chosen, and reiterated their choice through the ballot, to vest in non-elected Judges of the Supreme Court the power to be the final arbiter of what the Constitution says, the society does not cease to be democratic.

Such a constitutional scheme brings into question whether there is or can be a universal conception of the judicial role, particularly in view of varying political, social and economic milieux in developed and developing states. Are the problems and issues addressed by the Court in the affluent Western societies the same as those addressed by the Court in India? Can the concerns, and hence the response, of the Court be the same? As there is a difference in kind and not merely of degree between affluent developed states and subsistence-level developing states, the modes of political and social action by the judiciary will necessarily vary in these societies. As Baxi observes.[85]

> Despite similarities in underlying principles of structuring of ways of governance, the manners in which these underlying principles are grasped and actually operate vary enormously. For theorists of judicial process in contemporary England and United States, the issues of fundamental importance may be those relating to the nature, incidence and function of the appellate judicial discretion. For India, and other developing common law countries, the main problems of appellate judicial process may be those of institutionalisation of power and authority of the judiciary, and at times even of its survival.

To approach the point differently, even hardened critics will concede that the doctrine of separation of powers and the distinction between adjudication and legislation presupposes that the executive and legislature are themselves vested with legitimacy and popular support. But, what if politicians are viewed as commodities regulated by the laws of supply and demand? Would the function of the Court in a such a situation be the same as that in a society where Parliament does its job ?

Given that law is nothing but politics, the question ceases to be whether the Court should indulge in politics. Rather, the question arises as to what kind of politics it should indulge in. The issue is not whether or not the Court makes law; for it does. It would be more worthwhile debating what kind of law-making activity it should engage in. This law-making judicial function, as we have seen, will necessarily be contexualised in a democracy by the constitutional frame-work within which the judiciary operates. As far as PIL is concerned, the only standard to judge whether the active political role of the Court is justified is whether it enjoys the constitutional sanction. Such role of the Court cannot be termed as illegitimate if it falls squarely within the ambit of Articles 32, 142 and 226 of the Constitution. There is no limitation in these Articles requiring the Court to cling on to Anglo-Saxon jurisprudence and the resultant formalism. Rather, they confer the widest possible powers on the Supreme Court to enforce

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85. U. Baxi, *supra* note 80 at 234.

fundamental rights and in case of High Courts, any legal right. In other words, the Constitution specifies the function of enforcing such rights; it does not prescribe the means to perform the function. Hence, if the Court opines that legal formalism and procedural technicalities are impeding its attempt to perform its function, it is justified, nay, under a constitutional obligation to adopt new tools and remedies to achieve the specified end. It will be obvious to any one familiar with Indian bureaucracy that if the Court did not play an active role in ensuring the implementation of its orders, the orders would soon be reduced to pious exhortations. Hence, if the new tools and remedies necessarily include assuming a supervisory role in curing institutional malaise and consequently performing administrative functions, so be it.[86] Similarly, if the Court has to impinge on policy issues for constitutional or legal rights to be vindicated, it must do so.[87] The only qualification is that such intervention in administrative or policy issues must be only to the extent necessary for the enforcement of fundamental rights, in the case of the Supreme Court, and of any legal right in the case of High Courts; if the Court succumbs to the temptation of crossing this line, it would indeed be guilty of usurping powers of the executive or the legislature.

It is unfortunate that the Supreme Court has, in some of its recent decisions, consistently overlooked the above caveat that its writ jurisdiction under Art. 32 can be invoked only for the enforcement of the fundamental rights (whether they be individual, collective or diffuse rights). The Court has entertained matters where the infringement of fundamental rights is not even involved, let alone established. For example, in *D. C. Wadhwa v. State of Bihar*,[88] the Court allowed a PIL brought by a Professor of Political Science challenging as unconstitutional the practice of repromulgation of Ordinances by the Governor of Bihar from time to time without getting them replaced by Acts. In *All India*

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86. For a dissenting opinion, see V. D. Tulzapurkar, *Judiciary : Attacks and Survivals*, 1983 AIR (J.) 9.

87. The Court may 'legislate' within the parameters of the constitutional policy or the constitutionally valid legal policy; it cannot however initiate a policy de novo. To illustrate, in Mohini Jain v. State of Karnataka, (1992) 3 S CC 666, the Supreme Court had declared that as the right to education flows from right to life enshrined in Art. 21, a citizen could demand the State to provide him with education, primary or higher, of his choice. In Unnikrishnan v. State of Andhra Pradesh, (1993) 1 S C C 645, the Supreme Court overruled Mohini Jain's case to the extent that as Part III operates within the framework of Part IV, the right to education is not absolute; rather it is to be construed in light of Part IV. Hence, as far as the right to primary education is concerned, it is absolute in view of the time-bound Directive Principle in Art. 45. However, Art. 41, which also speaks of right to education, is qualified by the words 'within the limits of its economic capacity and development'. Thus, once a citizen has availed of the right to free primary education, his right to further education is subject to the limits of economic capacity and development of the State. Reference may also be made to Vincent v. Union of India, AIR 1987 SC 990 where the action entailed a claim to ban 7000 drugs; the Supreme Court declined to issue directions to the State as, in its opinion, it could not lay down the drug policy of the State.

88. AIR 1987 SC 579.

Judge's Association v. Union of India,[89] the Court allowed the PIL seeking the setting up of an All India Judicial Service and for bringing uniform service conditions for members of subordinate judiciary throughout the country. The Court has even entertained a PIL matter relating to allotment of petroleum product agencies by the State under its discretionary quota and has laid down extensive guidelines for the same.[90] In *Shiv Sagar Tiwari v. Union of India,*[91] the Court took the State to task for making irregular allotments of government houses to favoured politicians and for permitting former ministers to continue to cling on to the allotted residential premises. By its Order dated 4 September 1995, the Court directed the eviction of numerous former ministers and high ranking politicians from government houses.[92] Recently, the Court has entertained a PIL seeking action against national political parties for their failure to file the mandatory income tax returns since 1979 under the Income Tax Act.[93] Under the existing constitutional provisions, the Supreme Court simply lacks the competence to entertain such petitions howsoever desirable or necessary the objective may be. Even in respect of the current Hawala scandal[94] the Court may find it difficult to justify its directive to the Central Bureau of Investigation to prosecute all persons guilty, including senior politicians, of accepting bribes and kickbacks, often channelled in foreign currency through unofficial sources, unless the Court formulates its role in such a manner that its directive relates to the fact that the destruction of the economic and political system of the country will in turn result in the deprivation of the fundamental rights of the citizens.

