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Public Interest Litigation in India: Implications for Law and Development

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Though the implications of public interest litigation [PIL] has been extensively examined in the context of the Indian constitutional and legal system, in my view this 1980s phenomenon has acquired renewed significance in the context of the parameters of the current debate in law and development scholarship.¹ In their recent study of the literature of both law sceptics and law optimists, Davis and Trebilcock found that the empirical literature on determinants of economic development is consistent with the optimistic view that institutions are susceptible to deliberate efforts at reform and are not shaped exclusively by economic, cultural or political forces.² Yet they feel that while there appears to be an increasingly firm empirically grounded consensus that institutions are an important determinant of development, there is much less consensus on which legal institutions are important, what an optimal set of legal institutions might look like for any given developing country, what form a feasible and effective reform process might take and the respective roles of 'insiders' and 'outsiders' in that process.³

Davis and Trebilcock note that the nature of the data employed by these studies provides very little traction on which design features of legal institutions that are causally related to particular development outcomes are of particular importance. Fukuyama, for instance, while concluding that the institutionalists have won the argument with non-institutionalists on determinants of development, also notes that public administration is not a science susceptible to formalization under a set of universal rules and principles and that even macro political institutions are not susceptible of characterization in terms of optimal formal political arrangements. Rather, the full specification of a good set of institutions will be highly context-dependent, will change over time, and will interact with the informal norms, values and traditions of the society in which they are embedded.⁴

Similarly, Rodrick, Trebbi and Subramaniam⁵ write "There is growing evidence that desirable institutional arrangements have a large element of context specificity, arising from differences in historical trajectories, geography, political economy, or other initial conditions There is much to be learned about what improving institutional quality means on the ground. This we would like to suggest, is a wide open area of research."⁶

Finally, in a similar vein, Rohini Pande and Christopher Udry state, "Recent years have seen a remarkable and exciting revival of interest in the empirical analysis of how a broad set of institutions affects growth ... These papers conclude that institutional quality is a significant determinant of a country's growth performance. These findings are of fundamental importance for development economists and policy practitioners in that they suggest that institutional quality may cause poor countries and people to stay poor. However, the economic interpretation and policy implications of these findings depends on understanding the specific channels through which institutions affect growth, and the reasons for institutional change or the lack thereofThe research agenda identified by the institutions and growth literature is best furthered by the analysis of much more micro-data than has typically been the norm in this literature."⁷

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As Davis and Trebilcock find in their study, current literature sheds little light on issues surrounding the means of implementing any given set of legal reforms. Optimal institutions will often be importantly shaped by factors specific to given societies, including history, culture and long-established political and institutional traditions and this according to the authors implies some degree of modesty on the part of the external community in promoting rule of law or other legal reforms in developing countries and correspondingly a larger role for ‘insiders’ with detailed local knowledge. Reference points for legal reforms in many developing countries may not be legal regimes, substantive or institutional, that prevail in particular developed countries but more appropriately legal arrangements that prevail in other developing countries that share important aspects of the history, culture and institutional traditions with countries embarking upon such reforms. Thus, legal optimists generally conclude that the next research frontier should entail a context-sensitive analysis of legal regimes and institutions in particular societies, and potential reforms thereto, evaluated against some set of broad or more generalizable development goals.⁸

Stiglitz’s criticism of neo liberalism, rooted in neo-institutionalist economics, was also that economic changes generate results in a relationship to ‘norms, social institutions, social capital and trust’.⁹ He embraced the need for institutional, cultural and political analysis of development policy. Development policymaking had to be decentralized, since those with local knowledge would be more able to understand the cultural, institutional and political context within which development policy would need to be made. ‘Stakeholder’ participation was favoured in private and public decision-making.

Given this approach, it may be useful to critically examine the PIL regime in India as a case study of the initiation of substantive, institutional and procedural reform by an ‘insider’ institution, in this case the Supreme Court of India for reaching certain ‘developmental’ goals. The court tried to take a context-dependent and ‘experimental approach’ where the reform process could interact with informal norms, values and traditions of the society and arise from political, economic, and other initial conditions as well as long-established legal and institutional traditions. Its reference points for reform were not precedents from legal regimes (substantive/institutional) in developed countries but were dictated by the nature of the difficulties being faced by marginalized litigants in accessing the legal system and prevailing social and economic conditions.

For the purpose of this analysis, the court’s efforts need to be examined against a particular definition of development. I seek to evaluate the PIL phenomenon against Amartya Sen’s expanded concept of development¹⁰ where it is seen as a matter of human freedom and human flourishing. In his view, the state not only has to avoid limiting human freedom, but must also aim to expand human freedom, by providing security and promoting the fulfilment of basic human needs. Sen’s idea was that freedom is central to the process of development for an ‘evaluative’ reason: that is, that the assessment of development has to be done primarily in terms of whether the freedoms that people have are enhanced. The ends of development had to include removal of major sources of unfreedom such as poverty, tyranny, poor economic opportunities as well as systematic social deprivation. What people can positively achieve, according to Sen, is influenced by their economic opportunities, political liberties and social powers. I would like to examine how far the Supreme Court’s PIL jurisprudence in developing a regime of substantive rights promotes such an expanded notion of development in terms not of an exclusive concentration on economic wealth but a broader focus on the lives people lead and their capability to lead a good life.

In addition, I would also like to analyse how PIL places an enhanced emphasis on popular participation and liberalizing judicial access through its expansion of the *locus standi* rule and examine

its link to promoting development in terms of Sen's "effectiveness" reason. According to this reason, institutional arrangements for providing opportunities to people to lead better lives and to achieve development are also influenced by the free agency of the people to participate in social choice and in the making of public decisions that impel the progress of these opportunities. Bhagwati also states that the ability to mobilize, make oneself heard and to vote are the mediators through which the quality of a country's democracy affects the quality of its development,¹¹ because the political system can turn social needs into effective demands and there is better utilization of resources for public needs.

In section one of the article, after briefly describing the historical origins of the court's creative agenda, I examine how PIL has seen the elaboration of a rights jurisprudence by the Supreme Court. The court has expanded the frontiers of the fundamental rights regime in Part Three of the constitution and in the process almost rewritten some of its other parts. This section also refers to how the court has interpreted Part Four which "encapsulates the socio economic rights of the people and holds out social justice as the central feature of the new constitutional order".¹² The judges have interpreted Parts Three and Four to conclude that a balance between them was a part of the "basic structure of the constitution" which could not be amended by the legislature.¹³

Section two looks at PIL strategies for increasing popular participation and liberalizing judicial access through its expansion of the *locus standi* rule. The section examines its link to promoting development in terms of Sen's "effectiveness" reason that institutional arrangements for providing opportunities to people to lead better lives and to achieve development are also influenced by the free agency of the people to participate in social choice and in the making of public decisions that impel the progress of these opportunities. This approach also resonates with Bhagwati's conclusion that the ability to mobilize and make oneself heard and to vote were the mediators through which the quality of a country's democracy affects the quality of its development.¹⁴

Section three examines current scholarship on the significance of procedural reforms for securing the rule of law to achieve development goals. Trebilcock suggests that there is room for reformers to work in the interstices of institutional structures/subsystems and to devise accountability mechanisms that allow for wider participation by intermediate organizations / communities of interest to which public sector agencies/interests are accountable.¹⁵ While there is room for debate about the relationship between legal reforms and development, he concludes that reforms to legal institutions such as those charged with enforcing laws (such as securing effective access to courts and independence of the judiciary) is more effective than substantive reforms.¹⁶

This section examines how the court's PIL judgments aiming to better enforce constitutional guarantees and social welfare legislation have tried to secure government accountability and protect against state lawlessness and corruption. Decisions aiming to safeguard judicial independence are also related to this aspect of legal/public sector reforms and establishing the rule of law as a means of promoting development goals. As former Chief Justice Bhagwati has commented "...The proceedings [are] ... intended to vindicate and effectuate the public interest by prevention of violation of the rights, constitutional or statutory, of sizeable segments of society, who[,] owing to poverty, ignorance, social and economic disadvantages cannot themselves assert, and quite often [are] not even aware of these rights The grievance in a public interest action, generally speaking, is about the content and conduct of government action in relation to the constitutional or statutory rights of segments of society"¹⁷

The section also looks at how the court's flexible interpretation of its powers under Art. 32 (2) of the Indian constitution have expanded their writ jurisdiction to carve out remedies that appear to significantly shift the line between adjudication and administration. It traces the court's attempt to

redefine its role from being a passive and disinterested umpire to one of positive intervention in formulating the proceedings, molding reliefs and supervising its implementation. These are attempts at administrative reform, aimed at enforcing existing laws and forcing public agencies to take steps to enhance the welfare of citizens.

In section four, I point out differences between the thinking behind second generation reforms promoted by international financial institutions and the PIL phenomenon and how the latter has carved out a path to balance different goals: to be effective in giving remedies to aggrieved litigants; to generate reforms to change administrative behaviour towards enforcement of constitutional or statutory social entitlements while seeking to resist the court's capture by those sections of society that it is designed to control; to subject the court to self-imposed restraints within the constitutional framework and prevent encroachment of civil and political liberties; and allow a more participative and democratic process for achieving goals of social justice.

The analysis is relevant for addressing two major critiques of PIL. PIL has been critiqued for promoting an instrumental view of law as a means to achieve certain social concerns of a particular political group, or the views of an activist but unelected and unaccountable judiciary. Thus PIL is seen as serving to dismantle the liberal view which sees law as having an autonomous and impartial function oriented to restraining government excess, and to secure the liberties/freedoms of citizens against authoritarian institutions.¹⁸

The second problem is whether the court is the best actor to initiate public sector/legal reforms. Carothers refers to Type Two and Three reforms which include improving access to justice and increasing government compliance with law.¹⁹ He feels that bringing about government obedience to law is the hardest, and demands strong internal movements for reform. To the extent that PIL decisions have attempted such reforms, the court has come close to confrontation with the government and has been criticized for politicization of constitutional adjudication, exceeding its institutional capacity, usurping legislative and administrative functions and violating the rule of law.²⁰

Historical Origins

A striking factor of PIL in India is that it is primarily a judicially constructed phenomenon, and related to active assertion of judicial power. Although there was an explosive assertion of judicial power following the declaration of political emergency in India (between 1975 and 1977), such power had become pronounced even before. The constitutional tension between the court and Parliament had been pronounced over land reform.²¹ The property rights decisions of the Supreme Court during the late 1950s and 1960s appeared to obstruct social change, since they asserted the right to a fair return of the value of any property acquired by the state for redistributive purposes.²² In the 1970s, it protected the privileges and pensions of princes from the government²³ and invalidated bank nationalization legislation.²⁴

The electoral victory of Mrs. Gandhi's Congress in 1971 on issues of economic and social reform appeared to be a popular invalidation of the court's approach. During years leading up to the 1975-77 state of constitutional emergency, the court was marginalized – its pro-property decisions were neutralized by constitutional amendments;²⁵ there were transfers of 'uncommitted judges'; and the practice of supersession served to further erode judicial autonomy.²⁶ Since the 1970s, the right to property was removed from the list of fundamental rights. The court's failure to assert fundamental rights during the Emergency²⁷ reinforced its negative image and the 42nd amendment to the constitution tried to eliminate the power of judicial review.

However, there was a slow movement towards judicial activism that began to be noticed in the 1970s. In such important constitutional decisions such as *Kesavananda*,²⁸ the justices on both sides of the issue of the extent of parliament's amending powers under Article 368 of the Indian constitution legitimated their interpretative method by referring to the interests of the Indian people.²⁹ In *Kesavananda*, one of the judges said, "The constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people."³⁰ And further, "The court is not chosen by the people and is not responsible to them in the sense in which the House of the People is. However, it will...augment its moral authority if it can shift the focus of judicial review...to the humanitarian concept of the protection of the weaker section of the people."³¹ In *Indira Gandhi v Raj Narain*,³² the court's decision lent legitimacy to the basic structure doctrine asserted in *Kesavananda* as a limit on parliament's power of constitutional amendment, and as a major safeguard for individual liberties guaranteed by the constitution.

In the post-emergency period, judicial activism was the court's response towards retrieving a degree of legitimacy following the Emergency,³³ increasing its political power vis-à-vis the other organs of government³⁴ and the judicial realization that the narrow construction of constitutional provisions such as Article 21 (right to life and personal liberty) in *Gopalan*³⁵ was contradictory to its liberal stance in *Kesavananda* and *Minerva Mills*.³⁶ The assertion of judicial power had initially supported the status of princely states property owners against legislation seeking to change property relations.³⁷ Judicial exercise of authority in the post Emergency phase saw the PIL phenomenon, where the court reinterpreted the provisions of the fundamental rights more liberally so as to maximize the rights of the people, particularly the disadvantaged sections of society, and facilitated access to the courts by relaxing its technical rules of *locus standi*, and other procedural/institutional innovations.

