21

PUBLIC INTEREST LITIGATION

*A K Ganguli**

I INTRODUCTION

THE CHALLENGES that have confronted legal systems the world over after the second world war are an offshoot of the transition in political systems. The evolution of the welfare state has meant manifold expansion of governmental functions and consequently, of governmental power. An increase in governmental power to perform these additional functions necessarily results in expansion of judicial power.

Despite beginnings elsewhere, the Public Interest Litigation (PIL) witnessed in Indian courts has sparked the imagination of jurists across the world. Over the past decades a tide of public interest cases had been brought before the courts which led the courts to express their opinion on virtually every aspect of public life.

The court's intervention was apparently sought due to executive, and in some cases, legislative, inaction. This has inevitably brought forth the need for some introspection as far as the role of the judiciary is concerned. What has caused the raising of many an eyebrow is the fact that PIL has traversed much beyond the original objective of providing access to the judicial process to the poor and disadvantaged. Often enough it has been said that what started as a movement to secure better access[1] for the underprivileged to the judicial system has crossed over into the realm of policy making and implementation. On the other hand, questions are being raised as to whether the courts are justified in expanding the scope of judicial review by '*judicial activism*'[2]; whether the courts have been able to devise solutions for problems that, strictly speaking, ought to be resolved by legislative and executive action; and finally, whether the courts' intervention in such

* Senior Advocate, Supreme Court of India.

1 See A K Ganguli, 'In Public Interest: A Review of PIL', in I *Supreme Court on Public Interest Litigation: Cases and Materials*, A1-A25 (1997).

2 The noted legal commentator S P Sathe, perceives 'judicial activism' could either be 'positive' or 'negative'. According to him, "A court giving new meaning to a provision so as to suit the changing social or economic conditions or expanding the origins of the rights of the individual is said to be an activist court. Judicial activism can be positive as well as negative. A court engaged in altering the power relations to make the more equitable is said to be positively activist and a court using its ingenuity to maintain the status quo in power relations is said to be negatively activist". See, S P Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* 5 (2004).

widespread matters has benefited the society, enriched the institutions, and strengthened democracy?

Separation of powers

Under the traditional theory of separation of powers, the legislature, the executive and the judiciary enjoy separate and distinct domain. Policy making and implementation are conventionally regarded as the exclusive domain of the legislature and the executive, respectively, with the judiciary performing a supervisory function. The Indian Constitution does envisage distinct roles for the three organs of the state. It absorbs the philosophy of the theory of separation of powers, but to an extent. Specific provisions of the Constitution vest in each of these organs, powers and functions to be exercised in the manner laid down in it. But this division of powers does not carve out mutually exclusive domains as contemplated in the Montesquieun doctrine. What the Constitution contemplates is a separation of *functions* rather than a separation of *powers*. It is well within the scheme of this framework for the legislature and the executive to perform a judging function as it is for the executive and judiciary to assume policy making and implementation functions.

The fine balance envisaged in the Constitution, drawn on a system of checks and balances, overlaps the divisions of powers and functions. But such overlaps do not mean that one organ can usurp the power of another.[3] The Supreme Court has itself recognized the differentiation of functions between the executive, legislature and judiciary and reasoned that although the Constitution did not incorporate a rigid separation of powers, no organ could constitutionally assume the powers that essentially belonged to another organ.[4] However, to deny the elements of fluidity in the constitutional framework would be to rob the Constitution of the dynamism that has been the very reason of its survival for about 58 years now.

Access to justice

The philosophical declaration by Magna Carta that 'To no man will we deny, to no man will we sell, or delay, justice or right', have found their expression in most of the constitutions of the democratic societies governed by rule of law. This principle not only emphasizes the neutrality of the letter of the law which includes prevention of even reverse discrimination, but is also concerned with the even handed administration of that law.[5]

It is the machinery of justice that breathes life into all rights that follow from the law. Therefore, it is vital that the *justice delivery system* be accessible to all. The importance of this principle was amply highlighted in the words of Brennan J, Associate Justice of the US Supreme Court, when he cautioned, "..democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe and benefit by its

3 *Kihoto Hollohan* v. *Zachillu and others*, 1992 Supp(2) SCC 651 at 692.
4 *In re Delhi Laws* (1951) SCR 747; *Ram Jawaya* v. *Union of India*, (1955) 2 SCR 225.
5 *Report of the Committee on Legal Aid* 5 (1971).

impartiality and fairness."[6] No democracy which has adopted socialism as a pattern of its socio-economic structure can survive unless it is based on the rule of law, and the rule of law postulates that everyone, irrespective of his means, should be able to avail of the machinery of justice, whenever law is not observed and it becomes necessary to enforce it.[7]

The preamble to the Constitution holds the promise of securing for all its citizens "justice, social, economic and political" and "equality of status and of opportunity". Article 39 A[8] of part IV mandates that the state shall ensure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, ensure that opportunities for securing justice are not denied to any citizens by reason of economic or other disabilities. Indeed, the question of accessibility has always been one of the primary concerns of any legal system and the Indian legal system is no exception. In India, however, the need for ensuring access to justice is more pronounced. The legal system in India is viewed by many as a part of the colonial legacy. The legal system during the British reign served as an instrument of oppression and subjugation. After independence, there was a perceivable need to ensure that the legal system served the needs of the Indian people. The fact that there were millions of people distanced from law and justice for reasons of poverty and illiteracy did not render it an easy task.