Such 'judicial activism' seeking to cure institutional malaise may in the long run actually impair the credibility of the Court, and of PIL, particularly, in view of the bad experience of the U.S. judiciary in entertaining institutional litigation.[95] If the Court overlooks its constitutional limitations, it will become impossible to draw a line between matters that should be entertained as PIL and those which should not. Absence of rules to govern the exercise of power by the Court will result in contradictory and subjective exercise of power, and hence of discretion, by the Court. To illustrate, the same Court which is so active in monitoring and securing compliance of its Orders in the Hawala scandal declined, by its Order dated 9.2.1996, to entertain an application seeking a

89. AIR 1992 SC 165.
90. See *SC rules for petroleum agencies,* INDIAN EXPRESS (1 April 1995).
91. Writ Petition No. 585/94.Unreported.
92. See *SC directs Pant to vacate Govt house,* INDIAN EXPRESS (5 September 1995).
93. See *SC grants last chance to parties on I-T,* INDIAN EXPRESS (22 January 1996).
94. *Supra* note 3.
95. See *The naked and the corrupt and When hawala acquires explosive dimensions,* INDIAN EXPRESS (18 January 1996).

direction to the State of Uttar Pradesh to comply with the Order dated 8.9.1994 of the Court mandating the setting up of the autonomous Management Committee by 1.10.1994 to govern the Agra Mental Asylum.[96] Further, the Court will utilise its scarce infrastructure, funds and staff to monitor cases which clearly fall outside their jurisdiction at the expense of deserving cases, both traditional and PIL. Then there is the spectre of corruption in the judiciary which is evidenced by the Ramaswami episode and has been candidly acknowledged in discussions between the members of the Supreme Court Bench and the Bar.[97] These issues give rise to further question as to the accountability of Judges - while the Ramaswami scandal underscored 'the need for a standing judicial body with its own investigative machinery, armed with the power to investigate charges of misbehaviour against judges',[98] the repeated demand now is that it is '(t)ime for the judges to set their own house in order'[99] and that 'the Judges ethic code, which was drafted for years back by the Supreme Court Judges themselves but not enforced and made public so far, must be put into operation' because 'can morality be enforced by a legal process of asking all to be so without the institution ordering this, taking corresponding measures itself '.[100] Already in the Hawala scandal, where the Court is monitoring the investigation of the CBI behind closed doors, 'bothersome but necessary' questions are being asked as to 'whether the Court has asked the CBI as to why certain individuals, mentioned in the diary before it, have been investigated and not other' and 'if so, has the Court monitored the investigation of those the CBI has chosen to leave out.[101] In other words, the Court is getting into controversies which may raise doubts, no matter how unjustified, about its bonafides and impartiality to nab the prime culprits in the scandal. Never in its history has the Supreme Court, which has enjoyed immense affection from the public in general, been subjected to such volatile comments as : the Supreme Court Judges need 'pyschiatric treatment',[102] 'It will be unfortunate if the judiciary oversteps its constitutional role and seems to pander to populism';[103] the Supreme Court is 'exceeding is constitutional brief '[104] and 'it seems our justice system is moving towards absurdism'.[105] Such criticisms of the Court

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96. Aman Hingorani v. Union of India, AIR 1995 SC 215; Order dated 9.2.1996.
97. K. Mahajan, *Time for the judges to set their own house in order*, INDIAN EXPRESS (11 December 1995).
98. S.K.Pande, *Revulsion all around*, FRONTLINE 24 (4 June 1993).
99. K. Mahajan, *supra* note 97.
100. K. Mahajan, *Corruption cases force changes in SC functioning*, INDIAN EXPRESS (12 February 1996).
101. *Ibid.*
102. *SC pulls up Editor, Management*, INDIAN EXPRESS(6 February 1996).
103. See Editorial, *A 'third chamber'?* HINDUSTAN TIMES (28 December 1995).
104. *Ibid.*
105. V.N.Narayan, *Is Justice Stayed Justice Denied*, HINDUSTAN TIMES (24 December 1995).

bear an uncanny resemblance to those lashed out against the U.S. Supreme Court forcing it to retreat to its traditional impersonal judicial role. The Court would do well to recall its observation in *Bandhua Mukti Morcha v. Union of India* that[106]

> Where the Court embarks upon affirmative action in the attempt to remedy a constitutional imbalance within the social order, few critics will find fault with it so long as it confines itself to the scope of its legitimate authority. But there is always the possibility in public interest litigation of succumbing to the temptation of crossing into the territory which properly pertains to the legislature or to the Executive...in every case the Court should determine the true limits of its jurisdiction and having done so, it should take care to remain within the restraints of its jurisdiction.

To summarise, the Court has the constitutional sanction to 'creep' into the jurisdiction of the executive and legislature but only to the extent that is necessary to enforce fundamental rights in the case of Supreme Court, and any legal right in the case of High Courts. Moreover, the executive is obliged under Art. 256 of the Constitution to enforce the law. Hence, when the Court reminds the government of its constitutional obligations, is such a reminder 'usurpation' of power or is it a struggle to dispute the reading of the Constitution by the executive who sees in nothing by the codification of power, privilege and patronage? Is it not a necessary challenge to the abuse of power or governmental lawlessness when police connive to traffic in women, when women are raped by policemen in police custody, when incarceration and torture of prisoners has become institutionalised, when children are born as bonded labourers or are supplied to convicts for sexual satisfaction with the active connivance of the administration, when mental patients are dying daily due to inhuman living conditions, when dowry deaths are on the increase, when all these and many more situations involve a clear violation of the law ? In such hard cases, it is impossible for the Court not to take sides; for, here it does not enjoy the luxury of academicians of indulging in 'buts' and 'ifs'. It must either respond to such situations or ignore them. If it responds to fulfil its own constitutional obligations, is it 'usurping' the powers of the executive or the legislature ?

(ii) Political And Ideological Limits On PIL

The political checks on judicial activism stem from the realisation that the Court does not control the sword nor the purse. Hence, the executive could

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106. *Supra* note 51 at 843.

simply refuse to enforce judicial decisions and the legislature could nullify the effect of such decisions, by passing a law or a constitutional amendment. Hence, critics argue that the Court is not in a position to actually deliver remedial relief; rather it would soon be reduced to simply making speeches.

The criticism fails to distinguish PIL from judicial activism in cases having the traditional lis. The purpose of PIL actions is to ensure that the executive and the legislature discharge their constitutional obligations. Hence, when the Court directs the State to perform the functions it is supposed to under the Constitution, the State is in a 'no-win' situation; if it complies with the direction of the Court, it underscores its incompetence and complicity. Yet it cannot refuse to comply with the Court's direction without appearing to justify tyranny, governmental lawlessness and administrative sclerosis; hardly the signals any government, much less an elected government, would want to convey to a increasingly impatient public, powerful non-governmental organisations and an independent Press. Notwithstanding the criminalisation of politics, politicians must still woo the voters by promising to realise constitutional mandates; if the State now chooses to ignores a PIL order directing it to realise such mandates, it does so at its own peril.