Section One: Creating A Rights Jurisprudence to Enhance Freedoms

In my view, the Supreme Court's rights jurisprudence in PIL cases have asserted freedoms for Indian citizens that enhance development as Sen conceives it. According to Sen, the gap between an exclusive concentration on economic wealth and a broader focus on the capability to live a good life was a major issue in conceptualizing development. The maximization of income or wealth could not be treated as an end in itself. Development had to be concerned with enhancing the lives people led and the freedoms they enjoyed. Sen categorizes five types of freedoms, including political freedoms, economic freedoms and social opportunities, which, according to him, helped to advance the general capability of a person and also served to complement each other.³⁸

If the success of a society in achieving development is to be evaluated primarily by the substantive freedoms that members of that society enjoy, as Sen argues, then the Supreme Court's PIL decisions has helped to guarantee such freedoms in the Indian legal system. Such jurisprudence has developed principally through an expanded interpretation of the language of Article 21 of the Indian constitution. Initially, the court adopted a very restricted approach and in *Gopalan*³⁹ held that in Article 21 the words "personal liberty" meant only freedom from arbitrary arrest and "procedure established by law" meant procedure prescribed by any statute. The court further held that Article 19 (describing various political liberties) and Article 21 were mutually exclusive.⁴⁰ However, in *Kharak Singh v U.P.*,⁴¹ the court gave a wider meaning to the words "personal liberty" in Article 21 and included within it the right to privacy. The majority held that the words "personal liberty" could not be confined to its negative meaning of being mere protection from arbitrary arrest but could extend to all aspects of liberty outside the ambit of the freedoms specified in Article 19.

But *Maneka Gandhi*⁴² was the breakthrough judgment for an open, textured and expansive concept of “personal liberty.” The judgment also incorporated the ‘due process of law’ doctrine within the words “procedure established by law” in Article 21. Justice Bhagwati, speaking for the majority, enunciated two primary principles. The first was that the expression “personal liberty” in Article 21 was of the wisest amplitude and covered a variety of rights which constituted the personal liberty of man. Some of them had been raised to the status of distinct fundamental rights and given additional protection under Article 19,⁴³ but Article 21 could now include rights not specifically covered under Article 19.

The second principle was that a law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 had to stand the test of one or more of the fundamental rights conferred under Article 19; it also had to be tested with reference to Article 14. The significance of the test of Article 14 was that “the principle of reasonableness which legally as well as philosophically is an essential element of equality or non arbitrariness pervades Art. 14 like a brooding omnipresence and the procedure contemplated by Art. 21 must answer the test of reasonableness in order to be in conformity with Art. 14”. Consequently, statutory procedure for depriving an individual of personal liberty had to be “right and just and fair,” and not arbitrary, fanciful or oppressive, otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.⁴⁴ Thus in *Maneka*, both the scope of “personal liberty” and the ambit of judicial protection of such liberties was greatly widened.⁴⁵

Maneka established the seminal principle of interpretation that constitutional clauses can be open, textured and courts could judicially develop their nuances in a changing social and economic context. The principle was further elaborated by Justice Bhagwati in *Francis Coralie Mullin*.⁴⁶ He held, “This principle of interpretation which requires that a constitutional provision must be constructed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force in relation to a fundamental right enacted by the constitution.”⁴⁷

Along with the expanded judicial approach to the language of Article 21, another set of decisions contributed towards the expansion of fundamental freedoms. Elaborating on the “basic structure” doctrine of *Kesavananda*, the court, in *Minerva Mills*,⁴⁸ found that Parts III and IV of the constitution (relating to political and civil liberties and non enforceable social and economic rights respectively) had to be read together. To destroy the guarantees given by Part III (negative liberties) in order to achieve the goals of Part IV (positive social and economic rights) was plainly to subvert the constitution by destroying its basic structure. The Indian constitution was founded on a bedrock of a balance between political and civil liberties and social and economic rights.

But it was the court’s interpretative approach towards the right to life and personal liberty in Article 21 that formed the basis of PIL judgments. In *Francis Coralie Mullin*, the court said “the fundamental right to life which is the most precious human right and which forms the arc of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.”⁴⁹

Thus, the Supreme Court has found Article 21 to incorporate the substantive freedoms that Sen conceives of and can also serve as a means to remove major sources of unfreedom such as poverty, poor economic opportunities as well as systematic social deprivation, neglect of public facilities, as well as the intolerance of repressive governments.

I now focus on certain PIL judgments that provide evidence of such an approach.

Reading A 'Capabilities' Approach into Article 21

It was in *Francis Coralie Mullin* that the court also established that the right to life meant something more than just physical survival. Every limb or faculty through which life is enjoyed is protected by Article 21, including the faculties of thinking and feeling. Any act which damaged, injured, or interfered with the use of any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21. The court said, "...the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter...and facilities for reading, writing and expressing one self in diverse forms, freely moving about and mixing and commingling with fellow human beings."⁵⁰

The magnitude and content of the components of the right would depend upon the extent of the economic development of the country, but in any view of the matter, it had to include the right to the basic necessities of life and also the right to carry on such functions and activities that constituted the bare minimum expression of the human self. Every act which offended against or impaired human dignity would constitute deprivation *pro tanto* of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law. Any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into the right to live and would be prohibited by Article 21.

Guarantees of economic opportunities and protection against social deprivations were established in various decisions.

(i) Right to Livelihood

In *Olga Tellis*,⁵¹ the issue was whether pavement and slum-dwellers could be evicted without being offered alternative accommodation. The contention of the litigants was that they had a right to live which could not be exercised without a means to livelihood, and there was no option for them but to come to major metropolises and live on pavements/slums nearest to their places of work. The court held that if such pavement-dwellers were evicted from their dwellings, it would be tantamount to deprivation of their life and hence unconstitutional. An important facet of the right to life was the right to livelihood because no person could live without the means of living. To deprive him of his means of livelihood would be to denude life of its effective content/meaningfulness and as such, any deprivation of the right would have to be in accordance with procedure established by law.⁵²

(ii) Right to Live with Human Dignity

In *PUDR v Union of India*,⁵³ there was a complaint of a violation of Article 24 of the constitution (which prohibits employing children below the age of 14 years in hazardous employment) on behalf of child labourers employed in construction work in Delhi. The court held that the complaint also related to a violation of Art. 21. Referring to earlier precedents it held that the right to life included within its scope and ambit the right to live with basic human dignity, and the state could not deprive anyone of this right because no procedure by which such deprivation may be effected could ever be regarded as reasonable, fair and just. The rights and benefits conferred on the workmen employed by a contractor under the Contract Labour (Regulation and Abolition) Act, 1970 and the Inter State Migrant Workmen (Regulation of Employment and

Conditions of Service) Act, 1979, were clearly intended to ensure basic human dignity to the workmen and depriving workmen of any of the rights and benefits to which they are entitled under these pieces of social welfare legislation would be a violation of Article 21.

(iii) Right to Minimum Wages

Another constitutive element of 'the right to life' had to be the right to receive minimum wages under Article 23. In the court's opinion, Article 23 (which was available against the state and also private individuals) was an attempt by the Indian founders to change the socio-economic structure of the country and bring about social justice for the poor. Yet, despite such founding intentions, society had degenerated into a status-oriented hierarchical society with little respect for the dignity of the individual. The political revolution was completed, but freedom could not be an end in itself but a means to the end of raising the people to a higher level of achievement and bringing about their advancement and welfare. Political freedom would have no meaning if it was not accompanied by creating egalitarian social and economic conditions in which everyone would be able to enjoy basic human rights and participate in the fruits of freedom and liberty.

The existence of bonded/forced labour in large parts of the country (without minimum wages) was considered by the constitution drafters as being incompatible with a new egalitarian social order and a denial of basic human dignity. Article 23 embodied this goal and abolished every form of forced labour. The court defined the concept of forced labour broadly.⁵⁴ Under this definition, it offended against human dignity to compel a person to provide labour/service to another if he did not wish to do so even if it was a breach of contract. In India, because of poverty and unemployment, there was no equality of bargaining power. Therefore, while a contract of service could appear on its face to be voluntary, it could in reality be involuntary since the employee could be forced by economic circumstances to enter into an exploitative contractual arrangement.⁵⁵

Since the Directive Principles were not enforceable, it may not be possible through the judicial process to ensure the basic essentials which go to make up a life of human dignity. But where legislation is already enacted⁵⁶ providing these basic requirements to workmen, and thus investing their right to live with human dignity with concrete reality and content, the state can certainly be obligated to ensure observance of such legislation for inaction on the part of the state in securing implementation of such legislation would amount to a denial of the right to live with human dignity under Article 21. This is more so in the context of Article 256, which provides that the executive power of the state should be so exercised as to ensure compliance with the laws made by Parliament. The *Asiad Construction Workers* case⁵⁷ had established that the state is under a constitutional obligation to see that there was no violation of the fundamental right of any person, particularly when he belonged to the weaker sections. It was bound to ensure observance of various social welfare and labour laws enacted for the purpose of securing to the workmen a life of basic human dignity as guaranteed by the constitution.

(iv) Judicial Exegesis of the Right to A Balanced and Sustainable Development

In *Bamansi Sewa Ashram v U.P.*⁵⁸ and *Municipal Council, Ratlam v Vardichand*,⁵⁹ the court moved towards formulating a right to balanced and sustainable economic development. In the former case, the court had to consider the claims of tribals and other backward peoples living within the forest reserves, who used the forest area as their habitat. When the state government decided that a super thermal plant of the National Thermal Power Corporation Ltd. would be located in these lands and considered acquisition proceedings against these peoples, the court held that

depletion of forests disturbed the ecology and the climate cycle, but “at the same time we cannot lose sight of the fact that for industrial growth as also for the provision of improved living facilities there is great demand in this country for energy such as electricity. A scheme to generate electricity, therefore, is of national importance and cannot be deferred.” Court directions about how land for the power project could be freed from an earlier judicial ban of dispossession of tribals also balanced the need to secure the rights of these people by making provisions for legal aid and the proper administrative infrastructure for assisting them in making claims when their lands were acquired.

In *Rattlam*, the court considered the question whether it could compel a statutory body like the municipal corporation of a town (under provisions of the local Municipal Act, the Civil Procedure Code and the Criminal Procedure Code) to carry out its duty to the community by constructing proper sanitation facilities. It held that “public nuisance (like open drains, garbage etc.) because of pollutants being discharged by big factories to the detriment of poorer sections is a challenge to the social justice components of the rule of law. Likewise, the grievous failure of local authorities to provide the basic amenity of public conveniences Decency and dignity are non-negotiable facets of human rights and are a first charge on local self governing bodies. A responsible municipal council constituted for the purpose of preserving public healthcannot run away from its principal duty....Similarly, providing drainage systems cannot be evaded if the municipality is to justify its existence.”⁶⁰

(v) Protection Against Environmental Degradation

Constituting a balance between the right to protection against environmental degradation and securing sustainable development was a part of the decisions in *M/S A.R.C. Cement Ltd. v U.P.*⁶¹ and *Tarun Bharat Sangh v India*.⁶² In *A.P. Pollution Control Board v Prof. M.V. Nayudu*,⁶³ the court held that environmental concerns are of equal importance as human rights concerns and both are to be traced to Article 21. In environmental matters, it was the duty of the court to render justice by taking into consideration that there should neither be danger to the environment or the ecology nor a lack of sustainable development. The right to clean air and water as a part of Article 21 was enunciated by the court in this case and in *M.C. Mehta v Union of India*.⁶⁴

Considering whether limestone quarrying in the Mussorie hill ranges affected the environment, the court held that “...we are not oblivious of the fact that natural resources have got to be tapped for the purpose of social development but one cannot forget at the same time that tapping resources have to be done with required attention and care so that the economy and the environment may not be affected in any serious way – these are permanent assets of mankind and are not intended to be exhausted in one generation.”⁶⁵ Based on reports of committees of inspection, the court ordered the quarries to be closed with suitable government action to rehabilitate the mine-owners and workmen.⁶⁶

