

PUBLIC INTEREST LITIGATION IN INDIA: A SOCIO-LEGAL STUDY

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THESIS



Abstract

Public Interest Litigation (PIL) in India began in the late 1970s. For the first time the rights of prisoners, bonded labourers, other neglected peoples and issues were considered in the judicial forum. Using their inherent powers under Articles 32 and 226 of the Constitution, a few judges of the Supreme Court and High Courts made access to justice easier. Anyone acting in the public interest was permitted to file a petition on behalf of those unable to do so themselves, or for issues of grave public importance. Lawyers, social activists, concerned individuals and even judges approached the courts. Aside from *locus standi*, other procedural norms were relaxed, including the need to file a proper petition. Once admitted, attempts were made to resolve litigations using a conciliatory form of justice. Offending state authorities were encouraged to co-operate with the Court, which in turn took on the role of fact-finder, when appropriate, and appointed commissions of enquiry.

Most of the reported and many unreported PIL cases, filed from its inception until April 1994, have been examined. Interviews with petitioners and lawyers have revealed much about PIL, and have resulted in the discussion of many unreported cases. Interviews of Supreme Court Judges, administrative officials in the courts and analysts of Indian law have enabled the study to extend to all aspects of the legal process as it relates to PIL. This new form of litigation in the courtroom thus provides a focal point for the study of the Indian legal system.

The perception that inequities could be resolved through the legislative or administrative processes had given way to a belief that recourse to legal action was the only mechanism through which rights could be upheld. Thus, the initial agenda was to introduce the social justice considerations of poverty and inequality into the court, whilst making legal institutions more accessible. The hundreds of documented

PIL cases reflect a huge range of issues and concerns. While many do fulfil the initial mandate, PIL has often been used as another available legal tool that facilitates access to the courts and increases the public profile of the petitioner.

For many of those who have used PIL in an effort to counter serious violations of rights, the inherent limitations of legal action and the poor implementation of favourable Court orders have rendered PIL a meaningless exercise. For some, PIL has provided necessary short term redress or has focused attention on issues never before discussed in a national forum. Whatever the outcome, PIL has necessitated the recognition that every Indian citizen should have access to justice.

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Sangeeta Ahuja

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Acronyms

A P	Andhra Pradesh
AIDWA	All India Democratic Women's Association
AIR	All India Reporter
All	Allahabad
BEAG	Bombay Environmental Action Group
C W J	Civil Writ Jurisdiction (equivalent to a civil writ petition)
C A	Civil Appeal
C P C	Code of Civil Procedure, 1908
Cal	Calcutta
CBI	Central Bureau of Investigation
CBI	Central Bureau of Investigation
CEGAT	Customs, Excise and Gold Control Appellate Tribunal
CILAS	Committee for the Implementation of Legal Aid Services
CLAHRO	Civil Liberties and Human Rights Organisation
COCOI	Co-ordinating Committee on the Oinam Issue
Cr P C	Code of Criminal Procedure, 1973
D/-	Dated
DB	Division Bench
Del	Delhi
FB	Full Bench
FIR	First Investigation Report
Gau	Gauhati/Guwahati
GauLR	Gauhati Law Reporter
GLR	Gujarat Law Reporter
Guj	Gujarat
Guw	Guwahati/Gauhati
HC	High Court
HCLAC	High Court Legal Aid Committee
I P C	Indian Penal Code, 1860
ILR	Indian Law Reporter
J & K	Jammu and Kashmir
JT	Judgements Today
Ker	Kerala
KLJ	Karnataka Law Journal
KLT	Kerala Law Times
LAAB	Legal Aid and Advice Board
LAB	Legal Aid Board
LAC	Legal Aid Committee
M P	Madhya Pradesh
MBCWU	Manipur Baptist Convention Women's Union
MLA	Member of the Legislative Assembly

NPMHR	Naga People's Movement for Human Rights
O P	Original petition (equivalent to a writ petition)
Ori	Orissa
P & H	Punjab and Haryana
PIL	Public Interest Litigation
PUCL	People's Union for Civil Liberties
PUDR	People's Union for Democratic Rights
PUHR	People's Union for Human Rights
S L P	Special Leave Petition
SAL	Social Action Litigation
SC	Supreme Court
SCALE	a weekly reporter of Supreme Court cases
SCAORA	Supreme Court Advocate-on-Records Association
SCC	Supreme Court Cases
SCLAC	Supreme Court Legal Aid Committee
SCR	Supreme Court Reporter
SLAAB	State Legal Aid and Advice Board
SLR	Service Law Reporter
SPARC	Society for the Promotion of Area Resources Centres
W P	Writ Petition

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Monopolies and Restrictive Trade Practices Act, 1969

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Points to Note:

- The citation of each of the orders taken from SCALE gives the number of the case in ascending order in the volume, and in square brackets, for ease of reference, the page number
- For some of the orders, alternative citations are given
- For some of the cases, more than one reported order is listed

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Chapter One - The Context

In 1979, for the first time in Indian legal history, petitions were admitted into the Supreme Court that, earlier, would have been rejected on procedural grounds. This was done to enable poverty and inequality to be considered in legal fora by increasing access to justice. Public Interest Litigation (PIL), as these cases came to be known, is the particular use of Articles 32 and 226 of the Constitution to implement legal rights of disadvantaged groups, by circumventing strict procedural rules.¹ Determined by the parameters ascribed to both the content and form of cases by the judges, litigants, lawyers and commentators involved, PIL is a fluid category of cases, which cannot be conclusively defined, either in terms of issues or procedures. This thesis will examine all reported² and many unreported cases defined as PILs in the Supreme Court and High Courts, from their introduction in 1979 to April 1994.³

The growing concern for access to justice, and the provision of constitutionally guaranteed rights, led to the relaxation of procedural rules such as *locus standi* and the form in which a petition was filed. Letters were admitted as writ petitions and *suo moto* actions were instituted. As PIL evolved, its characteristics were further elucidated, and the importance of conciliatory methods of resolving cases was stressed. However, as this form of litigation gained credence, it extended into a broad range of issues beyond its initial remit. Initial concern was to make the Court more responsive to poverty and inequality, both in its judgments and through a reassessment

¹ For a full listing of these articles see Appendix A, and for a discussion, see 'Constitutional Remedies', *infra*.

² All the Supreme Court orders and judgments in PIL that have been published in AIR, SCC, SCR or SCALE have been referred to, along with some JT and SLR. All the High Court orders and judgments that have been published in AIR have been referred to, together with some from State law reporters.

³ Unreported cases are documented in Ahuja, Sangeeta, *Public Interest Litigation in India: A Casebook*, (Orient Longman, New Delhi, forthcoming 1995).

of the legal process. Escalating and encompassing an expanse of public interest issues, this legal mechanism has been increasingly appropriated by those who seek to use it as a tactic for gaining the attention of the courts, despite the availability of alternative remedies.

While PIL has yielded notable results, for example in extending the judicial discourse on rights, in promoting awareness of poverty related issues, and in establishing a concern for access to justice, there have been few cases in which substantive success has been realised. Having surmounted initial barriers to the courtroom, many petitions have not been listed or heard. The procedure prescribed for the management of letters sent to the Court has confounded the intention of providing access to justice when it has been most needed.

Despite numerous court orders directing that action be taken to remedy injustice, and the monitoring of directions given in certain cases, implementation has been inconsistent and inadequate. A theme that permeates the thesis, the poor implementation of PIL petitions, emphasises the limitation of the use of law for social change. Moreover, in the orders judges have not innovated to the extent anticipated by those who initiated the litigation.

The focus of this analysis is on the legal process, through an appraisal of why PIL emerged, what was sought to be achieved and why certain results have ensued. Initial fieldwork framed the discussion as many petitioners, who had approached the courts out of concern for poverty and inequality, were disappointed in the results of using law. As a microcosm for the study of the Indian legal system the study of PIL provides a more general understanding of the potentialities and constraints inherent in the use of law.

The shape of PIL has inevitably been determined by the structure and operation of the Indian Constitution, and by the legal framework into which it was introduced. Concentrating on the period until 1979, this chapter locates many of the issues of concern to the study of PIL, in terms of the legal and political process. After

a survey of the constitutional imperatives, the legal framework will be considered. Growing concern for access to justice and legal aid, the precursor to PIL, and international influences are then discussed. The chapter will conclude with an introduction to the analysis in the rest of the thesis.

Constitutional Imperatives

Law and lawyers have a prominent place in modern India. An adversarial legal system and a legal profession to support it, were introduced in the colonial period,⁴ when existing systems of adjudication were replaced by legislations and court orders. It was this structure that was inherited by the newly independent India. The Constituent Assembly, comprising many lawyers,⁵ was set up on December

⁴ See Cohn, Bernard S, 'From Indian Status to British Contract', *The Journal of Economic History*, Vol 21 No 4, Dec 1961, 613-628, in which he concludes, at 628:

Failure to understand the nature of Indian society, assumptions based on British practice, mistakes, and short-term practical considerations, rather than the unfolding of a social law or the implementation of a well thought through grand design on the part of the British rulers, lay behind the movement in Indian society of "status to contract".

Also see Maine, Henry, 'The Development of Law' in Ghai, Yash; Luckman, Robin and Snyder, Francis (eds), *The Political Economy of Law. A Third World Reader*, (Oxford University Press, Delhi, 1987), 35-39 for an exposition of this move from status to contract and Washbrook, David, 'Law, State and Agrarian Society in Colonial India', *Modern Asian Studies*, Vol 15 No 3, 1981, 649-721. See the section on the emergence of the modern legal system in Galanter, Marc, *Law and Society in Modern India*, (Oxford University Press, New Delhi, 1989). For a chronology of legal developments Jain, M P, *Outlines of Indian Legal History*, (N M Tripathi Pvt Ltd, Bombay, fifth edition, 1990) and Agrawala, B R, *Supreme Court Practice and Procedure*, (Eastern Book Company, Lucknow, fifth edition, 1989). Also of interest is Conrad, Dieter, 'The Influence of Western Liberal Ideas on Gandhi's Constitutional Philosophy' in Singh, Mahendra P (ed), *Comparative Constitutional Law*, (Eastern Book Company, Lucknow, 1989), 43-69.

⁵ One analyst of Indian law noted:

Western liberal education had made the "inheritance elite" conscious of the illegitimacy of colonial rule, but it was not enamoured by the strengths of indigenous traditions and political practices.

Sudarshan, R, 'In Quest of State: Politics and Judiciary in India', *Journal of Commonwealth and Comparative Politics*, Vol 28 No 1, Mar 1990, 44-69 at 46-47. Other observations have borne this out. See Cohn, Bernard S (1961) at 626:

The conceptualisation of the lawyer as an independent professional standing between his client and the court, defending the rights of his client, but at the same time being part of the judicial system, again illustrates the conflict between British conception and Indian reality.

9, 1946 to draft a constitution, but it was not until 26 November, 1950 that the Constitution of India was adopted. Establishing a parliamentary system of governance, the Constitution delineated the extent of judicial power and its organisation and included a bill of rights.⁶ Embodying the choice of modern polity and legal system,⁷ and the promise of a new age,⁸ the Constitution envisioned a professionalised state:

The Constitution's eclectic combination of elements borrowed from the state tradition of European constitutions and Anglo-American legal traditions has posed serious problems in working it. It envisages a state

Also the discussion of lawyers in chapter six.

⁶ See Austin, Granville, *The Indian Constitution. Cornerstone of a Nation*, (Clarendon Press, Oxford, 1966); Ray, Amal, 'From a Constitutional to an Authoritarian System of Government: Interactions between Politics and the Constitution in India', Vol 25 No 3, Nov 87, 275-291. The Constitution was loosely based on the Government of India Act, 1935. Other basic laws, such as the Indian Penal Code, 1860, the Code of Civil Procedure, 1908 and the Code of Criminal Procedure, 1898 continued in force. Referring to the 1935 Act, Robert Kidder noted:

In effect, the British colonial tradition was continued with few restraints.

Kidder, Robert L, 'Law and Order or Law and Freedom?' in Ghai, Yash; Luckman, Robin and Snyder, Francis (eds) (1987), 601-608 at 603. For a general study of the 1935 Act see Sarkar, Sumit, *Modern India, 1885-1947*, (Macmillan Press, Basingstoke, second edition, 1989). One political scientist has therefore observed:

The essential problem about the state in post-colonial societies stems from the fact that it is not established by an ascendant native bourgeoisie but instead by a foreign imperialist bourgeoisie.

Alavi, Hamza, 'The State in Post-Colonial Societies' in Ghai, Yash; Luckman, Robin and Snyder, Francis (eds) (1987), 231-239 at 231.

⁷ Upendra Baxi notes that Austin's chapter 'Which Road to Social Revolution?' reflects the: threshold "choice" between tradition and modernity in political institutions and in social structure and a cautious eclecticism, after that "choice" was made, in utilising the constitutional history of the world for our own Constitution.

Baxi, Upendra, '“The Little Done, The Vast Undone” - Some Reflections on Reading Granville Austin's *The Indian Constitution*', *Journal of the Indian Law Institute*, Vol 9, 1967, 323-430 at 339. For an overview of the predominance of ideas of modernity see Higgott, Richard A, *Political Development Theory*, (Croom Helm, London, 1983) and Ramirez-Faria, C, *The Origins of Economic Inequality between Nations*, (Unwin Hyman, London, 1991). For a critique of the foundation of a liberal-democratic, modernising state see Chatterjee, Partha, 'Secularism and Toleration', *Economic and Political Weekly*, 9/7/94, 1768-1777. Also see Galanter, Marc, 'The Modernisation of Law' in Weiner, Myron (ed), *Modernisation. The Dynamics of Growth*, (Basic Books Inc, New York, 1968) in which he discusses the characteristics of a modern legal system.

⁸ Referring to Article 17 of the Constitution, J S Gandhi noted:

The entire structure of the Constitution bears ample testimony to the legalistic-formalistic cognition of the Indian reality, on the part of its framers. The highly idealistic and euphoric tone in which some of its provisions are cast betokens the characteristic optimism which lawyers would have in the capacity of law to change the existing social reality.

Gandhi, J S, 'Potential and Parameters of Social Change through Law in Contemporary Indian Society - A Sociological Assessment' in Podgorecki, Adam; Whelan, Christopher J and Khosla, Dinesh, *Legal Systems & Social Systems*, (Croom Helm, London, 1986), 174-189 at 177.

with the requisite 'steering' capacity over society to fulfil its programmatic goals. A heavy burden is placed on constitutional law and the judiciary to supply what is, in fact, a missing tradition.⁹

Nonetheless, much discussion had foreshadowed the powers given to the judiciary, and the use to which they might be put.¹⁰

Soon after the Constitution began to operate, the Supreme Court began to pronounce judgments that exercised its powers of judicial review. Activism in the Court manifested itself in attempts by judges to assert powers of judicial review, examining cases of detention,¹¹ and upholding, in other cases, the right to freedom of speech and expression.¹² It was in response to these orders that the government first amended the Constitution in 1951 to provide for the protection of certain statutes from judicial review and to modify some of the rights available to citizens.¹³ The historic

⁹ Sudarshan, R, 'Political Consequences of Constitutional Discourse' in Sathyamurthy, T V (ed), *State and Nation in the Context of Social Change*, (Oxford University Press, Delhi, 1994), 55-86 at 69. Sudarshan went on to note, at 74:

the detailed and ideologically programmatic nature of the Constitution, combined with the vast jurisdiction granted to courts, has resulted in the judicialisation of many political issues. In turn this has resulted in attempts to politicize the judiciary.

¹⁰ For example, one member of the Constituent Assembly feared:

It might ... be that to give the judiciary an enormous amount of power - a judiciary which may not be controlled by any legislature in any matter except by ultimate removal - we may perhaps be creating a Frankenstein monster, which could nullify the intention of the framers of the Constitution.

T.T. Krishnaswami [VII CAD 583] quoted in Dhavan, Rajeev, *The Supreme Court of India: A Socio-Legal Study of its Juristic Techniques*, (N M Tripathi Pvt Ltd, Bombay, 1977) at 17.

¹¹ *A K Gopalan v State of Madras* AIR (37) 1950 SC 27.

¹² For example, *Romesh Thappar v The State of Madras* AIR (37) 1950 SC 124.

¹³ See the Constitution (First Amendment) Act, 1951. Soli Sorabjee described the Ninth Schedule, which was introduced to protection for some statutes, as tolling the death knell of Fundamental Rights by expressly sanctioning constitution-breaking law reforms - see the foreword to Dhavan, Rajeev (1978) at viii. However, in a speech in support of the Constitution (First Amendment) Bill, quoted in Dudeja, Vijay Lakshmi (1988) at 12, Jawaharlal Nehru had said:

The real difficulty we have to face is a conflict between the dynamic ideas contained in the Directive Principles of State Policy and the static position of certain things that are called "fundamental".

See below for a detailed discussion of the rights in the Indian constitution. George Gadbois discussed the schedule in the context of political imperatives, noting that of the forty-five constitutional amendments between 1951 and 1980, twenty-one were enacted to limit the exercise of judicial power:

the official response to a significant number of major decisions that have gone against the government has been an effort to circumvent such decisions via amendment of the Constitution, the sheltering of certain legislation from court scrutiny in the Ninth Schedule, the

tussle between the judiciary and the legislature had begun, with the former passing orders in favour of landowners whose property was jeopardised by land reform legislation, and the latter using its powers of constitutional amendment to counter these orders. The availability of the Fundamental Rights in the Constitution was delineated, and the power of constitutional amendment was used extensively.¹⁴ Identified as 'desirable conservatism', the guiding principles of judicial thought have resulted

in the very frequent conflict between Fundamental Rights and the legislative measures that have tried to uphold the Directive Principles of State Policy: this also explains the conflicting attitudes of Parliament and the Supreme Court towards justice, since the judiciary has been predominately conservative in striking down laws which have tried to enact social changes.¹⁵

In 1971, elected on a mandate that sought to pass constitutional amendments to "overcome the impediments in the path of social justice",¹⁶ the Congress (I) Government led by Indira Gandhi was unwilling to brook any more

devising of new limitations on the court's power, or some other step believed capable of solving the problem presented by the court.

Gadbois, George H, 'The Supreme Court of India as a Political Motivation' in Dhavan, Rajeev; Sudarshan, R and Khurshid, Salman (eds) (1985), 250-267 at 253. Also see Agarwal, Bina, *A field of one's own. Gender and land rights in South Asia*, (Cambridge University Press, Cambridge, 1994) at 220-221.

¹⁴ Much has been written about the first three decades of the post-independence the Supreme Court. Das, Gobind, *Supreme Court in Quest of Identity*, (Eastern Book Company, Lucknow, 1987) provides a useful and thorough starting point, as does Dhavan, Rajeev (1977). For a survey of the literature available on law in India see Dhavan, Rajeev, 'Means, Motives and Opportunities: Reflecting on Legal Research in India', *Modern Law Review*, Vol 51, Oct 87, 725-749 and Dhavan, Rajeev, 'Introduction' in Galanter, Marc, *Law and Society in Modern India*, (Oxford University Press, Delhi, 1989). Also see Kothari, Rajni, *Politics and the People. In Search of a Humane India. Volume I*, (Ajanta Publications, Delhi, 1990); Sudarshan, R (1990); Dudeja, Vijay Lakshmi, *Judicial Review in India*, (Sangam Books, London, 1988) on different stages of judicial review; Gadbois, George, 'The Supreme Court of India: A Preliminary Report of an Empirical Study' in Grover, Verinder (ed), *Courts and Political Process in India*, (Deep & Deep Publications, New Delhi, 1989), 9-37 for a study of the kinds of litigants and cases in the Supreme Court from 1950 to 1967; Gadbois, George 'The Supreme Court of India as a Political Institution' in Dhavan, Rajeev; Sudarshan, R and Khurshid, Salman (eds), *Judices and the Judicial Power*, (N M Tripathi Pvt Ltd, Bombay, 1985) at 250-267.

¹⁵ Gupta, Sobhanlal Datta, *Justice and the Political Order in India. An Inquiry into the Institutions and Ideologies: 1950-1972*, (K P Bagchi & Company, Calcutta, 1979) at 130.

¹⁶ Election manifesto of the Congress Party quoted in Das, Gobind (1987) at 64.

opposition from the Supreme Court. On its election platform the incumbent Congress Government had called for a “committed” judiciary, to enable the Directive Principles of State Policy to be realised.¹⁷ When it was held, in 1973, that there was a “basic structure” to the Constitution that could not be amended,¹⁸ the power of appointment of the Chief Justice of India and other judges was mobilised in support of the legislature, thus implementing the election call. Amongst others, Justice V R Krishna Iyer, former Independent Law Minister in Kerala's first Communist Government, and Justice P N Bhagwati were appointed to the Supreme Court in 1973. Although it has been widely acknowledged that “progressive” was becoming a code word for Mrs. Gandhi's partisan interest,¹⁹ the doctrine of a “committed” judiciary, dedicated to the policies of the government, was to have unexpected repercussions - it was these judges who were to initiate PIL.²⁰

The control of judicial appointments had many less welcome effects. The practice of appointing the senior most sitting judge as Chief Justice was disregarded for political reasons and three senior judges who had given orders against

¹⁷ R Sudarshan described how:

The expression 'committed' was ambiguous and ominous.

Sudarshan, R, 'Political Consequences of Constitutional Discourse' in Sathiyamurthy, T V (ed) (1994), 55-86 at 73. Baxi furthered the analysis:

The discourse of 'commitment' signified, too, that the judicial power of the state, legitimated through the doctrine of separation of powers, should serve as a mask of the centralised unity of state power.

