CHAPTER VII

REDRESS OF GRIEVANCES- A COMPARISON

Rights without a remedy remain imperfect and practically toothless. Under the Constitution the judiciary is vested with the role of interpreting the constitution. Since the reality of such rights is tested only through the judiciary, the safeguards assume even more importance. In addition, enforcement also depends upon the degree of independence of the Judiciary and the availability of relevant instruments with the executive authority. The Fundamental Rights provided in the Indian Constitution are guaranteed against any executive and legislative actions. Any executive or legislative action, which infringes upon the Fundamental Rights of any person or any group of persons, can be declared as void by the Courts under Article 13 of the Constitution. The Supreme Court has figuratively characterized this role of the judiciary as that of a "sentinel on the qui vive".458

Articles 8, 10 and 11 of the UDHR contain provisions for redress of grievances in the event of human rights violation. According to Article 8, UDHR, everyone has the right to effective remedy by the competent national tribunal for acts violating the fundamental rights granted to him by the constitution or by law. Article 10 of UDHR requires that everyone be entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him while Article 11 declares that everyone charged with a penal offence has a right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. Further Article 7, of the UDHR guarantees equal protection to all against any discrimination and incitement to such discrimination in violation of the provisions of the Universal Declaration of Human rights thereby guaranteeing the universality of ‘equal protection of all laws’.

The above provisions of the UDHR find expression in Articles 14, 15 and 16 and 26 of the ICCPR.

458 State of Madras v V.G.Row, AIR 1952 SC 196(1952) SCR 597
ICCPR: The International Covenant on Civil and Political Rights is monitored by the Human Rights Committee. Members of the Human Rights Committee are elected by member states, but do not represent any State. The ICCPR contains two Optional Protocols. The First Optional Protocol creates an individual complaints mechanism whereby individuals in member States can submit complaints, known as communications, to be reviewed by the Human Rights Committee. ‘Its rulings under the first optional protocol have created the most complex jurisprudence in the UN international human rights law system’.

The second optional protocol abolishes the death penalty; however, countries were permitted to make a reservation allowing for use of death penalty for the most serious crimes of a military nature, committed during wartime.

It is pertinent to note that India has not ratified either Optional Protocol of the ICCPR. In India the Supreme Court continues to remain the Apex grievance body mechanism and while the second Optional Protocol of ICCPR abolishes death penalty, capital punishment is still valid in India though applied only in rarest of rare cases.

PART III of the Indian Constitution that encompasses fundamental rights also contains constitutional remedies that can be invoked in the event of infringement of any fundamental right. B.R.Ambedkar when asked which fundamental right in the Constitution he considered paramount described Article 32 indeed as the most important one; for without it he believed the Constitution would be reduced to a nullity.

In addition, the Judiciary has the power to issue the prerogative writs. By including Article 32 in the Fundamental Rights, the Supreme Court has been made the protector and guarantor of these Rights. An application made under Article 32 of the Constitution before the Supreme Court, cannot be refused on technical grounds. In addition to the prescribed five types of writs, the Supreme Court may pass any other appropriate order. Under Article 32, the Supreme Court may issue a writ against any

459 Refer Annexure III for the full text of the First Optional Protocol to the ICCPR.
person or government within the territory of India. Where the infringement of a fundamental Right has been established, the Supreme Court cannot refuse relief on the ground that the aggrieved person may have remedy before some other court or under the ordinary law. The relief can also not be denied on the ground that the disputed facts have to be investigated or some evidence has to be collected. Even if an aggrieved person has not asked for a particular writ, the Supreme Court, after considering the facts and circumstances, may grant the appropriate writ and may even modify it to suit the exigencies of the case. The Court's power is not confined to issuing writs only; it can make any order including even a declaratory order, or give any direction, as may appear to it to be necessary to give proper relief to the petitioner.\footnote{Kochunni v. State of Madras, AIR 1959 SC 725, 733: 1959 Supp(2) SCR 316}

The significance of Art.32 was described by the Supreme Court in the following words in Prem Chand Garg v. Excise Commissioner UP,\footnote{AIR 1963 SC 996:1963 Supp(1) SCR 885} (Per Gajendragadkar,J):

"The Fundamental Right to move this Court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this Court should regard itself 'as the protector and guarantor of Fundamental Rights' and should declare that "it cannot, consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights..... In discharging the duties assigned to it, this Court has to play the role of a 'sentinel on the qui vive' and it must always regard it as its solemn duty to protect the said Fundamental Rights 'zealously and vigilantly.'"

Art.32 differs from Art.226 in that whereas Art.32 can be invoked only for the enforcement of Fundamental Rights, Art.226 can be invoked not only for the enforcement of Fundamental Rights but for 'any other purpose' as well.

This implies that the scope of Art.226 is wider than that of Art.32. The words 'for any other purpose' found in Art.226 (but not in Art.32), enables a High Court to take cognizance of any matter even if no Fundamental Right is involved.
It may, however, be pointed out that there have been a few exceptional cases where the Supreme Court has entertained writ petitions of great constitutional significance under Art.32 although no question of Fundamental Right was involved possibly because there was no forum except the Supreme Court where these questions could be authoritatively decided, and there was no other mechanism, except Art.32 to bring such matters within the cognizance of the Supreme Court. Examples of such exceptional issues include those relating to -

(i) misuse of the ordinance making power by the State of Bihar;
(ii) Appointment of the Judges of the High Courts and the Supreme Court;
(iii) Issues related with the procedure to remove a Supreme Court Judge.