The court has exercised broad remedial powers, closing factories or other commercial plants that are found to be in violation of environmental statutes, and has also developed the practice of maintaining these cases on the docket to enable monitoring of such cases to ensure compliance. In one case, the court after monitoring the situation for over three years, ordered that 292 industries either switch to natural gas as an industrial fuel or relocate from the Taj Mahal “trapezium” area.⁶⁷ In the Delhi Vehicular Pollution cases, the court ordered that auto rickshaws, buses and other vehicles convert to compressed natural gas to help reduce pollution in Delhi.⁶⁸

(vi) Right to Reasonable Accommodation

The Urban Land (Ceiling and Regulation) Act, 1976, allows state governments to exempt vacant sites above the ceiling limit from acquisition by the state if housing schemes are undertaken by owners of such vacant urban lands to provide housing for “weaker sections” of society. The Directive Principle under Article 46 declares that the state has to promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice and all forms of exploitation. In *Shantistar Builders v Narayan K. Totame*,⁶⁹ the court held that the basic needs of man had traditionally been accepted to be food, clothing and shelter. That would take within its sweep the right to food, the right to clothing and the right to a reasonable accommodation to live in. Suitable accommodation was required which would allow a human being to grow physically, mentally and intellectually. Since a reasonable residence was an indispensable necessity for fulfilling the constitutional goal in the matter of development and should be taken as included in the right to ‘life’ in Article 21, exemptions under S. 20 and 21 of the Urban Land Ceiling Act should have been appropriately monitored to have the fullest benefit of the beneficial legislation.⁷⁰

(vii) Right to Health

In *Vincent v India*,⁷¹ the court found that on reading Article 47 of the Directive Principles, which emphasizes improving public health and prohibiting the consumption of drugs which are injurious to health, maintaining and improving public health had to rank high as constitutional values as these were indispensable to the very physical existence of the community. “A healthy body is the very foundation for all human activities. In a welfare state therefore, it is the obligation of the state to ensure the creation and the sustaining of conditions congenial to good health.” The right to health was a part of the right to live with human dignity under Article 21.⁷² The right to health was also reiterated in *CERC v India*.⁷³ The court held that social justice under the constitution embodied diverse principles essential to the orderly growth and development of the personality of each individual. Social justice was required to relieve the handicaps of the poorer sections and to make their lives livable. The state had to provide facilities and opportunities to the workers to reach at least minimum standards of health, economic security and civilized living under Article 21.⁷⁴

(viii) Right to Education

*Mohini Jain*⁷⁵ and *Unni Krishnan*⁷⁶ saw the judicial development of the right to education within the language of Article 21. In *Mohini Jain*, the court again reiterated the principle of interrelation between the Directive Principles in Part IV and the Fundamental Rights in Part III. The state was under a constitutional mandate to create conditions in which the fundamental rights guaranteed to individuals under Part Three could be enjoyed by all, but without making the “right to education” under Article 41 a reality, the fundamental rights remained beyond the reach of a large majority which was illiterate. The right to speech and expression and other political freedoms under Article 19 could not be appreciated and enjoyed unless a citizen was educated and conscious of his individual dignity. The state was thus mandated by the constitution to provide educational institutions at all levels for the benefit of citizens and opportunities to acquire an education could not be confined to just the richer sections of society.

In *Unni Krishnan* the court referred to the *Bandhua Mukti Morcha* decision that Article 21 does guarantee “educational facilities”. “Having regard to the fundamental significance of education to the life of an individual and the nation, and adopting the reasoning and logic adopted in the earlier decisions of this court...we hold...That right to education is implicit in and flows from

the right to life guaranteed by Art. 21...without education being provided to the citizens of this country, the objectives set forth in the Preamble to the constitution cannot be achieved.”⁷⁷

(ix) Right to Food

The court recognized that the right to food was part of Article 21 and, therefore, justiciable in *P.U.C.L. v Union of India*. The court further recognized that the government had a positive duty to help prevent malnutrition and starvation.⁷⁸ The right to food derived from the right to life and required immediate fulfillment. There has been a series of interim orders from the court directing the proper implementation of a range of schemes.⁷⁹

Section Two

In Sen’s thesis,⁸⁰ there is also an “effectiveness” reason for promoting substantive freedoms to enhance development. Achieving the freedoms and opportunities necessary for development requires institutional arrangements in which people have the liberty to participate in social choice and in the making of public decisions that impell the progress of those opportunities. Such freedoms are a principal determinant of individual initiative and social effectiveness. But the “instrumental” role of freedom does not reduce the evaluative importance of freedom as an end of development.

For Sen, the instrumental role of freedom lay in the fact that different kinds of freedom interrelate with one another and freedom of one type greatly helps in advancing freedom of other types. Such instrumental freedoms included political freedoms and entitlements associated with democracies such as opportunities that people have to determine who should govern and on what principles, and also included the possibility to scrutinize and criticize authorities, and freedom of speech and the press. The people had to be actively involved in shaping their own destinies.

Bhagwati⁸¹ concludes that the quality of democracy affects the quality of development in that society. The political system had to provide the means/incentives to turn needs into effective demands. To him, democratic regimes that afforded political voice/access to those groups which stood to gain from social programmes were the most likely to see social needs translated into effective demands. The ability to mobilize, make oneself heard and to vote were the mediators through which the quality of a country’s democracy affects the quality of its development.

The Supreme Court’s procedural innovations in PIL cases, in my view, sought to create such opportunities for disadvantaged groups to gain political access, exercise their liberties to mobilize and voice their needs, and to participate in making social choices and political decisions that affected those needs. According to Justice Bhagwati, what prompted such judicial innovations was that “Anglo Saxon law is transactional, highly individualistic, concerned with an atomistic justice incapable of responding to the claims and demands of collectivity, and resistant to change. Such law was developed and has evolved...essentially...to deal with situations involving the private right/duty pattern. It cannot possibly meet the challenge raised by...new concerns for the social rights and collective claims of the underprivileged.”⁸²

Such procedural reforms were to “devise new procedures which would make it easier for the disadvantaged to use the legal process and evolve new, equitable principles oriented to distributive justice...”⁸³ Constitutional guarantees under Articles 226 and 32 provided avenues for PIL reforms since they allowed direct access to high courts and the Supreme Court in case of a ‘legal’ or ‘constitutional’ wrong which could be used by less advantaged groups to assert their interests through the courts.

But though such constitutional guarantees allowed anyone to approach the Supreme Court or the high courts for violation of legal or constitutional rights, the traditional rule of standing required that only a person who has suffered a specific legal injury by reason of actual or threatened violation of his rights could bring an action for judicial redress. This rule effectively barred the court to large masses of people who, on account of poverty or ignorance, could not utilize the judicial process. It was felt that even if legal aid offices were established for them, it would be impossible for them to take advantage of the legal aid programme because most of them lacked the awareness of their constitutional and legal rights. Even if they were made aware of these rights they could lack the capacity to assert them.

The Supreme Court decided to depart from the traditional *locus standi* rule and held that where a legal wrong or legal injury is caused to “a person or to a determinate class of persons” by reason of violation of their constitutional or legal rights, and such a person or class of persons by reason of poverty or disability was in a socially or economically disadvantaged position and unable to approach the court for relief, any member of the public or a social action group acting *bona fide* could approach the court and maintain an application seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. The liberalization of the rule would enable individuals or groups of people to raise matters of common concern arising from dishonest or inefficient governance before the court and to increase public participation in the process of constitutional adjudication.⁸⁴

PIL has also evolved through ‘epistolary jurisdiction’, where letters written to a court or to an individual judge, or *suo motu* action taken by the court on the basis of newspaper reports, have been used to institute an action. This was because it was felt that it would be an unfair burden to expect a person acting *pro bono* to incur expenses from his own pocket in order to prepare a regular petition to be filed before the court. Legal aid was established as a fundamental right in criminal cases and the court often waived fees, awarded costs and provided other forms of litigation assistance to public interest advocates.⁸⁵

The expanded *locus standi* rule and epistolary jurisdiction were institutionalized by the court in a judgment delivered in the *Judges Appointment and Transfer* case.⁸⁶ Certain parameters for such procedural innovations were laid down,⁸⁷ since it was not every letter addressed to the court or to an individual judge which was treated and acted upon by the court as a petition. In *Bandhua Mukti Morcha*, it said, “We are so much accustomed to the concepts of Anglo-Saxon jurisprudence which require every legal proceeding including a proceeding for a high prerogative writ to be cast in a rigid or definitive mould and insist on observance of certain well settled rules of procedure, that we implicitly assume that the same sophisticated procedural rules must also govern a proceeding under Art. 32 and the Supreme Court cannot permit itself to be freed from the shackles of these rules even if that be necessary for enforcement of a fundamental right...It was only in the year 1981 in the *Judges Appointment and Transfer* case...that this court for the first time took the view that where a person or a class of persons to whom a legal injury is caused by reason of violation of a fundamental right is unable to approach the court for judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting *bona fide* can move the court for relief under Art. 32 and *a fortiori*, also under Art. 226 so that the fundamental rights may become meaningful not only for the rich and the well to do who have the means to approach the court but also for the large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resources unable to seek judicial redress.”⁸⁸

The court found that this approach fell squarely within the meaning of Article 32. Clause(1) of Article 32 conferred the right to move the Supreme Court for enforcement of any of the

fundamental rights. But it did not specify who would have this right nor did it say by what proceedings the Supreme Court could be moved. There was 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 court nor did it say that the court should be moved only by a particular kind of proceeding. It was clear in the plain language of the clause that whenever there is a violation of a fundamental right, anyone could move the Supreme Court for enforcement of the fundamental right.⁸⁹

The court also said, "...Clause (1) of Art. 32 says that the Supreme Court can be moved for enforcement of a fundamental right by any "appropriate" proceeding. There is no limitation in regard to the kind of proceeding envisaged in Clause (1) of Art. 32 except that the proceeding must be 'appropriate' and this requirement of appropriateness must be judged in the light of the purpose for which the proceeding is to be taken, namely enforcement of a fundamental right".⁹⁰ Lack of constitutional specification of a proceeding for enforcement of a fundamental right or stipulation that such proceeding should conform to any rigid pattern reflected the founders' understanding that in a country like India any insistence on a rigid formula of proceeding for enforcement of a fundamental right would become self-defeating because it would place enforcement of fundamental rights beyond the reach of the common man.

The *Judges Appointment and Transfer* case had established that a member of the public acting *bona fide* who wanted to move the court for enforcement of a fundamental right on behalf of disadvantaged persons or groups could do so by just writing a letter, because it would not be right or fair to expect such a person to incur the expense of preparing a regular writ petition for enforcement of the fundamental right. In such cases, even a letter addressed by him could legitimately be regarded as an 'appropriate' proceeding.⁹¹ For example, in *Sunil Batra*⁹² and *Upendra Baxi v State of U.P.*,⁹³ the petitioners (a prison inmate and two law professors respectively) were allowed to move the court by addressing letters that were treated as writ petitions. Similarly, in *Olga Tellis*,⁹⁴ the court entertained a letter addressed by a journalist claiming relief against demolition of the homes of pavement-dwellers by the Bombay Municipal Corporation.