Baxi, Upendra, 'Law and State Regulated Capitalism in India: Some Preliminary Reflections' in Shah, Ghanshyam (ed), *Capitalist Development: Critical Essays*, (Sangam Books, London, 1992), 185-209 at 189. For an analysis of Mohan Kumaramangalam's support of a “committed judiciary” and his role in conceiving the twenty-fourth, twenty-fifth and twenty-sixth amendments to the constitution, see Rudolph, Lloyd I and Rudolph, Susanne Hoeber, *In Pursuit of Lakshmi. The Political Economy of the Indian State*, (University of Chicago Press, Chicago, 1987) at 107-108. For a discussion of the Directive Principles of State Policy see 'Constitutional Rights' *infra*.

¹⁸ *His Holiness Kesavananda Bharati Sripadagalvaru and others v State of Kerala and others* (1973) 4 SCC 225. See also Kothari, Rajni, 'Taking Stock of the Seventies', in Kothari (1990), Volume II, 343-353.

¹⁹ Rudolph, Lloyd I and Rudolph, Susanne Hoeber (1987) at 108-109.

²⁰ See the discussion of 'Judges' in chapter five.

the government were superseded.²¹ All three resigned.²² Justice H R Khanna, a sitting judge of the Supreme Court who was later superseded himself, noted the perceptible change of atmosphere in the Supreme Court at this time:

One of the new trends was the change in the approach of the court with a view to give tilt in favour of upholding the orders of government. Under the cover of high sounding words like social justice the court passed orders, the effect of which was to unsettle settled principles and dilute or undo the dicta laid down in the earlier cases.²³

A rift in the Court was becoming visible.

The power and legitimacy of the Supreme Court was eroded by subsequent events. Growing dissent, and a judgment of the Allahabad High Court which found Prime Minister Indira Gandhi guilty of violations of the election code, led the Prime Minister to declare a state of internal Emergency in 1975; it was through the law and the courts that she attempted to legitimise this declaration.²⁴ Unable or unwilling to counter the government at this time, the Supreme Court allowed civil liberties to be suspended. In an effort to curb dissent, detentions were made throughout India, under the Maintenance of Internal Security Act, 1971.²⁵ *Habeas corpus* petitions were filed in several High Courts challenging the orders of detention on the grounds that they violated the Constitutional right to life and personal

²¹ For biographical details of judges, and their dates in office see *Judges of the Supreme Court and the High Courts*, (Department of Justice, Ministry of Law, Justice and Company Affairs, Government of India, 1987).

²² After the appointment of Justice A N Ray to the post of Chief Justice, Justice J M Shelat and Justice K S Hedge resigned on April 30, 1973 and Justice A N Grover resigned on May 31, 1973.

²³ Khanna, H R, 'Neither Guns nor Roses', Eastern Book Company, Lucknow, 1986, at 63.

²⁴ See *Indira Gandhi v Raj Narain* AIR 1975 SC 2299; Baxi, Upendra (1982) at 16-21.

²⁵ Enacted to counter external aggression, this Act was later amended to serve in times of internal disturbance. After the declaration of Emergency, the Act was placed in the Ninth Schedule of the Constitution by the Constitution (Thirty-ninth Amendment) Act, 1975, thus giving it protection from judicial review. Over ten thousand people were detained without trial during the Emergency period, of which many had engaged in peaceful actions against the government. It was repealed in 1977. See Medhi, Kunja, 'Protecting Civil and Political Rights in India: Mrs Gandhi's Emergency and Thereafter' in Forsythe, David P (ed), *Human Rights and Development*, (The Macmillan Press Ltd, Basingstoke, 1989), 279-291 at 282; Tripathi, Parag P, 'The persisting dilemma', *Seminar*, Oct 1984, 32-46.

liberty.²⁶ Although the government did challenge the admissibility of the petitions on the grounds that rights guaranteed by the Constitution had been suspended by a Presidential Order, the petitions were allowed.²⁷ When the State appealed to the Supreme Court, the appeal was allowed and the petitions were dismissed. Even Justice Bhagwati, who was later to be lauded as the father of PIL in India gave a judgment supporting the suspension of Article 21 of the Constitution:

I do not think that it would be right for me to allow my love of personal liberty to cloud my vision or to persuade me to place on the relevant provision of the Constitution a construction which its language cannot reasonably bear ... the Constitution is the law of all laws and there alone judicial conscience must find its ultimate support and its final resting place. It is in this spirit of humility and obedience to the Constitution and driven by judicial compulsion that I have come to the conclusion that the Presidential Order dated June 27, 1975 bars maintainability of a writ petition for habeas corpus where an order of detention is challenged on the ground that it is mala fide or not under the Act or not in compliance with it.²⁸

Only Justice H R Khanna dissented,²⁹ and was then superseded for the post of Chief Justice of India.³⁰ He resigned from his post as Supreme Court judge on March 12, 1977.

The Constitution (Forty-Second Amendment) Act, 1976, although intended to disempower the judiciary³¹ and strengthen the executive, did bring in

²⁶ See *Additional District Magistrate, Jabalpur v Sivkant Shukla* AIR 1976 SC 1207 for details of the orders given by the High Courts of Allahabad, Bombay, Delhi, Karnataka, Madhya Pradesh, Punjab and Rajasthan. As each State has an individual legal history and therefore, in this chapter I will refer to judgments of the Supreme Court exclusively, with a few exceptions for illustrative purposes.

²⁷ *Ibid.*

²⁸ Justice P N Bhagwati in *Additional District Magistrate, Jabalpur v Sivkant Shukla* AIR 1976 SC 1207, quoted in Das, Gobind (1987) at 91-2. Unlike the Supreme Court, the High Court were more strident in their support for civil liberties. For example see *N P Nathwani v The Commissioner of Police* 1975 BLR (78) 1. For a discussion of 'Judges' see chapter six.

²⁹ See Khanna, H R (1986) at 78-82 for a personal recollection of the case.

³⁰ The method of judicial appointments and its bearing on the independence of the judiciary was to become one of the most controversial issues in contemporary India. See the section on 'Judges, Courts, Lawyers' in Chapter 4 for details.

³¹ See Ray, Amal (1987); Dhavan, Rajeev (1978); Desai, Ashok K, 'Assaults on the Judiciary', *Economic and Political Weekly*, 30/2/77, 726-729.

elements to the Constitution that were to be important for PIL cases, for example the introduction of a section of Fundamental Duties and an amendment to the Directive Principles of State Policy to include the right to free legal aid. It was in this amendment that the republic of India was declared to be socialist. As Justice Krishna Iyer observed, the constitutional amendments displayed a determination on the part of the Indian Parliament to transform the economic order and establish social justice through State action.³² In tandem with this, enactments intended to secure social justice were passed, including the Bonded Labour System (Abolition) Act, 1976. Even before the declaration of Emergency, and during Emergency Rule, the new appointees to the Supreme Court initiated procedural changes that were to form the basis of PIL. Justice Krishna Iyer was the main proponent of these changes.³³ Although criticised for his lengthy and sometimes erratic judgments,³⁴ it was he who first articulated the need for an interpretation of statutory provisions, sympathetic to the particulars of a case,³⁵ and the need to extend the scope of *locus standi*.³⁶ As early as 1976, he stressed the importance of relaxed standing provisions in the context of the injustices prevalent in India:

Public interest is promoted by a spacious construction of *locus standi* in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties where the remedy is shared by a considerable number, particularly when they are weaker.³⁷

In these sporadic judgments, a new era in the Supreme Court had begun. Practical

³² Iyer, V R Krishna, *Human Rights and the Law*, (Vedpal Law House, Indore, 1986) at 7.

³³ See the section on access to justice, *infra*, for a discussion of legal aid as supported by Justice V R Krishna Iyer and Justice P N Bhagwati.

³⁴ See Dhavan, Rajeev, 'Introduction' in Galanter, Marc (1989), xxiii to lxx at xxvi-xxvii. For a more generous view see Sharma, M K, 'The Judicial Universe of Mr. Justice Krishna Iyer' in Dhavan, Rajeev et al (eds) (1985), 316-336.

³⁵ See *Katikara Chintamani Dora and others v Guatreddi Annamanaidu and others* AIR 1974 SC 1069 at 1083.

³⁶ See *Jasbhai Motibhai Desai v Roshan Kumar* AIR 1976 SC 578; *Maharaj Singh v State of Uttar Pradesh and others* AIR 1976 SC 2602 at 2609. Also see Justice M H Beg speaking for the majority in *Bar Council of Maharashtra v M V Dabholkar* AIR 1975 SC 2092 at 2098.

³⁷ *Mumbai Kamgar Sabha, Bombay v M/s. Abdulbhai Faizullabhai and others* AIR 1976 SC 1455 at 1458.

attempts to counter injustices combined with a struggle over access to justice and the assertion of public rights against the state.

Once the Janata Government was elected at the end of the Emergency in 1977, the Constitution (Forty-third Amendment) Act, 1977 and the Constitution (Forty-fourth Amendment) Act, 1978 were enacted to restore the structure of the Constitution to its pre-Emergency state.³⁸ The primacy of the Fundamental Rights in Part III of the Constitution was restored, but certain provisions, such as the introduction of the right to free legal aid and the Fundamental Duties remained in place. Despite the return to a normal state of governance, provisions of the Constitution continued to be misused, for example the ordinance promulgation powers under Article 123 of the Constitution.³⁹ It was PIL that was to explore issues relating to the judiciary and the use of constitutional provisions that had emerged during the years since independence.⁴⁰ One analyst has noted that the Emergency exposed the inadequacies of the post-Independence developmental strategies adopted by successive governments, as well as the continuing impoverishment and marginalisation of millions of people.⁴¹ The Court was to assume the responsibility of ensuring the integrity of governance.

Describing PIL as “an assertion of judicial review” a sitting Supreme

³⁸ Formed in 1977 as a merger of four existing political parties, the Janata (People's) Party stood for election in opposition to the ruling Congress (I) Party and the imposition of Emergency.

³⁹ See *D C Wadhwa and others v State of Bihar* AIR 1987 SC 579 in 'Public Policy and Administration' in chapter four. In addition, existing provisions for control of political violence were supplemented with the National Security Act, 1980, and the Armed Forces (Special Powers) Act, 1958 was used in Assam for the first time in 1980. See the section on 'The Armed Forces' in chapter four.

⁴⁰ See the section on 'Judges, Courts, Lawyers' in Chapter 4.

⁴¹ Kothari, Smitu 'The Human Rights Movement in India: A Critical Overview' in Kothari, Smitu and Sethi, Harsh (eds) (1989), 83-89 at 83. An discussion of these points can be found in three successive articles: Nehru, B K, 'Western Democracy and the Third World', *Third World Quarterly*, Vol 1 No 2, Apr 1979, 53-70; Morris-Jones, W H, 'The West and the Third World: Whose Democracy, Whose Development', *Third World Quarterly*, Vol 1 No 3, July 1979, 31-42; Nehru, B K, 'Western Democracy and the Third World: A Further Comment', *Third World Quarterly*, Vol 2 No 1, Jan 1980, 126-130.

Court Judge⁴² stressed that convictions were made under the Emergency because of the absence of rights. The Supreme Court began to display a change when hearing cases that related to the Emergency excesses and to the limitation of fundamental rights by the Government.⁴³ Some have perceived this as an attempt, by the judiciary, to reassert its position as an independent institution of the state vested with integrity and worthy of the respect it had compromised in earlier years, when unable to uphold civil liberties under the Emergency.⁴⁴ Writing in 1991, with a perspective on the decades since 1950, Upendra Baxi described the struggle to capture judicial power on behalf of the dominant classes in the first two decades of the Constitution as having been converted into a struggle for constraining judicial power “on *behalf*, if not at the *behest*”, of the dominated classes, which in turn led to the judicial activism of the 1980s.⁴⁵

Thus, the Court found a focus in prisoners' rights cases and concentrated on the procedural impediments to access to justice. Many of those who had been detained during the Emergency had been made aware for the first time of the conditions in jails, and had recognised that few people had the resources or knowledge to approach the courts of their own accord. In a series of cases, the procedures governing *habeas corpus* were relaxed, and the issues raised were decided with a sympathy towards those imprisoned in appalling conditions.⁴⁶ The scope of Article 21 of the Constitution was considered,⁴⁷ and in 1980, Justice Krishna Iyer held that Article 21 of the Constitution, read with Articles 14 and 19 of the Constitution,

⁴² Justice YC1 in interview. Each of the eighteen sitting judges of the Supreme Court were interviewed from January to March 1991 have been given code names to respect confidentiality.

⁴³ See Das, Gobind (1987) at 103-130, where he describes the Supreme Court in the period 1977-1980 as having a “Spell of Grandeur”.

⁴⁴ See *Additional District Magistrate, Jabalpur* AIR 1976 SC 1207.

⁴⁵ Baxi, Upendra (1991) at 82, italics in original.

⁴⁶ See *Inder Singh and another v State (Delhi Administration)* AIR 1978 SC 1091; *Charles Sobraj v Supdt. Central Jail, Tihar, New Delhi* 1978 (4) SCC 104; *Sunil Batra (I) v Delhi Administration and others* (1978) 4 SCC 494.

⁴⁷ An important such case was *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

obligates the State only to imprison under that law which is reasonable, fair and just in procedure:

It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling.⁴⁸

Similarly, it was this judge who observed, in a 1978 judgment, that although there had been a remarkable improvement in policing methods, there was still torture and abuse of power.⁴⁹

The gravity of the problems endemic in India meant that the justifications for a departure from the recent tradition of judicial decision-making went beyond considerations of legal correctness that had hitherto guided the judgments of the Supreme Court. It was recognised by judges, activists, lawyers and academics that something needed to be done, and the courts were perceived as the only alternative, the “last resort”, short of extra-legal action. Predicting the course of a new kind of judgment, Justice Krishna Iyer was able to concentrate on a social justice orientation that could only be realised along with procedural changes. In a 1980 judgment he stated that the issues before the court necessitated a shift from the traditional individualism of the requirements of *locus standi* to the community orientation of public interest litigation.⁵⁰ Urging the liberalisation of procedures, he described the alternative to the law as “the streets”:

We have no doubt that in competition between courts and streets as dispenser of justice, the rule of law must win the aggrieved person for the law court and wean him from the lawless streets.⁵¹

This echoed the fears of B R Ambedkar, during the Constituent Assembly Debates, who had stressed the need to remove the contradiction between the inequality

⁴⁸ *Jolly George Varghese v The Bank of Cochin* AIR 1980 SC 470 at 475. See also *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608 on preventive detention and Article 21 of the Constitution.

⁴⁹ *Nandini Satpathy v P L Dani* AIR 1978 SC 1025 at 1029.

⁵⁰ *Municipal Council, Ratlam v Vardhichand and others* AIR 1980 SC 1622 at 1623, as discussed in ‘Urban Space’ in chapter four.

⁵¹ *Fertilizer Corporation Kamagar Union (Regd.) Sindri and others v Union of India and others* AIR 1981 SC 344 at 353, as discussed in ‘Labour’ in chapter three.

prevalent in social and economic life and the constitutionally established equality in political life:

We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of democracy which the Assembly has so laboriously built up.⁵²

The Legal Framework

Law in India has been variously defined as a set of policies declared by the government; the activity of law courts; a strategic weapon for (repression and facilitative use) by various individuals and groups and by agencies of the State; an activity of a professional group of lawyers; a process of litigation and the manner and conditions under which this process of litigation can be put into effect; a bureaucracy of judges operating within the context of the institutional framework of law courts; a hegemony of ideas which is both symbolic and rhetorical as well as capable of acting in certain limited situations when the pressure of other aspects of the law is not too great or too subtle.⁵³

Seen in this context, PIL, emerging in response to an acknowledged crisis in the Indian legal system,⁵⁴ provides a microcosm for the study of the many facets of law. Despite the lack of respect for the rule of law and of the prevailing governmental lawlessness,⁵⁵ the characteristics of the Constitution promoted a belief in the use of law for disempowered peoples. The Constitution laid the foundation for

⁵² B R Ambedkar in the Constituent Assembly Debates (CAD Vol XI at 979), quoted in Baxi, Upendra, 'Law, Democracy And Human Rights' in Kothari Smitu; Sethi, Harsh (1989), 101-117 at 102.

⁵³ Dhavan, Rajeev, 'Public Interest Law in India: An Investigative Report', (Report to the National Committee for the Implementation of Legal Aid Schemes, 1981) at 46, quoted in Dhavan, Rajeev (1986) at 166.

⁵⁴ See Baxi, Upendra (1982) for a study of this crisis.

⁵⁵ *Ibid.* at 22.

a society with more justice, which had not been realised after forty years of constitutional government. Moreover, many of the more authoritarian provisions in the Constitution⁵⁶ had been used to greater effect than the social justice texts which formed only a small part of the whole constitution.⁵⁷

The following sections analyse the ideological framework of constitutionally guaranteed rights, the constitutional remedies available for the enforcement of these rights and the statutory provisions relevant for the study of PIL

Constitutional Rights

The Indian Constitution contains sections of rights which have been described as the core of the Constituent Assembly's commitment to social justice.⁵⁸ Part III, the Fundamental Rights, and Part IV, the Directive Principles of State Policy, were supplemented by Part IVA, the Fundamental Duties, in 1976.⁵⁹ In framing the rights in Part III, the Constituent Assembly was informed by the natural law ideas prevalent in eighteenth century Europe. Knowledge of existing constitutions⁶⁰ and their declarations of rights went in tandem with the Universal Declaration on Human Rights, promulgated by the United Nations in 1948.⁶¹ The Fundamental Rights provided for

⁵⁶ For example, the use of Article 213 of the Constitution, providing for ordinance promulgation, see *D C Wadhwa op cit* note 39.

⁵⁷ Baxi, Upendra (1991) at 73. He describes the social justice texts as Parts III, IV, parts of IVA, and the fifth and sixth schedules which provide for the autonomous administration of tribal districts.

⁵⁸ Austin, Granville (1966) at 50.

⁵⁹ For a full listing of the articles in these parts, see Appendix A. See 'Constitutional Imperatives', *supra*.

⁶⁰ See Austin, Granville (1966) at 50-83.

⁶¹ See Waldron, Jeremy (1987) for a historical background of the rights contained in the declaration. Noting that the concern for rights is firmly entrenched in the modern world, he describes the lasting controversies. By examining the critiques of the French 'Declaration of the Rights of Man and the Citizen 1789' written by Bentham, Burke and Marx, Waldron, at 166-209, sets out the four main points of criticism of human rights which continue to be relevant for contemporary critiques: that they are too *abstract*; that they are too *rationalistic*; that they are too *individualistic* in their approach to human life;

justiciable civil and political rights available against the state, with the exception of Articles 15(2), 17 and 23 of the Constitution which, it was envisaged, would protect the individual against other citizens. “Reasonable restrictions” were included in many of the fundamental rights, delineating their availability and empowering the State to disregard them in certain circumstances. Debates in the Constituent Assembly about the inclusion of the right to “due process”⁶² in the right to life and personal liberty ended in a more diluted version of the phrase.⁶³ Thus, fears about conferring on the judiciary powers greater than the other branches of government informed the final decision on the form which the constitutional rights should take.⁶⁴

The Directive Principles of State Policy, which can be identified as social and economic rights were made non-justiciable.⁶⁵ This compromise which made civil and political rights justiciable, while leaving the realisation of economic and social rights to the anticipated governmental policies rather than judicial directive, delineated the new social order that was envisaged for independent India.⁶⁶

Critics of the constitutional scheme of rights have focussed on the particularities of the context in which they operate.⁶⁷ While some are concerned with

that they introduce an unjustified element of *egoism* into moral argument. For the text of this declaration see Brownlie, Ian (ed), *Basic Documents on Human Rights*, (Clarendon Press, Oxford, 1992).

⁶² The Fifth Amendment of the American Constitution held that no person should be deprived of life, liberty and property “without due process of law” as quoted in Austin, Granville (1966) at 84. This was described as the classic statement of the right to “due process”.

⁶³ See Article 21 of the Constitution in Appendix A.

⁶⁴ Austin, Granville (1966), 84-115.

⁶⁵ Opinion on the provisions varied. One member of the Constituent Assembly described the Directive Principles of State Policy as a “veritable dustbin of sentiment ... sufficiently resilient as to permit any individual of this House to ride his hobby horse into it”. Mr T T Krishnamachari quoted in Austin, Granville (1966) at 75-76.

⁶⁶ See Austin, Granville (1966), 50-83; Iyer, V R Krishna (1986) at 7.

⁶⁷ Sethi, Harsh and Kothari, Smitu (1989) provides an insight into the perspective on rights in India. See also *Understanding Human Rights*, (Structural Alternative Legal Assistance for Grassroots, Manila, 1988), and chapter seven.

human rights as civil and political rights,⁶⁸ others have focused more on economic and social rights,⁶⁹ and more recently, a need-based, situation-specific, theory of community rights has been discussed.⁷⁰ The historical antecedents of the modern critique of human rights is presented by Waldron, who notes that modern rights theorists depart from the historical critiques by their emphasis on welfare rights and on the idea that rights may express claims about need and not merely individual freedom.⁷¹ Dhavan and Partington expanded this argument in a discussion of the “new” entitlements that were being given to the poor and disadvantaged through PIL. These entitlements consist of social welfare rights (part of the “third generation” of community rights), a greater emphasis on the social aspects of the right to equality, and on increasing the scope of political participation.⁷²

Interpretation of constitutional rights by the courts had been restricted,⁷³ but by 1978, the interpretation of rights was being evolved in an effort to realise constitutional objectives. This was done by revising the procedures by which rights could be enforced and could be restricted. For example, in *Maneka Gandhi v Union of India*,⁷⁴ it was held that the procedure depriving a person of the right to life and personal liberty under Article 21 of the Constitution must be reasonable, fair and just. In the words of Justice Bhagwati:

⁶⁸ For example see *Human Rights in India: The updated Amnesty International Report*, (Vistaar Publications, New Delhi, 1993).

