CHAPTER V  
JUDICIAL ACTIVISM AND  
PUBLIC INTEREST LITIGATIONS

Another area of judicial activism during the post–emergency period was the emergence of ‘Public Interest Litigations’ in India. From 1978 onwards, the Supreme Court assumed a new role which included not only the guarding of civil–political liberties but also enforcing socio-economic rights of the citizens, particularly of the have–not’s and the downtrodden against the tyranny of the bureaucracy and unscrupulous politicians. As such, during the 1980’s the higher judiciary in India showed a tendency to deviate from the ‘well settled principles’ of law towards the more innovative principles.¹ The primary objective being to render ‘social justice’ in consonance with the Preambular slogan of Justice – social, economic and political. ‘Public Interest Litigations’ in India were the outcome of such tendency on the part of the Indian judiciary. Justice Krishna Iyer defines “Public Interest Litigations as the product of creative judicial engineering.”² Such creative judicial engineering was based on Roscoe Pound’s theory of Social Engineering. Professor Roscoe Pound states “Law must be stable, yet it cannot stand still.”³ If law cannot stand still so do judges cannot stand still. He also says “great jurists and great judges had been but the mouth pieces, through which social forces, or the civilization of the time and place or class struggle or economic pressure and the interest of the dominant class for the time being had spoken the

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¹ Justice B.N. Srikrishna, “Skinning a Cat,” 8 SCC (J) 3 2005, pp. 1-17, p. 8
law.”⁴ Lord Denning also remonstrated that judges cannot afford to be timorous souls. They cannot remain impotent, incapable and sterile in the face of injustice.⁵

**Emergence of Public Interest Litigation – Access to Justice through Public Participation**

The emergence of Public Interest Litigations was visible not only in India but also under different jurisdictions of the world. The concept of Public Interest Litigation has also developed under an authoritarian political system like China through activist lawyers. Fu Hualing finds that, “through representative litigation, lawyers and other intermediaries in PIL focus on certain sets of social problems aiming at remedies that are politically permissible within the authoritarian system and legally enforceable by China’s weak judiciary.”⁶ The need was felt to provide an appropriate solution for making justice accessible to the marginalised sections of the society. For the deprived, dispossessed and disadvantaged sections of the society, access to courts has been recognised as a worldwide problem.⁷ How can then the courts be accessed by these marginalized sections of the society? The concept of ‘Public Interest Litigation’ hereinafter sometimes referred to as ‘PIL’ was a boon to provide a solution to this common problem faced by almost all the legal systems of the world community. The ‘PIL’ has been described as a strategic arm of the legal aid movement which aims at bringing justice within the ambit of

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the disabled and poor masses who constitute the low visibility area of the humanity.\textsuperscript{8}

In this regard Justice Bhagwati said in \textit{People’s Union for Democratic Rights v. Union of India}:

“We wish to point out with all the emphasis at our command that Public Interest Litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating practices, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. Public Interest Litigation is brought before the Court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed.”\textsuperscript{9}

The judiciary has been assigned the task of playing an active role under the Constitution. They are not expected to sit in an ivory tower like an Olympian closing their eyes uncaring for the problems faced by the society. They have to exercise their judicial powers for protecting the rights and liberties of the citizens of the country. In order to achieve this mission, judicial powers have to be exercised with courage, creativity and circumstances complemented by vision, vigilance and practical wisdom.

Public Interest Litigation which was developed as a strategy to make justice accessible gained momentum through free legal aid programmes and public

\textsuperscript{8} People’s Union for Democratic Rights v. Union of India, AIR 1982 SC 1473

\textsuperscript{9} Ibid at p. 1476
participation. The concept of ‘Public Interest Litigation’ first emerged in the USA during the mid 1960’s through free legal aid movement and public participation. In the USA, the mid 1960’s was a period of social embroilment during which legal aid movement was gaining momentum due to the setting up of a few PIL centres funded by a few private foundations. One such PIL institution was ‘The Council for Public Interest Law’ set up by a private foundation called ‘The Ford Foundation’. It defined ‘Public Interest Law’ in its report of Public Interest Law, 1976 as follows:

“Public Interest Law is the name that has recently been given to efforts to provide legal representation to previously non – represented groups and interests. Such efforts have been undertaken in the recognition that the ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interest include the poor, environmentalists, consumers, racial and ethnic minorities and others.”

The evolution of ‘Public Interest Law’ led to the emergence of ‘Public Interest Litigations’ in the USA. PIL in the USA dates back to the celebrated decision of racial segregation in Brown v. Board of Education. In Brown, the American Supreme Court declared the Kansas State’s segregation of public school students by race as unconstitutional. The Warren Court held that there is a State–sponsored attempt to create an inferior class of citizens. Brown includes many

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11 347 U.S. 483 (1954)

procedural features associated with public law litigations. In Brown, the defendant was a public institution and the claimants comprised a self-constituted group seeking to reform future action by government agents. Brown v. Board of Education of Topeka, Kansas was a landmark lawsuit of 1954 which received the strong support from the National Association for the Advancement of the ‘separate but equal’ doctrine of Plessey for public education. The Warren Court’s elaboration on equal rights remains inspiring and encouraged the American people to continue fighting for their rights. Brown also marks the arrival of Public Interest Litigations in the USA.

“Public Interest Litigation distinguishes from the classical model of adjudication which is conceptualized as a private, bipolar dispute marked by individual participation and the imposition of retrospective belief involving a tight fit between right and remedy.”

