

THE SUPREME COURT AS THE MOST TRUSTED PUBLIC INSTITUTION IN INDIA

Oliver Mendelsohn
La Trobe University

THE PRINCIPAL ARGUMENT OF THIS PAPER IS CONTAINED IN THE TITLE, VIZ. that the Supreme Court is now probably the most trusted major institution in India.¹ This appears to be quite a recent circumstance and largely an outcome of two other developments. The first development is the steep decline in the prestige of other institutions, above all politicians but also including the bureaucracy. But secondly, the Supreme Court has been responsible for its own rise in popularity by adopting an overall approach that has increasingly made it seem the only true fount of justice in India. The more the other institutions have declined in prestige and trust, the more the Court has risen. This paper, then, is a short interrogation of aspects of the first half-century of the Supreme Court's existence. Although I will make an effort to place this history into the larger context of Indian public institutions, my main concentration will be on the Court itself. But I will begin with some words about this larger context.

There is no simple judgment to be made about the half-century of Indian Independence. On the one hand there are conspicuous successes both at the material and constitutional level. The most frequently cited material success is the tremendous increase in agricultural output, such that it is often said that

¹ At one level this is a factual proposition, demonstrable or falsifiable by surveys of public opinion in India. Important though such surveys are as a general indicator, they are not the basis of the argument here. In any case, I am not aware of any public opinion surveys that isolate attitudes to the Supreme Court. I understand that the Centre for the Study of Democratic Institutions in New Delhi has conducted surveys that include attitudes to the courts in general, as opposed to the Supreme Court in particular – these show a low level of trust, a circumstance discussed below.

'India can now feed itself'.² In political and constitutional terms, one only has to look at the history of the rest of pre-partition India to appreciate the strengths of the Indian experience. There is now a vigorous debate, for example, about whether Pakistan should be placed in a new analytical category called 'failed states' (along with the USSR, apartheid South Africa and so on).³ Whether or not such a category is useful, no serious observer would want to place India into it. Thus, India gave itself a highly detailed Constitution exactly 50 years ago, and this remains the Constitution which governs the country today.⁴ Somewhat more controversial but still generally agreed,⁵ India deserves credit for having remained a broadly open society and a democratic polity. In these respects India compares favourably with China. On the negative side, however, Indian poverty and inequality remain at appalling levels, sectarianism has been growing, official corruption and government lawlessness are rife and getting worse, and there is far more cynicism at every level of society than there was at the time of Independence.

Arguably one of the very worst symbols of what has gone wrong with Indian governance is the prosecution of former Prime Minister Narasimha Rao for official corruption. The veteran Congressman Rao was Prime Minister from 1992 to 1996, and the clouds of suspicion that formed around him in the last months of his rule culminated shortly after his fall in a cluster of prosecutions for the receipt of large sums of money in return for official favours. He was even arrested at one point. Nor was Rao the only leading politician to be accused of corruption. There was a whole slew of them, including L.K. Advani, then Leader of the BJP and currently Home Minister. But while these prosecutions were an indication of the level of corruption that had overtaken India at the very top, they were simultaneously something of an indication of the strength of Indian governance. The prosecutions did not take the form of victor's justice after a change of Government – in this respect they can be contrasted with Pakistan, where a death sentence has been carried out on one former Prime Minister and the immediate past Prime Minister is currently under prosecution. Whatever the merits of the charges

² This claim is true in the sense that famine is not the scourge in Independent India that it was during the colonial period, and there has indeed been a powerful increase in food production. This is not to say that all, perhaps even most, Indians get enough to eat, let alone enough to eat of the right foods. For a broader discussion of this problem, see O. Mendelsohn and M. Vicziany, *The Untouchables – Subordination, Poverty and the State in Modern India* (Cambridge, Cambridge University Press, 1998), pp. 149-53.

³ See, for one example, Jeffrey Herbst, 'Responding to State Failure in Africa', *International Security*, Vol. 21, no. 3, 1996-7, pp. 120-44.

⁴ In Asia, Japan and Indonesia seem to be the only other states which have retained their original Constitution for the duration of their post-War history. In the case of Japan this is a real source of that country's strength too, while the persistence of the Constitution in Indonesia masks at least one fundamental breach of constitutionalism in the form of a military coup.

⁵ An alternative view is put by Ayesha Jalal in a recent work, *Democracy and Authoritarianism in South Asia: A Comparative and Historical Perspective* (New York, Cambridge University Press, 1995) which throughout refers to India as a 'pseudo democracy'.

against these men, inevitably their prosecution has been tainted with suspicion of political bias. The Indian prosecutions, by contrast, were clearly non-partisan in inspiration.

Indeed, and not without its own problems, the actual prosecution (as opposed to the adjudication) of Prime Minister Rao and a number of other ex-Ministers of his Congress Government owed a great deal to the intervention of the Supreme Court itself. In response to 'public interest litigation' (PIL) petitions brought by lawyers acting either for themselves or for larger coalitions of interested citizens, the Supreme Court demanded that several insufficiently active investigations by the Criminal Bureau of Investigation (CBI) be taken up with vigour against any person 'whosoever high'.⁶ It was clear that the Supreme Court believed that the CBI was acting under Government pressure to go slow on investigating the flood of serious claims of official corruption during the period of the Rao Government. Following the lead of the Supreme Court, even the High Courts of the States began to concern themselves with the progress of criminal investigations and prosecutions.

This intervention of the Supreme Court of India into the affairs of a branch of the executive is highly unusual by the standards of the Westminster form. There has been no comparable occurrence in Britain or Australia, for example. In these constitutional systems, that of the United States too, such judicial intervention would be seen as a breach of the principle of the separation of powers. While it is possible for a court in a Westminster-style constitutional arrangement to direct an administrative body to make a decision that it has thus far failed to make, the Indian Court's energetic and multi-pronged directions to an investigative and prosecutorial authority such as the CBI go far beyond such practice. These interventions demonstrate just how far the Supreme Court has moved along the road of securing for itself a central part in Indian governance. The Supreme Court has become as powerful as any court in the world, perhaps more powerful than any other. This article will explore just how this has come about and what its implications are.

The Indian Constitution and the emergence of the Supreme Court's power

Before I sketch the development of the Supreme Court to its present position of power, it will be necessary to make some preliminary observations about the Constitution under which the Court works. The *Constitution of India* 1950 is a complex and lengthy instrument which cannot easily be characterised in terms of fundamental orientation. On the one hand it embodies a statement of fundamental rights for individual citizens of India,

⁶ *India Today*, 31 Oct. 1996, p. 21.

rights which are capable of full enforcement in the courts. The rights follow what was by 1950 a relatively standard international pattern, including rights to equality, religious freedom and speech, and freedom from arbitrary imprisonment and from deprivation of property without compensation. Such a statement of rights was no more than fit and proper to a society newly emerged from colonial autocracy. But on the other side the Constitution seems to perpetuate that authoritarian legacy by laying down powerful mechanisms of governance for a society conceived to be always susceptible to disorder. So the Constitution provides the Government of the day acting through the President as head of state a power to declare a state of emergency and thereby suspend the recognition of those very rights that have so forthrightly been enunciated earlier in the document (Article 359).

One of the most novel aspects of the Indian Constitution is its elaboration of a set of 'directive principles of state policy'. These constitute a relatively radical set of prescriptions to bring about social justice but, unlike the fundamental rights, they are not enforceable in the courts. The directive principles include the right to an adequate means of livelihood; 'that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment'; and that men and women receive equal pay for the same work (Article 39). Among the other goals there is to be free legal aid; provision for just and humane conditions of work and maternity leave; a living wage for workers; and provision for free and compulsory education for children. Despite the fact that the Constitution makes abundantly clear that these goals are not judicially enforceable, in recent years the Supreme Court has on occasion ignored the distinction between directive principles and fundamental rights. Thus the Court has in effect rendered the right to education a fundamental right with full enforceability.⁷ This has come about as part of the larger development of judicial activism, the subject of the present paper.

The Supreme Court did not begin its life as an activist court, that is a court dedicated to energetic intervention on behalf of the dispossessed elements of Indian society. Some of the most important early judicial battles were over land reform legislation, and a number of the Court's decisions invalidated crucial reform legislation and gravely injured the overall prospects of reform.⁸ Indeed, it is arguable that for roughly the first two decades the Supreme Court tended to function as a support for the most powerful landed interests in India. This approach of the Court reached its apogee in the famous *Golak Nath* case of 1971.⁹ The legal issue in this case

⁷ *Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCC 645.

⁸ There is no exhaustive study of the Supreme Court's dealing with land reform legislation. But one useful discussion is Daniel Thorner, *The Agrarian Prospect in India* (Allied Publishers, New Delhi, 1976), pp. 18-31.

⁹ *Golak Nath v State of Punjab* AIR 1967 SC 1643.

was the extent to which Parliament had free rein to change the Constitution so as to restrict property rights. In an effort to acquire more land for redistribution, a Constitutional amendment (the seventeenth) had been passed by the Parliament to effect a certain technical change in the definition of an estate in land. On the face of it, the Constitution was freely amendable by simple Act of Parliament (Article 368). But the question raised in *Golak Nath* was whether this free power of amendment of the Parliament could be used so as to deny or abridge fundamental rights laid down in the Constitution as originally created. In a split decision the Supreme Court held that there was a 'basic structure' to the Constitution that included the fundamental rights and that this basic structure was not open to amendment by the Parliament. The Parliament (in other words the Government of the day) was thereby prohibited from amending the Constitutional right to property in a way that disadvantaged property owners. Although this was in one sense yet another profoundly conservative decision in favour of landed interests trying to avoid confiscation under reform legislation, at another level the decision has underpinned the whole subsequent growth of judicial power in India. What the court was asserting for itself in *Golak Nath* was the right to determine just what constituted the 'basic structure' of the Constitution.

In the subsequent case of *Keshavananda Bharati v State of Kerala* (1973)¹⁰ the Court overruled its decision in *Golak Nath* and held that fundamental rights were susceptible of amendment by the Parliament. But the Court retained the idea that there was in fact a 'basic structure' to the Constitution: it was just that this basic structure did not include fundamental rights or the right to property in particular. The Court said that the basic structure included provision for democracy, a secular state, federalism and a number of other aspects of the Constitution.¹¹ Beyond the particular issue of amendment of the Constitution, the Court's flexing of its muscles had shown the way to a broader judicial activism. This activism has reached its full flowering in public interest litigation.

¹⁰ *Keshavananda Bharati v State of Kerala* (1973) 4 SCC 225.

¹¹ The present BJP Government has established a Constitutional Commission 'to examine in the light of past 50 years as to how far the existing provisions of the Constitution are capable of responding to the needs of efficient, smooth and effective system of governance and socio-economic development of modern India and to recommend changes, if any, that are required to be made in the Constitution within the framework of parliamentary democracy and without interfering with the basic structure or basic features of the Constitution'. It is clear that the BJP and its associated bodies would like to read out of the 'basic structure' of the Constitution the principle of 'secularism'. Whether it will be able to accomplish this through the Commission and subsequent action remains to be seen. For a discussion of this, see Upendra Baxi, 'The Kar Seva of the Indian Constitution? Some Reflections on the Proposals for the Review of the Indian Constitution', *Economic and Political Weekly* (forthcoming).

Public Interest or Social Action Litigation

The First Phase

Public Interest Litigation (PIL) is an invention of the period after the great constitutional trauma of the post-Independence period, the Emergency proclaimed by Indira Gandhi's Government and lasting from 1975 to 1977. Like virtually all structures in India, the courts had no reason to congratulate themselves on the way they upheld constitutional norms during the Emergency. Self-examination by some of the judges led to a stance markedly more favourable to the assertion of both the classic or negative civil liberties and also the positive interests of those at the bottom of the Indian economic and social heap. Somewhat curiously, the leftist (albeit left-authoritarian) orientation of the early Emergency period was one of the factors that helped move the Court in its new direction. PIL was essentially an invention of certain judges of the Supreme Court advised by a handful of academics – one of them Professor Upendra Baxi of the University of Delhi – and lawyers.

The form of the PIL cases was a writ petition under Article 32 of the Constitution moving the Supreme Court to enforce one or more fundamental rights enunciated by the Constitution and argued to have been breached. Later, and far less importantly, PIL writ petitions were also accepted by the High Courts of the States under Article 226. This device of the writ petition was one of the great innovations of the Constitution, enabling individuals to take their cases directly to the Supreme Court or the High Courts of the States rather than on appeal from lower courts after the inevitable years of litigation. Such petitions had been richly used, for example, by civil servants complaining of events (or non-events, such as lack of promotion) in their careers. But in the post-Emergency landscape, the writ petition came into its own as a mechanism by which the Supreme Court could dispense popular justice. PIL writ petitions differed from earlier petitions and ordinary litigation by virtue of not being directed to the narrow self-interest of the petitioner or litigant. Indeed, in many cases the potential beneficiaries had neither conceived nor played any substantial part in the conduct of the case. Sometimes activist lawyers working substantially alone have taken up a cause and petitioned the Court for an end to abuse. In other cases lawyers have been assisted by civil libertarians of diverse backgrounds or by journalists or by activists (environmentalists, for example) working in a particular area of struggle.

The essential foundation of PIL was a willingness on the part of the judges of the Supreme Court, and later the High Courts too, to relax the ordinary strictness of procedural forms for litigation.¹² Crucially, the rules as

¹² The best short account of PIL or SAL is Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India', U. Baxi (ed.), *Law and Poverty: Critical Essays* (N.M. Tripathi, Bombay, 1988), pp. 387-415.

to standing were relaxed: these are the rules that require litigation to be conducted by an interested party. As suggested above, one of the characteristics of PIL is that it is not directed to self-interest as this is usually conceived in the courts. But self-interest is what ordinarily gives a litigant standing – a litigant must not be a mere busybody. So the rules as to standing had to be varied to allow third parties – lawyers, ‘social workers’, journalists, academics and so on – to bring action in pursuit of a cause that the Court was prepared to see as their legitimate concern. The Supreme Court was also prepared to dispense with the accepted formalities of the admission process, such that on occasion it accepted as a legitimate petition something as informal as a mere postcard sent to a judge. (This came to be known somewhat grandly as the ‘epistolary jurisdiction’ of the Supreme Court.) This willingness to encourage public interest litigation proceeded side-by-side with the enormous overload and backlog of cases that has afflicted the Supreme Court for years and is constantly getting worse. Clearly the Court was saying that here is a vein of cases that is so important that way must be made for them without regard to form or burden of business.

There have now been many hundreds of PIL cases, far more than could possibly be discussed in a short article. All that will be done here is indicate the broad types of cases that have come to the Supreme Court, the distinct historical periods that can be discerned, some of the problems of the litigation, as well as several of the more important individual cases. Thus there have been two broad periods of intense PIL activity: the first period was from 1979 to the mid-1980s; and the second, from the early 1990s to the present. Between these periods there was much less activity. As to the subject matter of the litigation, during the first period there was a concentration on social injustice suffered by the downtrodden and powerless. During the second period, the thrust shifted to environmental and resource concerns; and, more recently, a major preoccupation has been corruption in high places.

The very first cases centred on the criminal justice system – prisons, the plight of prisoners supposedly under trial rather than sentence, the behaviour of police – and psychiatric institutions. Thus the very first case in 1979, *Hussainara Khatoon and others v Home Secretary State of Bihar*,¹³ concerned prisoners who had been imprisoned without trial for periods longer than any possible sentence that could be handed down for the offences of which they were charged. The Court was prepared to entertain the petition despite the fact that it was filed by an advocate who had had no direct acquaintance with the case and had read of its circumstances in a newspaper. Imprisonment of what came to be known as ‘undertrials’ for years on end, for a period longer than any permissible sentence, was found to violate Article 21 of the Constitution: ‘No person shall be deprived of his life or personal liberty except according to procedure established by law’. In what became

¹³ (1980) 1 SCC 81.

characteristic of many PIL cases this matter came back to the Court on several occasions as the facts of the case were clarified and the stance of the authorities was ascertained, including any recalcitrance in the face of legal directives. In *Hussainara* the Court had no hesitation in issuing orders far broader than necessary to decide the particular case – this itself is not the form that higher courts adopt in the Anglo-American-Australian world, though of course in these jurisdictions too an important case has value as precedent and is expected to influence the actions of the executive. The difference in *Hussainara* and many subsequent PIL cases is that the Court was prepared to issue general rulings on the law. In this case the Court ordered that all undertrials had to be informed of their entitlement to bail and that they had to be released if the period of their imprisonment was longer than the maximum possible sentence for the offences of which they were charged.

Fuelled and to a large extent framed by cases such as *Hussainara*, undertrials became one of the great issues of the early post-Emergency period. One aspect of this was the disgraceful overcrowding and squalid conditions of jails, which became a national scandal right at the end of the 70s. The habitual confinement of prisoners with leg irons and handcuffs was explored in a number of PIL cases in 1979 and 1980, as was the circumstance of solitary confinement. Another case followed the most infamous event of all involving undertrials, the Bhagalpur blinding of 1980, when ten men in Bhagalpur Central Jail had their eyes punctured with sharp instruments and then filled with acid (*Anil Yadav and others v State of Bihar and others*).¹⁴ This case was filed in order to try and ensure that the investigation and prosecution would proceed in a speedy and orderly manner. Given the inflamed caste feelings that led to the event in the first place, such orderliness was inevitably difficult to achieve. A later case sought to secure vocational training facilities for some of the victims.

Closely related to the litigation of abuse within the criminal justice system, a range of cases was brought to the Supreme Court about the treatment of mentally ill inmates – some in psychiatric institutions, some in jails. For example, *Rudul Sah v State of Bihar* (1982)¹⁵ was a habeas corpus petition claiming that a man had been kept in prison for 14 years as allegedly insane following his acquittal at trial.

For reasons of space, I will pass over a large number of cases categorised by a recent work under the following rubrics: the police; the armed forces; injustices specific to women; children.¹⁶ Though there are many important cases here, the broader perspective of this article can be anchored by cases

¹⁴ 1982 (1) SCALE 43.

¹⁵ AIR 1983 SC 1086.

¹⁶ Sangeeta Ahuja, *People, Law and Justice- a casebook on public-interest litigation* (Orient Longman, New Delhi, 1997), 2 Vols.

drawn from other categories. Thus in this first flush of PIL there were several cases that seemed to open up whole areas of social life to the scrutiny of progressive opinion for practically the first time. One of the most important of these was *Olga Tellis and others v Bombay Municipal Corporation and others* (1981).¹⁷ Olga Tellis was a journalist in Bombay, and she and two pavement dwellers brought their action to fight the mass and forcible eviction of pavement and slum dwellers ordered and begun by the then Chief Minister of the State, A.R. Antulay. The Government's intention to beautify the city by ridding it of human eyesores continued a strong theme of the mid-1970s Emergency in a number of cities, notably the capital New Delhi itself. Clearance and deportation of large numbers of people out of Bombay began early in the morning of 23 July 1981. In response Olga Tellis wrote to Justice Bhagwati of the Supreme Court and the letter was registered as a petition, later formalised and detailed by the advocate Indira Jaising.¹⁸

The radical argument in *Olga Tellis* was that there was a Constitutional right under Article 21 to squat on the pavements of Bombay. Of course, there was no such specific right articulated in the Constitution document. To repeat the words of Article 21: 'No person shall be deprived of his life or personal liberty except according to procedure established by law'. On the face of it and powerfully argued by the Bombay Corporation, squatting on pavements and erection of structures on public lands were unlawful. The Corporation argued that it had a duty to clean up the streets and the pavements to promote the orderly development of the city. But the argument of the petitioner was that the overwhelming poverty and deprivation of the people in question were the inescapable context of the petition. The pavement dwellers had not come to Bombay out of free choice but from necessity. To remove them abruptly and forcibly from their meagre existence in the city was to condemn them to a still worse and more dangerous life. The Court accepted this argument. The right to life in Article 21 was declared to include the right to livelihood:

If the right to livelihood is not treated as part of the Constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation (at pp. 193-4).

Perhaps no case illustrates the extraordinary change in the stance of the Supreme Court during the early period of Public Interest Litigation than *Olga Tellis*. Acceptance by the Court of the proposition that there was a fundamental Constitutional right to squat on the pavements of Bombay was nothing less than stunning. Prior to invention of the PIL form there would have been no mechanism by which to bring a case like this, but the

¹⁷ AIR 1986 SC 180.

¹⁸ There was parallel, less radical PIL on this same issue in both the High Court of Bombay and the Supreme Court. See Ahuja, *People, Law and Justice*, Vol. 1, pp. 352-6.

proposition itself is an indication of just how far the Court had come from its earlier, profoundly conservative, history.

This short discussion of the early period of PIL has no more than touched on the important range of problems addressed by the Supreme Court. The object has been to give an indication of the kind of issues to do with social justice that began to come to the court following the restoration of a functioning democracy after Indira Gandhi's Emergency. But I will return to this early period and discuss at least one more major case when a more evaluative approach to PIL is taken below.

Novel and important though these early PIL cases were as the major indication that the Supreme Court had ceased to be predominantly the servant of the rich and powerful in India, it is doubtful that they transformed the consciousness of the citizenry as a whole. By the middle-1980s the Supreme Court was probably still not generally seen as anything more than the highest court in India. It had not yet developed a reputation as the conscience of the nation. Two other developments have been the midwife to such a change. First, politics, politicians, the bureaucracy and even most of the courts of law have continued to decline in public estimation. And secondly, the Supreme Court has more recently taken up a different style of Public Interest Litigation. Once the Court began to pronounce on matters that affected the whole public rather than merely the underprivileged, the status of the Court began to rise accordingly.