⁶⁹ See Baxi, Upendra 'From Human Rights To The Right To Be Human: Some Heresies' in Sethi, Harsh and Kothari, Smitu (eds) (1989), 151-166.

⁷⁰ Dias, Clarence (1993) presents the arguments in favour and against a universal conception of human rights. See also Nariman, Fali S (1993); Muchlinski, P T, "“Basic Needs” Theory and “Development Law” in Snyder, Francis & Slinn, Peter (eds) (1987).

⁷¹ Waldron, Jeremy (1987) at 2.

⁷² Dhavan, Rajeev & Partington, Martin 'Co-optation or Independent Strategy? The Role of Social Action Groups', in Dhavan, Rajeev and Cooper, Jeremy (eds), 237-8.

⁷³ For example in *In re, Sant Ram* AIR 1960 SC 932, the Supreme Court held that the right to livelihood was not included in the right to life under Article 21 of the Constitution. See Basu, Durga Das (1994) for details of constitutional law.

⁷⁴ (1978) 1 SCC 248.

The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction.⁷⁵

Many of the provisions of Part IV of the Constitution, containing economic and social rights, had lain dormant until the appointment of activist judges who were to mobilise their potential. In 1976, one such judge, Justice Krishna Iyer stated:

Statutory interpretation, in the creative Indian context, may look for light to the lodestar of Part IV of the Constitution e.g., Art. 39(a) and (c) and Article 43. Where two judicial choices are available, the construction in conformity with the social philosophy of Part IV has preference.⁷⁶

Thus it is through PIL that the rights of groups began to be recognised.⁷⁷ In a leading PIL judgment, this phenomenon was described as a challenge and an opportunity for the government and its officers to make basic human rights meaningful to the deprived and vulnerable section of the community and to assure them socio-economic justice.⁷⁸ The trend was strengthened when, in 1979, after the emergency, India largely ratified the *International Covenant on Civil and Political Rights*, 1966 and the *International Covenant on Economic, Social and Cultural Rights*, 1966.⁷⁹

Constitutional Remedies

Article 32 of the Constitution

In his study of the Indian Constitution, Granville Austin analysed the

⁷⁵ *Ibid.* at 280.

⁷⁶ *Mumbai Kamgar Sabha op cit* note 37 at 1465.

⁷⁷ For example see Justice P N Bhagwati in *People's Union for Democratic Rights PUDR and others* AIR 1982 SC 1473 at 1476-7.

⁷⁸ *Bandhua Mukti Morcha v Union of India and others* AIR 1984 SC 802.

⁷⁹ These covenants were not fully ratified on 10/4/79, as India reserved autonomy with respect to certain provisions. See United Nations Publication ST/LEG/SER.E/11, *Multilateral Treaties Deposited with the Secretary-General. Status as at 31 December 1992*, (United Nations, New York, 1993) at 116 for details. For the text of these covenants see Brownlie, Ian (ed) (1992).

discussions about the scope of the remedies available in Article 32 of the Constitution.⁸⁰ He noted that while ordinary remedies existed for the enforcement of rights, the prerogative writs put teeth into the fundamental rights provisions and were widely believed to be “the cornerstone of freedom and liberty”.⁸¹ One member of the Constituent Assembly said of Article 32 of the Constitution:

If I was asked to name any particular article in this Consitution as the most important - an article without which this Constitution would be a nullity - I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it.⁸²

The writs in this article were an adoption of the English system, enabling the Supreme Court to issue writs and orders in the nature of *certiorari*, *mandamus*, *prohibition*, *habeas corpus* and *quo warranto*.⁸³

The way in which the use of Article 32 had developed⁸⁴ had laid the foundation for its use in PIL found from the late 1970s. In 1950, shortly after the Constitution was established, the Supreme Court commented on the scope of Article 32 of the Constitution, differentiating it from Articles 226 and 131-139⁸⁵ of the Constitution:

⁸⁰ Austin, Granville (1966) at 67.

⁸¹ Alexandrowicz quoted in Austin, Granville (1966) at 68. Marc Galanter has subsequently described the writ jurisdiction of the SC as “the most striking legal innovation in independent India”. See Galanter, Marc (1984) at 498.

⁸² B R Ambedkar in the Constituent Assembly Debates (Vol VII at 953) quoted by Chief Justice Y V Chandrachud in *Fertilizer Corporation Kamagar Union (Regd.) Sindri and others v Union of India and others* AIR 1981 SC 344 at 347.

⁸³ *Certiorari* is a direction against the decision of a lower court declaring it to be *ultra vires* or displaying an error in law. *Mandamus* is a direction which instructs a tribunal, public official or corporation to perform a specified public duty. *Prohibition* is an order instructing a lower court, a tribunal or an administrative authority not to carry out an *ultra vires* act. *Quo warranto* is a writ asking that the a person or institution show the legal basis for something that was done or a right that was claimed. *Habeas corpus* is a writ used to challenge the validity of a person's detention, whether in official custody or in private hands. For the first three, the court only admitted petitions praying for the issuance of a writ filed by a person whose rights had been aggrieved. The latter, *habeas corpus*, could be applied for by a person outside the scope of an aggrieved person but was usually applicable to someone with a connection with the aggrieved, for example a family member.

⁸⁴ See Basu, Durga Das (1994) for a comprehensive survey of the case law.

⁸⁵ These articles delineate the jurisdiction and powers of the Supreme Court.

Article 32 provides a “guaranteed” remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights⁸⁶

Referring to the scope of the writs, the Supreme Court held, in 1955:

In view of the express provisions in our Constitution we need not now look back to the early history or procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges.⁸⁷

It was held that the Court would not refuse to entertain a petition filed under Article 32 of the Constitution on the ground that it involved a determination of disputed questions of fact,⁸⁸ and in 1961, Justice Gagendragadkar had ruled that:

In our opinion, on a fair construction of Art 32(1), the expression “appropriate proceedings” has reference to proceedings which may be appropriate having regard to the nature of the order, direction or writ which the petitioner seeks to obtain from this Court. The appropriateness of the proceeding would depend upon the particular writ or order which he claims and it is in that sense that the right has been conferred on the citizen to move the Court by appropriate proceedings⁸⁹

Thus the procedures that were to promote access to justice, had already been raised in the courtroom, for example when the Court capitulated on its early orders to affirm that the right to invoke Article 32 of the Constitution could not be affected by the existence of an alternative remedy.⁹⁰

While these orders left a wide scope for the use of the Supreme Court, the opportunity was not taken up initially. The constitutional work of the Supreme

⁸⁶ *Romesh Thappar v State of Madras* AIR (37) 1950 SC 124 at 126.

⁸⁷ *T C Basappa v T Nagappa and another* (1955) SCR 250 at 256.

⁸⁸ *Kavalappara Kottarathil Kochunni alias Moopil Nayar v State of Madras and others* AIR 1959 SC 725 at 734.

⁸⁹ *Daryao and others v State of U. P. and others* AIR 1961 SC 1457 at 1461.

⁹⁰ See *Kavalappara Kottarathil Kochunni alias Moopil Nayar v State of Madras and others* AIR 1959 SC 725; *Kharak Singh v State of U P and others* AIR 1963 SC 1295.

Court had been small, and the number of fundamental rights cases were relatively insignificant. However, by the mid-1970s more fundamental rights cases were being filed.⁹¹ A statement issued regarding the number of pendencies in the Supreme Court in 1979, broke down the petitions into what are described as “constitutional matters”, which use the original jurisdiction of the court, and “non-constitutional” matters. Out of a total of 15,256 cases pending in the Supreme Court, 1015 were writ petitions, of which one had been pending for almost 9 years:⁹²

⁹¹ Dhavan, Rajeev, *Litigation Explosion in India*, (N M Tripathi Pvt Ltd, Bombay, 1986) at 80.

⁹² Table and information taken from: 'Cases pending before Supreme Court', *Lok Sabha Debates*, Series 6 Session 7 Vol 17, 15/5/79, 128-130. Question from Shri K Mallanna to the Minister of Law, Justice and Company Affairs (Shri Shanti Bhushan) at 129-130. For details of some High Courts see Galanter, Marc (1984) at 498.

Length of Pendency	Number of Writ Petitions pending in the Supreme Court as on 1st January 1979
less than one year	203 (20%)
1 to 2 years	478 (47%)
2 to 3 years	123 (12%)
3 to 4 years	18 (2%)
4 to 5 years	31 (3%)
5 to 6 years	87 (9%)
6 to 7 years	69 (7%)
7 to 8 years	5
8 to 9 years	1
number of writ petitions pending	1015 (100%)
total number of all petitions pending in Supreme Court	15256

It was PIL that was to realise this potential, leading to a broad interpretation of this article:

While interpreting Article 32, it must be borne in mind that Court's approach must be guided not by any verbal or formalistic canons of construction but by the paramount object and purpose for which this article has been enacted as a Fundamental Right in the Constitution and its interpretation must receive illumination from the trinity of provisions which permeate and energise the entire Constitution namely, the Preamble, the Fundamental Rights and the Directive Principles of State Policy.⁹³

The discussion about the extent to which the Court can give remedies, the function of a constitutional court and the extent of its powers, was to be articulated primarily

⁹³ *Bandhua Mukti Morcha v Union of India and others* (Haryana Mines I) AIR 1984 SC 802 at 813.

through PIL.⁹⁴

Article 226 of the Constitution

Whereas Article 32 of the Constitution could only be invoked for the enforcement of fundamental rights, the discussion in the courtroom on Article 226 of the Constitution⁹⁵ has centred on locating when it could be used for the enforcement of any rights.⁹⁶ Over time, the extent of the power of the High Courts has been delineated.⁹⁷ The breadth of the potential application of Article 226 has led to the Supreme Court decision that the availability of an alternative remedy could limit access to Article 226 of the Constitution, but that the decision as to whether a petition would be admitted would be be discretionary on the High Court.⁹⁸

As with Article 32 of the Constitution, the potential for PIL in Article 226 of the Constitution was indicated in a number of cases. In 1966, the Supreme Court held that this article confers wide powers on the High Courts to “reach injustice wherever it is found”, enabling the High Courts to “mould the reliefs to meet the peculiar and complicated requirements of this country”.⁹⁹ Similarly in 1974 it was held that all the residents of a municipality have a personal interest in the actions of a municipal body and would therefore have *locus standi* to petition the High Court

⁹⁴ It is interesting to note that in digests such as Jain, M P (1987) and Sastry, K K (1990), discussion of Article 32 of the Constitution concentrated on developments since 1979. See chapter one for a discussion.

⁹⁵ For full text see Appendix A.

⁹⁶ See Basu, Durga Das (1994) and Jain, M P (1987) for details of the case law.

⁹⁷ For example, see *Calcutta Discount Co Ltd v Income Tax Office, Companies District India, Calcutta and another* AIR 1961 SC 372; *M/s Esmail Noor Mohammad and Co. and others v Competent Officer, Lucknow and others* AIR 1967 SC 1244; *Praga Tools Corporation v C V Imanuel and others* AIR 1969 SC 1306.

⁹⁸ For examples see *C A Abraham v Income Tax Officer, Kottayam and another* AIR 1961 SC 609; *M/s. East India Commercial Co. Ltd. Calcutta and another v Collector of customs, Calcutta* AIR 1962 SC 1893; *Municipal Council, Khurai and another v Kamal Kumar and another* AIR 1965 SC 1321.

⁹⁹ *Dwarka Nath v Income Tax Officer, Special Circle, D Ward, Kanpur and another* AIR 1966 SC 81 at 84-5.

under Article 226 of the Constitution.¹⁰⁰ It was only with PIL that these initiatives were consolidated into the extensive use of this article, and therefore of Article 136 of the Constitution, the discretionary right to appeal to the Supreme Court in a special leave petition.

Procedural Provisions

In addition to *habeas corpus* petitions, which permitted standing in a representative capacity, provisions like Order 32 of the Code of Civil Procedure, 1908 made exceptions for children or for those of unsound mind.¹⁰¹ More significant for the development of PIL were provisions for class actions, by persons with a common interest in the outcome of a litigation. Section 91¹⁰² of the Code of Civil Procedure, 1908 provides for the award of standing to two or more persons, in cases of public nuisance, at the discretion of the court.¹⁰³ Section 92 and Order 1 Rule 8 of the Code contain similar provisions.

Other provisions gave the courts inherent discretionary powers. Section 151 of the Code of Civil Procedure, 1908 saved the inherent power of “the Court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the Court”. Section 482 of the Code of Criminal Procedure, 1973 saved

¹⁰⁰ *K. Ramdas Shenoy v The Chief Officers, Town Municipal Council, Udipi and others* AIR 1974 SC 2177 at 2181. Also see *Narendra Dutt Chakravarty v Corporation of Calcutta and others* AIR 1960 Cal 102; *R Varadarajan v Salem Municipal Council by its Commissioner, Salem and another* AIR 1973 Mad 55; *Nabaghan Naik and others v Sadananda Das and another* AIR 1972 Ori 188.

¹⁰¹ For details of civil and criminal remedies available in Indian law see Singh, Avtar (ed), *V M. Shukla's Legal Remedies*, (Eastern Book Company, Lucknow, sixth edition, 1991). Also see *Bandhua Mukti Morcha v Union of India and others* (Haryana Mines I) AIR 1984 SC 802 at 839, as discussed in 'Bonded Labour' in chapter three.

¹⁰² As amended in 1976. Justice Krishna Iyer described Section 91 and Order 1 Rule 8 of the C P C as the root of the changed procedures, such as *locus standi*, which enabled PIL to be used (interview, Enrakulam, 14/8/93). See the section on access to justice below.

¹⁰³ For a definition of “public nuisance” see section 268 of the Indian Penal Code, 1860 and Gupta, R S, 'Widening the Rules of Locus Standi', *Journal of the Indian Law Institute*, Vol 26 No 4, 1984, 424-444 at 424-425 for a discussion of this point.

the inherent powers of the “the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice”. In addition, provisions such as Order 39 Rule 1 of the Code of Civil Procedure, section 133 of the Code of Criminal Procedure and section 188 of the Indian Penal Code, 1860 empowered the judiciary to respond adequately to any kind of complaint.

The potential for widening access to justice and the issues brought to the court, dormant in these statutory provisions, had been mobilised before independence. In 1924, a petition was filed before the Sub-Divisional Office of Siwan, in Bihar, by almost a hundred people. All of them lived in the vicinity of a river which they claimed had been polluted by effluents from a local mill. The death of some cattle, the pollution of the drinking water and the fear of disease had prompted them to use section 133 of the Code of Criminal Procedure.¹⁰⁴ Although the case was lost both at the local level and in the High Court, standing had been awarded to the petitioners, and the justiciability of the issue was upheld.¹⁰⁵ This was echoed in 1979, when Chief Justice Y V Chandrachud upheld the order of a Magistrate who had closed a bakery on the grounds that the smoke emitted from its chimney was causing a public nuisance, stating that the matter concerned the public at large, not just an individual right.¹⁰⁶

Probably one of the most influential and widely quoted judgments, delivered by Justice Krishna Iyer, began as a class action petition to the Magistrate's Court, Ratlam, Madhya Pradesh, filed by citizens of the municipality, complaining about the inadequate drainage in the area. The Magistrate had allowed the petition, ordered the municipality to clean up the drains and further ordered it to draft a plan

¹⁰⁴ The reporter judgment does not give a date for this enactment. For a discussion of the Codes of Criminal Procedure in force at this time see Jain, M P (1990) at 539-541.

¹⁰⁵ *Deshi Sugar Mill v Tupsi Kahar and others* AIR 1926 Pat 505 at 507-8. For a discussion of the milieu in which this judgment was given see Anderson, Michael R, 'Public Nuisance and Private Purpose: Policed Environments in British India, 1860-1947', *SOAS Law Department Working Papers*, No 1, July 92.

¹⁰⁶ *Gobind Singh V Shanti Sarup* AIR 1979 SC 143 at 145.

for the removal of nuisance. The petition arrived, on appeal, in the Supreme Court, where the key question identified by the Court was whether a court, by affirmative action, could compel a statutory body to carry out its duty to the community. Referring to the Indian Penal Code and the Code of Criminal Procedure, Justice Krishna Iyer stated:

Although these two Codes are of ancient vintage, the new social justice orientation imparted to them by the Constitution of India makes it a remedial weapon of versatile use. Social justice is due to the people and, therefore, the people must be able to trigger off the jurisdiction vested for their benefit in any public functionary like a Magistrate under S. 133, Cr. P. C. In the exercise of this power, the judiciary must be informed by Art. 38 of the Constitution.¹⁰⁷

The substantive issue was linked with access to justice and the need for a sympathetic interpretation of statutory provisions:

a few profound issues of processual jurisprudence of great significance to our legal system face us and we must zero-in on them as they involve problems of access to justice for the people beyond the blinkered rules of 'standing' of British Indian vintage. If the centre of gravity is to shift, as the Preamble of the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, these issues must be considered.¹⁰⁸

Although the use of these provisions was soon to be superseded by the quicker, more direct access to the courts provided by the writ jurisdiction under Articles 32 and 226 of the Constitution, the content of statutes was to facilitate the emergence of PIL, having been framed or amended upon the tenets of social justice. It was not just procedural provisions, but the substantive content of laws that needed to be employed. A class action petition filed by rickshaw pullers from Punjab, challenging the validity of the Punjab Cycle Rickshaws (Regulation of Rickshaws) Act, 1975, illustrates this point.¹⁰⁹ Responding to the petition, the Court simply framed a scheme under the existing Act. In both procedural and substantive terms, much of

¹⁰⁷ *Municipal Council, Ratlam v Vardhichand and others* AIR 1980 SC 1622 at 1628.

¹⁰⁸ *Ibid.*, at 1623.

¹⁰⁹ *Azad Rickshaw Pullers Union, Amritsar and others etc v State of Punjab and another* AIR 1981 SC 14.

the existing legal framework contained the ingredients necessary for PIL to flourish in the courtroom.

The Court and its Rules

The costs of litigation and the difficulties in gaining access to justice have been compounded by the administrative establishment of the courts and the rules governing their procedure.¹¹⁰ The jurisdiction of the Supreme Court and High Courts is extensive, in both their original and appellate sides.¹¹¹ The constantly changing rules of procedure of the Supreme Court provide comprehensive regulations to be followed within the Court, and when approaching it.¹¹² Order XXXV, Rule 7 of the Supreme Court Rules, 1966 would seem to preclude the admittance of letters as writ petitions by establishing functional criteria for filing a writ petition.¹¹³ Far from being used to prevent PIL from emerging, other provisions in these rules, conferring discretionary financial powers on the Court, strengthened the existing opportunities to increase access to justice and to facilitate PIL petitions.¹¹⁴

¹¹⁰ See chapter five for a discussion.

¹¹¹ For details of the establishment and jurisdiction of the SC see the Constitution of India, Part V *The Union*, Chapter IV on *The Union Judiciary*; Agrawala, B R (1989). For details of the HCs see the Constitution of India, Part VI *The States*, Chapter V on *The High Courts in the States*.

¹¹² Information has been taken from Agrawala, B R (1989) and correct to that date. The frequent, subsequent changes to these rules have not been incorporated.

¹¹³ For example, that a minimum of seven copies be supplied.

¹¹⁴ Order XLI, Rule I of the Supreme Court Rules 1966 states:

Subject to the provisions of any statute or of these rules, the costs of and incidental to all proceedings, shall be in the discretion of the Court. Unless the Court otherwise orders an intervener shall not be entitled to costs.

Similarly, a specific provision for *habeas corpus* petitions is found in Order XXXV, Rule 2:

No court-fees shall be payable on petitions for *habeas corpus* or other petitions under Article 32 of the Constitution, arising out of criminal proceedings or proceedings connected with such petitions.

and in Order XXXV, Rule 6:

In disposing of any rule, the Court may in its discretion make such order for costs as it may consider just.

The discretionary powers are wide, as in Rule I of Order XLI, which states:

Subject to the provisions of any statute or of these rules, the costs of and incidental to all

Access to Justice

Questions about access to justice can only be considered in the context of the particularities and characteristics of a legal system, which consistently excludes many from its ambit. In his seminal book on the pervasive crisis of the Indian legal system, Upendra Baxi has documented this exclusion,¹¹⁵ an exclusion that had previously been noted in studies of the USA (United States of America).¹¹⁶ PIL was initiated when the inclusion of all citizens within the realm of court action was urged

proceedings, shall be in the discretion of the Court. Unless the Court otherwise orders an intervenor shall not be entitled to costs.

In addition to the Court rules provisions exist in enactments concerned with the costs of litigation. For example the Kerala Court Fees and Suits Valuation Act, 1960 stipulates that the court fee payable for a suit under section 91 of the Code of Civil Procedure would be a fixed sum of Rs.10. See Lohithakshan, A K, 'Law and Practice: Section 91 of the Code of Civil Procedure', *The Lawyers*, Vol 2 No 7, July-Aug 1987, 49.