On the other hand, Public Interest Litigation is conceptualized as an adjudication of a public, multipolar dispute marked either by group representation or third party representation on behalf of the marginalized sections of the society who are unable to have access to the courts because of their poverty and disability. In India, the classical model of civil adjudication is based on the traditional paradigm of the adversarial judicial process. It is adversarial in nature since it involves two parties who are adversary to each other. One party raises a claim to a right while the other party denies the claim to the right. The party who raises the claim is strictly governed by the rule of locus standi. This means that the party raising the claim

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14 Fuller, “The forms and Limits of Adjudication” 92 Harvard Law Review 353, 1978, pp. 3-4
must be aggrieved party whose rights are violated. The claim is also governed by the law of limitation, the code of civil procedure and the principles of res judicata, delay or laches and alternative remedy. The law of limitation requires the claimant to make the claim within the time specified whereas the code of civil procedure requires the petition to be made through a proper procedure prescribed in the code. The principles of res judicata require that if a matter has been decided by the court it cannot be again raised before a court of concurrent jurisdiction. The matter can, however, be raised through appeal before a superior court. In case of an alternative remedy available through arbitration, conciliation and mediation, the Court shall dispose of the matter to be decided through such non-judicial methods. The Court shall not consider an inordinate delay on the part of the petitioner as an excuse for entertaining petitions under the adversarial judicial process.

On the other hand, in case of Public Interest Litigations, the Court refuses to be bound by the traditional paradigm of adversarial judicial process. In cases of PIL, the two parties may not be adversary to each other since the party raising the claim may be representing the poor, indigent and deprived sections of the society. As such third party intervention is not governed by the strict rule of *locus standi*. Thus PIL’s make a departure of the rule that only the aggrieved can approach the court. PIL’s are neither governed by the law of limitation, code of civil procedure nor by the principles of res judicata, laches and alternative remedy. There is no limitation period for filing PIL’s. Inordinate delay cannot be a ground for refusing PIL. PIL’s are also not governed by the principles of res judicata. A matter of public interest concerning the poor and the deprived cannot be set at rest through the
principles of res judicata. The matter can again be brought before a court of concurrent jurisdiction if it raises a question of violation of constitutional principles. PIL’s are also not governed by the principle of alternative remedy. An availability of an alternative remedy shall not debar the person from filing a PIL. PIL’s are also not governed by the Code of Civil procedure. Letters, telegram and even a piece of paper are treated as PIL though the Court is careful to give them the status of PIL in the recent years.

Another aspect of the traditional paradigm of judicial process is the restrictive role played by the judges. The classical model of civil adjudication envisages that judges play a passive role. In playing a neutral role the judges are guided by the Blackstonian dictum that judges find law and do not make law. “If they make law, they did so only to fill in the interstices left by the statute and only to the extent necessary for the disposal of the matter before them.”15 “Where the legislature has had an intent and has sought to express it there is seldom a question of interpretation. The difficulties arise in the myriad cases in respect to which the lawmaker had no intention because he had never have thought of them.”16 The function of the judge is to give meaning to what the legislature has said. The legal fraternity in the commonwealth countries also believe in the strict theory which limits the power and legitimacy of a common law judge in creating new legal rights

or imposing new legal duties on fellow citizens. Judges are governed by *jus dicere not jus dare*.

Through Public Interest Litigations judges have dared to defy the Blackstonian dictum and have now openly avowed their creative role. The Supreme Court of India has been performing the role of judicial law–making during the post–emergency period by wielding judicial power in a manner unprecedented in its history of over 30 years.

**Public Interest Litigations in India – A Product of Judicial Activism of the Post – Emergency Era**

Unlike the Public Interest Litigations in the United States, Public Interest Litigations in India was initiated by the judiciary. Indian PIL is the product of judicial statesmanship and craftsmanship. “The Indian Supreme Court of India, pioneered the concept of Public Interest Litigation (PIL) thereby throwing upon the portals of courts to the common man.” According to Sathe, Indian PIL is the offspring of post–emergency judicial activism that was premised on a more affirmative and dynamic role. An affirmative role required the State to take positive steps for the realisation of fundamental rights to the poorest of the poor. A dynamic judicial role resulted in creating a bundle of rights from the existing fundamental rights in the Constitution. The consequence was the realisation of the

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18 Ibid.
Magna Carta not only in words but also in spirit. The Court had reminded the State that “Fundamental rights are not a gift from the State to its citizens.” They are not given in charity. “They can neither be withheld by the State nor waived by the citizens.”

It was in 1976 that the seeds of the concept of PIL was first sown in India in *Mumbai Kamgar Sabha v. Abdulbhai.* Justice Krishna Iyer, while disposing of an industrial dispute with regard to the payment of bonus acknowledged the concept of Public Interest Litigation though without assigning the terminology. During the post emergency era, the roots of Public Interest Litigations can be traced back to 1979 to the case of *Hussainara Khatoon v. Secretary, State of Bihar,* often called simply the undertrial’s case. Justice Krishna Iyer observed a change in the Court’s clientele. It now included not only the rich and the sophisticated but also the poor, low and weaker segments of the society. Prof. Sathe also observes that a glance at the PIL cases show the change in the clientele of the Court from its pre-emergency clientele. The pre-emergency clientele included the rich and the powerful. “It included the landlords whose lands were to be ceiled under the land reform legislations, industrialists whose business were to be nationalized, higher caste applicants opposing reservations in educational institutions or civil services,

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21 In *M. Nagraj v. Union of India,* AIR 2007 SC 71
22 In *Bashesher Nath v. Income Tax Commissioner* AIR 1959 SC 149
23 AIR 1976 SC 1455: (1976) 3 SCC 832
24 Ibid at para 7
25 (1980) 1 SCC 81: AIR 1979 SC 1360
government servants bringing in complaints about seniority, discrimination or arbitrary dismissal and political dissenters. The poor and the disadvantaged could never reach the poor.”  

Referring to the changed clientele of the Court, Justice Bhagwati said in *Bandhua Mukti Morcha v. Union of India*:

"It is to be remembered that the problems of the poor which are now coming before the Court are qualitatively different from those which have hitherto occupied the attention of the Court and they need a different kind of judicial approach. If we blindly follow the adversarial procedure in their case, they would never be able to enforce their fundamental rights."

Thus, the Supreme Court acknowledged that procedural innovations in the adversarial judicial process are inevitable if justice is to be made accessible to the poor and the underprivileged. Justice Krishna Iyer said that in entertaining Public Interest Litigations the Court was neither to be bound by the technicalities of law nor in the deficiencies in drafting pleadings nor in creating a proper title to the suit. The main purpose of adopting a flexible approach was to make justice accessible to the common man without placing unnecessary reliance on peripheral procedural shortcomings.

