



JUDICIAL ACTIVISM IN INDIAN POLITICAL SYSTEM

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Abstract:

Judiciary is the important organ of each Government in modern age. Every constitution gives the vast powers to review the process of law was making and executive orders. It is hoped that the Judiciary will act as free and fair in the light of constitutional provisions. As far as Indian context the Judiciary, these days, has been playing a vast role in day-to-day works of Govt. There are two kinds of exercise this powers as Judicial self-restraint and Judicial activism. Judicial self – restraint is the classical or traditional virtue of judicial behavior. The courts will be very careful in defining their jurisdiction and shy in expanding it and will observe restraint in interfering with legislative or executive action. However judicial self-restraint is not a rule, it is a case of auto limitation. But judicial activism can be both- negative and positive. In times of political instability the court tend to be more activist reaching more abstrusely into the daily life of citizens or restricting or directing the legislature and the executive in what they could do. So, this paper will reveal the too activism of the judiciary in Indian context.

Keywords: activism, constitution, court, government, judiciary, protecting, suggestions

1. Introduction

Modern Constitutions generally vest the higher courts with the power of judicial review. It is the power of the higher courts to see that the Constitution and the laws in force are observed both in letter and spirit. If a law is ultra vires the Constitution or if an executive order or act transgresses the law in force or is lacking in competence, it can, in appropriate proceedings before the higher courts, be declared null and void. This is the power of judicial review. In the exercise of this power, two types of behavioural patterns can be seen (a) judicial self-restraint, and (b) judicial-activism.

Judicial self-restraint is the classical or traditional virtue of judicial behaviour. It is the other name for standard behaviour. It means that the courts will be careful in

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defining their jurisdiction and shy in expanding it and will observe restraint in interfering with legislative will or executive action. The Supreme Court in U.S.A. unlike its Indian counterpart, has consistently denied to itself the competence to examine the validity of a Constitutional Amendment. From the very beginning the Supreme Court of the U.S.A. made it a rule not to decide "political cases", so as to keep clear off political controversies of the day. It refused to render "advisory opinion" to the executive in any case. It refused, for instance, to advise as to the lawful duration of Military Occupation in Cuba, holding it to be the function of the political branch of the government. Of course, the court itself is the judge as to what constitutes a political question.

Judicial self-restraint can be seen in the following built-in rules in the exercise of the power of judicial review-

- 1) Laws are not scrutinized by the courts suo motu but only when impugned in actual litigation.
- 2) Laws shall be invalidated only when their unconstitutionality is clear beyond all reasonable doubt.
- 3) Law as a whole need not be voided but only those portions of it which are violative of the Constitution unless of course the latter can not be severed from the rest without doing violence to the whole.
- 4) The court shall not decide political questions, that is, deny itself jurisdiction in cases involving political controversies.
- 5) The function of the court is to examine the constitutionality of laws, not to ensure justice or good government. So long as the laws are within the terms of the Constitution, the court does not interfere even if laws are oppressive, unjust or unwise.

Marshall CJ of the USA is said to be the leading exponent of the rule of judicial neutrality. In his verdict in *Osborne Vs. Bank of the United States*, he said, "*the judicial department has no will in any case... judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature*". (*Osborne vs Bank of United States*, 8 wheat)

Numerous Judicial pronouncements can be cited in support of the view that the function of the judiciary is only to find the law and declare it, and not to make the law. In the *South West Africa* case, the I.C.J. itself said, "*The duty of the court is to apply the law as it finds it, not to make it*" (1966). Legislation belongs to the province of the legislature exclusively.

The Judiciary must restrict itself to interpreting the law and applying it to the case before it, interpret it in terms of the intention of the law makers. "*The intention of Parliament is to be discovered by a body of independent persons, free from any direct interest in the result, and trained by long years of practice to standards of judgement by which that intention may be tested*". (Laski, 1952)

In India also, judicial self-restraint in the above sense has been accepted as a necessary element in the theory and practice of judicial review. The judges have tended to keep aloof from social life and avoid mixing up with the public. They have

scrupulously refrained from taking part in public debates involving political controversies. In the case impugning the constitutional validity of the Tashkent Agreement (1966), the Supreme Court presided over by Mr. Justice Gajendragadkar, C.J. refrained from giving any verdict on the ground that it was a political question and the Court will not decide political controversies. These questions, it added, are the exclusive domain of the political branch of the government. It may be recalled here that the Tashkent agreement involved cessation of national territory in favour of Pakistan, which had been recaptured from the illegal Pakistani possession, and in an Advisory Opinion given earlier (1960) the Supreme Court had laid down the principle that cessation of national territory in favour of a foreign state could not be lawfully made by means of an executive agreement or treaty but required a Constitutional amendment in accordance with the prescribed procedure. (Breubari Union, 1960) Public opinion was greatly dismayed at this abdication of authority and responsibility by the highest court of the land in matter involving the territorial integrity and sovereignty of the country. But the Supreme Court stood firm on its resolve not to enter into political controversies. The result was that when five years later the government made a similar cessation of national territory under the Shimla Agreement (1972) no one even dared to approach the apex court. The decision in the case involving the Tashkent Agreement was the highest water mark of judicial self-restraint.

In reference to Art 143, the Court reserved its right to refuse to give an Advisory Opinion. In re Special Courts Bill, the Supreme Court expressed doubts on whether it should answer references which are vague, general and of omnibus character. (AIR, 1979, SC 478). In the Ayodhya Ramjanmabhoomi case (1993) (Faruti vs Union of India 1994 S.C.C. 360) the Court refused to answer the reference made to it, namely, whether or not a Hindu temple existed at the site prior to the construction of a mosque there. In this way, the court has tried to keep clear of political controversies of the day.

2. Judicial Activism

However judicial self-restraint is not a rule, it is a case of auto limitation. It necessarily depends on the temperament, education, training and philosophy of the individual judges. It also depends on the balance of political forces in the other branches of government. In times of political instability, the courts tend to be more activist reaching more intrusively into the daily life of citizens or restricting or directing the legislature and the executive in what they could do.

Judicial activism can be both negative and positive. Negatively, the court can restrict the legislature and the executive in what they could do. Positively, the court by its rulings could extend the role of what the government could do even when the government did not want to do it. For instance, on March 18, 1985 the Supreme Court asked the Union Government to file a statement within two weeks explaining how it proposed to solve the problem of pre-1964 pensioners and their widows and dependent children in consonance with the principles of social justice. (Times of India)

Activism was advocated as a philosophy of "Practical idealism" by Rudolf Eucken (1846 to 1925) and has appeared in diverse forms. In the judicial sphere, it has found expression in the U.S.A., India and in many other countries in the form of normative judgments going beyond the public policy of the government of the day or pulling up the executive for its lapses, excesses, and failures. Justice Michael Kirby (2004) of Australia says, "*The law abhors a vacuum. Into a vacuum left by the failure of the other branches of government to respond to urgent legal and social needs, the courts have sometimes stepped.*"

The misuse of powers assigned to different functionaries has, according to senior advocate Shanti Bhushan, necessitated judicial activism, "*As the apathy and indifference of the executive and the officers of the government at various levels*" denies the underprivileged, disadvantaged and poor sections the benefit of social legislation, "*Judicial activism is essential for safeguarding, and ensuring that these laws are implemented*" concurs senior advocate, K.K. Venugopal, I.K. Gujral regards the phenomenon as "*an expression of the failures of the government and the administration to take the timely and right step*" (Pioneer). According to Justice Michael Kirby, (2004) "*the tension between judicial activism and judicial restraint has been present since the foundation of the Republic and the creation of the U.S. Supreme Court.*"

In the early years of this century, the judicial activists of the U.S. Court impeded legislation enacted by the U.S. Congress or state legislation, dealing with social or economic affairs, Thus legislation governing child labour, worker's hours, and worker's rights were consistently struck down as being violations of the commerce clause of the U.S. Constitution or the judicially created doctrine of "liberty of contract" under the due process clause of the U.S. Constitution. A well-known example of this kind of judicial activism is the decision of the Supreme Court in *Lochner Vs. New York* (1905) where the Supreme Court invalidated legislation regulating the hours that workers could work. In more recent years it is the judicial activism of the liberal school which has attracted the ire of Presidents Nixon, Ford and Reagan. Many a political slogan was devised in the USA to attack what was seen as the "adventurism" of the Supreme Court under Chief Justice Earl Warren. It was the Warren court which took many bold steps in the interpretation of the U.S. Constitution in matters such as school de-segregation, re-portionment of unequal congressional districts, prohibition of school prayers, aid to parochial schools and restraints on police invasions of individual civil liberties.