¹¹⁵ Baxi, Upendra, *The Crisis of the Indian Legal System*, (Vikas Publishing House Pvt Ltd, New Delhi, 1982). Also see Gandhi, J S, *Sociology of the Legal Profession: The Indian Setting*, (Gian Publishing House, Delhi, 1987). Raising many of the points that are discussed in Chapter 5, Baxi notes that the content of PIL petitions shows that, for many, the only contact with formal law is the delay and injustice of the criminal justice system. See Baxi, Upendra (1982) at 26-29. Also see Mendelsohn, Oliver, 'The Pathology of the Indian Legal System', *Modern Asian Studies*, Vol 15 No 4, 1981, 823-863 where the pathology is identified at 823:

The proceedings are extraordinarily dilatory and comparatively expensive; a single issue is often fragmented into a multitude of court actions; execution of judgments is haphazard; the lawyers frequently seem both incompetent and unethical; false witness is commonplace; and the probity of judges is habitually suspect. Above all, the courts are often unable to bring about a settlement of the disputes that give rise to litigation. So great are these failings that the Indian judicial process can reasonably be seen as a 'pathology' of a legal system.

He discusses differing perspectives on the way in which the Indian legal system has developed. See chapter six for a more general discussion.

¹¹⁶ In a study of litigation in the USA, Marc Galanter analysed why the "haves" come out ahead. He suggested the use of class actions to overcome obstacles to access and concluded that:

breaking the interlocking advantages of the "haves" requires attention not only to the level of rules, but also to institutional facilities, legal services and organization of parties.

See Galanter, Marc, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', *Law and Society*, Vol 9 No 1, Fall 1974, 95-160 at 150. It is interesting to note that he later acknowledged that this article had been "infused by perspectives developed in my encounter with Indian law". See Galanter, Marc, *Law and Society in Modern India*, (Oxford University Press, New Delhi, 1989) at 299. For an evaluation of international influences, including PIL in the USA, see below.

by judges, lawyers and activists.¹¹⁷ The discussions about access to justice centred on the provision of legal aid to those who did not have the means to approach the Court.

Shortly after the Indian constitution began to operate, the Supreme Court held that although the provision of legal aid was not mandatory, if a court of appeal or revision felt that by the denial of such aid, the accused was denied a fair trial, it could intervene.¹¹⁸ The first recorded legal aid programme in India, after independence, was formulated by Justice Krishna Iyer when he was an Independent Minister in the first Communist State Government of Kerala. The Legal Aid (To The Poor) Rules, 1958 were framed and Section 76 of the Kerala Court Fees and Suits Valuation Act, 1960 provided for the establishment of a legal benefit fund. Other states followed this example to frame schemes.¹¹⁹

It was not until the 1970s that legal aid was to become an issue on the national agenda and be provided by the majority of State Governments.¹²⁰ A new Code of Criminal Procedure was enacted in 1973, mandating the provision of legal aid in Section 304. Committees were established by State Governments to recommend the form that a legal aid scheme should take.¹²¹ The most important such development was the establishment of a committee, by the central government, in 1973. The expert committee, chaired by the newly appointed Supreme Court judge, Justice Krishna Iyer,

¹¹⁷ See chapter five.

¹¹⁸ *Janardhan Reddy & others v The State of Hyderabad & others* AIR (38) 1951 SC 217 at 222.

¹¹⁹ For example, in Punjab the Legal Aid to the Poor (Punjab) Rules, 1959 and the Legal Aid to the Scheduled Castes (Punjab) Rules, 1960 were formulated; in Maharashtra the Maharashtra Legal Aid to Backward Classes Rules, 1963 were instituted; in Andhra Pradesh a legal aid scheme was established in 1966 by a government order.

¹²⁰ For a comprehensive survey of the provisions for legal aid at State level see the Bhagwati Committee report, 88-107. Also see Baxi, Upendra (1975). In tribute to Justice P N Bhagwati, it was noted that only after twenty years of constitutional government was it realised that "social justice is a product of legal relationships". See Menon, N R Madhava, 'The Dawn of Human Rights Jurisprudence', (1987) 1 SCC (J) 1-16 at 1.

¹²¹ One of the first such reports was published by the Government of Gujarat in 1971. Others, such as the Ramakrishna Report on Legal Aid to the Poor (Government of Tamil Nadu, 1973), the Report of the Preparatory Committee for Legal Aid Schemes (Government of Madhya Pradesh, 1976) and a report published by the Government of Madhya Pradesh in 1976, followed.

with ten other members, was to consider the provision of legal aid for the weaker sections of the community, to persons of limited means and to persons belonging to socially and economically backward classes. The report of almost 300 pages, known as the Krishna Iyer Committee report, was the first of its kind.¹²² Apart from detailing the need for legal aid, the report indicated the need for legal aid centres to initiate litigation on behalf of their clients in a model that was to become known as PIL.¹²³ The report was subsequently criticised: by the government, reluctant to spend the necessary money on an unpredictable service; by lawyers who felt the report was no more than a plea that they provide their services free of charge or below the market rate; by voluntary activists who were promised nothing more than a visible representation on various bodies; by the disadvantaged, to whom the proposals seemed to be an invitation to get further drawn into the “law as a social trap”.¹²⁴ Nonetheless, the report was the first stage in central government's growing concern for access to justice, and began to define a new agenda.

During the Emergency, legal aid was inserted into the Constitution as a Directive Principle of State Policy.¹²⁵ Simultaneously, the Code of Civil Procedure, 1908 was amended in 1976, to insert Order 33, Rule 9A,¹²⁶ and Rule 18.¹²⁷ The same amendment altered the wording of Order 44 of the Code which provides for appeals

¹²² ‘*Processual Justice to the People*’ Report of the Expert Committee on Legal Aid, (Department of Legal Affairs, Ministry of Law, Justice and Company Affairs, Government of India, May 1973), hereafter referred to as the Krishna Iyer Committee report.

¹²³ Krishna Iyer Committee report at 126. The report also anticipated the controversial nature of PIL when it stated that:

Care has to be taken to save the legal service institution from acrimonious controversy while being ready to fight for unpopular but just legal causes, beliefs and rights.

¹²⁴ Dhavan, Rajeev, ‘Managing Legal Activism: Reflecting on India's Legal Aid Programme’, (unpublished paper, 1984) at 17.

¹²⁵ Article 39A of the Constitution was inserted by the Constitution (Forty-second) Amendment Act, 1976.

¹²⁶ In particular see section (1) of this rule, entitled “Court to assign a pleader to an unrepresented indigent person”.

¹²⁷ Again, see section (1) of this rule, entitled “Power of Government to provide for free legal services to indigent persons”.

and payment of fees by an indigent person. Another committee was appointed by the Congress (I) Government, this time with Justice P N Bhagwati as the chairman, Justice Krishna Iyer as the sole member and Shri N L Vaidhyanathan as the secretary. The committee was exhaustive in its recommendations on legal aid, taking the earlier Krishna Iyer Committee report as the starting point. The Bhagwati Committee report was published in 1977.¹²⁸ In a discussion of the philosophy, objectives and principles of a new legal services programme, the report noted that as the removal of poverty was dependent upon the radical transformation of the existing socio-economic structure, the legal services programme should aim at this. The programme would, therefore:

have to be directed *inter alia* towards providing representation to “groups of social and economic protest” and it must encourage group-oriented and institution-directed approach to the problem of poverty.¹²⁹

and to devise:

new legal techniques and methods to bring to the court the problems of the poor, like class action, group-interest litigation etc.¹³⁰

A national legal aid authority was proposed, draft legislation suggested and conciliation encouraged. Included in the twenty-four functions of the national authority, were two recommendations that it enlist the support of social service organisations,¹³¹ and that it take “necessary steps by litigation or otherwise” to ensure consumer protection, environmental control and for any other matter of special concern to the public.¹³² This theme was continued when the report suggested that a strategy to vindicate the rights of individuals, unable to pursue a remedy because of

¹²⁸ *Report on National Juridicare: Equal Justice - Social Justice*, (Committee on Juridicare, New Delhi, August 1977), hereafter referred to as the Bhagwati Committee Report. The use of the term “juridicare” was an attempt to embody some of the principles of “judicare” in the USA. Justice V R Krishna Iyer, interview, Ernakulam, 14/8/93.

¹²⁹ Bhagwati Committee Report at 25.

¹³⁰ *Ibid.* at 26.

¹³¹ The Report noted that the costs of class actions, other suits and proceedings purely of a *pro bono publico* nature incurred by voluntary agencies and social service organisations would be readily given by the proposed authority. *ibid.*, at 75-76.

¹³² Bhagwati Committee report at 15.

poverty and lack of assertiveness, would be to empower the Director of the national authority to adopt appropriate proceedings, and be awarded standing to do so. One of the examples given of a circumstance which would compel the director to act, was if minimum wages were not being paid to farm labour.¹³³ Contained in the report was a chapter on “Public Interest Litigation and Legal Aid”. This chapter identified collective injustices relating to environmental pollution, drug adulteration, mental retardation and untouchability. It imaginatively linked injustices “inherited and acquired, colonial, feudal, industrial, political, bureaucratic and economic” with an expensive, unequal court system, to demonstrate the need for public interest litigation, representative and class actions, within an active legal aid organisation.¹³⁴ The parameters of PIL were established and the report effectively invited PIL and class action petitions to be filed.

Within the courtroom, progress towards the provision of greater access to justice was more tentative. Judges had begun to acknowledge that the court had become limited in its scope,¹³⁵ and in 1974, Justice Krishna Iyer reproached Judges of the Sessions Courts for not responding with adequate gravity to the need to appoint competent State Counsel for undefended accused persons.¹³⁶ In 1978 it was held that, in the absence of a comprehensive programme of free legal services, a person who is a party to a proceeding can be represented by a person who is not an advocate.¹³⁷ In the same year, a public defender system was proposed,¹³⁸ and the government's responsibility to provide legal aid under Article 21 of the Constitution was

¹³³ *Ibid.* at 31.

¹³⁴ *Ibid.* at 61, Chapter XII.

¹³⁵ In *Kesavananda Bharati Sripadagalvaru and others v State of Kerala and others* (1973) 4 SCC 225, Justice Dwivedi stated, at 2009:

The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is meant for the common people.

¹³⁶ *Ranchod Mathur Wasawa v State of Gujarat* AIR 1974 SC 1143 at 1143-44.

¹³⁷ *Harishankar Rastogi v Girdhari Sharma and another* AIR 1978 SC 1019.

¹³⁸ *Nandini Satpathy v P L Dani* AIR 1978 SC 1025.

delineated.¹³⁹ However, it was *Maneka Gandhi v Union of India*,¹⁴⁰ that has been described as the judgment that paved the way for justice to the poor.¹⁴¹ By stipulating that the procedure in Article 21 of the Constitution, that “No person shall be deprived of his life and personal liberty except according to procedure established by law”, be a reasonable, fair and just, and that Articles 14 and 21 of the Constitution be read together, the Supreme Court effectively introduced the “due process” that had been excluded by the Constituent Assembly.¹⁴² Judicial power, which had been appropriated under the emergency, was more than restored.

By 1980 the need for a national legal aid programme became not only more apparent but embarrassingly lacking.¹⁴³ The Committee for the Implementation of Legal Aid Schemes (CILAS) was constituted by a Government Resolution of September 26, 1980,¹⁴⁴ to implement comprehensive Legal Aid Schemes throughout India.¹⁴⁵ Chaired by Justice P N Bhagwati, the initial term was for three years.¹⁴⁶ CILAS was to implement comprehensive legal aid schemes throughout India, In addition to monitoring the activities and funding of the Supreme Court Legal Aid Committee (SCLAC), the Legal Aid and Advice Boards and High Court Legal Aid

¹³⁹ *Madhav Hayawadanrao Hoskot v State of Maharashtra* AIR 1978 SC 1548.

¹⁴⁰ *supra* note 67. See Basu, Durga Das (1994) for details of the case law on Article 21 of the Constitution.

¹⁴¹ Dixit, A K (1986) at 51.

¹⁴² See Das, Gobind (1987) at 119-120 and Baxi, Upendra, *The Indian Supreme Court and Politics*, (Eastern Book Company, Lucknow, 1980), 157-167.

¹⁴³ There was discussion about the prospect of legislation. See ‘Bill to provide for Free Legal Aid to Poor’, *Lok Sabha Debates*, Series 6 Session 5 Vol 16, 18/7/78, 136.

¹⁴⁴ ‘Resolution’ D/-26/9/80.

¹⁴⁵ For details of the activities see ‘Legal Aid Newsletter’, available at the offices of CILAS in New Delhi.

¹⁴⁶ This term had been extended and from 14/11/90, CILAS was reconstituted with Justice A M Ahmadi, a sitting judge of the Supreme Court as its chair. See Chapter 5 for a discussion of the Legal Service Authorities Act, 1987.

Committees in many states,¹⁴⁷ CILAS funded legal aid camps, lok adalats (people's courts), PIL organisations and numerous other activities.¹⁴⁸ A workshop of social action groups to discuss the implementation of legal services was held in May 1981 in New Delhi, at which the strategy of PIL was discussed.¹⁴⁹ Access to justice through legal aid was to become a theme of the Court in the early 1980s, and PIL itself has been described, by Justice P N Bhagwati, as a strategic arm of the legal aid movement.¹⁵⁰

International Influences

Public Interest Litigation was first used to describe a legal development in the USA. Its emergence in India was not just dependent on the USA for its terminology (see chapter two). In a discussion about who could approach the Court, Justice Krishna Iyer articulated his sentiments with reference to North America and the terminology of development:

a new class of litigation - public interest litigation - where a section or whole of the community is involved (such as consumers' organisations or NAACP - National Association for Advancement of Coloured People - in America), emerges. In a developing country like ours, this pattern of public oriented litigation better fulfils the rule of law if it is to run close to the rule of life.¹⁵¹

¹⁴⁷ See the Bhagwati Committee report, at 88-107, for Annexure II which details 'Existing provision for Legal Aid'.

¹⁴⁸ See Dhavan, Rajeev (unpublished, 1984) for a critique of CILAS and 'Alternatives and Corollary Innovations' in chapter five.

¹⁴⁹ See chapter five; 'Workshop on Legal Services Delivery System for Rural Regeneration and Community Mobilisation, New Delhi, May, 1981', *Legal Aid Newsletter*, Vol 1 No 1, May 1981, 8; 'Report of a Workshop of Social Action Groups on Implementation of Legal Services held on 8 & 9 May, 1981 (New Delhi)', *Legal Aid Newsletter*, Vol 1 Part 2, August 1981, 10-12.

¹⁵⁰ *People's Union for Democratic Rights PUDR and others v Union of India and others* AIR 1982 SC 1473 at 1476. For a discussion of the developments in the 1980s see Chapter 5.

¹⁵¹ *Bar Council of Maharashtra v M V Dabholkar* AIR 1975 SC 2092 at 2104.

A number of petitioners and organisations have relied upon developments in the USA to substantiate efforts to increase both the range of petitions heard by the courts and access to justice.¹⁵² In his article urging the Supreme Court to hear a PIL petition filed by him and two of his colleagues, journalist Arun Shourie referred to a number of American decisions.¹⁵³ Justice Bhagwati drew inspiration from Mauro Cappelletti¹⁵⁴ when referring to the “massification” of rights in a leading PIL judgment in 1981.¹⁵⁵

PIL in the USA had begun with the civil rights movement in the 1960s when efforts were made to mobilise law to increase participation in the processes of democratic governance. Contributions from the American government through the Office of Economic Opportunity and the Legal Services Corporation helped to structure a movement that now has support from lawyers in the public and private sectors. Access to justice was facilitated when standing provisions were expanded and the provisions for class actions were amended.¹⁵⁶ Particular legal mechanisms, such

¹⁵² See, for example Shah, Manubhai and Tanna, Bhaskar, 'Public Interest Law Movement in North America and the U.K. Report of a Study Tour', (Consumer Education and Research Centre, Ahmedabad, 1983). At the time of writing this reports, both authors were members of a voluntary organisation which has used PIL on a number of occasions. The same is also true for academic studies of PIL. For example, Agrawala, S K (1985) surveyed US PIL before beginning his critique of PIL in India and Gomez, Mario (1993) directed a section of study of PIL in India and Sri Lanka to a survey of the American experience.

¹⁵³ See Shourie, Arun (1981).

¹⁵⁴ See Cunningham, Clark (1987) at 496-7.

¹⁵⁵ See *S P Gupta, V M Tarkunde, J L Kalra and others v Union of India and others* 1981 (Supp) SCC 87 / AIR 1982 SC 146, as discussed in 'Judges, Courts, Lawyers' in chapter four. Justice Bhagwati has referred to this outside of the courtroom:

Today in our contemporary society, because of the massification phenomena, human relationships assume a collective rather than a merely individual character; they refer to groups, categories and classes of people rather than to one or a few individuals alone

See Bhagwati, P N, 'Social Action Litigation: The Indian Experience' in Tiruchelvam, Neelan and Coomaraswamy, Radhika (eds) (1987), 20-31 at 21.

¹⁵⁶ For a detailed study of this see Scott, K E, 'Standing in the Supreme Court - A Functional Analysis', *Harvard Law Review*, Vol 86 No 4, Feb 1973, 645-692 and the 1966 Amendments to Rule 23 of the Federal Rules of Civil Procedure. Also see Stewart, R B, 'The Reformation of American Administrative Law', *Harvard Law Review*, Vol 88 No 8, June 1975, 1669-1813; Johnson, Earl; Bice, Scott H; Bloch, Steven A; Drew, Ann Barthelme; Kantor, Valerie; Schwartz, Elizabeth and Tucker; Marna Susan, 'Access to Justice in the United States: The Economic Barriers and Some Promising Solutions' in Cappelletti, Mauro and Garth, Bryant, *Access to Justice. Volume I: A World Survey. Book II*, (A. Giuffre Editore, Milan, 1978), 913-1023; Cappelletti, Mauro and Garth, Bryant, 'Finding an

as the use of the *amicus* brief and the Brandeis Brief, which was used in the USA for the first time in 1907, were to prove useful in attempts to circumvent the rigours of adversarial procedure in India.¹⁵⁷

The value of a comparison between the content of PIL in India and the USA is questionable, leading to the important debate on whether this legal phenomenon in India should rightly be called “public interest litigation”, or given the unique name “social action litigation” (see chapter two). Poverty was not the centre of concern in the USA in the way that it was in India in the late 1970's. PIL in the USA was more concerned with civil liberties, consumers and the environment,¹⁵⁸ than its Indian counterpart, a characteristic that Upendra Baxi had noted with foreboding.¹⁵⁹

Appropriate Compromise: A Comparative Study of Individualistic Models and Group Rights in Civil Procedure', *Civil Justice Quarterly*, 1983, 111-147 in which the replacement of a traditional model of adversarial justice with a distinction between public and private rights with a collective interest in legality is discussed.

¹⁵⁷ Harlow and Rawlings stated that the importance of the Brandeis Brief for future of interest-group litigation could not be overestimated:

First, it opened the door to the admission of sociological and other contextual material not normally admissible under legal rules of evidence. .. Second, when combined with the so-called 'amicus brief' - which can be filed by a person or organisation who is not a party to the suit and thus allows access to the court by third parties - it provided a convenient way for third parties to participate in court proceedings.

See Harlow, Carol and Rawlings, Richard (1992) at 77.

¹⁵⁸ Scheingold, Stuart A, 'The Politics of Rights Revisited' in Gambitta, Richard A L; May, Marlynn L and Foster, James C, *Governing Through Courts*, (Sage Publications, Beverly Hills, 1981), 193-224 at 202. Also see Scheingold, Stuart A, *The Politics of Rights. Lawyers, Public Policy and Political Change*, (Yale University Press, New Haven, 1974). For detail and analysis of PIL in the USA see Aron, Nan, *Liberty and Justice for All. Public Interest Law in the 1980s and Beyond*, (Westview Press, Boulder, 1989); Chayes, Abraham, 'The Role of the Judge in Public Law Litigation', *Harvard Law Review*, Vol 89 No 7, May 1987, 1281-1316; Handler, Joel F, *Social Movements and the Legal System*, (Academic Press, London, 1978); *Judicial Process and Social Change. Constitutional litigation Cases and Materials*, (American Casebook Series, West Publishing Co, St.Paul, 1977). For an analysis of the role of the judiciary see Theberge, Leonard J (ed), *The Judiciary in a Democratic Society*, (Lexington Books, Lexington, 1979).

¹⁵⁹ For detail see the discussion on the definition of PIL in Chapter 1. A discussion on the content of PIL in the USA has also been the subject of criticism:

In the current romance between public interest law devotees and pollution, there is a danger of a major moral default by the legal profession. Major Hatcher correctly observed that the environment issue had done what Alabama's George Wallace had not been able to do - “distracted the attention of the nation from the pressing problems of the black and poor people of America.”

See Cahn, Edgar S and Jean Camper, 'Power To the People or the Profession? - The Public Interest in Public Interest Law', *Yale Law Journal*, Vol 79 No 6, May 1970, 1005-1048 at 1005.

Thus, the schism between PIL in USA and PIL in India is mirrored by the debate in India over the terminology PIL, or Social Action Litigation (SAL) (see chapter two). In a lecture given in London in 1988¹⁶⁰ Justice Krishna Iyer described PIL in India as a unique indigenous system and explained that his numerous references to American decisions¹⁶¹ were necessary for the Indian version of PIL to gain credibility within the legal profession, the judiciary and the government. Interviewed in 1991, a sitting Judge on the Indian Supreme Court¹⁶² cited the Bihar blindings cases¹⁶³ as an example of an issue unique to India, as he perceived that PIL to be more important in India than the USA, because of the nature of the issues. A comparative study of PIL in India and the USA identified a more fundamental difference between the two legal phenomena:

the strategy for giving the poor and oppressed meaningful access to justice is not, as in the United States, to provide funds so that they may participate in the traditional system on an equal economic footing. Instead the strategy is to change the system.¹⁶⁴

Nonetheless, much can be learned from the scholarship on PIL in the USA, and other attempts to increase access to justice and encourage a focus on collective rights.¹⁶⁵ Obstacles to using the courts,¹⁶⁶ variations in the provision of legal

¹⁶⁰ Lecture on 'Public Interest Litigation' delivered at the School of Oriental and African Studies, University of London, 10/5/88.