Initially, Justice Krishna Iyer referred to such litigations as ‘Test litigations’, ‘representative actions’ and ‘pro bono public proceedings’. Such litigations form

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28 Ibid at p. 210  
29 AIR 1984 SC 802 , p. 815  
31 Ibid
the Court’s current form of jurisprudence. In this regard, Justice Krishna Iyer said in Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v. Union of India:

“Our current processual jurisprudence is not individualistic Anglo – Indian mould. It is broad based and people oriented, and envisions access to justice through ‘class actions’, ‘Public Interest Litigation’, and ‘representative proceedings’.”

Thus, the Court expressed its desire to come out of its mould of Anglo – Saxon jurisprudence and switch over to a broad-based and people-oriented jurisprudence.

Later, the term ‘Public Interest Litigation’ was used by Justice Krishna Iyer while delivering his opinion for Justice Bhagwati in Fertilizer Corporation Kamgar Union v. Union of India. However, Prof. Upendra Baxi prefers to use the term ‘Social Action Litigation’ instead of ‘Public Interest Litigation’ in India on the plea that what is happening in India is qualitatively different from that in the USA. According to I.P. Massey, Social Action Litigation (SAL) and Public Interest Litigation (PIL) are the terms which are used interchangeably in India. He agrees with Prof. Upendra Baxi that the term SAL is more appropriate in the Indian context. Shedrack C. Agbakwa and Obiora Chinedu Okafor of Nigeria suggest that “Public Interest Litigation (PIL) is a concept that overlaps to some extent with, but differs in some other important respects from, what Upendra Baxi refers to in the

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32 Ibid
33 AIR 1981 SC 298, p. 317
35 Prof. Upendra Baxi used the expression ‘SAL’ instead of ‘PIL’ in his article on “Social Action Litigation in The Supreme Court of India”, (Printed in the Review No. 29, December 1982, International Commission of Justice)
Indian Context as ‘Social Action Litigation’ (SAL).” But Prof. Sathe prefers to use the term ‘PIL’ because of its acceptance and familiarity at the popular level. It is agreed that the term ‘PIL’ is more common among the common masses for whom such ‘PIL’ is filed. “The term ‘PIL’ is now used in judgements of the courts and cells under that title have been set up in the Supreme Court as well as various high courts. It is also used in the media.”

Once the term ‘Public Interest Litigation’ was defined in *Fertilizer Corporation Kamgar Union* the Court’s jurisprudence blossomed with doctrinal creativity. Later, in *S.P. Gupta and others*, a seven member Bench of the Supreme Court firmly established the rule regarding ‘Public Interest Litigation’. Speaking for the majority Justice Bhagwati said:

“Where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right and such person or determinate class of persons is by reason of poverty, helplessness of disability or socially or economically disadvantaged position unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, or order or writ in the high court under Article 226 or in case of breach of any fundamental right to this Court under Article 32.”

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39 Ibid at p. 203

40 AIR 1981 SC 344: (1981) 1 SCC 568


42 Ibid
Article 32 defines the writ jurisdiction of the Supreme Court of India. It allows a person to move the Supreme Court by appropriate proceedings for the enforcement of fundamental rights. Correspondingly, it confers power on the Supreme Court to issue ‘appropriate directions’ or orders or writs for the enforcement of fundamental rights. The writs are in the nature of *habeas corpus, mandamus, certiorari, prohibition and quo warranto*. The writ of habeas corpus is in the form of an order to immediately release a person unlawfully detained by the authority in prison or private custody. The writ of mandamus is an order commanding a person or a public authority to do or forbear to do something in the nature of public duty or in certain cases of a statutory duty. A writ of certiorari invalidates and quashes the proceedings of a lower court or tribunal acting without jurisdiction or in violation of the principles of natural justice. On the other hand, a writ of prohibition prevents an inferior court or tribunal from exceeding its jurisdiction or acting contrary to the principles of natural justice. Similar writ jurisdiction is provided to the high courts of India under Article 226 for the enforcement of the fundamental rights and for ‘any other purpose’. “The Supreme Court held that ‘for any other purpose’ under Article 226 meant for the enforcement of any statutory as well as common law right.”\(^{43}\)\(^{44}\) The writs ‘in the nature of’ under Article 32 means that the courts are liberated from issuing writs in a mechanical manner. The proceedings must be ‘appropriate’ stipulate that a proceeding under Article 32 need not conform to any rigid pattern or a strait–jacket formula. Again the words ‘appropriate directions’ does not indicate a particular

\(^{43}\) In *Calcutta Gas Co. v. State of West Bengal*, AIR 1962 SC 1044; (1963) 1 SCC 106

form of directions. Thus, the vague expressions used in Article 32 and Article 226 provide ample scope to the Supreme Court and also to the high courts respectively to make procedural innovations in the traditional paradigm of adversarial judicial process.

The Court thus described Article 32 as the source of such procedural innovations for liberalising the strict rule of *locus standi*. Such procedural innovations were justified by Justice Bhagwati in *Bandhua Mukti Morcha v. Union of India*:

“There is no limitation in the words of clause (1) of Article 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.”

Thus, the learned judge observed that remedy shall be available under Article 32 whenever there is a violation of a fundamental right irrespective of the fact that the proceedings moved were ‘appropriate’ or it was moved by the ‘appropriate’ person. Public Interest Litigations liberalise the strict rule of *locus standi* applicable to the traditional civil adjudication. It replaces the principle that ‘a person can seek remedy only if his rights are violated’ through a new principle ‘any person acting pro bono public can seek remedy on behalf of the deprived, disabled and disadvantaged sections of the society. The Court made it clear that the strategy of Public Interest Litigations has been evolved by this Court which a view to

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45 AIR 1984 SC 802: (1984) 3 SCC 161
bringing justice within the easy reach of the poor and the disadvantaged sections of the community.46

The Court was criticised for flooding the court room with Public Interest Litigations resulting delay in deciding many other important cases. The Court rejected the argument that such Public Interest Litigations would create arrears of cases and therefore they should not be encouraged. In People’s Union for Democratic Rights v. Union of India, Justice Bhagwati said:

“No state had the right to tell its citizens that because a large number of cases of the rich are pending in our courts we will not help the poor to come to the courts for seeking justice until the staggering load of cases of people who can afford rich lawyers is disposed off.”47

An important aspect of Public Interest Litigation is that it is not required to be filed in the form required for filing a traditional civil litigation. In India, a telegram sent by a father alleging his son’s murder in the police lock–up was treated as a writ petition.48 Similarly, a piece of paper scribbled by an under trial informing the inhuman and barbarous treatment his fellow inmates underwent was treated as a writ petition.49 In yet another instance, a letter informing the illegal detention of prisoners in jails from 20 to 30 years was treated as a writ petition.50 Justice Bhagwati uses the expression ‘epistolary jurisdiction’ to describe the Court’s self innovated jurisdiction of entertaining such letters, telegrams and even a scribbled piece of paper as Public Interest Litigations.