The period of activism that began with the *Brown* decision in 1954 was followed by far more and far reaching decisions. In 1971, the *Swann* decision legitimated massive busing of children to over-come segregation in a large city. (Glazer and Kristol, 1976) In 1973 the Burger court ruled in *Roe and Deo* that just about all state laws on abortion were unconstitutional and decreed that state laws must treat each third of the pregnancy period according to different standards. In 1975, it applied the limitations of "due process" to the public schools, which now could not restrict the constitutional rights of students by suspending or expelling them without at least something resembling a criminal trial. (Glazer and Kristd, 1976) In the same year, it ruled, in the

first of a series of important cases on the rights of mental patients, that harmless persons could not be detained involuntarily in mental hospitals. (Glazer and Kristol)

3. Contents of Judicial Activism

Judicial activism denotes that the courts trespass into the roles going beyond the strict function of interpretation of the law, such as *“law making, laying down of policy, regulation and control of the executive agencies and other public bodies ensuring compliance with directions and orders given etc.”*

Law making is outside of the court’s ambit of jurisdiction. It has the power of interpretation of law and applying it to the case in hand. The interpretation of the law may involve expanding its metes and bounds and in this way creation of new rules of law. Judicial legislation is inherent in judicial interpretation. Judicial interpretation may even have the effect of amending the Constitution informally. The American Supreme Court arrogated to itself the power of judicial review and vested the Federal Government with *“implied powers”* by a constructive interpretation of the Constitution. These are the earliest instances of judicial activism in the field of Constitutional law. The reason for this unconscious intrusion of the judiciary into the realm of law making is that, in practice, it is not possible to separate the interpretation of law from the characteristic beliefs of the class to which the judge belongs. Because, *“the judge is not an automatic and passionless being who, as he does his work of interpretation, finds a meaning in law which is fixed and invariable. For were the law so fixed and so invariable, men would not go to court, it is the doubt of what the law is that provides the courts with their work. And this means that the judge is, even if incompletely and indirectly, making law no less than merely announcing”*. (Laski, 1938)

In this way, judicial decisions provide the source of new law, and not merely evidence of the existing one. By this process, judiciary helps to adapt and adjust the Constitution to the dynamics of socio-economic change. Speaking of the American Supreme Court, it has served as the continuous constitutional convention, so far as *“a judge is an arbitrator who adjudicates individual causes, an interpreter of the Constitution which gives him an opportunity to canvass the full panoply of his value system, a legislator making law and a pace setter for future action”*. (Cardozo, 1921)

The courts’ orders on providing fresh air to citizens, (Times of India) on setting up of an independent authority with wide powers to tackle tanneries’ pollution (Pioneer, 19 Aug., 1996) its role in sensitizing the central investigating agencies to discharge their legal obligations in the Hawala case, in the Medical equipment scam to the tune of over Rs. 5000 crores (Pioneer) and its various judgments ranging from the need for a uniform civil code, preservation of historical monuments like Taj Mahal, cleaning and keeping the metropolis more hygienic, directing the eviction of unauthorized occupation of governments bungalows, interim compensation to rape victims and their in-camera trial, punishing senior Karnataka IAS officer Vasudevan and former Chairman of the Bar Council of India, Vinay Chand Misra for contempt and puncturing the ego of the Chief Election Commissioner, T.N. Shesan, are evidences

which prove that the activist role of the judiciary touches upon policy making and even monitoring and supervising the executive agencies in their work of investigation and reporting. (Hindustan Times)

Likewise in *Rajendra Prasad Vs. U.P.* (1979), the Supreme Court observed that *“the activists believe that if the legislative text is too bald to be self-acting, the judge must make the provisions viable by evolution of supplementary principles even if it may appear to possess the flavour of law making”* (AIR 1979 SC 916)

The court directed the local authorities that *“all those who come to see Taj be provided clean water, sanitation and good roads,”* and a series of orders like *“Get back to us if government drags feet in sanctioning prosecution in Hawala case, ensure safety of chakmas and process their citizenship applications, sort out Cauvery tangle in 48 hour’*, are all instances of the courts trespassing into the legislative, and executive spheres and this intrusion is called Judicial Activism. It is an expression of the failure of the government, and the administration to take the timely, and right step. There would have been no ground for judicial activism had the executive and legislature not failed. So misuse of powers assigned to different functionaries has, necessitated judicial activism. Besides judicial activism is the widening of the Jurisdiction of the court by which the court takes cognizance of and decides matters brought before them. The jurisdiction of the court is carefully defined by the Constitution and the law, but within the parameters of the law and the Constitution the apex court has the power to decide its own jurisdiction and thereby widen its own sphere of activity.

4. Question of Locus Standi

Traditionally, the locus standi of the petitioner is regarded as a decisive factor in the admission of the case before the court. The strict constructionist court would satisfy itself that the petitioner has suffered definite legal injury so that he stands to gain from the decision of the court before admitting the case. Then alone can be said to have a locus standi, unless any of the legal rights of the petitioner is infringed he can not be said to have a locus standi in the case.

In the *Bearer Bonds* case (AIR 1981 SC, 2138) the Supreme Court was called upon to examine the economic and fiscal policies of the state and to probe into social and ethical morality of fiscal measures. The petitioners in this case were a senior practicing Supreme Court Advocate, editor of a weekly magazine and a social worker. None of them could be said to have had a locus standi in the case in the strict traditional sense. Their locus standi, however, flowed not from any individual personal interest in the case but from the general public interest in the matter. As Justice D.A. Desai said, *“would the citizens of this country deny the court such jurisdiction wherein an economic immorality compounded by the bankruptcy of tax recovery machinery was demonstrably established”*. (1981, 4 SCC 1675) The court agreed to admit the petition and to examine the question posed before it. In another case, the *Workers’ Union of Sindri Fertilizers Factory* challenged the legality of sale of certain plant and equipment of the factory on the ground inter alia that the manner in which the sale was brought about had inflicted

a huge loss on public exchequer. The majority considered it unnecessary to examine the question of locus standi of the Workers Union to challenge the sale because in its opinion the sale was not vitiated by any arbitrariness or mala fide, but kept the question open, observing that if and when the sale of a public property was found to be vitiated by mala fide, it would be necessary to examine the larger question as to who has the right to complain. (AIR 1981 SC 344)

The process of public Interest Litigation (PIL) was initiated by V.R. Krishna Iyer J. He observed in the Fertilizer Corporation Kamgar Union vs. Union of India case, *"Law is a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction of the court"*. The thread was picked up by P.N. Bhagwati J. who is supposed to be the father of this revolutionary concept. He explained the case for the PIL in the celebrated S.P. Gupta case, holding that *"the court has to innovate new methods, and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public spirited citizens seeking judicial redress on behalf of those who have suffered a legal wrong or an injury."* (AIR 1982 SC 149)

The principle of locus standi which narrowed the jurisdiction of the court of cases filed by the aggrieved person only and exclusively thus was thrown overboard. The court was now agreeable to admit petitions from public spirited citizens and bodies thereof on behalf of the suffering person or class of persons provided there was sufficient public interest involved in the case. This was the beginning of the PIL which became a running stream to the higher courts.

However Justice Bhagwati's ruling in favour of the PIL did not disregard any express provision of the Constitution. It was rather derived from the ambiguity of the language used in Art 32 providing for the writ jurisdiction of the Supreme Court. The Article, inter alia, says, *"The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed"*. The article is silent as to who is entitled to initiate the proceedings for the enforcement of the fundamental rights. Similar ambiguity exists in respect of proceedings in the High Courts under Art. 226

Thus, taking advantage of this ambiguity the activist judiciary in India has allowed and admitted public interest litigation by public spirited lawyers, journalists and other bodies. The Jain Hawala case which had come to light in March 1991 with the arrest of one Kashmiri militant, Ashfaq Hussain Lone of the Hizbul Mujahideen, was activated only when two journalists, Vineet Narain and Rajinder Puri, on a public interest litigation, moved the apex court to monitor progress of the CBI investigations into this scandal.

