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The 'Public Interest' in India: Contestation and Confrontation before the Supreme Court

Sarbani Sen
Jindal Global Law School, India

The judicial decisions of the Supreme Court through which the court's jurisdiction over Public Interest Litigation (PIL) was constructed manifest extraordinary exercises of judicial authority. These decisions primarily consist of the constitutional court's expansion of fundamental rights on the one hand, and procedural innovations to create better opportunities for disadvantaged groups to gain access to the legal system on the other. Through its decisions the court has emphasized increased access to the legal system in order to enable "the public" to exercise their liberties to mobilize and voice their needs, and to participate in making social choices and political decisions that affected those needs. While expanding on constitutional rights the court has tried to regenerate the idea of social and economic justice embedded in the constitution. PIL decisions also try to increase government accountability for enforcing constitutional guarantees and social welfare legislation, and to address state lawlessness and corruption. The court's flexible interpretation of its powers under Art. 32(2) of the constitution has allowed it to carve out remedies that appear to significantly shift the line between adjudication and administration. The court has often entered into a position of positive intervention in administration through molding "appropriate" reliefs and supervising its implementation.

This judicial phenomenon presents some interesting theoretical issues that I would like to examine. Section One looks at how in departing from, and expanding the traditional rule of locus standi and in validating an "epistolary jurisdiction" (where letters written to the court have been used to institute an action) the court has redefined the idea of "the public." "The public" for the purpose of the court's PIL jurisdiction is a different category from the definition of a "citizen" under the constitution or "the people" in the abstract, who invested the constitution with sovereign authority. The court establishes the parameters of who as a "member of the public" can approach the court and seek redress for their grievances, and thus sets up a constitutional/judicial preferred form through which political movements can interact with the legal system. The court's decisions determine who is "the public," what processes it can follow to formulate its claims and seek redress, what

Corresponding author:
Sarbani Sen, Jindal Global Law School, Sonipat Narela Road, Near Jagdishpur Village, Sector 35, Sonipat, Haryana 131001, India.
Email: sen2sarbani@rediffmail.com

constitutional rights/norms the parties can invoke to further their claims, and structures what relief should be given.

PIL has enabled the court to augment and validate its own authority as the "guardian" of the public welfare and as the constitutionally empowered institution to enforce their rights. PIL decisions are grounded in provisions in the constitutional text, embodying sovereign authority, of which the court is the primary interpreter, its reasoning trumping that of other state agencies.

Section Two examines how PIL decisions have elaborated a rights jurisprudence and in the process almost rewritten some parts of the constitution. It also looks at how the court has interpreted Part Four of the constitution which "encapsulates the socio economic rights of the people and holds out social justice as the central feature of the new constitutional order" (Bhagwati, 1985). Such PIL decisions can make it possible to understand law's potential for establishing ideas of justice as part of the manifestation of state power.

Section Three looks at how the court has legitimized examining/questioning the authority of other state agencies as the guardian of the public welfare and principal enforcer of public rights under the constitution and the laws. Certain decisions of the court refer to issues of arbitrariness of state action; violation of principles of good governance or government corruption; better enforcement of social welfare legislation and "positive duties" of the state towards marginalized groups. Yet the court has declared in its decisions that it regards PIL not as a confrontation but as an opportunity and a challenge to the state to make basic human rights available and to secure better observance of socio-economic welfare legislation for marginalized groups; it expects the state to fully cooperate in this effort. Through PIL, therefore, a new interaction between the realm of justice making and state governance has been set up through which state authority appears to be both questioned and reinforced.

Thus, through PIL decisions, the court has developed intertwined legal frameworks, both substantive and procedural, that shape and reconfigure the idea of "the public", and through its expanded rights jurisprudence has created a renewed conception of justice under the constitution in the context of varied social issues such as abolition of bonded labor, rights of pavement and slum dwellers to earn their livelihood, or maintaining and improving public health.

Thus PIL at one level has enabled the justice system and laws to define and shape social and political interactions and to channel democratic pressures for gaining a response from the state. But it has also been a process through which law and justice have emerged from social and political developments. Social groups and state agencies (through judicial construction) have been allowed to influence new judicial/legal acts and relationships, since the process of decision making in PIL cases is based on equal rights of participation requiring governments to listen and interact with civil society, and various social groups to interact with one another for framing judicial/state responses to societal claims.

This new interaction between the realm of judicial decision making and political/social movements has created adjustments and adaptations and the creation of new legal acts (for instance, innovative remedial measures crafted by the court to secure interim orders and directions to governments, and to create agencies such as court appointed commissions to suggest appropriate remedies and monitor compliance by the state), as well as systemic tensions and conflicts.

Section Four examines how the court's attempts at reform for better governance and state accountability has been criticized and opposed for politicization of constitutional adjudication, exceeding its institutional capacity, usurping legislative and executive functions, and imposing the views of an unelected judiciary on the political and legal system.

In conclusion, I look at some larger questions that PIL generates regarding public participation, representative government and the democratic polity under the constitution, which may not be easily answered.

1. "The public"

According to Justice Bhagwati, one of the major architects, what prompted the Supreme Court's procedural innovations in PIL cases, was that

> Anglo Saxon law is transactional, highly individualistic, concerned with an atomistic justice incapable of responding to the claims and demands of collectivity, and resistant to change. Such law was developed and has evolved [...] essentially [...] to deal with situations involving the private right/duty pattern. It cannot possibly meet the challenge raised by [...] new concerns for the social rights and collective claims of the underprivileged. (Bhagwati, 1985: 570)

Such procedural reforms were to "devise new procedures which would make it easier for the disadvantaged to use the legal process and evolve new, equitable principles oriented to distributive justice" (1985: 570). But who are the "disadvantaged public" and by what means would issues of "public interest"[1] be brought before the court? Judicial decisions constructed who as a valid representative of the "public" could approach the court and by what means. Constitutional guarantees[2] allow anyone to approach the Supreme Court or the High Courts for violation of legal or constitutional wrongs, but the traditional rule of "standing" restricted judicial access to only a person who has suffered a specific legal injury by reason of actual or threatened violation of his rights.[3]

The Supreme Court decided to depart from the traditional locus standi rule and held that where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of violation of their constitutional or legal rights, and such a person or class of persons by reason of poverty or disability were in a socially or economically disadvantaged position and unable to approach the court for relief, any member of the public or social action group acting bona fide could approach the court and maintain an application seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.