There was a temporal gap of about a decade between the first phase of Public Interest Litigation sketched above and the second phase which continues even now. During this decade, roughly from the mid-1980s to the mid-90s, there were still a considerable number of petitions being taken to the Court. And in retrospect, the beginnings of the shift of subject matter to the contemporary pattern can be discerned from the litigation of this time. But the decade can still be said to constitute something of an interregnum by virtue of the considerably lower profile than was true of PIL either before or since. Explanation of the lull in intensity of PIL at this time is not self-evident. Perhaps the explanation has something to do with the state of political life – it was a turbulent period, with the assassination of Prime Minister Indira Gandhi, the succession of her son Rajiv Gandhi to the Prime Ministership, his electoral defeat, a short-lived Janata Dal Government, and then assassination of Rajiv Gandhi. Narasimha Rao took over leadership of Congress and was able to serve out a whole five-year term. Perhaps the return to considerable stability during this period was a contributing factor to the re-emergence of a more intense judicial activism. It may be that judicial activism is suited to relatively quiet political times.

Environmental Issues

By far the dominant pattern of PIL since the mid-1980s has been issues to do with the environment – including pollution of water, air and land; deforestation and inappropriate forestation (using species like eucalyptus); encroachment on wetlands; and a range of other matters such as the hunter gathering rights of tribal people. Unlike the earlier period when issues of social justice predominated, there have been no individual cases of special significance. Rather, what stands out is the pattern of litigation rather than any individual case brought by an environmental movement that was gathering strength from the mid-80s. The name of one particular Supreme Court advocate, M.C. Mehta, recurs through many of the cases from the mid-1980s on. This pattern reached its zenith ten years later in a flurry of decisions of the Court in which Justice Kuldeep Singh gave judgment either alone or with one or more of his colleagues. Justice Singh became known as something of an environmental specialist, such judicial specialisation being yet another of the unorthodox aspects of PIL.

The environmental litigation that captured the public imagination was a series of cases brought by advocate M.C. Mehta on the industries polluting the air, water and land of Delhi. No doubt the fact that the subject of the litigation was the national capital contributed greatly to the impact of these cases. As early as 1985 Mehta had raised the issue of polluting industries in Delhi, but it was not until 1995 that the matter was taken up in earnest. In *M.C. Mehta v Union of India* (1995) the Secretary (Environment), Government of India, stated that 8378 industries, including noxious and heavy industry, were operating in Delhi in contravention of the Master Plan for that city and relevant legislation including the *Factories Act* (1948). The Court ordered that notices be sent to the offending installations requiring their closure or relocation. It appears that this order was not intended to close down particular factories at that stage, but to prepare the ground for such closures. In a later order in the same case, the Court directed the Municipal Corporation of India 'not to register or give licences to any hazardous/noxious industry in Delhi'. In a third order, the Court directed the closure of 168 of the hazardous installations which were found to be operating unlawfully and in disregard of the Master Plan for Delhi. Delhi and the neighbouring States were ordered to provide assistance to the industrial units to relocate in a more suitable environment.¹⁹ Following this decision and again prompted by advocate M.C. Mehta, the Supreme Court plunged deeply into the issue of pollution of the river Yamuna and also the Ganges into which the Yamuna flows. The Court made a series of orders in relation

¹⁹ This series of cases is reported as follows: *M.C. Mehta v Union of India* 1995 (4) SCALE 789; *M.C. Mehta v Union of India* 1995 (7) SCALE SP 7; *M.C. Mehta v Union of India* (1996) 4 SCC 351. The cases are summarised by S. Muralidhar in Ahuja, *People, Law and Justice*, Vol. 2, pp. 804-6.

to sewerage disposal and the discharge of toxic flows from industrial establishments.²⁰

The Probity of Public Officials

In quantitative terms, the judicial engagement with elected public officials has been a comparatively minor as well as recent preoccupation of the Court. But it is this engagement that has most clearly captured the public imagination and consolidated the Supreme Court's position as the custodian of public virtue. In a word, the issue is corruption. The acquisition of illicit money by both appointed and elected officials has long been a notorious element of public life in India and the general perception is that this phenomenon has been gathering strength over time. Normally, of course, any judicial engagement with this issue would be in the form of adjudication of prosecutions for breach of the criminal law. But, of course, the problem is that few cases involving corruption ever reach the stage of prosecution. In addressing this issue the Supreme Court has made its impact on corruption in the highest places.

The single most important case has concerned the 'Jain hawala' matter. This first received a public airing when a journalist and several Supreme Court advocates took a petition to the Supreme Court in October 1993 asking the Criminal Bureau of Investigation (CBI) to pursue allegations that the Jain brothers, businessmen, had given bribes to politicians in return for the award of government contracts and favours. The then Prime Minister, Narasimha Rao, was one of the politicians mentioned in the diaries as a participant in the unlawful activities of the Jain brothers. The petition stated that information had been laid before the CBI in 1991 but that because of the power of the suspects, the CBI was not pursuing the case with sufficient vigour. Progress of the writ petition was initially slow: one of the petitioners recalled that 'in the first year of the litigation, the Court seems to have had no clue to the case'.²¹ But when a new bench headed by Justice Verma was constituted in November 1994, it immediately grasped the significance of the case. The head of the CBI was required to attend the next hearing and was roundly criticised by the bench for his lack of progress to that time. For more than a year this official was required to submit periodic reports on the state of the investigation, the reports taking the form of in camera meetings with the bench. This highly unusual secretiveness seems to have been adopted against the backdrop of the great seniority of those under investigation. Eventually, early in 1996, the first charges against tens of leading politicians under investigation (but not including Prime Minister Rao) were laid by the CBI. Narasimha Rao was not so fortunate in one of several other investigations involving him among others. In what became known as the St Kitts Forgery

²⁰ See 'SC gives trend-setting verdict in Yamuna case', *Times of India*, 4 Dec. 1995.

²¹ *India Today*, 15 Mar. 1996.

case, Rao was not only charged but actually arrested before being granted bail. Again the charges had been brought against Rao only after the Supreme Court had taken up yet another PIL case arguing that the CBI had been going slow in its investigations of the then Prime Minister.²²

Never before 1996 had the Supreme Court so directly and personally confronted politicians occupying the very highest positions of power in India. Just why the Court was prepared to act so forcefully at this time is a matter of some speculation. One obvious factor was the character of the judge leading the bench in the Jain hawala and several other cases, Justice Verma. Clearly this particular judge was prepared to be more resolute than other judges had been. But it is also true that Justice Verma was one of a unanimous bench of three judges in the Jain hawala case, so at best he was the prime mover rather than a solitary radical. And, as the cases on the environment have shown, even prior to this confrontation with politicians the Court had already entered into a new phase of activism. Indeed, it was 'the environment specialist' Justice Kuldip Singh, not Justice Verma, who at the time had the reputation of being the most activist of the judges of the Supreme Court. Deeper explanations therefore have to be sought in the institutional history of the Supreme Court, the Bar, constitutional politics and public opinion. Perhaps the most powerful explanation is to be found in the idea of an institutional momentum built up by previous judicial activism, together with an intensification of public distaste at high-level corruption and its political practitioners. When the Supreme Court intervened it rekindled a sense of probity and public morality that many had despaired of ever revisiting.

The Controversies Surrounding Judicial Activism

Despite the record of achievement that has been sketched above, the activism of the Supreme Court of India has not lacked attendant controversy. The criticisms have been of several different kinds. First, members of the legal profession have been concerned about procedural novelties of Public Interest Litigation. Secondly, questions have been raised as to the efficacy of PIL decisions of the Court: in a word, are the decisions implemented? And thirdly, there has been an argument from the standpoint of democracy to the effect that the Supreme Court has usurped the political and executive privileges that properly derive from electoral trust of the people.

As to the first issue, there is no doubt that PIL has involved considerable departure from ordinary procedural forms. Some of the departures seem almost impregnably justifiable. This applies, for example, to the relaxed admission procedures which have by-passed lawyerish, procedural niceties so as to allow the hitherto downtrodden and mute to have a voice in the highest court. Other innovations are not so clear cut. For example, in a number of the

²² *Ankul Chandra Pradhan v Union of India* (1996) 6 SCC 354.

more important cases the Court has appointed particular persons to provide research reports on the situation that obtains in the relevant industry or jail or slum colony. These reports have then become part of the basis of the Court's decision. But advocates for the defence have often taken objection to this process, pointing out that it confounds the ordinary rules of evidence. Ordinarily evidence is given orally rather than in writing and is subject to robust cross-examination by the opposing party. Such procedure is the very essence of the adversarial system of justice and is the principal procedural characteristic of common law, in contrast to the code-based systems of Continental Europe. By taking notice of commissioned research reports as if they were uncontroversially factual, the Court has effectively denied the defence an opportunity to contest the evidence in the reports. There has also been criticism of the frequent tendency in PIL to make judgments which are expressed in highly general terms rather than limited to the particular case in litigation.

The question of the efficacy of PIL decisions is a much larger and more important issue. It is not an issue that can be more than touched on here; I have looked at it in considerable detail elsewhere.²³ There can be no definitive answer to the question of just how much difference PIL decisions have made to the industries and areas of injustice or concern that gave rise to the litigation. Far more research work needs to be done to see what improvement there has been, for example, in the conduct of jails and psychiatric institutions, and in the cleanliness of the Yamuna and Ganges rivers. The present author conducted a study of one industrial situation, that of the stone quarry workers of Faridabad, close to New Delhi. This is an appalling industrial site whose workforce is predominantly composed of inter-state workers brought by middlemen to work for the operators of the quarries. The Faridabad stone quarries were the subject of one of the most important PIL cases, *Bandhua Mukti Morcha v Union of India and others* (1984).²⁴ This case was brought by an organisation founded by a political activist, Swami Agnivesh, with the object of having a large number of the quarry workers declared 'bonded labourers' within the meaning of the *Bonded Labour System (Abolition) Act 1976*. The Act had been passed during the leftist phase of Indira Gandhi's Emergency, and had been designed to liberate and rehabilitate workers who were forced to work with little or no payment for someone to whom they (or even their fathers or grandfathers) owed money. After a great deal of evidence, some of it in the form of a research report commissioned from a social scientist, the Court found that many of the workers in the quarries were in fact bonded within the meaning of the Act, and ordered that they be returned to the place from which they had originally been transported and that the State of Rajasthan rehabilitate

²³ See Oliver Mendelsohn, 'Life and Struggles in the Stone Quarries of India: a case study', *Journal of Commonwealth and Comparative Politics*, Vol. 29, no. 1 (1991), pp. 44-71.

²⁴ AIR 1984 SC 802.

them and their downtrodden families. This remains one of the greatest victories of the PIL movement. Unfortunately, close scrutiny of what happened on the ground leads to a considerably less celebratory account of the case. It turns out that the bonded labourers were dumped into a wholly unsuitable environment in Rajasthan where they had had only a casual connection almost forty years previously. The Government of Rajasthan made scant effort to provide these hundreds of people with the means to survive, let alone thrive. When I interviewed them in the desert of Rajasthan, they were unanimous that their present condition was far worse than it had been in the degraded circumstances of Faridabad. My argument in the paper was that this miserable outcome had arisen from faulty reasoning in the case and also the utter unwillingness and incapacity of State governments to commit themselves to rehabilitating some of India's most put-upon people. In short, the PIL victory in the stone quarry workers' case had simply failed to deliver measurable improvement in the lives of the quarry workers.

It is not possible to generalise from this one case of Public Interest Litigation so as to conclude that PIL has been an overall failure. There have been many cases and very few of them have been studied in a rigorous empirical way. But the findings of the above study must give some pause to too-naïve hopes and claims that are made for PIL. It is far from a panacea. Any effectiveness that it may have will undoubtedly be vitiated by over-use. Moreover, it is vital that the judiciary have a sense of realism as well as goodwill to those in whose name litigation is waged. It was precisely that sense of realism that was lacking in the Stone Quarry Workers' case. On the other hand, it would also be wrong to suggest that the only measure of PIL is whether it has delivered concrete outcomes in individual cases. PIL has operated on multiple levels. On the one hand it has been directed to individual cases of injustice and wrongdoing. But simultaneously, if not always consciously, PIL has sometimes worked towards a general revitalisation of the moral foundations of Indian constitutionalism. This may be a difficult proposition to sustain empirically, but it is possible to argue – indeed I myself would want to argue this – that in its PIL jurisdiction the Supreme Court has been engaged in nothing less than the revival of Indian democracy. Again, this is not to suggest that the character and outcome of individual cases is not crucial to the quality of PIL. It is only to make the point that the subject matter and manner of considering PIL cases have had beneficial consequences for the larger project of Indian constitutionalism.

This latter argument connects up with the objections that have often been levelled against PIL and Supreme Court activism more generally, to the effect that they represent a challenge to and derogation from democracy. This argument is not novel to India but has been offered up wherever powerful apex courts have handed down judgments in areas of intense controversy. Thus, judicial activism in the United States has often been seen to have usurped power properly residing in the elected branches of government – the

President and the Congress. This was an argument frequently levelled against the Warren Court of the 1950s and the Court of the 1960s with its path-breaking decisions on the rights of criminal suspects and electoral malapportionment. More recently, the High Court of Australia has been intensely criticised by social and political conservatives for its decisions on Aboriginal land rights in *Mabo* and *Wik* and for its 'discovery' of implied rights embedded in the Constitution. So it is not a matter of any wonderment that the Supreme Court of India has been criticised for pushing into areas where it has no real business. For example, the sociologist Andre Beteille has written:

Judicial activism often stems from the best of motives, the desire to set things right in corrupt and decaying public institutions ... But it can also be argued that in a democracy, judicial restraint is a virtue not only in good times but also in bad times.²⁵

There is no doubt that fine decisions must be made about the proper extent of judicial power. Surely the Supreme Court, an unelected, unaccountable body cannot be allowed to entertain and make decisions on whatever it chooses. This would not only represent a problem for the principle of a constitutional democracy in its Indian form, it would also lead to the possibility of judicial tyranny. But in my reading this is not what has been happening in India. Rather, at key times and in limited ways, the Supreme Court has moved to fill a constitutional vacuum left by a parliament and executive which have been unable to focus sufficiently on 'institutional decay', to use Beteille's phrase, and public squalor and spoliation (in the matter of the physical environment).

Conclusion

In less than twenty years the Supreme Court of India has done nothing less than re-invent itself. From an early post-Independence history of conservatism, the Supreme Court has emerged as the most admired and trusted of the major institutions in India. While the lower courts, the bureaucracy and above all the politicians have come into widespread disrepute or at least cynicism by virtue of their perceived corruption, the Supreme Court has been untouched by scandal or even innuendo. This reputation for honesty has underpinned the Court's novel departure from its own previous approach to litigation. The Court has emerged as a friend of the poor and of social justice in general, a protector of the physical environment, a defender of constitutional morality. True, not all the judges and not all the decisions of

²⁵ Andre Beteille, 'Judicial Activism – Future of Institutional Autonomy', *Times of India*, 12 Dec. 1995. See also the debate between eminent Indian jurists Nani Palkhivala (critical of) and Soli Sorabjee (defending) PIL in the *Sunday Times of India*, 3 and 10 Dec. 1995.

the Court can be viewed in this light. But nor is this reading of the Court a selective one. An apex court can establish a general mood, indeed a whole 'era', by a few major decisions that tend to have a ripple effect. In the case of the Supreme Court of India there have been more than a few decisions establishing the progressive trend sketched above.

In striking out in the direction it has, the Supreme Court has not only renovated itself but also made a crucial contribution to Indian democracy itself. From the 1960s a veritable slew of commentators asked the question of whether India could survive as a democracy and whether the army was likely to take an increased role in political life.²⁶ The long-term decline of the Congress Party, the rise of the BJP and the resurgence of Hindu-Muslim tensions are just some of the developments that have put great strains on public life in India. Less immediately apparent but more insidious has been the overall decay of public institutions in India – notably, schools, universities and the bureaucracy. In this climate of strain, decay and public cynicism, the rising prestige of the Supreme Court has been of inestimable value to the whole project of democracy in India. Democracy is not just about majoritarianism; it is also about minority rights and social justice. It is precisely in relation to these matters that the Court has been so valuable, and in the process of taking these matters seriously it has given heart to a wide section of Indian society. But courts are also unusually fragile institutions. Changes of personnel, threats by more powerful institutions (Prime Ministers, politicians in general, bureaucracy) can quickly undermine the courts' autonomy. So the continued vitality and progressiveness of the Supreme Court cannot be taken for granted. Its progressive role is both immensely fragile and worthy of concerted support. The Supreme Court is now one of the central strengths of Indian public life.

²⁶ One of the best known works sounding alarm about the prospects of Indian democracy was Selig Harrison, *India: the Most Dangerous Decades* (Oxford University Press, Madras, 1960).

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VI

Growth of Public Interest Litigation: Access and Democratization of the Judicial Process

TRADITIONAL PARADIGM OF ADVERSARY ADJUDICATION

In chapter IV, we saw how the Supreme Court gave liberal interpretation to various provisions of the Constitution and thereby increased its own power while expanding the rights of the people. Along with the growth of the doctrinal law of individual liberty and governance, the Court also liberalized its procedure with a view to facilitating access to the common man and increasing public participation in the judicial process as a means to control the other organs of government. This required radical changes in the traditional paradigm of judicial process. The traditional paradigm of the adversarial judicial process was designed for adjudication of disputes between private parties over contracts or civil liability, property, or matrimonial matters. It was based on the following hypothesis: (1) people were supposed to know the law and their rights, and (2) the judicial process was the least desirable method of settling disputes and had to be used only when other methods such as inter-party settlement, conciliation, or mediation did not work.

The traditional legal theory of judicial process envisioned a passive role for the courts. It postulated that: (1) The courts merely found the law or interpreted it but did not make it. (2) If they made the law, they did so only to fill in the interstices left by the statute and only to the extent necessary for the disposal of the matter before them. (3) After a matter is dealt with by a court and it has given its decision, that decision is binding on the parties and the same matter cannot be raised again before the same court or a court of concurrent jurisdiction. An appeal may,

however, lie against the decision to a higher court. The decision of the highest appellate court is final and binding on the parties and the questions regarding rights and liabilities decided therein cannot be raised again before any court. This is known as the principle of *res judicata*. (4) Only a person who has suffered an injury or whose right is violated can approach the court and initiate the judicial process. This is known as the requirement of *locus standi*. (5) A person who has a cause of action and *locus standi* to raise an issue before a court of law must do so within a prescribed time limit provided by the law of limitation. This paradigm postulated a litigant who is conscious of his rights and is willing to vindicate them by taking prompt resort to judicial process. In this paradigm of judicial process, only a person whose interest was prejudiced could move the court and he had to do so within reasonable time.

The above paradigm of judicial process was based upon the negative concept of judicial function and it applied to the public law adjudication also. It suited the *laissez-faire* economy and the minimum State concept that was prevalent during the nineteenth century. Public law was an exception to the generality of private law and the application of the same paradigm to the public law was considered to be compatible with the concept of rule of law. The concept of judicial function, however, was bound to change when the court undertook the function of judicial review. In judicial review, the courts were to prevent illegality on the part of the government and thereby also to protect individual liberty. The above paradigm had to change when courts started resolving conflicts between liberty and authority and more so when the concept of the State underwent a change. With the transition from *laissez-faire* state to welfare state, the nature of judicial review changed and the courts could not continue to remain passive. Unlike in litigation involving private disputes, public law litigation involved greater public interest since the maintenance of the rule of law was its direct concern. Therefore, the courts had to gradually evolve a new paradigm of judicial process for public law adjudication.

PARADIGM OF PUBLIC LAW JUDICIAL PROCESS

In England, the king's courts exercised the power of judicial review over all subordinate courts and administrative authorities with a view to ensuring that they acted within the limits drawn upon their powers by law. The courts were endowed with the power to issue prerogative writs such as *habeas corpus*, *certiorari*, *mandamus*, *prohibition* and *quo warranto* for enforcing such limits. If a person was illegally detained or arrested, the writ of *habeas corpus* was issued to set him free. If a tribunal or an

administrative authority acted illegally, it could be stopped from proceeding by the writ of prohibition or its decision could be quashed by the writ of *certiorari*. *Mandamus* was a writ issued for compelling an authority to do what it was legally bound to do or to forbear from doing what it was forbidden by law to do. If a person occupied a public office illegally or by usurpation, he could be asked to vacate it by issuing the writ of *quo warranto*. It was because of the efficacy of these writs that Dicey said that liberty of an individual emanated from the remedies provided by the courts.¹ The courts for a long time followed the rules of private law adjudication while exercising the above jurisdiction. However, realizing that the larger public interest is involved in a public law litigation, the courts began to make exceptions. In England, for example, the earlier provision was that an application for a writ could be made only by a person who had suffered an injury or whose right had been violated. The writ of *habeas corpus*, however, could be sought by a friend or even a stranger on behalf of the person who was illegally detained. Subsequently, the rule of *locus standi* was liberalized in respect of other writs also. The Law Commission of the United Kingdom suggested that *locus standi* be given to any person who had 'sufficient interest' in the matter. This was incorporated in the Supreme Court Act of 1981.²

The Supreme Court of India has been evolving its own paradigm of public law adjudication by making a number of innovations quite unorthodox in traditional legal theory. The incorporation of a bill of rights in the Constitution and the vesting of special responsibility for protecting the rights on the courts must have inspired the courts to be less technical and more informal. The law-making function of the court was never disguised. The traditional rules of prematurity, *locus standi*, and *ratio decidendi* were not strictly followed. These three concepts will be explained in the course of this discussion.