The People's Union for Civil Liberties (PUCL) has been continually sponsoring the PIL for instance, the case relating to the over Rs. 5000 crore medical equipment import by the Union Health Ministry. (Pioneer, 29 Aug., 1996) The environmentalist lawyer, M.C. Mehta filed a PIL asking the Supreme Court to direct all the water polluting industries in Delhi to contribute their share of Rs. 40 crore for setting up 28

common effluent treatment plants or face closure of their units. (AIR 1987 SC 1086) The Vellore citizens forum in another PIL arraigned the tanneries located in five districts of Tamil Nadu for causing pollution (Hindustan Times). Mr. M.C. Mehta in another PIL petition brought 7 industries employing children below the age of 13 years in their units before the bar of the Supreme Court (Pioneer). It took cognizance of a newspaper report stating that electroplating industries in Subhash Nagar area of West Delhi were employing child labour on meagre daily wages between Rs. 8-10, and directed the Deputy Commissioner of Police and the Labour Commissioner to investigate the report (Hindustan Times). In one case the Paschmi Vihar Residence Welfare Association filed a petition and subsequently several other residence welfare associations joined in. They sought enforcement and implementation of the MCD (Municipal Council of Delhi) order banning PVC trade in the Jawalपुरi and adjoining areas in West Delhi (Times of India). In one "unique" case a petition was filed by the Central Commissioner for Scheduled Castes and Tribes charging the Central Government and the state authorities with violating the Constitution and the law, so far as they related to the tribals, and denying them the basic right to life. In one case a Judge of the Delhi High Court, Mrs Usha Mehra, sitting singly, passed an order on October 8, 1996 after reading newspaper reports regarding deaths due to dengue hemorrhagic fever, cerebral malaria, hepatitis, malaria and typhoid (Pioneer).

5. Results of the PIL

The PIL enabled the under privileged and the downtrodden to secure access to the courts through the agency of a public spirited person or an organization acting bona fide in the public interest. It was said in favour of the PIL that if the doors of the court are closed to a person who, though not individually affected, is acting bona fide in bringing cases to the court involving grave injustice resulting from negligence or callousness or inefficiency of public officials, governmental bodies and authorities would be left free to violate the law with impunity. Such a situation would be subversive of the Rule of Law.

5.1 Writ Petition: Format and Conveyance

PIL was therefore an expression of judicial activism. An equally revolutionary innovation in the judicial process was the acceptance of letters, telegrams and even post cards, as writ petitions. In one case, a letter sent from jail was treated as writ petition. The Andhra High Court treated as writ petition a telegram sent by a village woman, whose son was allegedly detained by the police (Hindustan Times). The same court, in another case, treated a printed pamphlet as writ petition, a printed pamphlet posted to the court by a domestic servant from Triupati. The acting Chief Justice Mr. Justice P. Chenappa Reddy and Mr. Justice A Seetarama Reddy who accepted the two postal communications as writ petitions directed the state government to file its counter affidavit and also asked the Collector of Chittoor district to file his inquiry report within two weeks (Times of India). It was Mr. Hidayatullah who during his tenure as the Chief

Justice of the Supreme Court, had made it a law to accept postal communication as writ petition when he received a postcard from Munger jail in Bihar from the socialist M.P. Madhu Limaye, challenging his detention (Times of India).

A UNI report dated 16 July 1985 describes the scene in the Cochin High Court as the usual hustle in the High Court dies down in the afternoon, an officer passes a bundle of letters to a judge who scans each one and dictates orders. Dealing with letter petitions has settled into a daily routine. The problems scribbled on the letters are diverse a decrepit school building is about to collapse, a greedy tehsildar is denying a widow her husband's gratuity; a constable is harassing a poor woman. Whatever the complaint, the communication is treated as a writ petition. The result: speedy dispensation of justice.

In this context Kanthimathi Amma's case was a typical example. She was ranked 86th in the list published by the Kerala Public Service Commission for appointment to the lower grade service. In course of time, many of those ranked lower got jobs but not Kanthimathi. Instead of filing a writ petition Kanthimathi posted a letter to the Chief Justice. Treating it as a writ petition under Article 226 of the Constitution, the court issued summons to the state and the Service Commission. The Commission raised elaborate objections to the conversion of a letter into a writ petition. Mr. Justice P. Subramanian Poti who was the acting Chief Justice then rejected the objection. Rules of procedure, he observed, were not immune from being waived and must necessarily be waived in the interest of justice by a court sitting under Article 226 of the Constitution. His successor, Mr. Justice Bhaskaran received letters from exasperated citizens from all walks of life-sales girls compelled to work for 14 hours a day, people put two difficulties by failure of civic amenities, families claiming compensation for deaths in road accidents, all have sought and received relief. So, letters pour by the dozen, and are screened before being sent to the judge (Times of India). This judicial innovation has thrown open the portals of the court to the poor and the ignorant alike. Mr. Justice P.N. Bhagwati of the Supreme Court some three years ago, on the basis of a letter, took up the case of workers employed in the construction of the Asian games village. Dismissing the argument that the practice would aggravate the arrears, he observed "*no state has a right to tell its citizens that we will not help the poor to come to the courts for seeking justice*"

There are instances of the courts acting suo motu, simply on seeing newspaper reports. Reference has already been made to Mrs. Usha Mehta of Delhi High Court, who on reading newspaper reports of deaths resulting from the spreading dengue fever, issued notices to the Delhi Administration (Pioneer). Similarly in the case relating to the exploitation of the child labour in electroplating industry in Subhash Nagar area of West Delhi, the Delhi High Court issued notice merely on the basis of a newspaper report. (Hindustan Times) These innovations have revolutionized the whole concept of locus standi and are a tribute to judicial activism of the Indian courts. The insistence is no longer on the administration of law. The emphasis has now shifted to the administration of justice. Courts of law are thus being transformed into courts of justice.

5.2 The Monitoring Enquiring and Investigating Role of the Court

Another dimension of judicial activism came to be seen in the Rs. 65 crore Jain Hawala case. In this case the apex court not only admitted a PIL seeking the court's intervention in virtually forcing the CBI to emerge from its stupor and start the investigations in right earnest, it took upon itself to monitor the day to day progress in these investigations saying at one stage, *"get back to us if the government drags its feet in sanctioning prosecution"*. In this way after five years of procrastination, the CBI on January 16, 1996 filed charge sheets against 7 top politicians. Earlier chargesheets were filed against 8 of the top bureaucrats. (Hindustan Times) Justice J.S. Verma, who headed the bench that monitored the case, said after his retirement, that investigating agencies had not done a satisfactory job in probing the case; otherwise, it would not have been possible for all the chargesheets to end up in a fiasco. He claimed that the Hawala case was one in which the court had granted complete insulation to the investigating agencies from extraneous circumstances. *"We even relieved them of the power of supervision by the highest authority in the executive (the Prime Minister) and yet they could not perform."* (Pioneer, 20 Aug. 1998)

In the Bonded Labour case, (AIR, 1984 SC 828) Justice Bhagwati on a letter from Swami Agniwesh, drawing attention to the miserable plight of the labourers employed in stone quarries in Faridabad, Haryana, first appointed two advocates as Commissioners to visit the stone quarries and report on the living conditions of these workers. Later he appointed Dr. Patwardhan of the IIT to carry on the social-legal investigation. He relied on the power of the Supreme Court to *"issue directions or orders or writs... whichever may be appropriate for the enforcement of any of the rights conferred by this part"* (Art. 32), to appoint such commissions of enquiry and to consider their report as evidence. Later speaking in an interview with Frontline, Justice Bhagwati defended his action and said *"...we started appointing commissions of enquiry for the purpose of ascertaining material, data, facts, so that the court can come to a right decision"*. He stated, *"we have been appointing district judges, District Magistrates, journalists, social scientists and many others as Commissioners to visit the particular place and gather facts and later report to the court"*. (Frontline, 3(1)) In the Sheela Barse vs. State of Maharashtra, the Supreme Court directed Miss A.R. Desai, Director, College of Social Work, Nirmala Niketan, Bombay to make a visit to Bombay Central Jail and interview women prisoners there, with a view to ascertaining the charges of custodial violence to women in the police lock up and Jail and submit a report.

The inquiring and investigating role of the Supreme Court has given a new dimension to the concept of judicial activism. The court sometimes selected a District Judge, or a Law Professor, or a journalist, or a social activist or an advocate or a public spirited person or a voluntary agency to gather facts and report to the court. (AIR 1983, SC 378) In the Babubigha case the Supreme Court appointed an enquiry committee consisting of Additional Session Judge, Nalanda, Dr. Vasudha Dhagamwar, and Dr. Jose Kananaikil to report on the atrocities committed on helpless men, women and children by a gang of some 40-50 anti-social elements who let loose a reign of terror on this Harijan settlement in retaliation for their refusal to work as bonded labour for their

landlords. (Methew, 1986) In the Dehradun Lime Stone Quarries case the apex court appointed a committee (August 11, 1983) consisting of Shri D.N. Bhargava, Controller General Indian Bureau of Mines, Nagpur, M.S. Gahlaut, Director General, Mines Safety and Col. P. Mishra, Head of the Photo Interpretation Institute to report on the ecological effects of lime stone quarrying. (AIR 1985, SC 1259 AIR 1987, SC 359, AIR 1987 SC 2426)

So, the substance of PIL is to secure justice, social, political and economic, within the parameters of existing law. It has so far succeeded in highlighting the following areas of public concern and remedying them-

- a) Cases of injustice to the weak, helpless, illiterate and poor, such as the bonded-labour, under trial prisoners, child labour, tribals, workers, destitute women, pavement-dwellers, rickshaw-pullers, even convicts.
- b) Environmental pollution, deforestation, upkeep of historic monuments like the Taj, supply of pure water, fresh air,
- c) Issues of wider public policy like the bearer bonds, public health hazards, pension, appointment and transfer of judges, consumer protection, price control, product-safety
- d) Indifference, negligence, callousness, atrocities of public and police officials and jail authorities.
- e) Loopholes in the machinery of government and administration, especially in the investigation of cases involving the high ups and filing cases against them.
- f) High handedness of the government, for example in the arbitrary transfer of Enforcement Director, Bezbaruah or in not taking suitable action against those held responsible by Srikrishan Commission Report for triggering communal riots in Bombay in the wake of Ayodhya events in December 1992.