In tune with the constitutional philosophy, the need for special treatment in certain situations is reflected in some provisions of the Code of Civil Procedure, 1908(CPC). There are specific provisions[9] which provide for exigencies where the complainant is incapacitated for one reason or the other from approaching the court.

Some exceptions to the standing rule have been recognized by the superior courts exercising *writ* jurisdiction. The law permits a person to petition for the release of an illegally detained individual through a writ of *habeas corpus*. If there is a defect in jurisdiction apparent on the face of the proceedings, an application for *prohibition* may be brought, not only by the aggrieved party but also by a "stranger" to the proceedings.[10] Courts have allowed such applications preventing judicial authorities from overstepping their limits. Another exception recognized by courts was when the public law remedy of *quo warranto*, or an injunction in the nature of *quo warranto*, is initiated by the person who had no personal interest in the office in respect

6 *Ibid*.
7 *Ibid.*
8 Inserted by the Constitution (Forty Second Amendment) Act, 1976.
9 Enabling provisions of order 32, CPC allow a minor or a person of unsound mind to institute a suit through a next friend. Similarly, order 33 recognizes that economic factors may act as a disability and obstruct access to justice. The definition of "indigent person" was amended in 1976 in response to the need for expanding the scope of the provisions. Likewise, representative and class actions, which are at the heart of PIL initiatives find life in the provisions of order 1 rule 8 CPC which allows the filing of suits in representative capacity when the cause of action is the same.
10 H.M. Seervai, II *Constitutional Law of India* 1823 (4th edn., 1996).

of which the writ was applied for. These provisions may have a limited sphere of application, but they are evidently demonstrative of the need for special treatment of the distanced subject. While these provisions were reflective of a softer philosophy of the law, they were insufficient for reaching out to the millions of people left untouched by the legal system. At the same time, the need for some provision for legal aid to persons who were prevented from approaching the court due to economic and social reasons was undeniable.

The emergence of *judicial activism* which marked that era is attributed to the post emergency crisis of conscience faced by the judiciary. Whether that be true or otherwise, the late 1970s mark the beginning of a spate of judgments that have transformed the judicial process in this country.

Doctrine of *locus standi*

The doctrine of *locus standi* relates to the question of who may approach the court for adjudication of an issue. Hence, the issue of *locus standi* is a threshold issue relating to the legal capacity of the party to any litigation, whether in a private or public action, to pursue the specific remedy. In other words, the court is required to determine whether the person approaching the court is one entitled to judicial redress. Traditionally, only a 'person aggrieved' could seek judicial redressal being the person entitled to the remedy. This rule was equally applicable when a fundamental right was sought to be enforced under article 32 as well as other legal rights, besides fundamental rights, under article 226.

Although the realm of PIL is fraught with controversies, there has been a virtual unanimity amongst all that the rule of *locus standi* needed to be relaxed.[11] The vindication of public rights, promotion of interests of disabled groups, protection of personal liberty, among other matters, require third party action initiated *bonafide,* be granted the standing. The vital question is, where the line must be drawn?[12]

11 In several cases, in the context of PIL, the Supreme Court has addressed the scope of *locus standi* see *Fertilizer Corporation Kamgar Union* v. *Union of India,* (1981) 1 SCC 568; *Maharaj Singh* v. *State of Uttar Pradesh,* (1977) 1 SCC 155*; S P Gupta* v. *Union of India*, (1981) Supp SCC 87; *M/s Mohapatra & Co.* v. *Orissa*, (1984) 4 SCC 108; *Ranjit Prasad* v. *Union of India,* (2000)9 SCC 313; *D S Nakara* v. *Union of India,* (1983)1 SCC 305; *Hussainara Khatoon* v. *Home Secretary, State of Bihar (I)*, (1980) 1 SCC 81. *Bandhua Mukti Morcha* v. *Union of India,* (1984) 3 SCC 161; *Janta Dal* v. *H S Choudhary* (1992) 4 SCC 305; *Laxmi Kant Pandey* v. *Union of India,* AIR 1984 SC 464; *Raunaq International Limited* v. *I.V.R. Construction Limited & Ors.,* (1999) 1 SCC 492; *Rajiv Ranjan Singh Lalan* v. *Union of India & Ors*, (2006) 8 SCALE 161.

12 While answering a serious contention raised by counsel that in view of change in the phraseology adopted in a subsequent delegated legislation, a line of demarcation ought to be drawn to differentiate between the cases falling within the scope of the respective subordinate legislations, M.N. Venkatachaliah J (as he then was) quoted with approval Lord Lindley's "robust answer" to the question – Where will you draw the line? "Nothing is more common in life than to be unable to draw the line between two things. Who can draw the line between plants and animals? And yet, who has any difficulty in saying that an oak tree is a plant and not an animal?" *Collector of Central Excise, New Delhi* v. *M/s Ballarpur Industries Ltd.,* (1989) 4 SCC 566 at 573.

The rationale underlying the standing rule continues to serve well as far as private actions are concerned. In a private action, two opposing parties are locked in a confrontational situation which pertains to the determination of the legal consequences of past events. In contrast, public law litigation is resonative of policy overtones because it is concerned with *conflict resolution* (of different interest groups) rather than *dispute resolution*. It has evolved in response to newer challenges posed by an expanded role of courts, new demands on judicial responsibility, the rise and growth of various systems of judicial review and the emphasis on *access to justice*. All these factors have caused the evolution of a broad rule of standing which allows any member of the public, acting *bona fide* and having sufficient interest, in instituting an action for redressal of public wrong or public injury.

