II. Public Interest Litigation and Representative Suits

A. Growth of PIL in India:

In the last two decades, the Indian Supreme Court and then the High Courts have widened the concept of *locus standi* by allowing public spirited people and organisations to have access to the courts for putting forth the cause of those people who due to their disabilities such as poverty, illiteracy etc., are unable to have access to justice. PILs are mostly directed towards government lawlessness. This has developed a whole new branch of law known as Public Interest Litigation or Social Action Litigation.

Dr. Agrawala on the basis of the decisions particularly of J.Bhagwati and J.Krishna Iyer two pioneers of PIL and Art. 226 and 32 of our Constitution has developed following ingredients of PIL:

1. It would comprehend any legal wrong or injury of illegal burden, caused or threatened. It would not necessarily be confined to the violation of fundamental rights,
(2) The subject may be either a person or a determinate class of persons who by reason of poverty, helplessness or disability or socially or economically disadvantageous position cannot themselves claim relief before the courts, (or the public interest)

(3) Any member of the public can maintain an application for appropriate direction etc. on behalf of such a person or class of persons,

(4) The High Court can be moved for the infraction of any right, the Supreme Court can be moved for the violation of fundamental rights only,

(5) The Court can issue any direction, order or writ for the redressal of grievances. This may include directions for affirmative action and continuous monitoring and

(6) The Court could be moved by a member of the public even by addressing a letter which the Court could convert into a writ petition. (Sometimes, even a newspaper report has been converted into a petition suo moto by the Court).5.

The Supreme Court of India has since 1978,
started liberally construing substantively Article 14 right to equality Article 21 right to life and liberty and due process clause and Art. 32 procedurally to increase access to justice of disadvantaged groups. The court widened the scope of locus standi so as to allow public spirited individuals or organisations to file writ petitions on behalf of those disadvantaged groups who due to lack of resources are unable to have access to justice. To name a few groups whose rights the court recognised and brought in limelight are prisoners, accused criminals, contract labourers, bonded labourers, women and the slum dwellers.

In this development of law the Supreme Court of India is much ahead of other common law countries of the world i.e. U.S.A., England, Canada, Australia, New Zealand and Malaysia. The court has acted suo moto adopting a very different approach interpretation and procedure than the adversarial common law approach. The Court has appointed fact finding commissions on its own.

The Court has even allowed any member of the public with sufficient interest to assert diffuse, collective and meta-individual rights.
which need not be fundamental rights or rights of poor.\textsuperscript{9} A petitioner being a citizen is allowed to sue as a public duty is owed to him. Some examples are cases involving President's power to transfer judges,\textsuperscript{10} whether foreigners should be allowed to adopt Indian children,\textsuperscript{11} the environmental impact of limestone quarrying in the Mussourie Hills, the leak of chlorine gas from a chemical plant\textsuperscript{12} Note that here the petitions are not for the benefit of socially appraised classes but rather in public interest.

Our apex Court has even laid down that the principles of the law of limitation should not be made applicable to public interest litigation when public rights are involved. \textit{In Dr. Kashinath G. Jalmi v. The Speaker}\textsuperscript{12A} the Supreme Court of India reversed the view of the Goa bench of the Bombay High Court which dismissed the writ petitions challenging the exercise of power of review by the Speaker of the Goa Assembly on the doctrine of laches. The apex Court through J. Verma remarked:

"The relief claimed by the appellants in their writ petitions filed in the High Court being in the nature of a class action, without seeking any relief personal to them, should not have been dismissed merely on the ground
of laches".

The Court accepted the contention that laches on the part of the appellants cannot legitimise usurpation of office by Ravi S. Naik, Chopadekar and Bandekar as it is a continuing wrong in respect of public office. The Court has thus widened the scope of public interest litigation by giving it a special concession of exemption from the ordinary law of limitation. In a very recent judgement Kerala High Court added to this special place by holding that when vindication of rights of public are involved existence of alternative remedy will not bar a direct writ petition to the High Court. The High Court further held that in a public interest litigation of inquisitor type the Court can give directions from time to time and monitor their implementation.  