47 AIR 1983 SC 339
49 In Sunil Batra (II) v. Delhi Administration, AIR 1980 SC 1759
50 In Veena Sathi v. State of Bihar, AIR 1983 SC 339
But the creation of epistolary jurisdiction was not accepted by all in the judicial fraternity. Justice R.S. Pathak considered it to be a dangerous practice in which an unverified letter or telegram might be posted by a blackmailer with an malafide or oblique intention with the purpose of blackmailing a person who holds a position of honour and respect in the society. 51 This argument was put in strong words by Justice R. S. Pathak:

“I see a 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 a 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 before making them.” 52

Agreeing with Justice Pathak, Justice Sen also said that such letters should be addressed to the Court and not to a single judge. The arguments put forward by the two learned judges did not go unheeded. Soon, the Court started appointing lawyers as amicus curiae and asked them to draft a regular petition on the lines of the letter received as Public Interest Litigations. “Letters to individual judges also became rare.” 53

As observed by Prof. Sathe, questions regarding the validity of such informal procedures were referred by a Bench of two judges comprising Justices

51 In Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802: (1984) 3 SCC 161
52 Ibid at p. 840
S.M. Fazl Ali and Venkataramiah to a larger bench for consideration. \(^{54}\) “The larger bench, however, never took up that matter perhaps because by then those questions had become academic.” \(^{55}\)

Though epistolary jurisdiction had become an academic matter, the zeal of the judiciary in making justice accessible to the poor and the have not’s never decreased. In this regard, the Indian high courts displayed an intense passion by suo motu entertaining Public Interest Litigations. In one such instance, the Gujarat High Court through Justice M.P. Thakkar (who later became a Supreme Court Judge) went to the extent of taking *suo motu* cognizance of a pathetic letter by a widow to the editor published in a newspaper, treated it as a writ petition and granted relief thereon. \(^{56}\) “The letter here was not addressed to the court but to the editor of a newspaper. The contents conveying the plight of the helpless widow exhorted the judge not to wait for any petition but to treat the letter to the editor itself as petition.” \(^{57}\) In another similar instance, a news item carried in a Rajasthan daily depicting miseries of a soldier’s widow in her fruitless struggle to get pension attracted the attention of a High Court judge. The Court took *suo motu* notice of the news item and treated it as a petition. \(^{58}\)

It is submitted the Court’s *suo motu* treatment of a news item as a PIL is dangerous as the Court’s treatment of an unverified letter or telegram as PIL.

\(^{54}\) In *Sudipt Mazumdar v. State of M.P.* (1983) 2 SCC 258

\(^{55}\) S.P. Sathe, op. cit., p. 207

\(^{56}\) *P.K. Mantiyam v. Regional Provident Commissioner, Allahabad,* (1983), Gujarat Law Reporter


\(^{58}\) *Ram Pyari v. Union of India,* AIR 1988 Raj. 124.
Nevertheless the Court continued to entertain Public Interest Litigations. The mode changed but not the mood.

**Public Interest Litigations – A Source of Judicial Activism through Public Participation**

Once the concept of Public Interest Litigation was developed in India it remained a source of judicial activism through public participation. Public Interest Litigations espousing a pro bono public cause were either filed by individuals or groups. “Groups such as the People’s Union for Civil Liberties, People’s Union of Democratic Rights, Bandhua Mukti Morcha, Akhil Bharatiya Shosit Karmachari Sangh and the Common Cause, a registered society and individuals such as M.C. Mehta, Sheela Barse, Shiv Sagar Tiwari and Upendra Baxi were able to come to the Court because of their standing to move the Court on behalf of the disadvantaged people was conceded.”

Even before *S.P. Gupta*, the rule of *locus standi* through representative petitions was established in *Municipal Council, Ratlam v. Vardhichand*. In *Municipal Council, Ratlam*, Vardhichand on behalf of the residents of Ratlam moved a petition before the Magistrate under Sec 133 of the Criminal Procedure Code. The petition asked the Magistrate to compel the municipal corporation to take immediate and adequate steps to provide proper sanitation facilities to the residents of Ratlam. The residents of Ratlam were leading a miserable life due to the stench and stink caused by open drains and open public excretion. The

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60 AIR 1980 SC 1626: (1980) 4 SCC 162
municipal corporation pleaded that it had no resources to construct drainage and sanitation facilities. The Magistrate rejected the plea and ordered the municipality to build drainage within six months. An appeal was made before the Sessions Court which reversed the Magistrate’s orders. An appeal was then made before the High Court. The High Court reversed the decision of the Sessions Court and affirmed the order of the Magistrate. An appeal from the decision of the High Court was made to the Supreme Court. “The Supreme Court rejected the objection to the standing of a person to take proceedings under the criminal law on behalf of all the residents of Ratlam.”

Justice Iyer described this collective petition as “a path finder in the field of ‘public involvement in the judicial process.’” “Vardhichand represented the wider concept of *locus standi* that allowed public participation in the judicial process against malfeasance of the municipality.” In this regard Justice Krishna Iyer observed:

“At issue is the coming of age of that branch of public law bearing on community actions and the court’s power to enforce public bodies under public duties to implement specific plans in response to public grievances.”