In *P.U.D.R.*,⁹⁵ the court held, "...the traditional rule of standing which confines access to the judicial process only to those to whom legal injury is caused or legal wrong is done has now been jettisoned by this court and a new dimension has been given to the doctrine of *locus standi* which has revolutionized the whole concept of access to justice in a way not known before...It has been held by the court...[in order to] transform it into an instrument of socio economic change, that where a person or class of persons to whom legal injury is caused...is by reason of poverty, disability or socially or economically disadvantaged position not able to approach the court for judicial redress, any member of the public acting *bona fide*...may move the court for judicial redress of the legal injury...[proceedings] may be set in motion by any public spirited individual or institution even by addressing a letter to the court...the court...would cast aside all technical rules of procedure and entertain the letter as a writ petition on the judicial side and take action upon it."⁹⁶ Further, it stated, "Today a vast revolution is taking place in the judicial process; the theatre of law is fast changing and the problems of the poor are coming to the forefront. The court has to create new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning."⁹⁷

The court would not, however, in exercise of its discretion, intervene at the instance of a meddling interloper or busybody. In *S.P. Gupta v Union of India*⁹⁸ the court further clarified, "...we must hasten to make it clear that the individual who moves the court for judicial redress in cases of this kind must be acting *bona fide* with a view to vindicating the cause of justice and if he is acting for

personal gain or private profit or out of political motivation...the court should not allow itself to be activated at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the court or even in the form of a regular writ petition filed in court.”⁹⁹

Bandhua Mukti Morcha also established that it was not obligatory to follow an adversarial procedure under Article 32, where each party produces his own evidence, tested in cross-examination by the other side, with the judge as a neutral umpire to decide the case only on the basis of materials produced before him by both parties. The adversarial system embodied in the Civil Procedure Code and the Indian Evidence Act had no application where a new jurisdiction was created in the Supreme Court for enforcement of a fundamental right. In fact, such a system could lead to injustice particularly where the parties to the litigation were not evenly balanced in social and economic strength. The litigants belonging to a deprived section of the community were bound to be at a disadvantage as against a strong opponent under the adversary system because of his difficulty in getting competent legal representation and his inability to produce relevant evidence before the court. Therefore, when the poor came before the court for enforcement of their fundamental rights, it was necessary to evolve a new procedure to make it possible for such litigants to produce the necessary material before the court. The ‘*laissez faire*’ approach to the judicial process had to be abandoned and new tools forged “for making the fundamental rights meaningful for the large masses of people”.¹⁰⁰

Thus when poor litigants or citizens acting *pro bono* approached the court, it could not expect them to produce relevant material before the court in support of their case. To adopt a passive approach and decline to intervene would make the fundamental rights “a teasing illusion” for such groups. The answer was judicial evolution of the practice of appointing commissions for the purpose of gathering facts and data in regard to a complaint of a breach of a fundamental right made on behalf of weaker sections.¹⁰¹ The court has often assumed the role of a quasi-administrative agency through the designation of special investigatory or monitoring committees. For example, in dealing with the issue of deforestation, the court in *T.N. Godavarman*¹⁰² cases designated a high powered committee to serve as an investigative, fact-finding arm of the court and to oversee the implementation of the court’s orders. The court and the committee became intensely involved in the oversight and administration of forests. In *Godavarman* and other cases, the court also developed the concept of the writ of ‘continuing mandamus’ to keep a matter pending to allow the court and its advisory committees to continue monitoring government agencies. The court, therefore, not only tried to correct unreasonable conduct of the state but has also tried to lay down norms of reasonable conduct similar to those made by administrative agencies.

The court has said that the state as respondent (as it usually is in such cases) instead of taking an adversarial stance, could assist the court in establishing the true facts of the case, so that it could improve its administration. In *P.U.D.R. v India*, Justice Bhagwati said, “Public interest litigation, as we conceive it is essentially a cooperative or collaborative effort on the part of the petitioner, the state or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them. The state or public authority against which public interest litigation is brought should be much interested in ensuring basic human rights, constitutional as well as legal, to those who are in a socially and economically disadvantaged position, as the petitioner who brings the public interest litigation before the court.”¹⁰³

An example of such cooperative effort was the decision in *Azad Rickshaw Pullers Union v Punjab*.¹⁰⁴ A state act¹⁰⁵ provided that licences to ply rickshaws could only be given to those owners who ran the rickshaws. This act threatened to cause unemployment to those rickshaw-pullers who

did not own their rickshaws and leave many other rickshaws owned by non-driving owners idle. Instead of striking down the law as violation of the fundamental right to carry on trade, business and occupation guaranteed by Article 19(1)(g), Justice Iyer provided a scheme by which the rickshaw-pullers could obtain loans from the Punjab National Bank and acquire the rickshaws. So the intention of the law to abolish the practice of renting rickshaws from the owners was achieved without causing hardship to the rickshaw-pullers.

Section Three

In this section, I look at how other scholars approach the relationship between law and development and try to assess if the judicial approach in PIL decision-making is related to development from these different perspectives. For Trebilcock,¹⁰⁶ there is evidence to suggest that specific legal and public sector reforms can influence certain aspects of development. However to him, empirically, reforms to substantive bodies of laws and regulations appeared less important than interstitial reforms to legal structures charged with enforcing laws. For instance, effective access to courts and independence of the judiciary were important factors in developing countries. It was also a truism that the ‘rule of law’ was causally related to development.¹⁰⁷ Derogations from the rule of law could signify ‘denial of natural justice’, ‘due process’, etc.

The need for a ‘rule of law’ model has been emphasized by other scholars such as Tamanaha¹⁰⁸ who conclude that what is required is a minimalist account of a rule of law model adapted to local circumstances. For Carothers,¹⁰⁹ promoting rule of law reforms moved countries past the relatively easy phase of political/economic liberties to a deeper level of “type three” reforms that involve changing the conditions for implementation and enforcement of laws and increasing governments’ compliance with law.

The court’s PIL approach caused it to define the ‘rule of law’ under the Indian legal system in a new way. For the court, the rule of law now came to mean a vindication of the public interest which demanded that violations of constitutional/legal rights of large numbers of people who were poor/ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredeemed and established PIL as a means to secure the rule of law so defined. “The rule of law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by...vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights.”¹¹⁰

Better enforcement of social welfare legislation, protection against government repression and increasing government accountability, securing judicial independence and ensuring that due process and principles of natural justice were incorporated in instances of infringement of liberties by government action have been primary issues in PIL litigation. Justice Bhagwati¹¹¹ said of PIL, “...the primary focus is on state repression, governmental lawlessness, administrative deviance, and exploitation of disadvantaged groups and denial to them of their rights and entitlements...It...seeks to ensure that the activities of the state fulfill the obligations of the law under which they exist and function.”¹¹² The court has tried to achieve these goals through strategies of incorporating the “due process” doctrine in review of legislation impinging on constitutional freedoms and an innovative remedial approach.

(i) Due Process

In incorporating the principle of due process, the Supreme Court’s PIL decisions built on a modification of the earlier rule laid down in *Gopalan*¹¹³ that the words “procedure established by

law” by which a person could be deprived of his life and personal liberty under Article 21 meant simply procedure established by enacted law and that the court had no power to ask whether the law and the procedure were fair and just. The current judicial position is that the procedure to be provided by the law must contain the essentials of fair procedure, which meant the principles of natural justice. Therefore, Article 21 has been interpreted by the Supreme Court in a way so as to afford to the individual the due process of law as understood in the United States.¹¹⁴ And the court is empowered to review legislation and government action affecting the lives and liberties of citizens to ensure that it complies with due process.¹¹⁵

(ii) Securing Adequate Remedial Action

In trying to promote the rule of law, proper enforcement and administration of constitutional rights and statutory human rights provisions, including government compliance with such laws, the court has evolved new remedies through PIL litigation. The usual understanding of judicial remedies requires that the rights of the parties be determined with finality, that the court avoid prolonged or multiple suits and resist involving itself in continuous supervision of a matter. Due to the institutional limitations of the courts and the doctrine of separation of powers, the courts appear to be excluded from intervening in administrative functions and going behind discretionary decisions.

But in PIL, the court has pushed the boundaries of this traditional understanding. Article 31(2) of the constitution grants the court the power of issuing the usual writs of habeas corpus, mandamus, certiorari and quo warranto. However, in PIL decisions, the court has not restricted its remedial power to these traditional orders, to awarding damages or giving injunctive relief, and has insisted on a flexible interpretation of their inherent power to do justice. Justice Bhagwati has remarked, “These [new] remedies were unorthodox and unconventional and were intended to initiate affirmative action on the part of the state and its authorities.” The courts have shown a willingness to experiment with remedial strategies that require continuous supervision and that appears to significantly shift the line between adjudication and administration. The final orders in PIL cases are often detailed, specific and intrusive. In many cases, the court does not simply decide that the respondents ought to perform specific actions but require that they return on a set date to report on implementation. The court has also created agencies to suggest appropriate remedies and monitor compliance. Sometimes compensation has been awarded for breach of fundamental rights if the infringement was patent and incontrovertible and the violation was gross.¹¹⁶

Remedies in PIL cases can often be piecemeal. As in *Hussainara Khatoon*,¹¹⁷ if the court is satisfied that a particular abuse has been identified, it has given orders without waiting until the case is finished. The court has sought improvement in the administration through such interim orders and directions. This kind of “creeping jurisdiction”¹¹⁸ can typically involve taking over direction and administration in a particular arena from the executive. Another feature has been the setting out of guidelines going beyond the circumstances of the case. *Hussainara* set a pattern in which the court granted immediate and comprehensive interim relief prompted by an urgent need expressed in the writ petition with a long deferral of final decision as to factual issues and legal liabilities.¹¹⁹ Through the use of ‘continuing mandamus’, the court retains jurisdiction and control over particular matters to monitor and oversee the implementation of its directives and orders.

Justice Bhagwati gives certain examples of remedial relief granted in PIL cases. In *Bandhua Mukti Morcha*,¹²⁰ the Supreme Court passed an order giving various directions for identifying,

releasing and rehabilitating labourers who were held in bondage through debt, ensuring the payment of minimum wages, observance of labour laws and medical assistance. In *Hussainara Khatoon*,¹²¹ the court directed that the state government prepare an annual census of the prisoners on trial each year and submit it to the high court. The high court was then to direct early disposal of cases where these prisoners were under detention for unreasonably long periods. In the Bihar blinding cases,¹²² the court directed that the prisoners under trial who had been blinded should be given vocational training in an institute for the blind and compensation should be paid to them for life. In *Kisben v State of Orissa*,¹²³ it directed the state government to appoint a Natural Calamities Committee under the Orissa Relief Code, which was to meet at regular intervals to review the social welfare measures taken by the government to mitigate hunger, poverty and starvation deaths in the district.

In *Sheela Barse*,¹²⁴ the court referred to Article 39(f) of the Directive Principles under Part IV of the constitution and commented that though every state had a children's act pursuant to Article 39(f), the statute had not been enforced in some states. Though ordinarily it was a matter for the state government to decide as to when a particular statute should be brought into force, in the present instance the court felt that it was appropriate to direct that every state ensure that the act be administered without delay. States where the act was not enforced had to indicate reasons for not doing so by filing a proper affidavit before the court within a certain deadline. There are numerous other instances of the court's attempts to secure better administration of social welfare laws, enforcement of constitutional directives to states for achieving certain social and economic goals, and ensuring that the federal and state government and administration adhered to procedural requirements of the rule of law.¹²⁵

However, Justice Bhagwati was clear that when judges granted relief in such cases they were not acting as a parallel government. They were merely enforcing the constitutional and legal rights of the underprivileged and ensuring that the government carried out its obligations under the law. Enforcement of such orders by the court required the cooperation of state agencies, since they were not self-executing. He referred to the methodology that the court had secured for enforcing its orders in PIL. For example, in a case brought by a journalist for protection of women in police custody, the Supreme Court gave various directives and asked a woman judicial officer to visit the police lock-ups periodically and to report to the relevant high court about whether the directives were being carried out.¹²⁶ In *Bandhua Mukti Morcha*,¹²⁷ when the court gave elaborate directives, it appointed the joint secretary in the ministry of labour to visit the stone quarries to ascertain that its order was being properly implemented.

Justice Bhagwati also stated "When the court entertains PIL, it does not do so in a cavilling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have-nots...and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive...The government...must welcome public interest litigation, because it would provide them with occasion to examine whether the poor and down trodden are getting their social and economic entitlements." In *Upendra Baxi v State of Uttar Pradesh*,¹²⁸ he suggested that PIL "involves a collaborative and cooperative effort on the part of the...government and its officers, the lawyers appearing in the case and the Bench for the purpose of making human rights more meaningful for the weaker sections of the community."¹²⁹

Using the 'due process' doctrine and an expanded remedial approach, the court has made decisions with implications for securing the rule of law.

(i) Protection against Government Repression

PIL cases have seen judicial intervention especially in the context of arbitrary actions of the prison administration violating the rights of under trials and prisoners. In *Hussainara Khatoon*,¹³⁰ the court held that a procedure established by law for depriving a person of his liberty cannot be “reasonable, fair and just” unless that procedure ensures a speedy trial for determining the guilt of such persons. A reasonably expeditious trial was an integral and essential part of the fundamental right to life and liberty under Article 21. In *Sunil Batra*,¹³¹ the court held that it is no more open to debate that convicts are not wholly denuded of their fundamental rights. A prisoners’ liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him was then all the more substantial. Conviction for a crime did not reduce the person into a non-person whose rights were subject to the arbitrariness of the prison administration. The imposition of any major punishment within the prison system was therefore conditional upon the observance of procedural safeguards.¹³²

In *Francis Coralie Mullin*,¹³³ the court held that preventive detention laws (which did not punish an individual for a wrong done by him, but curtailed his liberty with a view to preventing his injurious activities in future) had to meet the test of fair procedure under Article 21. The case established the right of detainees under such laws to have interviews with a legal advisor and with his friends and relatives as a part of his right to live with human dignity, subject to their regulation through a fair, just and reasonable procedure established by a valid law.