5.3 Justice to Poor, Weak, Down-Trodden

Public interest litigation has focused public attention on plight of under-trials, men and women, languishing in jails for years, even decades, awaiting trial. In the nineteen nineties "*nearly 1 lakh under-trials are still languishing in our prisons, half of them in Bihar and U.P.*" (Indian Express, 3 Jan. 1981)

The under-trials are treated as unpaid slave labour for the jail authorities. Unhygienic conditions led to deaths in large numbers. There were even children among them and there were others who were kept in protective custody so that they might be readily available as witnesses. They have been in jail for a period exceeding their possible sentence, if convicted.

The court ruled that prisoners can not be treated as non-persons deprived of all fundamental rights. It is the duty of the state to provide them legal assistance. They are entitled to speedy trial, fair procedure and right of appeal. The amount of surety must be related to social variables. Even the convicts have residuary rights and human dignity. The court prescribed the time limit within which investigations regarding under-trials must be completed. The jail is not protective custody for women and children, no substitute' for rescue and welfare homes for their. In Kedra Pahadia vs. State of Bihar, the Supreme Court lamented that "*these four petitioners, who entered the jail*

as young lads of 12 or 13, have been languishing in jail for over eight years for a crime which perhaps, ultimately they may be found not to have committed". (AIR 1983, SC 930)

In another case, it was complained that there were prisoners in Hazaribagh Central Jail awaiting trial for almost 2 or 3 decades. It was disclosed later that they were mentally unsound and were kept in jail as there was no place for them in mental asylums. The case of Gomia Ho who spent 37 years in jail and was insane for a part of it moved the Supreme Court to order his immediate release (Times of India, 11 May 1982). The Bihar Blindings case shocked the conscience of the entire country. In one case, a prisoner was detained in jail for fourteen years after his acquittal by session's court, Muzaffarpur, on 3.6.1968. (AIR 1981, SC 930) Likewise in Hussainara Khatoon, justice Bhagwati pointed out:

"The offence with which some of them are charged, are trivial which, even if proved, would not warrant punishment for more than a few months, perhaps for a year or two, and yet these unfortunate forgotten specimen of humanity are in jails, deprived of their freedom, for period ranging from three to ten years without even as much as their trial having commenced. (AIR 1979, SC 1590, SC 1360, SC 1770) That is why in the Hussainara I the court laid emphasis on just and reasonable procedure in keeping persons in detention, liberalization of bail and speedy trial. Again a case of a convict who even after four years of his acquittal and release order by the Patna High Court was still in detention in the Hazaribagh Central Jail (Statesman)."

Rudal Shah was kept in prison for more than 14 years after acquittal. Another under-trial, Oraon was detained in a mental home for six years even though he was declared sane for discharge. The court awarded him a compensation of Rs. 15000. (AIR 1983, SC 1087)

5.4 Children

PIL drew attention to the detention of children in jail violation of the provisions of the children Act. The Supreme Court in one case ordered that *"no person apparently under the age of 16 is to be sent to jail but must be detained in a children's home or a place of safety"*. (AIR 1982, SC 806) The scandal in Tihar jail prompted another PIL. Sanjay Suri and Rahul Pathak of the Indian Express filed a PIL petition on behalf of juvenile under-trials in Tihar jail, New Delhi, alleging indignities and assaults on children. Sheela Barse and M.C. Mehta advance a step further. They filed a PIL petition on behalf of all the children below 16 years of age languishing in jails all over the country. The petition prayed:

- a) All children below 16 years of age detained in any jail anywhere in the country should be released.
- b) The district Judge should be directed to visit jails within their jurisdiction to ensure that children are properly looked after.
- c) The state legal aid Boards be directed to provide counsel to children.

The petition elicited information about a number of things concerning juvenile courts, Children's Homes, Remand Homes, Observation Homes, Borstal schools and other institutions keeping delinquent or destitute children. (AIR 1986, SC 1773)

5.5 Child Labour

Children employed in factories were paid low wages, subjected to long hours of work, and exploited in other ways, in violation of the Constitution and the laws, notably, Art. 21-24 of the Constitution and Employment of Children's Act 1938, Factories Act 1948 and Minimum Wages Act 1948. The issue was raised in a PIL petition filed by Mr. K. Chandrasekharan in the Supreme Court.

5.6 Women Workers

In Sanjit Roy vs. Rajasthan, the Supreme Court insisted upon the payment of minimum wages to labourers even those engaged in famine relief work. Any payment less than the minimum wage prescribed, on the ground that the worker is engaged in famine relief work, is violative of Art. 23 as well as Art. 14 (AIR 1983, SC 328). In another case the Supreme Court ruled that sanitary napkins be provided by the Delhi Administration to the inmates of Nari Niketan, New Delhi, a rescue home for women. Inupendra Baxi Vs. State of U.P., abominable living conditions in another protective home for women, this time in Agra, were brought to court's attention in a PIL petition. The court issued a ten point directive to the state government to improve the conditions. (AIR 1983, SC 308)

In Sheela Barse vs. State of Maharashtra, the apex court was confronted with the problem of custodial violence to women in the police lockup and jail in Bombay. It proceeded to lay down specific directions for providing legal assistance to prisoners and women prisoners. It reiterated its stand that "*legal assistance to a poor or indigent accused who is arrested and put in jeopardy of his life or personal liberty is a constitutional imperative mandated not only by Art. 39-A, but also by Art. 14 and 21 of the Constitution*". (AIR 1983, SC 378). It issued detailed instructions as to how to handle cases of women prisoners and convicts.

5.7 Weaker Sections of Society

The PIL related to an assorted group of cases dealing with weaker sections of society such as bonded labourers, rickshaw pullers, pension holders, pavement dwellers, Scheduled Castes and Tribes and so on.

In the Azad Rickshaw Pullers case while upholding the ban on the pulling of hired rickshaws, the Supreme Court made arrangements for loans from Punjab National Bank for enabling rickshaw pullers to buy their own rickshaws. It set out a detailed scheme for amelioration of the professional conditions of the rickshaw pullers. (AIR 1981, SC 15) In the Bandhua Mukti Morcha case, the court came to the rescue of bonded labour engaged in mine quarrying in Haryana. It issued twenty one directions to the central and state governments in this connection. (AIR 1984, SC 837) In another case, Neeraj Chaudhary, civil rights correspondent of the Stateman, called the attention

of the court to the problem of release and rehabilitation of the bonded labourers in Madhya Pradesh. In the pavement dwellers case, the court upheld the right of the government of Maharashtra to evict the pavement dwellers but negated the assumption that they were criminals or anti-socials. The court insisted that these poor and helpless specimens of humanity must be treated humanely. The force used to evict them must be reasonable and appropriate and they must be given adequate time to vacate on their own. (AIR 1981, SC 1099, AIR 1985, SC 545)

In one cases, the People's Union for Democratic Rights, filed a PIL petition to seek justice for hundreds of peasants who were subjected to indiscriminate police firing, and who had gathered in the compound of Gandhi Library at Arwal (Bihar) to protest against the powerful Rajah family. The latter was involved in land disputes with nine poor families of the village. (AIR 1987 SC 355) In another case, the Supreme Court was asked to intervene on behalf of the Adivasis living in Mirzapur forests and directed that the land ousters should be treated leniently. In one case, the court directed the state government to start a special enquiry into unnatural death of two boys. It pulled up the police for not doing its duty properly, and expressed regret that the investigation was very slow and tardy. (AIR 1987, SC 374, AIR 1985, SC 374)