*Vardhichand* was a monumental judgment since it recognized the collective right to live with dignity as a guaranteed fundamental right under Article 21 of the Constitution to invoke the Court’s jurisdiction against government inefficiency, the enforcement of collective rights and the performance of positive obligations by public bodies.

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62 AIR 1980 SC 1622, p. 1623
63 S.P. Sathe, op. cit., p. 214
64 AIR 1980 SC 1622, para 1, p. 1623
The jurisprudence of Public Interest Litigations was conceptualized in the late 1970’s and the early 1980’s. It was dominated by petitions on behalf of the oppressed people and the main issue was human rights. The victims of oppression included the bonded labourers and the under trial prisoners. The human rights included negative rights against torture, handcuffing and also positive rights such as right to speedy trial, right to free legal aid. In absence of constitutional enumeration, the Court defined these human rights through a liberal interpretation of Article 21 of the Constitution. The Court also allowed procedural innovations by entertaining letters informing the deplorable conditions of the victims of injustice as writ petitions. Thus, processual activism ran complementary to substantive activism. The main purpose of such activism is to make justice accessible to the victims of injustice for whom justice had been an impossible dream.

During the 1980’s and the early 1990’s the Court entertained Public Interest Litigations championing the cause of the children who were an easy prey of sexual and physical exploitation. In *Lakshmi Kant Pandey v. Union of India* a letter complaining the malpractices indulged in the guise of adoption of Indian children to foreign parents was treated as a writ petition. In *Munna v. State of U.P.* a Public Interest Litigation was filed on the basis of a news report about sexual exploitation of children by hardened criminals in Kanpur jail. In *M.C. Mehta v. State of Tamil S.P. Sathe, op. cit., p. 209

66 (1984) 2 SCC 244; see also *Lakshmi Kant Pandey v. Union of India*, (1987) 1 SCC 667
67 (1982) 1 SCC 545
Nadu, a Public Interest Litigation was filed highlighting the condition of children engaged in hazardous employment.

During the 1990’s Public Interest Litigations concerning women in distress reached the portals of the Court. In Delhi Domestic Working Women’s Forum v. Union of India, a Public Interest Litigation was filed under Article 32 at the instance of Delhi Domestic Working Women’s Forum to expose the pathetic plight of four domestic servants sexually assaulted by army personnel in a running train. The Supreme Court laid down broad parameters to assist the victims of rape and sexual assault cases. In Vishaka v. State of Rajasthan, the Supreme Court entertained a Public Interest Litigation highlighting the sexual harassment of working women in places of their work. Delivering a landmark judgment the Supreme Court laid down exhaustive guidelines to prevent sexual harassment of working women until a legislation is enacted for the purpose. In Sarala Mudgal v. Union of India a Public Interest Litigation concerning the position of a Hindu wife whose Hindu husband, after conversion to Islam and without dissolving the first marriage solemnised the second marriage. The Court held that such a marriage will be illegal and the husband can be prosecuted for bigamy under Sec 494 of the IPC. The Supreme Court also directed the State to secure a uniform civil code. But unfortunately the Court clarified that its direction was only an obiter dicta and not legally binding on the Government.

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68 AIR 1991 SC 417
69 (1995) 1 SCC 14
70 AIR 1997 SC 3011
71 (1995) 3 SCC 635
Expanding Horizons of Public Interest Litigation

During the late 1980’s, the Court through Public Interest Litigations ventured into the unknown territories of environmental pollution. In *M.C. Mehta v. Union of India*, the Supreme Court ordered the closure of tanneries at Jajmau near Kanpur polluting the Ganga. The matter was brought to the notice of the Court by M.C. Mehta, a lawyer and an activist through Public Interest Litigation. Another similar Public Interest Litigation concerning Ganga water pollution was brought in *M.C. Mehta (2) v. Union of India*. The Supreme Court held that the petitioner, although not a riparian owner has the *locus standi* to move the Court on behalf of the people who make use of the Ganga water. In case of Public Interest Litigations concerning environmental pollution, the Court intervened even against private corporate bodies if their actions violated the fundamental right guaranteed under Article 21 of the Constitution. The Court, thus, ensured corporate responsibility towards environmental protection. Judicial activism through Public Interest Litigations concerning environment extended to the wholesale importation of the principles of international law into domestic law. Principles like ‘precautionary principle’ and ‘polluter pays’ has been made part of domestic environmental law by the judicial dicta in *Vellore Citizen’s Welfare Forum v. Union of India* and in *Indian Council for Enviro–Legal Action v. Union of India*. The ‘precautionary

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72 (1987) 4 SCC 463
73 (1988) 1 SCC 471
75 Justice B.N. Srikrishna, “Skinning a Cat”, 8 SCC J (3) 2005, pp.1-17, p. 5
76 Ibid
77 (1996) 5 SCC 647
78 (1996) 3 SCC 212
principle’ required the polluter industry to take precautionary measures to prevent pollution. The ‘polluter pays’ principle required the polluter industry to repair the damage caused. Both the principles are a part of sustainable development.

A corollary development of public interest jurisprudence is the Court’s compensatory jurisprudence. The Court defined its compensatory jurisprudence within the jurisdiction of article 32. In *M.C. Mehta v. Union of India* the Supreme Court held that the scope of Article 32 was wide enough to include its power to grant compensation for violation of fundamental rights. The power to award compensation was based on the hypothesis that Article 32 is not only preventive but also remedial in nature. But the Court clarified that it would exercise its power to grant compensation only in “appropriate cases”. The Court defined those “appropriate cases” as those where the infringement of fundamental rights is “gross and patent” or “incontrovertible and ex facie glaring” or “on a large scale” or “appears unjust or unduly harsh or oppressive”. The “appropriate cases” would apply only to people who on account of their poverty, disability or disadvantaged position are unable to initiate and pursue action in civil courts for compensation. The Court, however, made it clear that ordinarily a petition under Article 32 “should not be used as a substitute for enforcement of a right through the ordinary process of the civil court. The Court applied the “appropriate cases” where there was a violation of the fundamental right to life and liberty which was gross, patent, unjust and on a large scale. The “appropriate cases” included cases of violation of life either through state actions or through environmental pollution. In cases of