Similarly, if Parliament seeks to nullify a PIL decision by passing a constitutional amendment, it can do so only by admitting its inability to fulfil the constitutional goals. Moreover, such an amendment must not pertain to that part of the Constitution which is held by the Court to affect the basic structure of the Constitution. It is true that the 13 Judge Bench decision of *Keshavananda Bharati v. State of Kerala*[107] enunciating the basic structure doctrine can be overruled by a larger Bench. However, it seems unlikely that such a large number of Judges would concur, at any point of time, in gifting away their constituent power to Parliament.

The only political limitations on PIL are those prescribed by the constitutional scheme itself. PIL is restricted to the writ jurisdiction of the Court[108] as

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107. A I R 1973 SC 1461.

108. It may however be noted that the principles and philosophy of PIL become the law of the land by virtue of Art. 141 and permeate every branch of law thus making state law 'a law of the poor'. For example, in Bhim Singh v. Union of India, A I R 1981 SC 234, the Court upheld the URBAN LAND CEILING ACT 1976 observing that the proprietariat will no doubt suffer but the country cannot defer transformation as then hunger will know no law; in Sanjit Roy v. State of Rajasthan, A I R 1983 SC 328, the Court struck down the RAJASTHAN FINANCE RELIEF WORK EMPLOYEES ACT 1964 as being violative of Art. 23 of the Constitution inasmuch as it exempted the application of the MINIMUM WAGES ACT 1948 to certain employees. The Court ruled that forced labour prohibited by Art. 23 includes not only physical or legal force but also force arising out of economic compulsions as capitalism often exerts such economic pressure that the poor are compelled to provide labour even though the remuneration received for it is less than the minimum wages. Similarly, Sadhuram Bansal v. Pulin Behari Sarkar, A I R 1984 SC 1471, the Court ruled that it would lean in the favour of the weaker sections of society notwithstanding that it might detract from some technical rule in favour of the opposite party; in Lingappa v. State of Uttar Pradesh, A I R 1988 SC 389, the Court upheld the Act which restored land to tribals, ruling that law should be based on the principle - from each according to his capacity to each according to his need; in Prabhakaran Nair v. State of Tamil Nadu, A I R 1987 SC 2117, the Court recognised a fundamental right to shelter.

it is here that the Court can depart from Anglo-Saxon jurisprudence. On the same basis, PIL cannot be filed in Courts lacking writ jurisdiction, namely, the Courts subordinate to the High Courts.[109] Though trial courts cannot, under the existing constitutional scheme, entertain PIL actions, it does not follow that they cannot be involved in the implementation and monitoring of the orders of the Supreme Court or the High Courts. The Supreme Court has, in exercise of its power under Art. 142, directed Magistrates or District Sessions Judges to undertake follow-up actions in several PIL cases.

The criticism regarding the existence of ideological limitations on PIL too overlooks the purpose of PIL. There is no clash of ideology between the State and the Court, rather the ideology has already been concretised in Part IV of the Constitution, adopted by the Court and suscribed to, at least in election manifestos, by all political parties. PIL is a 'collaborative effort' on part of the Court and petitioner to prod the State to move in the direction which the State itself professes to move in.

(iii) PIL As An Institution-Legitimatizing Strategy

This criticism questions the motives for the Court in assuming such an activist role. Given that it had lost its credibility with the masses by upholding the Emergency, is the Court not merely augmenting its support base and moral authority in the nation at a time when other institutions of governance are facing a legitimatization crisis?[110]

The initial exercise of power by the Court in aid of the disadvantaged sections of society was perhaps a natural response to the extremely hard cases (*Hussainara Khatoon's* case, *Anil Yadav's* case) involving blatant violation of fundamental rights - before 1979, the Court simply was not confronted with such cases. More important, this exercise of judicial power bore constitutional sanction : the failure of the Court in such hard cases to deliver immediate relief

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109. Few Commentators (J. Cottrell, *supra* note 73 at 120; N. Suryawanshi, *Social Action Litigation under Section 91 Civil Procedure Code*, THE LAWYERS, 20 (January 1987) have recommended that PIL can and should be taken up in lower courts. This however is not permissible under the constitutional scheme. Suryawanshi proposes Sec. 91 of the Civil Procedure Code to be the enabling provision. Sec. 91 provides that in case of public nuisance, the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case. However, such a proposition overlooks that Sec. 91 is intended to operate within the adversarial system along with its limitations and characteristics such as the traditional role of the Judge as a neutral umpire, the necessity of sanction from the Advocate-General to institute the suit and procedural handicaps inducing delay and formalism. Moreover, the scope of Sec. 91 is limited to public nuisance actions. Further, as the trial courts lack writ jurisdiction under the Constitution, they lack the necessary power to transcend the traditional judicial function of adjudication in order to provide remedies to social maladies.

110. J. Cassels, *supra* note 74 at 515.

would have, in any legal jurisprudence, amounted to abdication of its constitutional obligations.

Over the years, PIL has indeed enhanced the legitimacy of the Court as an institution. But then, is it only an institution - legitimatizing strategy with no instrumental effect in inducing social reform? Or does the converse proposition present a more accurate position; for, would not any strategy adopted by an institution which is effective in providing relief to the masses bound to enhance the legitimacy of that institution? Hence, if the Court is effective through PIL in using state law as an instrument of distributive justice, would it be fair to criticise the Court for having enhanced its credibility in the process?

The effectiveness of PIL in granting immediate relief to the aggrieved has not been questioned even by critics. If only the illustrations of PIL actions given so far is taken into account, the impact of the judicial decisions in human terms is astonishing; millions of people have benefited through court action; whether they be undertrials, bonded labourers, delinquent children, dowry victims or simply the general public suffering from environment pollution.

The Court has, however, made few mistakes as well in its attempt to provide remedial relief. A good example is *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*[111] which pertained to the destruction of the vegetation cover of Mussoorie Hills, an exotic hill station, and the creation of drought-like conditions due to reckless limestone mining licensed by the State Government. The Court, in its endeavour to protect the fundamental right to clean environment as implicit in the right to life guaranteed by Art. 21, constituted and reviewed reports of several technical committees, including those of geological experts, and after considering, balancing and resolving competing policies and issues of resources including the need of environmental protection, developmental priorities, preserving jobs and protecting business investments, ordered all but one public and two private mines to close down. The three units were allowed to operate for a specified time under detailed conditions. The Court constituted a Monitoring Committee, at State expense, to ensure the compliance of its directions and to reforest the entire region; significantly, 25% of the gross profits of the three operating mines were to be paid to this Committee to facilitate the discharge of its functions. A Rehabilitation Committee was also set up to provide alternative mining sites for the displaced mine owners. However, the Court failed to take into account the interests of the labour. It is reported[112] that on closure of the mines, the mine

111. AIR 1985 SC 652; AIR 1985 SC 1259; AIR 1987 SC 359; AIR 1987 SC 2426; AIR 1988 SC 2187; AIR 1989 SC 594.

112. *Protecting Doon Valley's Eco System : Problems and Limitations*, ECONOMIC AND POLITICAL WEEKLY 1741 (10 October 1987).

owners literally chased out their workers without normal termination compensation amounting to one month's pay. Further, the mine owners used the environment campaign bogey to refuse regular employment pending closure. This allowed them to recruit workers on contract basis and thus escape the normal responsibility of providing provident fund contribution, medical relief and compensation in case of accidents which were frequent. It may however be clarified that the failure of Court to protect interests of the labour can be traced back to its observation[113]

> in regard to the mines closed for more than three years, we do not think the labour is sitting idle and the mine - owner is paying them. They must have got employed elsewhere or they have lost their service and have taken to alterative engagements.