**INTER RELATIONSHIP BETWEEN ARTICLES 32 AND 226**

In the matter of enforcement of Fundamental Rights, the High Courts under Art.226 and the Supreme Court under Art.32, enjoy concurrent jurisdiction.

When a question was raised whether a petitioner seeking to enforce his Fundamental Rights could go straight to the Supreme Court under Art.32 without first approaching the High Court under Art.226, as early as in 1950, the Supreme Court ruled that such a petitioner can come straight to the Supreme Court without going to the High Court first. The Court stated that unlike Art.226, Art.32 confers a Fundamental Right on the individual and imposes an obligation on the Supreme Court which it must discharge when a person complains of infringement of a Fundamental Right. This proposition was thereafter reiterated by the Supreme Court in a number of cases.

However, in 1987 a two-judge Bench of the Supreme Court ruled that a petitioner complaining of infraction of his Fundamental Right should approach the High Court first rather than the Supreme Court in the first instance⁴⁶².

---

Being a view expressed by a two Judge Bench, the researcher submits that this ought not to be regarded as an authoritative pronouncement on such an important constitutional issue, viz., inter relationship between Art.32 and Art.226. The ruling in Kanubhai seeks to negate what the Supreme Court has had to say on its role as a “sentinel on the qui vive.”

It is further submitted that this view will make Art.32 redundant for after having gone to the High Court first under Art.226, the petitioner would then come to the Supreme Court by way of appeal and not under Art.32, because of the principle of res judicata. Besides, when a litigant approaches the Supreme Court, the matter is decided by the Court finally. But if he approaches the High Court, the petition is first decided by a single judge, an appeal then lies to the division bench, and, thereafter, an appeal may be taken to the Supreme Court. In fact, this may cause more delay and prove costlier to the petitioner than a writ petition directly under Art.32. In effect, the Kanubhai ruling devalues the significance not only of the Fundamental Rights but of the Supreme Court itself. This could never have been the intention of the framers of the Constitution. In practice, however the Kanubhai pronouncement has had no effect on the existing practice and the writ petitions continue to be filed in the Supreme Court under Art.32 without first going to the High Court under Art.226.

Res Judicata: The Supreme Court has imposed a significant restriction on the invocation of its jurisdiction under Art.32 by applying the doctrine of res judicata. The rule of res judicata is based on considerations of public policy as it is in the larger interest of the society that finality should attach to binding decisions of courts of competent jurisdiction, and that individuals should not be made to face the same kind of litigation twice. If the doctrine of res judicata were not applied to writ proceedings, then a party could take one proceeding after another and urge new grounds every time in respect of one and the same cause of action. This would plainly be inconsistent with considerations of public policy.

However, res judicata would not apply if orders sought to be challenged through successive writ petitions are different, as for example, when a petition challenging the validity of the tax assessment for one year is dismissed by the
Supreme Court, a similar order passed for the subsequent year can be challenging through a new writ petition on some new grounds not raised earlier in the first writ petition.463

The Supreme Court has ruled in Lallubhai v. Union of India464 that the doctrine of constructive res judicata is applied only to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for the writ of habeas corpus under Art.32 on fresh grounds not taken in the earlier petition for the same relief. Thus, when a writ petition challenging an order of detention is dismissed by the Court, a second petition can be filed on fresh, additional grounds to challenge the legality of the continued detention of the detenue, and the subsequent petition is not barred by res judicata.

Further the Supreme Court has held that the writ jurisdiction of a High Court under Art.226 is concurrent to that of the Supreme Court under Art.32 and therefore res judicata would apply. In such instances the High Court’s decision can be challenged in an appeal to the Supreme Court but not through a writ petition.

However the res judicata principle will apply only when the High Court has disposed of the writ petition on merits. If the petition had been dismissed by the High Court not on merits, but on a technical ground, say on account of petitioner’s laches, or because he had an efficacious alternative remedy available to him, or because the petition was dismissed ‘in limine’ without passing a speaking order, then res judicata would not apply and the Supreme Court can entertain a petition under Art.32, because Art.32 is a fundamental right and the Supreme Court ordinarily issues a writ if there is a breach of any fundamental right.465

WRIT JURISDICTION: Under Article 32(2) of the Constitution, The Supreme Court has 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 PART III of

463 Amalgamated Coalfields v. Janapada Sabha, Chhindwara, AIR 1961 SC 964 : (1962) 1 SCR 1
The Writ of *Habeas Corpus*\(^{466}\) provides an efficacious remedy to a person unlawfully detained by another whether in prison or private custody. The scope of this writ has been considerably widened by the Supreme Court in India. In *Kanu Sanyal v. District Magistrate, Darjeeling*,\(^{467}\) while deciding on the validity of the detention in Vishakapatnam jail of a top-ranking naxalite leader arrested in 1971 without trial, the Court ordered rule *nisi* but not the production of the detenue and declared that the Supreme Court was not ‘bound by fetters’ of ‘a practice which originated in England about 300 years ago on account of certain historical circumstances which have ceased to be valid even in that country and which have certainly no relevance in ours’. The application of Habeas Corpus can also be made by any person, say a friend or relative, on behalf of the prisoner. Following the principle applied in the American case *Gideon v. Wainwright*, even a postcard written by a detenue from jail would be sufficient for the Court to examine the legality of detention. Technicalities and legal niceties are no impediments to the Court entertaining an informal communication as a proceeding for habeas corpus if the basic facts are found. “The dynamic role of judicial remedies after *Batra’s* case (No.1) imparts to the habeas corpus writ, a versatility and operational utility that makes the healing presence of the law live up to its reputation as a bastion of liberty even within jails”\(^{468}\) declared Krishna Iyer, J who in the said case accepted a letter written by an inmate of Tihar jail and treated the same as a writ petition.