It is in the backdrop of this constitutional scheme that the legitimacy of the PIL movement must be viewed.

II PIL IN SERVICE MATTERS

The Supreme Court in *Seema Dhamdhere's* case[13] declined to interfere with the order passed by the High Court of Bombay in a PIL in which the transfer of a police officer was sought to be questioned. Two writ petitions were filed by two practising advocates, alleging, on the basis of some newspaper reports, that there had been large scale malpractice in the examination conducted by the Maharashtra State Public Service Commission. On the basis of the complaint, a case was registered and one S B Pujari was appointed as the investigating officer. The petitioners alleged that the said investigating officer collected incriminating materials and had started the process of arresting one Sayalee Joshi and others and it was with a view to pre-empt him from doing so that Pujari was transferred from his posting. The director general of police filed an affidavit before the court stating, *inter alia*, that the investigation in the said case had come to an end. Pujari, however, filed an affidavit to the effect that the investigation was not yet complete. He requested that some more time be granted to him to respond to the affidavit of Anil P Dhere. The high court did not consider that grant of such time to Pujari was necessary. The court was of the view that if the special court, before which the matter was pending, so desired, it could direct production of further materials collected, if any, even after conclusion of the investigation. The high court also observed that there was difference in the perception of investigation between Anil P Dhere and S B Pujari. While disposing of the writ petition, the court observed that since Pujari had put three years in investigating the case, the state government would be objective and would not take any adverse view of the stand taken by Pujari.

13 *Seema Dhamdhere* v. *State of Maharashtra*, Judgment dated 14.12.2007 in Civil Appeal No. 5954 of 2007 with Criminal Appeal No. 1726 of 2007.

The court also clarified that the affidavit of Pujari be not used in any other proceedings. The order of the high court was challenged before the Supreme Court by a special leave petition preferred by the writ petitioners. The court held that the parameters of PIL in service matters were well settled. The court reiterated its earlier decision in *Gurpal Singh* v. *State of Punjab*,[14] wherein, it was held that:

> Though in *Duryodhan Sahu (Dr.)* v *Jitendra Kumar Mishra*[15] this Court held that in service matters PILs should not be entertained, the inflow of so called PILs involving service matters continues unabated in the courts and strangely are entertained. The least the High Courts could do is to throw them out on the basis of the said decision. The other interesting aspect is that in the PILs, official documents are being annexed without even indicating as to how the petitioner came to possess them. In one case, it was stated that a packet was lying on the road and when out of curiosity the petitioner opened it, he found copies of the official documents. Whenever such frivolous pleas are taken to explain possession, the Court should do well not only to dismiss the petitions but also impose exemplary costs. It would be desirable for the courts to filter out the frivolous petitions and dismiss them with costs as aforestated so that the message goes in the right direction and petitions filed with oblique motive do not have the approval of the courts.

In *Neetu* v *State of Punjab*[16] the appellant challenged an order passed by the Punjab & Haryana High Court issuing a writ in the nature of *quo warranto* setting aside the appointment of the appellant in a PIL initiated by one Daljit Singh. The writ petition was founded on the allegation that the appellant got appointed as an Audit Officer, Co-operative Societies, Firozpur, on the basis of a scheduled caste certificate obtained by her, though she was not a member of any scheduled caste. It was alleged that the appellant obtained this certificate on the strength of her marriage to Jagminder Singh, a member of the scheduled caste and that inspite of several complaints, the authorities did not take any steps to cancel the said certificate and terminate the services of the appellant. Pasayat J, speaking for the court, after analyzing the scope of PIL and the rule of *locus standi*, particularly in matters involving the service of an employee as delineated in earlier decisions,[17] held that a PIL in a service matter was not maintainable and hence the order

14 (2005) 5 SCC 136.
15 (1998) 7 SCC 273.
16 (2007) 10 SCC 614.
17 *State of Maharashtra* v. *Prabhu*, (1994) 2 SCC 481; *AP State Financial Corporation* v. *Gar Re Rolling Mills*, (1994) 2 SCC 647; *Budhi Kota Subharao (Dr)* v. *K Parasaran*, (1996) 5 SCC 530; *Duryodhan Sahu (Dr)* v. *Jitendra Kumar Misra,* (1998)7 SCC 273; *Ashok Kumar Pandey* v. *State of West Bengal*, (2004)3 SCC 349.

passed by the high court could not be sustained. The court, however, held that:[18]

> Though PIL is not to be entertained in service matters, that does not stand in the way of the officials from examining the question in the right perspective. In the present case admittedly the officials have initiated action. What action will be taken in such proceedings is not the subject-matter of controversy in the present appeal.