¹⁶¹ See for example *Fertilizer Corporation Kamagar Union (Regd.) Sindri and others v Union of India and others*, as discussed in 'Labour' in chapter three.

¹⁶² Justice LC2 in interview.

¹⁶³ *Anil Yadav and others v State of Bihar and others* (1981) 1 SCC 622 and *Khatri and others v State of Bihar and others* (1981) 1 SCC 623; (1981) 1 SCC 627; (1981) 1 SCC 635; (1981) 2 SCC 493; 1983 (2) SCC 266.

¹⁶⁴ Cunningham, Clark (1987) at 522.

¹⁶⁵ See Cooper, Jeremy, *Keyguide to Information Sources in Public Interest Law*, (Mansell, London, 1991) for a survey of the material on public interest law and an extensive bibliography. Also see Cooper, Jeremy and Dhavan, Rajeev (eds), *Public Interest Law*, (Basil Blackwell, Oxford, 1986); Harlow, Carol and Rawlings, Richard, *Pressure through Law*, (Routledge, London, 1992). For a comprehensive survey of PIL worldwide, up to 1978 see Cappelletti, Mauro and Garth, Bryant, *Access to Justice. Vol I. A World Survey. Book II*, (Sijthoff and Noordhoff: Alphen aan den Rijn, Milan, 1978).

aid,¹⁶⁷ the difficulties or “contradictions” of radical law practice,¹⁶⁸ and introspection

¹⁶⁶ See Johnson, Earl; Bice, Scott H; Bloch, Steven A; Drew, Ann Barthelme; Kantor, Valerie; Schwartz, Elizabeth and Tucker, Marna Susan, 'Access to Justice in the United States: The Economic Barriers and Some Promising Solutions' in Cappelletti, Mauro and Garth, Bryant, *Access to Justice. Volume I: A World Survey. Book II*, (Sijthoff and Noordhoff - Alphenaaerdenrijn Dott. A. Giuffre Editore - Milan, 1978), 913-1023 at 993-4:

There are at least three principal reasons why persons with small and modest claims may fail to seek judicial relief. First, they may be ignorant of their rights, and the harms they have suffered may be too small to justify investigation of their entitlements. Second, the costs of litigation may be too large to justify suit. Third, certain courts may require that a minimum amount of money be at stake before they will assume jurisdiction. the class action can potentially help overcome all three of these obstacles.

¹⁶⁷ On legal aid see Menkel-Meadow, Carrie, 'Legal Aid in the United States: the Professionalization and Politicization of Legal Services in the 1980's', *Osgoode Hall Law Journal*, Vol 22 No 1, 1984, 29-67; Besharov, Douglas J (ed), *Legal Services for the Poor. Time for Reform*, (AIE Press, Washington D C, 1990)

¹⁶⁸ Stuart Scheingold describes the three obstacles faced by British lawyers who attempt to develop a radical practice: they are encouraged to think of law as a vital and beneficent social institution; they are taught that their responsibility to the law is best served by their neutrality as legal advocates; they are distanced from radical alternatives by the social organization and homogeneity of the legal profession. See Scheingold, Stuart, 'The contradictions of radical law practice' in Cain, Maureen and Harrington, Christine B (eds), *Lawyers in a Postmodern World*, (Open University Press, Buckingham, 1994), 265-285 at 265. Marc Galanter made a similar point:

The more that lawyers view themselves exclusively as courtroom advocates, the less their willingness to undertake new tasks and form enduring alliances with clients and operate in forums other than courts, the less likely they are to serve as agents of redistributive change. See Galanter, Marc (1974) at 151. Elsewhere Scheingold has grappled with the description of such lawyers:

How are we to refer to these lawyers who make a commitment to social change? A number of terms have been used: public interest lawyers, legal rights lawyers, radical lawyers, and the like. My original solution was to refer to them as activist lawyers and to distinguish among traditional, innovative, and radical activists depending principally on the tactics they employed. In a sense, any of these terms would suffice if agreement could be reached, but no consensus has emerged. Moreover, each of these terms is misleading in important ways. There are, for example, an increasing number of lawyers these days using activist tactics on behalf of the status quo rather than social change. Similarly as the issues get more complex, it is not always clear who is speaking in the public interest.

Scheingold, Stuart A (1981) at 194-195. For discussion the legal profession see 'The New Public Interest Lawyers', *Yale Law Journal*, Vol 79 No 6, May 1970, 1069-1152. For a history of PIL in the USA see Auerbach, Jerold S, *Unequal Justice*, (Oxford University Press, New York, 1976); Green, Jerry Aln & Green, Ellen Sickles, 'The Legal profession and the Process of Social Change: Legal Services in England and the United States', *Hastings Law Journal*, Vol 21, 1969-70, 563-607. For an early class-based analysis of legal representation see Carlin, Jerome E and Howard, Jan, 'Legal Representation and Class Justice', *UCLA Law Review*, Vol 12, 1964-65, 381-437 and for a study of the career choices made by lawyers see Handler, Joel; Hollingsworth, Ellen Jane and Erlanger, Howard S, *Lawyers and the Pursuit of Legal Rights*, (Academic Press, London, 1978).

over the tactic of using laws¹⁶⁹ were issues in North America and Britain as much they are now in India. Problems of implementation were to become the most intransigent difficulty of PIL in India, echoing the experience of the USA.¹⁷⁰ Similarly, the growth and recession of concern for poverty and access to justice in the USA has structural similarities with PIL in India.¹⁷¹ Most striking is that the problem of defining what constitutes PIL in India appears to be a universal phenomenon. Rajeev Dhavan noted the problems with the nomenclature in the USA:

Marketed as a compendium phrase to gather together a cluster of movements seeking to mobilize law and legal services on behalf of the disadvantaged, the phrase has come to acquire many meanings, not the least of which has been to encompass any espousal of the 'public interest' (often subjectively defined) by any persons or group¹⁷²

It was not just examination of the USA that inculcated the need to introduce new issues and techniques into the judicial fora. India sought to participate in international fora. For example, it was after Prime Minister Indira Gandhi had attended the United Nations Conference on the Human Environment held in

¹⁶⁹ See Scheingold, Stuart A (1981), Scheingold, Stuart A (1974) and Alinsky, Saul J. Simon Wexler examined the reasons which might induce a lawyer to build up a practice which would be aimed at helping poor people, corresponding to many of the lawyers involved in PIL in India were to face: First, there aren't enough lawyers to serve poor people, so poor people must be helped and taught to serve themselves. Second, it is better for poor people to acquire new skills than new dependencies. Third, poor people can often do what lawyers cannot or will not do. Finally, the law ought to be demystified for all laymen, but especially for the poor.

See Wexler, Simon, 'Practicing Law for Poor People', *Yale Law Journal*, Vol 79 No 6, May 1970, 1049-1067 at 1055. Also see Kessler, Marc, *Legal Services for the Poor. A Comparative and Contemporary Analysis of Interorganisational Politics*, (Greenwood Press, Connecticut, 1987).

¹⁷⁰ Handler, Joel F (1978) at 221 describes the bureaucratic contingent as the most critical variable in divining the results of using law. Moreover, as Marc Galanter has observed, rule change can have unintended results:

Randall's study of movie censorship shows that liberalization of the rules did not make censorship boards more circumspect; instead, many closed down and the old game between censorship boards and distributors was replaced by a new and rougher game between exhibitors and local government-private group coalitions.

Galanter, Marc (1974) at 139. Also see Stuart A Scheingold (1981) at 194.

¹⁷¹ For example see Auerbach, Jerold S (1976); Dhavan, Rajeev, 'Whose Law? Whose Interest' in Dhavan, Rajeev and Cooper, Jeremy (eds) (1986) at 19.

¹⁷² Dhavan, Rajeev, 'Whose Law? Whose Interest?' in Dhavan, Rajeev and Cooper, Jeremy (eds) (1986), 17-48 at 17.

Stockholm in 1972, that enactments, including the Air (Prevention and Control of Pollution) Act, 1981, were passed. Similarly, developments in Australian law were used to counter fears that liberalized access would add to the already intolerable burden on the courts¹⁷³ and to support the admittance of class actions into the Supreme Court.¹⁷⁴

Resultant Changes

It is clear that a number of factors contributed to the emergence of PIL, when a few judges of the post-emergency Supreme Court began to mobilise the initiatives of the 1970s. By 1979, a recognisable alternative to established patterns of litigation had begun to emerge. Judges, lawyers, social activists and mediapersons formed an informal nexus, exposing injustice and petitioning the Supreme and High Courts (see chapter six). Perhaps the most vital contribution to the nexus which enabled PIL was the open and critical manner in which discussion was held in the press, the courtroom and in the Lok Sabha (the House of the People). After the suppression of information and freedom of expression during the Emergency, the reclaimed ability to express a critical response to state policies and their implementation was harnessed in a way never before witnessed in India. The dialogue between the Court and the Legislature that had been underway for many years found a resting place as attention was diverted into constitutional remedies for the atrocities that were being exposed:

the Emergency, which came close to emasculating the judiciary, paradoxically strengthened it, and gave legitimacy to the 'basic structure' doctrine. ... The 'basic structure' doctrine, and the democratic

¹⁷³ For a reference to the Australian Law Commission review of the litigation that arise from the Michigan Environmental Protection Act, 1970, see Shourie, Arun (1981) at 26.

¹⁷⁴ For example, see Justice V R Krishna Iyer in *Fertilizer Corporation Kamagar Union (Regd.) Sindri and others v Union of India and others* AIR 1981 SC 344 at 355, as discussed in 'Labour' in chapter three.

processes it is expected to protect, now have widespread support from intellectuals, lawyers and even politicians. The country's rulers, who did not encounter much resistance from these elites when the Emergency was imposed, cannot now count on similar acquiescence to autocracy¹⁷⁵

Fundamental Rights and the Directive Principles of State Policy were being discussed in the courtroom, as the judiciary was able to display its willingness to depart from a rule-mindedness in order to meet the imperatives of the society.¹⁷⁶ Not only were the Courts perceived as a last resort, trust was placed in their ability to provide relief. Throughout the 1980s and early 1990s, petitions have been filed relating to most of the issues of concern in the contemporary Indian polity.¹⁷⁷

The Thesis

PIL is defined in chapter two, according to the mechanisms by which it became established and the grievances raised in the courtroom. The discussion is located in the debate, initiated by Upendra Baxi, over the terminology PIL or Social Action Litigation. The case studies in chapters three and four are divided into issue based sections. At the beginning of chapter three, a brief summary of methodology is followed by discussions of the cases on 'Prisons and State Institutions', 'The Police', 'The Armed Forces', 'Injustices Specific to Women', 'Children', 'Labour', 'Bonded Labour' and 'Urban Space'. In chapter four cases on 'Environment and Resources', 'Consumer Issues', 'Education', 'Politics and Elections', 'Public Policy and Administration' and 'Judges, Courts, Lawyers' are discussed. Both these chapters provide an insight into the breadth of cases and illustrate the characteristics of PIL.

¹⁷⁵ Sudarshan, R (1990) at 57.

¹⁷⁶ See Baxi, Upendra, 'Taking Suffering Seriously. Social Action Litigation in the Supreme Court of India' in Baxi, Upendra (ed) (1988), 387-415.

¹⁷⁷ See the case studies in chapters 3 and 4.

Chapter five, *Administering Justice*, discusses the administrative apparatus in the courts, and its response to PIL by presenting data and information collected in the Supreme Court and eight High Courts. Chapter Six, *the Court and the People*, provides a sociological analysis of the people involved in PIL - primarily the judges, lawyers, activists, the media and those involved in funding. It is in this chapter that insight is sought about the motivations of the actors, and their input into the emergence of PIL. As PIL continues to evolve, the parameters determining what the Court can decide upon and who can petition it are constantly under review. Much has depended on how PIL has been used at particular times, by whom and why. Chapter seven summarises the analysis in each chapter of the thesis, and addresses the broader implications of the conclusions reached.

Chapter Two - Defining “Public Interest Litigation”

Definitions of PIL which were given in many of the early PIL cases, were lengthy and imprecise. In a leading judgment in 1982, Justice Bhagwati described PIL as litigation undertaken to redress public injury, enforce public duty, protect social collective or “diffused” rights and interests, or for vindication of the public interest.¹ He stated:

where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal position or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of any breach of fundamental right of such persons or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.²

Articulated in terms of its structure, PIL was described as a “strategic arm of the legal aid movement ... which is intended to bring justice within the reach of the poor masses”, as justice would be provided to groups, rather than individuals.³ It was

¹ *S P Gupta, V M Tarkunde, J L Kalra and others v Union of India and others* 1981 (Supp) SCC 87 as discussed in ‘Judges, Courts, Lawyers’ in chapter four.

² *Ibid.* at 210. For other definitions, see *People's Union for Democratic Rights PUDR and others v Union of India and Ors* (Asian games) AIR 1982 SC 1473, *Labourers Working on Salal Hydro Project v State of Jammu and Kashmir and others* (1983) 2 SCC 181 and *Fertilizer Corporation Kamgar Union (Regd.) Sindri and others v Union of India and others* AIR 1981 SC 344, as discussed in ‘Labour’ in chapter three.

³ *People's Union for Democratic Rights PUDR and others v Union of India and others* AIR 1982 SC 1473 at 1476, *ibid.* See the discussion of legal aid in chapter one, and ‘Alternative and Corollary Innovations’ in chapter six. Many analysts welcomed the innovations, for example, Mukhoty, Gobinda, ‘Public Interest Litigation: A Silent Revolution’, (1985) 1 SCC (J) 1-11; Menon, N R Madhava, ‘Public Interest Litigation: A Major Breakthrough in the Delivery of Social Justice’, *Journal of the Bar Council of India*, Vol 9 No 1, 1982, 150-165.

recognised that injustice was intrinsic in the structure of the legal system, because of limited, economically determined, access to justice, the requirements of the adversarial process and the functioning of the courts. Care was taken not to circumscribe the potentialities of PIL, as the Court supported and nurtured litigation “in which [the] public or [a] class of the community have peculiar interest by which their legal rights or liabilities are affected”.⁴

Writing in the early 1980's, Upendra Baxi, an analyst and participant in PIL, objected to the terminology of “public interest litigation”, which had been borrowed from the USA.⁵ Stressing the need to highlight the conceptual differences, he suggested “Social Action Litigation” as a more accurate description.⁶ By focussing on the nomenclature he sought to avoid the extension of this litigation, evolved for the disadvantaged and deprived, into a more general legal tool for all public interest issues. This semantic, but crucial, distinction was to symbolise the dilemma over the use of PIL in its varied forms, and to highlight the differing contexts:

The appreciation of the vital political and cultural differences between the two societies will be deferred; and a loose-minded importation of notions apposite to the circumstances of development in the United States will continue to obscure a genuine appreciation of the distinctive social and historical forces shaping, generally, the role of adjudication in India. I propose to use the notion SAL rather than PIL to avoid these pitfalls.⁷

⁴ *Janata Dal v H S Chowdhary and others* (1992) 4 SCC 305 at 331, as discussed in ‘Public Policy and Administration’ in chapter four. The Supreme Court concluded that no litmus test could be applied as the contours of the litigation were still evolving.

⁵ See Baxi, Upendra, ‘Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India’ in Baxi, Upendra (ed) *Law and Poverty*, (N M Tripathi Pvt Ltd, Bombay, 1988), 387-415. See ‘International Influences’ in chapter one for a discussion of PIL in the USA. In particular see Scheingold, Stuart, A, ‘The Politics of Rights Revisited’ in Gambitta, Richard A L; May, Marlynn L and Foster, James C, *Governing Through Courts*, (Sage Publications, Beverly Hills, 1981), 193-224.

⁶ *Ibid.* at 389:

The issues within the sway of PIL in the United States concerned not so much state repression or governmental lawlessness but rather civic participation in governmental decision-making. Nor did PIL groups there focus preeminently on the rural poor. And, typically, PIL sought to represent “interests without groups” such as consumerism or environment.

⁷ Baxi, Upendra, ‘Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India’ in Baxi, Upendra (ed) (1988), 387-415 at 390.

Justice Bhagwati, one of the main supporters of PIL on the Supreme Court, later acknowledged Baxi's argument, describing SAL as seeking to vindicate exploitation and repression.⁸ While it is acknowledged that the PIL/SAL debate is important, the term PIL will be used in this thesis as the more widely recognised terminology, and more appropriate in the context of the breadth of issues raised.

Much of the debate amongst activists and supporters of PIL, about the use and efficiency of PIL, as discussed in chapter six, can be located in terms of a choice between PIL and SAL.⁹ Before this can be considered, analysis in the present chapter will focus on the mechanisms of PIL, at the centre of much of the literature on this legal phenomenon.¹⁰ Examination of the procedures involved when PIL began and events within the courtroom will be followed by a general survey of the issues raised. After a discussion of the resistance to PIL and the limits of judicial action, attention will again be focused on the definitional problem raised by Upendra Baxi.

⁸ Bhagwati, P N, 'Social Action Litigation: The Indian Experience' in Tiruchelvam, Neelam and Coomaraswamy, Radhika (eds) (1987), 20-31 at 23. Also see Bhagwati, P N 'Law, Justice and the Underprivileged', (Keynote address at the National Seminar on Unorganised Labour, Delhi, 5-8/1/84), quoted in Agrawala, S K, *Public Interest Litigation in India: A Critique*, (N M Tripathi Pvt Ltd, Bombay, 1985) at 46.

⁹ For a good survey of the initial momentum that inaugurated PIL see Jaising, Indira, 'Social Engineering through SAL', *The Lawyers*, Vol 1 No 8, Aug 1986, 4-7.

¹⁰ S K Agrawala identified six "broad contours" of PIL in India, taken from the leading cases up to 1985 in Agrawala, S K (1985) at 9-10. See the sections on PIL in the Annual Survey of Indian Law, published by the Indian Law Institute, including Singh, Parmanand, 'Public Interest Litigation', *Annual Survey of Indian Law*, Vol 23, 1987, 139-161; Singh, Parmanand, 'Public Interest Litigation', *Annual Survey of Indian Law*, Vol 25, 1989, 45-63; Singh, Parmanand, 'Public Interest Litigation', *Annual Survey of Indian Law*, Vol 26, 1990, 181-189. For general surveys see, for example, Prasad, M Krishna, 'Public Interest Litigation: A New Juristic Horizon', AIR 1984 J 1; Morje, Mahabaleshwar N, 'Public Interest Litigation', *Indian Bar Review*, Vol 15 Nos 1&2, 1988, 59-68; Hedge, Santosh, 'Public Interest Litigation and Control of Government', *Indian Bar Review*, Vol 15 Nos 1&2, 1988, 1-7; Gupta, Niwas, 'Public Interest Litigation', KLT 1984 J 23-27. Also see Jaswal, Nishtha, *Role of the Supreme Court with Regard to the Right to Life and Personal Liberty*, (Ashish Publishing House, New Delhi, 1990) and Gupta, Uma, *Supreme Court and Civil Liberties*, (Mittal Publications, Delhi, 1988).

The Procedures

Although the Fundamental Rights, applicable to every Indian citizen, could be enforced in the Supreme Court under Article 32 of the Constitution, and all other legal rights could be enforced in the High Courts under Article 226 of the Constitution, the procedures governing the use of these provisions were determined by the rules of each court and by accepted practice.¹¹ Acknowledging that procedural arrangements were limiting access to justice, some judges began to disregard accepted practice.¹² It was the suitability of the forum of the court to decide upon the issues that were coming before it that was to become a pivotal consideration and induced procedural liberalisation, by broadening the interpretation of the term “appropriate proceedings” in Article 32 of the Constitution.¹³ The urgency and imperative of the grievance became the important point for consideration, together with the absence of viable alternative remedies.

The following sections chart the elements which enabled a new kind of petitioner and a new kind of petition to be heard in the courts. Using elements of existing provisions and disregarding those that did not foster the aims of the litigations, the Court began to develop new techniques, perhaps a new jurisprudence. The next section ‘PIL Begins’ is followed by a discussion of the means used to gain access to justice, and the procedures deliberated upon in the courtroom.

¹¹ A full listing of these provisions can be found in Appendix A.

¹² Justice V R Krishna Iyer in *The Mumbai Kamgar Sabha, Bombay v M/s. Abdulbhai Faizullabhai and others* AIR 1976 SC 1455 at 1458, pronounced that “Procedural prescriptions are handmaidens, not mistresses, of justice”, a sentiment echoed by Justice Bhagwati in *S P Gupta op cit* note 1 at 210. The affinity between judges on the SC is not only reflected in PIL but also in other areas law relating to social justice. For example see Venkataramani, R, *Judgments by O Chinappa Reddy - A Humanist*, (International Institute of Human Rights Society, New Delhi, 1989).

¹³ In *Bandhua Mukti Morcha v Union of India and others* (Haryana Mines I) AIR 1984 SC 802, as discussed in ‘Bonded Labour’ in chapter three, Justice Bhagwati held that the consideration of appropriateness was with reference to the purpose of the proceeding, not in terms of any particular form.