The writ of *Mandamus* (meaning order) has been invoked by a superior court to command a person or public authority (including the Government and public corporations) to do or forbear from doing something in the nature of a statutory duty.

---

\(^{466}\) A Latin term which literally means “you may have the body”

\(^{467}\) *Kanu Sanyal v. District Magistrate, Darjeeling*, AIR 1974 SC 510

\(^{468}\) *Sunil Batra v Delhi Administration* AIR 1980 SC 1579.
or public duty. However where the duty is merely discretionary in nature the Supreme Court has held that mandamus cannot be issued to compel the Government to exercise its power. Like wise the writ of mandamus is not maintainable to enforce contractual obligations.

The writ of Prohibition has been used primarily to prevent an inferior court or tribunal from exceeding its jurisdiction or acting contrary to the rules of natural justice. This writ has much in common with the writ of Certiorari. While prohibition is preventive in nature and can prohibit a lower court that has usurped a jurisdiction not legally vested in it from hearing a matter any further, Certiorari is invoked to quash orders that a lower court has heard and passed without jurisdiction making this relief curative in nature. Prohibition like certiorari, lies only against judicial and quasi-judicial bodies and will not lie against a public authority which acts purely in an executive or administrative capacity or for that matter against a legislative body. By the writ of Quo warranto a holder of a public office is called upon to show the court under what authority he holds the office. If the holder of a public office was initially disqualified to hold that office, the writ of Quo Warranto would not be issued if at a subsequent stage that disqualification was removed making the incumbent thereby qualified for the post for the decree would in such event become futile. Any member of the public may file a quo warranto petition. However the remedy is discretionary and where the Court is of the opinion that the suit is vexatious or that the petitioner has acquiesced or that his motive is suspicious, the court may decline the writ petition.

Any piece of legislation or law, which tends to interfere with the power of Supreme Court under Article 32 shall be declared as void. Hence, there is no way that the legislative or the executive authorities can by-pass the power and responsibility entrusted to the Supreme Court by the Constitution. In the famous case, Gopalan Vs State of Madras, the Supreme Court declared Section 14 of the Preventive

---

471 Dr. Het Ram Kalia v. Himachal Pradesh University, Simla, AIR 1977 NOC 246 (Him.Pra.).
473 AIR 1950 SC 27
Detention Act of 1950 as void, because as per the Supreme Court, the said Section acted as an iron curtain around the acts of the executive authority making the order of preventive detention.

The role of Public Interest Litigation (PIL):

For Indian Courts that have drawn closely from the Anglo Saxon jurisprudence, the concept of PIL marks a significant departure from traditional judicial proceedings and the blinkered rules of 'locus standi'. PIL was an idea which took shape in the mid 70's and mushroomed in the 1980's and has helped fructify, the conscience of the Indian Constitution by serving as an effective armoury of law in delivering social justice to citizens and by making the provisions of Part III and Part IV of the Indian Constitution more meaningful.

CHARACTERISTICS OF PIL

PIL is non adversarial in character. In Dr. Upendra Baxi V State of UP (1986) 4 SCC 106 at 117 the Supreme Court observed that PIL involves a 'collaborative and co-operative effort on the part of the State Government and its officers, the lawyers appearing in the case and the Bench for the purpose of making human rights meaningful and redress accessible for the weaker sections of the community'.

PIL marks a shift to community orientation. Reacting to the innovative approach of PIL in Municipal Council Ratlam V Sri Vardhichand Justice V. R. Krishna Iyer speaking for the Supreme Court observed that if the Court were to provide greater access to justice for the people beyond the blinkered rules of standing of British-India vintage, the center of gravity of justice should shift as the preamble mandates, from the traditional individualism of locus standi to the community orientation of PIL'.

Courts in India have time and again reiterated that 'representative, non-political, non-profit and voluntary organizations who have a sufficient interest can

474 'Public Interest Litigation' (PIL) refers to the legal action initiated in a Court of Law for the enforcement of 'public interest'.
475 (1980) 4 SCC 162
maintain an action for judicial redress of a public injury arising out of the breach of public duty or violation of some provision of the Constitution.

Recognizing the flexibility of procedure, the court has accepted letters\textsuperscript{476} and telegrams\textsuperscript{477} and treated them as petitions drawing inspiration from the rule in Gideon V Wainwright\textsuperscript{478} that paved the way for the era of `Social Interest Litigation' in America in the 1960s.