B. Criticism.

PIL resulted in highlighting the role of the Supreme Court and High Courts in India as forums for social justice enshrined in our Constitution to Indians. Other branches of our government viz. the Legislature and Executive for various reasons unable to ensure equality and
justice to Indian masses, people and various social organisations started looking at the Supreme Court of India perhaps as the only hope. Baxi says "The Supreme Court of India is at long last becoming after 30 years of the Republic, The Supreme Court for Indians". For too long, the apex Constitutional court had become an area of legal quibbling for men with long purses. The active role of the court is welcomed from all sources. The court has become a centre of continuous attention through media and press publicity due to the development of its so called epistolary jurisdiction.

Most of the Indian scholars in the field too welcomed this role of the Court initially. But, as years passed seeing the results and also the ever increasing entrance of the Court in the Executive and Legislative branches, scholars have started becoming critical of PIL.

Our Constitution envisages separation of powers of the Legislature, Executive and the Judiciary. The task of bringing about social reform is really the task of the first two. It is only in case of violation of a fundamental right that the court is empowered to pass necessary order only when the aggrieved person comes to the court. The critiques maintain by widening the concept of locus
standi and giving very liberal meaning to Art. 14 and 21 the Court is undertaking to itself the task of social reform and encroaching in the other two branches of the government. Alexander Bickel calls such work of the judiciary as "anti-democratic and counter-majoritarian, the Judges not being the representatives of people". Recently, it is reported that an individual has filed a writ petition before the High Court at Bombay, praying for declaring the whip issued by the Congress party to its members in the parliament to abstain from voting as illegal and seeking direction to the Members of Parliament to vote in respect of the impeachment motion of J. Ramaswami by redoing the whole exercise again. The petition as can be seen confronts the Judiciary with the Legislature.

This also encourages false litigation. In a petition made for obtaining directions to the municipal corporation to remove nuisance and encroachments on a public street made by shops, hutments etc., the Court observed that the petition was an example of how the concept of PIL could be twisted, distorted and then misused so as to deprive the numerous citizens of their right to exist. Sathe S.P. notes a number of such cases.
of misutilisation: a petition seeking directions to the President of India asking him to dismiss a Governor on the basis of the newspaper reports that he was intending to re-enter active politics, a petition raising question whether a minister had committed a breach of oath of office and secrecy, a petition seeking quo warranto against a Chief Minister on the basis of allegations that he had not fulfilled his promise made to the electorate or a petition seeking mandamus against a Chief Minister for restraining him from acting in a film which according to the petitioner was contrary to the Code of Conduct for Ministers.  

In State of H.P. v. Student's Parent Medical College, Shimla an appeal was preferred in a PIL to the Supreme Court. It related to the allegations of ragging in the medical college, at Shimla. The S.C. disapproved of the direction given by the High Court which, it said was nothing short of an indirect attempt to compel the state government to initiate legislation with a view to curbing the evil of ragging. This was entirely a matter for the executive branch of the government. In State of H.P v. Umed Ram, the residents of hilly areas complained of being
affected by the denial of proper roads. The H.C. issued certain directions and despite the government's assurance that the directions would be carried out, listed the matter again to be satisfied that the directions had in fact been carried out. The S.C. disapproved and said that the H.C. should have known its limitations. It quoted Benajamin Cardozo in "The Nature of Judicial Process": "The judge even when he is free is still not wholly free".

It is also observed that most of such cases are not yet finally decided by the Court. The Court has merely passed interim orders. Baxi calls it "Creeping jurisdiction consisting of taking over the direction of administration in a particular arena from the executive". Thus, the courts have on the one hand given remedies without determining the rights. For example, as Cunningham points out in Barse v. State of Maharashtra, the Court instead of determining the factual validity of the petition and remedying whatever legal injuries were disclosed by the facts, the court used Barse to issue guidelines applicable to the entire State of Maharashtra in respect of under trial prisoners. On the other hand, in some cases the court has merely limited itself to a
declaration of rights without giving any remedies. For example, in B'bay Pavement Dwellers case the Supreme court found that the inability of low wage workers in B'bay to obtain legal housing within a reasonable distance of their jobs is deprivation of Art. 21 right to life. Yet, the Court desisted from giving any concrete and specific order in this respect. The Court recommended a long list of improvements and observed:

"Giving directions in a matter like this where availability of resources has a material bearing, policy regarding priorities is involved, expertise is very much in issue, is not prudent and we do not, therefore, propose to issue directions. We however, do hope and believe that early steps shall be taken to implement in a phased manner the improvements referred to in our decision".