III PIL TO DEFEAT PIL

It may seem paradoxical that a PIL is initiated to throttle public interest and public spirited people from continuing their service to the vulnerable sections of the society, but it is true and it came to focuss in a proceeding under article 32 of the Constitution instituted by an organization styled as National Council for Civil Liberties[19] through its president V K Saxena. The writ petition was filed seeking a direction from the court against the Union of India, State of Gurarat, State of Madhya Pradesh, and the Central Bureau of Investigation (CBI) to investigate into the alleged routing of foreign funds into the accounts of certain individuals and organizations arrayed as parties to the petition – Medha Patkar, Narmada Bachao Aandolan and Rahul Banerjee of Khedut Mazdoor Chetna Sangath. It was further alleged that the said individuals and their organizations had acquired arms, explosives, detonators, gelatin sticks and bullets etc. by misuse of such funds. Although, the court initially entertained the petition, it did not consider it necessary to issue notice to Medha Patkar and the Director of CBI, apparently being not convinced of the allegations made against them in the writ petition. The respondents had questioned the maintainability of the writ petition, particularly by way of PIL, and also on the ground that the petitioners had no *locus standi*. The responents had further alleged that Saxena, the sole petitioner, sought to maintain the petition in his individual capacity, with a view to settle his private scores against Medha Patkar. Analysing the factual background that led to the filing of the petition, the court concluded that although the writ petitioner had attempted to demonstrate that the petition was filed for the benefit of the residents of the States of Gurarat, Madhya Pradesh and Rajasthan, the writ petition had infact been filed, out of grudge harboured by Saxena, against Patkar. The court ruled that there was no material on record to show that foreign funds had, infact, been received by Medha Patkar or that the same had been misutilised for subversive activities of antinational character. Accepting the objections raised by the respondents, the court held that Saxena had a private grudge against Patkar which had motivated him to file the writ petition and not in the public interest, as claimed by him. The writ petition was filed also as a "fishing exercise" to

18 Para 8.
19 *National Council for Civil Liberties* v. *Union of India,* (2007) SCC 506.

draw and procure evidence against the respondents including Patkar. Kabir J, speaking for the court, reiterated the note of caution drawn in *Dattaraj Nathuji Thaware* v. *State of Maharashtra*[20] that "Public Interest Litigations were admitted with great care and for redressal only of genuine public wrongs or injury and not for the redressal for private, publicity oriented or political disputes or other disputes not genuinely concerned with public interest". Dismissing the writ petition with costs, the court held that:[21]

> Although the writ petition is alleged to be in the nature of a public interest litigation, the same appears to be a "private interest litigation" to discredit and diffuse the agitation undertaken by Respondent 5 for rehabilitation of the displaced persons from the dam site before submergence of their habitat.

IV PIL TO SETTLE POLITICAL SCORES

In *Vishwanath Chaturvedi* v. *Union of India*,[22] the petitioner, an advocate by profession, who claimed that he did not belong to any political party, filed a PIL to highlight the root of corruption in Uttar Pradesh administration. In the writ petition, he alleged that the respondents, including the then Chief Minister, Mulayam Singh, his two sons and one daughter-in-law, had, by misusing their power and authority acquired assets more than the known source of their income and hence, appropriate action to prosecute them under the Prevention of Corruption Act, 1988 be initiated in the interest of justice. Though, the respondents questioned the *bona fides* of the petitioner and the maintainability of the petition, the court refused to entertain the said questions at the interlocutory stage of the case and directed the respondents to file their income tax and wealth tax returns for the assessment years 2001-02 to 2006-07. The respondents complied with the said directions and filed copies of their returns in sealed covers. When the petition came up for final hearing, the respondents reiterated their grievances that the petitioner had attempted to mislead the court, and in the guise of a PIL, he was seeking to tarnish the name and reputation of the respondents. The respondents, therefore, pleaded that the court should not entertain the petition. On behalf of the petitioner, it was contended that the holders of the public offices are entrusted with certain powers which are to be exercised only in public interest, since they hold such public offices in trust for the people. If the conduct of the holders of public offices amounts to a breach of such trust, it must be promptly investigated and the holders of such offices be brought to book. Lack of probity leads to high degree of corruption and hence it was imperative that such corruption in public life be brought to book through PIL. In support of his contention, the petitioner

20 (2005) 1 SCC 590.
21 Para 35.
22 (2007) 4 SCC 380.

relied upon an earlier decision of the court in *Vineet Narain* v. *Union of India*.[23] Rejecting the contentions regarding maintainability of the PIL raised by the respondents, the court entertained the petition and directed the CBI to conduct a preliminary enquiry into the assets of all the respondents and, after scrutinizing, if a case is made out, then to take further action in the matter. Lakshmanan J, speaking for the court held that:[24]

> [I]n his own interest, it is of utmost importance that the truth of these allegations is determined by a competent forum. Such a course would subserve public interest and public morality because the Chief Minister of a State should not function under a cloud and that it would also be in the interest of Respondent 2 and the members of his family to have their honour vindicated by establishing that the allegations are not true. In our view, these directions would subserve public interest.

The court held that the ultimate test in this case was "whether the allegations have any substance. An enquiry should not be shut out at the threshold because a political opponent of a person with political differences raises an allegation of commission of offence". The court hastened to add that the general test which one has to apply for testing the maintainability of a PIL is, undoubtedly the "sufficiency of the petitioner's interest". The court, however, held that:

> It is wrong in law for the court to judge the petitioner's interest without looking into the subject-matter of his complaint and if the petitioner shows failure of public duty, the court would be in error in dismissing the PIL.