The expanded locus standi rule was institutionalized by the court in a judgment delivered in the *Judges Appointment and Transfer* case,[4] and the parameters of "public" access were subsequently discussed in cases such as *Bandhua Mukti Morcha*.[5] In the latter case the court said:

> It was [...] in the year 1981 in the Judges Appointment and Transfer case [...] that this court for the first time took the view that where a person or a class of persons to whom a legal injury is caused by reason of violation of a fundamental right is unable to approach the court for judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting bona fide can move the court for relief under Art. 32 and also under Art. 226 so that the fundamental rights may become meaningful [...] for the large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resources unable to seek judicial redress. [...] There is no limitation in the words of clause (1) of Art. 32 that the fundamental right which is sought to be enforced by moving the Supreme Court should be one belonging to the person who moves the Supreme Court nor does it say that the Supreme Court should be moved only by a particular kind of proceeding. It is clear on the plain language of Clause (1) of Art. 32 that whenever there is a violation of a fundamental right, anyone can move the Supreme Court for enforcement of such fundamental right. (*Bandhua*, § 11)

> But the court would allow a member of the public acting bona fide to represent the cause of disadvantaged persons or groups and move the court for judicial enforcement of their rights. (*Bandhua*, § 11)

"Public" access to the court's jurisdiction was expanded. The court explained:

> Clause (1) of Art. 32 says that the Supreme Court can be moved for enforcement of a fundamental right by any "appropriate" proceeding. There is no limitation in regard to the kind of proceeding envisaged in Clause

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> (1) of Art. 32 except that the proceeding must be "appropriate" and this requirement of appropriateness must be judged in the light of the purpose for which the proceeding is to be taken, namely enforcement of a fundamental right. (*S.P. Gupta*, § 17; see also *Bandhua*, § 12)[6]

It rationalized, "Today a vast revolution is taking place in the judicial process; the theatre of law is fast changing and the problems of the poor are coming to the forefront. The court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning" (*S.P. Gupta*, § 17). The only way in which this could be done is "by entertaining writ petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong [...] or whose constitutional or legal right has been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the court for relief" (*S.P. Gupta*, § 17).

For instance, in *Olga Tellis*,[7] the court entertained a letter addressed by a journalist claiming relief against demolition of the houses of pavement dwellers by the Municipal Corporation of Bombay.

The court further refined the norms for "public" access to and use of legal procedure in PIL cases in decisions such as *Bandhua Mukti Morcha*, where it was held that an adversarial procedure was not obligatory under Art. 32 for enforcement of a fundamental right. The court felt that in cases where one of the parties were members of disadvantaged communities, such procedural rules could lead to injustice because of the difficulty in getting competent legal representation and inability to produce relevant evidence before the court. Therefore, when disadvantaged members of the "public" came before the court for enforcement of their fundamental rights, it was necessary to evolve a new procedure to make it possible for such litigants to produce the necessary material before the court.

The "laissez faire approach" to the judicial process had to be abandoned and new tools forged "for making the fundamental rights meaningful for the large masses of people" (*Bandhua*, § 13). To adopt a passive approach and decline to intervene would make the fundamental rights "a teasing illusion" for such groups. This judicial conviction led to the court appointing commissions for gathering facts and data in regard to a complaint of a breach of a fundamental right. The report of the commissioner would furnish prima facie evidence of the facts and data gathered by the commissioner.[8]

2. Rights jurisprudence

In another extraordinary assertion of judicial authority the court has used its primary interpretive powers (which trump that of other branches of government) to elaborate a rights jurisprudence which has expanded the frontiers of the fundamental rights regime and in the process almost rewritten some parts of the constitution. Such jurisprudence can demonstrate law's potential to establish the idea of a just social order through a manifestation of state power.

Such jurisprudence has developed principally through an expanded interpretation of the language of Art. 21 of the Indian constitution.[9] *Maneka Gandhi*[10] was the breakthrough judgment for an open textured and expansive concept of "personal liberty" and incorporating the idea of "due process of law" within the words "procedure established by law" in Art. 21. Justice Bhagwati, speaking for the majority, enunciated two primary principles. The first was that the expression "personal liberty," in Art. 21, was of the widest amplitude and covered a variety of rights which constituted the personal liberty of the individual. The fact that some of those rights had been expressed as distinct fundamental rights and given additional protection in Art. 19 did not imply

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that Art. 21 had no further content. The second was that a law which prescribed a procedure for depriving a person of personal liberty under Art. 21 had to stand the test of both Art. 19 and Art. 14. The significance of the test was that "the principle of reasonableness which legally as well as philosophically is an essential element of equality or non arbitrariness pervades Art. 14 like a brooding omnipresence and the [prescribed] procedure [...] must answer the test of reasonableness in order to be in conformity with Art. 14." It must be "right and just and fair," and not "arbitrary, fanciful or oppressive" (*Maneka Gandhi*, §§ 54, 55, 56). Thus in *Maneka*, both the scope of "personal liberty" and the ambit of judicial protection of such liberties under Art. 21 were greatly widened.

The seminal principle of interpretation established by *Maneka* that constitutional clauses can be open textured and courts can judicially develop their meaning in a changing social and economic context, was further elaborated by Justice Bhagwati in *Francis Coralie Mullin v Administrator, Union Territory of Delhi*:

> This principle of interpretation which requires that a constitutional provision must be constructed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force in relation to a fundamental right enacted by the constitution. (p. 618)

These decisions determined that the court can use its constitutional interpretive authority to derive a dynamic and flexible use of the language of Art. 21 to reflect major social change. In *Francis Coralie Mullin*, the court said:

> The fundamental right to life which is the most precious human right and which forms the arc of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. (p. 618)

Further, the court also used this authority in *Kesavananda*[12] and in *Minerva Mills*[13] to link Parts III and IV of the constitution (relating to political and civil liberties and non enforceable social and economic rights respectively). The court found that the two Parts had to be read together since the idea of justice under the constitution was founded on a bed rock of balance between political and civil liberties and social and economic rights in Parts III and I.[14]

Over time, two kinds of adjudicative responses evolved. First, the Supreme Courts began to deploy the Directives as a technology of constitutional interpretation, favouring an interpretative style that fostered, rather than frustrated, the Directives. This "indirect" justiciability has contributed substantively towards what a normative concept of a just social and political order could be under the constitution. Second, in its more activist incarnation since the eighties, the court has begun to translate some Directives into rights (Baxi, 2007).

Thus, this judicial exegesis of Art. 21 accommodated social and economic rights, and political liberties have been accommodated under the article. As Justice Bhagwati reasoned,

> Civil and political rights [...] do not exist for the large masses of people in the developing countries who are suffering from poverty, want and destitution. [...] It is only if social and economic rights are ensured to these large masses of people that they will be able to enjoy civil and political rights and become equal participants in the democratic process. (Bhagwati, 1988)

In defense of political liberties, decisions have critiqued arbitrary actions of prison administrations violating the rights of under trials and prisoners.[15] In *Francis Coralie Mullin*, the court held that

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preventive detention laws (which aimed at curtailing personal liberty with a view to preventing harmful activities in future) had to meet the test of fair procedure under Art. 21. The court also established that the right to life meant something more than just physical survival, and that every limb or faculty through which life is enjoyed is protected by Art. 21, including the faculties of thinking and feeling. Any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and would be prohibited by Art. 21. The court went on to say:

> We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter [...] and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. (§ 7)

Decisions have also established guarantees of economic opportunities and protection against social deprivations. In *Olga Tellis* (*supra*) it was found that an important facet of the right to life was the right to a livelihood because no person could live without the means of living. The importance of effective state enforcement of social welfare laws were emphasized in *People's Union for Democratic Rights (PUDR) v Union of India*,[16] and in *Bandhua Mukti Morcha*.[17] The court said that where legislation has already been enacted providing basic requirements to workmen, and thus investing their right to live with human dignity with concrete reality and content, the state can certainly be obligated to ensure observance of such laws.