Hence, the Court erred in this case because of its assumption that the mine-owners had discharged the labour in accordance with law rather than on account of any inherent inability to provide relief to the labour.

Critics do not dispute effective enforcement of the normally comprehensive court orders. Rather, they are concerned with what happens subsequently. The Court might release thousands of undertrials or bonded labourers, but who will rehabilitate them? For all that the Court may do, it cannot end bonded labour nor find homes for the pavement dwellers. In other words, they point out that the Court 'cannot be a substitute for executive efficiency' and that socio-economic change in a society 'organised around privilege, patronage and power, cannot be brought about just by a few PIL actions, howsoever well intentioned'.[114]

It is not entirely correct that the Court is helpless as regards the rehabilitation of the bewildered. For example, in *Ajaib Singh v. State of Punjab*[115] and *Sivaswamy v. State of Andhra Pradesh,*[116] thousands of released bonded labourers were rehabilitated. However, this criticism goes beyond the issue of rehabilitation and other remedial steps; what is being questioned is the ability of any litigative strategy to redistribute wealth or power on a massive scale within society.

This criticism seems to be correct to some extent. But then, the problem of the impoverished in India are too enormous and myriad to be solved even if major surgical operations were to performed by Parliament and executive working dutifully in cohesion with the judiciary. Nor does the Court profess to perform such a monumental task alone. Critics must remember that it is not a

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113. A I R 1988 SC 2187 at 2209.
114. S.K.Aggarwal, *Public Interest Litigation : A Critique,* INDIAN LAW INSTITUTE 45 (1985).
115. Writ Petition No. 2448-57 of 1983.Unreported.
116. Writ Petition No. 1187 of 1982.Unreported.

question of choosing between judicial efficacy and executive efficiency; while the Court may not be the best forum for socio- economic amelioration of the poor, it is their last resort precisely because of lack of executive efficiency.

Yet other commentators point to those PIL actions where the Court recognises the right of the aggrieved but fails to provide a remedy. An instructive example of such decisions, though fortunately rare, is *Olga Tellis's* case[117] filed on behalf of the Bombay pavement and slum dwellers who pleaded that eviction fron. pavements and slums would result in deprivation of their livelihood and consequently of life. In this case, the Court read a right to livelihood into the right to life under Art. 21 and recognised that the inability of such dwellers to obtain housing within a reasonable distance from their place of work violates such right to livelihood. Yet the only remedy it provided for the deprivation of this right was a prior warning to be given before eviction. It limited itself to giving unenforceable suggestions that the State should undertake a massive low-income housing programme in Bombay and that such programmes should 'be pursued earnestly' and 'implemented without delay'.

It is true that half an ounce of relief is more satisfying to a litigant than toothless rights. It would, however, be instructive to consider a similar case litigated around the same time as *Olga Tellis's* case, that is, of *Govind Ram (now Yashwant) v. Union of India.*[118] The action, which was filed on behalf of 7000 lepers in Delhi as being representative of 4 million lepers in the country, prayed for directions to the State to provide housing and medical aid to the lepers and to rehabilitate them. During the pendency of the petition, Delhi Development Authority (DDA) evicted lepers living in unauthorised hutments on the DDA land. The Court stayed further demolition and directed DDA to accommodate these lepers in alternative sites. It ordered DDA to construct hutments, with provision for medical treatment and vocational training, and hand over such hutments to the evicted lepers in lieu of their demolished hutments; an order complied with on 4 and 5 August 1986. The Court prohibited DDA from evicting the lepers, even if on unauthorised land, without providing alternative arrangement.

It would be incorrect to assume that the Court is composed of disembodied eminences who cannot seem to take a consistent stand. Critics overlook that the prescription that 'where there is a right there is a remedy and where there is no right, there is no remedy' stems from the traditional judicial role which limits the Court to resolving cases possessing the traditional lis. But if we step out of this traditional model, the function of the Court ceases to be adjudication; rather the Court may 'transcend traditional forms and inhibitions'[119] to assume

117. *Supra* note 55.
118. Writ Petition No. 10210 of 1985. Unreported.
119. *Supra* note 57.

several roles such as that of an ombudsman, an investigator, a mediator, a monitor, a social wrong publicist, a forum for a calm discussion of volatile public issues or even a deputy legislator. There may thus arise cases involving a right and no remedy (*Olga Tellis's* case) and those granting remedies without the determination of rights (*Govind Ram's* case). Such actions can be clubbed together as cases.[120]

> in which the court tells the government what in its opinion, the government ought to do. If the court feels that the social injustice presented by a particular case creates a powerful imperative for concrete action, and feels sufficiently confident that the executive will share that sense of imperative, then it will venture to issue specific remedial relief. If it does not feel that a case presents such an imperative, or doubts its ability to persuade the executive, it may limit itself to a declaration of rights bolstered by argument and rhetoric.

Hence, the allegation that PIL is ineffective in cases like *Olga Tellis's* case overlooks the secondary uses of PIL, such as a catalyst for legislative action or a deterrent for lawlessness or simply the highlighting of social wrongs.

Yet another criticism directed against PIL is that it is an episodic response to a particular outrage. Hence, it does 'not mobilise the victims nor help them to develop capabilities for sustained, effective use of law'.[121] The non-mobilising force of PIL awaits empirical proof. As regards its mobilising force, it will suffice to refer to *Randhir Singh v. Union of India*[122] where the Court expresses its 'pride and satisfaction' that the petitioner, who was a driver employed by Delhi Administration, had approached the Court pleading discrimination in pay. Observing that constitutional provisions had till then been invoked by the privileged classes for their protection and 'for a "fair and satisfactory" distribution of the buttered loaves amongst themselves', it rejoices that[123]

> thanks to the rising social and political consciousness and the expectations aroused as a consequence, and the forward looking posture of this Court, the underprivileged also are clamouring for their rights and are seeking the intervention of the Court.....