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79 AIR 1987 SC 1086
violation of life through environmental pollution the Court applied the principle of ‘polluter pays’. Whereas in cases of violation of life through state actions the Court diluted the doctrine of sovereign immunity. In this regard, certain instances of such “appropriate cases” are cited. In *People’s Union for Democratic Rights v. Police Commissioner, Delhi Police Headquarter*, a Public Interest Litigation was filed by the People’s Union for Democratic Rights, a non–governmental organization on behalf of a labourer who was beaten to death in police custody. The Court directed the State to pay a compensation of Rs. 75,000/- to the family of the deceased labourer. In yet another instance, in *Saheli vs Commissioner of Police* a Public Interest Litigation was filed by Saheli, a women’s non–governmental organization on behalf of the mother of the victim. The victim was a tender aged boy of nine years who died of beating in police custody. The Court considered both the instances as “appropriate cases” where the violation of the fundamental right to life was gross and patent and also unjust and unduly harsh. Both the instances are cases where the Court diluted the doctrine of sovereign immunity in awarding compensation. *Shriram Food and Fertilizer* provides an instance where the Supreme Court directed the polluter company to deposit a sum of Rs. 20 lakhs as security for payment of compensation claims to the victims of Oleum gas leak with the Registrar of the Court. *Shriram Food and Fertilizer* is an instance where the Court applied the principle of ‘polluter pays’ for awarding compensation.

^80 (1989) 4 SCC 730
^81 AIR 1990 SC 513
^82 M. C. Mehta v. Union of India, (1986) 2 SCC 176
The PIL jurisprudence based on the liberalisation of the rule of locus standi further expanded as the Court entertained Public Interest Litigations against government lawlessness and abuse of power. The Court held that the petitioners had “sufficient interest” to uphold the rule of law and other constitutional principles. One such earliest petition was *S.P. Gupta v. Union of India*. Three practising advocates S.P. Gupta, Tarkunde and Iqbal Chagla had filed writ petitions under Article 226 of the Constitution before the High Courts of Delhi and Bombay seeking opinion regarding the appointment of the judges of the Supreme Court and the high courts and their transfer, the procedure for making the additional judges permanent and the discretion exercised in this regard even when the workload in the courts demanded the additional strength. The petitions filed in the High Courts of Delhi and Bombay were transferred to the Supreme Court under Article 139–A of the Constitution. That case came to be known as *S.P. Gupta v. President* popularly known as Judges (I) case. In the instant case, the Court held that the practising lawyers had ‘sufficient interest’ to maintain a writ petition under Article 32 on matters affecting the independence of the judiciary. In this regard Justice Bhagwati said:

“We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely necessary for maintaining the rule of law furthering the cause of justice and accelerating the pace of realisation of the constitutional objectives.”

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84 Ibid
While expanding the scope of *locus standi* Justice Bhagwati expressed a note of caution and said:

“But we must be careful to see that member of the public who approaches the court in case of this kind, is acting bonafide and not for personal gain or private profit or political motivation or other oblique consideration. The Court must not allow its process to be abused by politicians and others.” 85

The Court made it clear that “Public Interest Litigation cannot become either Political interest litigation or Publicity interest litigation or Private interest litigation or Paisa income litigation.” 86

Another instance of broader application of *locus standi* was *D.C. Wadhwa v. State of Bihar*. 87 D.C. Wadhwa, a professor of political science filed a writ petition pointing the glaring abuse of ordinance making power by the Government. The professor through his research pointed out that 256 ordinances were promulgated between 1967 and 1981. Out of these 256 ordinances 69 were re–promulgated several times without the prior permission of the President of India. The writ petition based on the research was admitted as a Public Interest Litigation. The Court held that the petitioner had sufficient *locus standi* to prevent the “subversion of the democratic process” and the “colourable exercise of powers” by the Executive.

Prof. Sathe observes that Public Interest Litigations can be of two types. The first type includes Public Interest Litigations in which *locus standi* can be

85 Ibid
87 (1987) 1 SCC 378
accorded to any member of the public. The second type includes Public Interest Litigations in which *locus standi* would be restricted only to a person who has suffered an injury. “The second category included cases of dismissal, removal or reduction or discrimination filed by civil servants are public law cases in which only the aggrieved civil servant can be the petitioner.”  

*Indra Sawhney v. Union of India*  

Indra Sawhney, a journalist filed a PIL questioning the constitutional validity of the recommendations of 25 percent reservation for socially and educationally backward classes in Government jobs. The recommendation was made by Mandal Commission appointed by the V.P. Singh Government. Indra Sawhney was not personally aggrieved by the reservation policy. But her petition was admitted on the basis of her *locus standi* to question policy matters affecting the larger public interest.

Towards the late 1990’s judicial activism entered into political thicket as it entertained PIL’s concerning government lawlessness and abuse of power in public life. The PIL proved to be a strong and potent weapon in the hands of the court to punish the guilty involved in scams and corruption cases in public life. In *Shiv Sagar Tiwari v. Union of India*, Shiv Sagar Tiwari through a Public Interest Litigation challenged the validity of allotment of shops and stalls made by Smt. Sheela Kaul, the then Minister for Housing and Urban Development, Government of India. The Supreme Court held that the allotment of shops by the Minister was

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89 AIR 1983 SC 477
90 AIR 1997 SC 83
arbitrary, malafide, unconstitutional and done without following any policy or criterion. The Court found that the allotment was based on favouritism as shops were allotted by the Minister to her own relatives, employees and domestic servants of her family and family’s friends. The Court directed the Minister to deposit Rs. 60 lakhs as exemplary damages done to the Government Exchequer. In another similar instance the Supreme Court directed three senior ministers – Smt. Sheela Kaul, Mr. Sukhram and Capt. Satish Sharma to pay Rs. 50,00,000/- as compensation to the Government of India for abusing their power as ministers. A Public Interest Litigation was filed alleging misuse of official position by the ministers through illegal allotment of petrol pumps.