The two cases also bring out the fact that the Court is really acting as an executive and legislative branch of the government. Critics call this judicial romanticism for populism.

Enforcement of these kinds of directions and recommendations of the Court can not be ensured by the Courts in such cases. For example, very little has come out of the Supreme Court's initiative in the Bhgalpur Blindings, Asiad workers
cases etc. Dr. Vasudha Dhagmwar\textsuperscript{25} a prominent public interest litigant notes:

"The problem is that most of us who work in this new area of public interest litigation are working on false assumptions. We assume that we are in a situation of rule of law, and that every one of us leaves by his or her legal rights. In fact, we live in a world of privilege, patronage and power. For the downtrodden of the world, we secure their rights by law, exactly as though they had the same privileged background as us, and then, outside the courtroom, we leave them to their separate ways. Ours is not, however the universe which they inhabit. Their grim, hostile world, which recedes while we are present, returns with a vengeance. This is why our legal victories often turn out to be dangerous to the poor. There is a real danger if legal activists continue to interfere haphazardly, on a short term, case-wise basis with the lives of the downtrodden. It is time we learn that it is not enough to expose the innumerable and appealing social evils through the courts and the media. We must link up with social activists who alone can provide them with the ground support".

The Courts should not raise expectations in the people which they cannot fulfill, considering the magnitude of the problem of social reform
in India realising its limitations. Otherwise, the Court will lose its sanctity. It affects even the image of impartial and unbiased justice by the Courts. The Courts are just not equipped with the resources necessary to take up the task of social reform. The court neither has the sword of the executive nor the purse of the legislature. According to the critiques this is a short cut method and cannot be a substitute for political process. This work of the court in PIL according to them has been wastage of time, money and energy of every one concerned. The Court, ignoring the mounting arrears of cases is taking up a cause which has not reaped any fruits. Further, such a litigation sometimes becomes an obstacle in the public utility works.

In a recent case the Supreme Court held that a petition by a citizen to quash prosecution at threshold against persons involved in Bofors did not involve public interest. On the contrary the petitioner was much concerned with personal and private interest of accused. The Court in detail discussed the scope of public interest litigation and the danger of people using the same for their private interest under the garb of public interest. The Court also took a depressing note.
of wastage of judicial time affecting the genuine litigants and resulting in their loss of faith in the judiciary.

Next, and this criticism though not as much voiced as the above is equally important particularly for our subject matter. I propose to deal with the same under a separate heading which follows.

C. PIL and Representative Suits: a Comparative Analysis:

In the zeal of pursuing PILs the Courts, the lawyers and the litigants seem to have forgotten the traditional legal process, its concepts, and the lower courts. In many PIL cases the lower Courts could have given reliefs and it was not necessary to stretch the interpretation of the Constitution so as to allow a PIL. Again, if the litigants do not have faith in the lower judiciary the alternative in the long run is not allowing PILs but seeing to it that the lower Courts function in the most effective manner. And there are remedies like injunction, compensation etc. which even the lower Courts could have given in a number
of such cases even against government lawlessness. Here, the use of the legal device of representative suit could have been made most effectively.

In fact PIL is also many a times a representative suit and vice versa in as much both always deal with rights of a group. The main difference is that in a Representative Suit only a person affected can file a suit on behalf of the group whereas in a PIL the Courts have allowed standing even to third parties or organisations in the interest of the disadvantaged groups of the society or in public interest at large. Further, requirements of notice to the other members of the class and other prescribed procedure which has to be followed in a representative suit is neither prescribed nor followed by the Court in a PIL. Again, a judgement in a Representative Suit will bind only the members of a defined class represented by the plaintiff or defendant. A judgement in PIL is binding on everyone whether they were parties to the proceeding or not and whether they were issued notices and given opportunity or not. This in a way is against the principles of natural justice. Again, in a PIL a problem may arise if the petitioner wants to
withdraw from the proceedings. In a representative suit, as we have seen if one representative does not wish to act as such, another can be appointed in his place. Thus representative suit is a traditional legal device which follows all procedural norms and they are given utmost protection to the litigants and avoid abuse of the process of law.