In fact most cases of injustice and atrocities on weaker sections of society are to be explained by collusion or connivance of the police and the district officials with the criminals and the antisocials. The crime is committed with their consent, connivance or knowledge the investigation which follows is deliberately slow and tardy. Even the compliance with court orders is unsatisfactory. The executive devises every means to frustrate the court directions and their purpose. The detention of Rudal Shah in jail even 14 years after his release by the Sessions judge is a glaring case of disregard of judicial orders by the police. The shifting of the women's protective home in Agra to a new building is another case of executive high handedness. Public Interest Litigation often slips into judiciary versus the Executive. (AIR 1983, SC 1087 AIR 1987, SC 1991)

5.8 Issues of Wider Public Policy

Public Interest Litigation has in many cases led the court into laying down public policies in several areas of wider public interest, such as environment protection, consumer interest, product safety, health safeguards and the like. One such area is the retirement benefits for government employees, such as pension, gratuity, provident fund and the like. These are all matters of public policy solely within the discretion of the executive branch of the government. However, the judicial intervention has been invoked in enforcement of equal protection of the laws under Art. 14 and right to life under Art.21. On a writ petition filed by Common Cause a public interest organization on March 18, 1985, the Supreme Court asked the Union government to file a statement within two weeks explaining why family pension scheme was restricted to widows and dependents of employees retiring in 1964 and why dependents of pre-1964 pensioners of the Central Government had been deprived of this benefit. (Times of India) Similarly, the court came down heavily on arbitrary choice of a date for enhancement of pension. Justice Bhagwati in an interview explained, *"The government had increased the rate of*

pension for persons who had retired after a certain date. The fixation of that date was challenged as violative of Art. 14 of the Constitution. The Court held that it was violative and that the benefit of the increase in pension must also extend to those who retired earlier.” (Routine). In yet another case, in U.P. the pension of the college and university teachers retiring at the age of 60 years was to be fixed with reference to their salary at the age of 58 years. The teachers filed a writ petition and the anomaly was removed. The pension option has been opened and reopened several times, on court orders, for retiring teachers.

5.9 Environmental Protection

In the Dehradun Lime Stone quarrying case the Supreme Court, dwell upon the needs for environmental protection and ecological balance. In the Shriram Food and Fertilizers case, the court held that industrial units responsible for gas leaks that are hazardous to life and health must bear liability to pay compensation. It imposed hard conditions on industrial units in respect of updating design and quality of plant and safety equipment in the interest of the community and the environment. (AIR 1985, SC 1259, AIR 1987, SC 359) In another case, the Supreme Court directed the authorities of the prestigious JNU to display the level of radiation from the Gama chamber and keep it within permissible limits. It also directed them to insure every person associated with the chamber and exposed to the risk for a sum of Rs. 1 lakh each. (Mehta, M.C., 1987)

5.10 Pollution

In a series of comprehensive measures to tackle the serious pollution caused by hundreds of tanneries in five districts of Tamil Nadu, the Supreme Court directed the Centre to set up within thirty days an independent authority with wide powers to deal with the situation even as it levied a fine of Rs. 10000 on each polluting unit. The tanneries are located in five districts of Trichy and Dindigul area. The polluting tannery shall pay the fine along with the compensation amount for the effected families to be assessed by the authority. If the money was not deposited by 31st October 1996 the tanneries were liable to be closed forthwith besides attracting action for contempt of court. The court said even in cases where an industry is found to have set up pollution control device, it would still be liable to pay compensation for polluting the environment in the past and causing its degradation (Pioneer).

Earlier, in April, the apex court had directed all the water polluting industries in Delhi located in the city's 28 industrial zones to either contribute their share of Rs. 40 crore for setting up 28 common effluent treatment plants (CETPs) or face closure of their units. The court directed the Delhi government to direct all its agencies not to create new industrial estates until CETPs were set up first in these areas (Hindustan Times). The court also directed the Ridge Management Board to clear all the four scattered slum clusters of Delhi's southern ridge to enable the revival of the Asola wild life sanctuary in eight months time. These measures were necessary to curb growing water pollution in the capital. In another judgment, the Supreme Court coming down heavily on the highly polluting tanneries in Tamil Nadu directed the closure of more

than 200 of them for their failure to comply with the repeated directions of the court to them to set up pollution control devices. (Hindustan Times)

The court also directed the T.N. Pollution Control Board to issue notices to fix distilleries and Sugar Mills in the state to set up pollution control devices within a specified time limit or face closure. (Hindustan Times)

5.11 Protecting the Taj

The PIL provided the court an opportunity to issue a number of directives to variety of authorities for the protection of the Taj Mahal maintenance of its surroundings and for welfare of the tourists who come to visit the historic monument. The court was chiefly concerned with the deleterious effects on the Taj resulting from emission of smoke from industries located in the Taj trapezium, emission of sulphur dioxide into the air from Mathura refinery and air pollution caused by 14000 trucks passing through Agra city every day. It pulled up the U.P. government for not properly maintaining the natural surroundings around Taj and said, *“Neither there are good roads, nor proper sanitation facilities, nor drinking water facilities for tourists who come from all over the world”*. The court ordered: (Hindustan Times).

- a) All those who come to see Taj must be provided clean water, sanitation and good roads.
- b) Asked the Agra Development Authority to hire services of renowned Town Planning experts to prepare a beautification plan around the monument.
- c) Came down heavily on officials concerned responsible for delay in clearing a hydrocracker unit at the Mathura refinery to control noxious sulphurdioxide pollution, ordered by the court 14 months ago.
- d) Asked for explanation of Mathura refinery for emitting 500 kg of sulphurdioxide into the air per hour against the permissible limit of 80kg.
- e) Made it clear that air polluting industries located in Taj trapezium who would not make use of natural gas will have to be shifted outside the trapezium.
- f) Directed the U.P. Government to complete construction of a 24 km bypass road to prevent air pollution caused by the 14000 trucks which pass through Agra every day.

These directions were issued by the Supreme Court on a PIL Petition filed by environmentalist lawyer, Mr. M.C. Mehta seeking directions from the court to protect the ecologically fragile 10400 sq km Taj trapezium.

Later, the Supreme Court ordered removal of all offices and establishments around 200 meters from the outer walls of the Taj Mahal in the east south and west. Besides them about 50000 people living in Taj Ganj on the southern side of the Mausoleum were required to be shifted and about 100 shops, hotels and emporiums to be demolished (Pioneer). In March 1996, the Delhi High Court issued several directions to the various civic authorities in enforcing the ban already imposed by the Municipal Corporation on the PVC trade causing pollution in the area. (Times of India) The court said, the citizens of this country have a fundamental right to breathe fresh air, unpolluted by noxious gases. It is the duty of the government to ensure protection of

right to breathe fresh and unpolluted air. The court gave the following orders keeping in view that large number of residents may be in lakhs, may suffer health effect by breathing poisonous and noxious fumes emanating from the Jwalapuri PVC market:

- a) *“The Delhi Development Authority shall forthwith barricade all entry points. No vehicle or cart carrying PVC material shall be allowed. Police authorities to have pickets at the barricade points.*
- b) *The offending material shall be seized at the entry points and matter reported to the committee.*
- c) *Advocates Vinod Dutta and Mukul Talwar to constitute the committee to monitor the directions.*
- d) *Delhi Electric Supply Undertaking to ensure that there is no unauthorized trapping of electricity.*
- e) *Commissioner of police directed to depute staff and vehicle for keeping round the clock vigil.*
- f) *The national capital territory of Delhi, Pollution Control Board and Department of Environment directed to issue notification prohibiting the utilization of the non-customary material as fuel such as PVC, Plastic etc.”*

5.12 Pollution of the Ganga and Yamuna

The PIL has persistently pursued the cause of the pollution of the sacred Ganga by the tanneries in Kanpur or by the saree printing industries in Varanasi and Mirzapur. The Allahabad High Court has on several PIL petitions ordered the tanneries and the saree printing industries to install Effluent Treatment Plants or to close down. (Hindustan Times) In a PIL petition the Allahabad High Court directed the U.P. Pollution Control Board to inspect 28 industries which were allegedly polluting in the Yamuna river and directed the District Forest Officer to provide land 10 km away Mathura city for the slaughter house. (Hindustan Times) In another PIL petition, the Allahabad High Court issued a series of directives on city upkeep and on streamlining the traffic system in Allahabad city. (Pioneer)

5.13 Bearer Bonds Case

In the Bearer Bonds case, the Supreme Court examined the morality of black money getting official recognition and a tax evader getting benefit of his anti-national activity. In other words, the court was asked to pass judgment on the fiscal and economic policies of the state in a PIL. It was contended that it was no business of the court to probe into the ethical morality of economic and fiscal measures. (AIR 1981, SC 675)