Though a PIL could not be maintained to probe or enquire into the returns of a tax payer, the court ruled that the petition was maintainable under "special"circumstances.[25]

V PIL, JUDICIAL RESTRAINT AND SEPARATION OF POWERS

The decision of the Supreme Court in *State of UP* v. *Jeet Singh Bisht*[26] raises more intricate issues of far reaching consequences than it resolves. The two judge bench agreed to 'request' the central government as well as the respective state governments to consider the desirability of fixing appropriate/adequate salaries and allowances for members of the consumer

23 (1998) 1 SCC 226.
24 (2007) 4 SCC 380 at 394, para 36.
25 *Id.* at para 40.
26 (2007) 6 SCC 586.

fora at all the three levels so that they can function effectively and with free mind.[27]

The judges, however, agreed to disagree on all other issues including the binding effect of a larger bench decision which otherwise squarely applied to the case. The judges delivered separate opinions.[28] In view of their rather strong disagreement on the core question, as regards the power and propriety of courts to entertain PIL seeking directions for fixation of pay and allowances of the members of the adjudicatory bodies like the district consumer forum and state consumer forum etc., the presiding judge (Sinha J) directed that the matter be listed before another bench to be nominated by the Chief Justice of India.[29] The other member of the bench, Katju J began his opinion with the observation that:[30]

> [T]his appeal furnishes a typical instance of a widespread malady which has infected the judicial system in India, namely, the tendency in some courts of not exercising judicial restraint and crossing their limits by encroaching into the legislative or executive domain, contrary to the broad separation of powers envisaged under our Constitution.

These observations were not only in respect of the high court judgment under appeal but also for the Supreme Court, for having entertained the petition and passed interim directions earlier in the very same proceedings. In contrast, while supporting the earlier orders passed by the court, Sinha J after analyzing the Consumer Protection Act and its functioning in the State of UP, observed:[31]

> In a situation of this nature where the action or inaction on the part of the executive government of a State or Union Territory would lead to virtual closure and /or non functioning of such an important judicial fora created under the Act, it is permissible for the superior courts and particularly this Court, while exercising its constitutional functions, to issue necessary directions for proper and effective implementations of the provisions thereof.

The factual matrix out of which the case arose before the Supreme Court was thus:

The respondent had approached the Allahabad High Court with a writ petition with the grievances that though the UP State Electricity Board had been charging excessive amount in the electricity bills, he could not seek any

27 *Id.* at para 57, 59.

28 An editorial note describes the opinion of Katju J as 'the leading opinion' while that of Sinha J as a 'separate' opinion! See *id.* at 600.

29 *Id.* at 632, para 102.

30 *Id.* at 600.

31 *Id.* at p 614, para 63.

relief from the District Consumer Forum, Chamoli as his case could not be taken up by it since the term of the two of the members thereof had expired and the state government had not made any appointments against those vacancies. The district forum, therefore, was a non-functional entity and could not entertain any complaint under the Consumer Protection Act. The high court entertained the petiton and gave certain directions to the state government. The directions included constitution of atleast five state consumer fora at the state level with benches at "Commissionary level"; to provide for infrastructure facilities for building and recruiting staff necessary for functioning of the commissions. The state preferred an appeal against the said directions issued by the high court, *inter alia*, on the ground that the directions were contrary to the provisions of the Consumer Protection Act and that the court could not have issued such directions including the direction to amend the law, if necessary. Several interim orders were passed by the Supreme Court during the pendency of the appeal with a view to strengthen functioning of various consumer fora throughout the country including the National Consumer Forum. When the appeal came up for final hearing before a two judge bench of the court, the Additional Solicitor General of India submitted that the court should fix salaries and allowances of the members of the state consumer redressal commission in all the states as well the salaries and allowances of the district fora all over India and cited an earlier decision in *All India Judges Associations* v *Union of India*[32] wherein the court had suggested setting up of an all India judicial service with certain uniformity in the conditions of the service of such judges. The judges, though agreed that the central and the state governments be requested to consider fixing adequate salaries and allowances for members of the consumer fora at all the three levels, so that they can function effectively and with a free mind and that the respective governments be requested to fill up the vacancies expeditiously to enable the fora to function effectively, yet disagreed on the vital question as to the power and propriety of the court having entertained a PIL on the subject and having passed several interim orders therein. The decision gives rise to another important question as regards the administration of justice by the superior courts and the constitution of benches in the Supreme Court consisting of two judges, while hearing appeals from judgments and orders from high courts which are also rendered by benches consisting of two learned judges, and the burden on the exchequer and the litigants when a two judge bench of the court is unable to reach a decision,[33] warranting another round of hearing of the case by a bench of three or more judges.

32 (1993) 4 SCC 288.

33 This case is not the first of its kind. On many occasions two judge benches have delivered two contradictory judgments compelling another round of hearing before a three judge bench, see for example *Maniklal Majumdar* v. *Gouranga Chandra Dey & Ors*, (2004) 12 SCC 448; *Maniklal Majumdar & Ors.* v. *Gouranga Chandra Dey & Ors,* (2005) 2 SCC 400.

Katju J in his opinion was not only critical of the high court having entertained the writ petition as a PIL and having enlarged the scope of the said petition, but was equally critical of the Supreme Court having passed several interim orders in the pending appeal, which, according to the judge, virtually amounted to the court directing amendment to an Act enacted by a competent legislature. Criticizing the interim orders passed by the court in the very same proceedings, Katju J observed that such orders do "not seem to be within its jurisdiction as it is contrary to the clear provisions of the Consumer Protection Act".[34] He stated further that "this Court cannot amend the Consumer Protection Act by issuing directions contrary to the clear provisions of the Act nor can the High Court do so."[35] According to him, "in recent years it has been noticed that the judiciary has not been exercising self-restraint and has been very frequently encroaching into the legislative or executive domain. We should do introspection and self-criticism in this connection."[36]. Accepting that our Constitution does not envisage a rigid separation of powers, it was held that " it is not proper for one organ of the State to encroach into the domain of others",[37] adding that "by exercising self-restraint the Court will enhance its own respect and prestige".[38] According to Katju J, "Judicial restraint may also be called judicial respect, that is, respect by the judiciary for the other coequal branches. In contrast, judicial activism's unpredictable results make the judiciary a moving target and thus decreases the ability to maintain equality with the co-branches. Restraint stabilizes the judiciary so that it may better function in a system of inter-branch equality".[39] "Judicial restraint tends to protect the independence of the judiciary. When courts encroach into the legislative or administrative fields, almost inevitably voters, legislators, and other elected officials will conclude that the activities of judges should be closely monitored. If judges act like legislators or administrators it follows that judges should be elected like legislators or selected and trained like administrators. This would be counterproductive".[40]