Cunningham divides PILs into two parts. One, PILs under representative standing and two PILS under citizen standing. The former belong to the category of cases which are brought by third persons for the disadvantaged groups. The latter are cases brought in public interest as a citizen of the country and as a public duty is owed to the citizens. According to him, as far as the PILs brought under representative standing are concerned they are modified form of class action. In a PIL a person who is not the member of a particular class is allowed to raise their claims in their interest. Thus, cases categorized as brought under representative standing could thus be recategorised as class actions with a nonclass member representing the class. He gives examples of PIL cases filed by Kapila and Nirmala Hingorani. They file the PILs using the names ...
of actual 'class members in the petition caption, even though they themselves are the petitioners. In one such case they have included both actual class members, pavement and slum dwellers and public spirited citizens among the petitioners. In the latter form of citizen standing, the difference will be that in a representative suit, that class will get defined as suit on behalf of public will not be allowed. For this purpose, the person suing will be required to show injury to himself.

Thus, a number of such cases could have been procedurally brought as representative suits. Only requirements will be defined class and member of that class to be a party as distinguished from a PIL. In essence, a public spirited person or organisation can take up the cause and meet these requirements through someone else. Further, the notice requirement of a representative suit, would give all the concerned parties a proper opportunity which a PIL does not give. Again, the principles of res judicata are applicable to the representative suits giving finality to the issues. It is difficult to apply these principles to a PIL as persons who are not parties to a PIL can reagitate the issues. A number of cases filed as PILs could therefore have been filed as Representative suits.
without stretching Art. 14, 21, 32 and 226 of the Constitution of India.

Of course, the success of a representative suit will depend on the substantive law. Thus, in cases where the vires of an Act is challenged or where only remedy can be by way of a writ a representative suit may not succeed. But, one finds that major chunk of PILs could have been brought without invoking the writ jurisdiction of the High-Courts or Supreme Courts as representative suits. We have already seen some such examples. The Courts need not in such cases stretch the interpretations of Art. 14, 21, 32 and 226. No thought seems to have been given to this aspect. And if the Higher Courts can be innovative and creative in developing an entire new jurisprudence of public interest litigation not prescribed explicitly anywhere, why can't the lower Courts do so when there is an explicit provision. A reference to this can be found in writings of some jurists.

Sathe S.P remarks:

"Although, the Supreme Court of India and some High Courts have made innovative uses of their writ jurisdictions under Art. 32 and 226, it is the writer's submission that the Courts would not be able to take all such
burdens on their writ jurisdictions. The writ jurisdictions cannot become an alternative to the existing delivery system of justice. The writ jurisdictions provide an expeditious remedy, the main purpose of which is to protect fundamental rights and prevent illegal actions of administrative authorities. There are inherent limits of such jurisdiction. It can not be a panacea for the evils of the system of justice. Quick, inexpensive and non-technical delivery of justice is a sine qua non of a just society. We need more PIL matters to be taken at District and Taluka levels. There are matters such as environmental pollution, police torture, abuse of power by Government authorities, gangsterism of communal and anti-social groups, harassment of women and assaults on weaker sections of society which need to be taken up at the lower Courts".

I venture to add that the most effective way a PIL can be taken up at the District level is through representative suit filed at Civil Courts. It has all the essential ingredients of the aims of a PIL. Further, it will give greater access to justice as such suits can be filed locally and one need not go to High Court or Supreme Court. It will also be less expensive. Faster ad-interim reliefs like temporary injunctions can also be obtained by moving separate applications to that effect.
In fact, in a number of other individually filed cases the Supreme Court and the High Courts have refused to entertain writ petitions on the ground that the proper forum is the lower Court. Thus, it has been held that Art.32 and 226 are not intended to provide an alternative method of redress to the normal process of a decision in action brought in the usual course established by law. 32

V.S.Deshpande another noted jurist observes:
"It would not be correct to say that a High Court is bound to entertain a writ petition in which contravention of fundamental right is alleged. The enforcement of fundamental rights is not restricted to Art. 226 and 227. On the contrary, the ordinary civil courts constitute the primary forum even for the enforcement of the fundamental rights. Under Section 9 of the C.P.C., every right of a civil nature is enforceable by a suit arising out of a cause of action of a civil nature"33.