Another distinct feature of PIL is that unlike a private litigant, who can abandon his claims, the PIL petitioner will not of his free will be allowed to withdraw the petition and the Court may decide to take over the conduct of the matter particularly if it is of the opinion that the matter must be heard in public interest.\textsuperscript{479}

PIL has also been a `strategic arm of the legal aid movement'.\textsuperscript{480}

The Apex Court has sought to overcome the difficulties forced by genuine PIL petitioners through

A) the appointment of Commissioners\textsuperscript{481}

B) by relying on expert bodies to study the matter in question and submit a report to Court\textsuperscript{482}

\textsuperscript{476} As in Sunil Batra's case, Veena Sethi V State of Bihar and in D.K.Basu v State of West Bengal.
\textsuperscript{477} Paramjit Kaur V State of Punjab (1996 7 SCC 20)
\textsuperscript{478} In this case a letter written by detenue of Florida State Prison was treated as a writ petition.
\textsuperscript{479} In Sheela Barse V Union of India (1988) 4 SCC 226, the Supreme Court while declining the right of the Petitioner to withdraw the PIL on account of the extremely slow and tardy process of the case, nevertheless asked the Supreme Court Legal Aid Committee to provide a lawyer to act as `amicus curie' in the matter. The two member committee on juridicare (Justice V R Krishna Iyer & Justice Bhagvati) emphasized the need for PIL in its final report of August 1977 by citing that the new philosophy of legal service programme must be framed in the light of socio-economic conditions prevailing in our country
\textsuperscript{480} The two member committee on juridicare (Justice V R Krishna Iyer & Justice Bhagvati) emphasized the need for PIL in its final report of August 1977 by citing that the new philosophy of legal service programme must be framed in the light of socio-economic conditions prevailing in our country
\textsuperscript{481} The Court has appointed district judges, journalists, lawyers, doctors, mental health professionals, bureaucrats and expert bodies as Commissioners in various cases. For e.g., In Kamala Devi Chattopadaya V State of Punjab (1985) 1 SCC 41, a district Judge was appointed to report on women and children detained in Ludhiana Jail.
\textsuperscript{482} In M C Mehta V Union of India 1999 (4) Scale 196, the Courts relied on Central Pollution Control Board to make an assessment and submit its report.
C) by drawing on empirical data and expert studies and

D) by appointing lawyers as amicus curiae

E) Senior Advocates of the Supreme Court have assisted the Court in several cases ranging from bonded labour to police atrocities

THE DARKER SIDE OF PUBLIC INTEREST LITIGATION:

While the emergence of PIL since the late 1970s in India has had a salutary effect on the vast majority of citizens in terms of access to justice and as an ‘armoury of law in delivering social justice’ the credibility of PIL remains an issue for some very pertinent reasons as stated below.

i) There is a lurking fear that PIL is being misused by people ‘agitating for private grievance in the garb of public interest and seeking publicity rather than exposing public causes’. In 1996 a Private Member’s Bill entitled Public Interest Litigation (Regulation) Bill was tabled in the Rajya Sabha in this light of the criticism and suspicion that PIL had attracted. The Bill was introduced by Suresh Pachouri who urged that if a PIL petition failed or was shown to be malafide, the petitioner should be put behind bars and be made to pay damages.

In Malik Brothers V Narendra Dadtiick 1999 (5) SCALE 212 the Court while dismissing the PIL in question observed that the case was filed not in public interest but to merely ‘ventilate a private grievance’. In the widely reported

In S Jagannath V Union of India (refer S.Jagannath v UOI (1997) 2SCC 87), in order to protect the fragile Coastal Regulation Zone, the Court relied on the report of the National Environmental Engineering Research Institute, Nagpur.

The Apex Court drew upon empirical data and expert studies to study the impact of liberty and loss of livelihood to pavement dwellers consequent to eviction in Olga Tellis V Bombay Municipal Corporation case (1985) 3 SCC 545


To cite instances, Kapil Sehal, assisted the Supreme Court in the cases concerning out of turn allotment of government accommodation. For further details see Shri Sagar Tiwari V UOI (1966) 6 SCC 599

F S Nariman was amicus curiae to assist the Court in Vishaka V State of Rasjasthan (1977) 6 SCC 241.

KK Venugopal assisted the Court in one aspect of the case concerning the Narmada Dam : Narmada Bachao Andolan V Union of India 1999 (5) SCALE 437; 1999(6) SCALE 571.For further details refer (a) State of West Bengal V Sampath Lal (1985) 1 SCC 317 and (b) People’s Union for Civil Liberties V State of Tamil Nadu 1997 (7) SCALE SP 17.

Refer Public Interest Litigation : Potentials and Problems by Ashok H Desai & S.Muralidhar
Janata Dal case\textsuperscript{487} the Supreme Court held that the petitioner lacked 'locus standi' as he had a personal motive and was agitating in the garb of PIL.

All such cases are a pointer that the judiciary must act with 'circumspection', 'care and caution' while entertaining PIL.

\begin{itemize}
  \item[ii)] PILs could encourage forum shopping\textsuperscript{488} and lead to a dangerous situation where 'a man may be a Judge of his own cause' and create a fear of 'bias'. Through the informality of treating letter petitions as 'writ petitions' there is a danger of greater identification of the Court and the Judge concerned with the cause than would be in a case involving the same type of cause if filed in the normal way. These pertinent doubts were also raised in \textit{Sudip Majumdar V State of Madhya Pradesh} (1983) 2 SCC 258. Thus the very flexibility of PIL poses easy access to a particular judge and in turn raises apprehension of 'interference with justice'. As Justice Pathak aptly pointed out 'Which Judge or Judges should hear a case is exclusively a matter concerning `the internal regulation of the business of the Court and interference in such matters by a member of the public would constitute `the grossest impropriety'.