PREMATURITY

The rule of prematurity is that a court interprets a statute or discovers a common law in so far as it is absolutely necessary for the disposal of a matter. If a matter can be disposed of without deciding the question of law, the court should do so. A court will not decide a question of law if the matter can be disposed of on a preliminary issue such as the lack of

¹ A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, p. 195 (Macmillan and Co. Ltd., 9th ed., London, 1952)

² Wade and Forsyth, *Administrative Law*, p. 680. (Clarendon Press, Oxford, 7th ed., Indian reprint, 1997).

jurisdiction. A court will not decide the constitutionality of a statute if it is not absolutely necessary to do so. This rule is known as the rule of prematurity or ripeness. Abstract or hypothetical questions are not answered by a court. The Supreme Court of India has not been too fussy about the doctrine of prematurity.³ In a country where the majority of the people are poor and are ignorant of their rights, the Court thought that it was better to decide such questions about fundamental rights before any actual invasion thereupon took place. That would prevent unnecessary prolongation of litigation also. In *Basheshar Nath v. Commissioner of Income Tax*,⁴ the Court decided whether fundamental rights could be waived even though the contested matter could have been decided without going into that question. From a strict positivist standpoint, going into the wider question of waiver of fundamental rights was unnecessary and undesirable. Seervai said:⁵

But this case also furnishes an example of extreme undesirability of a Court pronouncing on large constitutional questions which do not directly arise.

The Court, however, went into that question (of waiver of fundamental rights) because it wanted to protect people against themselves. In a rights-conscious society, the doctrine of waiver was quite relevant because there was a level playing field. But in a society where rights had been given to people who for generations had been powerless and exploited, such waiver could be dangerous and could make the entire bill of rights meaningless. The rights were not mere individual entitlements but constituted the societal commitment to a new social order and therefore could not be left to be asserted by the individual for whose benefit they had been guaranteed. A proactive judicial process was a condition precedent to the enforcement of fundamental rights.

WRIT JURISDICTION OF THE SUPREME COURT AND THE HIGH COURTS

The Constitution confers power on the Supreme Court under article 32 and the High Courts under article 226 to issue writs and orders in the nature of *habeas corpus*, *mandamus*, *certiorari*, prohibition, and *quo warranto*. The Supreme Court can issue these writs for the enforcement of the fundamental rights and the High Courts can issue them for the

³ S. P. Sathe, 'Avoidance of Premature Constitutional Questions by the Supreme Court', *Yearbook of Legal Studies*, Madras, pp. 23-47. (1975).

⁴ AIR 1959 SC 149.

⁵ H. M. Seervai, *Constitutional Law of India*, 2nd ed., vol. 1, p. 194 (1976).

enforcement of the fundamental rights and for 'any other purpose'. The Supreme Court held that 'for any other purpose' meant for the enforcement of any statutory as well as common law right.⁶ Further, the Constitution is farsighted in using the words 'in the nature of' because it liberates our courts from the technical constraints with which the writs in England were hedged. In one of its earliest judgements, the Supreme Court made it clear that it would not stand on the formality of the petitioner's having asked for a specific remedy. If the petitioner establishes the case of violation of his right, the court would issue an appropriate remedy irrespective of what remedy has been prayed for.⁷ Since the Constitution uses the words 'in the nature of' it does not make our writs identical with those in England but only draws an analogy from the latter. Secondly, our courts can issue directions, orders, or writs other than the prerogative writs. This leaves to the courts in India a good deal of elasticity to deal with the problems in hand. It enabled them to use the private law remedies of injunction and stay orders given by the Code of Civil Procedure in the discharge of its public law function.⁸ Processual activism was therefore inherent in the provisions of the Constitution. The Supreme Court has observed that the scope of the writs under the Indian Constitution is wider than that of the prerogative writs in England.

Although the Constitution does not expressly say so, the courts have made a distinction between issuance of writs for the enforcement of fundamental rights and issuance of writs for other purposes. The courts insist that alternative remedies should have been exhausted by the applicant before coming to court with a request for a writ 'for other purposes'.

DELAY AS GROUND FOR REFUSAL OF JUDICIAL REVIEW

Although article 32 confers a fundamental right to move the Supreme Court for the enforcement of fundamental rights, the Supreme Court held that such a right was not absolute. A person could lose his right if he came to court after a long delay.⁹ That decision was severely criticized in academic writings.¹⁰ The law of limitation applies to ordinary suits and

⁶ *Calcutta Gas Co. v. State of West Bengal* AIR 1962 SC 1044: (1963) 1 SCJ 106. See S. P. Sathe, *Administrative Law*, p. 355 (Butterworth 6th ed., 1998).

⁷ *T. C. Basappa v. T. Nagappa* AIR 1954 SC 440.

⁸ S. P. Sathe, *Administrative Law*, pp. 353-5 (6th ed., Butterworth India, 1998).

⁹ *Tilokchand Motichand v. H.B. Munshi* AIR 1970 SC 898.

¹⁰ Upendra Baxi, 'Laches and the Right to Constitutional Remedies: Quis Custodiet Ipsos Custodes?' in Alice Jacob (ed.), *Constitutional Developments since Independence*, p. 559 (N. M. Tripathi, Bombay, 1975); Alice Jacob, 'Denial of Judicial Relief under Art. 32 and 226', 16 *JILI* 352 (1974).

its purpose is to give finality to transactions. It is premised on the principle that no one should sleep over his rights and no one should be kept in uncertainty about his legal position indefinitely. Although the law of limitation is not applicable to the writ jurisdiction, the courts have held that one must come to the court for the enforcement of his right within a reasonable period.

However, in a recent decision in *Dr. Kashinath G. Jalmi v. the Speaker*,¹¹ it was held that where public interest was involved, a court would be slow to reject an application for a writ of *quo warranto* on the ground of delay. The Tenth Schedule of the Constitution, which was inserted by the Constitution (Fifty-Second Amendment) Act, contains provisions against defection of a member of the legislature from one party to another. Under the schedule, what is defection has been defined and the decision as to whether a member of the legislature has incurred such disqualification is to be given by the Speaker. The Speaker of the legislative assembly had given a ruling disqualifying certain members from membership on the ground of defection. Subsequently, the Speaker was removed and the Deputy Speaker acted as Speaker. In that capacity, he reviewed the decision given by his predecessor and held that those members had not incurred such disqualification. A petition against the Deputy Speaker's decision was made by one Dr Jalmi eight months after that decision. The High Court rejected the petition on the ground of delay. In the Supreme Court, on appeal, it was held that the petition was not barred.

Justice J. S. Verma, as he then was, surveyed the case law on the subject and found that all those decisions in which petitions were rejected on the grounds of delay were those in which enforcement of a personal right was sought, and they did not relate to the assertion of the right of the people against the illegal occupation of a public office. The relief claimed in this case was not of any personal benefit to the petitioner but of vacation of a public office held illegally by some persons. The learned judge pointed out that the principle of laches (delay) as a ground for not entertaining a petition was based on a sound policy of protecting public interest. Where, however, not entertaining a petition caused greater harm to public interest than the harm caused by entertaining it, it must be entertained. Where a person occupies a public office illegally, a petition seeking *quo warranto* against him is not in the interest of any individual but is in the interest of the general public. Delay is a valid ground for rejecting a petition when one individual asserts his right against another

¹¹ (1993) 2 SCC 703.

individual but not where public interest in the occupation of a public office by the right person is involved. A person who has illegally occupied such an office would benefit by the Court's refusal to entertain the petition on the ground of delay. So when a writ is sought for preventing an illegality in the occupation of a public office, delay would not bar the petition.

The above case was decided when the jurisprudence of public interest litigation was developed and the Court developed a new paradigm of judicial process consistent with the rights discourse it has generated through judicial activism. The new paradigm envisions an affirmative, proactive role of the Court for facilitating access to justice for those who did not possess either the know-how or the resources for invoking the judicial process on their behalf and for ensuring greater public participation in the judicial umpiring of the constitutional government. The new paradigm was for a court that had to protect the rights of the poor and illiterate people of India and to ensure that the rule of law was observed by citizens as well as the rulers. The doctrinal activism the Court developed needed to be supported by processual activism. Such activism aimed at (1) bringing the redressal of grievances of the victimized sections of society within the purview of the Court, (2) making processual innovations with a view to making justice less formal, cheaper and more expeditious, and (3) making the judicial process more participatory, polycentric, and result-oriented.

LOCUS STANDI

One of the important methods by which courts saved themselves from spurious or vicarious litigation was of ascertaining that the person who petitioned the court had the *locus standi* to do so. Who had the *locus standi*? A person must show that she is adversely affected by the impugned action or that her own right has been violated. Further, the issue she raises must be a justiciable issue. An issue is justiciable when it can be resolved through judicial process. This rule of private law adjudication was also applicable to public law adjudication. The only exception was in the case of the writ of *habeas corpus*. This writ is issued to liberate a person from illegal detention. The person held in such illegal detention may not be in a position to move the court and therefore a stranger or friend is given *locus standi* to move the court for such a writ. Such a stranger or friend can trigger the judicial process after showing that the impugned action or law has resulted in denial of the liberty of a person.

The rule of *locus standi* was based on sound policy. However, it

presupposed that the people were conscious of their rights and had the resources to fight against violations of their rights. Even in England, the rule of *locus standi* was widened to allow persons with 'sufficient interest' to challenge the government action. When the rules of *locus standi*, which were conceived for more efficient functioning of the judicial process, inhibited genuine claims from reaching the court, exceptions became necessary. According to S. A. de Smith,¹²

All developed legal systems have had to face the problems of adjusting conflicts between two aspects of public interest—the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interlopers to invoke the jurisdiction of the courts in matters that do not concern him.

If public duties are to be enforced and the public interest subserved by their enforcement is to be protected, public-spirited persons or organizations must be allowed to move the court and act in furtherance of the group interest even though they may not be directly injured in their own rights or interests. Both in the United States and in the United Kingdom, such liberal view of *locus standi* had come to be adopted.

The Supreme Court of India is the protector and guarantor of the fundamental rights of the people of India, most of whom are ignorant and poor. The liberalization of the rule of *locus standi* came out of the following considerations: (1) to enable the Court to reach the poor and the disadvantaged sections of society who are denied their rights and entitlements, (2) to enable individuals or groups of people to raise matters of common concern arising from dishonest or inefficient governance, and (3) to increase public participation in the process of constitutional adjudication. This litigation came to be known as public interest litigation. It is, really speaking, a misnomer. All public law litigation is inspired by public interest. In fact, even private adjudication subserves public interest because it is in the public interest that people should honour contracts, should be liable for civil wrongs, and should honour rights in property or status. But whereas public interest is served indirectly in private litigation, the main focus being on private interest of the litigants, it is served more directly by public law adjudication because the focus is on the unconstitutionality arising from either lack of power or inconsistency with a constitutionally guaranteed right. Public interest litigation is a narrower specie of public law litigation. The term public interest litigation was used in the United States. The public interest litigation in India

¹² S. A. de Smith, *Judicial Review of Administrative Action*, p. 409 (4th ed., Stevens and Sons, London, 1980).

substantially differs from that in the United States.¹³ Baxi pointed out that American public interest litigation was funded by government and private foundations and its focus was not so much on State repression or government lawlessness as on public participation in governmental decision-making. He therefore insisted that the Indian phenomenon described as PIL should be described as social action litigation (SAL).¹⁴ I am using the term PIL because of its acceptance and familiarity at the popular level. That term is now used in judgements of the courts and cells under that title have been set up in the Supreme Court as well as various High Courts. It is also used in the media. Public interest litigation is different from the normal writ jurisdiction litigation in the following aspects: (1) the courts allowed informality of procedure by entertaining letters written to judges or to the court as petitions or took cognizance of matters on their own (*suo motu*) and substituted inquisitorial processes in place of the adversary processes wherever necessary for the disposal of a matter; (2) the rules of *locus standi*, which meant the rules regarding the eligibility of a person to invoke the jurisdiction of the courts, were relaxed, and (3) new reliefs and remedies were developed to do justice. In addition, PIL brought about radical metamorphosis in the nature of the judicial process by imbibing it with polycentric as well as legislative characteristics. The conceptual difference between public law litigation (which means constitutional law and administrative law litigation) and PIL will be explained later after the evolution of the latter is fully described.

The Court responded in *Sunil Batra v. Delhi Administration*¹⁵ to a letter written by Sunil Batra, a prison inmate drawing its attention to the miserable lot of a fellow prisoner who was being subjected to unbearable physical torture by the prison authorities. The prisoner had scribbled the letter on a piece of paper and managed to have it sent to Justice Krishna Iyer, judge of the Supreme Court. The learned judge responded to that letter and from that response emerged the first judicial discourse on prisoners' rights.¹⁶ Justice Bhagwati while dealing with a petition filed by advocate Kapila Hingorani regarding inordinately long periods of undertrial detention suffered by some accused criminals obtained information about a large number of people who suffered from such detention,

¹³ Clark D. Cunningham, 'Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience', 29 *JILI* p. 494 (1987).

¹⁴ Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Rajeev Dhavan, R. Sudarshan and Salman Kurshid (ed.), *Judges and Judicial Powers*, pp. 289–90 (Sweet and Maxwell, Tripathi, 1985).

¹⁵ AIR 1978 SC 1675.

¹⁶ *Sunil Batra v. Delhi Administration* AIR 1980 SC 1579: (1980) 3 SCC 448.

which sometimes far exceeded the longest period of imprisonment prescribed as punishment for the offence they were charged with. He took up the issue and held in *Hussainara Khatoon v. Bihar*¹⁷ that the right to a speedy trial was part of the right to be governed by the procedure established by law guaranteed by article 21 of the Constitution and directed courts and the governments on how trials should be speeded up.

Since then several letters were written to individual judges, who took cognizance and inquired into the matter. Since such letter writers rarely possessed the lawyer's expertise, the facts they mentioned needed to be verified. This could be done by appointing commissioners who investigated the facts on behalf of the letter writer and submitted their report to the Court. Such innovations in procedures were justified by Justice Bhagwati in *Bandhua Mukti Morcha v. India*.¹⁸ First of all, the learned judge justified the liberal rule of standing that the Court was articulating. The learned judge said:¹⁹

There is no limitation in the words of clause (1) of Article 32 that the fundamental right which is sought to be enforced by moving the Supreme Court should be one belonging to the person who moves the Supreme Court nor does it say that the Supreme Court should be moved only by a particular kind of proceeding.

The learned judge observed that wherever there was violation of a fundamental right, any one could move the Supreme Court for the enforcement of that right. This was, however, further qualified by the following words:²⁰

Of course, the Court would not, in the exercise of its discretion, intervene at the instance of a meddlesome interloper or busybody and would ordinarily insist that only a person whose fundamental right is violated should be allowed to activate the court.

This was the rule but exceptions had to be made where the actual victim lacked either the knowledge of his rights or the resources for approaching the court and some public-spirited persons or a social action group moved the court on his behalf. The Court could not close its doors to genuine complainants of violations of rights in order to keep out 'a meddlesome interloper' or 'busybody'. That amounted to throwing out the baby with the bath water.

How does a public-spirited person or group move the court? The judge said that such a person or group could do so by writing a letter 'because

¹⁷ AIR 1979 SC 1360: (1980) 1 SCC 81.

¹⁸ AIR 1984 SC 802: (1984) 3 SCC 161.

¹⁹ Ibid., p. 813.

²⁰ Ibid.

it would not be right or fair to expect a person acting *pro bono publico* to incur expenses out of his own pocket for going to a lawyer and preparing a regular writ petition for being filed'.²¹ Thus, the Court seems to have been actuated by the desire not only to provide access to the less advantaged persons but also to deprofessionalize the system of justice. Two reforms were undertaken: (1) to allow a public-spirited person to move the court on behalf of the victims of injustice who were poor, illiterate, or socially and educationally disadvantaged; (2) to activate the court through a letter instead of a formal petition. Public interest litigation was therefore seen as an instrument of bringing justice to the doorstep of the poor and the less fortunate. Justice Bhagwati said in *P. U. D. R. v. India*.²²

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

The Court observed that the courts did not exist only for the rich and the well-to-do but also for the poor, the downtrodden, and the have-nots. It was only the moneyed who had, so far, held the key to unlock the doors of justice. Now, for the first time, the 'portals of the Court are being thrown open to the poor and the downtrodden', the Court said.²³ In *Bandhua Mukti Morcha v. India*,²⁴ Justice Bhagwati pointed out that article 32(2) required courts to enforce the fundamental rights through 'appropriate proceedings'. 'Appropriate proceedings' meant such proceedings as would meet the ends of justice. Justice Bhagwati further stated how the processual innovations that the Court was making were meant to make justice more meaningful.²⁵

²¹ Ibid., 14.

²² AIR 1982 SC 1473, 1476.

²³ Ibid., p. 1478.

²⁴ AIR 1984 SC 802: (1984) 3 SCC 161.

²⁵ Ibid., p. 815.

It is not at all obligatory that an adversarial procedure, where each party produces its own evidence tested by cross examination by the other side and the judge sits like an umpire and decides the case only on the basis of such material as may be produced before him by both parties, must be followed in a proceedings under article 32 for enforcement of fundamental right ... [I]t may be noted that there is nothing sacrosanct about the adversarial procedure.

On letter petitions as well as *locus standi*, however, there was another viewpoint, which was forcefully put across by Justice R. S. Pathak in *Bandhua Mukti Morcha v. Bihar*.²⁶

I see grave danger inherent in a practice where a mere letter is entertained as a petition from a person whose antecedents and status are unknown or so uncertain that no sense of responsibility can, without anything more, be attributed to the communication. There is good reason for the insistence on a document being set out in a form, or accompanied by evidence, indicating that the allegations made in it are made with a sense of responsibility by a person who has taken due care and caution to verify those allegations before making them.

The learned judge was apprehensive that an unverified communication received through the post might have been employed *mala fide*, as an instrument of coercion or blackmail or other oblique motive against a person who holds a position of honour and respect in society.²⁷ The judge warned that the process of the court should not be allowed to be abused and it was necessary to follow formalities that would ensure that the extraordinary remedy provided by the Constitution was not used to serve partisan private interests or on inadequate consideration. Justice Sen in his judgement agreeing with Justice Pathak also said that letters should be addressed to the Court, and not to a judge.

Anonymous letters were seldom entertained. In most of the cases the petitioner was a known person, such as Sunil Batra²⁸ or Vasudha Dha-gamwar (a social activist)²⁹ or an organization such as the Bandhua Mukti Morcha³⁰ or People's Union for Democratic Rights.³¹ The practice of letters being addressed to individual judges had received criticism from various quarters. Letter petitions have now become rare and the Court has taken recourse to appointing lawyers as *amicus curiae* and asking them to draft a regular petition on the lines of the letter and insisted on

²⁶ Ibid., p. 840.

²⁷ Ibid.

²⁸ *Sunil Batra v. Delhi Administration* AIR 1978 SC 1675.

²⁹ *Kadra Pahadiya v. Bihar* AIR 1981 SC 939: (1981) 3 SCC 671.

³⁰ *Bandhua Mukti Morcha v. India* AIR 1984 SC 802.

³¹ *P. U. D. R. v. India* AIR 1982 SC 1473.

the drafting of a regular petition. Letters to individual judges also became rare.

In fact, questions regarding the validity of such informal procedures were referred by a bench of two judges (Justices S. M. Fazl Ali and Venkataramiah, who later became the Chief Justice of India) to a larger bench for consideration.³² The larger bench, however, never took up that matter perhaps because by then those questions had become academic.

When the judges spoke against the adversary procedure, they did not mean that any evidence would be believed without giving an opportunity to the other party to show that it was false. To that extent the adversary procedure could not be dispensed with. However, what the courts expected from the respondent, which was the State in most of the cases, was that instead of taking an adversary position, and merely denying the allegation, it should help the Court to find the truth. The litigation was not against the respondent but against the illegalities committed on its behalf. The State would benefit from such judicial inquiries because it would know what was lacking in its administration and would be able to improve its performance. It was in this sense that Justice Bhagwati said that it was not an adversary proceeding. Justice Bhagwati said in *P. U. D. R. v. India*.³³

Public interest litigation, as we conceive it is essentially a co-operative or collaborative effort on the part of the petitioner, the State or public authority and the Court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them. The State or public authority against whom public interest litigation is brought should be as 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.

Even the reports of the commissioners are open to cross-examination by the respondents. They merely help the court to form a prima facie opinion. The Supreme Court is careful in appointing responsible persons as commissioners.³⁴ What the Court has meant is that in public interest litigation, the judges need not take a neutral position as they take in an adversary litigation but can examine complaints of violations of human rights, subversion of the rule of law, or disregard of environment with greater care and through a proactive inquiry. They need not wait for the

³² *Sudipt Mazumdar v. State of M. P.* (1983) 2 SCC 258.

³³ AIR 1982 SC 1473, 1477-8.

³⁴ Justice Bhagwati in *Bandhua Mukti Morcha v. India*, *supra* n. 30, AIR p. 816.

petitioner to prove everything, letting the respondent take recourse to mere denials as is done in adversary proceedings, but can order investigations and can employ inquisitorial methods for finding the truth.

A good example of such cooperative or collaborative effort was the decision in *Azad Rikshaw Pullers Union v. Punjab*.³⁵ The Punjab Cycle Rikshaw (Regulation of Rikshaws) Act, 1975 provided that licenses to ply rikshaws could be given only to those owners who run the rikshaws. Licenses could not be given to those who owned but rented it out for plying to another person. This Act threatened to cause unemployment among a number of rikshaw pullers who did not own their rikshaws and leave many rikshaws owned by the non-driving owners idle. The Act was challenged on the ground that it would affect the right to carry on any trade, business or occupation guaranteed by article 19(1)(g) of the Constitution. Justice Krishna Iyer, instead of striking down the law, provided a scheme whereby the rikshaw pullers could obtain loans from the Punjab National Bank and acquire the rikshaws. The scheme provided for the repayment of the loan over a period of time. So the intention of the legislature to abolish the practice of renting the rikshaws from the owners was achieved without causing suffering to the rikshaw pullers.