It may be noted thus that writ jurisdiction is an extra ordinary remedy, the ordinary remedy being a civil suit. That is why Section 9 of C.P.C. is so broadly worded i.e."The Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred". In encouraging PIL, the Courts have not paid much attention to
In fact, amongst the Judges of the Supreme Court there is no unanimity as far as PIL and its scope is concerned. Thus, S.M.Fazal Ali and Venkataramiah JJ. have formulated ten questions and recommended that they be taken up by the Constitution Bench. This has not been done so far which in fact is the need as then certain fixed principles can be laid down in this respect. Two of the questions posed by this Bench make reference to the lower courts and their powers. They are:

(1) Can this Court take action in matters for which remedy can be had in ordinary Civil, Criminal or Revenue Courts or other offices on the ground that a number of people are affected.

(2) If this Court can take action on such letters in such informal way, why should not the High Courts and other Courts, authorities, and officers in India also act in the same way in all matters.

To sum up, considering the facts that provision for representative suits is there in our legal system, its aim and effects are akin to that of PIL and considering the aforesaid problems and criticisms of PIL, representative suits do have great potential for becoming an effective tool...
for access to justice for the Indian people.

To show this with a concrete example I will now turn to case study of Bhopal Gas Leak Disaster to find out if and how the device of representative suit could have been used effectively there. Then we can think of the problems and remedies in the utilisation of this device.
FOOTNOTES ON PUBLIC INTEREST LITIGATION & REPRESENTATIVE SUITS

(1) Some jurists like Dr. Upendra Baxi and J. Bhagawati prefer calling it Social Action Litigation to distinguish the same from American Public Interest Litigation. I do not propose to enter into this controversy as it is the substance than the nomenclature we use which is important. However, for this purpose see S.K. Agrawala, PIL in India, a critique The Indian Law Institute, N.M. Tripathi, 1958 p. 7-8 and Dr. Baxi's "Social Action Litigation in the Supreme Court of India: some preliminary notes”, from PIL introductory readings a Report to committee for Implementing Legal Aid Schemes prepared by Rajiv Dhavan, 1982.

(2) S.P. Sathe "Legal Activism, Social Action and Government Lawlessness" Cochin University Law Review page 361 defines government lawlessness as (1) Government not doing what the law enjoins it to do and (2) doing what the law prohibits it to do.

(3) See generally S.P. Sathe "Legal Activism, Social Action and Government Lawlessness", Cochin University Law Review, the author has with reference

(4) Text of Art.226 of the Constitution of India:

(1) Notwithstanding anything in article 32 every High court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including (writs in the nature of habeas corpus, mandamus prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause(1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such
person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without - (a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and (b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of
Article 32:

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

(2) The Supreme Court shall have 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 by this part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2),

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

(5) S.K. Agrawala, PIL in India: a critique, The Indian Law Institute, New Delhi, 1958 p.9. Another ingredient would be any member of the public moving the Court on the basis of a public duty owed to
him. This is made clear in the discussion.

(6) **Art. 14:** The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.;

**Art. 21:** No person shall be deprived of his life or personal liability except according to procedure established by law.; and **Art. 32:** Supra foot note 4.

(8) Agrawala supra foot note 5, p. 15.

(9) For example, Judges' Transfer case, AIR 1982 S.C. 149 at 192

(10) AIR 1984 S.C.469,

(11) AIR 1985 S.C.652


(12A) (1993) 2 SCC 703. Also see Brndaban Nayak v. Election Commission of India AIR 1965 SC 1892 and an English case A.G. v. Proprietors of the Bradford Canal (1866) LR 2 Equity Cases 71 for the proposition that laches is not imputable to the Crown or to the Attorney General suing on behalf of the public.


(17) Times of India, May 1993.

(18) AIR 1986 Guj.164.

AIR 1987 Mad.207, D.Stayanarayana v. N.T.Ramarao


(20) AIR 1985 SC 910.

(21) AIR 1986 SC 847 State of H.P. v. Umed Ram

(21A) Upendra Baxi supra foot note 13

(22) Supra Foot Note 13

(23) AIR 1985 SC 378 Oga Telli's

(24) (1985)3 SC 545 - Oga Telli's

(25) Quoted in "The limits of Judicial Activism" by Tehmtan R. Andhyarjunia, Sr.Advocate Bombay, article published on the occasion of Silver Jubilee of Bar Council of Maharashtra.

(26) fn.16 Bickel Supra.

(26A) AIR 1993 SC 892.

(28) Supra foot-note 12 Cunningham at P.500.


(30) Oglia Tellis supra Foot-note 7.

(31) Sathe S.P. "Access to Law and Justice" Journal of Education and Social change, P.79 and 81