Expressing his disagreement with the views of Katju J, S.B. Sinha J, held that:

> [T]he evolution of separation of powers doctrine, traditionally the *checks and balances* dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable *social and economic* entitlements, hybrid administrative bodies, private functionaries discharging

34 *Supra* note 26 at 608, para 36.
35 *Id.* at 608, para 38.
36 *Id.* at 609, para 40.
37 *Id.* at 609, para 41.
38 *Id.* at 611, para 47.
39 *Id.* at 612, para 49.
40 *Id.* at 612, para 50.

> public functions, we have to perform the oversight function with more urgency and enlarge the field of *checks and balances* (emphasis in original) to include governmental inaction.

According to Sinha J, there had been larger bench decisions of the court which have dealt with the fixation of pay scales including those for the judicial officers and the same were binding on the bench.[41] On the question of propriety of the interim orders passed by the Court, Sinha J. observed:[42]

> I regret to express my inability to agree with brother Katju J. in regard to the criticisms of various orders passed in this case itself by other Benches. I am of the opinion that it is wholly inappropriate to do so. One Bench of this Court, it is trite, does not sit in appeal over the other bench particularly when it is a coordinate Bench. It is equally inappropriate for us to express total disagreement in the same matter as also in similar matters with the directions and observations made by the larger bench. Doctrine of judicial restraint, in my opinion, applies even in this realm. We should not forget other doctrines which are equally developed viz. Judicial Discipline and respect for the Brother Judges.

While reiterating the significant role played by the court in exercise of its jurisdiction in PILs and explaining the scope of the traditional doctrine of separation of power, Sinha J held that:[43]

> Although functional tests and positive tests have not yet been fully evolved in the context of new separation of powers doctrine, undoubtedly their application would, in appropriate cases, be necessary so as to consider the institutional balance between various branches of the polity. It will be wholly inappropriate if we fail to consider the expanding jurisdiction.

Though the reference to the larger bench still remains to be answered, on several occasions, the Chief Justice of India fully defended the courts intervention in the spheres of inaction of the executive government notwithstanding the open criticism by even the Prime Minister of India suggesting judicial 'overreach'.[44]

41 *Id.* at 619, para 83.
42 *Id.* at 623, para 100.
43 *Id.* at 623, para 99.
44 *Indian Express*, 9th February, 2007.

VI PIL AND CRIMINAL PROCEEDINGS

In a significant decision concerning the *Taj Corridor Scam* case,[45] the Supreme Court was petitioned by the *amicus curiae* to set aside the order passed by the Governor of Uttar Pradesh refusing to grant sanction for prosecution of the then Chief Minister Mayawati and the Minister for Environment, Naseemuddin Siddiqui for their role in the "Taj Heritage Corridor Project". The project contemplated diversion of the river Yamuna to reclaim 75 acres of land between the Agra Fort and the Taj Mahal and use of the reclaimed land for constructing food plazas, shops and amusement activities. In a PIL initiated for protection of the Taj Mahal and its surrounding areas, the Supreme Court, by adopting the process of 'continuous mandamus',[46] had issued several directions, including a direction to the CBI to investigate into the said project and furnish its report; to record its findings based on such investigation and to suggest actions to be taken against the erring officers and the holders of public posts. The court by its order dated 27.11.2006,[47] directed the CBI to place the evidence/material collected by it alongwith the report of the superintendent police before the court/special judge concerned, who will decide the matter in accordance with law. When the said report was placed before the special court, the judge directed the CBI to obtain sanction of the Governor of the state. The Governor, however, refused to grant sanction. The *amicus curiae* then filed an interim application questioning the Governor's decision. The question before the court was, whether the bench, seized of the PIL relating to cultural, heritage and ecology issues, should enquire into the correctness of an order passed by the Governor of the state refusing to grant sanction for prosecution of the chief minister. Declining to accept the request of the *amicus curiae* to interfere with the order passed by the Governor, S B Sinha J, speaking for the court, held that "while entertaining a PIL though, in a given case, the Court may exercise a jurisdiction to set aside the decision of a constitutional authority, but we are not concerned with such situation."[48] Delineating the contours of the intervention by the courts in PIL, the court laid down the following propositions:[49]

i. Judiciary may step in where it finds the actions on the part of the legislature or the executive are illegal or unconstitutional but the same by itself would not mean that the public interest litigation, in

45 *M C Mehta* v. *Union of India & Ors;*IA no. 465 of 2007 in Writ Petition (C) no. 13381 of 1984, decided on 10.10.2007. The writ petition was filed under article 32 of the Constitution of India.

46 The concept of 'continuous mandamus' is the creative invention of the court to give a continuity to the outcome of PIL. See *Vineet Narain* v. *Union of India*, (1998) 1 SCC 226.