In *PUDR*, the court also referred to the right to receive minimum wages under Art. 23 as a fundamental right since freedom was not an end in itself but a means of raising the people to a higher level of achievement and bringing about their advancement and welfare. Political freedom would have no meaning if it was not accompanied by creating egalitarian social and economic conditions in which everyone would be able to enjoy basic human rights and participate in the fruits of freedom and liberty.

Later PIL decisions have further explored and layered the meaning of the right to life. It now includes a right to balanced and sustainable economic development, the right to services from local self governing bodies such as municipal corporations for providing basic public services as facets of a life of dignity and decency,[19] the right to food, clothing and the right to reasonable accommodation,[20] to health,[21] and education[22] and the right to protection against environmental degradation.[23]

3. Positive intervention

Through PIL decisions, the court has imposed a framework through which social and political movements can impact on the legal/judicial system by defining who can approach the court, by what procedural routes, and how to gain a response from the court/state for taking remedial action. But as discussed earlier, PIL has also been a process through which social groups and state agencies (through judicial construction) have been allowed to influence new judicial/legal acts and relationships. The interplay of the legal system and social movements led to creative adaptations of the legal process by the court. In addition to an expanded locus standi rule and introduction of epistolary jurisdiction, the court has also modified evidentiary rules of an adversarial procedure and crafted appropriate remedies to meet societal demands. However, establishing such new judicial contexts and relationships can create tensions and conflicts as well as adjustments and adaptations. PIL decision making has seen such tensions at crucial points of the judicial/legal process.

One such point of tension has been between the court and "public" litigants and the respondent government on issues of social justice, and was related to fact finding and rules of evidence

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during the course of a PIL litigation. When the government/respondent in such litigation challenged allegations of violation of rights, the court had to consider modifying the traditional form of adversarial process to accommodate participation in such a process by disadvantaged litigants:

> The adversarial procedure can operate fairly and produce just results only if the two contesting parties are evenly matched in strength and resources. Quite often, however, that is not the case. Where one of the parties to the litigation [...] does not possess adequate social and material resources, he is bound to be at a disadvantage under the adversarial system, not only because of the difficulty in getting competent legal representation, but more than anything else because of the inability to produce relevant evidence before the court [...] This problem becomes acute in many cases because, often enough the opposing respondents [the state] deny on affidavit the allegations of exploitation, repression and denial of rights made against them. Sometimes the respondents contest the bona fides or the degree of the relevancy of the information on which the litigation is based and sometimes they attribute [...] ulterior motives to the social activists bringing the litigation. (Bhagwati 1985: 573–574)

The state has also disparaged the sources on which PIL petitioners rely – mostly media reports and investigative reporting. They have also raised claims under evidentiary and procedural laws to prevent the disclosure of documents relevant to the determination of violation of fundamental rights. Even when they are disclosed, there is the possibility of impugning their evidentiary value, through multiple investigations which the state sets up (Baxi, 1985).

The court was faced with the problem of how to produce evidence before the court on behalf of the poor. Considering the issue, Justice Bhagwati felt that the court either had the option of asking for a thoroughly researched Brandeis brief,[24] which would most often be beyond the means of an ordinary individual and even of a social action group, or of ordering its own investigation. The Supreme Court initiated the strategy of supporting socio-legal commissions of inquiry. In various cases it has appointed social activists or researchers as court commissioners to visit particular locations for fact finding and to submit a quick but detailed report setting out their findings as well as their suggestions and recommendations.[25] The practice of appointing such commissions has been rationalized by the court in *Bandhua Mukti Morcha*.[26]

Apart from issues of fact finding and evidence, enforcing court decisions against the government and its agencies has also produced its own potential for conflict. The court has urged cooperation from the government in PIL matters to improve its administration. In *PUDR*, for instance, Justice Bhagwati said:

> Public interest litigation, as we conceive it is essentially a cooperative or collaborative effort on the part of the petitioner, the state or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them. The state or public authority against whom public interest litigation is brought should be much interested in ensuring basic human rights, constitutional as well as legal, to those who are in a socially and economically disadvantaged position, as the petitioner who brings the public interest litigation before the court. (*PUDR*, pp. 1477–1478)

But if such cooperation is not evident, the court has had to evolve new remedial action to enforce its orders against the government. In carving out such remedies that appear to significantly shift the line between adjudication and administration, the court has attempted to redefine its role from being a passive and disinterested umpire to one of positive intervention in molding reliefs and supervising its implementation. The court has pushed the boundaries of the traditional understanding of judicial remedies and established new judicial acts as it has engaged with tasks of administration and governance. The court did not restrict its remedial powers to the usual writs of habeas

corpus, mandamus, certiorari and quo warranto under Art. 31(2) of the constitution, or to awarding damages or giving injunctive relief. Instead, they have relied on their inherent power to do justice. As Justice Bhagwati has remarked, "These [new] remedies were unorthodox and unconventional and were intended to initiate affirmative action on the part of the state and its authorities."

The court has shown a willingness to experiment with remedial strategies that require continuous supervision – for instance, the concept of a "continuing mandamus" involves the passing of regular directions and the monitoring of their implementation by executive agencies. Remedies in PIL cases can often be piecemeal. As in *Hussainara Khatoon v State of Bihar* (*supra*), the court, satisfied that a particular abuse had been identified, has given orders without waiting until the case is finished. This kind of "creeping jurisdiction" (Baxi, 1985: 122) can typically involve taking over the direction and administration in a particular arena from the executive.

The final orders in PIL cases are often detailed, specific and intrusive. In many cases, the court does not simply decide that the respondents ought to perform specific actions but requires that they return on a set date to report on implementation. The courts can create agencies to suggest appropriate remedies and monitor compliance. Sometimes compensation has been awarded for breach of fundamental rights if the infringement was patent and incontrovertible, the violation was gross and its magnitude was such as to shock the conscience of the court.[29] Another feature has been setting out guidelines sometimes extending beyond the circumstances of the case.