The liberal rule of *locus standi* has helped social action groups to come to court on behalf of disadvantaged sections of society. Groups such as the People's Union for Civil Liberties, People's Union for Democratic Rights, Bandhua Mukti Morcha, Akhil Bharatiya Shoshit Karmachari Sangh, Banwasi Sewa Ashram, and the Common Cause, a registered society, and individuals such as M. C. Mehta, Sheela Barse, Shiv Sagar Tiwari, and Upendra Baxi were able to come to court because their standing to move the Court on behalf of the disadvantaged people was conceded. Similarly, undertrial prisoners,³⁶ prison inmates,³⁷ unorganized labour,³⁸ bonded labour,³⁹ pavement dwellers,⁴⁰ children prosecuted under the Juvenile Justice Act,⁴¹ children of prostitutes,⁴² and women in protective custody⁴³ were able to receive the Court's attention. Public interest litigation of the late 1970s and early 1980s was dominated by

³⁵ AIR 1981 SC 14.

³⁶ *Hussainara Khatoun v. Bihar* AIR 1979 SC 1360; (1980) 1 SCC 81.

³⁷ *Sunil Batra v. Delhi Administration* AIR 1978 SC 1675.

³⁸ *P. U. D. R. v. India* AIR 1982 SC 1473.

³⁹ *Bandhua Mukti Morcha v. India* AIR 1984 SC 802; (1984) 3 SCC 161.

⁴⁰ *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545; AIR 1986 SC 180; *Sodan Singh v. New Delhi Municipal Corporation* (1998) 2 SCC 727, 743.

⁴¹ *Munna v. State of U. P.* AIR 1982 SC 806.

⁴² *Gourav Jain v. India* (1997) 8 SCC 114.

⁴³ *Dr. Upendra Baxi v. U. P.* (1983) 2 SCC 308.

petitions on behalf of oppressed people and the main issue was human rights. The Court's liberal interpretation of article 21 of the Constitution enabled it to include various human rights within the scope of the fundamental rights guaranteed by the Constitution. The liberal rules of access from which public interest litigation emanated enabled the courts to reach victims of injustice who so far had remained invisible. The processual activism ran complementary to the substantive activism that we surveyed in Chapter IV.

PETITIONS AGAINST VIOLATIONS OF FUNDAMENTAL RIGHTS

The liberal rule of *locus standi* allowed claims against violations of human rights on behalf of the victims of political oppression, social tyranny, and economic exploitation to be made by persons or organizations motivated by public interest. The Court went into the allegations of the killing of innocent people or suspected accused through false encounters,⁴⁴ the death of persons in police custody because of torture,⁴⁵ and the cases of the blinding of prisoners by the police.⁴⁶ Through PIL, the Court's intervention was sought against inhuman working conditions in stone quarries,⁴⁷ for controlling occupational health hazards and diseases to workers in the asbestos industry,⁴⁸ for banning import, production, and distribution and sale of forty named insecticides that caused health hazards and were banned in the United States,⁴⁹ and to get the CBI to inquire into the Gajraula nuns rape case⁵⁰ or into alleged police atrocities.⁵¹ The Supreme Court took cognizance of a complaint by a legal aid committee regarding the uncivilized practice of chaining the inmates of a mental hospital. The Court found that some inmates had been kept naked. It asked the government to implement the report of a committee of physicians given in that regard.⁵² The Supreme Court entertained a petition against the sexual exploitation of children in the flesh trade. The Court asked the CBI to inquire into the matter.⁵³

⁴⁴ *Chaitanya Kalbagh v. U. P.* (1989) 2 SCC 314.

⁴⁵ *Dilip K. Basu v. West Bengal* (1997) 6 SCC 642.

⁴⁶ *Khatri and Others v. Bihar* (1981) 1 SCC 623, 627, 635; (1981) 2 SCC 493.

⁴⁷ *Bandhua Mukti Morcha v. India* AIR 1992 SC 38.

⁴⁸ *C. E. R. C. v. India* AIR 1995 SC 922; (1995) 3 SCC 42.

⁴⁹ *Dr. Ashok v. India* (1997) 5 SCC 10.

⁵⁰ *Gudalure M. J. Cherian v. India* (1992) 1 SCC 397.

⁵¹ *Arvinder Singh Bagga v. U. P.* AIR 1995 SC 117; (1994) 6 SCC 565.

⁵² *Supreme Court Legal Aid Committee v. M. P.* (1994) 5 SCC 27; AIR 1995 SC 204.

⁵³ *Vishal Jeet v. India* AIR 1990 SC 1412; (1990) 3 SCC 318.

Even a cursory glance at these cases shows the change in the clientele of the Court from its pre-emergency clientele. The pre-emergency clientele consisted essentially of landlords whose lands were about to be taken away under the land reform legislation, industrialists whose businesses were about to be nationalized, higher caste applicants opposing reservations in educational institutions or civil services, government servants bringing in complaints about seniority, discrimination, or arbitrary dismissal, and political dissenters. Political dissenters such as Dr Ram Manohar Lohia⁵⁴ or Madhu Limaye⁵⁵ had invoked the jurisdiction of the Court in defence of their rights. But Kanu Sanyal⁵⁶ could not secure relief. The poor and the disadvantaged could never reach the Court. Therefore, while there was so much case law on right to property, there was none on the right to freedom from traffic in human beings and forced labour guaranteed by article 23 of the Constitution. That article was interpreted for the first time in *P. U. D. R. v. India*⁵⁷ decided in 1982. Referring to the changed clientele of the Court, Justice Bhagwati said in *Bandhua Mukti Morcha v. India*:⁵⁸

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

Not only the class of people whose grievances came to the Court changed but the Court's approach also changed. Under the traditional paradigm, a court would not have gone into how the inmates were being treated in a mental hospital or it might not have asked the CBI to inquire into the allegation of exploitation of children in the flesh trade. A proactive judicial strategy became the most distinguishing characteristic of judicial activism. This was a subtle shift from a neutralist adversarial judicial role to an inquisitorial, affirmative judicial role. The judicial process changed from an adversarial, bilateral process to a polycentric, conflict-resolving process. A process is polycentric 'when it involves a multiplicity of variable and interlocking factors, decisions on each of which presupposes decisions on all the others'.⁵⁹ Drawing from Fuller's

⁵⁴ *Ram Manohar Lohia v. Bihar* AIR 1966 SC 740.

⁵⁵ *In re Madhu Limaye* AIR 1969 SC 1014.

⁵⁶ *Kanu Sanyal v. District Magistrate* AIR 1973 SC 2684.

⁵⁷ AIR 1982 SC 1473.

⁵⁸ AIR 1984 SC 802, 815.

⁵⁹ *Lloyd's Introduction to Jurisprudence*, M. D. A. Freeman (ed.), p. 1259 (6th ed., Sweet and Maxwell, International Students Edition, London, 1996).

theory, Baxi points out that polycentric matters fall more adequately within the realm of legislation. He says:⁶⁰

Such matters involve negotiations and trade offs between a variety of social interests, and are best left to politically representative institutions rather than to judges.

Baxi may be right from the standpoint of the theory of separation of powers. But because the legislatures are overburdened and over-politicized, and therefore seem to be incapable of dealing with micro-issues requiring an empirical approach, and the executive is less trusted by people for being impartial and objective, these issues are now coming before the courts. Therefore, interests and parties other than those who are strictly petitioners and respondents or plaintiffs and defendants are required to be heard. This means wider public participation in the judicial process.

PUBLIC PARTICIPATION IN JUDICIAL PROCESS: RECOGNITION OF GROUP RIGHTS

The traditional judicial process is concerned only with the parties to the litigation. In an adversary procedure, all the parties to the litigation have to be joined either as plaintiffs or as respondents. There is a provision for intervention by interested parties with the permission of the court.⁶¹ Permission to intervene was granted if the applicants fulfilled the requirement of having substantial interest in the outcome of the suit. With the liberalization of *locus standi* arose the question of allowing people who had direct or indirect stake in the outcome of a suit but who did not have the *locus standi* in strict terms to be represented in the judicial proceedings. In *Fertilizer Corporation Kamgar Union v. Union of India*,⁶² the workers of a public sector company challenged the sale of a plant by the management, which in their opinion had caused colossal loss to the public treasury and consequently to the citizens of India, of which those workers were a part. An objection was taken to the maintenance of the petition on the ground that the workers lacked the *locus standi*. Workers were citizens also and as citizens they could certainly raise questions about the conduct of the management of a public sector corporation that in their opinion acted against public interest. Since they were workers, they had

⁶⁰ Upendra Baxi, 'How Not to Judge the Judges: Notes towards Evaluation of the Judicial Role', 25 *JILI* p. 211 (1983).

⁶¹ First Schedule, Order I, Rule 8A, Code of Civil Procedure Act, 1908.

⁶² AIR 1981 SC 344: (1981) 1 SCC 568.

also a stake in the financial well-being of the concern. But the traditional rule of *locus standi* would not have allowed such a claim to be made by the workers. Strictly speaking, it was a matter between the corporation and the buyer of its plant. Since it was a public corporation, it was subject to the control of the legislature as well as the Central government. In view of the fact, however, that neither legislative nor governmental control had been effective in preventing waste of public money, the only place the workers could go to for preventing such abuse was the Court. When the Constitution proclaims in its preamble that India is a democratic, secular, and socialist republic, a restricted view of *locus standi* would have been totally unsustainable. Chief Justice Chandrachud, while rejecting the objection to the *locus standi* of the workers to raise the question, observed:⁶³

The question whether a person has the locus to file a proceeding depends mostly and often on whether he possesses a legal right and that right is violated. But, in an appropriate case, it may become necessary in the changing awareness of legal rights and social obligations to take a broader view of the question of locus to initiate a proceeding, be it under Art. 226 or under Art. 32 of the Constitution. If public property is dissipated, it would require a strong argument to convince the Court that representative segments of the public or at least a section of the public which is directly interested and affected would have no right to complain of the infraction of public duties and obligations.

In *National Textile Workers Union v. P. R. Ramakrishnan*,⁶⁴ the Supreme Court held that although the Companies Act did not provide for the participation of the workers in the winding up proceedings of a company, they were held to be entitled to be heard in those proceedings. The traditional law gave standing only to the shareholders and creditors of the company but the workers had a direct stake in the continuance of the company. Justice Bhagwati, while speaking on the question of *locus standi*, said:⁶⁵

We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. ... We cannot therefore mechanically accept as valid a legal rule, which found favour with the English courts in the last century when the doctrine of *laissez faire* prevailed.

This was the beginning of allowing interests to be represented even

⁶³ Ibid., p. 350.

⁶⁴ (1983) 1 SCC 228: AIR 1983 SC 75.

⁶⁵ AIR 1983 SC 75, 87.

when they were not entitled to be under the strict provisions of the law.⁶⁶ In the above cases, the workers were given *locus standi* because they had stakes in the outcome of the actions proposed to be taken, namely the selling of the plant of a public sector company or the winding up of a company. This was the beginning of allowing persons who are interested in the disposal of a matter by a court to participate in the judicial process even though they might not technically be the parties to that litigation. It was in reality not as much an extension of *locus standi* as the extension of the right to be heard to the workers in matters raised by the management in which their interests were vitally involved. The Court drew from a directive principle of state policy that enjoined on the State to facilitate workers' participation in management.⁶⁷

In *Municipal Council, Ratlam v. Verdhichand*,⁶⁸ the residents of Ratlam, a city in Gujarat, moved the magistrate under section 133 of the Criminal Procedure Code asking him to compel the municipality to save them from stench and stink caused by open drains and public excretion by nearby slum dwellers. The municipal corporation pleaded that it had no money to construct drainage. The magistrate rejected that plea and ordered the municipality to build drainage within six months. On appeal, the Sessions Court reversed the magistrate's order. The High Court reversing the decision of the Sessions Court affirmed the order of the magistrate.

The Supreme Court on appeal from the decision of the High Court rejected the objection to the standing of a person to take proceedings under the criminal law on behalf of all the residents of Ratlam. Justice Krishna Iyer, speaking for himself and Justice O. Chinappa Reddy, asked whether by affirmative action a court could compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-bound basis. In Ratlam, prosperity and poverty lived as strange bedfellows, the judge observed. The rich had bungalows and toilets, the poor lived on pavements and littered the streets with human excreta because they used roadsides as latrines in the absence of public facilities. Justice Iyer described this collective petition as a pathfinder in the field of 'public involvement in the judicial process'.⁶⁹ Here the petitioner's injury was not specific. He shared it with all the citizens of the town. It was a diffused injury but together all the citizens were

⁶⁶ S. P. Sathe, 'Public Participation in the Judicial Process: New Trends in Law of *Locus Standi* with Special Reference to Administrative Law', 26 *JILI* p. 1 (1984).

⁶⁷ Article 43-A, Constitution.

⁶⁸ AIR 1980 SC 1622: (1980) 4 SCC 162.

⁶⁹ Ibid., p. 1623.

deprived of the quality of life. Such collective loss of quality of life was what the Court considered a threat to public interest. Such collective loss became justiciable because it resulted in the loss of the right to live with dignity, which every person has been guaranteed as a fundamental right by article 21 of the Constitution.⁷⁰ This was the wider concept of *locus standi* that allowed public participation in the judicial process against malfeasance of the municipality. Justice Krishna Iyer said:⁷¹

At issue is the coming of age of that branch of public law bearing on community actions and the courts' power to force public bodies under public duties to implement specific plans in response to public grievances.

The judge further said:⁷²

Social justice is due to the people, and therefore, the people must be able to trigger off the jurisdiction vested for their benefit in any public functionary like a magistrate under s. 133 Cr. P.C. In the exercise of such power, the judiciary must be informed by the broader principle of access to justice necessitated by the conditions of developing countries and obligated by Art. 38 of the Constitution.

In *Ratlam Municipality*, for the first time it was recognized that the people could approach the court against violations of their collective rights and that the judicial process could be invoked for the enforcement of the positive obligations that such public bodies have under the law. This was seen as specially suited to Indian conditions. In *Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v. Union of India*, Justice Krishna Iyer said:⁷³

Our current processual jurisprudence is not of individualistic Anglo Indian mould. It is broad-based and people oriented, and envisions access to justice through 'class actions', 'public interest litigation' and 'representative proceedings'. Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions.

Here objection was taken to the *locus standi* of the Akhil Bharatiya Shoshit Karmachari Sangh, which was an unregistered organization, to maintain the writ petition. The Court rejected that objection.

⁷⁰ See 'Right to Life' in Chapter IV, n. 50-9.

⁷¹ AIR 1980 SC 1622, 1623 (para. 1).

⁷² Ibid., p. 1628 (para. 14).

⁷³ AIR 1981 SC 298, 317.

Any member of the public having sufficient interest can maintain an action for judicial redress against public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such a public duty and the observance of such a constitutional or legal provision. Collective actions were seen as a means of using judicial process against governmental malfeasance.

It is important to note that this first case on enforcement of the collective rights of the people originated in a magistrate's court and not in a High Court. It is unfortunate that the Supreme Court has held that the liberal rule of *locus standi*, which it has accepted for proceedings before the High Courts and the Supreme Court in public interest litigation, would not be available for claims made in subordinate courts or tribunals.⁷⁴ In our opinion, there is no reason why liberal rule of *locus standi* should not apply to those courts also. It is necessary from the point of view of access.

PIL AGAINST GOVERNMENT LAWLESSNESS AND ABUSE OF POWER: *LOCUS STANDI* FURTHER EXPANDED

The entire litigation against government lawlessness or environmental degradation grew out of liberalized rule of *locus standi*. Although in the *Wadhwa* case,⁷⁵ which we have discussed earlier, the Court did not discuss the question of *locus standi*, it did so in *S. P. Gupta v. President of India*,⁷⁶ popularly known as the *Judges* case. S. P. Gupta, Tarkunde, and Iqbal Chagla were practising advocates who had filed writ petitions under article 226 of the Constitution before the High Courts of Delhi and Bombay seeking the Court's opinion on how judges of the High Courts and the Supreme Court should be appointed and transferred, how additional judges appointed for a period of two years initially should be made permanent, and whether the government had the discretion not to make them permanent even when the workload in the courts demanded the additional strength. All petitions filed in High Courts of Delhi and Bombay were transferred to the Supreme Court under article 139-A of the Constitution. That case came to be known as *S. P. Gupta v. President of India*. This case arose out of a circular issued by the government headed by Mrs Indira Gandhi seeking the consent of the judges to their transfer. Earlier, where a transfer was challenged by a judge himself, the Court had held by majority of three against two that a judge could be transferred

⁷⁴ *Duryodhan Sahu (Dr.) v. Jitendra Kumar* (1998) 7 SCC 273; *Northern Plastics Ltd. v. Hindustan Photo Films Mfg. Co. Ltd.* (1997) 4 SCC 452.

⁷⁵ *D. C. Wadhwa v. Bihar* AIR 1987 SC 579. See Chapter IV.

⁷⁶ AIR 1982 SC 149; (1981) Supp. SCC 87.

without his consent.⁷⁷ In that case, the judge who had been transferred had approached the court. So no question of standing arose.

S. P. Gupta came as a sequel to the action of not continuing some judges who had been appointed as additional judges for two years and the threat of transfer given through the government's circular. There has been a long-standing practice that persons are appointed as additional judges who are later confirmed as permanent judges when vacancies occur. The main question for the Court's consideration was whether the petitioners, who were lawyers, had the *locus standi* to file the petitions. Two judges who had been discontinued also joined as petitioners. The bench consisted of seven judges, namely Justices Bhagwati, A. C. Gupta, Murtaza Fazl Ali, V. D. Tulzapurkar, D. A. Desai, R. S. Pathak, and E. S. Venkataramaiah. The standing of the lawyers was admitted by all the judges except Justice Venkataramaiah. The judges were unanimously of the view that independence of the judiciary was an aspect of the basic structure of the Constitution. The supersession of 1973 hung on the minds of the lawyers as well as the judges when they raised the question of the independence of the judiciary. Subsequently, the Court entertained another petition by an association of lawyers on the same question.⁷⁸ The same question was referred more recently by the President for the opinion of the Court under article 143 of the Constitution.⁷⁹ In *Gupta* as well as *Advocates Association*, the lawyers' standing to challenge actions violative of the independence of the judiciary was conceded. But do only lawyers have such a standing? Justice Bhagwati said in *S. P. Gupta v. President of India*:⁸⁰

We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision.

The learned judge further said:⁸¹

But 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

⁷⁷ *India v. Sankalchand* AIR 1977 SC 2328.

⁷⁸ *Supreme Court Advocates on Record Association v. India* (1993) 4 SCC 441: AIR 1994 SC 268.

⁷⁹ *In re Presidential Reference* AIR 1999 SC 1: (1998) 7 SCC 739.

⁸⁰ AIR 1982 SC 149, 194 (para. 22): (1981) Supp. SCC 87.

⁸¹ *Ibid.*, p. 189 (para. 17).

profit or out of political motivation or other oblique consideration, the Court should not allow itself to be activated at the instance of such person and must reject his application at the threshold ...

The judge further added that as a matter of prudence and not as a rule of law, 'the Court may confine this strategic exercise of jurisdiction to cases where legal wrong or legal injury is caused to a determinate class or group of persons'⁸² and not entertain cases of individual wrong or injury at the instance of a third party, where there is an effective legal aid organization that can take care of such cases. There may be cases where the State or a public authority may act in violation of a constitutional or statutory obligation or fail to carry out such obligation resulting in injury to public interest. Any member of the public would have the standing to trigger the judicial process in such cases. The learned judge said:⁸³

In public interest litigation—undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, 'diffused' rights and interests or vindicating public interest—any citizen who is acting bona fide and who has sufficient interest has to be accorded standing. What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not possible for the Court to lay down any hard and fast rule or any strait-jacket formula for the purpose of defining or delimiting 'sufficient interest'.

The learned judge was cautious in distinguishing public interest litigation in which *locus standi* would be accorded to any member of the public from the public law litigation in which *locus standi* would be restricted to a person who has suffered an injury. For example, all cases of dismissal, removal or reduction in rank, or discrimination filed by civil servants are public law cases in which only the aggrieved civil servant can be the petitioner. But when the government decided to adopt the recommendations of the Mandal Commission to reserve twenty-seven per cent of the jobs for the backward classes in addition to twenty-two per cent already reserved for the Scheduled Castes and Scheduled Tribes, a petition was filed by a journalist, Indra Sawney.⁸⁴ Her petition was admitted because whether so much reservation was constitutionally valid and how should backwardness be determined were questions concerning the larger public interest.

⁸² *Ibid.*

⁸³ *Ibid.*, p. 192.

⁸⁴ *Indra Sawney v. India* AIR 1993 SC 477. See S. P. Sathe, 'Constitutional Law I' in *ASIL* 1993, vol. xxix, pp. 201, 209.

While the cases against dismissal or removal or seniority of government servants are public law cases, and are therefore governed by the traditional principle of *locus standi*, the case against reservation for the backward classes involved public interest far wider than that of any individual litigant. All cases of promotion or selection on the basis of the reservation contested by a beneficiary of the reservations are public law cases in which the individual litigant has to satisfy the test of *locus standi*. He must be a person entitled to reservation and he must show that he has been denied what he was entitled to get. But Indra Sawney was not interested in a reserved post. She was interested in raising the question of constitutionality of the quantum of reservation and the criteria chosen for identifying the beneficiaries of reservation. This was a public interest litigation and therefore a more liberal rule of *locus standi* was applied.

Where a tenderer whose tender is not accepted challenges the grant of a contract to another person on the ground that the Government had not applied its mind or had acted *mala fide*, it is a public law litigation.⁸⁵ But where a person who is not an applicant challenges the allotment of petrol pumps by a minister to his favourites, it is a case of public interest litigation.⁸⁶ Both are cases of abuse of discretion but in the former case the issue was whether the petitioner should have got the contract in preference to the respondent whereas in the later case the issue was whether the minister had violated the public interest by distributing largesse in an arbitrary manner. The line dividing the two is thin. The most important difference is that in PIL, the petitioner has no personal interest and is personally not going to gain from the decision of the Court. He does it only in the public interest, though sometimes his own interest may be included in the public interest since the issues often pertain to human rights, governance, or environment.