(ii) Judicial Independence and Access to the Judicial Process

M.H. Hoskot,¹³⁴ *Sukdas*¹³⁵ and *Sheela Barse*¹³⁶ established that the right to free legal aid was guaranteed by Article 21. The court held that free legal aid at state cost was a fundamental right of an accused who was charged with an offence which could involve jeopardy to his life or personal liberty. This right was implicit in the requirement of a reasonable, fair and just procedure under Article 21. A majority of the rural poor was illiterate and not aware of the rights conferred upon it by law. This absence of legal awareness was responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffered. The law ceased to be their protector because they did not know that they were entitled to the protection of the law.¹³⁷ Promoting legal literacy was also of prime importance.

In 1993, the court in *Supreme Court Advocates-on-Record Association v Union of India*¹³⁸ dealt with the issue of the executive’s powers of judicial appointments. The court ultimately overturned *S.P. Gupta* holding that the chief justice of India (in consultation with a collegium of two senior justices) not the executive, had primacy and the final say in judicial appointments and transfers.

(iii) Securing Good Governance in Accordance with Constitutional Principles

The court also decided to address the practice of governance in the state of Bihar through governors’ ordinances in *D.C. Wadhwa*.¹³⁹ Such ordinances, despite constitutional provisions to the contrary, were continually promulgated without bringing them before the legislature for enactment into statutes. The court said “The startling facts...clearly show that the executive in Bihar has almost taken over the role of the legislature in making laws not for a limited period, but for years together in disregard of constitutional limitations. This is clearly contrary to the constitutional scheme and it must be held to be improper and invalid.”¹⁴⁰

In *Common Cause, a Registered Society v Union of India*,¹⁴¹ the court held that the expression “conduct of elections” in Article 324 of the constitution was wide enough to include in its sweep,

the power of the Election Commission to issue – in the process of securing fair conduct of elections --- directions to the effect that political parties submit to the commission for scrutiny, the details of the expenditure incurred or authorized by political parties in connection with the election of their candidates. To reinforce the powers of the Election Commission for this purpose the court gave several directions.¹⁴²

(iv) Government Corruption

*Vineet Narain*¹⁴³ is an example of the court's intervention in the area of corruption and government accountability. In that case, the court asserted power over the Central Bureau of Investigation in the light of its failure to investigate and prosecute politicians involved in illegal financing of terrorist groups through a series of illicit transactions. The court noted that “the continuing inertia of the agencies to even commence a proper investigation could not be tolerated any longer”. It further observed that in view of the fact that “merely issuance of a mandamus directing the agencies to perform their task would be futile” the court was compelled to “issue directions from time to time and keep the matter pending requiring the agencies to report the progress of the investigation...so that the court retained seisen of the matter till the investigation was completed and the charge sheets were filed in the competent court for being dealt with thereafter, in accordance with law”.¹⁴⁴

Section Four

PIL in India has involved putting a spotlight on law as both a means to secure freedom and as a definition of freedom. There is a centring of law and its investment with intrinsic value for promoting social justice in India. The expectation is that the widened conception of development should be reflected in legal prescriptions, with greater participation and democratization to inform the processes through which it is generated. Through the substantive rights jurisprudence of Supreme Court decisions relating to Article 21, PIL involves a formalization of legal and constitutional entitlements. The court's attempt to secure broader access to the judicial process through its expanded rule of standing, defining a constitutional right to free legal aid, creating an 'epistolary' jurisdiction for itself and modifying the evidentiary rigours of the adversarial process has prioritized procedural concerns and impacted on promoting stakeholder participation in making public decisions.

The court has emphasized reviewing government actions for their respect for human rights – both by preventing the state from limiting freedom by violating human rights and by promoting the fulfilment of basic human needs. The court's decisions have insisted on the state following a “fair and just” procedure for depriving a person of his political liberties. It has also emphasized how political/legal institutions or cultures might be better preserved or altered. Using PIL as essentially a cooperative or collaborative effort, its innovative remedial approach and through decisions focusing on government compliance with constitutional/statutory guarantees and constitutional provisions for responsible governance, the court has impacted on legal implementation and institution building.

The court has tried to balance democratic concerns (through protecting political liberties and rights of access to justice) with social justice goals by giving an integrated reading to Parts III and IV of the Indian constitution.¹⁴⁵ It has tried to promote the values of a liberal constitutional order as a good thing to have in itself while also using law to develop a framework and vocabulary for debating social concerns. Through broadening the rule of standing and innovations to evidentiary rules and remedial

options, as well as its purposive approach to interpretation of Parts III and IV of the Indian constitution, the court has tried to develop processes of argument and reasoning suitable for debating appropriate pathways to broad social goals and for attuning state policy towards social justice.

(1) Difference Between PIL and Reforms Advanced by IFIs

What is significant is that PIL in India has helped to create a discourse on law and development which significantly differs from the one being advanced by international financial institutions (IFIs) as second generation reforms. For the latter, the basic thrust of the reform agenda is to promote a market-friendly legal and institutional order organized around the protection of property rights/enforcement of contracts and other rules and institutions that ensure a stable and attractive investment climate. These reforms embrace human rights because they contribute to good economic outcomes and are part of a political climate necessary to attract investment and ensure growth.

As the previous discussion has shown, the Supreme Court's PIL jurisprudence has a different focus. Such jurisprudence has allowed the concerns of marginalized sections to be articulated within the judicial process. The court's formalization of constitutional entitlements is not marked by 'individualization', where individual rights are favoured over group rights. In fact, PIL, both in terms of formulating substantive rights entitlements and in its procedural innovations, has tried to shift from an 'individualistic' to a 'communitarian' focus.

PIL has involved the balancing and ordering of rights that is done by the court itself in response to different interests that appear before it and the interpretative approaches taken by judges in interrelating different provisions of the constitution. Such responses are not due to the IFIs' articulation of the relationship of rights to economic growth and their appropriateness in market centered societies, and their management of the processes by which they are incorporated by ranking/ordering the importance of different social objectives and legitimating/delegitimizing the means/strategies by which they can be pursued.

Second-generation reforms also tend to demonstrate a wariness of state intervention in social concerns and still assume that growth is most likely to result from policies of deregulation/liberalization. There is a shift from a 'protective/regulatory' to an 'enabling' state to protect a limited set of rights and to promote efficiency/competition to create conditions for flourishing markets or foreign investment. In contrast, the Supreme Court's concern in PIL with "state repression, government lawlessness, administrative deviance",¹⁴⁶ has been to secure better implementation by the state of constitutional and statutory guarantees. In devising PIL strategy actively, the court conceives of "...a collaborative and cooperative 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 for the weaker sections of the community".¹⁴⁷ The court's attempts in PIL to secure better administration of social welfare laws make the directives to the state under Part IV justiciable and enforce constitutional directives to states for achieving social and economic goals and ensure that the federal and state governments adhere to procedural requirements of the rule of law. These are premised on the need for an 'interventionist' state to secure social justice goals.

Second-generation reforms have implications for the nature of 'sovereignty', since there is a problem in making such reforms more democratic or participatory. The IFIs by articulating a comprehensive economic rationale for engaging with domestic policies/regulations, redefine the boundaries of sovereignty. PIL, on the other hand, has attempted to democratize the judicial

process and to make it more participatory, and to expand, preserve and implement the domestic constitutional/legal order unrelated to market or investor rights concerns. The court has created an independent mandate for itself to act as human rights enforcers and to create constitutional/legal solutions to social concerns even to the extent of getting involved in political issues or making policy decisions.

(2) Significance of PIL for Illustrating Relationship Between Law and Social Change

PIL puts an emphasis on law as instrumental and purposive – a site and vehicle for weighing and balancing institutional prerogatives and limits to state policy. The idea of the rule of law/legal system as an agent of social change and development is contested terrain.¹⁴⁸ The Supreme Court's PIL decisions can be taken at one level to have established an indigenous variant of procedural elements of the rule of law to promote development goals (that governments act according to laws and rules produced in the political arena and respects the rights of citizens; proper implementation and government compliance with laws and a judicial body to resort to that embodies the ethic of treating all cases before it neutrally and fairly.) But it has also gone beyond that.

As discussed in the sections above, it has established substantive freedoms that are determinants of individual capability and an end of development in terms of enhancing peoples' lives. PIL fits with the 'deontological' perspective of scholars such as Sen.¹⁴⁹ From this perspective, the rule of law, to the extent that it guarantees human freedoms, has an intrinsic value independent of its effect on various other measures of development. By interpreting Parts III and IV of the constitution together it has created a normative foundation for establishing a linkage between law and social change and allowed for a discourse on achieving social goals to develop within the legal process.

Such jurisprudence has also tried to make the development process more democratized and participatory by allowing marginalized groups to litigate their grievances before the court. Most importantly, it allows the conversation to take place on equal terms. The judicial forum makes it possible to restore what Baxi calls the republican virtue of civility, that is, that everyone is treated as an equal citizen.¹⁵⁰ The court has also evolved new remedies to induce affirmative action on the part of the state, better enforce constitutional or statutory guarantees that specifically promote developmental goals, and to set the direction for change and monitor its implementation.

In this sense the Supreme Court's PIL jurisprudence can be seen as an illustration of the transformative potential of law. Such jurisprudence gives a central place to legal rules and institutions. Law is seen as a condition of possibility of both social justice and democratic participation.¹⁵¹ The importance of legal reform is no longer limited to its instrumental role in fostering economic efficiency and growth but is now also represented as critical to the achievement of social objectives. Law is seen as a constitutive element of development since respect for the rule of law and recognition of constitutional/legal rights has become definitional to the achievement of development itself. PIL has also tried to secure a participatory process for a democratic conversation to develop between judges, government actors and different social and political groups on setting a litigation agenda and ensuring its proper enforcement. Its innovations in procedural and evidentiary rules have tried to create better processes for fact finding and to monitor implementation of social guarantees.

(3) Critique

Yet critiques of PIL also point to the limitations of the use of law as an instrument of social change and of the court's role in promoting development goals. Such critiques have been made by both commentators on the PIL phenomenon in India and also law and development scholars in general.

(i) Tamanaha has referred to the dangers of urging an instrumental view of law on developing countries.¹⁵² The issue is whether PIL represents an unelected and unaccountable judiciary imposing its values on the political and legal system [the 'anti-majoritarian difficulty'] and whether it has allowed the government to use the achievement of social and economic rights to restrict civil/political liberties. It is argued that while PIL must be effective in giving remedies to those who have suffered and must be capable of changing the behaviour of those who infringe such rights, such jurisprudence has to be developed within a constitutional/legal framework that does not encroach on individual civil and political liberties and also subjects the court to self-imposed restraints.

The Supreme Court has shown some awareness of this critique. Justice Bhagwati, as the primary architect of PIL in India, has an openly instrumental approach to the rule of law. For example, in defining his concept of judicial activism he says, "Technical and juristic activism considered in isolation obscures our understanding of the purpose behind such activism. It is important to try to discover why a particular kind of judicial creativity has been adopted and to inquire into the purpose which it seeks to serve. It is the instrumental use of judicial activism that needs to be considered, for judicial activism cannot be divorced from the purpose it serves...We in India are trying to move away from formalism and to use juristic activism for achieving distributive justice or, as we in India are accustomed to labelling it, 'social justice'."¹⁵³ In such a normative conception of a just law there is of course an inherent subjectivity which could give rise to disagreements irreconcilable by consensus or justification, resulting in conflicts over what constitutes 'good law' and threatens the stability of the legal order.¹⁵⁴

Yet even Justice Bhagwati feels that "[j]udges in India are not in an uncharted sea in the decision making process. They have to justify their decision making within the framework of constitutional values. This [PIL] is nothing but another form of constitutionalism which is concerned with substantivization of social justice."¹⁵⁵ He refers to the court's interpretative effort to read Parts Three (political and civil liberties) together with Part Four (social and economic rights) and to establish that the balance between the two Parts was a 'basic feature' which cannot be amended. The state cannot seek to infringe political and civil rights in Part Three to enforce social welfare legislation.

Moreover, PIL has an important procedure-oriented rule of law element, in terms of making the government subject to the constitution and the laws, treating citizens with human dignity, and access to a fair and neutral judiciary. Justice Bhagwati's opinion is that the primary purpose of PIL is to "ensure that the activities of the state fulfill the obligations of the law under which they exist and function".¹⁵⁶ Even the judiciary has to approach PIL within a system of rules. While it is true that he advocated judicial activism and a departure from Anglo-Saxon jurisprudence, nevertheless, the 'new strategies' of PIL are not purely products of judicial discretion, but are carefully fashioned on the basis of constitutional Articles such as Articles 32 and 21, or reasoned judicial decisions such as the *Judges' Appointments and Transfer* case,¹⁵⁷ and are based on judicially constructed procedural principles based on principles of due process and natural justice.