47 (2007) 1 SCC 110.

48 *M C Mehta* v. *Union of India*, *supra* note 45, para 14.

49 *Id.*, para 9.

a case of this nature, should be converted into an adversarial litigation.

ii. The jurisdiction of the court to issue a writ of continuous mandamus is only to see that proper investigation is carried out. Once the court satisfies itself that a proper investigation has been carried out, it would not venture to take over the functions of the magistrate or pass any order which would interfere with his judicial functions.

iii. Constitutional scheme of this country envisages dispute resolution mechanism by an independent and impartial tribunal. No authority, save and except a superior court in the hierarchy of judiciary, can issue any direction which otherwise take away the discretionary jurisdiction of any court of law.

iv. Once a final report is filed in terms of sub-section (1) of section 173 of the Code of Criminal Procedure, it is the magistrate and magistrate alone who can take appropriate decision in the matter one way or the other. If he errs while passing a judicial order, the same may be a subject-matter of appeal or judicial review.

v. There may be a possibility of the prosecuting agencies not approaching the higher forum against an order passed by the magistrate, but the same by itself would not confer a jurisdiction on this Court to step in. We should not entertain the application of the *amicus curiae* on such presumption.

vi. In an unlikely event of the interested parties in not questioning such orders before the higher forum, an independent public interest litigation may be filed.

VII LIMITS OF JUDICIAL ACTIVISM

In *Divisional Manager, Aravali Golf Club and Another* v. *Chander Hass and Another*,[50] the bench, rather than confining their decision to the merits of the case, which alone would have the binding force as the law declared by the Supreme Court under article 141 of the Constitution, went ahead and made critical observation on judicial activism.[51] The bench, after deciding the *lis* on the merits, arising out of a civil proceedings initiated before a subordinate court, Faridabad, devoted considerable part of their judgment on the propriety of the courts transgressing the limits of the doctrine of separation of powers in the context of public interest litigation, demonstrating judicial activism rather than judicial restraint! In the case under review, the respondents, as plaintiffs had filed a suit before the trial court, Faridabad, praying for their regularization as tractor drivers instead of

50 Decided on 6.12.2007 in Civil Appeal no. 5732 of 2007 by a bench comprising A K Mathur and Markandey Katju JJ.

51 *Supra* note 26 at paras 34 to 37.

malis. Although, they performed the duties of tractor drivers, there were no posts of tractor drivers in the golf club in which they were employed. The suit was dismissed by the trial court on that ground. On appeal, the additional district judge, reversed the judgment and decreed the suit, holding that since the golf club had been taking the work of tractor drivers from the plaintiffs, they must get the posts of tractor drivers sanctioned and regularize the plaintiffs in those posts. The golf club preferred an unsuccessful second appeal before the High Court of Punjab and Haryana. A single judge of the high court held that since the tractors were available with the club, there was no hitch in creating the post of tractor drivers. On further appeal to the Supreme Court, the golf club succeeded in persuading the Supreme Court to reverse the judgments of the lower appellate court and of the high court. A two judge bench of Supreme Court held that since there was no sanctioned post of tractor drivers against which the plaintiffs could be regularized, the directions given the additional district judge and the high court were beyond their jurisdiction. The court also dismissed the suit. Having held so, the court proceeded to make its observations 'about the limits of the powers of the judiciary'. The reasons that prompted the court to undertake such an exercise have been spelt out thus:[52]

> We are compelled to make these observations because we are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions. In our opinion this is clearly unconstitutional. In the name of judicial activism, judges can not cross their limits and try to take over functions which belong to another organ of the state.

The court was of the view that 'the theory of separation of powers first propounded by the French thinker Montesquieu in his book *The Spirit of Laws* broadly holds the field in India too.[53]

VIII CONCLUSION

There has been apparent divergence of views amongst the judges of the Supreme Court even at a time when PIL was being heralded as the *messiah* of the lost and the deprived. Over the years some broad parameters of PIL have evolved, though no guidelines or rules have been made. The differences in opinion among judges is one aspect but the inconsistency that has resulted in the judgments pronounced in various PIL cases over the years has serious institutional implications.[54] The evolution of PIL though reveals the initial

52 *Id.*, para 17.

53 *Ram Jawaya Kapur* v. *State of Punjab*, AIR 1955 SC 549; *Asif Hameed* v. *State of J&K*, 1989 Supp (2) SCC 364. In these cases it has been held that the doctrine of separation of powers apply in Indian constitutional context only to a limited extent and not in absolute terms.

rejection of courts' expansive jurisdiction by the executive government and as also the hesitation of the judiciary to take on the executive in any sphere of its activity, it may appear to be strange but true that over the years even the executive and legislature have eventually given in and have reconciled themselves to act within the parameters of their powers as delineated by the court. Does this feature indicate that the other institutions have found it convenient to abdicate their powers and duties in favour of the court in order to gain an *alibi* and holding the courts responsible for eventual failures which would have otherwise been attributable exclusively to the executive and legislature? It is interesting that the political constituents of democracy while themselves have approached the court inviting adjudication on essentially political issues and at the same time been critical of the courts for 'judicial activism' and 'judicial overreach'.[55]

It is beyond doubt that today, the Supreme Court of India is one of the few public institutions which inspires confidence amongst ordinary citizens. It is imperative that it continues to enjoy such credibility and support. At the same time, judges must remain conscious of our constitutional scheme and the balance of power envisaged therein. The health of a democracy hinges upon harmonious and coordinated interaction between the three wings of government.