The Supreme Court has indeed reacted to this danger and while issuing a notification on what matters can be entertained as PIL\textsuperscript{489} also laid down the procedure that the petition should be first screened in the PIL cell and thereafter would be placed before a Judge to be nominated by the Hon'ble Chief Justice of India for directions thereby ensuring that the Judge who converts the 'letter petition' into 'writ petition' does not himself adjudge the matter. These steps are indeed intended to obliterate the fear of interference of justice through PILs.
\end{itemize}

\textsuperscript{487} Janata Dal v H S Chowdhary (1992) 3 SCC 305
\textsuperscript{488} as observed by Justice Pathak in Bhandu Mulki Morcha case
\textsuperscript{489} The notification of 1 December 1988 states that only matters concerning bonded labour, neglected children, petitions from prisoners, petitions against the police, petitions against atrocities on women, children SC and ST and matters of public importance like petitions pertaining to environmental matters, adultration of drugs and food, maintenance of culture and heritage can normally be entertained. Matters relating to landlord-tenant disputes, service matter and admission to educational institutions may not normally be entertained.
iii) Though the Supreme Court has time and again stated that its power of judicial review should not be used to ‘usurp or abdicate the powers of other organs’ and have respected the doctrine of separation of powers, PIL in practice has tended to ‘narrow the divide between the role of various organs of government’. This has invited controversy leading critics to point out that courts should not lay down ‘policy’ but should be more concerned with the ‘law’.

It is unfortunate that the Apex Court of our country has not adopted a uniform approach with respect to the ‘law and policy divide while dismissing on several occasions PILs on the ground that the matter related to ‘policy’, the Court has on other occasions actively intervened as in Vishaka V State of Rajasthan (1997) 6 SCC 241, a PIL concerning sexual harassment of women in the work place. The significant feature in this case was the Court’s willingness to step in and fill in the legislative lacunae. This is in stark contrast to cases where the Court has expressed its reluctance to step into the legislative field and lay down policy.

iv) The adversarial framework has some decided advantages in that it relies on the evidentiary value of evidences and recognizes the right of an adversary to test evidence and witnesses through cross examination and counter affidavits. Further the traditional jurisprudence requires ‘delineation of issues in a legally manageable form, so that the opposite party can respond to specific issue. The Court ostensibly to overcome such problems in PILs have appointed ‘amicus curiae’ and commissions in the past. However, the evidentiary value of Court appointed Commissioners have been questioned by Critics since there have been instances where the Apex Court has relied totally on the report of expert bodies and commissions without giving an opportunity to the opposite party to file counter affidavits. S.Jagannath V Union of India is a case in point where the Supreme Court relied heavily on Report of National Environmental Engineering

---

490 Ram Jawaya Kapur V State of Punjab (1955) 2 SCR 225
Research Institute (NEERI) without permitting the filing of a counter affidavit.

What is worse is that the Courts lose their very credibility when orders are not effectively complied with. Justice Bharucha rightly expressed concern in this direction stating “This Court must refrain from passing orders that cannot be enforced..... It is counter productive to have people say ‘The Supreme Court has not been able to do anything’.

Also, as Chief Justice Anand had rightly pointed our ‘Courts must be careful to see that by their overzealousness they do not cause uncertainty or confusion and further cautioned that judicial activism should not turn into ‘judicial adventurism’.

Courts also contend that if the free flow of PIL is unchecked, traditional legislation could well suffer and the slow progress of routine cases would be all the more tardy.

In conclusion, the researcher would like to state that though the ills of PIL is potent with danger, it is unwise to do away with PIL and it is only prudent to accept the fact that PIL has come to stay in India. In view of the changing socio-economic conditions prevailing in the country, the Courts have had to ‘forge new remedies and fashion new strategies’ in order to make fundamental rights more meaningful to the masses, and PIL no doubt has served as an effective armoury in delivering social justice to citizens and in according greater protection of Human Rights to the masses. It may be a fact that PIL detracts Judges from routine cases. But none can dispute the fact that PIL has drawn the attention of the Court to instances of gross miscarriage of justice and acts of inhumanity with utmost impunity. PIL brought the Bhagalpur blinding and the hapless plight of scores of under trials languishing for years in jails of Bihar to light. PIL brought much needed relief to scores of mentally ill prisoners, some of them even detained for over 30 years in jail to the notice of the

492 (1997) 7 SCC (Journal) 11 at 23
493 Khatri (I) V State of Bihar (1981) 1 SCC 623 (6) Hussainara Khatoon cases
494 Hussainara Khatoon cases drew the attention of the court to the hapless plight of scores of under trials who had served more years in jail than they would have had they been tried and punished! The court ordered immediate release of all such under trials
Court. Through PIL, Courts awarded damages to the hapless families of victims of custodial death. It enabled the Court to lay down detailed guidelines for the protection of the arrestee. It has shaped the law in environmental matters by recognizing important doctrines like 'precautionary principle' and the polluter pay principle. It has given fillip to Public Accountability and tried to restore it in some measure and more importantly it has helped to fill in legislative lacunae as in the Vishaka case, thus obliterating the 'law and policy' divide.

Justice J S Verma could not have summed it up more aptly when he said the need of the hour is to 'prevent misuse of PIL and not to criticize the process. Every innovation takes time to get into proper shape. Any attempt to curb PIL 'would be to throw the baby with the bath water'.