There are numerous other instances of the court's attempts to examine/question governmental authority to secure better administration of social welfare laws, enforcement of constitutional directives for achieving certain social and economic goals, and to secure that the federal/state government and administration adhered to procedural requirements of the rule of law. In *Kishen v State of Orissa*, the court directed the state government to appoint a Natural Calamities Committee for the district of Koraput under the Orissa Relief Code that was to meet every two months, to review the social welfare measures taken by the government to mitigate hunger, poverty and starvation deaths in the district. In *Karjan Jalasay*,[30] the court directed how the state government would deal with the problem of displaced tribals whose lands would be acquired by the state to create a dam. It created a procedure for the state to acquire and take possession of the land and provide the displaced persons with means of subsistence. In *M.C. Mehta v Union of India*, the court directed the Central government, the Uttar Pradesh Board and the District Magistrate, Kanpur, how to properly enforce its order that tanneries in the district install primary treatment plants within six months for treating effluent before it was discharged into the municipal sewerage connecting to the Ganges, causing gross pollution, or else to close such establishments.

In another environmental PIL, the Vellore Citizens Welfare Forum,[31] the court gave even more detailed directions. It ordered and directed that the central government constitute an authority under the Environment (Protection) Act, 1986, within a deadline and also set out the composition and powers of such an authority. It identified the principles (the "precautionary principle" and "polluter pays" principle) on the basis of which the authority had to assess the loss to the ecology/environment in the affected areas, and the compensation to be recovered from the polluters to the residents and for reversing any ecological damage caused.

In *Vincent v Union of India*, the court, referring to a WHO report, directed the central government to adopt an approved national policy and prescribe an adequate number of drug formulations that would meet the requirements of the people at large. It also proceeded to establish the basic principles for creating such a drug policy.

Certain PIL cases through which the court has confronted issues of enforcing fair procedure in governance, and of government corruption, has also involved a conflicted court–government dynamic with the judicial exercise of authority for critiquing and invalidating crucial policies/actions of the state and its agencies. Justice Bhagwati had said of PIL cases that "the primary

focus is on state repression, governmental lawlessness, administrative deviance, and exploitation of disadvantaged groups and denial to them of their rights and entitlements. [... It] seeks to ensure that the activities of the state fulfill the obligations of the law under which they exist and function" (Bhagwati, 1985: 569).

For instance, the court examined and critiqued the practice of governance in the state of Bihar[32] through Governors' ordinances in *D.C. Wadhwa*. The court said: "The startling facts [...] clearly show that the executive in Bihar has almost taken over the role of the legislature in making laws, not for a limited period, but for years together in disregard of constitutional limitations. This is clearly contrary to the constitutional scheme and it must be held to be improper and invalid."[33]

In *Nandini Sunder v State of Chhattisgarh*[34] the court examined the state practice of arming tribal group members as temporary police officers (SPOs), with little or no training, to fight against alleged Maoist extremists. In that context, the court took the opportunity to critique the state's governance at various levels. It commented on the paradigm of economic development that led to "development terrorism" on poor regions and their populations, and the state's misguided policy in confronting resistance to such processes as a "law and order" problem. It critiqued the state for being unable to provide security for its citizens against both Maoist insurgents and such temporary tribal forces, and also for violating the constitutional rights of the tribals inducted into such forces.

It said justice – social, economic and political as conceived by the constitution – to every citizen could not condone policies that caused disaffection amongst the poor, creating conditions of violent politics. To create conditions of political violence caused by such policies, and then claim that there are not enough resources to restrain such violence within the framework of constitutional values was an abdication of constitutional responsibilities.[35] In the court's opinion, "We expect the benefits of democratic participation to flow to us – all of us. [...] Consequently, we must also bear the discipline, and the rigour of constitutionalism, the essence of which is accountability of power, whereby the power of the people vested in any organ of the State, and its agents, can only be used for promotion of constitutional values and vision" (§ 1).

Seeking to enforce a fair electoral process, in *Common Cause (a Registered Society) v Union of India*, the court held that the expression "conduct of elections" in Art. 324 of the constitution was wide enough to include in its sweep the power of the Election Commission to issue directions that political parties submit to the Commission, for its scrutiny, the details of the expenditure incurred or authorized by the political parties in connection with the election of their respective candidates.

On the issue of corruption the court has attempted to restrain the use of official discretion in the distribution of public largesse, whether it was petrol pumps or government accommodation, and to make the government accountable for use of such discretionary authority. For example, in *Common Cause v Union of India*,[36] the court required the Attorney General to submit draft guidelines that would govern all future allotments of dealerships under the discretionary quota. In a later case, the issue surfaced again and the court found that there was no indication in the allotment orders or in the records to show that the minister kept any guidelines in mind while making such allotments, and that they were made in an arbitrary and discriminatory manner. The court quashed the allotments, directed the minister concerned to pay exemplary damages and asked the police to initiate his prosecution.

In *Centre for Public Interest Litigation v Union of India*[37] the question was whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise than by following a fair and transparent method consistent with the constitutional principle of equality under Art. 14. In its decision the court said: "we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by constitutional principles including the doctrine of equality and larger public good."

In *Vineet Narain*,[38] the court gave a series of directions to ensure that the investigation by the Central Bureau of Investigation into allegations of bribery of officials and bureaucrats in return for awarding government contracts could proceed to its logical conclusion. Investigations into every accusation made against any person on a reasonable basis, irrespective of the position and status of that person, had to be conducted and completed expeditiously to retain public confidence in the impartial functioning of government agencies such as the Central Bureau of Investigation.

4. Powers and legitimacy

The "judicialization" of governance and the new contexts and relationships established by PIL decisions between the court and the government have created the potential for institutional resistance and tension between them. The court has itself commented on how its attempt to promote the constitutional values embodied in the Fundamental Rights and Directive Principles can impact on other values such as the separation of powers between the various branches of government. It has acknowledged that though the constitution has not recognized the doctrine of separation of powers in its rigidity, the functions of different organs of government have been sufficiently differentiated and the constitution does not contemplate assumption by one organ of functions that belong to another.

For instance, in Nandini Sunder's case (*supra*), the court referred to a recent judgment by a constitutional bench, in *G.V.K Industries v ITO* and observed:

> Our Constitution charges the various organs of the state with affirmative responsibilities of protecting the interests [...] and the security of the nation. [...] The powers of judicial review are granted in order to ensure that such power is being used within the bounds specified in the Constitution. [...] It is imperative that the powers so granted to various organs of the state are not restricted impermissibly by judicial fiat such that it leads to inabilities of the organs of the government in discharging their constitutional responsibilities. [...] The very essence of constitutionalism is [...] that no organ of the state may arrogate to itself powers beyond what is specified in the Constitution. Walking on that razors edge is the duty of the judiciary. Judicial restraint is necessary in dealing with the powers of another coordinate branch of the government; but restraint cannot imply abdication of the responsibility of walking on that edge.[39]

The court has also reflected on the scope of its powers and its legitimacy, inherent institutional limitations of the court, and potential for tension and conflicts in its relations with other branches in the context of PIL. Justice S.P. Barucha for instance, said:

> This court must refrain from passing orders that cannot be enforced, whatever the fundamental right may be and however good the cause. It serves no purpose to issue some high profile mandamus or declaration that can remain only on paper [...]. It is of cardinal importance to the confidence that people have in the Court that its orders are implicitly and promptly obeyed and is, therefore, of [...] importance that orders that are incapable of obedience and enforcement are not made. (Desai and Muralidhar, 2000: 182)[40]

Justice Bhagwati was clear that when judges granted relief in such cases, they were not acting as a parallel government. They were merely enforcing the constitutional and legal rights of the underprivileged and ensuring that the government carries out its obligations under the law. He acknowledged that enforcement of such orders by the court required the cooperation of state agencies, since they were not self-executing.[41] In *Bandhua Mukti Morcha*, he said:

> PIL is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice. [...] The government [...] must welcome public

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> interest litigation, because it would provide them with occasion to examine whether the poor and down trodden are getting their social and economic entitlements. [...] When the court entertains PIL, it does not do so in a cavilling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have nots [...] and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. (*Bandhua*, p. 811; also *PUDR*, pp. 1476–1479)

In *Upendra Baxi v State of Uttar Pradesh*, he suggested that PIL "involves a collaborative and cooperative effort on the part of the [...] government and its officers, the lawyers appearing in the case and the Bench for the purpose of making human rights more meaningful for the weaker sections of the community."

Chief Justice Pathak (who succeeded Bhagwati as Chief Justice) cautioned that while PIL claims to represent an increasing emphasis on social welfare and progressive humanitarianism, the court should not exceed the limits of its own powers. It could not disregard statutorily required procedures and had to be careful not to trespass on legislative territory or make political decisions. It could not forget the differences between the public debate characteristic of legislatures, and the process by which judicial decisions are reached. The court had to avoid emotional appeals and rely on legal principle. "That we sit at the apex of the judicial administration and our word, by constitutional mandate, is the law of the land can induce an unusual sense of power. It is a feeling we must guard against by constantly reminding ourselves that every decision must be guided by reason and by judicial principles."[42]

However, PIL decisions have narrowed the divide between differentiated functions. The court has sometimes even obliterated such distinctions when implementation/non implementation of a policy resulted in a constitutional rights violation. For example exercising judicial governance in *T.N. Godavarman*,[43] the court used its powers of "continuing mandamus" to implement its orders. It imposed restrictions on felling trees and the sale of timber and constituted an expert commission to examine depletion of the forest cover and to consider who could be permitted to use forest produce and in what circumstances. Therefore, the court intervened to give directions for performance of its duty by the government as mandated by law. In *M.C. Mehta*[44] the court indicated how, despite the enactment of the Environment (Protection) Act, 1986, there had been a decline in environmental quality because the authorities did not discharge the duty imposed on the state under the act. In another PIL regarding sexual harassment of women in the workplace,[45] the court filled a legislative gap and held that until the legislature enacted a law consistent with the Convention on Elimination Of All Forms Of Discrimination Against Women, to which India was a signatory, the guidelines laid down by the court would be enforceable.[46]

Such legal acts and interventions in PIL cases have been resisted by the other institutions. Parliament has tried to pass a bill to curtail the court's PIL powers. A private members' bill, the "Public Interest Litigation (Regulation) Bill," 1996, was tabled in the upper house (Rajya Sabha). Its Statement of Objects and Reasons stated that while PIL's goals, especially those intended to benefit the poorer sections of society, were laudable, it was being misused and given priority over other cases.The Bill however lapsed. In April 2007, the Prime Minister commented critically at a conference of Chief Ministers and High Court Chief Justices on judicial "overreaching" into the domain of the other branches.[48] Moreover, in his opinion public interest litigation can be used as "a tool for obstruction, delay and sometimes even harassment."[49]

This institutional tension arising from the court's attempt to enforce PIL legal processes and its paradigms of governance against the other branches of government can be seen as a new dimension to the historical contestation for power and authority between them. The extent of the court's power of "judicial review" was strongly contested throughout the 1950s and 1960s, primarily over

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the question of the "right to property".[50] By the late 1960s, this struggle between the court and Parliament – dominated by the Congress party – was transformed into an arena where the idea of "judicial review" on one hand stood in opposition to unqualified "parliamentary sovereignty" on the other hand.

The Supreme Court limited such "sovereign" claims with regard to Parliament's amending power through its doctrine of the constitution's "basic structure" in *Keshavananda* (*supra*). Such intragovernmental conflicts provided a causal element in initiating PIL as a judicial response to the perception of the court as an elitist body engaged in preserving the privileges of propertied groups. The post emergency period was also marked by a national focus on deprivation of rights, state repression and government failures. Some judges took the lead in raising concerns about improving access to justice for the underprivileged and enforcing the rule of law, as issues that could express an egalitarian constitutional philosophy and the principle of accountable government under the constitution.

Yet institutional backlash against the legal/constitutional adjustments and adaptations made by the court through its PIL decisions has not resembled the "courtpacking" during the earlier period of conflict. "The public has rather quietly allowed the Supreme Court to take on many of the roles of its representative bodies. This situation may arise out of a lack of information about the Court's current role, an inability to organize to challenge it, or acquiescence to or even welcome acceptance of the Court's actions" (Robinson, 2009: 54).[53]

This exercise of hybrid powers by the court bordering on executive and legislative functions also creates paradoxical implications for the democratic and representative constitutional order. PIL appears to involve an unelected and unaccountable judiciary promoting an instrumental view of law (Tamanaha, 1995: 470) as a means to achieve certain social concerns of a particular political group.[55] The other problem is of the court as an actor initiating public sector/legal reforms and whether it lacks institutional capacity to do so. Since PIL decisions impact on crucial social and economic policies of the state, it can be questioned whether processes of litigation before the court can provide an adequate vocabulary to argue about policy making regarding appropriate pathways to broad social and economic goals, and become a substitute for the economic analyses and political choices that legislative or executive decision making can conceivably involve.

Conclusion

It can be argued that one explanation for the court's creation of a PIL jurisdiction was a reaction to the failure of democratic processes, that is, the corruption and general unresponsiveness on the part of the government and the legislature (Andhyarujina, 1992: 36) and fear of Parliament's ability to subvert liberal democracy and abdication of its responsibility for good governance. In this "pathological" political/constitutional context, the court has, through the adjustments and adaptations made through its PIL decisions as it accommodated the "public" within the legal/judicial process, created an "accountability" function that can be said to have altered accountability norms and administrative structures through the creation of new remedial action.

In doing so, despite the resulting interinstitutional tensions and conflicts, the court can be seen as both examining and reinforcing the representative democratic process and state authority, by forcing the executive/legislative branches to be accountable to statutory and constitutional laws in governance matters, and by alerting the legislature and the government to political/social movements that make a claim for legislative/executive action on issues of societal concern. PIL decisions can also be seen as a mode by which the court bolsters the legitimacy/stability of political regimes by providing an alternative forum and mechanism through which individuals and civil society can seek to ameliorate government illegalities and failures. For instance, in cases such as

PUCL v Union of India the court appears to be addressing broader issues of a breakdown in the democratic process, where citizens do not know what they can or should demand from their government, or where political processes may not be able to successfully implement desired programs (Robinson, 2009: 52–53).