Justice Pathak (who succeeded Bhagwati as chief justice) has also cautioned that while PIL claims to represent an increasing emphasis on social welfare and progressive humanitarianism, the court should not exceed the limits of its own powers and has to follow established rules of procedure. For instance, the court has to ensure that it gives notice to all who might be affected by its orders, cannot bypass statutorily required procedures and has to be careful not to trespass on legislative territory or make political decisions. It should distinguish between the public debate characteristic of legislatures and the process by which judicial decisions are reached. The court should avoid emotional appeals and rely on legal principle. "That we sit at the apex of the judicial administration and our word, by constitutional mandate, is the law of the land can induce an unusual sense of power. It is a feeling we must guard against by constantly reminding ourselves that every decision must be guided by reason and by judicial principles."¹⁵⁸

(ii) The second question is whether the court is the best actor to initiate public sector/legal reforms to secure government accountability. Carothers refers to Type Two and Type Three reforms and feels that bringing about government obedience to law is the hardest, and demands internal movements of reform. To the extent that PIL attempts such reforms, the court has come close to confrontation with the government and has been criticized for politicization of constitutional adjudication, exceeding its institutional capacity, usurping legislative and executive functions, and violating the requirements of the very rule of law it has tried to secure.¹⁵⁹ It has been noted that PIL procedure brings polycentric cases before the court, without necessarily giving it the tools to deal with the range of issues implicated in a complex policy field. In transitioning from giving immediate relief, such as imposing merely a duty of restraint, to structural change which requires the design, institution and implementation of complex policies, the nature of PIL remedies can overtax the resources of the court.¹⁶⁰ Other commentators have noted a lack of consistency in there being no clear or sound theoretical basis for selective intervention on social issues.¹⁶¹

PIL appears the most successful when the court intervenes to require implementation of policies which have already achieved broad consensus but through disorganization or failure to prioritize have not been put into action. The court in such situations does no more than require the government to act in ways it has already committed itself to, but simply failed to honour. The "right to food" case, for example, turned existing policies into fundamental rights and elaborated on them. The court can also be effective in its intervention in cases where there is a conspicuous gap in policy-making in areas affecting most fundamental rights, such as the right to dignity and equality of mentally disabled people. Another area has been that of sexual harassment. The court has held that sexual harassment constituted a violation of women's constitutional right to dignity and drafted quasi-legislative guidelines, drawing on internationally recognized norms.¹⁶²

However, scholars have commented that the role of the court in stepping in where government fails is more complex than it seems. Appointment of commissions can, in some cases, create a parallel structure of decision-making within the area of executive competence because they are empowered not just to find the facts, but also to consider possible solutions as a basis for positive duties to be imposed by the court.¹⁶³ The court selects commissioners on the basis of its own views of who should have the appropriate standing and expertise, without being required to follow any procedure or open application process.

The court has tried to preserve constitutional limits on its powers in relation to the other branches of government and in seeking to enforce orders made by the court in PIL cases. Justice Bhagwati has stressed the need for cooperation with state agencies. Moreover, certain principles

of judicial restraint have been articulated by the court. First, while the court has acted as a critic and monitor of the government, it has acknowledged that it is beyond its powers to usurp the administration or be itself involved in continued surveillance of administrative bodies. Second, the court can be activated only if the executive is remiss in its constitutional/statutory obligations to the disadvantaged. Next, the court will respond only if there is already in existence ameliorative legislation for the welfare of the poor and disadvantaged.¹⁶⁴

PIL cannot be used for political gain or for furthering personal interests. The court is aware of its minimal ability to reallocate public resources and of the need for popular legitimacy of its PIL jurisprudence. There is also a recognized need to ensure that remedies are clear and feasible and to secure enforcement of its orders through cooperation with the government, so that PIL can actually contribute to improving the lives of the disadvantaged. As one Supreme Court judge has said, “Since the court possesses the sanction neither of the sword nor the purse and...its strength lies basically in public confidence and support...the legitimacy of its acts and decisions must remain beyond all doubt...certainty of substance and certainty of direction are [the elements] which command public confidence in its legitimacy.”¹⁶⁵

It would appear that in order to fulfil its transformative potential¹⁶⁶ to achieve developmental goals, the court should not try to be a substitute for recalcitrant governments or replace political action.¹⁶⁷ PIL’s achievement can be to create a normative foundation for social issues to enter the legal process through its creative interpretation of Parts III and IV, facilitate a social conversation requiring governments to listen and interact with civil society, and groups within civil society to listen and interact with each other. PIL’s significance can also lie in that it has promoted equal participation so that the poor and disadvantaged can be given an equal voice.

For better implementation of constitutional/legal guarantees, PIL can also allow the court to act as a catalyst for democratic pressures to develop to make recalcitrant governments act. Instead of trying to act as a substitute for government with PIL decisions being regarded as a means for a hierarchical transfer of power, PIL’s strength could lie in the court encouraging democratic deliberation in place of interest bargaining. The court will need to avoid capture by dominant political interests and seek to act as a facilitator by attempting to structure the judicial process to be flexible and dynamic enough to continue the conversation (between the judges, government and the public) for finding the most effective way to secure constitutional rights guarantees. The court can thus serve to energize the political process in cooperation with other state agencies and create structures which remain responsive to a range of issues and manage implementation in a way that produces outcomes through a participative ethic ensuring that those most affected by the decision have a role in shaping and monitoring it.

Notes

¹ One of the founders of the Indian Supreme Court’s public interest litigation jurisdiction was Justice P.N. Bhagwati. See P.N. Bhagwati, ‘Judicial activism and public interest litigation’ (Address delivered at Columbia University School of Law, 3 October 1984, unpublished). [P.N. Bhagwati, ‘Judicial activism’].

² Kevin E. Davis and Michael J. Trebilcock. *The relationship between law and development: optimists versus skeptics*, Public Law and Legal Theory Research Paper Series, Working Paper No. 08-14, New York University School of Law, (May 2008) at 54-56 [Davis and Trebilcock, *The relationship between law and development*].

³ *Ibid.* at 60.

⁴ Francis Fukuyama, ‘Development and the limits of institutional design’ (Paper presented to the Annual Conference of the Global Development Network, St. Petersburg, 20 January 2006, unpublished).

- ⁵ D.Rodrick, A. Subramaniam, and F. Trebbi. "Institutions rule: The primacy of institutions over geography and integration in economic development" (2004) 9(2) *Journal of Economic Growth* 131.
- ⁶ *Ibid.* at 157-8.
- ⁷ Rohini Pande and Christopher Udry, 'Institutions and development: A view from below', (Discussion Paper No. 928 presented to the Yale Economic Growth Centre, Yale University, 18 November 2005, unpublished).
- ⁸ Davis and Trebilcock, 'The relationship between law and development', *supra* note 2 at 60-61.
- ⁹ Joseph E. Stiglitz, 'Whither reform? Ten years of transition' (Keynote address at Annual World Bank Conference on Development Economics, 28 April 1999, unpublished).
- ¹⁰ Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).
- ¹¹ Jagdish Bhagwati, 'Democracy and development: new thinking on an old question' (Rajiv Gandhi Memorial Lecture, 22 October 1994) [Jagdish Bhagwati, 'Democracy and development']; Jagdish Bhagwati, *A stream of windows: unsettling reflections on trade, immigration and democracy* (Cambridge: Massachusetts Institute of Technology Press, 1998) c. 40.
- ¹² P.N. Bhagwati, 'Judicial activism', *supra* note 1 at 568.
- ¹³ *Minerva Mills v India*, A.I.R. 1980 SC 1789 [*Minerva Mills*].
- ¹⁴ P.N. Bhagwati, 'Democracy and development', *supra* note 11.
- ¹⁵ Michael J. Trebilcock, 'What makes poor countries poor? The role of institutional capital in economic development' in Edgardo Buscaglia, William Ratliff & Robert Cooter, eds., *The law and economics of development* (Connecticut: JAI Press, 1977) at 227 [Trebilcock, 'What makes poor countries poor?']
- ¹⁶ Kevin E. Davis and Micheal J. Trebilcock, 'Legal reforms and development', (2002) 22 *Third World Quarterly* 21-36.
- ¹⁷ Justice P.N. Bhagwati, 'Judicial activism', *supra* note 1 at 576.
- ¹⁸ Brian Tamanaha, 'The lessons of law and development studies' (1995) 89 *American Journal of International Law* 470 [Tamanaha, 'The lessons of law and development studies']. He refers to Trubeck and Galanter's critique in David Trubeck and Marc Galanter, "Scholars in self estrangement: some reflections on the crisis in law and development studies in the United States" (1974) *Wis. L.Rev.* 1062 and to Roberto Unger's concern that the rise of an instrumental view of law was a major aspect of the disintegration of the rule of law and the shift to a post liberal society and social welfare state in Roberto Unger, *Law in modern society* [New York: The Free Press, 1976) at 192-200. Tamanaha also refers to Yash Ghai's comparative analysis of liberal and socialist constitutions in Africa as further support for this argument in Yash Ghai, "Constitutions and governance in Africa: a prolegomenon" in Sammy Adelman & Abdul Paliwala, eds., *Law and crisis in the Third World* [London: Hans Zell Publishers, 1993] at 51 [Adelman and Paliwala, *Law and crisis*].
- ¹⁹ Thomas Carothers, "The rule of law revival" (1998) 77 *Foreign Affairs* 95-106 [Carothers, "Rule of Law revival"].
- ²⁰ Jamie Cassels, "Judicial activism and public interest litigation in India: attempting the impossible?" [1989] 37(3) *The American Journal of Comparative Law* 495-519 [Cassels, "Judicial activism"]
- ²¹ For an analysis of the history of the conflict between redistributive legislation and constitutional property rights, see Jagat Narain, "Judges and distributive justice," in Rajeev Dhavan & R. Sudarshan, eds., *Judges and the judicial powers* [London: Sweet and Maxwell, 1985]; S.P. Sathe, *Judicial activism in India, transgressing borders and enforcing limits* [New Delhi: Oxford University Press, 2002] c. 2 [Sathe, *Judicial activism*].
- ²² Sathe, *ibid.* at 46-50.
- ²³ *Madhav Rao Scindia v Union of India*, A.I.R. 1971 SC 350
- ²⁴ *R.C. Cooper v Union of India*, A.I.R. 1970 SC 564.
- ²⁵ The 24th Amendment Act, 1971 sought to restore to parliament the unqualified power of constitutional amendment it had possessed until the Supreme Court's decision in *Golaknath v The State of Punjab*, A.I.R. 1967 SC 1643; the 25th Amendment further restricted the right to property and the 26th abolished the privy purses.
- ²⁶ Cassels, "Judicial activism," *supra* note 20 at 510.
- ²⁷ *A.D.M. Jabalpur v Shiv Kant Shukla*, A.I.R. 1976 SC 1207. See Sathe, "Judicial Activism," *supra* note 21 at 100-106.

²⁸ *Kesavananda Bharati v State of Kerala*, (1973) 4 S.C.C. 225.

²⁹ Upendra Baxi, “Taking suffering seriously: Social action litigation in the Supreme Court of India,” in Neelan Tiruchelvam and Radhika Coomaraswamy, eds., *The role of the judiciary in plural societies* [London: Frances Pinter (Publishers), 1987] c. 3 [Baxi, “Taking suffering seriously”].

³⁰ *Ibid.* at 35, quoting Justice Dwivedi.

³¹ *Ibid.*

³² A.I.R. 1975 SC 1590.

³³ Baxi, “Taking suffering seriously,” *supra* note 29 at 36; See also Upendra Baxi, *The Indian Supreme Court and politics* [Lucknow: Eastern Book, 1980]

³⁴ Sathe, *supra* note 21 at 106-107.

³⁵ *A.K. Gopalan v State of Madras*, A.I.R. 1950 SC 27 [*Gopalan*].

³⁶ Sathe, *supra* note 21 at 106.

³⁷ *Ibid.*

³⁸ In Sen’s view, what people can positively achieve is influenced by economic opportunities, political liberties and social powers, and the enabling conditions of good health, basic education and cultivation of initiatives. Political liberties are directly important on their own, and do not have to be justified indirectly in terms of their effects on the economy. People deprived of such liberties are deprived of important freedoms in leading their lives, even if they do not lack adequate economic security. Political liberties are thus constitutive elements of human freedoms along with economic rights.