Another measure of effectiveness of PIL is the transformation in the attitude of the legal profession towards it. For the first couple of years, PIL had met with contempt, resistance and ridicule. In *Hussainara Khatoon's* case, the Court issued notice to the Supreme Court Bar Association to assist the Court,

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120. C.D. Cunningham, *supra* note 60 at 521.
121. M.Galanter, LAW AND SOCIETY IN MODERN INDIA 291 (1989).
122. AIR 1982 SC 879.
123. *Id.* at 879.

yet the Bar did nothing and did that well. [124] The Bar was particularly piqued with the recognition of the right to speedy trial; for, with stricter standards for adjournment, the entire tribe of adjournment-lawyers could be driven to near extinction. Its reaction soon 'moved from indifference to indignation at what it regard(ed) as freak litigation'.[125] Senior lawyers were openly heard to say 'that if the Supreme Court thus wants to do social justice, it had better meet on the weekends'.[126] However, as human rights talk has gained legitimacy internationally, PIL has become 'fashionable'. One no longer hears the allegation that PIL is nothing less than a foreign conspiracy to topple the government through the C.I.A. Instead, the same lawyers now claim that they have always been associated with PIL .[127]

The attitude of the State, too, has become more receptive. The Court may characters PIL as a collaborative with all emphasis at its command; the behaviour of State Counsels in Court was still quite adversarial. After having been at its subversive best in cases [128] like *Anil Yadav's* case and *Rudul Sah's* case, the State is now more willing to co-operate with the Court and the petitioner. Judges of the High Courts are also becoming increasingly PIL-prone .[129]

B. Limitations Of Public Interest Litigation

The limitations on PIL as a strategy to provide remedies for social wrongs include the misuse of PIL by litigants filing actions for personal motives; institutional weaknesses of the Court to entertain PIL and political influence on judicial appointments.

(i) Abuse Of PIL

The very innovations that provide the impoverished access to Court also open the doors of the Court for unscrupulous litigants filing PIL actions for personal gain or motives. Given the epistolary jurisdiction of the Court and that

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125. U.Baxi, *Taking Suffering Seriously : Social Action Litigation in the Supreme Court of India,* in Baxi (ed.) LAW AND POVERTY : CRITICAL ESSAYS 387 (1988).

126. *Id.* at 409.

127. *Id.* at 410.

128. In Anil Yadav's case, the State Government initially prohibited its Inspector General of Prisons to appear before the Court and blocked investigations which were to be conducted by the Central Bureau of Investigation. It clamped down all data on the prisoners (*Bihar clampdown on data on convicts,* TIMES OF INDIA (3 December 1980)). Similarly, in Rudul Sah's case, it attempted to argue that Rudul Sah was not released as he had become insane. The Court promptly rejected the argument for lack of evidence and observed that even if Rudul Sah had become insane, such insanity must have been caused by his illegal detention for 29 years.

129. U.Baxi, *supra* note 125 at 413.

the Court shoulders the responsibility of investigating into the alleged facts, it is not surprising that attempt has been made to misuse PIL. To illustrate, in *Subhash Kumar v. State of Bihar,*[130] a letter, which alleged that a particular factory was polluting a river by discharging effluents, was discovered to have been sent merely to harass a rival industrialist. Similarly, in *C. P. W. Samiti v. State of Uttar Pradesh,*[131] the petition, which alleged air pollution, was found to have been filed out of enmity between parties. The Court dismissed these actions ruling that PIL cannot be invoked by a person to satisfy his personal grudge and enmity and that it was the duty of the Court to protect society from so-called protectors.

Again, in *Janta Dal v. H S Choudhary,*[132] the Court dismissed a PIL action for the quashing of the proceeding against the accused in the infamous Bofors corruption case. Holding that the petitioner had filed the PIL at the instance of the accused, the Court observed that a PIL action cannot be filed for personal gain or private profit or political motive or any oblique consideration. Similarly, the Court refused on 24 July 1995 to entertain a matter challenging the controversial Enron power project deal.[133]

Such cases use the already scarce human and financial resources available to the Court. At the National Conference on PIL organised by the International Institute of Public Interest Law[134] in Hyderabad on 24-25 September 1994, the then Chief Justice of India as well as the present Chief Justice of India cautioned that PIL will face structural and procedural problems unless it was administered in a disciplined manner and that the misuse of PIL will result in the loss of its credibility and will stem judicial activism.[135]

Few PIL analysts propose that the remedy is to impose heavy costs on the petitioner found to be misusing the judicial process through PIL. Others opine that laying down of clear guidelines specifying the matters that could be agitated in Courts as PIL would help in checking the abuse of PIL. Till then, there seems to be no solution other than requiring the Court to maintain a constant vigil.

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130. AIR 1991 SC 420.

131. AIR 1990 SC 2060.

132. AIR 1993 SC 892.

133. *SC dismisses plea against Enron deal,* INDIAN EXPRESS (25 July 1995).

134. The International Institute of Public Interest Law was founded in response to a perceived need for formal institutionalisation of PIL. Justice M N. Venkatachaliah, Chief Justice of India and Chief Patron of the Institute inaugurated the Institute on 27.1.1994. Justice S.R. Pandian, former Judge, Supreme Court of India is its Patron while the Governing Council of the Institute comprises Kapila Hingorani (Advocate), Dipankar Gupta (Solicitor General of India), Suman Krishna Kant (of Mahila Dakshata Samiti), Vimla Farooqui (of National Federation of Indian Women), H . K. Dua (former Chief Editor of Indian Express), Father P. D. Mathew (of Indian Social Institute, New Delhi) and the present author.

135. *CJ For Proper Use of Public Interest Law,* INDIAN EXPRESS (25 September 1994); *Proper Handling of Public Interest Litigation Stressed,* NEWSTIME (25 September 1994).

(ii) Institutional Limitations

The Court is overworked, understaffed and underpaid. Despite its brave ruling in Bandhua Mukti Morcha's case that arrears of cases is no reason to deny justice to the poor, the Court simply does not have the facilities, resources nor the time to individually supervise each and every case. Though the mechanism of constituting commissions has reduced the burden of the Court, a formal and extensive infrastructure is nonetheless imperative for the Court to cope up with the PIL docket explosion.

The Court could do well with a major structural change in the operation of PIL cells. These cells are manned by the administrative staff rather than by socio-legal experts. Hence, several worthwhile PIL letters might be disregarded during the screening exercise itself. Similarly, the staff might not be able to correctly gauge the urgency nor the implications of certain letters. To illustrate, in *Nilima Priyadarshini v. State of Bihar*,[136] the Court expressed its shock that a letter written by the petitioner complaining of illegal detention was placed before it two and a half months after the PIL cell received it. Observing that such aberration make a 'mockery of the judicial process', the Bench referred the matter to the Chief Justice for taking 'suitable action against the responsible officials' and to 'devise machinery' to ensure that such incidents are not repeated. [137]

A similar set of guide-lines is required for the Court Registry. Several rules governing the filing of PIL actions are self-contradictory. A PIL action filed in the Registry is still to be accompanied by an affidavit, notwithstanding the evolution of epistolary jurisdiction and suo moto actions by the Court. It seems quite futile to require a lawyer or the petitioner-in-person to solemnly declare that the alleged facts are taken from a press report, especially when the press report is attached to the petition. Such bottle-necks in bringing actions before the Court is bound to discourage several prospective petitioners.