With such liberal rule of standing, various issues of governance and environment were bound to appear in court through PIL. The *Wadhwa* case⁸⁷ belonged to this category. Unlike in *Ratlam Municipality*,⁸⁸ where the petitioner in *Wadhwa* could not show any injury to himself except his interest in sustaining the rule of law.

Since the late 1980s, the rule of law and the environment have been the main concerns of public interest litigation. It may be that after the establishment of the National Human Rights Commission, the Court preferred to leave the human rights issues to the commission and gave it

⁸⁵ *R. D. Shetty v. International Airport Authority* AIR 1979 SC 1628: (1979) 3 SCC 489.

⁸⁶ *Common Cause, A Registered Society v. India* (1996) 6 SCC 530 (*Petrol Pump case* I).

⁸⁷ *D. C. Wadhwa v. Bihar* AIR 1987 SC 579.

⁸⁸ AIR 1980 SC 1622: (1980) 4 SCC 162.

a helping hand. Under the Protection of Human Rights Act, 1991, the NHRC cannot take any action on its own against violations of human rights. But we find from reports of the NHRC that it has been awarding compensation to the victims of human rights violations and the state governments seem to be complying with those orders. It seems that the NHRC also approaches the Supreme Court for a mandamus to get its awards implemented.⁸⁹ The Court has been referring certain cases to the NHRC for investigation. Its reference to the NHRC of the question whether violations of human rights had taken place in Punjab during the times of terrorism was opposed on the ground that the NHRC being a statutory body, its powers were circumscribed by the provisions of the Protection of Human Rights Act, 1993 and therefore it could not investigate events that had taken place before the enactment of that act. The Court, while rejecting that contention, observed that when it referred any matter to the NHRC, the NHRC acted *sui generis* and was not bound by the limitations imposed by the Protection of Human Rights Act, 1993.⁹⁰ I have reservations about the doctrinal soundness of that judgement, but since a critique of it might take us away from the main theme of this discourse, I will not undertake it here. What is relevant is that the Court relies heavily on the NHRC for investigating cases of alleged violations of human rights.

The main focus of public interest litigation since the late 1980s seems to have shifted towards prevention of government lawlessness and sustenance of the rule of law.⁹¹ *S. P. Gupta v. President of India*⁹² was the decision in which several issues of good governance were raised and decided. In a real sense that was the case that articulated various aspects of PIL jurisprudence.

CONCEPT OF JUSTICIABILITY EXTENDED

The PILs raising questions of governance asked the courts to compel the government to do what it was its duty to do or to prevent the government from doing what it was legally forbidden to do. This is the function of the writ of mandamus. The difference between the traditional mandamus and the mandamus under PIL is that under PIL the scope of mandamus increased. Under PIL, mandamus was issued to compel the government

⁸⁹ See S. P. Sathe, *Administrative Law*, p. 293 (6th ed., Butterworths, 1998).

⁹⁰ *Paramjit Kaur v. Punjab* AIR 1999 SC 340: (1996) 7 SCC 20.

⁹¹ Rajeev Dhavan, 'Law as Struggle: Public Interest Litigation in India' 36 *JILI* p. 302, 310 (1994).

⁹² AIR 1982 SC 149: (1981) Supp. SCC 87

to do what it was entirely within its discretion to do or not to do. Mandamus was issued under traditional administrative law only to compel the State or a public authority to do what it was legally bound to do. If there was discretion to do or not to do, no mandamus could issue. Under PIL it is issued to mandate acts that were within the discretionary power of the government and that therefore did not fall within the purview of the traditional writ of mandamus.

For example, it was issued where the petitioner alleged that there had been violation of human rights and the CBI should be asked to investigate it,⁹³ where a petition sought directions from the Court to entrust to the CBI an inquiry into sexual exploitation of children in the flesh trade,⁹⁴ where failure of government hospitals to provide timely emergency medical treatment to persons in need resulted in violation of their right to life,⁹⁵ on petitions against the management of hospitals for mental diseases,⁹⁶ on a petition seeking enforcement of measures to ensure public health and safety against municipal corporations,⁹⁷ on a petition against non-functioning of medical equipment in government hospitals,⁹⁸ or on a petition against mosquito menace, which jeopardized the right to life.⁹⁹ A petition asking for education of the children of the prostitutes¹⁰⁰ or a petition impugning a provision in the Jail Manual providing that the body of a hanged convict be kept suspended for half an hour after death, on the ground that it violated the right to dignity included in the right to personal liberty,¹⁰¹ were responded to with suitable mandamus and other orders.

Examples of PIL in judicial matters are petitions for improving the conditions of service of the members of subordinate judicial service,¹⁰² filling up vacancies of the judges of the Supreme Court and the High Courts,¹⁰³ seeking a ban against judges taking up post-retirement jobs in government or plunging into politics,¹⁰⁴ seeking directions from the Court

⁹³ *Paramjit Kaur v. Punjab* (1996) 7 SCC 20; *Secretary, Hailakandi Bar Association v. Assam* (1995) Supp. (3) SCC 736.

⁹⁴ *Vishal Jeet v. India* AIR 1990 SC 1412; (1990) 3 SCC 318.

⁹⁵ *P. B. Khet Mazdoor Samity v. West Bengal* AIR 1996 SC 2426; (1996) 4 SCC 37.

⁹⁶ *S. R. Kapoor v. India* AIR 1990 SC 752; *B. R. Kapur v. India* (1989) 3 SCC 387; *Rakesh Chandra v. Bihar* AIR 1989 SC 348.

⁹⁷ *K. C. Malhotra v. M. P.* AIR 1994 M.P. 48.

⁹⁸ *PUCL, Delhi v. India* AIR 1997 Del. 395.

⁹⁹ *India v. S. J. Pandit* AIR 1997 Ker. 152.

¹⁰⁰ *Gourav Jain v. India* (1997) 8 SCC 114.

¹⁰¹ *Pt. Parmanand Katara Advocate v. India* (1995) 3 SCC 248.

¹⁰² *All India Judges Association v. India* (1998) 2 SCC 204.

¹⁰³ *Subash Sharma v. India* (1991) Supp. (1) SCC 574.

¹⁰⁴ *Nixon M. Joseph v. India* AIR 1998 Ker. 385.

for expediting the disposal of pending cases so as to reduce the period of under-trial detention,¹⁰⁵ by a Bar Association seeking contempt proceedings against the police for conniving at and patronizing a bandh organized by a political party,¹⁰⁶ or seeking permission of the Court to allow non-lawyers to appear in court during a lawyers' strike.¹⁰⁷ Wadhwa raised a question about repromulgation of ordinances,¹⁰⁸ Common Cause, a registered society founded by Mr H. D. Shourie, raised questions about blood transfusion,¹⁰⁹ arrears in courts,¹¹⁰ appointment of consumer courts,¹¹¹ and abuse of power to distribute largesse like petrol pumps,¹¹² Shiv Sagar Tiwari raised a question about arbitrary allotments of houses,¹¹³ and Vineet Narain obtained orders from the Court to the CBI to fairly and properly conduct and complete investigations into alleged acts of corruption and breach of foreign exchange and to report to the Court regarding the investigation.¹¹⁴ He, also, by another petition, obtained directions as to how the CBI could be reorganized so as to ensure its independence as an investigating agency.¹¹⁵

The Court monitored the investigation of corruption cases since the CBI and the revenue authorities had failed to investigate matters arising out of seizure of the Jain diaries, which contained detailed account of vast payments made to various high-ranking politicians. Chief Justice Verma speaking for the Court observed that 'none stands above the law'¹¹⁶ and that the court had to monitor the investigation so that it progressed while ensuring that it did not direct or channel the investigation or in any manner prejudiced the right of those who might be accused to a full and fair trial. The Court made it clear that monitoring was taken over only because the superiors to whom the investigating authorities were supposed to report were themselves involved or suspected to be involved in the crimes to be investigated and that the monitoring would end once a charge-sheet was filed. The Court called this a continuing

¹⁰⁵ *Common Cause, A Registered Society v. India* (1996) 4 SCC 33; AIR 1996 SC 1619; (1996) 6 SCC 775; AIR 1997 (Supp.) SC 1539 (Arrears case II).

¹⁰⁶ *Supreme Court Bar Association v. U. P.* (1995) Supp. (3) SCC 602.

¹⁰⁷ *Common Cause, A Registered Society v. India* (1994) 5 SCC 557 (Lawyers Strike case).

¹⁰⁸ *D. C. Wadhwa v. Bihar* AIR 1987 SC 579.

¹⁰⁹ *Common Cause v. India* (1996) 1 SCC 753 (Blood Bank case).

¹¹⁰ *Common Cause v. India* (1996) 4 SCC 33; AIR 1996 SC 1619; (1996) 6 SCC 775; AIR 1997 SC (Supp.) 1539 (Arrears case I).

¹¹¹ *Common Cause v. India* (1992) 1 SCC 707 (Consumer Court case).

¹¹² *Common Cause v. India* (1996) 6 SCC 530 (Petrol Pump I case).

¹¹³ *Shiv Sagar Tiwari v. India* (1996) 6 SCC 558 (Shiv Sagar I).

¹¹⁴ *Vineet Narain v. India* (1996) 2 SCC 199.

¹¹⁵ *Vineet Narain v. India* (1998) 1 SCC 226; AIR 1998 SC 889.

¹¹⁶ *Ibid.*, SCC 236.

mandamus. Similar continuing mandamus was issued in the fodder scam case in Bihar, where the Court issued guidelines as to how and to whom the CBI authorities should report about the offences under investigation.¹¹⁷ A petition was filed by a member of Parliament in conjunction with NGOs praying for the disclosure of the Vohra Committee's report on corruption.¹¹⁸

The court entertained PILs complaining of non-implementation of a ban imposed on import, manufacture, and sale of certain drugs by a notification issued under the Drugs and Cosmetics Act, 1940,¹¹⁹ inadequacy of safety precautions in the army's ammunition test firing range near Itarsi in Madhya Pradesh resulting in death of tribals who strayed into the range for collecting metal scraps of exploded or unexploded ammunition,¹²⁰ shortage of hazardous and non-hazardous chemicals,¹²¹ inhuman working conditions in stone quarries,¹²² and serious deficiencies and shortcomings in the collection, storage, and supply of blood by blood banks.¹²³

The Communist Party of India appealed to the Supreme Court against the decision of the Kerala High Court¹²⁴ on a writ petition filed by a citizen holding that a bandh organized to close down all business on a particular day and enforced through coercion was violative of the right to freedom of movement guaranteed by article 19(1)(d) and the right to personal liberty guaranteed by article 21. The Supreme Court affirmed the judgement of the Kerala High Court.¹²⁵ In another petition it was contended that demonstrations and processions conducted in the city area caused obstruction of free movement of pedestrians and vehicular traffic and the court issued directions.¹²⁶ Where, however, an allegation that the government did not take action against the culprits of the communal riots held in Mumbai in December 1992 and February 1993 was made, the court did not entertain it.¹²⁷

¹¹⁷ *India V. Sushil Kumar Modi* (1997) 4 SCC 771: (1998) 8 SCC 661.

¹¹⁸ *Dinesh Trivedi v. India* (1997) 4 SCC 306.

¹¹⁹ *Vincent v. India* (1987) Supp. 90: AIR 1987 SC 990.

¹²⁰ *Sudip Mazumdar v. M. P.* (1996) 5 SCC 368.

¹²¹ *M. C. Mehta v. India* (1987) Supp. SCC 131.

¹²² *Bandhua Mukti Morcha v. India* AIR 1992 SC 38.

¹²³ *Common Cause v. India* (1996) 1 SCC 753 (Blood Bank case).

¹²⁴ *Bharat Kumar K. Palicha v. State* AIR 1997 Ker. 291 (Bandh case).

¹²⁵ *Communist Party of India (M) v. Bharat Kumar* (1998) 1 SCC 201: AIR 1998 SC 184.

¹²⁶ *Peoples Council for Social Justice, Ernakulam v. State* AIR 1997 Ker. 309.

¹²⁷ *Committee For the Protection of Democratic Rights v. Chief Minister of State of Maharashtra* (1996) 11 SCC 419.

Petitions were successfully made seeking improvement in the management and control of road traffic,¹²⁸ construction of a new bridge over a river in place of a wooden bridge that had collapsed due to negligence of the authorities, where such a bridge formed the lifeline for the villagers,¹²⁹ and provision of separate schools with vocational training and hostels with regular medical check-up for the children of lepers.¹³⁰ In *M. C. Mehta v. India*,¹³¹ the Court asked the Government of India and the Government of Uttar Pradesh to file an affidavit explaining why a large part of the toll tax and the visitor's fee received from the tourists visiting the Taj should go to the Agra Development Authority when that amount should be spent on the preservation of the Taj and the cleaning of the city of Agra.

Employees of a non-aided private educational institution were held to possess standing to claim enforcement of their right to equal wages with the employees of a government institution. There was an element of public interest involved since education was a matter of public interest.¹³² A petition to remove an advocate general¹³³ and a petition challenging appointment of lecturers in a college because they did not fulfil the prescribed qualification by a professor of the same college who had no personal animosity against those persons and who had genuine interest in the standards of education¹³⁴ were held to be admissible. A student's council was held not to possess the standing to challenge the decision of the Vice Chancellor to allow certain students to appear for examinations because it had failed to show (1) whether it was authorized to file such litigation, (2) if so by whom, (3) whether it had sufficient funds to indulge in such litigation, and (4) what public purpose was subserved.¹³⁵ When *locus standi* is liberalized on such a large scale, consistency is often a casualty. We see unequal application of the rules of the *locus standi* and justiciability depending upon the personal inclinations of judges or the circumstances in which the petitions are heard.

¹²⁸ *M. C. Mehta v. India* AIR 1998 SC 186 (Toll Tax on Taj).

¹²⁹ *B. Sakarama v. Asst. Commissioner Kundapura D.K.* AIR 1992 Knt. 364.

¹³⁰ *S. Rathi v. India* AIR 1998 All 331.

¹³¹ (1998) 8 SCC 711 (Toll Tax of Taj case).

¹³² *K. Krishnamacharyulu v. Sri Venkateshwara Hindu College of Engineering* (1997) 3 SCC 571: AIR 1998 SC 295.

¹³³ *Ponnusamy v. Tamil Nadu* AIR 1995 Madras 78.

¹³⁴ *Meera Massy v. S. R. Mehrotra* AIR 1998 SC 1153.

¹³⁵ *Bharatiya Homeopathy College v. Students Council* (1998) 2 SCC 449: AIR 1998 SC 1110.

PIL AGAINST DEGRADATION OF ENVIRONMENT

The cases raising questions of environmental degradation were really speaking cases against inaction of the State or wrong action of the State. The Court made it clear that petitions alleging environmental pollution caused by private industrial units were not as much against those private units as against the Union of India, the state government, and the pollution control boards established under the Environmental Protection Act, 1986, which were supposed to prevent environmental hazards. Their failure to perform their statutory duties resulted in violation of the right of the residents to life and liberty guaranteed by article 21 of the Constitution.¹³⁶ The Court entertained a petition by residents of Bangalore objecting to the approval of a development scheme that was likely to adversely affect the quantity and quality of water of a river.¹³⁷ The Court had to actually monitor restrictions on mining operations that were hazardous to the health of the people living in surrounding areas by appointing a committee to oversee the implementation of the Court's directions.¹³⁸ The Court has dealt with environmental issues such as pollution by tannery industries,¹³⁹ protection and conservation of forests,¹⁴⁰ urban and solid waste management,¹⁴¹ vehicular pollution,¹⁴² environmental pollution in Delhi due to location of mechanized slaughterhouses,¹⁴³ and protection and conservation of wildlife.¹⁴⁴ The Supreme Court was also approached against degradation of the Taj Mahal,¹⁴⁵ pollution of the river Ganges by Calcutta tanneries that discharged untreated noxious and poisonous effluents into it,¹⁴⁶ and protection of the people from stone quarrying in the Dehradun region.¹⁴⁷ The Court also laid down the principle that the

¹³⁶ *Indian Council for Enviro-Legal Action v. India* (1996) 3 SCC 212; AIR 1996 SC 1446.

¹³⁷ *D.L.F. Universal Ltd. v. Prof. A. Lakshmi Sagar* (1998) 7 SCC 1.

¹³⁸ *Tarun Bharat Sangh v. India* (1993) Supp. (1) SCC 4.

¹³⁹ *Vellore Citizens Welfare Forum v. India* (1996) 5 SCC 647; AIR 1996 SC 2715.

¹⁴⁰ *T. N. Godavarman Thirumulpad v. India* (1997) 2 SCC 267; 3 SCC 312; 7 SCC 440; (1998) 2 SCC 341; AIR 1998 SC 1153.

¹⁴¹ *Almitrah Patel v. India* (1998) 2 SCC 416; AIR 1998 SC 993.

¹⁴² *M. C. Mehta v. India* AIR 1998 SC 2340; (1998) 6 SCC 60, 63; *M. C. Mehta v. India* (1991) 2 SCC 137 (Vehicular Pollution case).

¹⁴³ *Buffalo (Protection of Wildlife) Traders Welfare Association v. Maneka Gandhi* (1996) 1 SCC 35.

¹⁴⁴ *M. C. Mehta v. India* (1997) 3 SCC 715.

¹⁴⁵ *M. C. Mehta v. India* (1997) 2 SCC 353 (Erosion of the Taj); AIR 1997 SC 734; also see *M. C. Mehta v. India* (1999) 6 SCC 611.

¹⁴⁶ *M. C. Mehta (Calcutta Tanneries Matter) v. India* (1997) 2 SCC 411, *M. C. Mehta v. India* (1998) 1 SCC 471. See Sathe, *Administrative Law* p. 416.

¹⁴⁷ *Rural Litigation and Entitlement Kendra v. U. P.* (1985) 3 SCC 614, AIR 1985 SC

polluter pays for the pollution.¹⁴⁸ In another case, the Court held that in matters of environment, the burden of proof will lie on the party that wants to change the status quo.¹⁴⁹

In environmental cases, the Court has had to balance the competing claims of environment and development. Objections that a development scheme was approved by the government without taking into consideration the environmental hazards,¹⁵⁰ or without providing for the rehabilitation and relief to the people displaced by such a scheme,¹⁵¹ or without considering its probable adverse effects on the rights of the tribals or adivasis¹⁵² were considered in PILs. Where lands were acquired for the construction of a dam and tribals were evicted from the land, it was held that no possession could be taken until the tribals were given alternate land and compensation.¹⁵³ Often development has resulted in impoverishment of the weaker sections of society and degradation of the environment. The judicial relief has, however, been limited to providing protection against decision-making by government without taking into consideration all the relevant aspects. This is a well-known principle of judicial review of administrative action. The courts have ensured that all relevant aspects of environment are considered and the persons likely to be adversely affected are heard. The Court has, however, said that the scope of judicial review in such cases is limited. The Courts, it seems, adhere to the *Wednesbury* principle,¹⁵⁴ under which a court does not substitute its own judgement for that of the authority to whom the power of taking decision is entrusted by the legislature. A court cannot go into whether a policy is right or wrong. It only goes into whether the decision has been taken after considering all the relevant factors or without considering any irrelevant factors and whether the persons likely to be affected were heard and provided against the loss, if any. In *Dahanu Taluka Environment Protection Group v. Bombay Suburban Electricity Supply Co. Ltd.*, Justice Rangarajan while explaining the scope of judicial review observed:¹⁵⁵

1259; (1985) 2 SCC 431; AIR 1985 SC 652; (1987) Supp. SCC 487; AIR 1987 SC 359; AIR 1991 SC 2216; (1991) 3 SCC 347.

¹⁴⁸ *M. C. Mehta v. India* AIR 1987 SC 965; (1986) 2 SCC 325 (Oleum Gas case I).

¹⁴⁹ *A. P. Pollution Control Board v. M. V. Nayudu* AIR 1999 SC 812; (1999) 2 SCC 718.

¹⁵⁰ *D. L. F. Universal Ltd v. Prof. A. Lakshmi Sagar* (1998) 7 SCC 1.

¹⁵¹ *Narmada Bachao Andolan v. India* (1998) 5 SCC 586; *Banwasi Sewa Ashram v. U.P.* AIR 1992 2 SC 920; (1992) 1 SCC 117.

¹⁵² *Animal and Environment Legal Defence Fund v. India* (1997) 3 SCC 549.

¹⁵³ *Karjan Jalasay YAS Samiti v. Gujarat* AIR 1987 SC 532; (1986) Supp. SCC 351.

¹⁵⁴ *Associated Provincial Pictures Ltd. v. Wednesbury Corporation* (1948) 1 K.B. p. 223.
¹⁵⁵ AIR 1991 SCW 910, 911; (1991) 2 SCC 539, 541.

It is sufficient to observe that it is primarily for the governments concerned to consider the importance of public projects for the betterment of the conditions of living of the people, on the one hand and the necessity for preservation of social and ecological balance, avoidance of deforestation and maintenance of purity of the atmosphere and water free from pollution, on the other in the light of various factual, technical and other aspects that may be brought to its notice by various bodies of laymen, experts and public workers and strike a just balance between these two conflicting objectives. The Court's role is restricted to examine whether the government has taken into account all relevant aspects and has neither ignored nor overlooked any material considerations nor been influenced by extraneous or immaterial considerations in arriving at its final decision.

This judicial restraint of not undertaking a review of the policy is subject to one caveat that such policy should not result in the violation of any of the fundamental rights. Whether it violates a fundamental right is a question for the Court to decide and, being a value judgement, is subject to the vagaries of judicial sensitivity and predilection.