Thus, for Sen, the success of a society in achieving development and enriching human life is to be evaluated primarily by the substantive freedoms that the members of that society enjoy. Substantive freedoms are a principle determinant of individual initiative and social effectiveness. Substantive freedoms included avoiding starvation, under nourishment, being literate, enjoying freedoms such as free speech etc.

³⁹ *Gopalan*, *supra* note 35.

⁴⁰ Justice Das for instance, held that it would be straining the language of Art. 19 to squeeze in personal liberty or the right to life into Art. 19. Some of the important attributes of personal liberty as independent rights are protected in Art. 19 and the expression personal liberty under Art. 21 is a compendious term including within its meaning all varieties of rights which go to make up personal liberties of individuals. *Ibid.* at para. 215.

⁴¹ A.I.R. 1963 SC 1295

⁴² *Maneka Gandhi v Union of India*, A.I.R. 1978 SC 597 [*Maneka*].

⁴³ The earlier judicial view that “personal liberty” included all attributes of liberty except those mentioned in Art. 19 stood rejected. Sathe, *supra*, note 21 at 110.

⁴⁴ *Maneka*, *supra* note 42 at paras. 54 – 56. The court held that rules of natural justice [for example, that no one would be a judge in his own cause, that no one should be condemned unheard, and that the person who decides should be an unbiased person] were the essential requisites of fair procedure.

⁴⁵ In *Maneka*, the court clearly overruled *Gopalan* on the following issues (1) the law authorizing deprivation of personal liberty would have to be valid not only under Art. 21 but also under Art. 19(1) (d) (2) The words “life” and “personal liberty” had wider meanings that would be discovered from time to time (3) The words “procedure established by law” meant not the procedure established by law but procedures considered to be just and fair in civilized countries.

⁴⁶ *Francis Coralie Mullin v Administrator, Union Territory of Delhi*, (1981) 1 SCC 608 [*Francis Coralie Mullin*].

⁴⁷ *Ibid.* at 618.

⁴⁸ *Minerva Mills v the Union of India*, A.I.R. 1980 SC 1789 [*Minerva Mills*].

⁴⁹ *Minerva Mills*, *ibid.* note 48.

⁵⁰ *Francis Coralie Mullin*, *supra* note 46 at para. 7.

⁵¹ *Olga Tellis v State of Bombay*, A.I.R. 1986 SC 180 [*Olga Tellis*].

⁵² Arts. 39(a), 41 and 37 of the constitution had to be read together and had to be regarded as equally fundamental in the understanding/interpretation of the meaning and content of fundamental rights such as the right to life. ⁵² The court had also intervened to transform policy documents and schemes such as the

Sampoorna Grameen Rozgar Yojana (which aims to provide additional wage employment in rural areas, using the labour provided to create assets and infrastructural development in rural areas) into a fundamental entitlement. This has now been given statutory backing in the form of the National Rural Employment Guarantee Act, 2005, which gives the right to be employed on public works doing unskilled manual labour at the statutory minimum wage up to 100 days per household per year, or failing that, to an unemployment allowance.

⁵³ *PUDR v Union of India*, A.I.R. 1982 SC 1473 [*PUDR*].

⁵⁴ If labour was supplied not willingly but as a result of force or compulsion, it would fall within the definition. Therefore, even if a person has contracted with another to perform service and there is consideration for such service in the shape of liquidation of debt or even remuneration, he cannot be forced by compulsion to continue to perform such service.

⁵⁵ *PUDR*, supra note 53 at paras. 11 – 14. Bonded labour was also the subject matter of another PIL brought on behalf of workmen made to provide forced labour and consigned to a life of deprivation and degradation. The court again invoked the idea of human dignity, free from exploitation as part of Art. 21 read with Arts. 39(e) and (f) and Arts 41 and 42. The minimum requirements mentioned in these Directive Principles had to exist in order to enable a person to live with human dignity and when a complaint was made that the workmen were being held in bondage and working/living in conditions without adequate food, clothing or shelter, it was a violation of Art. 21.

⁵⁶ In this case, the Bonded Labour System (Abolition) Act, 1976.

⁵⁷ A.I.R. 1982 SC 1473.

⁵⁸ (1986) 3SCC 753.

⁵⁹ *Ratlam v Vardhichand*, A.I.R. 1980 SC 1622 [*Ratlam*].

⁶⁰ *Ratlam*, ibid. at para. 15.

⁶¹ (1993) Supp. (1) SCC 57.

⁶² (1993) Supp. (1)4.

⁶³ (1999) 2 SCC 718.

⁶⁴ A.I.R. 1988 SC 1037; *M.C. Mehta v India*, (1999) 6 SCC 9, 12.

⁶⁵ A.I.R. 1985 SC 652, paras 17,18,19,20.

⁶⁶ In *Shriram Oleum Gas Leak Case* [*M.C. Mehta v Union of India* (1986) 1 S.C.R. 312 (*Mehta* No. 1)]; the Delhi Pollution case [*M.C. Mehta v Union of India* (1996) 3 Supp. S.C.R. 49,56,77 (*Mehta* No. 2)]; the Taj Mahal Pollution case [*M.C. Mehta v Union of India* (1997) 3 S.C.C. 715 (*Mehta* No. 3)]; and the Delhi Vehicular Pollution and Traffic Regulation cases [*M.C. Mehta v Union of India* 6 SCC 60 (1998); 8 SCC 648; (1999) 6 SCC 14; (2000) 9 SCC 519; (2001) 3 SCC 756; (2001) 3 SCC 763; (2001) 3 SCC 767; (2002) 4 SCC 352;(2002) 4 SCC 356; (2003) 10 SCC 560 (*Mehta* Nos. 1-10)], the court developed a new doctrine of tort law, and also developed and used new remedial powers to enforce existing statutory laws dealing with environmental degradation. For example, in the *Shriram Oleum Gas Leak* case, the court adopted the doctrine of strict liability in cases involving industries engaged in hazardous or dangerous activities. The court also construed the right to life in Art. 21 broadly, so as to include the right to clean air in dealing with the carcinogenic effect of diesel exhaust.

⁶⁷ *Mehta* No. 2, ibid. at 1060-61.

⁶⁸ See S.C. Writ Pet. (civil) *M.C.Mehta v Union of India* (Apr. 5, 2002) (No. 13029/1985).

⁶⁹ (1990) 1 SCC 520.

⁷⁰ The court gave guidelines about how to scrutinize the genuineness of claims for to accommodations to be built by owners of such excess vacant lands.

⁷¹ A.I.R. 1987 SC 990 [*Vincen*].

⁷² Though the court found that judicial proceedings were not appropriate to give directions for banning the import, manufacture, sale and distribution of such drugs as were recommended for banning by the Drugs Consultative Committee or for cancellation of licenses authorising import, manufacture, sale and distribution in respect of such drugs, it held that the central government should formulate guidelines to achieve these objects. While doing so, the government should ensure that injurious drugs were totally eliminated from the market;

that such drugs as were found necessary should be manufactured in abundance to satisfy every demand; and that undue competition in the matter of production of drugs by allowing too many subsidies should be reduced.

⁷³ *CERC v India*, A.I.R. 1995 SC 927 [*CERC*]

⁷⁴ *CERC*, *ibid.* at para 20.

⁷⁵ *Mohini Jain v Karnataka*, A.I.R. 1992 SC 1858.

⁷⁶ *Unni Krishnan v A.P.*, (1993) 1 SCC 645.

⁷⁷ *Ibid.*, para 142.

⁷⁸ *Peoples' Union of Civil Liberties v Union of India*, (2007) 1 SCC 728 (ordering state governments and union territories to implement the Integrated Child Development Scheme.) The court also recently ordered that the Indian government pay Rs. 1.4 million to help combat starvation and malnutrition through the implementation of the Integrated Child Development Services plan.

⁷⁹ These include the Public Distribution System, which distributes food grain and other basic commodities at subsidized prices through "fair price shops"; special food based assistance to destitute households (*Antyodaya*); and the Integrated Child Development Scheme which seeks to provide young children with an integrated package of services such as supplementary nutrition, health care, and pre school education, as well as covering adolescent girls and pregnant women. The most far reaching scheme was one requiring midday meals at schools, which the court strengthened by requiring not just a supply of food, but a proper cooked meal.

⁸⁰ *Sen*, *Development as freedom*, *supra* note 10.

⁸¹ Jagdish Bhagwati, "Democracy and development," *supra* note 11.

⁸² P.N. Bhagwati, "Judicial activism," *supra* note 1 at 570.

⁸³ *Ibid.*

⁸⁴ In *S.P. Gupta v Union of India*, (A.I.R. 1982 SC 149) [*S.P. Gupta*] the court referring to prior precedents carving out various exceptions to the strict rule of *locus standi* reiterated the rule of expanded standing in PIL cases. It gave the example of *Sunil Batra v Delhi Administration*, A.I.R. 1980 SC 1579 and of *Upendra Baxi v State of Uttar Pradesh*, 1986 4 SCC 106 [*Upendra Baxi*] as examples of expanded interpretation given to the rule in favour of prisoners and the inmates of the Protective Home at Agra. The petitioners (one of the prisoners and two law professors respectively) were allowed to move the court by addressing letters that were treated as writ petitions. Similarly, in *Olga Tellis*, the court entertained a letter addressed by a journalist claiming relief against demolition of the houses of pavement dwellers by the Municipal Corporation of Bombay.

⁸⁶ A.I.R. 1982 SC 149.

⁸⁷ *Bandhua Mukti Morcha v Union of India*, AIR 1984 SC 802 [*Bandhua Mukti Morcha*]

⁸⁸ *Ibid.* at para. 11.

⁸⁹ Other cases where an expanded *locus standi* rule was applied include : (1) *Fertilizer Corporation Kamgar Union v Union of India*, (A.I.R. 1981 SC344) where the court held that workers in a factory owned by the government could question the legality and/or validity of the sale of certain plants and equipment of the factory by the management (2) In *S.P. Gupta*, practicing lawyers were considered by the court to be partners in the task of administration of justice undertaken by the judges and vitally interested in the maintenance of an independent judiciary. They were therefore considered to have standing either in their individual capacity or as representatives of the Lawyers' Association since they had a sufficient interest in the subject matter of the writ petitions (relating to arbitrary transfer of judges and short term extensions of judicial tenures) *S.P. Gupta*, *supra* note 84 (3) *Ratlam* saw the court upholding the standing of citizens of a municipal ward to bring a petition against the municipality to redress a public nuisance. *Ratlam*, *supra* note 59 (4) In *D.C. Wadhwa v State of Bihar*, (A.I.R. 1987 SC 579) the court found that a professor of Political Science in the state of Bihar "...has sufficient interest as a member of the public because it is a right of every citizen to insist that he should be governed by laws made in accordance with the constitution and not laws made by the executive in violation of the constitutional provisions ... here what [the] petitioner as a member of the public is complaining of is a practice

which is being followed by the state of Bihar of re promulgating the ordinances [passed by the executive] from time to time without their provisions being enacted into acts of the legislature.”

⁹⁰ *Bandhua Mukti Morcha*, supra note 87 at para. 12.

⁹¹ *Ibid.*

⁹² A.I.R. 1980 SC 1789.

⁹³(1981) 3 SCALE 1137.

⁹⁴ *Olga Tellis*, supra note 51. .

⁹⁵ *PUDR*, supra note 53.

⁹⁶ *Ibid.*, at para. 9.

⁹⁷ *Ibid.*

⁹⁸ A.I.R. 1982 SC 149.

⁹⁹ *Ibid.*

¹⁰⁰ *Bandhua Mukti Morcha*, supra note 87 at para.13.

¹⁰¹ The report of the commissioner would furnish prima facie evidence of the facts and data gathered by the commissioner and that was why such commissioners had to be responsible individuals (like a district magistrate, a district judge, a professor of law etc.) who enjoyed the court’s confidence to make an inquiry into the facts of the case in an objective and impartial fashion without prejudice.

Copies of the commissioners’ report would be supplied to the parties so that either party, if it wanted to dispute any of the facts or data stated in the report, could do so by filing an affidavit and the court then had to consider the report of the commissioner and such affidavits as may be filed and proceed to adjudicate upon the issues to the case. It would be entirely for the court to consider what weight to attach to the facts and data stated in the report of the commissioner and to what extent to act upon it. Simply because the report had not been tested by cross examination did not mean that such a report could have no evidentiary value at all. Order XXVI of the Civil Procedure Code (relating to appointment of commissions by the court) was not exhaustive and did not detract from the inherent power of the court to undertake such strategies that were necessary to establish the facts when deprived sections of the community brought an allegation of violation of their fundamental rights.¹⁰¹

¹⁰² *Godavarman Thirumulkpad v Union of India*, (2008) 8 S.C.R. 152, 154.