PROTECTION OF HUMAN RIGHTS UNDER PROTECTION OF HUMAN RIGHTS ACT, 1993:

In pursuance of a resolution of the General Assembly adopted in 1966, the Economic and Social Council asked the Human Rights Commission of the UN to consider the question of creation of National Commission of Human Rights to perform certain functions relating to the observance of the International Covenant on Human Rights. This question was also considered by the Commission in 1970 and the Commission recommended that the question of establishment of National Commission of Human Rights in each Member State of the UN ought to be decided by each Government of the Member State keeping in view the traditions and

495 Sheela Barse V UOI (1983) 2 SCC 96
496 Nilabarti Bachura V State of Orissa (1993) 2 SCC 746 is one such instance;see Veena Sethi V State of Bihar (1982) 2 SCC 583
497 D K Basu V State of West Bengal where the Court acted upon a letter petition in August 1986 by the Chairman of Legal Aid Services, West Bengal and laid down eleven guidelines for the police to mandatorily follow
498 Tehri Bandh Virodhi Sangharsh Samiti case
499 Vellore Citizens' Welfare Forum V Union of India (1996) 5SCC 647
500 Vineet Narain V Union of India (i.e., popularly known as Hawala Case) (1996) 2 SCC 199 and Shiv Sagar Tiwari V Union of India (1996) 6 SCC 558 wherein Court quashed out of turn allotments of Government accommodation directing Sheila Karve the then Union Minister for Urban Development to pay Rs.60 lakhs as exemplary damages to the Government Exchequer are examples of PILs safeguarding Public Accountability
institutions of each country. Since then the Human Rights Commission has several times stressed the need of the creation of National Commission of Human Rights in each Member State. Vienna Declaration and Programme of Action adopted by the Vienna Conference on Human Rights on June 25, 1993 recommended that every State ought to provide an effective framework of machinery or institution to provide remedies in case of violations of human rights. It was after the said World Conference that several States including India have established National Commission of Human Rights to redress human rights grievances or violations.

The western countries and America, in particular, criticized India for violation of human rights by Indian armed and security forces especially in the State of Jammu and Kashmir. Though it is now well recognized that terrorism is a serious violation of human rights yet these countries especially America never lost an opportunity to criticize India whenever Indian Security Force sought to clear sternly with extremists and ultras in J&K in North Eastern States and Andhra Pradesh. In order to meet this criticism apart from other reasons, India decided to establish a National Commission of Human Rights for the redressal of grievances of human rights violations. On 28th September 1993 the President of India promulgated an Ordinance which established a National Commission of Human Rights on October 12, 1993. Thereafter, a Bill on human rights was passed in the Lok Sabha on December 18, 1993 to replace the Ordinance earlier promulgated by the President. The Bill received the assent of the President on January 8, 1994 and was published in the Gazette of India, Extraordinary Part II, section 1, on January 10, 1994. Thus the Protection of Human Rights Act (No.10 of 1994) came into force. Section (2) provides that the Act extends to the whole of India provided that it shall apply to the State of J&K only in so far as it pertains to the matters relatable to any of the entries enumerated in List I or III in the Seventh Schedule to the Constitution applicable to that State.

The Preamble of the Act makes it clear that it is an Act to provide for the constitution of National Human Rights Commission; Commission in States and Human Rights Courts of better protection of human rights and for matters connected therewith or incidental thereto.
DEFINITION OF 'HUMAN RIGHTS' UNDER THE ACT: Section 2(d) of the Act defines 'human rights' as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India. Thus for the purposes of the Act, 'human rights' are rights relating to life, liberty, equality, and dignity of the individual guaranteed in the Constitution or embodied in the International Covenants and enforceable by courts in India. Thus, the Act gives a very narrow definition of 'human rights' and does not even include all the fundamental rights guaranteed by the Constitution. It simply includes the fundamental rights relating to the life, liberty equalities and dignity guaranteed in the Constitution or embodied in International Covenants of Human Rights and enforceable in India. For example, it does not include fundamental rights of prohibition of employment of children in factories etc. (Article 24), Protection of interests of minorities (Article 29), Right of Minorities to establish and administer educational institutions. Further the term 'international Covenants' did not encompass all International Covenants. Under Sec.2 (f) "International Covenants" means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights adopted by the General Assembly of the United Nations on the 16th December, 1966. However since the corpus of International Covenants have considerably grown and owing to the NHRC’s submissions for amendment of this narrow definition to the Government Sec.2(f) was amended in 2006 to also include “such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify”.

LIMITATIONS OF THE NHRC:

The statutory body to address human rights violations in the country is “hamstrung by rules that severely limit its role”502. The Government’s implementation of the Commission’s recommendation is crucial to the success of the Commission in fulfilling its mandate. However NHRC has been designed as a purely

502 Observation of the NHRC Chairperson S. Rajendra Babu on the eve of the Commission’s 15th birthday.
recommendatory body and as such does not have the power to make determinations and enforceable orders.\textsuperscript{503}

The NHRC works under various challenges. Section 36 of the PHRA states,

(1) The Commission shall not inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force.

(2) The Commission or the State Commission shall not inquire into any matter after the expiry of one year from the date on which the act constituting violation of human rights is alleged to have been committed.

It is submitted by the researcher that the limitation period needs to be extended. It is pertinent to add here that in Paramjit Kaur v State of Punjab,\textsuperscript{504} the Supreme Court directed the National Human Rights Commission to make an inquiry into a matter more than one year old on the ground that the Commission would be functioning \textit{sui generis} under the direction issued by the Court under Art.32 and not under its own constituent statute.