In environmental litigation, the courts are at times faced with difficult policy choices. The running of factories may be hazardous to the health of people in the surrounding area but their closure may result in unemployment of the factory workers. In *M. C. Mehta v. India*,¹⁵⁶ the Court directed the closure of 168 industries and their relocation to another place. The workers of the industries could either take up employment at the relocated place or be retrenched. If they chose to continue to be employed at the relocated place, they were to get their wages during the period of shifting of the industries and one year's wages as shifting bonus. Those who opted not to continue at the relocated place were to be considered as retrenched within the meaning of section 25(f)(1) of the Industrial Disputes Act and were to get one year's wages plus retrenchment compensation as provided under that Act. After relocation, the company could not absorb all the employees by the date specified in the order of the court since the factory had not become fully operational. In a contempt petition, the company pleaded that it could absorb only 937 employees. The Court therefore asked 937 employees to report immediately and others were to continue to get the shifting allowance as provided in the order.¹⁵⁷

The Court ordered that all vehicles older than fifteen years should be discarded because of the polluting potential. It was, however, argued that such a ban caused harm to the vehicle owners. The Court therefore amended the directions and provided a means by which they could be

¹⁵⁶ 1999 1 AD (Apex Decisions) (SC) 157: (1999) 2 SCC 92 (Right to Fresh Air case)

¹⁵⁷ *Workmen of M/s Birla Textiles v. K. M. Birla* (1999) 3 SCC 475.

gradually got rid of.¹⁵⁸ In another case, the Supreme Court gave directions against hazards of diesel emissions. The Court also held that the manufacturers of diesel vehicles were liable for violation of the right to life of the people caused by air pollution.¹⁵⁹

PUBLIC PARTICIPATION IN CRIMINAL JUSTICE

Criminal justice, however, continues to be adversarial in nature. Normally it is adjudication between the State and the accused. A private person has no right to intervene or appeal against acquittal or conviction.¹⁶⁰ Such an appeal must be preferred only by the State. The Court has made some exceptions. In *P. S. R. Sadhanantham v. Arunachalam*,¹⁶¹ the Supreme Court allowed a private citizen, who was the brother of the deceased, to appeal against the acquittal of the accused. The Court observed:¹⁶²

We think that the Court should entertain a special leave petition filed by a private party, other than the complainant, in those cases only where it is convinced that the public interest justifies an appeal against the acquittal and that the State has refrained from petition for special leave for reasons which do not bear on the public interest but are prompted by private influence, want of bona fide and other extraneous considerations.

Thus, participation of people other than the accused or the State is exceptional in a criminal case and not allowed where normal trial under the Criminal Procedure Code is available. There is a great need to improve the system of criminal justice and to lend it a participatory character. While the Court may be choosy in conceding standing to strangers, it should not stand on formalities. It is surprising that the Supreme Court did not allow the National Commission for Women to intervene in an appeal against the conviction and sentence to death of a woman who was the mother of a suckling child.¹⁶³ If the function of the NCW is to protect the interest of women, the Court should have listened to its plea. The chairman of the NHRC is a former chief justice of the Supreme Court and the Protection of Human Rights Act, 1993 provides for appointment

¹⁵⁸ *M. C. Mehta v. India* AIR 1999 SC 291: (1999) 6 SCC 12; *M. C. Mehta v. India* AIR 1998 SC 2340: (1998) 6 SCC 60 (Vehicular Pollution case).

¹⁵⁹ *M. C. Mehta v. India* (1999) 6 SCC 9, 12.

¹⁶⁰ *Satvir Singh v. Baldeva* (1996) 8 SCC 593.

¹⁶¹ (1980) 3 SCC 141.

¹⁶² *Ibid.* 152.

¹⁶³ *Panchhi v. U. P.* (1998) 7 SCC 177; *National Commission for Women v. U. P.* (1998) 7 SCC 177.

of chairman and members after obtaining the recommendation of a high-powered committee and for their irremovability during the tenure except on specified grounds and in accordance with the procedure laid down. These two aspects make the NHRC a highly powerful authority.¹⁶⁴ On women's issues, however, the NCW is taken seriously. The Supreme Court referred the question of how rape victims should be compensated or rehabilitated to the NCW and asked it to frame a scheme under section 10 of the National Commission for Women Act, 1990.¹⁶⁵

The democratization of the criminal justice system started when four professors of law wrote an open letter to the Chief Justice of India¹⁶⁶ against the decision of the Court in *Tukaram v. Maharashtra*,¹⁶⁷ popularly called the *Mathura* case after the tribal girl Mathura, who had been raped in police custody by two constables. Although the sessions judge had acquitted the accused, the High Court reversing the trial judge convicted them. The Supreme Court again reversed the High Court's decision and acquitted the accused. The judgement reflected a strong patriarchal bias and the black letter law approach of the judges and that was the main criticism of the professors who wrote the above letter. The letter catalysed the women's movement against the law of rape. Women's organizations filed a review petition against the decision and although the decision remained unchanged, the debate paved the way for legal reform and change in judicial attitude.¹⁶⁸ The public criticism of the Supreme Court's decision has had a salutary effect on its rape jurisprudence. It opened up one more dimension of public participation in the judicial process. A decision of a court could be subjected to public criticism and such public criticism as a method of public advocacy of law reform (legislative as well as decisional) was indeed a new leaf in the court-people relationship. Since then various studies have criticized decisions of courts on the offence of rape.¹⁶⁹ However, the rate of conviction in rape cases has not improved. This is due to faulty police investigation, lack of infrastructural

¹⁶⁴ See S. P. Sathe, *Administrative Law*, pp. 288, 284 (6th ed., Butterworths India, 1998).

¹⁶⁵ *Delhi Domestic Working Women's Forum v. India* (1995) 1 SCC 14.

¹⁶⁶ 'An open letter to the Chief Justice of India' by Professors Upendra Baxi, Lotika Sarkar, Raghunath Kelkar and Vasudha Dhagamwar (1979) 4 SCC (Jour.) at p. 17.

¹⁶⁷ AIR 1979 SC 185; (1979) 2 SCC 143.

¹⁶⁸ See S. P. Sathe, *Towards Gender Justice* Lecture I (1993); see S. P. Sathe 'Gender, Constitution and the Courts', in Amita Dhanda and Archana Parashar (ed.), *Engendering Law: Essays in Honour of Lotika Sarkar* (Eastern Book, 1999).

¹⁶⁹ Flavia Agnes, *State, Gender and Rhetoric of Law Reform* (Research Centre, Women's Studies S.N.D.T. University, 1995; Also by the same author 'Protecting Women against Violence: Review of Decade of Legislation 1980-88' xxvii (17) *Economic and Political Weekly*, p. WS-19 (1992).

facilities such as timely medical examination and forensic reports, and the hypertechnical attitude of lawyers and judges.

In India, there has not been a strong tradition of juristic criticism of judicial decisions. Whatever critical writing has taken place has been analytical and critical of the judicial decisions from the standpoint of legal logic such as whether the judge has correctly interpreted the law, whether he has followed all the relevant precedents, and whether his interpretation is in accordance with the well-established rules of statutory interpretation. Criticism of a judicial decision on the ground that it reflected class or gender bias was unknown until recently. The strong influence of the black letter law tradition among Indian lawyers and judges and academics was responsible for such an approach. In the United States, where the realist school of jurisprudence has dominated juristic thought for a long time, such criticism of judicial decisions even from the perspective of the judges' social philosophy is not unknown. American legal scholarship has adopted a behavioural approach to the study of judicial decisions.¹⁷⁰ The open letter written by four professors shook the legal world because it criticized the Indian Supreme Court in unprofessional language that could be understood by the common man and thereby demythologized the Court. It blamed the judges for their insensitivity to the woes of a rape victim and thereby challenged the assumption widely shared among the people that the judges had no personal responsibility for their decisions, an assumption implicit in the slot machine theory of judicial process popularized by the legal fraternity till then.

ADMISSIBILITY OF PII

While entertaining a public interest litigation, a court has to make sure that the person who petitions is not a busybody or meddlesome interloper and that the issue raised is justiciable. An issue is justiciable when it can be resolved through judicial process. The concept of justiciability has itself undergone a metamorphosis under PIL. We have described above how the Court used mandamus or similar remedy to compel the government or public authorities to do what they were not strictly bound by the law to do but had the discretion to do. This has expanded the meaning of justiciability. The concept of justiciability widened as the Court played a more positive role as expounder of the Constitution. Many issues such as repromulgation of ordinances or asking the CBI to make an inquiry

¹⁷⁰ Rajeev Dhavan, *Introduction to Marc Galanter, Law and Society in Modern India*, p. xxi (Oxford University Press, Delhi, 1997).

would not have been considered justiciable issues under the traditional paradigm of the judicial process. Some would have been avoided under the doctrine of political questions, some on the ground that they were academic and did not give rise to any cause of action, and some because they could better be dealt with by another organ of government. The concept of justiciability was very much governed by the doctrine of separation of powers. Liberalization of *locus standi* and expansion of the categories of justiciability have been simultaneous. A petition was filed by a journalist objecting to the expenditure incurred by a state government on hospitality to a former President of India. It was entertained though it was not upheld because the money was spent from a head of account that was a voted expenditure.¹⁷¹ Similarly, it was held that an objection that the state government had incurred expenditure on a function to mark the second anniversary of assumption of office by the chief minister could not be considered since it was for the legislature to consider that matter.¹⁷² Here the Court refused to entertain the objection because it was a matter to be looked into by a co-ordinate organ of the State, i.e., the legislature. So within the exclusive domain of another organ of the State matters are not justiciable. But what is within the exclusive domain of another organ is for the court to decide and in many cases the Court has gone into those issues despite their being clearly within the exclusive domain of either the legislature or the executive.

The Court refused to entertain a petition alleging that the Government collected court fee in excess of the amount of money it spent on the administration of justice. This was held to be a question of fiscal policy into which a court ought not to go.¹⁷³ Where a petition asked the court to allow non-lawyers to appear in courts when lawyers went on strike, the Court refused to entertain the petition because before any such decision could be taken, a public notice would have to be given to all lawyers' associations so that the opinion of a cross-section of the members of the bar could be obtained.¹⁷⁴ A petition asking Chief Justice of India to declare any place a seat of the Supreme Court was filed under article 226 before a High Court. The Supreme Court held that the High Court should not have entertained that petition since the matter lay outside its jurisdiction.¹⁷⁵ A writ petition seeking direction to the Union of India and a particular state government to carve out part of the state as a separate

¹⁷¹ *I. K. Jagirdar v. State of Karnataka* AIR 1992 Knt. 175.

¹⁷² *K. N. Subba Reddy v. State* AIR 1993 Knt. 66.

¹⁷³ *Secretary to Government of Madras v. P. R. Sriramulu* (1996) 1 SCC 345.

¹⁷⁴ *Common Cause, A Registered Society v. India* (1994) 5 SCC 557 (Lawyers Strike case).

¹⁷⁵ *India v. S. P. Anand* AIR 1998 SC 2615.

state from the existing state was held to be not maintainable.¹⁷⁶ A writ petition successfully filed before the Karnataka High Court to impose severe restrictions on the state government from providing security and other facilities to organizers of a women's beauty contest was held by the Supreme Court to be abuse of the judicial process.¹⁷⁷ There have been petitions that were premature¹⁷⁸ or that sought to mandate a government to enforce a policy such as the policy of total prohibition.¹⁷⁹ These were not entertained. Similarly, the courts reject PILs that are in reality petitions for serving private interests. In *Raunaq International Ltd v. IVR Construction Ltd.*,¹⁸⁰ Justice Sujata Manohar speaking for a bench consisting of herself and Justice Kirpal said that when a petition was filed as a PIL, the Court must satisfy itself that the party that has brought the litigation is litigating *bona fide* for public good. The PIL should not merely be a cloak for attaining private ends of a third party or of the party bringing the petition.

Public interest litigation is often criticized for its potential to obstruct genuine plans of development through stay orders or injunctions. The Supreme Court has emphasized the inadvisability of issuing interim orders that deprive the State of revenues legitimately due to it. Generally a stay order or an interim order should not be granted unless, after considering the balance of convenience, it is found that the loss likely to be caused to the petitioner would be irreversible if the contemplated action were found to be illegal.¹⁸¹ In a PIL the Court has to weigh the advantage to the public of staying a project against the advantage in getting it implemented. In *Raunaq International Construction Ltd.* Justice Sujata Manohar imposed a most onerous condition on the public interest litigant. The learned judge said:¹⁸²

The party at whose instance interim orders are obtained has to be made accountable for the consequence of the interim order. The interim order could delay the project, jettison finely worked financial arrangements and escalate costs. Hence the petitioner asking for interim orders in appropriate cases should be asked to provide security for any increase in cost as a result of such delay or any damages suffered by the opposite party in consequence of an interim order. Otherwise public detriment may outweigh public benefit in granting such interim orders.

¹⁷⁶ *Machineni Kishan Rao v. India* AIR 1997 A.P. 275.

¹⁷⁷ *Amitabh Bachchan Corporation Ltd. v. Mahila Jagran Manch* (1997) 7 SCC 91.

¹⁷⁸ *Ramsharan Autyanuprasi v. India* AIR 1989 SC 549.

¹⁷⁹ *B. Krishna Bhat v. India* (1990) 3 SCC 65.

¹⁸⁰ (1999) 1 SCC 492; Also see *Environment Society of India v. Administrator, Chandigarh* AIR 1998 P&H 94.

¹⁸¹ Sathe, *Administrative Law*, p. 377.

¹⁸² (1999) 1 SCC 492, 503.

It is submitted that while a court should take maximum care in granting interim orders, imposing liability for reimbursement on the public interest litigant in case the court ultimately finds that its contention could not be upheld would act as a terrible deterrent against genuine PILs. Such litigants are mostly social action groups, which are short of resources and have no personal axe to grind. They are often pitted against strong adversaries such as governments or the big industrial companies. Mostly such petitions raise questions of proper application of mind by the authorities or even *mala fide* exercise of power by the authorities, which are difficult to prove in a court of law. If the litigant is to be penalized if ultimately its contention is not upheld, it will mean a death-blow to public interest litigation against corruption and abuse of power. It is submitted that the above view is entirely against the ethos of public interest litigation.

In fact, the Court has in the past held that a PIL continues even if the petitioner who initiated it withdraws from it. Sheela Barse had initiated litigation against state governments on behalf of children who were languishing in remand homes and the litigation was prolonged because of delays caused by the state governments in filing their affidavits. The state governments could make the litigation most expensive for Barse by merely asking for adjournments. Exasperated at such delaying tactics, Barse threatened to withdraw from the litigation. The Supreme Court held that even if she withdrew, the PIL would not abate.¹⁸³ It would continue until finally disposed of. Once a PIL was brought to the notice of the Court, it could not be withdrawn, as can a private litigation, at the will of the litigant. To hold the initiator of the PIL liable for any loss caused by the admission or stay order given on such a petition in my opinion is against the public character of such litigation. If such a litigant has committed any fraud to obtain a stay order or an interim relief, it could certainly be punished but not an honest litigant for having obtained an interim relief in a matter that ultimately goes against it.

COMPENSATORY JURISPRUDENCE

The courts have taken advantage of the open-textured wording of articles 32 and 226 of the Constitution. These articles give freedom to the courts to mould the remedies and even invent new remedies for the enforcement of the rights. Traditionally, the writ jurisdiction was supposed to be an exercise only for stopping or preventing a mischief, not for providing

¹⁸³ *Sheela Barse v. India* (1988) 4 SCC 226.

relief for the mischief already done. If a person was illegally detained, a court could set him free but could not provide compensation for wrongful confinement or punishment for the wrongdoer. The person concerned had to prosecute or sue the police or any other authority responsible for such illegal detention. In India, there has been a very weak tradition of tort litigation, because of delays, high court costs, and Indian judges' tendency to award meagre compensation. The Supreme Court rightly felt that mere release of a person from illegal detention would not be an adequate relief for him and would not deter irresponsible police officers from riding roughshod over people's rights. It therefore used the writ jurisdiction for awarding token compensation to the aggrieved person. The first case in which such compensation was awarded was *Rudal Shah v. Bihar*.¹⁸⁴ Rudal Shah had been arrested on the charge of murder in 1953 and was acquitted in 1968. He, however, continued to languish in prison until 1982. The jail authorities said that he had been insane but could not show on what basis he had been adjudged as insane and what measures had been taken to cure him. It was obviously a case of illegal imprisonment due to sheer carelessness and callousness. The Court not only set him free but also asked the State to pay him Rs 30,000 as compensation. Since then compensation has been awarded in a number of cases.¹⁸⁵

The principle of the State's liability to pay compensation for the infringement of fundamental rights was stated most unequivocally by Chief Justice Bhagwati in *M. C. Mehta v. India*.¹⁸⁶ This case extended the liability to pay compensation not only in respect of infringement of first generation human rights as was done in *Rudal Shah* but in respect of third generation human rights, which are group rights. This was a case of environmental pollution that jeopardized the right to life of a large number of people. The legal Aid and Advisory Board and the Bar Association had filed a petition for closure of certain units of a company on the ground of possible health hazard. The Court had allowed the company to continue to function subject to certain conditions. While the petition was pending, there was leakage of oleum gas. The petitioners therefore asked for compensation to the affected persons. While conceding the claim, Justice Bhagwati said:¹⁸⁷

These applications for compensation are for the enforcement of the fundamental right to life enshrined in Art. 21 of the Constitution and while dealing with such

¹⁸⁴ AIR 1983 SC 1086.

¹⁸⁵ S. P. Sathe, *Administrative Law*, p. 466 (6th ed., Butterworths, 1998).

¹⁸⁶ AIR 1987 SC 1086.

¹⁸⁷ *Ibid.*, p. 1089.

applications, we cannot take a hypertechnical approach which would defeat the ends of justice.

The Court further said:¹⁸⁸

It may now be taken as well settled that Art. 32 does not merely confer power on this Court to issue a direction, order or writ for enforcement of the fundamental rights but it also lays a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights. It is in realization of this constitutional obligation that this Court has in the past innovated new methods and strategies for the purpose of securing enforcement of the fundamental rights, particularly in the case of the poor and the disadvantaged who are denied their basic human rights and to whom freedom and liberty have no meaning.

The learned judge stated that the power of the Court was not only injunctive in ambit but was also remedial and included the giving of relief against a breach of fundamental rights already committed. If the Court did not have such power, the violator of fundamental rights would be quick in violating them and the Court would watch it helplessly. The power to grant such remedial relief included the power to award compensation in appropriate cases. The Court used the words 'appropriate cases' so as to limit the use of the writ jurisdiction for awarding compensation to cases of gross violation of fundamental rights of a large number of people who are poor and disadvantaged. For other people, civil remedies were available. The Court said:¹⁸⁹

The infringement of the fundamental right must be gross and patent, that is incontrovertible and ex facie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the persons affected by such infringement to initiate and pursue action in civil Courts.

Thus, award of compensation was to be made under the writ jurisdiction when (1) fundamental rights were infringed (2) of a large number of people and/or (3) of people who were helpless, resourceless, and socially and economically disadvantaged. The writ jurisdiction under articles 226 and 32 was held to include the power to award compensation so as to partly undo the effects of infringement of fundamental rights of those who could not undertake civil litigation in pursuit of their claim for compensation.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid., p. 1091.

Such compensation was, however, different from compensation for the wrong suffered. In *Nilabati Behera v. Orissa*,¹⁹⁰ the Supreme Court held that the compensation under the writ jurisdiction was different from the compensation awarded in a civil suit for tort. In a tort case, the compensation would be commensurate with the loss suffered, whereas in a writ petition, the compensation would be a mere token. In fact, the loss complained of in a writ petition is of a fundamental right and no amount of compensation is worth the value of that loss. A token compensation award, howsoever paltry, symbolizes the protest against the denial of fundamental right. The right to sue for tort remains despite the award of compensation under the writ jurisdiction. Unfortunately, the Supreme Court of India has not yet expressly overruled its decision in *Kasturilal v. U. P.*¹⁹¹ given 35 years ago in which it had been held that the State in India was not liable for the torts of its servants committed in exercise of the sovereign functions of the State. The decision was based on the theory of sovereign immunity, which is totally unsuitable for a democratic polity. Even in England, the Crown was made liable for the torts of its servants by the Crown Proceedings Act, 1947. Since the Indian Parliament has not legislated to provide for liability of the State, the Court ought to state the law of State liability in unreserved terms. Although the Court has not overruled the above decision, it has been holding various public authorities liable for the torts of their servants.¹⁹² That, however, is done on the premise that those functions are not sovereign functions and therefore the State is liable even according to the *Kasturilal* decision.

JUDICIAL PROCESS: FROM ADVERSARIAL TO POLYCENTRIC

Public interest litigation has changed the character of the judicial process from adversarial to polycentric and adjudicative to legislative.¹⁹³ Order 1, rule 8 of the Code of Civil Procedure states that a judicial decision is binding only on the parties to the litigation. This is known as *res judicata*. A decision is binding and final on the parties to the litigation and no party can raise a question regarding rights or liability on which the decision has been given, except before an appellate court if appeal is provided by the law. Where appeal is provided, the decision of the highest appellate

¹⁹⁰ (1993) 2 SCC 746: AIR 1993 SC 1960.

¹⁹¹ AIR 1965 SC 1039.

¹⁹² See Sathie, *Administrative Law*, p. 419.