PIL Begins

It was in the procedure determining the writ of *habeas corpus* that the increased scope of standing was first apparent.¹⁴ The first petitions that are identifiable as PILs related to conditions in detention. Indira Jaising, a leading practitioner of PIL, noted that the precise date when PIL began cannot be established, but stated that the turning point was in 1978 when the Supreme Court took cognizance of letters written from prison by Charles Sobraj and Sunil Batra.¹⁵ Filed as *habeas corpus* petitions, these cases have not been discussed in the case studies in chapters three and four, as they can be filed by an aggrieved person, and therefore do not fit within any definition of PIL. Nonetheless, they did contribute to the increasing awareness of access to justice and social justice, as discussed in chapter one. The Supreme Court Registry described a case that was not filed or heard until 1980 as the first PIL,¹⁶ while S K Agrawala, in an exposition of the legal characteristics of PIL,¹⁷ stated that it was Justice Bhagwati who gave the concept of PIL a comprehensive exposition in *S P Gupta*¹⁸ popularly known as the Judges' case.¹⁹

The first PIL that clearly fulfils the criteria later established by the Supreme Court was a *habeas corpus* petition filed by an advocate on the basis of news

¹⁴ See Order 32 of the Code of Civil Procedure, 1908.

¹⁵ Jaising, Indira (1986) at 4. Although procedures were relaxed in both these cases, because they were filed by the aggrieved prisoner, they cannot be described as PIL in the form supported by the Supreme Court. See *Charles Sobraj v Supdt. Central Jail, Tihar, New Delhi* 1978 (4) SCC 104 and *Sunil Batra (I) v Delhi Administration and others* (1978) 4 SCC 494.

¹⁶ *Khatri and others v State of Bihar and others* (1981) 1 SCC 623, as discussed in 'Prisons and State Institutions'.

¹⁷ Agrawala, S K (1985) at 8-9.

¹⁸ *Op cit* note 1.

¹⁹ This view was shared by a sitting judge of the Supreme Court in 1991:

The first PIL was the Judges' case where the *locus standi* of a member of the bar was upheld.

Justice HN1 in interview. A discussion of PIL first appeared in the Annual Survey published by the Indian Law Institute in 1984, when it was observed that the first PIL was the judges case. See Prakash, Anand, 'Public Interest Litigation', *Annual Survey of Indian Law*, Vol 20, 1984, 324-332 at 324.

reports in the *Indian Express* in early 1979.²⁰ Other similar petitions were admitted, for example when a letter written by Sunil Batra, a prisoner in Tihar jail complaining on behalf of another prisoner was sent to a judge of the Supreme Court.²¹ By the early 1980's some High Courts had also begun to admit petitions filed under Article 226 of the Constitution, using relaxed proceedings.²² For the first time since the inception of the Constitution, representative proceedings, where the petitioner is not the aggrieved person or persons, were allowed by the court.²³ PIL emerged as a category of petitions distinct from *habeas corpus*.

Petitions were filed as representative actions by petitioners who would not specifically benefit from the litigation, and in many instances the fate of a large group of people was at stake.²⁴ Relaxation of standing requirements brought new issues to the courtroom, and widened the parameters of justiciability. Simultaneously,

²⁰ *Hussainara Khatoon and others v Home Secretary, State of Bihar* (1980) 1 SCC 81 as discussed in the section on 'Prisons and State Institutions' in chapter three.

²¹ *Sunil Batra (II) v Delhi Administration* (1980) 3 SCC 488, also see *Prem Shankar Shukla v Delhi Administration* (1980) 3 SCC 526, *Kishore Singh Ravinder Dev v State of Rajasthan* AIR 1981 SC 625, *Rakesh Kaushik v B L Vig, Superintendent, Central Jail, New Delhi and another* AIR 1981 SC 1767, all of which have been discussed in the section on 'Prisons and State Institutions' in chapter three.

²² Upendra Baxi has noted that:

the activism in SAL historically arose first in some High Courts, although the caste-view of the judiciary in India has so far forbidden explicit recognition of this fact.

Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Baxi, Upendra (ed) (1988), 387-415, footnote 103 at 409, and his references at 412-3 to the Himachal Pradesh, Gujarat and Rajasthan High Courts. See Baxi, Upendra, *The Crisis of the Indian Legal System*, (Vikas Publishing House Pvt Ltd, New Delhi, 1982) at 27 for details of an unreported case initiated by Justice Thakkar in the Gujarat High Court. Manubhai Shah of the Consumer Education and Research Centre supported this assertion, by referring to the petitions he had been instrumental in filing in the High Courts:

Justice Bhagwati's statements on Article 21, on the right to life with dignity, came later. I used Article 21 before Justice Bhagwati on safety.

Manubhai Shah, Consumer Education and Research Centre, Ahmedabad, 17/2/91. Others have supported the view that PIL was initiated in the High Courts. See Mahajan, Krishan, 'Major Issues in Public Interest Litigation' in Gandhi, P K, *Social Action through Law*, (Concept Publishing Company, New Delhi, 1985), 83-92 at 84. See 'Judges' in chapter six.

²³ See chapter one for alternatives to the use of the writ jurisdiction of the Supreme Court and High Courts.

²⁴ One of the first such petitions, *Municipal Council, Ratlam v Vardhichand and others* AIR 1980 SC 1622, as discussed in 'Urban Space' in chapter four, did not originate in the writ jurisdiction, but in a magistrates court. It has been included because of its key role in the emergence of PIL.

the rules determining the way in which petitions were to be filed were relaxed. Those without the resources to file proper petitions were allowed, even encouraged, to write letters or telegrams to the courts. Judges of the Supreme Court and various High Courts initiated petitions *suo moto*, newspaper clippings were accepted as evidence. There was an increase in the number of class actions and issues such as delays in the filing of petitions and *res judicata* were decided in relation to PIL. Efforts were made to provide adequate legal representation, to facilitate the provision of evidence, and to appoint commissions to enquire into the facts of cases. Innovative directions were issued and the courts began to monitor the implementation of their own directions. PIL was heralded as a conciliatory form of litigation, and an opportunity for the Government to examine the social and economic entitlements due to the poor.²⁵ New remedies were devised as the courts began to award compensation, treating PIL as a class of litigation separate from that which already existed.

Gaining Access to Justice

This section discusses the mechanisms facilitating access to justice: *locus standi*, justiciability, letters as writ petitions, fees, *suo moto* actions, newspaper clippings as evidence, class actions, delay and *res judicata*. This analysis underpins the discussion on 'Access to Justice' in all the case studies in chapters three and four.²⁶

- *Locus Standi*

Standing, or the right to approach a court, was, in Anglo-Saxon jurisprudence, conferred upon someone with a grievance which would be recognised by the courts.²⁷ While standing is needed to get entry for a hearing by a court, an issue must be considered justiciable if a petition can be admitted as suitable for

²⁵ See Justice P N Bhagwati in *Bandhua Mukti Morcha op cit* note 13 at 810-811.

²⁶ With the exception of the cases on 'Judges, Courts, Lawyers' in chapter four.

²⁷ The rudiments of PIL have been traced to Roman Law in Mohan, Surendra K, 'Public Interest Litigation and Locus Standi', *Cochin University Law Review*, [198?], 523-533.

adjudication. Before the inception of PIL, standing had reinforced the notion that the primary duty of a court was to give relief to individuals seeking remedy or redress for private wrongs.²⁸ Representative standing was to gain currency with PIL, in the form of petitions for individuals and class actions, as *locus standi* now encompassed anyone acting in a public spirit. In 1981 the SC held that standing had to be relaxed to meet the ends of justice,²⁹ and in the judges' case, the standing of a group of advocates was upheld:

Where a legal wrong or injury is caused to a person or to a determinate class of persons ... and such a person or determinate class or persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for appropriate direction.³⁰

Within the first few years of PIL, standing was given to a vast array of petitioners including journalists, academics, lawyers, citizens, and large bodies of individuals.³¹

The Court was careful to prescribe that only genuine public interest litigants be allowed to approach the Court, and not meddlesome interlopers or busybodies, and not those bringing issues of no public interest import to the courts.³²

²⁸ See Deshpande, V S, 'Standing and Justiciability', *Journal of the Indian Law Institute*, Vol 13 No 2, 1971, 153-188; Sathe, S P, 'Public Participation in Judicial Process: New Trends in Law of Locus Standi with Special Reference to Administrative Law', *Journal of the Indian Law Institute*, Vol 26 Nos 1&2, 1984, 1-12; Chaturvedi, Maheshwar Nath, 'Liberalising the Requirement of Standing in Public Interest Litigation', *Journal of the Indian Law Institute*, Vol 26, Nos 1&2, 1984, 42-54; Gupta, R S, 'Widening the Rules of Locus Standi', *Journal of the Indian Law Institute*, Vol 26 No 4, 1984, 424-444. Even before PIL, individual standing had already incorporated, to an extent, citizen standing, as seen in the statutory procedures outlined in chapter one, and provision such as order 1, rule 8 in the C P C, 1908 have been mobilised for PIL petitions - see *Consumer Action Group and another v State of Tamil Nadu and others* as discussed in 'Urban Space' in chapter four.

²⁹ *Fertilizer Corporation op cit* note 2 at 356.

³⁰ *S P Gupta op cit* note 1 at 189. Similarly *People's Union for Democratic Rights op cit* note 2, the rule of standing was liberalised to allow a petition to be filed by a social action group, and in *Bandhua Mukti Morcha op cit* note 13 and *Neeraja Chaudhary v State of M P* AIR 1984 SC 1099, the importance of such social action groups in furthering the cause of social justice was stressed - see 'Bonded Labour' in chapter three.

³¹ See the section on class actions, *infra*.

³² See 'Resistance to PIL' *infra*.

This led to a number of decisions in which standing was not given to the petitioner,³³ and in which courts have limited the expansion of standing in the early 1980's by using the definition of an ideal type of PIL to question the *bona fides* of the petitioner.³⁴ The Supreme Court refused to hear a PIL petition filed against the death penalty stating that a third party can only raise an issue if the aggrieved party has a disability recognised by law.³⁵ The often incoherent approach of the SC to the question of standing is apparent in *Krishna Swami v Union of India & Ors*,³⁶ and throughout the case studies in chapters three and four. Denial of standing, while often arbitrary, has been more prevalent in some cases as the justiciability of the issues raised has

³³ See *Sachidanand Pandey and another v State of West Bengal and others* AIR 1987 SC 1109, an order that has been widely referred to in subsequent decisions, and *T N Rugmani and another v C. Achutha Menon and others* AIR 1991 SC 983, as discussed in the section on 'Urban Space' in chapter four. Other examples are *Ramsharan Autyanuprasi and another v Union of India and others* AIR 1989 SC 549 and *Chhetriya Pardushan Mukti Sangarsh Samiti v State of U.P. and others* AIR 1990 SC 2060 in 'Environment and Resources' in chapter four - see the critique of this order in Menski, Werner F, 'Bottlenecks of Justice? A further note on the limits of public interest litigation', KLT (1) 1992, 57.

³⁴ Numerous examples from the Supreme Court have been discussed in various sections of chapter four: *Subhash Kumar v State of Bihar and others* AIR 1991 SC 420 in 'Environment and Resources', *Kashinath G Jalmi and another v Speaker and others* AIR 1993 SC 1873 in 'Politics and Elections', *Janata Dal op cit* note 4 in 'Public Policy and Administration', *Nandjee Singh v P.G. Medical Students' Association and others* (1993) 3 SCC 400 in 'Education', *Krishnaswami v Union of India and others* 1992 (1) SCALE 87 [484] and *K Ashok Reddy v Government of India and others* (1994) 2 SCC 303 in 'Judges, Courts and Lawyers'. Examples from the High Courts in chapter three include *E. Sharma v The State of Assam and others* AIR 1992 Gau 58 in 'Prisons and State Institutions' and *Sand Carrier's Owners' Union and others v Board of Trustees for the Port of Calcutta and others* AIR 1990 Cal 176 in 'Labour'; and in chapter four *S S Sobti v Union of India and others* AIR 1982 Del 51 in 'Urban Space', *Vinod Kumar Gupta v Indian Airlines and others* AIR 1984 J&K 35 in 'Consumer Issues', *Duyal Chandra Bhuyan and others v Secretary to the Government of Assam, Panchayat and C.D. Department and others* AIR 1987 Gau 56 in 'Politics and Elections', *Jagram v Gwalior Town and Country Development Authority Gwalior and others* AIR 1987 MP 11 in 'Public Policy and Administration' and *Satyavani and another v A P Pollution Control Board and others* AIR 1993 AP 257 in 'Environment and Resources'.

³⁵ See *Simranjit Singh Mann v Union of India & Anr* 1992 (2) SCALE 102 [506], as discussed in 'Prisons and State Institutions' in chapter three. A similar position was taken in a petition filed by on behalf of two persons sentenced to death, see *Karamjeet Singh v Union of India* JT 1992 (5) SC 598. Standing was refused on the grounds that there were no provisions in the Code of Criminal Procedure, 1973 or in any other statute permitting a third party stranger to question the correctness of the conviction and sentence imposed by the Court after a regular trial. The SC refused to consider the legal disability of the two, who had been unable to petition the Court themselves. For both see 'Prisons and State Institution' in chapter three.

³⁶ 1992 (2) SCALE 66 [311], as discussed in 'Judges, Courts, Lawyers' in chapter four. The advocate-petitioner was given standing, but Raj Kanwar, another advocate-petitioner was not permitted to approach the court. A reading of the case reveals that the Court refusal stemmed from his persistence in attempting to orally address the Court.

been questioned (see chapter four).

- Justiciability

The nexus between the right of a litigant to approach the court and the suitability of an issue to be heard on the judicial forum is pivotal. However, in *S P Gupta*³⁷ Justice Venkataramiah noted that although the issues raised in the petition are non-justiciable, and may have to be dismissed on the ground that the impugned administrative action is beyond judicial review, this would have no bearing on the question of *locus standi* of the petitioners. Nonetheless, he observed that there was still a class of questions such as international relations and national security that could not be examined by the Court.³⁸ The Supreme Court thus sought to uphold the doctrine of the separation of powers which ascribes particular functions to the legislature, the executive and the judiciary,³⁹ while at the same time retaining the jurisdiction necessary to enable law to be meaningfully deployed.⁴⁰

In a number of High Court cases, standing has not been considered in instances where a petition has been rejected as unsuitable for adjudication in the courts.⁴¹ The Supreme Court linked the two criteria of standing and justiciability to

³⁷ *Op cit* note 1.

³⁸ *S P Gupta op cit* note 1. Also see Justice Bhagwati's order at 219 where he explained the vital distinction between *locus standi* and justiciability. See the section on the limits of judicial action.

³⁹ For an exposition of this see Dicey, A V, *An Introduction to the Study of the Law of the Constitution*, (Macmillan Education, Basingstoke, tenth edition, 1959).

⁴⁰ It was held, in 1981:

The Court must defer to legislative judgement in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgement appears to be palpably arbitrary.

R K Garg v Union of India and others (1981) 4 SCC 675 at 706 - see 'Public Policy and Administration' in chapter four. See *Scheduled Caste and Weaker Section Welfare Association (Regd.) and another v State of Karnataka and others* (1991) 2 SCC 604, as discussed in 'Urban Space' in chapter four when standing to bring a PIL action was given despite the lack of standing under the Karnataka Slums Areas (Improvement and Clearance) Act, 1973 - it was held that the object of the statute and the relief that was sought to be conferred were matters that had to be taken into consideration in such an action.

⁴¹ For example, see chapter four for: *Chandanmal Chopra and another v State of West Bengal* AIR 1986 Cal 104 in 'Public Policy and Administration'; *Goa Foundation and another v The Konkan Railway Corporation and others* AIR 1992 Bom 471 and *K K Vasant v State of Karnataka and others*

hold that a lack of remedy amounted to a lack of *bona fides*,⁴² but held elsewhere that private litigation involving questions of public importance assumes the character of public interest litigation,⁴³ thus reaffirming an earlier order of the Gujarat High Court.⁴⁴ These orders are by no means conclusive, as the reactions of courts have been diverse and unpredictable,⁴⁵ particularly when the issues raised were not directly concerned with poverty.⁴⁶ Further complexity has been added by the administration of letter petitions sent to the court, using the PIL guidelines.⁴⁷

- Letters as Writ Petitions

Using the terminology of appropriate proceedings in Article 32 of the Constitution, the Supreme Court began to register letters sent to the Court as writ petitions, enabling easier access to justice and the avoidance of court fees. The increase in the scope of petitions has led PIL to be described as the epistolary jurisdiction of the Court.⁴⁸ Again it was prisoners' rights and *habeas corpus* petitions that signalled this innovation. While the Court would accept letters, telegrams or postcards complaining of illegal detention, it was only with the onset of PIL that the

AIR 1992 Kant 256 in 'Environment and Resources'.

⁴² *Rajatha Enterprises v S K Sharma and others* (1989) 1 SCR 547 in 'Urban Space' in chapter four.

⁴³ *Shivajirao Nilangekar Patil v Dr Mahesh Madhav Gosavi and others* (1987) 1 SCC 227 in 'Education' in chapter four.

⁴⁴ *Bhaghubhai H. Devani v Porbander Municipality and other* AIR 1984 Guj 134 in 'Urban Space' in chapter four.

⁴⁵ In *Nandjee Singh v P.G. Medical Students' Association and others* (1993) 3 SCC 400 as discussed in 'Education' in chapter four, it was held that as the petition detailed a dispute relating to an individual without any question of law, it could not be treated as a PIL. A similar order was passed in *Chhetriya Pardushan Mukti Sangarsh Samiti op cit* note 33 when it was held that there needed to be a violation of fundamental rights - the criteria of justiciability was only one factor as the Court also held that the petition was filed *mala fides*.

⁴⁶ The petitions relating to urban space, discussed in chapter four, highlight this.

⁴⁷ See chapter five and Appendix B for a full listing of the guidelines.

⁴⁸ Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Baxi, Upendra (ed) (1988), 387-415 at 398.

courts could be approached informally for other forms of legal redress.⁴⁹

At the overt⁵⁰ and covert⁵¹ invitation of Justice Bhagwati, letters were sent to individual judges or the Court. Upendra Baxi noted that the receipt of such letters by Justice Bhagwati, and their adjudication by him, on the bench of court number two had unforeseen effects:

First, it indirectly deprives the Chief Justice of India of his undoubtedly important role in docket management and allocation of work to his companion judges. This clearly has its own implications for *inter se* relationships among justices, including perhaps factionalism in the Court. Second, many justices are deprived by this result of epistolary jurisdiction of the much-needed exposure to SAL; in the process the learning capacity of the Court as an institution is constricted. Third, the existing overload on Court No. 2 is accentuated, causing problems of priority in handling. If high priority is accorded to SAL at the cost of other matters, irate leaders of the Bar (as it is happening) are bound to seek to discredit SAL. If such priority is not accorded, SAL matters continue to drag on, like others and this (as is already happening) begins to raise serious questions concerning the impact of judicial intervention for such causes⁵²

This prophetic analysis was realised even as letters were being encouraged. While Justice Bhagwati was endorsing the use of letters, Justice Pathak was cautious in his response:

No such communication or petition can properly be addressed to a particular judge. Which judge or judges will hear the case is exclusively a matter concerning the internal regulation of the business of the Court, interference with which by a litigant or member of the public constitutes the grossest impropriety.... It is only right and proper that this should be known clearly to the lay public.... They also

⁴⁹ It is unclear which was the first letter to be registered as a writ petition, records in the Supreme Court Registry stated that the first letter converted to Writ Petition was that sent by Rural Litigation and Entitlement Kendra, D/-2/7/83. The letter was registered as a petition on 14/7/83 and disposed of on 30/8/88. Other letters appear to have been registered before this, in particular see 'Prisons and State Institutions' as discussed in chapter three.

⁵⁰ See *Bandhua Mukhti Morcha* op cit note 13.

⁵¹ See 'Judges' in chapter six.

⁵² Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Baxi, Upendra (ed) (1988), 387-415 at 400-401.

embarrass the judge to whom they are personally addressed.⁵³

Before retiring from the Court, then Chief Justice Bhagwati ensured that a mechanism for the administration of letters sent to the Court was in place. This removed objections to the personalisation of PIL, ensured its place amongst other forms of litigation in the Supreme Court, but led to the formalisation of a procedural relaxation that had been remarkable for its informality.⁵⁴

- *Suo Moto* Actions

The enthusiasm for social justice led some judges to initiate PIL actions *suo moto* or revive petitions through *suo moto* proceedings.⁵⁵ As with standing, the appropriateness of such an action was dependent upon the issue raised and the intended beneficiaries of the case.⁵⁶ These actions, largely prompted by newspaper reports and representative in character, reveal much about the sympathy of judges, for example, when mobilised by the plight of widows whose pensions had not been paid.⁵⁷

⁵³ *Bandhua Mukti Morcha op cit* note 13 at 848. In the same case, Justice Sen echoed this sentiment, at 848:

A private communication by a party to any learned judge over any matter is not proper and may create embarrassment for the Court and the judge concerned.

Commentators on PIL have gone further in their reservations about the registration of letters, for example:

While the court treats a letter as a regular petition, necessarily, the condition regarding payment of court fees is necessarily waived, Article 39A being addressed only to the legislature and the government and directive principles being not enforceable in court, the court cannot legitimately adopt such a course in exercise of judicial power.

Rajagopalan, M, 'Constitutional Issues in Public Interest Litigation in India', *Cochin University Law Review*, [(198?)], 516-522 at 520. Also see Tulzapurkar, V D, 'Judiciary: Attacks and Survivals', AIR 1983 J 9 at 13.

⁵⁴ Cells have been created in the Supreme Court and some High Courts to process the letter-petitions received. For detail see chapter five. The PIL guidelines, listed in Appendix B, were used by the cells.