Further the Commission should be allowed to inquire into violations by the armed forces in areas where they have been deployed and to submit a report to the government. Presently NHRC may merely seek a report from the Central Government in this regard and furnish their recommendations if any. According to 2003-04 Annual Report of Ministry of Home Affairs, India faces intensive internal armed conflicts in Assam, Arunachal Pradesh, Jammu and Kashmir, Meghalaya, Manipur, Mizoram, Nagaland and Tripura. In addition, Indian states of Andhra Pradesh, Bihar, Chattisgarh, Orissa, West Bengal, Madhya Pradesh, Maharashtra, and parts of Uttar Pradesh are afflicted by left wing Naxalites movement against inequity and social injustices. In most of these situations, armed forces have been deployed. Yet, under Section 19 of the Human Rights Protection Act, NHRC does not have jurisdiction

\textsuperscript{503} \textit{India's National Human Rights Commission: A Shackled Commission?} By Vijayashri Sripathi, Boston University International Law Journal, Spring 2000

\textsuperscript{504} Paramjit Kaur v State of Punjab, AIR 1999 SC 340 : (1999) 2 SCC 131

According to the report of the Asian Center for Human Rights it is not the statutory limitations alone which has made India's NHRC more ineffective but "its operational inefficiencies such as non-registration of complaints, denial of the right to information on the complaints, violation of the cardinal principle of administration of justice by not providing response of the State to the complainant in the course of considering the complaints, closure of cases on frivolous grounds, exposing the complainants, flawed investigation processes and lack of follow up mechanisms for prosecution".\footnote{Refer ACHR Review dated 3 AUGUST 2005. (www.achrweb.org/Review/2005/84-05.htm)}

Critics point out that the need to provide prior intimation to the authorities for visiting any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of the inmates defeats the purpose of prison reforms. Even so, the researcher submits that NHRC reports on prison visits and statistics gathered by the Commission have thrown light on the grim situation in prisons in India and improved the plight of hapless detainees. To cite a few examples statistics compiled by the Commission's custodial justice cell in May 2003 revealed that 2, 25,817 of 3, 04,893 or 74.06 per cent of the total prison population, are those awaiting trial. The report added that the total jail capacity in India is for 2, 32,412 prisoners, which makes the total prison population 31 per cent higher than capacity. A scrutiny made by the NHRC found that as many as ten States were holding non-criminal lunatics in their jails, which constitutes a serious human rights violation. The Commission requested the Chief Ministers of these States to arrange transfer of these patients to Mental Hospitals.\footnote{Reger NHRC Newsletter www.nhrc.nic.in/dispararchive.asp?fno=106} Thanks to the efforts of NHRC 77 year old Machang Lalung, was released from incarceration in the northeast Indian state of Assam after spending fifty four years in incarceration awaiting trial in July 2005.
Another distressing factor is that Section 30 and Section 31 of PHRA have remained a dead letter ever since the coming into force of PHRA. To this day we do not have in the country a Court of Session to be a Human Rights Court as designed in Section 30 of the said Act or Special Prosecutors to try such cases as envisaged in Section 31 of PHRA.

Despite the inbuilt limitations, the NHRC which completes 15 years of its existence in 2008 is gradually expanding its ambit and sensitizing officials and the average citizen to the sanctity of human rights. The commission has grown manifold over the years. From 400 petitions being filed annually when it came into being, to 100,000 now, the NHRC is striving to fulfill its role of upholding human rights. The need of the hour is to give more teeth to Protection of Human Rights Act, 1993 to ensure that better functioning of the Human Rights Commissions framed under the Act.

India is one of the few countries in the world whose Constitution allows for preventive detention during peacetime without safeguards that elsewhere are understood to be basic requirements for protecting fundamental human rights.

**DRACONIAN LEGISLATIONS ON PREVENTIVE DETENTION IN THE POST INDEPENDENT PERIOD:**

The Preventive Detention Act, 1950 was originally passed for one year to curb the ‘violent and terrorist’ activities of the communists in Hyderabad, West Bengal and Madras State but was periodically extended up to 1969. During this period the Act continued to be challenged in the Supreme Court for its validity and Parliament continued to amend it. Again in 1971, the need was felt to frame another Preventive Detention Act with the object to maintain internal security. The infamous MISA (Maintenance of Internal Security Act, 1971) was the end result. MISA was grossly misused to scuttle all political opposition during the emergency (1975-1977). The Act gave extraordinary powers to the executive, the misuse of which was observed by the Supreme Court thus - ‘It turned into an engine of oppression posing threat to democratic way of life’. The total rout of the Congress Party in the 1977 election is
largely attributed to the public resentment of the misuse of MISA. The Janata Party Government fulfilling their poll promise repealed MISA on July 3, 1978. Though MISA was gone COFEPOSA, 1974 along with Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act continued. Arms Act, TADA and more recently POTA are examples of other draconian legislations. Though TADA was allowed to lapse in 1995, following widespread criticism that it was used widely against peaceful political opponents, human rights defenders, and minorities and marginalized sections of Indian society, while in existence, around 77,000 persons had been arbitrarily arrested under TADA and thousands were tortured with a view to extracting confessions from them. Of those arrested, around 72,000 were later released without having been charged or tried. A decade after the TADA lapsed, 147 persons are under detention for offences under that Act, including some held in connection with high profile cases for which trials are still ongoing. The subsequent draconian legislation POTA allowed the detention of a suspect for up to 180 days without the filing of charges in court. It also allowed law enforcement agencies to withhold the identities of witnesses and treats a confession made to the police as an admission of guilt. Though POTA was repealed in Sept.2004 in the three years of its existence around 3,500 persons in 18 Indian states (including a few children in Jharkhand and Tamil Nadu) were held under POTA for varying periods of time with the State of Gujarat having the highest number of detentions where all but one of the 287 people held under the Act were Muslims. While promulgating an ordinance to repeal POTA in Sept 2004, just one month before it was due to lapse the President promulgated another ordinance to amend the provisions of the Unlawful Activities (Prevention) Act (UAPA) to effectively deal with terrorists, terrorist outfits and other facets of terrorism. The UAPA now bans 32 terrorist organizations that were earlier proscribed under POTA