Over the years individual judges of the Supreme Court have stressed the need for ensuring that judicial review in the area of PIL is exercised with restrain and circumspection. The wide jurisdiction conferred by the Constitution on the Supreme Court has been viewed by some as a tremendous power and by others as an onerous duty. The expanded "sweep of Articles 14 and 19" has made it even more difficult for judges to walk the tight rope. Today, judges are called upon to find solutions to problems in almost every sphere of public life. In performing this role the court needs to be alive to the fact that a weak government may seek judicial intervention to cover up its own inaction or as a political expediency. The court would need to resist such blandishment and refuse to take upon itself the duty of discharging the functions essentially meant to be performed by the executive.

There are two aspects of controversy that surrounds PIL today. The first aspect relates to the dilution of procedural norms. It could hardly be denied that the pre-existing procedural norms did serve to prevent any abuse of process of law and waste of public time and money. The second aspect concerns the subject matter of PIL. PIL has transcended its boundaries and has since traveled a long distance. It has not only come to stay in our life but is determined to develop further. The objection against PIL today is not as much on procedural issues as it is on the substance. The parliamentary debate

54 The conflict is best highlighted in the ten question posed by S.M. Fazal Ali and E.S. Venkatramiah JJ in *Sudipt Mazumdar* v. *State of Madhya Pradesh*, (1983) 2 SCC 258.

55 See *Rameshwar Prasad & Ors.* v. *Union of India*, (2006)2 SCC 1; also see A K Ganguli, 'Constitutional Law II', XLII *ASIL* 119-129 (2006).

on PIL bill[56] paints the picture that 'publicity crazy' judges provide for an adjudicator and supervisor, but also an investigator, an administrator and some times even a legislator. The deliberations however fail to take into account that the greatest contribution of PIL is that the superior courts, which were viewed by many as institutions only meant to serve the elite, are now regarded as institutions belonging to the people and particularly the have nots. The concerns of the vulnerable have been given voice and unequivocally placed on the national agenda.

While in *Jeet Singh* Katju J did not feel inclined to follow the course of action adopted by a larger bench of the Supreme Court in *All India Judges Association*,[57] as according to him, the directions given by the court in the said decision were "without any discussion as to whether such directions can validly be given by the court at all" and "the decision therefore passed *sub silento*,"[58] the decision of the court in *Aravali Golf Club*[59] in contrast, demonstrates that in certain cases, the court may feel compelled to make observations on questions which did not at all arise for its consideration, although the court is aware that, in law, such observations would not have the efficacy of laying down a binding precedent.

The decision of the court in the *Jeet Singh*[60] has not only become the debating point amongst various sections of the society but also raises a serious question of judicial discipline. It needs hardly any reiteration that the Supreme Court of India is not merely the highest court of the land but also enjoys a unique position with multi-faceted duties, responsibilities and powers under the Constitution. It acts as the protector and the guarantor of the fundamental rights of the citizens, and in certain cases, of aliens. It is the court which ensures and maintains the fine balance of power amongst different levels of government and resolves all constitutional issues, many of which are unprecedented, acting as the final interpreter of the Constitution. In the ultimate analysis, the institution belongs to the people who could not be deprived of the great institution entrusted with the constitutional duty of maintaining checks and balances between various organs of the government and as a watchdog of the fundamental rights of the people. The judges, who preside over the court, have the duty and responsibility to ensure that the court remains, at all times, in a position to fulfil its pivotal constitutional role.

It is evident from the decisions in *Seema Dhamdhere* and *Neetu* that inspite of the repeated caution by the Supreme Court, that high courts should not entertain PILs relating to service matters, as they primarily concern individuals and quite often the proceedings are initiated by private motives,

56 The PIL bill, which sought to curtail the definition of *locus standi* was introduced before Parliament but lapsed with the dissolution of the 12th *Lok Sabha*.
57 (1993) 4 SCC 288.
58 *Supra* note 26 at 603, para 18.
59 Katju J is a party to this decision.
60 *Supra* note 26.

then have continued to entertain such proceedings. Is the Supreme Court required to do more than mere reiterating its disapproval of such PILs? One possible reason why high courts often lost sight of the note of caution was probably their perception of the high courts that justice of the matter demanded their interference though the subject matter of PIL concerned service conditions of individuals. An instructive decision by the Supreme Court laying down the principles that necessarily come in conflict with entertaining PILs in service matters may perhaps provide a solution.

The decision in the *Civil Liberties* case also destroys the myth that PILs are always in public interest. The decision also highlights, how, but for the extremely cautious approach of the court and a careful analysis of the entire proceedings, the petitioners, who initiated the so-called PIL proceedings, would have succeeded not only in defeating the public interest but also in victimizing the genuine public spirited citizens from approaching the courts with PILs for the protection of the vulnerable sections of the society.

Whatever be the pitfalls of the developments in the realm of PIL, it is certain that PIL has not only come to stay with the administration of justice by courts, it has now developed deep roots in the system. All that is needed is, a little change in the perspective of the courts consistent with the enormous responsibilities that the judiciary has taken upon itself and the projected image of the court as possibly the sole institution which could truly protect the society and the people.

All that the court is required to undertake is to so orient its PIL jurisdiction that whilst it continues to provide protection to the disadvantaged, this does not become a site of an institutional power conflict.