In *Motor Owner’s Insurance Co. Ltd. vs. J.K. Modi and others*, the Supreme Court ruled that the provision in the Motor Vehicles Act, 1939 fixing a liability of Rs. 50000 in all in respect of any one accident means Rs. 50000 in respect of each victim of the accident. This was emotive innovative construction and the court may be said to have arrogated the role of Parliament. As Justice D.A. Desai’s notes in *Kerala Vs. Thomas*, *State of Maharashtra vs. Fatehchand*, *State of Karnataka vs. Ranganath Reddy*, *Hoskot vs. State of Maharashtra*, Supreme Court innovated so that the system which

catered to the needs of the rich and the affluent, its doors were opened to the needy and the under dog. He goes on to say, *“coming to recent times, Bihar under-trials case, Agra Nari Niketan case, Bihar Blinding case, Bombay Pavement Dwellers case, Raman Shetty’s case are landmarks in the activist role of the Apex Court.”* (Desai, 1982)

5.14 Check on Official High-Handedness, Neglect, Dereliction of Duty

The transfer of M.K. Bezbaruah from Enforcement Directorate was challenged in the Supreme Court on the ground that it was arbitrary and mala fide and made for extraneous considerations. It was alleged in the PIL that by transferring Mr. Bezbaruah the Centre was not only seeking to scuttle the prosecution of Jayalalitha and her associates, but was trying to send a signal to the law enforcing agencies that they must play along the wishes and dictates of the persons in power and those supporting them. (Times of India) The transfer was subsequently revoked. In another PIL petition, the Allahabad High Court came down heavily on the district administration for overlooking unauthorized constructions on the roadside or bylanes and decreed that individual responsibility shall be fixed in case encroachments came up again within city limits after their demolition. The court also ruled that no goods should be permitted to be loaded or unloaded by heavy vehicles within city limits. That can only be done from Transport Nagar. Only light vehicles would be permitted to serve as linkage between the city Transport Nagar for the purpose. (Times of India) The Delhi High Court issued notices to several Central agencies, ITDC, MTNL and others on a petition seeking legal action against various VIPs for allegedly defaulting in payment of dues worth crores of rupees. (Pioneer) The petition filed by a NGO Krishak Bharati sought to impose 24 per cent interest on the defaulters for non-payment of dues regarding services rendered to them by these agencies on priority over common consumers. (Pioneer)

The petitioners urged the court to direct the respondent departments to disclose the full list of defaulter politicians, political parties and officials, in the public interest. (Pioneer) The Patna High Court on a PIL petition strongly criticized the state government for defying its orders regarding removal of encroachments, regulation of traffic and other related issues. It said that it had been passing several orders for the removal of encroachments from public places for several years now, but in most of the cases, the orders were not being complied with. It said, even in those places, where encroachments were removed, they were being allowed to reappear. (Hindustan Times) In a PIL regarding the deteriorating law and order situation in the capital, the Delhi High Court ordered slash in VIPs security to spare the force for common man. Taking strong view of the fact that about half of the capital’s police force was tied up looking after the security of the VIPs, the court directed that either these 27000 to 29000 personnel on security duty be recalled or the strength of the force be increased. The court said, *“This alarming situation calls for drastic action so that the common man feels safe while discharging his normal activities in the city”*. (Hindustan Times) In fact, the court made several suggestions, going beyond their judicial function.

5.15 Implications of Judicial Activism

PIL has vastly expanded the ambit of judicial function. It is a multidimensional expansion. The judiciary has as a result trespassed into the jurisdiction of the legislative and the executive branches of the government. The judiciary has taken on the role of policy-making, which is strictly speaking the domain of the legislature and the executive. Referring to the decision in the pension case, Justice Bhagwati acknowledged the policy making role of the Supreme Court. He said, now, in a way, it was policy making because the government wanted to give it to only one class of persons. The court said, it must be given to all. (Frontline). Secondly, the judiciary has taken over many of the functions of the executive, such as directing, superintending and controlling the activities of the governmental agencies and departments.

It has been devising its own methods to collect facts and data, appointing commissions of enquiry for the purpose. Bhagwati explained this in an interview:

“Now, when a social action group or a public spirited individual comes, how are we going to gather material, data, facts bearing upon issues arising in that litigation?... we started appointing commissions of enquiry for the purpose of ascertaining material, data, facts so that the court can come to a right decision. We have been appointing District Judges. District Magistrates, journalists, social-scientists and many others as commissioners to visit that particular place and gather facts and later report to the court.” (Frontline).

The courts have monitored the investigations into the alleged crimes, directing at one stage in the Jain Hawala case, that the CBI shall directly report to the court and take instructions from it and not from the PMO. They have been issuing directions for the conduct of the cases, pulling up the police for delay in filing charge sheet, in completing investigations. Through the PIL, the judiciary has moved on from adversarial adjudication to arbitration between public causes and the government. As justice, Bhagwati explained in his interview with the Frontline:

“...we felt that adversarial system of justice can not work... The adversarial system is evolved to deal with private right duty pattern, the pattern of private law where on individual seeks relief against another individual but not where, because of what I would call the peculiar phenomenon, right of classes of people are involved.” (Frontline)

So, in most of the PIL cases the judiciary has been giving directions to the administration to initiate affirmative action.

5.16 Initiating Affirmative Action

The giving of directions to the executive to initiate affirmative ameliorative action may unconsciously slip into policy-making. In any case, these directions are no part of the traditional judicial function they are rather in the nature of rule-making by the judiciary. Not only rule making the court also wants to hold the executive accountable

to itself for carrying out its directions. Whatever the cause pursued in PIL, whether it be the rights and interests of bonded labourers, under-trial prisoners, convicts, pavement dwellers, rickshaw pullers, workers, the court has been eager to issue detailed directions in an endeavour to do complete justice and plug and possible loopholes. The number and range of such directions is in many a case baffling for the executive.

In the *Bandhua Mukti Morcha* case, Supreme Court gave as many as 21 directions, spelling out a programme of affirmative action. It included rehabilitation of bonded labour, ensuring the payment of minimum wages, provision of pure drinking water and medical facilities. (AIR 1984 SC, 837) The Central Board of Worker's Education was directed to organize periodic camps near stone quarries and stone crushers to make workers aware of their rights and entitlements.

The apex court evolved a humane new jail jurisprudence through its directions in the PIL cases. It insisted on the residuary rights of prisoners, their release on parole, payment of wages to prisoners for work done by them, speedy trial, reasonable procedure, even their psychological treatment including transcendental meditation and yoga exercises. Compensation was granted to Rudal Shah for illegal detention after acquittal by the court, (AIR 1983, SC 1086) directions were given to provide loans to rickshaw pullers to enable them to buy rickshaws, (AIR 1981, SC 15), instructions were given to the state of Kerala to increase seats in medical colleges, (AIR 1979, SC 766) mandates were issued to bring about necessary changes in rules so that poor may not have to pay court fee in automobile accident cases, (AIR 1979, SC 855), directions were given for the protection of the Taj Mahal from air pollution, (Hindustan Times, 11 April, 1996), and of the river Yamuna and Ganga from industrial pollutants. (AIR 1986, SC 955) In the Bihar Blinding case, the Supreme Court suggested a series of relief measures. It suggested that the blinded prisoners be kept in Blind Relief Association New Delhi and failing it, other relief centres be found for them and the Bihar state must incur all expenses in their treatment. (AIR 1987, SC 930)

Petitions filed on behalf of the individuals were treated as though they were filed on behalf of the class to which the petitioners belonged. Likewise, relief granted to individual was extended to the class in so far as these reliefs were general in character. This was stretching the judicial process to extreme lengths. In this manner, the court laid down the public policy for juvenile delinquents. It directed that child under trials and convicts should not be kept in jails. The number of children's Remand Homes must be increased. The court suggested that the Union Government should initiate legislation on the subject "*so that there is complete uniformity in regard to various provisions relating to children in the entire country*". The Central Act should also contain provisions for social, economic and psychological rehabilitation of children. In the *Agra Protective Home for Women* case, the court issued a ten point direction to U.P. government with regard to the upkeep of the building and its approach road. (AIR 1987, SC 195) In the *Delhi Nari Niketan* case, the Supreme Court directed that sanitary napkins be provided to the women inmates. In the former case, the court laid down a detailed programme of rehabilitation for the women inmates. In several cases, the Supreme Court gave specific directions for providing legal assistance to prisoners and women prisoners. It issued

detailed directions to the administration on how to handle cases of women prisoners and convicts.