Despite problems of enforcement, court orders in PIL cases may have an impact in reinforcing state power and the legitimacy of its exercise, since they can attune governments to their obligations and create a political space within which policy changes can occur. PIL processes can change citizens' perceptions of their rights and empower them in new ways to demand these entitlements. Civil society movements, such as the Right to Food campaign, have often approached the court for initiating new campaigns (2009: 55–56).[56]

At another level, through PIL decisions the court has valorized its own role of monitoring/oversight of implementation of enacted statutes and policies, and in coordinating public behavior in policing the government. PIL strategy has allowed the court to act strategically in expanding its role in governance and policy making through the gradual and incremental process of case by case dispute resolution, while simultaneously broadening its jurisdiction and remedial powers. Consequently, the court has become "embedded" in many aspects of governance, such as monitoring, overseeing and even directing government activity in matters of environmental policy, land planning, development, education, health care etc. (Mate, 2010: 210). The court's role in adjudicating these claims has resulted in the creation of a new corpus of constitutional rights and equitable remedies that have solidified the court's power and enabled it to assert limits on government authority.[57]

Another complex dimension of the court's PIL jurisdiction involves its relationship with the constitutional text and the rule of law. The court has reasoned in its decisions that they merely attempt to enforce and safeguard constitutional values of a democratic, representative and accountable government and the constitutional rights of citizens (social and economic as well as political and civil rights) against invalid state action. Chief Justice Bhagwati has said that "Judges in India are not in an uncharted sea in the decision making process. They have to justify their decision making within the framework of constitutional values. This [PIL] is nothing but another form of constitutionalism which is concerned with substantivization of social justice" (Bhagwati, 1985: 567). He referred to the court's interpretive effort to read Part Three (political and civil liberties) together with Part Four (social and economic rights) and to establish a balance between the two parts as an unamendable "basic feature." Moreover, PIL had an important procedure-oriented rule of law element, in terms of making the government subject to the constitution and the laws. In Bhagwati's opinion the primary purpose of PIL was to "ensure that the activities of the state fulfill the obligations of the law under which they exist and function" (1985: 569). The court has emphasized that PIL has to evolve within a system of rules. The "new strategies" of PIL are not purely products of judicial discretion, but are carefully fashioned on the basis of constitutional Articles such as Art. 32 and Art. 21, or reasoned judicial decisions such as the *Judges' Appointments and Transfer* case (*supra*) and are based on fair and equitable procedural principles. Yet PIL jurisdiction has been based on the court almost rereading the constitution and an expansion of its own powers beyond a traditional constitutional understanding.

Thus PIL involves a duality: does it actually promote the constitutional order and values and the processes of a representative democracy, or does it represent an overriding of the constitutional text by the court using its powers as its primary interpreter? Does it promote judicial governance, collapsing the powers of the three branches and creating an extra-constitutional PIL governance mechanism, or does it actually help to reinforce effective and accountable administration in accordance with the rule of law and the constitution, increasing the effectiveness of executive and legislative functioning? Does it discourage the elected and representative branches from exercising

their own constitutional jurisdictions on difficult social issues? Can PIL enhance civic participation in the processes of decision making or does it, by defining "the public interest" and prioritizing/legitimizing a particular judicially preferred mode of making claims, discourage/demoralize other avenues that political/social movements can use for this purpose?[58] Thus, the Indian Supreme Court's extraordinary and innovative strategies aiming to incorporate the demands of the socially disadvantaged, addressing issues of government accountability and better enforcing the constitutional vision of a just social order, have to be viewed in the context of its ambiguous and dual relationship with the constitution, the other branches, and civil society.

Notes

1. The constitution does not define the "public." The Preamble refers to "We the people of India" and Art. 5-11 defines "citizenship." Parliament using the powers granted by Art. 11 to legislate on the acquisition and termination of citizenship passed the Citizenship Act, 1955 (subsequently amended) and establishes various means of acquiring citizenship.
2. If a fundamental right was alleged to have been violated the remedy could be sought from the High Court or directly from the Supreme Court under Art. 32. The constitutional guarantees of direct access itself ensured that less advantaged individuals and groups could assert their interests through the courts.
3. This rule which evolved to deal with the right/duty pattern which is to be found in private law litigation effectively barred the court to large masses of people who, on account of poverty or ignorance, could not utilize the judicial process. Legal Aid programs could not be effectively used by such groups since they lacked the awareness of their constitutional and legal rights.
4. *S.P. Gupta v Union of India*, A.I.R. 1982 SC 149.
5. *Bandhua Mukti Morcha v Union of India*, A.I.R. 1984 SC 811.
6. Even *suo motu* action taken by the court on the basis of newspaper reports has been used to institute an action. Legal aid has been established as a fundamental right in criminal cases and the court will often waive fees, award costs and provide other litigation assistance to public interest advocates. However, one judge noted, "I see grave danger inherent in a practice where a mere letter is entertained as a petition from a person whose antecedents and status are unknown or so uncertain that no sense of responsibility can, without anything more, be attributed to the communication. There is good reason for the insistence on a document being set out in a form, or accompanied by evidence indicating that the allegations made in it are made with a sense of responsibility by a person who has taken due care and caution to verify those allegations." The judge also felt that letters should be addressed to the entire court rather than to a single judge (*Bandhua*, § 55).
7. *Olga Tellis v Bombay Municipal Corporation*, A.I.R. 1986 SC 180.
8. Commissioners had to be responsible individuals (like a district magistrate, a district judge, a professor of law etc.) who enjoyed the court's confidence to make an inquiry into the facts of the case in an objective and impartial fashion without prejudice. Copies of the commissioners' report would be supplied to the parties and either party, if it wanted to dispute any of the facts or data stated in the report, could do so by filing an affidavit. The court would then consider the report of the commissioner and such affidavits as may be filed and proceed to adjudicate upon the issues to the case. It would be entirely for the court to consider what weight to attach to the facts and data stated in the report of the commissioner and to what extent to act upon it. The court has found that, simply because the report had not been tested by cross examination, it did not mean that such a report could have no evidentiary value. Order XXVI of the Civil Procedure Code (relating to appointment of commissions by the court) was not exhaustive and did not detract from the inherent power of the court to undertake such strategies that were necessary to establish the facts when deprived sections of the community brought an allegation of violation of their fundamental rights.
9. Initially, the court had adopted a very restricted approach and in *A.K. Gopalan v State of Madras* (A.I.R. 1950 SC 27) held that in Art. 21 the words "personal liberty" meant only freedom from arbitrary arrest and "procedure established by law" meant procedure prescribed by any statute. The court further held that Art. 19 (describing various political liberties) and Art. 21 were mutually exclusive. The court took a

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different turn in *Kharak Singh v State of Uttar Pradesh* (1964 SCR (1) 332) where it gave a wider meaning to the words "personal liberty" and included within it the right to privacy. The majority held that the words "personal liberty" could not be confined to its negative meaning of being mere protection from arbitrary arrest but could extend to covering all aspects of liberty other than those specified under Art. 19.