A far more serious institutional limitation is the fluctuating bench structure. It may be emphasised that though today PIL enjoys a collective endorsement from the Court, Judges vary in their degree of affection for PIL. The Indian Supreme Court too suffers from the universal problem of having some Judges activist, few conservative and others simply unpredictable. This problem gets further aggravated by the discretion of the Chief Justice to form Benches. Moreover, the Bench which admits a PIL action need nor necessarily be the one to hear it. These difficulties that arise due to the fluctuating bench structure get further compounded by the lack of cohesion and co - ordination even among the

136. A I R 1987 SC 2021.
137. *Id.* at 2022.

activist Judges.[138] This may be illustrated by considering *Nimeon Sangma v. Home Secy, Govt. of Meghalaya*[139] which was filed on behalf of the undertrials pursuant to *Hussainara Khatoon's* case. Two of the three Judges constituting the Nimeon Sangma Bench were common to the Hussainara Khatoon Bench Yet in Nimeon Sangma's case which was decided after three interim orders had already been passed in Hussainara Khatoon case, the court made no reference to *Hussainara Khatoon's* case nor read a right to speedy trial under Art. 21. The petitioner, common in both cases, was not asked to prepare charts categorising the undertrial prisoners. Instead the Court passed a blanket order releasing all prisoners, other than those charged with murder or dacoity, who had been in jail for more than six months without being charge-sheeted. As regards those charged with murder or dacoity, the Court directed that investigation must be completed within two months. This lack of cohesion among the Judges raises the spectre of litigants indulging in Judge-shopping[140] and of Judges in issue-shopping. Not only does it create legal loopholes that are bound to be gleefully exploited by the State, it results in unnecessary friction among the Judges which weakens the Court at an institutional level.

No matter how sound a jurisprudence may be in theory, attention still has to be paid to lowly details like remunerating the petitioner. It does seem a topsy-turvy situation that the petitioner who is vindicating public causes incurs personal expenses[141] while the State Counsel opposing PIL action or defending

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138. U.Baxi, *The Supreme Court Under Trial : Undertrials and the Supreme Court*, 1 S.C.C. 35, 47 (1980).

139. AIR 1979 SC 1518. Similarly, inconsistency has crept in while interpreting Art. 21 to include a right to clean environment. The Court in Rural Litigation and Entitlement Kendra's case simply did not mention the Art. under which it read this right as a fundamental right. Several High Court read it into Art. 21. For example, the Andhra Pradesh High Court in Damodar Rao v. The Special Officer Municipal Corp. of Hyderabad, AIR 1987 AP 171 argued that there was no reason why only violent extinguishment of life must be considered as deprivation of life and not slow poisoning by environment degradation. Hence it was the ambit of the term 'deprived' in Art. 21 which was perceived to have been extended by the Supreme Court. In later cases (such as Subhash Kumar's case - *supra* note 130), the Supreme Court expressly read a right to pollution free air and water and to clean environment into right to life itself, thereby widening the ambit of 'life' in Art. 21. The significance of this distinction is that in the latter case, it is presumed by the Court that pollution per se violates Art. 21. The petitioner need not make out a prima facie case that the complained pollution is of such a degree that it will result in deprivation of life; a major advantage in cases where the impact of pollution is not as drastic or apparent as it was in Rural Litigation and Entitlement Kendra's case.

140. In early eighties, an unhealthy practice of writing letters to certain Judges had resulted in friction among few Judges of the Court (see Tulzapurkar *supra* note 86 at 14). In Sheela Barse's case (*supra* note 57), the Court ruled that such a practice is undesirable particularly as other Judges on the Bench are often not even aware of the contents of such letters. Further, even the authencity and delivery of letters might be disputed. As Judges should keep out of such controversies, the Court opined that all letters must be addressed to the Registry which will forward them to the Court.

141. The Supreme Court has in few cases directed the State to pay costs to the petitioner. For example in P. N. Thampy v. Union of India, AIR 1984 SC 74, costs of Rs 5000 were awarded. In D. C. Wadhwa's case (*supra* note 88), where a Professor of Political Science brought an action successfully challenging the practice of repromulgation of Ordinances by the Governor of Bihar from time to time without getting them replaced by Acts as unconstitutional, the Court awarded Rs 10,000 as costs. However, such awards are made on an ad-hoc basis and depend on Judge to Judge.

governmental lawlessness gets paid by the hearing from the public exchequer. Remuneration to a successful petitioner by the State would go a long way in endearing PIL to the lawyers and the public, and, in the process, check governmental excesses. Given the time, money and energy needed to bring and pursue a PIL action, lack of remuneration would, on the same footing, slacken the current momentum of bringing voluntary actions.

However, these limitations of lack of infrastructure and guide-lines or that of the fluctuating bench structure or of remuneration are not insurmountable difficulties. The Court has all the powers it needs to set its house in order; it may lack the same perceptions.

(iii) Political Influence On Judicial Appointments

PIL draws its strength from the insulation of the judiciary from the executive and legislature. However, political influence, particularly in the High Court - the recruiting ground for Supreme Court Judges - is on the increase today. The main reason for this is the method of appointment of Judges.

Art. 124 of the Constitution empowers the President of India to appoint the Supreme Court Judges after consultation with the Chief Justice of India and such other Judges who he deems fit. The President appoints the High Court Judges in consultation with the Chief Justice of India, the Chief Justice of the State and Governor of the State (Art. 217). Prior to 1981, the advice of the Chief Justice of India was considered binding. However, the Supreme Court, in *S P Gupta's* case, inflicted a wound on itself by ruling that no primacy is to be given to the advice of the Chief Justice of India over that of the other functionaries. This decision encouraged the executive to use its conventional weapon system of appointing co-operative Judges.[142] Further, it construed its constitutional right to initiate appointments to mean that the State Governments could propose the names of Judges directly to the Central Government by-passing the Chief Justice of the High Court.

In *Subhash Sharma v. Union of India*,[143] the three Judge Bench of the Supreme Court ruled that the right to initiate appointments is limited to suggesting appropriate names to the Chief Justice of the State or to the Chief Justice of India and that the practice of State Governments to send proposals directly to the Central Government is impermissible under the Constitution. Further, the Court held that the advice of the Chief Justice of India should play a decisive role; if the executive has primacy in the selection process, it may

142. U.Baxi, *supra* note 80.
143. AIR 1991 SC 631.

involve arbitrariness. Ruling that the seven Judge decision in *S P Gupta's* case needs reconsideration, it referred it to a larger Bench of nine Judges for review. In *Supreme Court Advocates-On-Record Association v. Union of India,*[144] the nine Judge Bench overruled *S P Gupta's* case to hold that the opinion of the Chief Justice of India has primacy in the appointment of Supreme Court and High Court Judges. It remains to be seen whether the 1994 decision will reduce the vulnerability of Judges to political influence.