On a petition filed by two municipal corporators of the Varanasi Nagar Nigam, the Allahabad High Court stayed the implementation of the Ganga Action Plan, launched in 1985. (Hindustan Times, Lucknow, 19 Oct. 1998) It ordered a thorough reassessment of the entire project by an expert group. The court said, "*it is almost clear that on account of failure of the scheme, everywhere and in Varanasi in particular, pollution instead of controlled, had multiplied*". It further said, "*It has become necessary to stop work till the entire project is carefully examined and scrutinized by a group of environmental experts.*"

The court directed:

- a) A team of officers, headed by Mr. Samir Gupta a retired official of the C&AG Office should do audit of Rs. 500 crore spent on the GAP so far.
- b) This team should have full powers to check the accounts of all the departments, including the departments of the Central government as also the local bodies, apart from the state government departments wherever they find that money had been sanctioned for GAP.
- c) The team should have the authority to requisition services of experts to assess whether the work undertaken by agencies had been performed properly and efficiently as per technical specifications set originally.
- d) The projects under the GAP could be taken up for implementation only after getting clearance from the committee, to be set up by the Environment Ministry.
- e) The GAP should be implemented by involving local bodies who should be authorized to construct, maintain and operate the treatment plants and undertake the river conservation work at their own level with the help of the government.
- f) There should be total transparency regarding the action to be taken and an effort made to educate the people on keeping the river free of pollution.
- g) The U.P. Pollution Control Board and Varanasi Nagar Nigam should take water samples from the bathing ghats for daily analysis and display the pollution level to alert the public if it does not meet the pollution control standards.

These are just illustrations to show how the court in PIL cases has tended to deviate from its judicial function and unwittingly stray into the executive jurisdiction. Its motive, no doubt has been to prescribe guidelines and provide administrative details so as to secure work efficiency, honesty, economy and justice.

6. Criticism of P.I.L.

Public Interest Litigation has been criticized mainly on the ground that it has blurred the traditional division of governmental functions and encouraged the judiciary to trespass into legislative and executive spheres. This makes the judiciary the dominant branch of government, holding the executive accountable to itself, exercising the power of direction, superintendence and control over it. This is not what the Constitution intends or prescribes. This is to disturb the constitutional scheme of division of powers

and functions. Under the Constitution, the Ministers are collectively responsible to the Parliament. They are accountable to the Parliament even for day to day working. They must formulate and finalise governmental policy with approval of the Parliament.

IPL has to some extent made the judiciary supplant the Parliament in the exercise of these functions. The courts have thus come to combine the role of policy making, prosecution, and adjudication, all rolled into one. This is contrary to the basic tenets of political development or modernization. In the result:

“The courts are being overloaded with excessive work, not only on the judicial side, but with fresh responsibilities of direction, superintendence and control over the executive. The mounting arrears of cases in the Supreme Court and the High Courts on both the civil and the criminal sides are already a cause of growing public concern.” (Pioneer, Lucknow, 20 Oct. 1996)

It seems indefensible and illogical that the court should add to its own work and responsibilities inaugurating the silver jubilee celebrations of the Maharashtra Bar Council, Mr. R.S. Pathak, ex-Chief Justice of India, warned that *“the courts should not overstep the limits of their powers nor trespass into the territory which the Constitution has properly assigned to the other organs of the state.”* (Times of India, 8 Feb., 1998)

He continued, *“perhaps few would object to the concept of the movement which was a new chapter in court jurisdiction, for it would serve an appreciable section of people, who would otherwise have no opportunity for redress from courts. But there were obvious limitations which should be observed and guidelines drawn to strengthen the content of this jurisdiction”*. He stressed the need to define the concept of PIL more clearly and said it was time to evaluate court’s work in this area and lay down the procedures.

1. Judicial encroachment into the executive sphere has in some quarters been criticized as an attempt to governing through courts or governance by the judiciary. The superintendence, direction and control of the executive by the courts is an extra constitutional growth. It subordinates the elective representative government to the whims and caprice of individual judges. It is an individualist personal response to an equally individualist and personal initiative. As such, PIL must necessarily rise and fall with individuals in the Bar and on the Bench.
2. The encroachment of the judiciary into the sphere of policy making and governance is subversive of faith in the democratic process and constitutional government. The apex court is hardly equipped to supervise the running of a vast, populous, developing state. The court is not equipped to go into such complex issues as telecom licensing, Cauvery tangle, rehabilitation of chakma refugees, and the like. In issuing directions in matters which are purely administrative and about which the court does not possess the requisite expertise and efficiency, it is overstepping its areas of operation. Such decisions often put the administrative machinery in an awkward situation and make it bear the brunt of its decisions. Mr. Justice Kuldeep Singh’s directive to the Union

government for enacting a uniform civil code one of the Directive Principles of State Policy, is a case in point. Commenting on apex courts' order on safety and citizenship applications of Chakmas, a core committee headed by Arunachal Chief Minister Gegong Apang regrets that *"the identity and culture of our state and its protection were not appreciated in the judgement of the Supreme Court and the direction given therein to provide continued protection and status to the refugees have affected its interests and hopes"* (Pioneer).

On the apex court's order to the Prime Minister to sort out the Cauvery tangle in 48 hours, former Irrigation Secretary Ramaswamy Iyer's comment was *"one wishes that the Supreme Court had passed an order that would have strengthened the hands of the Tribunal and reaffirmed the supremacy of the Constitution and the rule of law"* (Pioneer).

Justice Kuldeep Singh has himself often admitted that the Supreme Court should not have embarked on the decade old effort to rehabilitate the Rohtas Industries to save the jobs of thousands of workers as it has resulted in colossal losses to the government of India and the government of Bihar. (Pioneer, *ibid*) It is no function of the courts to assume such one rouse responsibilities. The court can not be a vanguard of social and economic reforms. Nor can it afford to be an organ of regulation and control over the executive. That will, as justice Khanna remarked in an article, result in judicial oligarchy dethroning democratic set up. It will strike at the very root of our democratic polity and pave the way for judicial despotism.

"The judiciary is set above the executive in the sphere of day to day administration. It can not be said that the court is infallible and do no wrong. If the court were to err in its directives, where is the executive or citizen to go for redressal? The displacement of thousands of people and of shops, restaurants, hotels, offices, and other commercial establishments in and around the Taj Mahal complex, the demolition of unauthorized constructions on road-sides and lanes in cities, the cancellation of allotments of petrol pumps, plots, houses, LPG dealership, are not simple, legal, non-technical questions but involve sociological and humane considerations which may be beyond law and logic."

(Pioneer)

The Supreme Court has acquired the final say in all matters relating to the governance of the country. For instance, it can now ask for the records based on which the President and the Governors may have reached their subjective satisfaction with regard to, say, imposition of President's rule in a state. This means that these issues are no longer non-justiciable and can be challenged on various ground like the mala fides, unreasonableness etc.

Many other provisions of the Constitution relying on the pleasure of the President have been brought under judicial control through creative interpretation of Articles 14, 19 and 21 of the Constitution. One columnist remark, *"when the other wings of state overstep their limits, the aggrieved party can always approach the courts for redress. But when the courts are themselves guilty of such transgression to which forum would the aggrieved turn for justice?"* (Pioneer)

Chief Justice Harlan in *U.S. Vs. Butler* wrote, “...*While unconstitutional exercise of power by the executive and legislative branches of government is subject to judicial restraint, the only check upon our own exercise of power is our own self-restraint*”.

The judiciary has to depend on the executive for giving effect to its directives. Art 142 authorities that the Supreme Court “*in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India, in such manner as may be prescribed by law made by Parliament and, until provision in that behalf is so made in such manner as the President may by order prescribe.*”

In practice, the compliance with the Supreme Court directives has been very slow, uncertain and unsatisfactory. The court can do very little to secure faithful compliance of its directives by the executive. In many cases, the directives are unrelated to ground reality and there is no option for the executive but to avoid, evade or ignore them. In a judgment, Patna High Court expressed its resentment over non-compliance of its orders on removal of illegal constructions by the state government (*Hindustan Times*).

There is no follow up on compliance. It is not certain how far the directives issued to various agencies in the *Bandhua Mukti Morcha* case or in the various environmental cases have been carried out. In some cases, as for instance in the case relating to protecting the Taj from polluting industries and air pollution, the court’s directives may be dragged into endless litigation. The executive may indeed devise ways and means to frustrate the court’s directives.