⁵⁵ For example, see the cases on family pensions in 'Public Policy and Administration' in chapter four; *In the matter of: Judicial Enquiry into Gang-Rape Demanded, and, Concerted Demand for Judicial Probe* (1988) 1 GauLR 489 and *Niloy Dutta v District Magistrate, Sibsagar District* (1991) 2 GauLR 217 in 'Injustices Specific to Women' in chapter three; *M C Mehta v State of Tamil Nadu & Ors* (child labour) (1991) 1 SCC 283 as discussed in 'Children' in chapter three. See note 27 in chapter six. *Suo moto* actions have been initiated outside the purview of PIL, for example *News item from 'The Tribune' of 1st November, 1993* 1993 (4) SCALE 56 [299] and 1993 (4) SCALE 151 [652].

⁵⁶ See *Krishna Swami op cit* note 36 and *Janata Dal op cit* note 4.

⁵⁷ See 'Public Policy and Administration' in chapter four.

- Class actions

The access to justice provided by PIL was often used for whole classes of people, both in the initiation of representative standing and the encouragement of citizen standing by groups of people with a common interest in the outcome of the litigation.⁵⁸ The latter category of class actions, is distinct from the representative standing, in the same way that habeas corpus petitions are distinct from letter petitions.⁵⁹ However, in practice the distinction is often hard to make. Some class action petition, although filed with the name of aggrieved persons on the cause title, have been instigated by an organisation or individual without a direct interest in the outcome of the petition. Because of the differing strategies used, the import of some class actions to the emergence of PIL⁶⁰ and the Court's description of some as PILs, the case studies in chapters three and four seek to account for some problematic class actions in the analysis.⁶¹

⁵⁸ See the section on 'Statutory Procedures' in chapter one. One of earliest cases discussed, *Municipal Council, Ratlam op cit* note 24 is in fact a class action appeal that came to the Supreme Court from the Magistrates' Court. Class action petitions, which have to be discussed when considering PIL, have been indicated in the footnotes to the case chapters three and four. The definitional problem is underscored by *National Textile Workers' Union etc v P V Ramakrishnan and others* AIR 1983 SC 75, a class petition filed by workers objecting to the closure of a company, has been described as one in which "public participation was facilitated. See Sathe, S P, 'Public Participation in Judicial Process: New Trends in Law of Locus Standi with Special Reference to Administrative Law', *Journal of the Indian Law Institute*, Vol 26 Nos 1&2, 1984, 1-12 at 9.

⁵⁹ See note 242 in chapter three for citations of some of the numerous class action petitions filed asking the Court to decide on the question of equal pay for equal work. In particular, see *Balbir Singh and others v M/s M.C.D. and others* (1985) 1 SCC 167, *Krishan Kumar v Union of India and others* (1989) 2 SCC 504 and *Krishena Kumar and others v Union of India and others* (1990) 4 SCC 207.

⁶⁰ For example, *Bombay Hawkers' Union and others v Bombay Municipal Corporation* AIR 1985 SC 1206, as discussed in the cases on 'Urban Space' in chapter four.

⁶¹ For example *V Lakshmipathy and others v State of Karnataka and others* AIR 1992 Kant 57 in 'Urban Space' in chapter four was described as a PIL, but could also have been treated as a class action. In his regular survey of PIL, Parmanand Singh has overlooked the often crucial distinction bringing class actions in the ambit of his discussion: *Dhirendra Chamoli v State of Uttar Pradesh* (1986) 1 SCC 637 and *Surinder Singh v Engineer-In-Chief, C.P.W.D.* (1986) 1 SCC 639 on equal pay for equal work, in Singh, Parmanand, 'Public Interest Litigation', *Annual Survey of Indian Law*, Vol 22, 1986, 483-506; petitions concerning the resettlement of Army personnel, *Assam Rifles Multipurpose Co-operative Society Ltd. v Union of India* (1987) 2 SCC 638 and the housing of hutment dwellers, *In the Matter of No 57 Block Bastuhara Committee and others* AIR 1987 Cal 122 in Singh, Parmanand (1987); petitions asking for equal pay for equal work, *Daily Rated Casual Labour employed under P&T Department through Bhartiya Dak Tar Mazdoor Manch v Union of India and others* (1988) 1 SCC 122, *Jaipal and others v State of Haryana* (1988) 3 SCC 354, *Federation of All India Customs and Central Excise Stenographers v Union of India* (1988) 3 SCC 91, and for the reservation of jobs for scheduled castes

- Delay & *Res Judicata*

Other procedural norms, such as the limitation on filing a petition after an undue delay (known as laches), were disregarded by judges adjudicating upon PILs because of the extraordinary situation necessitating the petitions.⁶² The Supreme Court has held that *res judicata* only applies to PIL if the previous litigation was also PIL.⁶³

In the Courtroom

Having surmounted the difficulties faced by marginalised groups of people in gaining access to the courts, the process through the courtroom itself had to be adjusted to accommodate the different needs that arose. The Court's response to PIL petitions filed on various issues, as discussed in chapters three and four, was informed by the available procedures.⁶⁴ The following sections chart the attention paid to legal representation, evidence and fact-finding, conciliation, devising new remedies, compensation and costs, and withdrawing a PIL petition.

- Legal Representation

Access to justice extended beyond the parameters of procedural

and scheduled tribes, *P and T Scheduled Caste/Tribe Employees' Welfare Association (Regd.) and others v Union of India and others* (1988) 4 SCC 147 in Singh, Parmanand, 'Public Interest Litigation', *Annual Survey of Indian Law*, Vol 24, 1988, 123-146 and concerning hawkers, *Sodan Singh and others v New Delhi Municipal Committee and others* AIR 1989 SC 1988 / (1989) 4 SCC 155 and labour issues, *S Krishna and others v The State of Karnataka and others* AIR 1989 Kant 291 in Singh, Parmanand, 'Public Interest Litigation', *Annual Survey of Indian Law*, Vol 25, 1989, 45-63; *Hardoi Roadways (Private) Union, Hardoi and another v Cantonment Board, Shahjahanpur and others* AIR 1991 All 59 in Singh, Parmanand, 'Public Interest Litigation', *Annual Survey of Indian Law*, Vol 27, 1991, 35-55.

⁶² See *Hundung Victims of Development through its convenor Mr David Mahung v North Eastern Council and others* as discussed in 'Environment and Resources' in chapter four.

⁶³ See *Forward Construction Co and others v Prahbat Mandal (Regd.), Andheri and others* AIR 1986 SC 391 in 'Urban Space' in chapter four.

⁶⁴ With the exception of the section on 'Judges, Courts, Lawyers'.

impediments and into the courtroom, with its pervasive inequities.⁶⁵ Although many of the petitions were initiated by advocates, petitioner-organisations or individuals were often unable to afford adequate legal representation. The courts enlisted the help of legal aid organisations or appointed advocates as *amicus curiae*, in those cases where no advocate was present.⁶⁶ In 1987, the rules of the Supreme Court were amended to provide for the payment of advocates fees, at the discretion of the Court.⁶⁷

- Evidence & Fact-finding

The need for the strict pleadings of adversarial litigation, was sought to be replaced by inquisitorial proceedings. Newspaper clippings have been accepted as evidence in many cases, either at the initial stage, in *representative* or *suo moto* actions, or during the course of the litigation. Many of the early PILs were filed on the basis of news reports - a practice that has continued.⁶⁸ Investigative journalism was significant in exposing the kinds of issues that were brought to the courts, and news

⁶⁵ See chapter one for a discussion of legal aid and chapter six for a discussion of lawyers and for 'Alternative and Corollary Innovations'. Also see the cases discussed in 'Judges, Courts, Lawyers' in chapter four.

⁶⁶ See the discussion of cases 'Prisons and State Institutions' in chapter three, for example, for *Kishore Singh Ravinder Dev v State of Rajasthan* AIR 1981 SC 625 and *Dhronamraju Satyanarayana v N T Rama Rao and others* AIR 1988 AP 62 in 'Politics and Elections' in chapter four. It is not just in PIL cases that legal representation has been discussed. See, for example, *Sukh Das and another v Union Territory of Arunachal Pradesh* AIR 1986 SC 991.

⁶⁷ Amendment made 26/7/87 inserting rule 10-A(1) to order XVIII of the Supreme Court Rules, 1966 (with effect from 18/7/87), which provides:

Where the petitioner is not represented by an advocate of his choice, in any writ petition, civil or criminal, or any other case, the Court may in proper case direct the engagement of an Advocate *amicus curiae* at the cost of the State. The fee of an Advocate so engaged shall be Rs.250 up to the admission stage and a lump sum not exceeding Rs.500 for the final hearing of the case as may be fixed by the Bench hearing the case, and in an appropriate case, the Bench hearing the case may, for the reasons to be recorded in writing, sanction payment of a lump sum not exceeding Rs.750 to the said advocate.

See note 209 in 'Alternatives and Corollary Innovations' in chapter six.

⁶⁸ For examples in chapter three, see the cases discussed in 'Prisons and State Institutions'; *Mukesh Advani v State of M P* AIR 1985 SC 1854 in 'Bonded Labour'; *Supreme Court Legal Aid Committee, through its Hon'y Secretary v State of Bihar and others* in 'The Police'; *Labourers Working on Salal Hydro Project op cit note 2*; *Laxmi Kant Pandey v Union of India* (1984) 2 SCC 244 in the chapter on 'Children'. See also *Naga People's Movement for Human Rights (NPMHR) v Union of India and others* in 'The Armed Forces' for a case in which the Guwahati High Court refused to accept newspaper articles as evidence because they were not accompanied by affidavits for verification. The SC was similarly wary in *Manmohan Kalra v Shri Yash and others* AIR 1984 SC 1161.

reports have provided an important backdrop to the socio-legal issues involved.⁶⁹ The onus was with the Court to evolve methods of resolving a case with disputed facts.

One of the most essential elements that was to characterise PILs, in particularly those heard in the early 1980s by Justice Bhagwati, was the investigatory role assumed by the Court.⁷⁰ Enquiry commissions were appointed by the judges, and the implementation of the recommendations of these commissions, and of the Court's own orders, was monitored. The most noted example of this was *Bandhua Mukti Morcha*⁷¹ in which numerous commissions were appointed and the case monitored over many years.⁷² Similarly, a petition filed concerning a protective home for women, filed in 1981, was still pending in 1994, partly because poor conditions in such homes were not ameliorated and partly because of the Court's technique of continually reviewing PIL matters.⁷³ Although many PILs have been characterised by the appointment of enquiry commissions, the results of such enquiries have depended upon the progress of the petition through Court,⁷⁴ the sympathies of the experts

⁶⁹ The Court has used newspapers and other media to provide publicity for its orders, for example in *For examples, see M C Mehta v Union of India* AIR 1992 SC 382 in the chapter on 'Environment and Resources' and *Parmanand Katara v Union of India and others* AIR 1989 SC 2039 in the chapter on 'Prisons and State Institutions'. For a discussion of the media and its involvement with PIL see chapter six. It was perhaps the significance of the media for PIL that led Parmanand Singh to describe a petition that was concerned with freedom of expression, *Indira Jaising v Union of India and others* AIR 1989 Bom 25, to be a PIL. Singh, Parmanand (1988).

⁷⁰ See the analysis of evidentiary problems in PIL in Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Baxi, Upendra (ed) (1988), 387-415.

⁷¹ *Op cit* note 13.

⁷² For further examples, see the cases on children in prisons in chapter three.

⁷³ *Upendra Baxi v State of U P & Ors* 1982 (1) SCALE 84 [502] as discussed in 'Prisons and State Institutions' in chapter three, and 'Petitions and Petitioners' in chapter six. Also see *Banwasi Sewa Ashram v State of U P* (1986) 4 SCC 753 in 'Environment and Resources' in chapter four. The Court has been criticised for taking on an administrative role, see Tulzapurkar, V D (1983) at 14.

⁷⁴ Analysing *Bandhua Mukti Morcha op cit* note 13 S K Agrawala noted that the petition had not been posted since the famous order of 16/12/83, in spite of the Court's request for a report. He used this example to strengthen his suggestion that a permanent investigative machinery be established:

the Court cannot exercise continuous supervision over the implementation of laws and its directions, through commissioners appointed by it. Its character as a Court enables and entitles it only to determine the violations of rights, and not supervise the implementation of laws and directions for which it is not at all equipped and constituted. The appointment of commissioners is therefore, justified, if at all, for the ascertainment of facts and for nothing

appointed to the commission, the mandate for the enquiry, the method by which it was conducted, and indeed on the ease with which an issue lends itself to resolution.⁷⁵ The evidentiary problems which arose have led to other innovations. Although not a court of record, the Guwahati High Court ordered that evidence for a writ petition pending in the High Court be heard in the Sessions Court at Imphal,⁷⁶ and Justice Sujata Manohar heard direct evidence from evicted pavement dwellers whilst on the Bombay High Court.⁷⁷

- Conciliation

The rhetoric of conciliation between the State and its citizens was a theme that permeated many of the early PILs. It was envisaged that parties in a PIL would strive towards a common goal, to find a solution to a problem, with the Court as investigator. Focussing on the co-operation required of the State, and on the opportunity presented to the government to remove inequalities and exploitation, the Court delineated its own role:

When the Court entertains public interest litigation, it does not do so in a cavilling spirit or confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. The Court is thus merely assisting in the realisation of the

else
Agrawala S K (1985) at 28.

⁷⁵ For an example of the variation in effectiveness see *P Rathinam v State of Gujarat* 1987 (2) SCALE 317 [1464] as discussed in 'Injustices Specific to Women' in chapter three and *Chattisgarh Krishak Mazdoor Sangh v State of M P & Ors* 1984 (3) SCALE 93 [603] as discussed in 'Bonded Labour' in chapter three. In another case on bonded labour, *Neeraja Chaudhary op cit* note 30 the Supreme Court mobilised social action groups to help it in its task. In other cases, in 'Labour' in chapter three, the State was praised for its co-operation with the appointed commissioners, whilst in others, the State did very little to co-operate. For a more general discussion see 'Petitions and Petitioners' in chapter six.

⁷⁶ *Naga People's Movement for Human Rights op cit* note 68.

⁷⁷ *Nazamunissa Shaukat Ali and another v Municipal Corporation of Greater Bombay and others* as discussed in 'Urban Space' in chapter four.

constitutional objectives.⁷⁸

A similarly notable characteristic of PIL has been the relative failure of the rhetoric of conciliation to affect the actual progress of a petition through Court.⁷⁹ That there has been change in the judicial discourse is undeniable, but the effects have been inconsistent, if at all.⁸⁰

- Devising new remedies

The *obiter dicta* of Justice Krishna Iyer and Justice Bhagwati,⁸¹ and the expansion of the scope of some litigations is most striking when examined in the context of the legal developments in the relevant field.⁸² Innovation of remedy enabled the Court to extend the realm of justiciability,⁸³ to frame schemes,⁸⁴ to order the

⁷⁸ *Bandhua Mukti Morcha op cit* note 13 at 811. Justice Bhagwati also held, at 803, that “there is nothing sacrosanct about the adversarial procedure and in fact it is not followed in many other countries where the civil system of law prevails”.

⁷⁹ The wisdom of expecting the State to respond to PIL in a collaborative manner had already been questioned by Justice Bhagwati:

We have undoubtedly an Attorney-General as also Advocates General in the States, but they do not represent the public interest generally. They do so in a very limited field .. even if we had provision empowering the Attorney-General or Advocate General to take action for vindicating public interest, I doubt very much whether it would be effective. The Attorney-General or the Advocate General would be too dependent upon the political branches of government to act as an advocate against abuses which are frequently generated or at least tolerated by political and administrative bodies.

S P Gupta op cit note 1 at 215.

⁸⁰ The example of the first *Bandhua Mukti Morcha* case, *op cit* note 13, can again be used. The other example given of a commission was the Agra case, *Upendra Baxi op cit* note 73, in which the continued monitoring has bettered conditions in the home. See the case chapters and ‘Petitions and Petitioners’ in chapter six.

⁸¹ See the discussion of judges in chapter six.

⁸² The scope of the petition was enlarged by the Court at the time of passing orders in *Bandhua Mukti Morcha op cit* note 13, *Rajangam, Secretary, District Beedi Workers’ Union v State of Tamil Nadu and others* (1992) 1 SCC 221 in ‘Children’ in chapter three, and “*Niyamakendran*” *v State of Kerala and others* in ‘Public Policy and Administration’ in chapter four, amongst others. In the former case, twenty-one directions were issued that fell outside the scope of the petition.

⁸³ See *Geetha Timbers, Chalakudy v State of Kerala and others* 1990 (1) JLT 402 (F.B.) in ‘Environment and Resources’ and in *Dhronamraju op cit* note 66, *Anil Yadav & Ors v State of Bihar* (1982) 1 SCALE 43 [278] in ‘Prisons and State Institutions’ in chapter three, and numerous other PIL petitions.

implementation of existing legislation,⁸⁵ and to determine the priorities of State action.⁸⁶

- Compensation and costs

In addition to relaxing requirements to pay fees on the registration of petitions filed in the court in the form of a PIL,⁸⁷ the Court has often awarded costs in PIL orders. Amounting to small sums in comparison to the fees charged by many Supreme Court advocates, costs were often awarded in recognition of the public service done by the petitioner.⁸⁸ Exercising its discretion, the Court has made *ex gratia* compensation payments, or exemplary awards. In the first such recorded instance the Court held:

we have no doubt that if the petitioner files a suit for damages for his illegal detention a decree for damages would have to be passed in that

⁸⁴ For example, *Laxmi Kant Pandey op cit* note 68. Referring to the orders in this case, Parmanand Singh questioned the viability of Court action:

Laxmikant cases invite a brief comment. It may be asked why should the Supreme Court indulge in 'legislation' every time when the problem of Indian children adopted by foreign parents come up before it? Why does not the court ask Parliament to enact a comprehensive legislation on this matter? Judicial ad-hocism might only create several complexities and uncertainties. For instance, in none of the three *Laxmikant* cases is there any mention of 'penal' provisions preventing the oppression and exploitation of the adopted Indian children in foreign countries.

Singh, Parmanand (1991) at 41.

⁸⁵ As in *Common Cause, A Regd Society v Union of India & Ors* 1989 (2) SCALE 98 [541] in 'Consumer Issues' in chapter four. In *State of H P v Parent of a Student of Medical College, Simla and Others* (1985) 3 SCC 169 in 'Education' in chapter four, the SC overturned the Simla HC's direction that legislation be passed to prevent ragging.

⁸⁶ For example *State of Himachal Pradesh and others v Umed Ram Sharma and others* AIR 1986 SC 847 in 'Environment and Resources' in chapter four. Contrast with *P Nalla Thampy Thera v Union of India and others* (railway services) AIR 1984 SC 74 as discussed in 'Consumer Issues' in chapter four.

⁸⁷ Petitions clearly marked as PILs are automatically exempted from the fees charged by the Registry. See Agrawal, K P, 'Class Action and Payment of Court Fees', *The Lawyers*, Vol 7 Nos 8&9, Aug-Sept 1992, 41.

⁸⁸ Costs were awarded to the PIL petitioner in *Bandhua Mukti Morcha op cit* note 13 on the basis that the efforts of social activists must be supported. Other examples include *Mukesh Advani v State of M P* AIR 1985 SC 1363 in 'Bonded Labour' in chapter three and *M C Mehta v State of Tamil Nadu & Ors* (child labour) (1991) 1 SCC 283 in 'Children' in chapter three. Conversely, in *Subhash Kumar v State of Bihar and others* AIR 1991 SC 420 the petition was charged punitive costs for filing a PIL *mala fides*. See 'The Court and its Rules' in chapter one for rule 1 of order XLI of the Supreme Court Rules, 1966, a provision which has been mobilised to reward PIL petitioners.

suit ... In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. ... The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield.⁸⁹

Despite numerous decisions in which compensation or *ex gratia* payments have been awarded, the Court has avoided making a decision on liability,⁹⁰ and on the criteria for the award of compensation for a violation of Article 21 of the Constitution.⁹¹ This avoidance reflects prevalent reservations about the payment of compensation, for example, the financial burden it would involve, and concern about the perceived boundaries of judicial action.⁹² In addition to compensation or costs paid to the petitioners, records exist of the concerned state government being asked to pay for the

⁸⁹ *Rudul Sah v State of Bihar* AIR 1983 SC 1086 as discussed in 'Prisons and State Institutions' in chapter three. Described variously as compensation or exemplary costs, awards were made in *Sebastian M Hongray v Union of India* AIR 1984 SC 571 in 'The Armed Forces' in chapter three exemplary costs were awarded and in many other cases, including a number of cases relating to the police, discussed in the sections on 'The Police' and 'Injustices Specific to Women' in chapter three.

⁹⁰ *M C Mehta v Union of India and Ors* (Sriram gas leak) 1985 (2) SCALE 151 [1280] as discussed in 'Environment and Resources' in chapter four, in particular, for the order given on Article 12 of the Constitution. For the text of this article see Appendix A.

⁹¹ For example in *Khatri op cit* note 16 as discussed in 'Prisons and State Institutions' in chapter three. Also see *Sant Bir v State of Bihar* 1982 (1) SCALE 144 [668], for similar indecision in a *habeas corpus* petition. See chapter six for a discussion of this point.