C. Pre-Requisites For Public Interest Litigation

The norms of PIL, like any other legal rules, become invisible as rules of action precisely when they are effective. They don't appear as rules at all but simply as an apt response 'to an immediate reality, as part of 'the way things are' [145]. As a result, several conditions necessary for the very existence of PIL are relegated to the background. Let us start the task of appropriating these pre-requisites for PIL from the realm of the natural by referring to the view held by several commentators [146] that PIL is Judge-induced and Judge-led. While the accuracy of the latter part of the proposition varies from Judge to Judge and petitioner to petitioner, the former part is certainly not true. PIL is not Judge induced; rather, it was induced by ripe political, social and economic conditions co-inciding in time, facilitated by constitutional provisions and sustained by a free Press and vibrant democracy.

(i) Ripe Political, Social And Economic Conditions

There must exist a vacuum for justified political authority before the Court can assume an active political role without losing its credibility. In other words, loss of legitimacy of the legislature and the executive (and the Court) during the 1975 Emergency and the criminalisation of politics was crucial for PIL to exist today. Further, before the Court can justify its affirmative role to mitigate the sufferings of the poor, there must be acute poverty along with its dehumanising economic and social implications. Unfortunately, there had to be cases like the *Hussainara Khatoon's* case, *Anil Yadav's* case and *Rudul Sah's* case to conscientise the nation and the Court; though even these ghastly cases do not appear to have stirred the vestigial conscience of the State. To put the point

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144. A I R 1994 SC 268.

145. L. L. Fuller, *Collective Bargaining and the Arbitrator,* WISCONSIN LAW REVIEW 3 (1991).

146. U. Baxi, *supra* note 125 at 90; P. N. Bhagwati, *Judicial Activism and Public Interest Litigation,* 23 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 561 (1985); J. Cassels, *supra* note 74 at 497; A. Rosencranz, S. Divan & M. Noble, ENVIRONMENTAL LAW & POLICY IN INDIA 119 (1991).

differently, for the Court to justify its departure from the traditional judicial role, ripe socio-economic conditions must coincide in time with political vacuum.

(ii) Enabling Constitutional Provisions

The politically active judicial role must fall within the constitutional framework. The insulation of the judiciary from the executive and legislature[147] is necessary for very conceptualisation of PIL. Further, even an insulated Court could not have justified its departure from Anglo-Saxon jurisprudence but for the language of Art. 32 and 226 not prohibiting the Court from exercising its judicial power in cases lacking the traditional lis. Art. 142, perhaps the only provision of its kind in the world, supplements the wide powers of the Court to mould the relief in light of the circumstances of the case.

Few High Courts have also used the Fundamental Duties Chapter (Part IVA of the Constitution) to secure public accountability by reading the prescribed Duties as rights. In *Koolwal v. State of Rajasthan,*[148] where the complaint pertained to pollution, the Rajasthan High Court held that Part IVA 'is the right of citizens to..move the Court to see that the State performs its duties faithfully '.[149] Given that every citizen owes a constitutional duty to protect the environment, he must also be entitled to enlist the Court's aid in enforcing it against recalcitrant state agencies.

It has been suggested that the notion of imposing Fundamental Duties on citizens as well as the ease with which the Court read enforceable rights from unenforceable obligations might stem from the concept of *Dharma.*[150] By

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147. Several constitutional provisions seek to insulate the judiciary from the executive and the legislature. For example, the salaries of the Judges are fixed by the Constitution and cannot be varied by the legislature except under proclaimed financial emergency (Art. 125, 221 and 360). The privileges or allowances of a Judge of the Supreme Court or of a High Court, or his rights in respect of leave of absence or pension cannot be varied to his disadvantage after his appointment (Art. 125, 221). The administrative expenses, including salaries, allowances and pensions payable to or in respect of the officers and servants of the Supreme Court is charged on the Consolidated Fund of India and that of the High Court, on the Consolidated Fund of the State (Art. 146, 229). Further, the Supreme Court and the High Court can recruit their own staff and frame rules regarding their conditions of service (Art. 146, 229). No discussion is permitted in the legislature with respect to the conduct of a Judge of the Supreme Court or the High Court in discharge of his duties (Art. 121, 211). Moreover, a Supreme Court Judge is debarred from practicing in any Court or before any authority after retirement (Art. 124) while a retired High Court Judge may practice only in the Supreme Court or in a High Court in which he has not been a Judge (Art. 220).

148. AIR 1988 Raj. 2.

149. *Id.* at 4.

150. The Anglo-Saxon division of the normative world into separate domains - legal, moral and religious - was alien to ancient India. Rather Dharma, enunciated in Sanskrit texts called Dharmasastras written between 600 BC and 500 AD could connote law, religion, duty, morality or simply rightful action. It applied to all aspects of life and had a binding force similar to what Santos terms as 'interlegality' - see *supra* note 4.

prescribing obligations to regulate the conduct of individuals in ancient Indian society, *Dharma* precluded the abstraction of natural law type and hindered the development of any sort of human rights. Rather a person could move the royal court or panchayat for the failure of another person to fulfil a prescribed obligation. Hence, the principle adopted to protect human interests was that of 'obligations' and not of 'rights'. The notion that something was due to an individual flowed from the non-observance of an obligation owed to him rather than from the concept of inalienable natural rights with their individualising effect. It is interesting to observe that the Court adopts the same strategy[151] to protect human interests by relying on the positive obligations contained in Part IV of the Constitution to read new rights into Part III.

Again, if the Constitution had professed liberal capitalist ideology, any departure from Anglo-Saxon jurisprudence could have confidently been ruled out.

(iii) Democracy, Free Press And Strong Bar

Not only must the Court draw its sanction from the Constitution, it must enjoy the support of the people. Without popular mandate, the Court would have been chastened by the executive and legislature long ago. In India, there exists a grassroot democracy, perhaps, as a result of the involvement of men, women and children from all sections of society in the Independence Movement against the British colonial rule. Moreover, the legal profession has historically played an important role in the freedom struggle and is therefore inextricably linked to politics. The Press, being extremely independent and pro-people, has played a major role in the evolution of PIL. It has ceaselessly worked to expose state corruption, lawlessness and callousness. The Court, the Press and the people seem to be sharing a symbiotic relationship which has at times kept an important check on the Judges from committing irregularities. This somewhat unique check and balance system is illustrated in the corruption scandal involving the then Supreme Court Judge, Justice V. Ramaswami.

In April - May 1990, press reports highlighted the huge expenses incurred by Justice Ramaswami for his official residence during his tenure as Chief

151. Another similarity between the ancient legal system and the present judicial role is the flexibility in resolving disputes. The pandits who interpreted and applied Dharmasastras, also sought to incorporate and accommodate the practice and customs of parties. The panchayats or the royal courts did not strive for uniformity nor binding precedents; the system cohered by 'example, instruction and slow absorption rather than by imperative imposition' (M. Galanter, *supra* note 4 at 31). The panchayat tradition offered a model where adjudication was blurred with mediation. The membership of the traditional panchayat was flexible so that the conflicting parties might often be included to decide their own conflict : as the panchayats operated on the rule of unanimity, the process resulted in a communal consensus on the solution, somewhat akin to the way 'a close-knit family might resolve a problem between two cousins' (C. D. Cunningham, *supra* note 6 at 797).