“Judges have neither the power of sword nor of purse. Yet Judges have now become roaming knights—errant on white chargers tilting at windmills of injustice to defend the honour of the Dame of Justice.” 91 In corruption cases, the courts have taken upon themselves the duty of monitoring actions through the innovation of a new writ. This new writ is called the writ of continuing mandamus. In Vineet Narain (I) v. Union of India92 the Court monitored the investigation of corruption cases revealed through the seizure of the Jain diaries as the CBI and the revenue authorities had failed to investigate. In Vineet Narain (II) v. Union of India,93 Vineet Narain obtained directions from the Court to make the CBI an independent agency so that it may function more effectively and investigate crimes and corruption at high places in public life. Both the cases were brought before the

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91 Justice B.N. Srikrishna, 8 SCC (J) 3 2005, p. 9
92 (1996) 2 SCC 199
Court through Public Interest Litigations. The Court held that Vineet Narain had a *locus standi* to file a PIL to uphold the ‘rule of law’. On behalf of the Court, Chief Justice Verma observed that “none stands above the law.” ⁹⁴ The Court was criticised for overdoing and jumping into the fence that essentially belonged to the executive. The judges have justified the writ of ‘continuing mandamus’ as an exercise of its extra–ordinary powers sanctioned by the constitutional mandates under Articles 32, 136 and 142. But extraordinary powers must be used on extraordinary occasions.⁹⁵ Frequent use of extraordinary powers dilutes the effects and invites contempt. As someone said, “Over familiarity breeds contempt and over visitation results inhospitality, just as the Bhil woman in the Malaya mountain burns sandalwood for fuel.” ⁹⁶

Public Interest Litigations come to the court as a result of the efforts made by a third party acting pro bono public. Whether such a person acting pro bono public is required to incur expenses from his own pocket in moving the court? If it was so, Public Interest Litigations would gradually become extinct. The Court, thus, considered it desirable to award expenses personally incurred by such persons. In this regard certain instances can be cited. In *Sheela Barse v. Union of India*,⁹⁷ the Court directed the Central Government to pay to Sheela Barse, a social worker Rs. 10,000/- as expenses. The expenses were incurred during her visit to different jails to gather information about the detention of children below 18 years. Similarly, in

⁹⁴ (1998) 1 SCC 226, p. 236
⁹⁵ Justice B.N. Srikrishna, loc.cit
⁹⁶ Ibid at p.9
⁹⁷ (1986) 3 SCC 596
Jiwan Mal Kochar v. Union of India\textsuperscript{98}, the Court awarded the cost of litigation to the petitioner for highlighting the grievances faced by the passengers availing the services of the Indian Railways. The petitioner himself was a passenger who voiced his grievances on behalf of the other passengers availing the services of the Indian Railways. Again, in D.C. Wadhwa v. State of Bihar,\textsuperscript{99} the Court directed the State of Bihar to pay Rs. 10,000/- to Dr. Wadhwa, a professor of political science. Dr. Wadhwa had done substantial research regarding the repressive practices followed by the State of Bihar in repromulgating a number of ordinances without getting the approval of the legislature. Dr. Wadhwa was not a resident of Bihar. But the Court held that the petitioner as a member of the public has sufficient interest to espouse the cause on behalf of the people of Bihar.

\textbf{Indian PIL not the Panacea of all Ills}

But the Indian PIL is not the panacea for all sufferings. It is not the pill for all ills. As Chief Justice Sabyasachi Mukherjee observes, “Article 32 of the Constitution of India is not the nest for all the bees in the bonnet of public spirited persons.”\textsuperscript{100} Indian PIL was created for the vindication of ‘public interests’ of the downtrodden and the have–not’s and not for private interests. Indian PIL was neither intended to be‘Publicity–interest litigation’ nor a ‘Paisa–income litigation’. The Supreme Court created Public Interest Litigations as it was absolutely necessary for maintaining the rule of law, for furthering the cause of justice and for

\textsuperscript{98} (1984) 1 SCC 200
\textsuperscript{99} AIR 1987 SC 579
\textsuperscript{100} Quoted by Ms. Syeda Roushanana Begum in “An Analytical study on the Recent Trend of Judicial Activism in India and its impact in the society,” (Dissertation), PG Department of Law, Gauhati University, Session 2005 – 06
accelerating the pace of constitutional objectives. But the Court was also aware that the liberal rule of *locus standi* might be misused by vested interests. The Court made it clear that in any case the Court will not allow the remedy called PIL to be abused by vested interests. In this regard few instances may be cited. The case of *Janata Dal v. H.S. Chowdhari* \(^{101}\) is an example where the petitioner tried to abuse the remedy of PIL solely for political purposes. The Supreme Court held that the petitioner had no *locus standi* to file a PIL requesting the Court not to issue a letter of rogatory to the Government of Switzerland. The letter of rogatory requested the Government of Switzerland to provide necessary assistance to the Court in conducting investigation against those involved in the Bofors scandal. Another example of abuse of Public Interest Litigation for political purpose is *Krishna Swami v. Union of India*. \(^{102}\) In Krishna Swami, the Court held that the petitioner had not *locus standi* to file a PIL for quashing the motion initiating proceedings for removing Justice V. Ramaswami from office. Likewise in *Simranjit Singh Mann v. Union of India* \(^{103}\) the Court held that the petitioner who was a total stranger to the prosecution culminating in the conviction of the accused have no *locus standi* to challenge the conviction and the sentence awarded to the convicts. The two accused were found guilty of assassinating General Vaidya and were awarded death penalty which was confirmed by the Supreme Court.

Still in many others, the Court was criticised for entertaining certain petitions as Public Interest Litigations. The Court was held to be guilty of populism

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\(^{101}\) (1992) 4 SCC 305
\(^{102}\) (1992) 4 SCC 605
\(^{103}\) (1992) 4 SCC 653
as well as adventurism. That there was a judicial usurpation of executive and legislative functions in violation of the doctrine of separation of powers. The Court was held guilty of jumping into the fence of the executive when it entertained PIL’s raising questions about serious deficiencies and shortcomings in blood transfusion or PIL’s complaining of non-implementation of a ban imposed on import, manufacture notification issued under the Drugs and Cosmetics Act, 1940. Public Interest Litigations were held to be cosmetic when it sought improvement in the management and control of road traffic, construction of a new bridge over a river in place of a wooden bridge that had collapsed due to negligence, provision of separate schools with vocational training and hostels with regular medical check-up for the children of lepers, explanation of the allotment of a large part of the toll tax and visitors fee to the Agra Development Authority and not for the preservation of the Taj and cleaning of Agra, or even the objection of the residents of Bangalore to the approval of a development scheme that was likely to adversely affect the quantity and quality of water of a river or vehicular pollution.