10. *Maneka Gandhi v The Union of India*, A.I.R. 1978 SC 597.
11. In *Maneka*, the court clearly overruled Gopalan on the following issues (i) the law authorizing deprivation of personal liberty would have to be valid not only under Art. 21, but also under Art. 19(1)(d); (ii) The words "life" and "personal liberty" had wider meanings that would be discovered from time to time; (iii) The words "procedure established by law" meant not the procedure established by law but procedures considered to be just and fair in civilized countries (1981) 1 SCC 608.
12. *Kesavananda Bharati v State of Kerala*, A.I.R. 1973 SC 1461.
13. *Minerva Mills v the Union of India*, A.I.R. 1980 SC 1789.
14. The court's view was that laws which abridged any of the rights under Arts 14 and 19 (rights of equality before the law, protection against government arbitrariness and other political and civil liberties) while seeking to give effect to the principles of social justice of Part IV, had to be reviewed by the court to ascertain if there was a violation of the basic balance between the two Parts.
15. *Hussainara Khatoon v State of Bihar*, A.I.R. 1979 SC 1360; *Sunil Batra v Delhi Administration*, A.I.R. 1980 SC 1579.
16. A.I.R. 1982 SC 1473. The court found that the rights and benefits conferred on the workmen employed by a contractor under the Contract Labour (Regulation and Abolition) Act, 1970, and the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, were clearly intended to ensure basic human dignity to the workmen and depriving workmen of any of the rights and benefits to which they are entitled under these pieces of social welfare legislation would be a violation of Art. 21.
17. In this case, the legislation was the Bonded Labor System (Abolition) Act, 1976. The *Asiad Construction Workers* case, (1986) 3 SCC 753, had established that the state was bound to ensure observance of various social welfare and labor laws enacted for the purpose of securing to the workmen a life of basic human dignity as guaranteed by the constitution.
18. *Banwansi Seva Ashram v U.P.*, A.I.R. (1986) 3 SCC 753; *Municipal Council, Ratlam v Vardhichand*, A.I.R. 1980 SC 1622.
19. *Municipal Council, Ratlam v Vardichand*, A.I.R. 1980 SC 1622.
20. *Shantistar Builders v Narayan K. Totame* (1990) 1 SCC 520.
21. *Vincent v India*, A.I.R. 1097 SC 990; *CERC v India*, A.I.R. 1995 SC 927.
22. *Mohini Jain v Karnataka*, A.I.R. 1992 SC 1858; *Unni Krishnan v A.P.* (1993) 1 SCC 645.
23. *M/S A.R.C. Cement Ltd. v U.P.*, A.I.R. 1985 SC 652; *Tarun Bharat Sangh v India* (1999) 2 SCC 718; *A.P. Pollution Control Board v Prof. M.V. Nayudu*, A.I.R. 1988 SC 1037; *M.C. Mehta v India* (1999) 6 SCC 9, 12. The court also decided in *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664 and *M.C. Mehta v India*, 1998 (6) SCC 60 and 1998 (9) SCC 589 that Art. 21 also contained the right to clean air and water.
24. A Brandeis brief is usually a brief appellate brief that utilizes economic, sociological or other evidence in addition to legal principles in constructing arguments in a case.
25. The courts have also commissioned the parties themselves (as in *Sheela Barse v Union of India*, A.I.R. 1983 SC 378. where the petitioner was a Bombay journalist) to produce evidence or have asked the authorities (as in *Hussainara Khatoon v State of Bihar*, A.I.R. 1979 SC 1360).
26. The court has in a number of cases of torture or ill treatment called upon medical specialists to submit comprehensive reports at state cost. It has also used the services of its own officials or those of the High Courts (Baxi, 1985: 126).
27. An example of such cooperative effort was the decision in *Azad Rickshaw Pullers Union v Punjab*, A.I.R. 1981 SC 14. The state Act (The Punjab Cycle Rickshaw – Regulation of Rickshaws – Act, 1975) provided that licenses to ply rickshaws could only be given to those owners who run the rickshaws. This Act threatened to cause unemployment to those rickshaw pullers who did not own their rickshaws and leave many other rickshaws owned by non driving owners idle. Instead of striking down the law as a violation

of the fundamental right to carry on trade, business and occupation guaranteed by Art. 19(1)(g), Justice Iyer provided a scheme by which the rickshaw pullers could obtain loans from the Punjab National Bank and acquire the rickshaws. So the intention of the legislation to abolish the practice of renting rickshaws from the owners was achieved without causing hardship to the rickshaw pullers.

28. Habeas corpus is a judicial mandate to a prison official to produce an inmate before the court so that it can determine whether a person has been lawfully imprisoned. Through a writ of mandamus the court commands an individual or organization (such as the government, administrative tribunal or quasi judicial body or court) to perform a certain action, to make a decision which agency is required, or for which the agency has discretion under a statute. The writ of certiorari is a form of judicial review whereby a court is asked to consider a legal decision of an administrative tribunal/judicial office or organization (such as the government) to determine if there is an error of law, if the organization has the power to make the decision complained of or whether it exceeded its power in making the decision. Quo warranto is a challenge to a person allegedly improperly asserting a right to hold public office and is a writ that seeks to disenfranchise a person or organization from doing something for which it may not have legal authority.
29. *M.C. Mehta v Union of India*, A.I.R. SC 1987 at 1091.
30. *Karjan Jalasay Y.A.S.A.S. Samiti v State of Gujarat*, A.I.R. 1987 SC 532.
31. *Vellore Citizens Welfare Forum v Union of India*, A.I.R. 1996 SC 2715.
32. *D.C. Wadhwa v State of Bihar*, A.I.R. 1987 SC 579. Such ordinances, despite constitutional provisions to the contrary, were continually repromulgated without bringing them before the legislature so that they could be enacted into proper law.
33. The court invalidated the Bihar Intermediate Education Council Ordinance, 1985 for such procedural irregularity.
34. Writ Petition (Civil) No. (s) 250 of 2007.
35. The court ordered that the state government had to take all appropriate measures to prevent the operation of any group, including the tribal forces, that attempted to take law into private hands, act unconstitutionally or otherwise violate the human rights of any person. It held that both Art. 21 and Art. 14 of the constitution of India have been violated by the appointment of tribal youth, with very little education, as temporary police officers engaged in counter-insurgency activities, and that the union/state governments had to desist from such practices.
36. *Common Cause v Union of India* (1996) 6 SCC 530; *Common Cause v Union of India* 1999 (4) SCALE 354.
37. Writ Petition (Civil) No. 10 of 2011
38. *Vineet Narain v Union of India* (1996) 2 SCC 199. (2011) 4 SCC 3650.
39. The need for deference to the other wings of government in respect of questions of policy was also expressed by Justice R.S. Pathak: "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 territory which properly pertains to the legislature or to the executive government… In the process of correcting executive error or removing legislative omission the Court can so easily find itself involved in policy making of a quality and to a degree characteristic of political authority, and indeed run the risk of being mistaken for one" (*Bandhua*, 232).
40. See also the critique of PIL by Katju and Mathur JJ. in *Divisional Manager, Aravalli Golf Club v Chander Hass* (2008) 1 SCC (L and S) 289.
41. He referred to the methodology that the court had secured for enforcing its orders in PIL. In a case brought by a journalist for the protection of women in police custody, for example, the Supreme Court gave various directives and asked a woman judicial officer to visit the police lock ups periodically and to report to the High Court whether the directives were being carried out. In *Bandhua Mukti Morcha*, when the court gave elaborate directives it appointed the Joint Secretary in the Ministry of Labor to visit the stone quarries to ascertain that its order was being properly implemented.
42. Pathak J. in *Bandhua Mukti Morcha*.
43. *T.N. Godavarman Tirumulkpad v Union of India* (1997) 2 SCC 267.
44. *M.C. Mehta v Union of India* (1998) 9 SCC 589.