In the last few decades, legislations that include the National Security Act508, the Disturbed Areas Act, the Armed Forces Special Powers Act, the Armed Forces

508 National Security Act was formulated in 1980 with the object of coping with 'situations of communal disharmony, social tensions, extremist activities, industrial unrest and increasing tendency on the part of various interested parties to engineer agitations on different issues'
Under Article 22 of the Constitution of India preventive detention may be implemented \textit{ad infinitum} -- whether in peacetime, non-emergency situations or otherwise. The Constitution expressly allows an individual to be detained -- without charge or trial -- for up to three months and denies detainees the rights to legal representation, cross-examination, timely or periodic review, access to the courts or compensation for unlawful arrest or detention. In short, preventive detention as enshrined under Article 22 strikes a devastating blow to personal liberties.

It also runs afoul of Article 4 of the International Covenant on Civil and Political Rights (ICCPR) which India has ratified permits derogation from guaranteeing certain personal liberties only during a state of emergency.

The researcher submits that Entry 3 of List III of the Constitution of India, which allows Parliament and state legislatures to pass preventive detention laws in times of peace for “the maintenance of public order or maintenance of supply and services essential to the community,” should be repealed.

The researcher would like to draw attention to certain pertinent recommendations put forth by SAHRDC in this regard namely-

“Assuming that preventive detention could be justified in the interest of national security as identified in Entry 9 of List I of the Constitution, there is still no compelling reason to allow this extraordinary measure in the circumstances identified in Entry 3 of List III. Second, lacking clear guidance from the Constitution, courts have applied vague and toothless standards -- such as the subjective “satisfaction” of the detaining authority test -- to govern the implementation of preventive detention laws. If preventive detention is to remain in the Constitution, constitutional provisions must include well-defined criteria specifying limited circumstances in

---

\textsuperscript{509} Amnesty International Public Statement ASA 20/026/2006
which preventive detention powers may be exercised -- and these standards must be designed to allow meaningful judicial review of officials' actions.

Third, under Article 22(2) every arrested person must be produced before a magistrate within 24 hours after arrest. However, Article 22(3) (b) exempts preventive detention detainees from Clause (2) and, as a consequence it should be repealed in the interest of human rights. At present, detainees held under preventive detention laws may be kept in detention without any form of review for up to three months, an unconscionably long period in custody especially given the real threat of torture. At the very least, the Government should finally bring Section 3 of the Forty-fourth Amendment Act, 1978 into effect, thereby reducing the permitted period of detention to two months. Though still a violation of international human rights law, this step would at least reduce the incidents of torture significantly.

Fourth, the Advisory Board review procedure prescribed by the Constitution involves executive review of executive decision-making. The absence of judicial involvement violates detainees’ right to appear before an “independent and impartial tribunal”, in direct contravention of international human rights law including the ICCPR (Article 14(1)) and the Universal Declaration of Human Rights (Article 10). The Constitution must be amended to include clear criteria for officials to follow, and subject compliance with those standards to judicial review.

Fifth, the Constitution provides that the detaining authority must refer to the Advisory Board where detention is intended to continue beyond three months. No provision exists for the consideration of a detainee’s case by the Advisory Board more than once. Yet, periodic review is an indispensable protection to ensure that detention is “strictly required” and fairly administered. Hence, the Constitution should mandate periodic review of the conditions and terms of detention.

Sixth, detainees must receive detailed and prompt information about the grounds of their arrest. Currently, the detaining authority is required only to communicate the grounds of detention to the detainee “as soon as may be” after the arrest. Article 9(2) of the ICCPR provides that “anyone who is arrested shall be
informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.’ Detainees must be guaranteed a minimum period in which the grounds are promptly communicated to them, and be given information sufficient to permit the detainee to challenge the legality of his or her detention.

Seventh, individuals held under preventive detention must be given the right to legal counsel and other basic procedural rights provided by Articles 21, 22(1) and 22(2) of the Constitution. Article 22(1) of the Constitution, for example, guarantees the right to legal counsel, but Article 22(3)(b) strips this right from persons arrested or detained under preventive detention laws. Relying on these provisions, the Supreme Court stated, in AK Roy v. Union of India, that detainees do not have the right to legal representation or cross-examination in Advisory Board hearings. Contrary to India’s constitutional practice, the U.N. Human Rights Committee has stated, “all persons arrested must have immediate access to counsel.” Article 22(3) (b) of the Constitution – denying detainees virtually all procedural rights during Advisory Board hearings – must be repealed.

Eighth, Article 9(5) of the ICCPR provides the right to compensation for unlawful detention, except during public emergencies. The Law Commission charged with reshaping the anti-terrorism legislation observed that Supreme Court orders have held that people are effectively entitled to compensation, in practice superseding India’s reservation to Article 9(5) of the ICCPR. In this light, the Government of India should promptly withdraw its reservation to Article 9(5) of the ICCPR and include a Constitutional provision guaranteeing the right to compensation, at least for unlawful detention during peacetime.510

In keeping with the overriding spirit of the Constitution and with minimum standards of international human rights law, it is essential that the Constitutional reforms discussed above be adopted. The key to this is political will and the commitment to seeing justice done.

510 Refer recommendations of APHRN- a joint initiative of SAHRDC AND HRDC. For more refer report HRF/26/00 of September 2000.