

## **PIL: The Indian Experiment**

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### **Abstract**

Public interest litigation as an innovative procedural instrument/ mechanism of redressal owes its genealogical evolution to the Supreme Court of USA. Ever since its inception it has raised continued debate and discussion involving the issue of overstepping by one of the three institutions of government. The present paper intends to provide a deeper understanding of the ongoing debate in the realm of academic jurisprudence.

The conceptual framework of overreach is based on the notion of transgression of one's designated zone of structured functions within the parameters of constitutionally mandated separation of powers. However, the issue of this transgression/overstepping involving the judicial activism in the incarnation of PIL is neither new nor settled as the proponents of 'LakshmanRekha' have been countered by the validity and necessity of intent or spirit of the action which is reflected in the attempted course correction by the judiciary failing which the desired goal of constitutional democracy would have collapsed. In other words, the tussle between the judiciary and other two branches of the government which began with judicial review has reached its optimal level with the innovative initiative of PIL. While, it will be too early to decide as to whether PIL has led to overreach or not it would be logical to put forward the bare facts which require an

analysis of theoretical formulation of separation of powers, constitutional backdrop and the case studies involving the issue of overreach.

The constitutional democracies in the modern times are based on the concept of limited democracy and the supremacy of the Constitution with a necessary institution of Judiciary which acts as the watchdog of the constitution on one hand and on the other hand ensures that the legislature functions in conformity with the text and ideals of the constitution. In the system of governance, the powers are conferred by the people in such a way that it is not vested in one person or one institution. In India, though not explicitly mentioned, it is based on the Principle of Separation of Powers wherein powers are very minutely and distinctively divided between the three pillars of democracy—the legislature, executive and judiciary and it is expected that they will function in such a way that they do not step in each other's domain and at the same time exercise their respective powers. In such a system the legislature is the policy making body, the judiciary is the adjudicating body and the executive looks after day to day administration by implementing policies. The judiciary is independent of the legislature and the executive. Laws made by the legislature are scrutinized by the judiciary. i.e they are subject to judicial review. Under this division of power due to the lack of regulatory mechanism, paucity of time, requisite expertise and manpower, the Judiciary was given limited policy making function as it was thought that the judiciary was not competent in this regard. Montesquieu pointed out the dangers inherent in the concentration of Legislative, executive, and judicial powers in any one authority and stressed on the necessity of the concept of checks and balances in constitutional governance.

The success of democracy rests on the absolute steadiness of three pillars of government; the executive, legislature and judiciary. If any of the pillars becomes

totalitarian, synchronization will sever and this will lead to complete failure of democracy. Lately, allegations are being made that judiciary is unnecessarily and aggressively impinging in the domain of executive and the legislature and there has been a spectacular increase in the role of the Supreme Court. Under the guise of basic structure, no doubt, it has emphasized its power to nullify the constitutional amendments, managed appointments in the judiciary, administered and controlled policies pertaining to the environment, has kept a check and looked into corruption in administration, and has ensured the accountability of the government towards its citizens. It has also promoted electoral transparency.

The notion of judicial review as envisioned by the Constitution gave way to judicial activism and subsequently to judicial overreach, as is being propounded by its critique. This was inevitable as the architects of the Indian Constitution has left enough manoeuvring space for judiciary to step in wherever constitutional framework is being disregarded in letter and spirit which is best reflected in the failure of state in keeping pace with the changing normative expectations and desires of the society.

As Soli Sorabjee has pointed out: " it is the executive's failure to perform its duty and the notorious tardiness of legislatures that impels judicial activism and provides its motivation and legitimacy. When gross violations of human rights are brought to its notice, the judiciary cannot procrastinate".<sup>1</sup>

Undoubtedly the Supreme Court has emerged as the most authoritative and assertive court in the world in matters of governance and policy making. Simultaneously, it has aroused great concern and skepticism. Thus the critiques are of the opinion that it is flouting its most important 'function of ensuring that the

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<sup>1</sup> Quoted in Michael Kirby AC CMG, Bar Council of India Lecture, 1997 on Judicial Activism, New Delhi, 6-1-1997.