Justice of Punjab and Haryana High Court. These reports agitated lawyers who voiced their concern to the Chief Justice of India. On 3 July 1990, the Chief Justice announced in open Court that he had advised Justice Ramaswami to desist from discharging judicial functions so long as the investigations continued. [152] Justice Ramaswami went on leave for 5 months and resumed work only in December 1990 when the new Chief Justice ended his leave. Soon thereafter, press reports appeared again detailing the various acts of outright misappropriation of goods by Justice Ramaswami. This prompted the Supreme Court Bar Association to pass an unprecedented resolution on 1 February 1991 which asked Justice Ramaswami to resign and called upon the Chief Justice not to assign him judicial work, failing which it would be constrained to boycott Justice Ramaswami's Court. Soon thereafter, the Speaker of Parliament admitted an motion for the impeachment of Justice Ramaswami and constituted an Inquiry Committee just before the dissolution of Parliament on collapse of the government. The new Congress-I government refused to proceed with the matter contending that the motion lapsed on dissolution of Parliament. This provoked a body of lawyers to constitute a Committee on Judicial Accountability and file a PIL action[153] impleading the Union of India, the Chief Justice of India and Justice Ramaswami as respondents. It prayed for a ruling that the motion had not lapsed and also for a direction to the Chief Justice prohibiting him from assigning judicial work to Justice Ramaswami. While the Court held that the motion had not lapsed, it observed that the Chief Justice did not have the power to direct a brother Judge to desist from discharging judicial function. However, it held that 'the question of propriety (was) different than that of legality' and it 'should be expected that the Judge would be guided by the advice of the Chief Justice of India as a matter of convention'.[154] Justice Ramaswami still did not resign.

In December 1992, the report of the Inquiry Committee was tabled in the Parliament, but only after the Court has disposed off two petitions: one[155] filed by a proxy of Justice Ramaswami and the second[156] filed by Justice Ramaswami's wife held by the Court to be on behalf of Justice Ramaswami. The report found Justice Ramaswami guilty on several charges. The Constitution requires that a motion to remove a Judge be carried by a special majority of not less than 2/3 of the members voting and an absolute majority of the total membership of the House (Art. 124(4)). When the motion to impeach Justice Ramaswami was

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152. P. Bhushan, *A historic non-impeachment*, FRONTLINE 17 (4 June 1993).
153. Sub-Committee on Judicial Accountability v. Union of India, A I R 1992 SC 320
154. *Id.* at 357.
155. Krishnaswami v. Union of India, Writ Petition No. 149 of 1992. Unreported.
156. Ramaswami v. Union of India, A I R 1993 SC 2219.

put to vote on 11 May 1993, the Opposition voted for it but the ruling Congress-I party abstained from voting; for, Justice Ramaswami was a staunch Congress supporter. Hence, with 196 votes for, no votes against and 205 abstentions in a House with 401 members present and an effective strength of more than 500, the motion failed - Justice Ramaswami, despite of being proven to be corrupt, could not be impeached.

The 'reaction amongst the people, reflected in the press, was of shock and revulsion'.[157] There was unanimous and severe condemnation of Congress-I. The intensity of public outcry shook the government. The Opposition promised that the non- impeachment of Justice Ramaswami would be the major issue in the forthcoming election. Under mounting public pressure and press editorials and articles condemning it, the government withdrew its support for Justice Ramaswami; the Judge announced his resignation on 14 May 1993.

CONCLUSION

It would be appropriate to conclude by quoting Cunningham[158],

> All throughout the world, those who share in the ancient British legal tradition, should observe with rapt attention as that tradition is immersed in the fiery crucible of modern Indian society. For as the heat of the crucible burns away the dross and impurities to leave only pure metal, so too the jurisprudence which emerges from India's refining process may well prove a model of the best and most universal concepts of the common law. Indeed the metaphor of the crucible is inadequate because often the strongest and most durable metal is alloy, a fusing of different elements into a new form. Thus a comparative study should not merely examine how in India outmoded legal traditions have been stripped away, but also how qualities which are India's own may have merged with elements of the common law system to form a more just and enduring jurisprudence...Yet perhaps neither the metaphor of refined metal nor the alloy is appropriate. Indian PIL might rather be a phoenix : a whole new creature arising out of the ashes of the old order.

PIL represents the first attempt by a developing common law country to break away from legal imperialism perpetuated for centuries. It contests the assumption that the more western the law is, the better it must work for economic and social development; the only development such law produced in

156. Ramaswami v. Union of India, AIR 1993 SC 2219.
157. P. Bhushan, *supra* note 152 at 21.
158. C. D. Cunningham, *supra* note 60 at 496.

developing states, including India, was the 'development of underdevelopment'.

Before the emphasis shifted from legal centralism to legal pluralism, the strategy used by most states to deliver justice to the victims of underdevelopment had been to provide legal aid services; the purpose of these services being to enable the impoverished to participate in the traditional legal system on an equal economic footing. But then, just as access to hospitals need not necessarily secure good health, access to Courts need not necessarily secure justice. What happens within the Court is equally, if not more, important - the formalism, the 'neutrality' of law, the procedural technicalities and delay render justice as a commodity tragically beyond the grasp of the bewildered.

The shift from legal centralism to legal pluralism was prompted by the disillusionment with the formal legal system. In India, however, instead of seeking to evolve justice-dispensing mechanisms outside the formal legal system, the endeavour has been to deliver justice by changing the formal legal system itself through PIL. The changes, as we have seen, are both substantive and structural. The remedial nature of state law, the relaxation of the strict rule of locus standi and the evolution of the epistolary jurisdiction together offer a new paradigm of law which has taken on its identity as a response to the misery of the impoverished. It has radically altered the traditional judicial role so as to enable the Court to bring justice within reach of the common man. Such a paradigm of law has profound implications for the theoretical premise of current literature on legal pluralism, namely, that of locating informal justice outside and in contradiction to formal state law. It renders irrelevant the question on the challenge of informal justice to the state monopoly of production and distribution of law and justice, on the 'trivialisation' or 'relativization' of 'official' formal law by informal justice or on informal justice functioning as an agent or alternative to state law.

Given that developing states are desperately in need of a remedial jurisprudence, PIL has attracted emulation in few countries like Malaysia and Philippines;[159] its success will invariably depend on the context in which it fuses with the pre- existing legal system. However, more than providing a model for emulation, it sends an important message to those developing states, who look towards the developed States for inspiration, to glance inwards at their own history and modes of social regulation in order to forge new tools and remedies to secure justice. But then, how many developing states, reeling under legal, cultural and intellectual imperialism, even remember their own history; and among those who do, how many value it ?

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159. J. Cottrell, *supra* note 73.