The judicial activism has come under heavy attack from the political quarters as more and more of PIL has sought to expose political corruption and implicate the politicians, Ministers, MPs, party leaders and even the Prime Minister. In October 1996 several Congress MPs came out with sharp criticism of judicial activism. They demanded that a special session of Parliament be summoned to discuss the issue and pass the necessary constitutional amendment to set limits on judicial activism. Even the former Lok Sabha Speaker, P.A. Sangma, in a symposium of presiding officers of legislatures fired a bombshell against judicial activism. The politicians adopted a two pronged strategy to escape the judicial dragnet. One was to disclaim that they were “Public Servants” within the meaning of Prevention of Corruption Act The other was to curb PIL through legislation. (*Pioneer, Lucknow, 2 April, 1997*) A hastily drafted bill to this effect proposed to make it mandatory for a petitioner to deposit Rs. 1 lakh for filing a PIL petition in the Supreme Court and Rs. 50000 in the High Court. If the petitions were found to be frivolous, the amount would be forfeited.

According to a note appended to the proposed bill, the new legislation had become necessary as:

1. the judiciary has digressed from its traditional duties and functions as an interpreter of the Constitution and the laws,
2. has failed to recognize that it cannot be substitute for the failure or the irresponsibility of other branches of the government, and
3. has been delivering increasingly legislative or administrative judgments.

Besides, abuse of PIL for personal or political gains and considerable increase in the workload of courts because of such cases were other reasons cited to justify the proposed measure. There was such a widespread outcry against the proposed bill that it was quietly dropped.

7. In Defense of Judicial Activism

Much of the criticism of PIL is misconceived. The outcry against it in the political circles is clearly malicious and motivated.

As for the allegation that PIL was the main reason for the huge pendency of cases before the apex court and the High Courts, Mr. Shanti Bhushan, a former Law Minister (1977-1979) said (Pioneer):

"I totally disagree with this view. It is not the judicial activism or public interest litigation but the paucity of judges and courts in the country which is responsible for the serious problem of backlog facing the judiciary. Present Judge-ratio in our country, considering its population, is the lowest in the world. It was for this reason that the eleventh Law Commission had recommended fivefold increase in the present judge strength to clear the hung backlog of pending cases. But nothing has been done so far."

Presiding over a symposium in Delhi, Justice Kuldeep Singh denied the charge of "judicial activism". He said *"What we are doing today is a part of our duty... judges only perform their constitutional duty to safeguard people's right when there is no one to administer or execute social justice legislation". He asked now could one call it "judicial trespass or judicial terrorism, when the court intervened to investigate innocent people being killed by the law enforcing agencies, or when the government was asked to have a treatment plant for the Yamuna where 75 per cent of Delhi's sewage was being dumped, causing serious health hazards"?* (Pioneer)

Justice Kuldeep Singh returned to this theme in his 12th Bar Memorial Lecture on "Human Rights and Judiciary". He said, the Supreme Court was duty bound to step in whenever the government failed to enforce basic human rights and it was a misnomer to call it judicial activism. *"It is in the very purview of the judiciary to see that the government agencies were performing in the people's interest"* (Pioneer).

Chief Justice A.M. Ahmadi said in defence of judicial activism that the role of the judiciary in a developing country is not *"static or status quo"*. He added *"when new litigations came up before the judiciary, it had to act on them. As such the pattern of litigation and the judicial response to it was changing"* (Pioneer).

The President of the Bar Association of India, Mr. F.S. Nariman says that when the bureaucracy shows a callous indifference and insensitiveness to its mandatory duties, the judiciary can not procrastinate. It must respond. In such circumstances, the judiciary cannot be accused of exceeding its jurisdiction as long as the exercise of judicial power by it is for bona fide purposes and in good faith. (Hindustan Times) Can it be said that the Supreme Court over steps its constitutional limits if it mandates the

executive to carry out its constitutional obligations and pulls up the law enforcing agencies for violations of human rights of citizens? Asks Mr. Nariman. He further asks, if the executive abdicates its responsibilities which could be the forum to be approached by the people barring the judiciary to ventilate their grievances and what options would be left for the common man today? Defending the new role of the Supreme Court, Mr. Ram Jethmalani says that in a democratic society like India, the courts have to play an active role if law is to keep pace with social needs. In his words, *“when more than 80 per cent of the people are socially suppressed, economically depressed and educationally backward, when the executive and legislature are apathetic and fail to discharge their constitutional duties, the apex court has no other choice but to step in and direct these functionaries to discharge their obligations”* (Hindustan Times).

It must be emphasized that the exercise of judicial power is not for vainglory or aggrandizement but in discharge of its constitutional obligations. For otherwise, the constitutional government will be paralysed. In his 12th Birmemorial Lecture Justice Kuldeep Singh noted that some of the apex court’s judgments were not being enforced. *“We, therefore, invented methods of monitoring and reporting, we cannot wait for the government agencies to perform.”*

Judicial Activism does not mean government by the judges, as is alleged by vested interest. It only mean dispensing with legal, procedural technicalities and adopting a pro-active and goal oriented approach in the interest of *“the weaker sections of the community... such as under-trial prisoners languishing in jails without a trial, inmates of the protective home in Agra or Dalits workers engaging in road construction in Ajmer district, who are living in poverty and destitution, who are barely eking out a miserable existence with their sweat and toil, who are helpless victims of an exploitative society and who do not have any access to justice”*

The court was thus to expose, among other things, the brutality of Bhagalpur blindings, the state callousness towards pavement dwellers, pathetic plight of children in juvenile homes, of destitute women in protective homes, the merciless exploitation of bonded labour, Adivasis, the Dalits, the workers. The apex court’s rulings in some cases provided prompt relief to victims of injustice, resulted in the conviction of guilty policemen, government officials and led to the enforcement of labour laws relating to minimum wages, and elimination of bonded labour. The court sensitized the Central investigating agencies to discharge their legal obligations in the Jain Hawala case and its judgments ranging from the need for a uniform civil code, pollution control, preservation of historical monuments like Taj Mahal, cleaning and keeping the metropolis more hygienic, directing the eviction of unauthorized occupants of government bungalows, interim compensation to rape victims and their in-camera trial, puncturing the ego of T.N. Shesan, Chief Election Commissioner, are evidence of the court’s endeavour to redefine justice in terms of public interest. The executive has exhibited little concern, keenness or competence for protecting the rights and freedoms of the people. In many cases it itself has been responsible for their infringement or disregard. In such circumstances, judicial activism has served to contain the resulting rising revolution of public frustrations. It has served to sustain people’s faith in

democracy and constitutional government. It is a tribute to the vigilance, vision and wisdom of the court that it evolved its jurisdiction with courage, creativity and circumstances. Judicial Activism is but reflection of that creativity and pragmatism.

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In a telegram, a village woman Konikamma sought the court's help in getting her son Mirampal, freed from the Konda village police station in Prakasam district. The Additional Advocate General received the court notice on the government's behalf. *Times of India*, July 17, 1985.

Khalap, R.K., former Union Law Minister told the Rajya Sabha in July 1996, that there was a backlog of about 25 million cases before various courts in the country. Allahabad High Court had arrears of 8 lakhs, Madras 3.20 lakhs and Calcutta 2.55 lakhs. The total number of cases pending in the District and subordinate courts in Delhi was 572903. (*Pioneer*, Lucknow, 20 October, 1996). In a judgment delivered by the case Siddharth Kumar Vs. Upper Civil Judge, the Allahabad High Court noted that there were 9.25 lakh civil cases pending in the courts of U.P. Out of these about 3 lakh are 1-3 years old, about 2.5 lakh are 3-10 years old, possibly including those embroiling succeeding generations in litigation started

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- Sharma, R.D.: *Justice for All*, said, "The sudden probation for the PIL bill was the spate of judgements by the apex court in the allotment of petrol pumps case, Jain Hawala cases, housing scam and others of the ilk dealing with corruption in high places. (*Pioneer*, Lucknow, 2.4.1997). The court had received a pamphlet from Shanti of Karnataka who alleged that she was employed without any payment as

domestic servant and washerwoman by a flour mill owner in Tirupati. The court called for a report from the Chittoor Collector. *Times of India*, 17 July 1985.

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Upendra Baxi vs. State of U.P., AIR 1987 SC 1991. Venkataramaiah, the former chief Justice of the Supreme Court, expresses his observations the same. observations express this same concern. He said, "If the legislature exceeds its power, this court steps in. If this court itself exceeds its powers what can people do? Should they be driven to seek an amendment of the law on every such occasion. The only proper solution is the observance of restraint by this court in its pronouncements so that they do not go beyond its own legitimate sphere". (*Pioneer*, Lucknow, 4 September 1996).

Venugopal K.K., Senior Advocate emphasizes, "The court has to be more cautious where it seeks to take affirmative action in areas not covered by statute or express constitutional provisions requiring a particular thing to be done or action to be taken" In his view, this implies that the court "would be taking upon itself the function of laying down policy. It would also encroach upon the legislative powers of parliament or the state legislatures" (*Pioneer*, Lucknow, November 13, 1995).

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