¹⁹³ Upendra Baxi, 'On the Problematic Distinction Between "Legislation" and "Adjudication" A Forgotten Aspect of Dominance', *Delhi L. R.* vol. 10, pp. 3-15 (1990).

court is final and binding on the parties. A decision is effective in *personam*, which means between the litigants. A decision in a PIL may, however, become effective on persons who have not been actual litigants. A PIL does not deal with a dispute between two parties but often involves conflict resolution, which affects many people who are not parties to the litigation. The decision may become effective *in rem*. Such quasi-legislative character of a PIL became manifest in a recent litigation in which the orders of the Court banning certain type of shrimp culture in coastal areas were challenged on the ground that they were not binding on those who were not parties to that case. In *Jagannath v. India*,¹⁹⁴ the Court had issued orders prohibiting the setting up of shrimp culture industry in the ecologically fragile coastal area because of its ill effects on mangrove ecosystems, depletion of casuarina, pollution of potable water and plantations, reduction in fish catch, and blockage of direct approach to the seashore. In *Gopi Aqua Farms v. India*,¹⁹⁵ the petitioners argued that the above decision was not binding on them since they had been parties to the litigation. They argued that they should be heard against that decision. Technically they were right because a judicial decision is supposed to be final and binding only on the parties to the litigation. This rule of private adjudication if applied to public interest litigation would have made it toothless. The Court held that order 1, rule 8 of the Code of Civil Procedure was not applicable to a PIL. The Court said:¹⁹⁶

The case of *Jagannath* had received widest publicity. Various investigations into facts relating to shrimp culture were carried out, reports were obtained from various sources like NEERI, Central Board of Prevention and Control of Water Pollution and various other authorities. It is difficult to believe that the petitioners were unaware of all these events. A large number of shrimp farmers and organizations representing them appeared in Court and placed their points of view about the dispute ... A large number of them appeared and the case was argued at great length for very many days and the decision was ultimately given. Now, a few persons cannot come up and say that they were not made parties in that case or that they were unaware of that case altogether and, therefore, the judgement does not bind them and the case should be heard all over again. If this practice is allowed, there will be no end to litigation.

Public interest litigation has changed this traditional character of the judicial process and made its decisions effective even against those who

¹⁹⁴ AIR 1997 SC 811: (1997) 2 SCC 87.

¹⁹⁵ AIR 1997 SC 3519: (1997) 6 SCC 577. See S. P. Sathe, *Administrative Law*, p. 419 (6th ed., Butterworths, 1998).

¹⁹⁶ AIR Ibid., p. 3520.

were not parties to the litigation. In such litigation, various aspects of public interest are canvassed before the court and the court has to strike a balance between them. We saw above how in cases involving environmental issues the Court had to strike a balance between competing interests. In fact such conflict resolution has long been an aspect of Indian judicial process. In *Express Newspapers v. India*,¹⁹⁷ Justice N. H. Bhagwati dealt with three concepts of minimum wage, fair wage, and living wage and tried to reconcile the obligations to pay such wages with the capacity of the industry to pay. The Court held that while minimum wage had to be paid irrespective of the capacity of the industry to pay, fair wage and living wage could be made obligatory only in light of the capacity of the industry to pay. In Mumbai, commuters by local trains as well as passengers travelling by through trains have been victims of stone pelting by anti-social elements. Some travellers died and some were seriously injured. It is believed that this happens because there are slums very close to the railway track and therefore a writ petition has been filed in the Bombay High Court seeking mandamus against the State of Maharashtra and the Central government asking them to remove such slums from within forty yards from the railway track. On the other hand, permission was sought on behalf of the slum dwellers to intervene and they have prayed that unless alternative arrangement for their habitation was made, they should not be removed from their dwelling places.¹⁹⁸

DIRECTIONS: A NEW FORM OF JUDICIAL LEGISLATION

Articles 32 and 226 confer on the Supreme Court and the High Court respectively the power to issue 'directions, orders or writs' for achieving the objectives of those articles. The courts have issued directions for varied purposes. In public interest litigation, the Supreme Court and the High Courts have issued directions for appointing committees or for asking the government to carry out a scheme. They may constitute specific orders to the parties to do or not to do something. For example, directions in the *Azad Rikshaw Pullers* case¹⁹⁹ asked the Punjab National Bank to advance loans to the rikshaw pullers and contained a whole scheme for the repayment of such loans. Directions in *Common Cause v. India*²⁰⁰ provided for how blood should be collected, stored, and given for transfusion and how blood transfusion could be made free from

¹⁹⁷ AIR 1958 SC 578.

¹⁹⁸ *Times of India* 5-2-99; 25-2-99.

¹⁹⁹ AIR 1981 SC 14.

²⁰⁰ (1996) 1 SCC 753 (Blood Bank case).

hazards. Directions were given to the government to disseminate knowledge about environment through sliders in cinema theatres or special lessons in schools and college.²⁰¹ The Supreme Court laid down directions as to how children of prostitutes should be educated,²⁰² on what should be the fee structure in private medical or engineering colleges,²⁰³ on preparing a scheme for the housing of pavement dwellers or squatters,²⁰⁴ and on how the CBI should be insulated from extraneous influences while conducting investigations against persons holding high offices.²⁰⁵

When workers engaged as contract labour in the Food Corporation of India sought extension of the Contract Labour (Regulation and Abolition) Act, 1970 so that it would apply to them, the Court issued directions to the governments concerned to constitute committees under section 5 of that Act to make necessary inquiry and to submit reports as to whether contract labour should be abolished in those corporations.²⁰⁶ In another case,²⁰⁷ the Court was asked to institute an inquiry against police officers under whose jurisdiction the red light areas as well as *devadasis* were flourishing and to bring all victims of the flesh trade from there and provide them with remedies. The Court could not undertake such a roving inquiry but gave directions to the government. In *Kishen v. Orissa*,²⁰⁸ the Supreme Court gave directions to the government on measures to be taken for preventing starvation deaths due to poverty. These directions were in the nature of specific orders from the Court to the government. They had administrative character.

Some of these directions have legislative effect. Law-making by the Supreme Court through directions has belied the legal theory regarding *ratio decidendi* and *obiter dictum*. Any legal principle that becomes the basis of a decision and without which such a decision could not have been rendered is called *ratio decidendi*. Such a legal principle or *ratio* is binding on that court and on all courts subordinate to it in future litigation involving a similar question. Such *ratio* is the law laid down by the court and that alone is binding on the subordinate courts in future litigation. A legal principle that the court may elucidate but that may not be necessary

²⁰¹ *M. C. Mehta v. India* AIR 1992 SC 382; (1992) 1 SCC 358 (Environment Education case).

²⁰² *Gaurav Jain v. India* AIR 1990 SC 292.

²⁰³ *TMA Pai Foundation v. Karnataka* (1995) 5 SCC 220; AIR 1995 SC 2431.

²⁰⁴ *Sodan Singh v. New Delhi Municipal Corporation* (NDMC) (1998) 2 SCC 727, 743.

²⁰⁵ *Vineet Narain v. India* (1998) 1 SCC 226.

²⁰⁶ *Food Corporation of India Workers Union v. Food Corporation of India* (1985) 2 SCC 294; AIR 1985 SC 488.

²⁰⁷ *Vishal Jeet v. India* AIR 1990 SC 1412; (1990) 3 SCC 318.

²⁰⁸ AIR 1989 SC 677.

for the disposal of the case does not enjoy the status of a *ratio*. Such extraneous judicial observations on the principles of law are known as *obiter dicta*. The *obiter dictum* is merely of persuasive value. It may be cited by lawyers while arguing a case and may become a binding precedent only if it is accepted by court as a *ratio* in that case.

While a decision is binding on the actual parties (*res judicata*), the ruling (*ratio*) is binding on the courts while deciding future cases. The doctrine of *stare decisis* means that every court is bound by the decision of a higher court. This principle applies to various benches of the Supreme Court also. Therefore, a bench of a higher strength of judges of the Supreme Court is constituted if a previous decision of a bench is to be reconsidered. The doctrine of precedent means that a court is bound by its own previous decision and the lower courts are bound by the decision of a higher court. Article 141 of the Constitution says that the law declared by the Supreme Court shall be the law of the land. Here, in terms of strict legal theory, only the *ratio* constitutes the binding law. But the High Courts have held that they were bound by even the *obiter dicta* of the Supreme Court.²⁰⁹

Strictly speaking the dictum of the Supreme Court in *L. C. Golaknath v. Punjab*²¹⁰ that Parliament could not amend the Constitution so as to take away or abridge the fundamental rights was not a *ratio* because the actual decision of the Court was that the impugned constitutional amendments that protected the laws by which the petitioner's properties had been taken away were valid. Since the Court had applied the doctrine of prospective overruling, all those constitutional amendments that the petitioner had challenged had been held to be valid. So the actual decision in the case had no direct connection with the futuristic mandate of the Court that Parliament shall not amend the Constitution so as to take away or abridge the fundamental rights. That mandate was to be applicable only in the future. Since the traditional legal theory of positivism did not conceive any law-making function to be performed by the courts, such futuristic mandate saying that Parliament shall not do this or that was preposterous. Therefore, in strict positivist terms, the *Golaknath* dictum was not the law. In reality it was treated as law not only by the Court itself but also by Parliament. Parliament took steps to amend the Constitution to overturn that dictum. The Court itself held in *Kesavananda Bharati*²¹¹ that the *Golaknath* dictum was wrong and therefore was overruled.

²⁰⁹ See M. P. Jain, *Indian Constitutional Law*, p. 143 (3rd ed., 1978).

²¹⁰ AIR 1967 SC 1643.

²¹¹ AIR 1973 SC 1460.

Since then the *ratio-obiter* distinction has become inconsequential in respect of constitutional law litigation in general and PIL in particular. In PIL, the Court has started legislating through giving directions. Such directions are overtly legislative and are considered binding not only by the Court and the subordinate courts but also by the governments and the social action groups. In *Laxmikant Pandey v. India*,²¹² the Supreme Court gave directions as to what procedures should be followed and what precautions should be taken while allowing Indian children to be adopted by foreign adoptive parents. There was no law to regulate inter-country adoptions and such lack of regulation could cause incalculable harm to Indian children, considering the possibility of child trade for prostitution as well as slave labour. When the Court was approached, it did not throw up its hands in despair and say that since there was no legislation it could do nothing. Justice Bhagwati laid down an entire scheme for regulating inter-country adoptions and also intra-country adoptions. For the last twenty years, social activists have taken recourse to these directions for protecting children and promoting desirable adoptions.

In *Visaka v. Rajasthan*,²¹³ the Supreme Court was asked to lay down directions for the effective implementation of gender equality, which was threatened by sexual harassment of working women. The genesis of the case bears mention. A woman named Bhanwari, who worked as a social worker in the service of the Government of Rajasthan, was raped by some well-placed persons. They did so in retaliation for her effort to expose the child marriages that had taken place among their relatives. The accused were tried for the offence of rape but were acquitted. An appeal against their acquittal was filed by the State. The rape and the acquittal had been severely criticized by women's organizations. Visaka, a social action group, approached the Supreme Court with a request to lay down guidelines for protecting working women from sexual harassment at the workplace. So the petitioners went to the Court for obtaining the law on the subject and the Court entertained the petition and laid down the guidelines. Since there was no legislation against such sexual harassment, the Court felt that it was necessary to fill in the gap. Chief Justice J. S. Verma said:²¹⁴

The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement is of the

²¹² AIR 1987 SC 232; also see *S. C. Kamdar v. Asha Trilokhbhai Saha* AIR 1995 SC 1892; *Laxmi Kant Pandey v. India*, AIR 1992 SC 118.

²¹³ (1997) 6 SCC 241; AIR 1997 SC 3011.

²¹⁴ Ibid., pp. 3012-13.

legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under articles 14, 19 and 21 are brought before us for redress under article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

The Government of India also consented to such judicial legislation, which is obvious from the following statement of the learned Chief Justice:²¹⁵

The progress made at each hearing culminated in the formulation of guidelines to which the Union of India gave its consent through the learned Solicitor General, indicating that these should be the guidelines and norms declared by this Court to govern the behaviour of the employers and all others at the work places to curb this social evil.

These directives were issued 'in exercise of the power available under article 32 of the Constitution for enforcement of fundamental rights' and the judge further emphasized that 'this would be treated as the law declared by this Court under Article 141 of the Constitution.'²¹⁶ These directions were not mere orders but they constitute the law applicable in the future to all cases of sexual harassment of working women in government and semi-government services. The Court also asked the government to include them in the Standing Orders made under the Industrial Disputes Act so as to be applicable to the private industry. The Court through its directions defined what was meant by sexual harassment. In that definition, 'physical contact and advances' was mentioned as an essential ingredient of sexual harassment. In a subsequent case,²¹⁷ where the High Court had acquitted a person on the ground that he had tried to molest but did not molest, the Court observed:²¹⁸

The behaviour of respondent (sic) did not cease to be outrageous for want of actual assault or touch by the superior officer.

The Court observed:²¹⁹

In a case involving charge of sexual harassment or attempt to sexually molest, the Courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or the dictionary

²¹⁵ Ibid. 3014.

²¹⁶ Ibid., p. 3015.

²¹⁷ *Apparel Export Promotion Council v. A. K. Chopra* (1999) 1 SCC 759; AIR 1999 SC 625.

²¹⁸ Ibid., p. 777.

²¹⁹ Ibid.

meaning of the expression 'molestation'. They must examine the entire material to determine the genuineness of the complaint.

It is hoped that the lower courts will heed this message while dealing with cases involving women in general and particularly cases involving rape.

Directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The Court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as being an essential component of its role as a constitutional court. In *M. C. Mehta v. State of Tamil Nadu*,²²⁰ although the actual petition was in respect of child labour in Sivakasi in Tamil Nadu, where a large number of children were engaged in the hazardous work of matchbox manufacture, the Court thought it fit to 'travel beyond the confines of Sivakasi' and to 'deal with the issue in wider spectrum and broader perspective taking it as a national problem'.²²¹ The Court therefore decided to address itself to 'how we can, and are required to tackle the problem of child labour, solution of which is necessary to build a better India.'²²² The wider conception of its own role is also obvious from the observation that the judiciary could not merely watch the effort of the other organs of government to bring about social transformation visualized in the directive principles of state policy but must actively participate in that process. Referring to the directive principles of state policy in general and particularly the principle enjoining upon the State to provide free and compulsory education for children below the age of fourteen years contained in article 45, Justice Hansaria said:²²³

[I]t is the duty of all the organs of the State [according to article 37] to apply these principles. Judiciary being also one of the three principal organs of the State, has to keep the same in mind when called upon to decide matters of great public importance. Abolition of child labour is definitely a matter of great public concern and significance.

Among various directions which the Court gave, the most important were that (1) the offending employer (i.e., one who engages prohibited child labour) must be asked to pay Rs 20,000 as compensation for every child employed in contravention of the provisions of the Child Labour (Prohibition and Regulation) Act; (2) the government must either provide

²²⁰ (1996) 6 SCC 756; AIR 1997 SC 699 (Child Labour case).

²²¹ *Ibid.*, 765.

²²² *Ibid.*

²²³ *Ibid.*, 766.

a job to an adult member of a family in lieu of the child belonging to that family who has been employed in any factory, mine, or other hazardous work or it must deposit Rs 5000 for every child; (3) where such alternative employment is not given, the parent or guardian of the child would be entitled to be paid per month the income earned on the corpus of Rs 25,000 (Rs 20,000 contributed by the employer and Rs 5000 contributed by the State) for each child; (4) all amounts received from the employers as well as governments should be deposited in a fund called the Child Labour Rehabilitation cum Welfare Fund; (5) the *alternative* employment given as per above direction or the interest on Rs 25,000 payable to the parent or guardian of a child worker shall be stopped if the child is not sent to school; and (6) the inspectors appointed under section 17 of the act shall ensure compliance with its provisions.

While the intentions as well as the meticulous scheme laid down by the Court are admirable and show its genuine concern about human exploitation in the form of child labour, the judgement also points out the limitations of judicial activism in solving such socio-economic problems. The Court observed that it could not ask the State 'at this stage to ensure alternative employment in every case covered by article 24' of the Constitution. Article 24 says that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. This is a fundamental right that has been enforced by the Child Labour (Prohibition and Regulation) Act. What the Constitution contemplated was prohibition of child labour not merely in hazardous industries but per se. This could be achieved by making primary education free and compulsory and providing the right to work to every adult. Both of these have been provided in the directive principles of state policy. The right to work provided by the directive principles of state policy is to be provided 'within the limits of the economic capacity and development of the State' (article 41). The right to work can become a reality only through appropriate economic policies of the State. If abolition of child labour is linked to employment of the adult population, and the Court cannot provide the right to work, it also means that the Court cannot abolish child labour. Provisions such as those the Court recommended could on the other hand perpetuate the practice of child labour. Considering the market conditions of labour it may be worthwhile for an employer to engage child labour by paying Rs 20,000 per child to the Child Labour Rehabilitation cum Welfare Fund. Another question that may arise is where will the State find the funds to pay Rs 5000 per child on its failure to provide work for an adult member of the child's family? The Court is directly undertaking the work of

prioritizing the allocation of resources. Will child labour be abolished even if all this is done? We have our doubts.

In *M. C. Mehta v. India*,²²⁴ the Supreme Court gave directions for protecting the environment from pollution caused by vehicular traffic and for protecting people from road accidents. These directions laid down that the vehicles should be equipped with speed control devices and that goods vehicles should go by a maximum speed of 40 kilometres per hour, should not overtake passenger vehicles, and should be driven only by an authorized driver. The Court also laid down qualifications for drivers of buses belonging to or hired by educational institutions for transporting children. Obviously these directions were given because of the ghastly accidents that had resulted in the death of several school children due to callousness of the drivers.

The Court has insisted that it undertook law-making through directions only to fill in the vacuum left by the legislature or the executive and that its directions could be replaced by legislation enacted by the legislature or, where no legislation was required, by the executive, whose power was coterminous with the legislature. In *Vineet Narain v. India* Chief Justice Verma once again reiterated:²²⁵

[I]t is the duty of the executive to fill the vacuum by executive order because its field is coterminous with that of the legislature and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions [Article 32 and Article 142 of the Constitution] to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.

How are these directions enforced? The Supreme Court has made it clear that these directions are the law laid down by the Supreme Court under article 141 of the Constitution. In *M. C. Mehta v. India*, the Court said:²²⁶

The directions issued by this Court are meant to be complied with and we wish to emphasize that it is the obligation of the State to comply with the same.

I have not come across any empirical data on how far the directions are enforced. We know that directions in respect of inter-country adoption and sexual harassment of working women have been taken seriously by governments and semi-government institutions as well as social action groups. What sanctions are available for the enforcement of these

²²⁴ (1998) IX AD (SC) 37.

²²⁵ (1998) 1 SCC 226, 266.

²²⁶ AIR 1998 SC 2340, 2341; (1998) 6 SCC 60, 61.

directions? According to S. K. Agrawala, 'such directions do not serve much useful purpose'.²²⁷ This was said fifteen years ago and was not based on any empirical study. We are not aware of any empirical studies of the effectiveness of judicial directions. What happens if the directions are not obeyed? The only sanction for the enforcement of the sanctions is a petition for contempt. Since such a petition will have to be filed in the Supreme Court, it may seldom be resorted to. We have not come across any case in which the Court has invoked the power of contempt of court against disobedience or non-obedience of the directions. What appears to be happening is that implementation of the directions is being insisted upon by the social action groups in their fields of operation. Even the governments do not seem to be challenging the status of these directions and are cooperating to enforce them. In *Vineet Narain v. India*,²²⁸ Chief Justice Verma appreciated the cooperative attitude of the counsels who appeared on behalf of the State and the *amicus curiae* for the petitioners, who did not adopt 'the adversarial stance'.²²⁹

CONCLUDING OBSERVATIONS

This chapter has been a survey of the decisional law of the Supreme Court of India on public interest litigation. It shows the expansion in the activity of the Supreme Court, change in the class of the users of its process, and the varied interests that were espoused by public interest litigants during the last twenty years. The fact that so many people and social activists have invoked the Court's jurisdiction shows that there has been greater reliance on the judicial method for redressing people's grievances and for bringing in greater accountability of the governing institutions. Public interest litigation has not been a panacea for all evils of the legal and political system. Even its original purpose, which was to facilitate access to courts, seems to have been only partly successful. In the absence of a system of legal aid, PIL is bound to face the problem of funding. Social activists such as M. C. Mehta or Common Cause have acquired good infrastructure for PIL. Although individual lawyers have volunteered to work free, however, a PIL costs a lot of money. A news item in the *The Times of India* (5 February 1999) describes that residents of Dadar in Mumbai who wanted to resist the construction of a flyover gave up their effort and also chose not to go to court because a PIL would cost them

²²⁷ S. K. Agrawala, *Public Interest Litigation in India* (K.M. Munshi Memorial Lecture, Second Series), p. 31 (Indian Law Institute, 1985).

²²⁸ (1998) 1 SCC 226; AIR 1998-SC 889.

²²⁹ *Ibid.*, 234.

Rs 2 lakh and they were not able to raise that much money. So access depends on the chance of a lawyer taking up a brief without charging fees or on the collective strength of a group of people to raise money for other expenditure. Even if a lawyer volunteers to work free, several other expenses are incurred for a PIL. Research into the facts, preparation of various papers and documents and multiple copies thereof, and travelling to various places including the court are costly exercises.

The PILs need to be audited to reveal how many of them ended in giving the desired relief to the petitioner. PIL may not in all cases be undertaken for achieving final results. It may be undertaken as an additional method of a political mobilization, to obtain temporary respite from an adverse action, to highlight the abuse of power by the authorities, or to obtain immediate relief for a person suffering from violation of human rights. In all such matters, PIL seems to have been successful. It does not seem to have been successful where overambitious aims such as reform of the prison system, reform of the criminal justice system, or relief from poverty, which depend upon radical changes in the economy, were aimed at.

Unlike PIL in Canada and the United States, PIL in India was initiated by the judiciary. It has, however, been sustained by social activists and individuals who have found its use more fruitful than the use of political methods such as demonstrations, satyagraha, or mass protest. Public interest litigation has created a class of consumers who have now developed vested interest in its use. It may not be possible for the Court to revert from the high profile role it has projected through its decisions. Indian PIL is the offspring of post-emergency judicial activism that was premised on a more affirmative and dynamic judicial role. A foreign observer rightly feels that the Court is trying to achieve the impossible.²³⁰ Public interest litigation has been severely criticized, but most of the criticism is from the perspective of the paradigm of the adversary judicial process.²³¹

Even from the perspective of the new paradigm of public law judicial process, the Court has doubtless exceeded the limits of judicial function, and some of its decisions were populist. Why has the executive or the legislature not protested against such usurpation of their functions by the Court? During the years of Nehru, the political establishment had

²³⁰ James Cassels, 'Judicial Activism and the Public Interest Litigation in India: Attempting the Impossible?' 37 *American Journal of Comparative Law*, p. 495 (1989).