Similarly, the Court was accused of unwarranted intrusion into the domain of the legislature when it laid down guidelines for regulating noise pollution for

104 In Vincent Panikurlangara v. Union of India, (1987) 2 SCC 165
105 In Common Cause v. Union of India (1996), 1 SCC 753 (Blood Bank cases)
106 In M.C. Mehta v. Union of India, AIR 1998 SC 186
107 B. Sakarama v. Assistant Commissioner Kundapur D.K. AIR 1992 Knt. 364
108 S. Rathi v. Union of India, AIR 1998 All 331
109 M.C. Mehta v. Union of India, (1998) 8 SCC 711 (Toll Tax of Taj Case)
110 D.L.F. Universal Ltd. v. Prof A Lakshmi Sagar (1998) SCC 1
112 In Re Noise Pollution, AIR 2005 SC 3136
preventing sexual harassment of working women,\textsuperscript{113} for relocation of workmen working in hazardous industries outside Taj Mahal,\textsuperscript{114} for assisting rape victims,\textsuperscript{115} for rehabilitating children of prostitutes,\textsuperscript{116} for regulating telephone tapping,\textsuperscript{117} for promoting the health of workmen working in asbestos industries \textsuperscript{118} or for regulating arrest and custodial death.\textsuperscript{119}

Such judicial activism though beneficial to the people, has a tendency to undermine the authority of the legislature and the executive. It has a tendency to supersede the legislative mandate and the executive authority. Judiciary neither possess the experience of drafting a legislation nor the resources in policy execution. An overuse of judicial powers have a tendency to make the other two functionaries non – functional since their functions have already been performed by the judiciary. Judicial activism thus may ultimately lead to judicial despotism. Judicial despotism is against the accepted principles of democracy where all the three functionaries the executive, legislature and the judiciary have an equal obligation for forming a ‘government for the people’. As Dr. I.P. Massey said, “Social Action Litigation is not considered as a battle to be won but a disease to be cured.”\textsuperscript{120} The obligation to cure the disease lies equally on the shoulders of the three functionaries – the executive, the legislature and the judiciary. The judiciary

\textsuperscript{113} Vishakha v. State of Rajasthan, AIR 1997 SC 3011
\textsuperscript{114} M.C. Mehta v. Union of India, AIR 1997 SC 735 (Pollution of Taj Mahal)
\textsuperscript{115} Delhi Domestic Working Women’s Forum v. Union of India, (1995) 1 SCC 14
\textsuperscript{116} Gaurav Jain v. Union of India, AIR 1997 SC 3021
\textsuperscript{117} People’s Union for Civil Liberties v. Union of India, AIR 1997 SC 568
\textsuperscript{118} In Consumer Education and Research Centre v. Union of India, (1995) 3 SCC 42
\textsuperscript{120} I.P. Massey, Administrative Law, 7\textsuperscript{th} ed., (New Delhi: Eastern Book Company, 2008), p.438
without the co–operation of the other two functionaries, cannot alone remedy the disease.

**Concluding Observations**

Indian PIL was born as a result of the judiciary’s efforts to clean its image of the emergency era. The emergency period of 1975–1977 witnessed a colonial regime of the Indian State. During emergency, state repression and governmental lawlessness was widespread. There was a complete deprivation of civil and political rights. In such a situation the courts remained ‘lions under the throne’. Playing a positivist role, the Court validated state actions. It was only during the post–emergency period that it tried to revamp its negative image of the emergency period. In this regard it would be appropriate to quote Cunningham, “Indian PIL might rather be a phoenix, a whole new creative arising out of the ashes of the old order.”

Indian PIL did receive a universal and unanimous acceptance. It also received its share of criticisms. It was criticised for flooding the court–room with litigations resulting delay in deciding many other important cases. The Court was also accused of transgressing into the domain of the executive and the legislature. Judicial activism through PIL was likely to cause friction between the three organs of the government. Lastly, the Court has no capacity to enforce its orders and in many cases the conditions have not changed.

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In spite of its certain loopholes, the Indian PIL has proved to be a potent weapon in the hands of the Indian judiciary to wipe some tears of the dispossessed, deprived and disadvantaged sections of the Indian society. As rightly said by Justice Krishna Iyer, “Judicial activism gets its highest bonus when its order wipes some tears from some eyes.”\(^{122}\) There is no doubt that the only option left before the deprived next to a miracle is a PIL petition.\(^{123}\)

Another misconception is equating PIL with judicial activism in India. Judicial activism is not PIL.\(^{124}\) A court can be judicially active or inactive irrespective of PIL. Judicial activism is a word of many shades. The Indian Supreme Court through its creative jurisprudence provides many instances where there was judicial activism but without a PIL. The Supreme Court’s formulation of the doctrine of basic structure in 1973, the infusion of non–arbitrariness in the right to equality in 1974 and the importation of the due process in the right to life and liberty in 1978 are all stellar examples of how judicial function can be creative without a PIL.\(^{125}\)

The debates over limiting judicial activism in the area of PIL has been vigorous. A private member Bill entitled “Public Interest Litigation (Regulation) Bill, 1996” was tabled in the Rajya Sabha. The statement of objectives and reasons stated that PIL was misused in the name of providing justice to the poor sections of

\(^{122}\) In *Azad Rickshaw Pullers Union v. State of Punjab*, AIR 1981 SC 141


\(^{125}\) Ibid
the society.\textsuperscript{126} That PIL cases were given more priority over other cases which led to pending of several general cases in the courts for years. However, the Bill did not get passed.

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\textsuperscript{126} "Public Interest Litigation", loc. cit.
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