constitutional texts and values are followed in letter and spirit on regular basis. It has become extra constitutional law making body by not restraining itself, interpreting law with impunity and has often been encroaching the jurisdiction of the executive sometimes on its own behest and sometimes on the basis of PIL. This interference of the court is violating the classical principle of separation of power which is the part of the basic structure of the Constitution. Through PIL the Court has in a way taken over the governance by trying to settle down various questions relating to policies. It should be noted that the Judiciary in order to give direction to the executive generally and regularly called upon Article 21 of the Constitution which the other two branches of government refer as undue interference. For example, the guidelines approved by the High Court of Delhi is of contemporaneous significance which deals with an array of issues which range from eligibility criteria for nursery admissions, unauthorised schools, criteria for reservation of seats in schools, provision of water for consumption in schools, allotment of free beds for the patients below poverty line in hospitals built on public land, usage of ambulances, Instituting burns ward in the hospitals, improving the quality of air which people in Delhi inhale, banning begging, whether the constructions which are carried in Delhi are within the building norm or not, identification of the illegal constructions to be demolished, over charging by auto-rickshaws, increasing number of road accidents, etc. These matters are prerogative of the executive or legislature. If there is a law, judges can certainly enforce it, but judges cannot create a law and seek to enforce it.<sup>2</sup> For such unrestrained excessive judicial interference with laws and executive action Manmohan Singh, former Prime Minister, used the word 'judicial overreach'. While speaking on Judicial Overreach he commented "Courts have played a

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<sup>2</sup>Sharma Siddharth, Economic and Political Weekly, Vol. 43, No. 10 (Mar. 8 - 14, 2008), pp.16

salutary and corrective role in innumerable instances. They are highly respected by our people for that. At the same time, the dividing line between judicial activism and judicial overreach is a thin one and a takeover of the functions of another organ may become a case of over-reach”.<sup>3</sup>In the same conference he said, PILs cannot become vehicles for settling political or other scores. Justice P. Sathasivam, Judge of the Supreme Court said “We need standards and bench marks for screening PILs, so that only genuine PIL with a justifiable cause of action based on judicially manageable standards are taken up”<sup>4</sup>Judicial activism is denounced as anarchistic and appropriation of the prerogatives of executive and legislature. T.R.Andhyarujina writes, “With the acquisition of powers to correct unreasonable actions there have been no constraints on the court’s power to control actions of the other branches of government. Today, the superior courts not only correct unreasonable conduct of the State but lay down norms of reasonable conduct for the State. These rules of conduct and schemes are akin to those made by administrative agencies themselves”.

The judicial overreach is said to be the consequence of the neglect of the legislature and the executive towards the discharge of their function in vital areas. Quite often the inefficiency of the executive results in the violation of peoples’right. The court in such a case has to actively intervene and protect violation of rights and act strongly to check the inaction of the government. But, certain developments in the past have created the impression that the country is being governed by the judiciary and the judiciary has established supremacy over executive and the legislature.The Constitutional practice has also allowed judicial overreach. Judicial review has been unequivocally expressed in the Constitution. The Constitution of India is the source of law whereby it aims to curb the power

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<sup>3</sup> The Hindu , April 9. 2007

<sup>4</sup> The Hindu , January 20th ,2008

which the government has and ensures the rights and freedom which it guarantees. The framers of the Constitution keeping in mind the inequality rampant in society wanted an interventionist state which could solve the critical problems in the society. Making it crystal clear PratapBhanu Mehta says that in the name of “Social Reform” the constitution allows the Court’s intervention on one hand and on the other hand the judges have expanded the meaning of rights to hold it constitutionally “justiciable.” And, this has made it possible for the court to pronounce on anything be it civil liberty to urban planning.

The court has secured its invasive strategies by developing new juristic techniques; PIL being one of these. It has taken help of the Preamble of the Constitution and the mandate on Directive Principles to put forward the argument that the Constitution being a social document with implied goal of socio economic development of the marginalized section<sup>5</sup> of the society in general and the dalits and the tribals in particular, the judiciary has no option left but to take up their cause in the absence of any concerted effort to champion their plight. The many socio economic and political problems which the country faces can be solved by the Parliament. It cannot be solved in the courtroom. Judicial overreach has an impact on the assets which the court has as an institution. It channelizes the time, talent and energy without realizing that neither do they have the competence to legislate nor do they have the required expertise. In other words, the issue of overreach may be described as nothing less than a necessary evil in the interest of protecting and promoting the cherished values of conscience collective of we the people.

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<sup>5</sup>Bandhua Mukti Morcha vs Union of India (1984), 3 SCC 161, M.C.Mehta v Union of India (Oleum Gas case) (1987) 1 SCC 395, People’s Union for Democratic Rights v Union of India (1982) 3 SCC 235

The Supreme Court in India has used Public Interest Litigation to intervene and spread out its active role in the governance of the country. Basically, it was an instrument through which the court tried to bring innovative solutions to problems. The early purpose of the Supreme Court was to make it possible for the poor and the downtrodden to have an access to justice but now it has wafted away from it. It has swung its attention to integrity in governance. For this it has brought judicial legislations and has rebuked the authorities who were in persistent habit of inaction and directed them to enforce orders. In a way PIL completely transformed the Indian Supreme Court and in this process to a great extent it gradually usurped the power of the Parliament and the Executive. Today it is literally the pivot around which the entire administration revolves as they have taken a dynamic and crucial job in the governance of the Indian state. The growth of PIL was a watershed in the transformation of the Indian Supreme Court making it an assessor and dynamic participant in the governance of the country.