²³¹ M. Hidayatullah, 'Highways and Bylanes of Justice', Justice B. D. Bal Memorial lecture delivered at the ILS Law College, Pune on 24 Oct 1983; S. K. Agrawala, *Public Interest Litigation*, *supra* n. 227.

assigned a limited role to the judiciary and within that limited sphere it was respected and held in high esteem. But it was insisted that the judiciary should not become the third chamber of Parliament. Since 1989, it is the political establishment that is referring more and more questions for the determination of the courts. It has not protested even when the Supreme Court laid down how the CBI should be structured. In recent days, the Courts have started mediating between employees and the government institutions to bring about peaceful settlement of their disputes. A strike by senior physicians of the All India Institute of Medical Sciences in Delhi was called off at the instance of the Delhi High Court and the Court ordered the government to pay those physicians' salaries according to the recommendations of a committee appointed for that purpose until final settlement was reached between them and the government.

At times, there have been protests but only when judicial activism seemed to impinge on the discretionary area of the politicians or civil servants. Clandestine moves were made to clip the wings of the courts by imposing restrictions on the eligibility of persons to file PIL but were withdrawn when there was public protest. There has been talk of streamlining judicial activism but the political establishment has not had either moral courage or political strength to strip the courts of their newly acquired power. This is because the court has carved for itself a niche in the hearts of the people. Why have people gone to court for the redressal of grievances that they should have known was beyond the power and function of the judiciary? Although the system of justice continues to be inequalitarian and inaccessible to a large number of people and hence PIL seems to be nothing more than tokenism, the people have reposed greater faith in judges than in the politicians. There have been disappointments with the Court, for example with its authorship of the settlement between Union Carbide Corporation and the victims of the Bhopal gas tragedy, which included the quashing of all civil and criminal cases against Union Carbide Corporation,²³² or with its decision during the emergency in *A. D. M. Jabbalpore v. Shiv Kant Shukla*,²³³ which we have discussed in Chapter IV. Yet, neither the political establishment nor the lay people have raised any objections against judicial activism. Criticisms against individual decisions have been made but not against judicial activism.

²³² *Union Carbide Corporation v. Union of India* (1989) 1 SCC 674. For criticism see Upendra Baxi and Amita Dhanda, *Introduction to Valiant Victims and Lethal Litigation: The Bhopal Case* (Indian Law Institute, 1990).

²³³ AIR 1976 SC 1207.

Why has judicial activism received such strong public support? Why has it acquired such strong social legitimacy? Is it out of the helplessness of the people, the escapism of the political elite, or the intrinsic merit of the judicial process as a check on democracy? We shall attempt to answer these questions in the last chapter of this monograph.

VII

Legitimacy of Judicial Activism

We have seen in the previous chapters how the Supreme Court of India became the most powerful apex court in the world. Unlike the US Supreme Court or the House of Lords in England or the highest courts in Canada or Australia, the Supreme Court of India can review even a constitutional amendment and strike it down if it undermines the basic structure of the Constitution.¹ It can decide the legality of the action of the President of India under article 356 of the Constitution whereby a state government is dismissed.² We have said in Chapter IV that such actions cannot be judged except by political parameters. Through public interest litigation, the Court has granted access to persons inspired by public interest to invite judicial intervention against abuse of power or misuse of power or inaction of the government. Not only was the requirements of *locus standi* liberalized to facilitate access but the concept of justiciability was widened to include within judicial purview actions or inactions that were not considered to be capable of resolution through judicial process according to traditional notions of justiciability.³

The realist school of jurisprudence exploded the myth that the judges merely declared the pre-existing law or interpreted it and asserted that the judges made the law. It stated that the law was what the courts said it was. This is known as legal scepticism and was really a reaction to Austin's definition of law as a command of the political sovereign. According to analytical jurisprudence a court merely found the law or merely interpreted the law. The American realist school of jurisprudence asserted that the judges made law, though interstitially. Jerome Frank, Justice Holmes,

¹ *Kesavananda Bharati v. Kerala* AIR 1973 SC 1460.

² *S. R. Bommai v. India* (1994) 3 SCC 1: AIR 1994 SC 1918.

³ See Chapter VI.

Supreme Court of India

In Re vs Indian Woman Says Gang-Raped On ... on 28 March, 2014

Author: . .

Bench: P Sathasivam, S.A. Bobde, N.V. Ramana

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

1 SUO MOTU WRIT PETITION (CRIMINAL) NO. 24 OF 2014

In Re: Indian Woman says gang-raped on orders of Village Court published in
Business & Financial News dated 23.01.2014

J U D G M E N T

P.Sathasivam, CJI.

1) This Court, based on the news item published in the Business and Financial News dated 23.01.2014 relating to the gang-rape of a 20 year old woman of Subalpur Village, P.S. Labpur, District Birbhum, State of West Bengal on the intervening night of 20/21.01.2014 on the orders of community panchayat as punishment for having relationship with a man from a different community, by order dated 24.01.2014, took suo motu action and directed the District Judge, Birbhum District, West Bengal to inspect the place of occurrence and submit a report to this Court within a period of one week from that date.

2) Pursuant to the direction dated 24.01.2014, the District Judge, Birbhum District, West Bengal along with the Chief Judicial Magistrate inspected the place in question and submitted a Report to this Court. However, this Court, on 31.01.2014, after noticing that there was no information in the Report as to the steps taken by the police against the persons concerned, directed the Chief Secretary, West Bengal to submit a detailed report in this regard within a period of two weeks. On the same day, Mr. Sidharth Luthra, learned Additional Solicitor General was requested to assist the Court as amicus in the matter.

3) Pursuant to the aforesaid direction, the Chief Secretary submitted a detailed report dated 10.02.2014 and the copies of the same were provided to the parties. On 14.02.2014, this Court directed the State to place on record the First Information Report (FIR), Case Diaries, Result of the investigation/Police Report under Section 173 of the Code of Criminal Procedure, 1973 (in short the

Code), statements recorded under Section 161 of the Code, Forensic Opinion, Report of vaginal swab/other medical tests etc., conducted on the victim on the next date of hearing.

4) After having gathered all the requisite material, on 13.03.2014, we heard learned amicus as well as Mr. Anip Sachthey, learned counsel for the State of West Bengal extensively and reserved the matter.

Discussion:

5) Mr. Sidharth Luthra, learned amicus having perused and scrutinized all the materials on record in his submissions had highlighted three aspects viz. (i) issues concerning the investigation; (ii) prevention of recurring of such crimes; and (iii) Victim compensation; and invited this Court to consider the same.

Issues concerning the investigation:

6) Certain relevant issues pertaining to investigation were raised by learned amicus. Primarily, Mr. Luthra stated that although the FIR has been scribed by one Anirban Mondal, a resident of Labpur, Birbhum District, West Bengal, there is no basis as to how Anirban Mondal came to the Police Station and there is also no justification for his presence there. Further, he stressed on the point that Section 154 of the Code requires such FIR to be recorded by a woman police officer or a woman officer and, in addition, as per the latest amendment dated 03.02.2013, a woman officer should record the statements under Section 161 of the Code. While highlighting the relevant provisions, he also submitted that there was no occasion for Deputy Superintendent of Police to re-record the statements on 26.01.2014, 27.01.2014 and 29.01.2014 and that too in gist which would lead to possible contradictions being derived during cross-examinations. He also drew our attention to the statement of the victim under Section 164 of the Code. He pointed out that mobile details have not been obtained. He also brought to our notice that if the Salishi (meeting) is relatable to a village, then the presence of persons of neighbouring villages i.e., Bikramur and Rajarampur is not explained. Moreover, he submitted that there is variance in the version of the FIR and the Report of the Judicial Officer as to the holding of the meeting (Salishi) on the point whether it was held in the night of 20.01.2014 as per the FIR or the next morning as per the Judicial Officers report, which is one of the pertinent issues to be looked into. He also submitted that the offence of extortion under Section 385 of the Indian Penal Code, 1860 (in short the IPC) and related offences have not been invoked. Similarly, offence of criminal intimidation under Section 506 IPC and grievous hurt under Section 325 IPC have not been invoked. Furthermore, Sections 354A and 354B ought to have been considered by the investigating agency. He further pointed out the discrepancy in the name of accused Ram Soren mentioned in the FIR and in the Report of the Judicial Officer which refers to Bhayek Soren which needs to be explained. He also submitted that the electronic documents (e-mail) need to be duly certified under Section 65A of the Indian Evidence Act, 1872. Finally, he pointed out that the aspect as to whether there was a larger conspiracy must also be seen.

7) Mr. Anip Sachthey, learned counsel for the State assured this Court that the deficiency, if any, in the investigation, as suggested by learned amicus, would be looked into and rectified. The above

statement is hereby recorded.

Prevention of recurring of such crimes:

8) Violence against women is a recurring crime across the globe and India is no exception in this regard. The case at hand is the epitome of aggression against a woman and it is shocking that even with rapid modernization such crime persists in our society. Keeping in view this dreadful increase in crime against women, the Code of Criminal Procedure has been specifically amended by recent amendment dated 03.02.2013 in order to advance the safeguards for women in such circumstances which are as under:-

154. Information in cognizable cases. (1) x x x Provided that if the information is given by the woman against whom an offence under Section 326A, Section 326B, Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, or Section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:

Provided further that:--

(a) in the event that the person against whom an offence under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, or Section 509 of the Indian Penal Code is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such persons choice, in the presence of an interpreter or a special educator, as the case may be;

(2) x x x (3) x x x 161.Examination of witnesses by police:-

(1) x x x (2) x x x (3) x x x Provided further that the statement of a woman against whom an offence under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, or Section 509 of the Indian Penal Code is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer. 164.Recording of confessions and statements. 5A In cases punishable under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, sub-Section (1) or sub-Section (2) of Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, or Section 509 of the Indian Penal Code, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-Section (5), as soon as the commission of the offence is brought to the notice of the police: 164 A. Medical examination of the victim of rape.- (1) Where, during the stage when an offence of committing rape

or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:--

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman; (v) general mental condition of the woman; and (vi) other material particulars in reasonable detail, (3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent, to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigating officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.

Explanation--For the purposes of this section, "examination" and "registered medical practitioner" shall have the same meanings as in section 53.

9) The courts and the police officials are required to be vigilant in upholding these rights of the victims of crime as the effective implementation of these provisions lies in their hands. In fact, the

recurrence of such crimes has been taken note of by this Court in few instances and seriously condemned in the ensuing manner.

10) In *Lata Singh vs. State of U.P. and Ors.*, (2006) 5 SCC 475, this Court, in paras 17 and 18, held as under:

17. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.

18. We sometimes hear of honour killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal-

minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.

11) In *Arumugam Servai vs. State of Tamilnadu*, (2011) 6 SCC 405, this Court, in paras 12 and 13, observed as under:-

12. We have in recent years heard of Khap Panchayats (known as Katta Panchayats in Tamil Nadu) which often decree or encourage honour killings or other atrocities in an institutionalised way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out. As

already stated in Lata Singh case, there is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of personal lives of people committed by brutal, feudal- minded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal.

13. Hence, we direct the administrative and police officials to take strong measures to prevent such atrocious acts. If any such incidents happen, apart from instituting criminal proceedings against those responsible for such atrocities, the State Government is directed to immediately suspend the District Magistrate/Collector and SSP/SPs of the district as well as other officials concerned and charge-sheet them and proceed against them departmentally if they do not (1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or (2) if it has occurred, they do not promptly apprehend the culprits and others involved and institute criminal proceedings against them, as in our opinion they will be deemed to be directly or indirectly accountable in this connection.

12) Likewise, the Law Commission of India, in its 242nd Report on Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition) had suggested that:

11.1 In order to keep a check on the high-handed and unwarranted interference by the caste assemblies or panchayats with sagotra, inter- caste or inter-religious marriages, which are otherwise lawful, this legislation has been proposed so as to prevent the acts endangering the liberty of the couple married or intending to marry and their family members. It is considered necessary that there should be a threshold bar against the congregation or assembly for the purpose of disapproving such marriage / intended marriage and the conduct of the young couple. The members gathering for such purpose, i.e., for condemning the marriage with a view to take necessary consequential action, are to be treated as members of unlawful assembly for which a mandatory minimum punishment has been prescribed.

11.2 So also the acts of endangerment of liberty including social boycott, harassment, etc. of the couple or their family members are treated as offences punishable with mandatory minimum sentence. The acts of criminal intimidation by members of unlawful assembly or others acting at their instance or otherwise are also made punishable with mandatory minimum sentence.

11.3 A presumption that a person participating in an unlawful assembly shall be presumed to have also intended to commit or abet the commission of offences under the proposed Bill is provided for in Section 6.

11.4 Power to prohibit the unlawful assemblies and to take preventive measures are conferred on the Sub-Divisional / District Magistrate. Further, a SDM/DM is enjoined to receive a request or information from any person seeking protection from

the assembly of persons or members of any family who are likely to or who have been objecting to the lawful marriage.

11.5 The provisions of this proposed Bill are without prejudice to the provisions of Indian Penal Code. Care has been taken, as far as possible, to see that there is no overlapping with the provisions of the general penal law. In other words, the criminal acts other than those specifically falling under the proposed Bill are punishable under the general penal law.

11.6 The offence will be tried by a Court of Session in the district and the offences are cognizable, non-bailable and non-compoundable.

11.7 Accordingly, the Prohibition of Interference with the Freedom of Matrimonial Alliances Bill 20 has been prepared in order to effectively check the existing social malady.

13) It is further pertinent to mention that the issue relating to the role of Khap Panchayats is pending before this Court in Shakti Vahini vs. Union of India and Others in W.P. (C) No. 231 of 2010.

14) Ultimately, the question which ought to consider and assess by this Court is whether the State Police Machinery could have possibly prevented the said occurrence. The response is certainly a yes. The State is duty bound to protect the Fundamental Rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage. Such offences are resultant of the States incapacity or inability to protect the Fundamental Rights of its citizens.

15) In a report by the Commission of Inquiry, headed by a former Judge of the Delhi High Court Justice Usha Mehra (Retd.), (at pg. 86), it was seen (although in the context of the NCR) that police officers seldom visit villages; it was suggested that a Police Officer must visit a village on every alternate days to instill a sense of security and confidence amongst the citizens of the society and to check the depredations of criminal elements.

16) As a long-term measure to curb such crimes, a larger societal change is required via education and awareness. Government will have to formulate and implement policies in order to uplift the socio-economic condition of women, sensitization of the Police and other concerned parties towards the need for gender equality and it must be done with focus in areas where statistically there is higher percentage of crimes against women.

Victim Compensation:

17) No compensation can be adequate nor can it be of any respite for the victim but as the State has failed in protecting such serious violation of a victims fundamental right, the State is duty bound to provide compensation, which may help in the victims rehabilitation. The humiliation or the reputation that is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace.

18) In 2009, a new Section 357A was introduced in the Code which casts a responsibility on the State Governments to formulate Schemes for compensation to the victims of crime in coordination with the Central Government whereas, previously, Section 357 ruled the field which was not mandatory in nature and only the offender can be directed to pay compensation to the victim under this Section. Under the new Section 357A, the onus is put on the District Legal Service Authority or State Legal Service Authority to determine the quantum of compensation in each case. However, no rigid formula can be evolved as to have a uniform amount, it should vary in facts and circumstances of each case. In the case of State of Rajasthan vs. Sanyam, Lodha, (2011) 13 SCC 262, this Court held that the failure to grant uniform ex-gratia relief is not arbitrary or unconstitutional. It was held that the quantum may depend on facts of each case.

19) Learned amicus also advocated for awarding interim compensation to the victim by relying upon judicial precedents. The concept of the payment of interim compensation has been recognized by this Court in Bodhisattwa Gautam vs. Miss Subhra Chakraborty, (1996) 1 SCC 490. It referred to Delhi Domestic Working Womens Forum vs. Union of India and others to reiterate the centrality of compensation as a remedial measure in case of rape victims. It was observed as under:-

If the Court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the Court the right to award interim compensation which should also be provided in the Scheme.

20) This Court, in P. Rathinam vs. State of Gujarat, (1994) SCC (CrI) 1163, which pertained to rape of a tribal woman in police custody awarded an interim compensation of Rs. 50,000/- to be paid by the State Government.

Likewise, this Court, in Railway Board vs. Chandrima Das, (2000) 2 SCC 465, upheld the High Courts direction to pay Rs. 10 lacs as compensation to the victim, who was a Bangladeshi National. Further, this Court in SLP (CrI.) No. 5019/2012 titled as Satya Pal Anand vs. State of M.P., vide order dated 05.08.2013, enhanced the interim relief granted by the State Government from Rs. 2 lacs to 10 lacs each to two girl victims.

21) The Supreme Court of Bangladesh in The State vs. Md. Moinul Haque and Ors. (2001) 21 BLD 465 has interestingly observed that victims of rape should be compensated by giving them half of the property of the rapist(s) as compensation in order to rehabilitate them in the society. If not adopting this liberal reasoning, we should at least be in a position to provide substantial compensation to the victims.

22) Nevertheless, the obligation of the State does not extinguish on payment of compensation, rehabilitation of victim is also of paramount importance. The mental trauma that the victim suffers due to the commission of such heinous crime, rehabilitation becomes a must in each and every case. Mr. Anip Sachthey, learned counsel for the State submitted a report by Mr. Sanjay Mitra, Chief Secretary, dated 11.03.2014 on the rehabilitation measures rendered to the victim. The report is as follows:-

GOVERNMENT OF WEST BENGAL HOME DEPARTMENT Report on the Rehabilitation Measures Reference: Suo Motu Writ Petition No. 24 of 2014 Subject: PS Labpur, District Birbhum, West Bengal Case No. 14/2014 dated 22.01.2014 under section 376D/341/506 IPC.

In compliance with the order passed by the Honble Supreme Court during the hearing of the aforesaid case on 4th March, 2014, the undersigned has reviewed the progress of rehabilitation measures taken by the State Government agencies. The progress in the matter is placed hereunder for kind perusal.

1. A Government Order has been issued sanctioning an amount of Rs.50,000/- to the victim under the Victim Compensation Scheme of the State Government. It is assured that the amount will be drawn and disbursed to the victim within a week.
2. Adequate legal aid has been provided to the victim.
3. Patta in respect of allotment of a plot of land under Nijo Griha Nijo Bhumi Scheme of the State Government has been issued in favour of the mother of the victim.
4. Construction of residential house out of the fund under the scheme Amar Thikana in favour of the mother of victim has been completed.
5. Widow pension for the months of January, February and March, 2014 has been disbursed to the mother of the victim.
6. Installation of a tube well near the residential house of the mother of the victim has been completed.
7. Construction of sanitary latrine under TSC Fund has been completed.
8. The victim has been enrolled under the Social Security Scheme for Construction Worker.
9. Antyodaya Anna Yojna Card has been issued in favour of the victim and her mother.
10. Relief and Government relief articles have been provided to the victim and her family.

The State Government has taken all possible administrative action to provide necessary assistance to the victim which would help her in rehabilitation and reintegration.

(Sanjay Mitra) Chief Secretary

23) The report of the Chief Secretary indicates the steps taken by the State Government including the compensation awarded. Nevertheless, considering the facts and circumstances of this case, we are of the view that the victim should be given a compensation of at least Rs. 5 lakhs for rehabilitation by the State. We, accordingly, direct the Respondent No. 1 (State of West Bengal through Chief Secretary) to make a payment of Rs. 5 lakhs, in addition to the already sanctioned amount of Rs. 50,000, within one month from today. Besides, we also have some reservation regarding the benefits being given in the name of mother of the victim, when the victim herself is a major (i.e. aged about 20 years). Thus, in our considered view, it would be appropriate and beneficial to the victim if the compensation and other benefits are directly given to her and accordingly we order so.

24) Further, we also wish to clarify that according to Section 357B, the compensation payable by the State Government under Section 357A shall be in addition to the payment of fine to the victim under Section 326A or Section 376D of the IPC.

25) Also, no details have been given as to the measures taken for security and safety of the victim and her family. Merely providing interim measure for their stay may protect them for the time being but long term rehabilitation is needed as they are all material witnesses and likely to be socially ostracized. Consequently, we direct the Circle Officer of the area to inspect the victims place on day-to-day basis.

Conclusion:

26) The crimes, as noted above, are not only in contravention of domestic laws, but are also a direct breach of the obligations under the International law. India has ratified various international conventions and treaties, which oblige the protection of women from any kind of discrimination. However, women of all classes are still suffering from discrimination even in this contemporary society. It will be wrong to blame only on the attitude of the people. Such crimes can certainly be prevented if the state police machinery work in a more organized and dedicated manner. Thus, we implore upon the State machinery to work in harmony with each other to safeguard the rights of women in our country. As per the law enunciated in Lalita Kumari vs. Govt. of U.P & Ors 2013 (13) SCALE 559, registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and the Police officers are duty bound to register the same.

27) Likewise, all hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, are statutorily obligated under Section 357C to provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under Sections 326A, 376, 376A, 376B, 376C, 376D or Section 376E of the IPC.

28) We appreciate the able assistance rendered by Mr. Sidharth Luthra, learned ASG, who is appointed as amicus curiae to represent the cause of the victim in the present case.

29) With the above directions, we dispose of the suo motu petition.

.CJI.

(P. SATHASIVAM) .J.

(SHARAD ARVIND BOBDE) .J.

(N.V. RAMANA) NEW DELHI;

MARCH 28, 2014.