¹⁰³ *Supra* note 53.

¹⁰⁴ A.I.R. 1981 SC 14.

¹⁰⁵ The Punjab Cycle Rickshaw (Regulation of Rickshaws) Act, 1975.

¹⁰⁶ K. Davis and M. Trebilcock, “Law reforms and development” (2001) 22 (1) *Third World Quarterly* 1-36.

¹⁰⁷ Ronald Daniels, Michael Trebilcock and Joshua Rosensweig, “The political economy of rule of law reform in developing countries” (2004) 26 *Mich. J. Int’l L* 99 [Daniels, Trebilcock and Rosensweig, “The political economy of rule of law reform.”].

¹⁰⁸ Brian Tamanaha, “The lessons of law and development studies” (1995) 89 *American Journal of International Law* 470.

¹⁰⁹ Thomas Carothers, “The rule of law revival”, supra note 19.

¹¹⁰ *Ibid.*, at para 2.

¹¹¹ Justice P.N. Bhagwati, “Judicial activism”, supra note 1.

¹¹² *Ibid.* at 569.

¹¹³ *Gopalan*, supra note 35.

¹¹⁴ *Sathe*, supra note 21 at 121-122.

¹¹⁵ *See* note 45.

¹¹⁶ *M.C. Mehta v Union of India*, A.I.R. SC 1987 1086 at 1091

¹¹⁷ *Hussainara Khatoon v State of Bihar*, A.I.R. 1979 SC 1360.

¹¹⁸ *Baxi*, supra note 29, pp. 42.

¹¹⁹ Clark Cunningham, “Public Interest Litigation in the Indian Supreme Court: A study in the light of the American experience,” (1987) 29 *J. Indian L. Inst.* 494 at 511-511.

¹²⁰ *Bandhua Mukti Morcha*, supra note 87.

¹²¹ *Hussainara Khatoon*, supra note 117.

¹²² *Khatri v State of Bihar*, A.I.R. 1981 SC 928.

¹²³ A.I.R. 1989 SC 677.

¹²⁴ *Sheela Barse v Union of India*, A.I.R. 1983 SC 378.

¹²⁵ Again, in *Karjan Jalasay YASAS Samity v State of Gujarat*, A.I.R. 1987 SC 532, the court directed how the state government was to deal with displaced tribals whose lands would be acquired by the state to create a dam across the Karjan river. It specified a procedure by which the land would be acquired and taken possession of by the state, and how such persons would be provided with the means of subsistence.

In the Kanpur Tanneries case, *M.C.Mehta v Union of India*, A.I.R. 1987 4 SCC 463, the court seeking to properly implement the provisions of the Water (Prevention and Control of Pollution) Act, 1974 issued a direction to the Central government, the Uttar Pradesh Board and the District Magistrate, Kanpur, that they properly enforce its order that tanneries in the district install primary treatment plants within six months for treating effluents before it was discharged into the municipal sewerage leading to the Ganges causing gross pollution of its waters, or else to close such establishments. In another environmental PIL, the *Vellore Citizens Welfare Forum v Union of India*, A.I.R. 1996 SC 2715, the Court gave even more detailed directions, since it felt that in the absence of any authority established under the Environment (Protection) Act, 1986 by the central government, tanneries operating in five districts in the state of Tamil Nadu would pollute all rivers/ canals and underground water resources in these districts, contaminate agricultural land, and expose the residents in these areas to the risk of serious diseases.

In *Vincent*, having established that the right to live with human dignity embodied in Art. 21 imposed an obligation on the state to create the minimum requirements for such a life, including maintaining and improving public health, the court referred to a WHO report and directed the central government to adopt an approved national policy and prescribe an adequate number of drug formulations that would meet the requirements of the people at large. *Vincent*, supra note 71.

¹²⁶ *Sheela Barse*, supra note 124.

¹²⁷ Supra note 87.

¹²⁸ *Upendra Baxi*, supra note 84.

¹²⁹ *Bandhua Mukti Morcha*, supra note 87.

¹³⁰ *Hussainara Khatoon*, supra note 117. A number of women and children were behind bars for years awaiting trial in courts of law. The offences for which they were charged were trivial, yet they were deprived of their freedom for periods ranging from 3-10 years without their trials having commenced.

¹³¹ *Sumil Batra*, supra note 84.

¹³² Arts. 14, 19 and 21 could be invoked together to prevent inflictions which were unreasonable, arbitrary or imposed with procedural unfairness.

¹³³ Supra note 46 at 750.

¹³⁴ *M.H. Hoskot v State of Maharashtra*, (1978) 3 SCC 544.

¹³⁵ *Sukdas v Union Territory of Arunachal Pradesh*, (1986) 4 SCC 401.

¹³⁶ *Sheela Barse*, supra note 124.

¹³⁷ *Sukdas*, supra note 135 at paras 5-6.

¹³⁸ (1993) 2 Supp. S.C.R. at 659.

¹³⁹ *D.C. Wadhwa v State of Bihar*, A.I.R. 1987 SC 579.

¹⁴⁰ The court invalidated the Bihar Intermediate Education Council Ordinance, 1985 for such procedural irregularity.

¹⁴¹ A.I.R. 1996 SC at 3088.

¹⁴² It directed that political parties were under a statutory obligation to file returns of income in respect of each assessment year in accordance with the provisions of the Income Tax Act. The court found that Income Tax authorities had been remiss in the performance of their statutory duties in failing to take appropriate action against the defaulter political parties. The court directed that the Secretary, Ministry of Finance, Department of

Revenue of the central government had to have an investigation/inquiry conducted against each of the defaulter parties and initiate necessary action in accordance with law including penal action under the Income Tax Act. The Secretary was also to appoint an inquiring body to find out why and in what circumstances the mandatory provisions of the Income Tax Act regarding filing of return of income by the political parties was not enforced. The court reiterated that a political party which did not maintain audited and authenticated accounts and did not file returns for the relevant period could not be permitted to say that it had incurred or authorized expenditure in connection with the election of its candidates which was protected under Explanation 1 to section 77 of the Representation of the Peoples' Act. It laid down the procedure which candidates had to follow to claim protection under the section for such expenditure.

¹⁴³ *Vineet Narain v Union of India*, (1996) 2 SCC 199.

¹⁴⁴ Ashok H. Desai and S. Muralidhar, "Public Interest Litigation: Potential and Problems", in B.N. Kirpal et al, eds., "Supreme but not infallible --- Essays in honour of the Supreme Court of India" (New Delhi: Oxford University Press, 2000) at 172.

¹⁴⁵ See Section One, above, for discussion of the Minerva Mills case.

¹⁴⁶ P.N. Bhagwati, "Judicial activism", supra note 1.

¹⁴⁷ *Upendra Baxi*, supra note 84 at 117.

¹⁴⁸ In one view, Ghai (1991) sees law as a dependent and not an independent variable, a reflection of underlying socio economic realities and legal change is not viewed as a fruitful way of effectuating social change. In another view, Brenner (1990) argues that economic problems emanate from a weak tradition of law generally and the rule of law specifically and that the legal system should be accorded a high development priority. He assumes that the legal system can play a transformative role, despite the pervasiveness of social/economic /cultural forces antithetical to such a role. An intermediate position is taken by Cooter (1994, 1995, 1996) states that developing countries should rely less on "top-down" statutory and regulatory law and more on judicial and statutory codification of selective existing social norms that are conducive to efficient forms of cooperation rather than appropriation. (Trebilcock, "What makes poor countries poor?", supra note 15).

Tamanaha holds that modern law is necessary, though not sufficient for economic development. Legal reform was important because the world market system was gradually resulting in a global homogenization of commercial laws. To partake in this system required a minimum infrastructure of the laws and institutions necessary to enforce them. He also feels that the quality of life of developing countries will improve if they develop their own variant of the minimum content of the rule of law --- such as ensuring that the government acts according to the rules produced in the political arena and respects the civil rights of citizens, and that there is a judicial body to resort to that embodies the ethic of treating all cases before it neutrally and fairly. (Brian Tamanaha, "The lessons of law and development Studies," supra note 18)

Carothers finds that rather than mere enactment of laws, considerable investment in changing the conditions for implementation and enforcement of laws and government compliance with laws are necessary. (Thomas Carothers, "The rule of law revival", supra note 19).

Trebilcock concludes that incremental reform in the interstices of institutional structures/subsystems of developing countries is likely to be more effective than promoting changes in entire regime types. He asserts along with Tamanaha and Carothers, that a minimalist, procedurally oriented rule of law is a necessary, albeit not sufficient, condition for a just legal system. He finds that there are important connections between legal institutional reform and political reform since the effectiveness of legal institutions are contingent upon the effectiveness of a number of other institutions. (Trebilcock, "What makes poor countries poor?", supra note 15).

¹⁴⁹ See section One above.

¹⁵⁰ Sandra Fredman, "Restructuring the courts: Public Interest Litigation in the Indian Courts" in Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) [Fredman, *Human rights transformed*].

¹⁵¹ Kerry Rittich, “The future of law and development: second generation reforms and the incorporation of the social” in David M. Trubeck & Alvaro Santos, eds., *The new law and economic development: a critical appraisal* (Cambridge: Cambridge University Press, 2006).

¹⁵² See supra note 18.

¹⁵³ See P.N. Bhagwati, “Judicial activism”, supra note 1 at 566.

¹⁵⁴ Daniels, Trebilcock and Rosensweig, “The political economy of rule of law reform.”, supra note 107.

¹⁵⁵ Ibid. at 567.

¹⁵⁶ P.N. Bhagwati, “Judicial activism”, supra note 1 at 569.

¹⁵⁷ Supra note 86.

¹⁵⁸ Pathak J. in *Bandhua Mukti Morcha*, supra note 87.

¹⁵⁹ Cassels, supra note 14 at 509.

¹⁶⁰ Fredman, *Human rights transformed*, supra note 150.

¹⁶¹ Surya Deva, “Public Interest Litigation in India: a critical review” (2009) 28 (1) C.J.Q. 37 [Surya Deva, “Public Interest Litigation”]

¹⁶² *Visakha v State of Rajasthan* (1997) 6 SCC 241. See Fredman, *Human rights transformed*, supra note 150.

¹⁶³ For instance, in a case challenging the failure of the Delhi authorities to deal with waste and pollution in the city, the terms of reference of a judicially appointed committee took commissioners into the area of executive policy making as they tried to formulate proposals for economically feasible, safe, and eco friendly hygienic processing and waste disposal practices, suggesting necessary modifications to municipal buy laws and formulating standards and regulations for management of urban solid waste. See Fredman, *Human rights transformed*, supra note 150.

¹⁶⁴ Jill Cottrell, “Third generation rights and social action litigation,” in Adelman and Paliwala, *Law and crisis*, supra note 18 at 116 referring to writings by Parmanand Singh.

¹⁶⁵ Quoted in Cassels, “Judicial activism,” supra note 20 at 514. The court has also tried to send strong messages on a case by case basis whenever they noticed that the process of PIL was misused. The Supreme Court has also compiled a set of “Guidelines to be followed for entertaining letters/petitions received by it as PIL.” The Guidelines based on the full court decision of December 1, 1998 have been modified on the orders/directions of the Chief Justice in 1993 and 2003. See Surya Deva, “Public Interest Litigation,” supra note 161 at 38.

¹⁶⁶ It may be of interest to note that Indian PIL jurisprudence has also contributed to trans judicial influence especially in South Asia, in that courts in Pakistan, Sri Lanka, Bangladesh and Nepal have cited Indian PIL cases to develop a similar jurisprudence. See generally, Jona Razzaque, “Linking human rights, development and environment: experiences from litigation in South Asia” (2007) 18 *Fordham Law Review* 587; Surya Deva, “Public Interest Litigation”, supra note 162 at 32.

¹⁶⁷ Though more empirical research needs to be done to investigate the extent of compliance and the difference made by the Supreme Court’s guidelines, PIL cases are often seen as doing just symbolic justice since judges are often unable to ensure that its guidelines or directions in PIL cases are complied with. See Surya Deva, “Public Interest Litigation”, supra note 162. See also Mahendra P. Singh, “Protecting the rights of the disadvantaged groups through Public Interest Litigation,” in Mahendra P. Singh, Helmut Gorelich and Michael von Hauff, eds., *Human Rights and basic need: Theory and Practice* (New Delhi: Universal Law Publishing Co., 2008) at 322.

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