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45. *Visakha v State of Rajasthan* (1997) 6 SCC 241.
46. In certain PILs, the court has refused to entertain the case as involving a question of policy, as for instance, in *Delhi Science Forum v Union of India* (1996) 2 SCC 405, where the government's telecommunications policy was challenged. PILs that have asked for recognition of a particular language as a national language (*Ahmedabad Womens' Action Group v Union of India* (1997) 3 SCC 573) or the introduction of a Uniform Civil Code (*Mohd. Aslam v Union of India* (1994) 2 SCC 48) have been rejected. Yet, the court has asserted its role as policy maker in cases such as *Visakha*, adoption of children by foreign nationals (*D.K. Basu v State of West Bengal* (1997) 1 SCC 416) or vehicular pollution in *M.C. Mehta v Union of India* (Writ Petition (Civil) No.13029/1985).
47. It was urged that if a PIL petition failed or was shown to be mala fide, there should be provision for such petitioners to be imprisoned or to pay damages.
48. Manmohan Singh, Prime Minister, "Administration of Justice on a fast track," speech delivered at the Conference of Chief Ministers of States and Chief Justices of High Courts (April 8, 2007) in (2007) 4 S.C.C. J-9, J-12.
49. Manmohan Singh, Prime Minister of India, Speech at the Conference of Chief Ministers and Chief Justices of High Courts: "Has the Pendulum Swung to the Other Extreme?" (March 11, 2006).
50. During that phase, governments at both the Union level and most states enacted legislation providing for land acquisition in order to advance the policy of agrarian land reforms. These laws were challenged before the courts on grounds such as inadequate compensation, among others. While the Nehru-led government passed several Constitutional amendments with the objective of immunizing these land reform measures against "judicial review," the courts frequently ruled in favour of the property-owners.
51. It was ruled that Parliament's power of amendment was not absolute and it could not amend the "Basic structure" of the constitution, which in the opinion of the judges consisted of elements such as democracy, rule of law, secularism, separation of powers and judicial review. The decision was criticized by Indira Gandhi's government and three of the judges who ruled for the majority were superseded in the matter of appointment to the position of Chief Justice of India in 1973.
52. There were two instances of supersession by the executive in the appointment of chief justices of the Supreme Court. The first was in 1973 when Justice A.N. Ray was appointed Chief Justice superseding Justices Shelat, Hegde and Grover who had given the majority judgment in *Kesavananda*. In 1976, Justice Khanna who had dissented in *A.D.M. Jabalpur v Shiv Kant Shukla* (1976) Supp. S.XC.R. 172, 175, was superseded and Justice Beg took over as Chief Justice.
53. See also Mate (2010–2011: 208), "One explanation for the expansion of the court's role in government through PIL is [...] corruption and the general unresponsiveness on the part of the government."
54. He refers to Trubeck and Galanter's critique (1974), and to Roberto Unger's concern that the rise of an instrumental view of law was a major aspect of the disintegration of the rule of law and the shift to a post liberal society and social welfare state (Unger, 1976).
55. Chief Justice Bhagwati, the primary architect of PIL in India, expressed an openly substantive approach to the rule of law (which measures the outcomes of a particular set of rules against standards such as justice/fairness, and is concerned with formal rules insofar as they contribute to certain goals within the legal order) when he said: "While interpreting Article 32 it must be borne in mind that our approach must be guided not by any verbal or formalistic cannons of construction but by the paramount object [...] for which this article has been enacted [...] and its interpretation must receive illumination from the trinity of provisions which permeate and energize the entire constitution, namely, the Preamble, the Fundamental Rights and the Directive Principles of State Policy" (*Bandhua*, § 11, p. 813). Thus the court's justifications for its interventionist strategies have referred to standards set in the Preamble, the Directive Principles and also appeals to the "public interest." In *Kasturi Lal v State of Jammu and Kashmir* (1980) 3 SCR 1338 it said: "what according to the founding fathers constitutes the plainest requirement of public interest is set out in the Directive Principles and they embody par excellence the constitutional concept of public interest" (1995 SCC, Suppl. (2) 572).
56. Through the court's orders in *PUCL* and the Right to Food campaign's synergistic efforts, free midday meals are now given in all primary schools in India. The court's orders concerning implementation of a work-for-food scheme, in combination with efforts of the Right to Food campaign, played a significant

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role in the creation of the National Rural Employment Guarantee Act (2005). Two Supreme Court decisions on the right to education helped pressurize the government to pass a constitutional amendment in 2002 that clearly stated that the right to education was a fundamental right for children between six and fourteen years of age.

57. However, as P. B. Mehta suggests (2007: 70, 72, 80–82), it is not clear whether this iterative cycle has actually created a stable body of law that generates predictable results in all areas. The court's extensive interventions are seen as being too arbitrary and not guided by predictable standards either externally or through the court's own internal reasoning. This view is supported by Cunningham's analysis of the court's practice of creating ad hoc "remedies without rights" through interim orders (Cunningham, 1987: 511–515).
58. For instance, Justice Bhagwati noted in *S.P. Gupta* (*supra*) at § 18: "It is also necessary to point out that if no one can have standing to maintain an action for judicial redress in respect of a public wrong or public injury, not only will the cause of legality suffer but the people not having any judicial remedy to redress such public wrong or public injury may turn to the street and in that process the rule of law will be seriously impaired. It is absolutely essential that the rule of law must wean the people away from the lawless street and win them for the court of law."

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