However, it must not be forgotten that from the very beginning Public Interest Litigation has generated a lot of heat and dust giving rise to controversies and apprehensions. Abraham Chayes<sup>6</sup> has rightly pointed out that in USA the rising momentum of public law litigation saw the emergence of counter tendencies which led to the rejection of the public law and in its place there was a re emphasis on the traditional model of law to solve the problems related to class action and there was a heavy reduction in funding by private organisation for public interest law”.

Madhu Limaye commented that it was through PIL that the Court asserted itself as a champion of the rule of law in checking and ameliorating government’s illegality

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<sup>6</sup>Abraham Chayes, —Forward: Public Law Litigation and the Burger Court , 96 Harvard Law Review 4 (1982).



and statutory noncompliance.<sup>7</sup> Its interference in policy formulation has no doubt been criticised to a large extent by people from all quarters. Criticising this role of judiciary MarkandeyKatju comments in the Aravali Golf Course case:

“If the judiciary does not exercise restraint and overstretches its limits, there is bound to be a reaction from politicians and others. The politicians will then step in and curtail the powers, or even the independence of the judiciary. If there is a law, judges can certainly enforce it, but judges cannot create a law and seek to enforce it. Judges must know their limits and must not try to run the government. They must have modesty and humility, and not behave like emperors. There is a broad separation of powers under the Constitution and no organ of the State, the legislature, the executive, and the judiciary-should encroach into each other's domain. 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”<sup>8</sup>.

As PratapBhanu Mehta explains “The Court’s PIL initiatives-an innovation influenced by Gandhi’s populist political style-allowed judges to make policy and demand that executive officials carry it out by closing businesses on environmental grounds, building new housing for slum dwellers, and even maintaining particular college courses”.<sup>9</sup> He further Says “irony is that the Court has helped itself to so much power-usurping executive functions, marginalizing the representative process-without explaining from whence its own authority is supposed to come. In theory, democracy and constitutionalism can reinforce each other, but in practice their relationship is complex and even problematic. The question of where one begins and the other ends has taken on global significance in light of the widely observed trend toward “post democracy,” according to which representative institutions are losing power to non elected centers of decision making the world

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<sup>7</sup>MADHU LIMAYE, JANATA PARTY EXPERIMENT: AN INSIDER'S ACCOUNT OF OPPOSITION POLITICS: 1975-1977, at 153-57, 205-15, 295 (1994).

<sup>8</sup>Divisional Manager, Aravali Golf Club v. Chander Hass, (2007) 12 S.C.R. 1084, 1091, 1098. (in *Two Paths to Judicial Power*, SAN DIEGO INT'L L. VOL. 12: 175, 2010

<sup>9</sup>PratapBhanuMehta, India's Unlikely Democracy :The Rise of Judicial Sovereignty,page no73.



over. In India, unelected judges have effectively replaced the notion of the separation of powers among three governmental branches with a “unitarian” claim of formal judicial supremacy. The concept of the rule of law is supposed to legitimate this claim, but whether judicial supremacy-either as such or as exercised by the Indian Supreme Court-actually upholds the rule of law remains an open question”.<sup>10</sup>

So, in a way, the judiciary has become a panacea for all the wrongs in society. But, the judiciary has various reasons for this interference- ranging from inaction on the part of the government to implementation of legislations in vital areas, bureaucratic failure, red tapism, rampant corruption in administration and government’s unresponsive attitude towards the citizens of the country- are responsible for judicial overreach. The judiciary’s interventionist role in policy making and administrative functioning has become a routine activity. Many a times the inefficiency of the government is reflected in the violation of rights of people and in such case the Supreme Court has no alternative but to intervene. The Courts have taken resort to legislation when required, have held the government accountable to the statutory and constitutional law which they have to follow in matters of governance. They have safeguarded the fundamental rights of the people and thereby protected the basic structure of the constitution. The judiciary, no doubt, has the task of reviewing the legislations and due performance of the executive in discharging its role of performing the constitutional duty of implementing the public policies, but it’s hyper active role of judicial legislation has upset the separation of powers.

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<sup>10</sup>PratapBhanuMehta ,India’s Unlikely Democracy :The Rise of Judicial Sovereignty,page no72.

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