⁹² Agrawala, S K (1985) at 43. There have been a number of cases, outside PIL, in which the Court has used its newly found discretion to award compensation or exemplary costs. See for example, *Devaki Nandan Prasad v State of Bihar and others* AIR 1983 SC 1134, *Jwala Devi v Sub-Inspector, Bhoop Singh and others* AIR 1989 SC 1441, *State of Maharashtra and others v Ravikant S Patil* (1991) 2 SCC 373, *Ashok Kumar & Anr v Union of India & Ors* 1991 (1) SCALE 129 [564], *Ganga Das v State of Orissa & Ors* 1992 (2) SCALE 192, *Kumari v State of Tamil Nadu* AIR 1992 SC 2069, *Veer Bala v Delhi Administration and others* 1993 (2) SCALE 45 [179], *Nilabati Behera Alias Lalita Behera (through the Supreme Court Legal Aid Committee) v The State of Orissa & others* 1993 (2) SCALE 70 [309], *B Rammlamma v State of Andhra Pradesh* 1993 (1) SCALE 27 [90]. The temptation to equate innovation in remedy with PIL is seen when Parmanand Singh discussed a case in which compensation was given to an Member of the Legislative Assembly, who had been wrongfully arrested by the police, *Bhim Singh, MLA v State of J & K and others* AIR 1986 SC 494 / (1985) 4 SCC 677, as a PIL. See Singh, Parmanand (1987). The discretionary nature of this power is highlighted by *Jiwan Mal Kochar v Union of India and others* AIR 1983 SC 1107 when the Court held that "damages and compensation cannot be granted in this proceeding under Article 32 of the Constitution".

costs and expenses of any commissions of enquiry instituted by the Court.⁹³

- Withdrawing a PIL petition

Departing from the procedure delineated by the Supreme Court Rules, 1966,⁹⁴ the Supreme Court, by preventing a PIL petition from being withdrawn, has affirmed the separate character of a litigation in the public interest.⁹⁵ Simultaneously, the Court has asserted its own role in litigation that enhances the projected image of a judiciary concerned with a myriad of social justice concerns.⁹⁶

The Issues

If procedural justice provided the structure and the mechanism of PIL, it was in an effort to promote a more egalitarian society. That the changing judicial interpretation of the Fundamental Rights and Directive Principles of State Policy,⁹⁷ has been critical in the initiatives to facilitate social justice, is not questioned.⁹⁸ However,

⁹³ Costs of the committee and costs to the petitioner were awarded in *M C Mehta v Union of India and others* (pollution of the River Ganges) (1987) 4 SCC 463 in 'Environment and Resources' in chapter four, and in *Ram Kumar Misra v State of Bihar and others* AIR 1984 SC 537 in 'Labour' in chapter three.

⁹⁴ Order XVIII, rule 9 provides for the withdrawal of a petition.

⁹⁵ See *Sheela Barse & another v Union of India & Ors* (children in jails) 1986 (2) SCALE 1 [1] as discussed in 'Children' in chapter three and 'Petitioners and Petitions' in chapter six.

⁹⁶ In *Sampat Singh & Ors v State of Haryana & Ors* 1992 (3) SCALE 117 [565] at 567, a party was criticised for withdrawing his allegations:

He ought to have submitted to the discipline of the Court, especially when he has initiated the proceedings as a public interest litigant.

⁹⁷ See chapter one and Appendix A for a discussion and listing of these rights.

⁹⁸ Jamie Cassels identified four distinctive characteristics of PIL, three of which were procedural (liberalisation of locus standi, procedural and remedial flexibility and ongoing judicial participation/supervision) and one which was the creative and activist interpretation of legal and fundamental rights. Cassels, Jamie, 'Judicial Activism and Public Interest Litigation: Attempting the Impossible?', *The American Journal of Comparative Law*, Vol 37, 1989, 493-519 at 498. Parmanand

it was the issues that could then be presented for legal resolution, that were to determine the direction that PIL was to take. Five broad categories of petitions that have been heard by the Supreme Court and High Courts are detailed below. Although this categorisation provides a way of understanding the PIL cases discussed in chapters three and four, none of the categories are exclusive of all the others, and many cases can only be understood in terms of two or more categories. For example, gender issues cut across all the sections outlined here. Women have suffered appalling conditions in jail, have been displaced from their homes, have been discriminated with regard to labour conditions and have been the subject of petitions seeking judicial review for legislation.

1. PIL for the marginalised/excluded

These are cases which have arisen when an individual or group is pitted against the state, having been excluded from the ambit of civil and political rights, as found in the Fundamental Rights. Those disadvantaged as a direct result of executive action, or more pertinently, inaction, had, for the first time, a recourse to law. Criminal jurisprudence cases horrified the courts and judgments were given directing the State administration to act. Conditions in protective homes, hospitals and other State institutions were exposed. Petitions were filed attempting to vindicate executive power and gain relief for the victims of custodial rape and those who had not received their legitimate dues (for example widowed women who had not been paid the pension

Singh observed:

It all happened with the socially motivated crusade of a few judges of the Supreme Court who by an activist interpretation of fundamental rights, converted them into "positive rights". .. In this process a new regime of fundamental rights emerged. For example, right to free legal aid, right to access to court, right to speedy trial, right against torture, right not to be solitarily confined, right to human treatment in prison, right to be paid minimum wages and not to be subjected to forced labour, right to human dignity, etc. emerged as independent fundamental rights.

Singh, Parmanand, 'Vindicating Public Interest through Judicial Process: Emerging Trends and Issues', *Indian Bar Review*, Vol 10 No 4, 1983, 683-694 at 683-4.

due to them).⁹⁹

Aside from individual exceptions, this group of cases, which formed the bulk of the petitions in the early days of PIL, has been scantily implemented as each order relies upon the offending official or institution itself for implementation. However, the horror of some of the cases has created an increased public awareness of conditions in jails and other institutions, causing some betterment in conditions and more discussion of jail reforms.

There are striking features to the orders given in these cases. The courts have condemned the apathy of the state, but have not condemned its functionaries, and have rarely made individuals responsible for their actions. The courts have mourned the injustices meted out, for example to prisoners, by the State administration, but have not analysed the laws and procedures which cause there to be so many prisoners and detainees. Using arguments about the separation of powers the court has not even been able meaningfully to employ Article 13 of the Constitution, which states that laws must be consistent with the Fundamental Rights.¹⁰⁰ By neglecting to examine the ways in which existing legislations criminalise the most disadvantaged, and the real difficulties in using legal services, the courts have not explored an area which could have alleviated certain injustices. Hence, enactments giving the army and police wide powers and thus denying peoples' basic right of hearing have not been disputed by the courts, or have simply not been heard. Despite these shortcomings, PIL has given prisoners an opportunity to be heard and has been instrumental in generating attention to punishment and prison conditions.

⁹⁹ See the discussions on 'Prisons and State Institutions', 'The Armed Forces', 'The Police', 'Injustices Specific to Women' and 'Children' in chapter three, and the discussion of cases on family pensions in 'Public Policy and Administration' in chapter four.

¹⁰⁰ See Appendix A for the text of this article.

2. PIL for the disadvantaged and deprived

These are cases for those who have not secured the equality promised by the constitutional scheme. Challenging structural injustice and prejudice, these cases have a complex background and appertain to many state and private bodies. Bonded labour cases form a major portion of the PILs in this section, as do other labour and wage issues and cases relating to more distinct groups like women, scheduled castes or tribes and children. There is a greater focus on economic and social rights (than on civil and political rights), and therefore on the realisation of the Directive Principles of State Policy. In tandem with this is the expansion in the courtroom or, rather, recognition on the judicial forum, of the scope of Fundamental Rights such as Article 21 of the Constitution. The right to life is no longer constructed in a narrow way, now including the right to livelihood. However, as with the cases for the marginalised/excluded, implementation has been problematic, in the absence of political will to ensure the issues are resolved.¹⁰¹

3. PIL for development/resource rights

Issues of development, environment, community rights and resource rights form a unique category of petitions.¹⁰² Those complaining of environmental pollution have largely been successful in gaining the attention of the court, as the right to life has been interpreted to include the right to live in a clean environment. Other petitions, raising issues of economic and social policy, have received a mixed reception as at times judges have been welcoming and at others dismissive. Thus, although the suitability of using law has been questioned, it is in this category of cases that the courts' willingness to innovate can be most clearly evaluated - both in procedural and substantive terms. Property relations which had been set beyond the

¹⁰¹ See the sections on 'Bonded Labour', 'Labour', 'Children' and 'Injustices Specific to Women' in chapter three, and 'Urban Space' chapter four.

¹⁰² See the discussions on 'Environment and Resources' and 'Urban Space' in chapter four.

courts' jurisdiction by constitutional amendments are again raised, but with a different emphasis. Instead of individual rights to property, the court has had to consider, for example, the community rights of tribal people who have been displaced by a development project. In the instances where it has been asked to assess the suitability of a development project itself, the courts have been reticent, remaining within the accepted limits of judicial action and at most making some concession, for example on environmental safeguards. The famous case of pavement dwellers in Bombay sets out many of the problems in using the court to reallocate resources.¹⁰³

Law has acted as a catalyst, conferred certain freedoms and provided an ideological framework of organisation and action for those petitioning the courts. However, in dealing with the most disadvantaged in rural areas, as in the section on the disadvantaged/deprived, the Court does not appear to be the appropriate institution for providing the necessary structural changes. Judicial attitudes to the role of the Court has tempered judicial decision making, just as political will has tempered the value of PIL orders.

4. Where PIL ends?

Increasingly in recent years, petitions have been filed relating to a myriad of often legitimate complaints, as well as those which attempt to appropriate PIL for corporate gain, political advantage or personal interest.¹⁰⁴ The majority of the cases in this section are well-intentioned but inappropriate. As PIL is widely perceived as an easy way to focus an issue, the courts have been approached for grievances which could, and should, be addressed to other agencies. A central paradox arises as other agencies are unable to manage the problems brought before them. Thus the discussion of many issues appertaining to a group or class of people, for example land

¹⁰³ See the chapter on 'Urban Space' for the discussion of *Olga Tellis and others v Bombay Municipal Corporation* AIR 1986 SC 180, and 'Petitioners and Petitions' in chapter six.

¹⁰⁴ See the sections on 'Public Policy and Administration', 'Politics and Elections', 'Education', 'Urban Space' and 'Consumer Issues' in chapter four.

allotments and pensions, would not have been possible without PIL. Procedures do exist in the civil and criminal manuals and in other provisions for the presentation of such petitions, but endemic problems of long pending cases, obstructive procedures, high costs and the lengthy process of appeals when petitioning a lower court have made PIL into an attractive option. Recourse to PIL is now common practice for many Supreme Court and High Court lawyers. It provides the opportunity to participate in the well-being of society, to vindicate causes and, for some young lawyers, valuable experience of the Court and career advancement. That public interest sentiments can be misplaced is seen in the case of an advocate whose first PIL petition asked the court to direct the telephone company to prioritise the allocation of telephones to advocates as well as to medical doctors, because of the importance of the legal profession to the general public.¹⁰⁵ Moreover, personal grievances are often framed in terms of public importance to take advantage of the benefits of using PIL. Undoubtedly the manifold difficulties of dealing with public authorities are frustrating, but using a legal tool fashioned as a last resort for those to whom the legal system is inaccessible cannot be the first refuge for those with easy access to the courts.

Most pernicious has been the arrogation of PIL as another tool in the weaponry of corporate warfare and of political manipulation. Numerous petitions have been filed with questionable motives, including one attempting to ban the Koran,¹⁰⁶ another to expel a minister from office (although such a petition has import for judicial review)¹⁰⁷ and to manipulate urban planning regulations.¹⁰⁸ Often hard to distinguish from genuine litigants, especially as lawyers themselves have been petitioning the courts, judicial vigilance has not always interceded. While many petitions have been rejected on the grounds of standing or justiciability, others have been admitted and heard as PILs.

¹⁰⁵ See *M Balagovindam, advocate v Union of India and another* in the chapter on 'Consumer Issues'.

¹⁰⁶ See *Chandanmal Chopra op cit* note 41.

¹⁰⁷ For example, see *A G Prayagi v State of M.P. and others* AIR 1987 MP 25 in the chapter on 'Politics and Elections'.

¹⁰⁸ See the section on 'Land and its Use' and 'Construction' in the chapter on 'Urban Space'.

5. PIL and the Judicial Process

Aside from the actual procedural mechanisms and the issues raised, PIL began with much discussion of the role of the judiciary and the need for the benefits of law to accrue to those who have previously not had access to courts. It is not just the development of PIL that has had an input into the judicial process. Activism in the court has taken on new dimensions through PIL, as judges have begun to enter realms of decision-making previously reserved for the legislative or executive branches of government. As already indicated, some Judges have acted *suo moto* and awarded compensation. A reassertion of the integrity of the court and its essential function as an institution of the state can be witnessed in PIL actions. Parameters and functions of judicial review and judicial action have been evaluated and expanded, and the incorruptibility of the judicial process has been upheld. In *S P Gupta* and the body of cases that follow, the Supreme Court addressed the essential requirements of the judicial/democratic process, inevitably including issues of public policy.¹⁰⁹ Questions of jurisdiction have recently seen cases regarding judicial corruption and parliamentary sovereignty. The court has discussed the parameters of constitutional adjudication and decision making, definitions of the state, liability and torts, and the disclosure of documents in court. Political impasses have been brought to the court and while some have been resolved, others have not gained the Court's attention. The discretion exercised by judges has meant that by ignoring certain PIL matters the Court has left untouched certain areas of policy making or executive action.¹¹⁰

PIL has also provided a forum in which issues of importance to the judiciary itself have been sorted out. Judicial appointments and transfers have been examined, judges have directed that court vacancies be filled and have determined their own conditions of service - even deciding the kind of cars they should drive.

¹⁰⁹ See 'Judges, Courts, Lawyers' in chapter four.

¹¹⁰ For example see chapter three for *Chaitanya Kalbagh and another etc v State of U P and others* AIR 1989 SC 1452 as discussed in 'The Armed Forces' and the petitions challenging enactments in 'Injustices Specific to Women'.

Allegations of corruption by judges have been heard, as have issues relating to the integrity of the Court in cases of contempt.¹¹¹

Resistance to the changes

Few judges were unequivocally supportive of PIL.¹¹² The ambivalence of many of those hearing PIL cases has already been seen in the discussion of procedures.¹¹³ The tensions within the bench were reflected in statements about the implausibility of certain features of PIL, rather than their undesirability. PIL has not been condemned, because of its populist inclusion of issues of concern to the have-nots,¹¹⁴ but has certainly been circumscribed by some judges.

Initially there was little discussion in the courtroom itself about the availability of an alternative forum or remedy to PIL - PIL itself was the alternative. Attempting to assuage the fear that PIL would open the floodgates to the Court, bringing an unmanageable burden, it was held, in 1982:

There is a misconception in the minds of some lawyers, journalists and men in public life that public interest litigation is unnecessarily cluttering up the files of the Court and adding to the already staggering arrears of cases which are pending for long years and it should not therefore be encouraged by the court. This is, to our mind, a totally perverse view smacking of elitist and status quoist approach. ... No State has a right to tell its citizens that because a large number of cases of the rich and well-to-do are pending in our courts we will not help the poor to come to the courts for seeking justice until

¹¹¹ *Ibid.* Also see the chapters on 'Judges, Courts, Lawyers' and 'Public Policy and Administration'.

¹¹² See the discussion of judges in chapter six.

¹¹³ See Agrawala, S K (1985) for a discussion of the resistance to PIL and Tulzapurkar, V D (1983) for Justice Tulzapurkar's critique of the Supreme Court's directions and procedural innovations in PIL. In particular see 'letters as writ petitions' *supra*.

¹¹⁴ I have borrowed this term from Galanter, Marc (1974).

the staggering load of cases of people who can afford, is disposed of.¹¹⁵ Nonetheless, growing concern about the load of PIL cases adding to the already high pendencies in the Supreme Court led to pronouncements suggesting that the High Court of the State in which the issue arose¹¹⁶ or, for example, an Industrial Tribunal,¹¹⁷ should first be approached. Although the number of PILs is growing, in comparison to the total number of cases on the docket of the Supreme Court and High Courts the number remains relatively small in 1994.¹¹⁸

The order given in 1982 by Justice S Murtaza Faizal Ali and Justice E S Venkataramiah in response to a petition filed in 1980 by Supreme Court advocate, Sudipt Mazumdar, delineates the reservations about PIL.¹¹⁹ The ten procedural questions were raised,¹²⁰ which were directed to be considered by a five judge bench. However, this aspect of the case was not considered again until 1994, when the earlier order was modified and the procedural questions were directed to be dealt with by a

¹¹⁵ *People's Union for Democratic Rights* op cit note 2 at 1478. Also see 'Constitutional Remedies' in chapter one and chapter five.

¹¹⁶ *In Re the Petitions of Nawal Thakur, a convict kept in the Kulu Jail* (1984) 3 SCC 572 in 'Prisons and State Institutions' in chapter three; in an order D/-18/2/87 by Justice M P Thakkar in *Kanubhai Brahmabhatt v State of Gujarat* AIR 1987 SC 1159 at 1159, the Supreme Court directed the petitioner to approach the High Court, stating:

If this Court entertains Writ Petitions at the instance of parties who approach this Court directly instead of approaching the concerned High Court in the first instance, tens of thousands of Writ Petitions would in the course of time be instituted in this Court directly (more than 9,000 are already pending). The inevitable result will be that the arrears pertaining to matters in respect of which this Court exercises exclusive jurisdiction under the Constitution will assume more alarming proportions. As it is, more than ten years old Civil Appeals and Criminal Appeals are sobbing for attention.

Decision taken on the letters sent to the Court also determine the number of cases - see chapter five. Also see 'Alternatives and Corollary Innovations' in chapter six.

¹¹⁷ See *Vidyulatta Vivek Pandit and others v State of Maharashtra and others* as discussed in 'Labour' in chapter three.

¹¹⁸ See the discussion of the courts in chapter one and in chapter five.

¹¹⁹ *Sudip Masumdar v State of Madhya Pradesh* (1983) 2 SCC 584. The substance of the case was not reported until 1994, at 1994 (2) SCALE 25 [329] and is discussed in 'Environment and Resources' in chapter four.

¹²⁰ The issues raised in this order became known as "The 10 Commandments".

bench of two judges.¹²¹ It appears that the matter no longer warranted the attention of five judges, as PIL no longer represented a conflict within the bench. It had been delineated by case law, the evolution of court procedure and the administering bodies of the Supreme Court and High Courts.

Discussion about the limits of judicial action has been prompted both by the relaxation of the procedures determining access to justice and innovations in the form and substance of Court orders. Apprehensions that PIL could undermine the authority of the Court that it had helped to re-establish led to calls for prudence in judicial activism.¹²² By using unconventional tactics, some judges were said to be contesting the foundations of Indian law and the legal system:¹²³

As the reach of law expands, it begins to lose its autonomy, self-contained quality, certainty and predictability. .. Some recent PIL opinions on bonded labour, children of prostitutes, Bofors scandal, the Ramaswamy and the Nadiad episodes, closing down of stone quarries, and the like would look like moral discourse and the statements issued in the judgments would seem to be addressed to other political elements - policy-makers, legal academics, professionals, the press and wider public.¹²⁴

Criticism of the cases that were to form the fourth category of PIL petitions, 'Where PIL ends?'¹²⁵ pointed to the appropriation of PIL as another legal tool in the hands of a private litigant.¹²⁶ Even more threatening to some was the agenda of petitioners who

¹²¹ It had been hoped by supporters of PIL that the questions raised would not be heard. See note 166 in chapter six.

¹²² For example, see Hedge, Santosh, 'Public Interest Litigation and Control of Government', *Indian Bar Review*, Vol 15 Nos 1&2, 1988, 1-7. The background can be found in chapter one.

¹²³ The Constitution of India, promulgated in 1950, established a separation of powers between the three branches of government, in terms of structure and function. See 'The Constitutional Imperatives' in chapter one.

¹²⁴ Singh, Parmanand (1991) at 35.

¹²⁵ See 'Where PIL ends' *supra*.

¹²⁶ See Menski, W F, 'On the Limits of Public Interest Litigation', KLT 1990 (2) J 45; Parmanand Singh described it as being a return to feudalism, as it opened up the judicial process to new abuses like blackmail. Singh, Parmanand, 'Thinking About the Limits of Judicial Vindication of Public Interest', (1985) 3 SCC (J) 1. S P Sathe forewarned:

We should take care that public interest litigation does not become a resort of the trigger happy litigants or professional litigants, or another method of political agitation.

brought new issues within the ambit of the Court's discourse, which Upendra Baxi described as symbolising “the politics of liberation”.¹²⁷ Where would this new form of litigation end? What changes would it require? Would it compromise the integrity of the institution and its power? These were the prevailing fears, as PIL gained momentum.

The power of appointments affected the ethos of the Court, which was, in turn, to inform the debate on PIL (see chapters one and five). Either in limiting their own actions or in extending their orders, it was the actions of judges that shaped the controversies. Considerations of justiciability and appropriate action were not discarded¹²⁸ and even those judges who supported PIL did not necessarily accede to the demands in all the petitions filed relating to poverty issues.¹²⁹ The optimism that

Sathe, S P (1984) at 11.

¹²⁷ Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Baxi, Upendra (ed) (1988), 387-415 at 406. See Singh, Parmanand (1990) at 182:

Almost anything under the sun that could be brought under the elusive rubric “public interest” came to be the subject matter of PIL. ... Many PIL actions did not seek to enforce any one's fundamental rights or provide access to justice to the disadvantaged group but to vindicate the claims that were so diffused among the public generally that no traditional legal or constitutional rights existed to be enforced.

¹²⁸ See 'Justiciability', *supra*. Also see *B Krishan Bhat v Union of India* (1990) 3 SCC 65 in 'Public Policy and Administration' in chapter four, when the Court held that the Directive Principles of State Policy are not enforceable in a writ petition under Article 32 of the Constitution. In *Tehri Bandh Virodhi Sangarsh Samiti and others v State of U P and others* (1990) 2 Supp SCR 606 in 'Environment and Resources', when the Court refrained from deciding on the suitability of a dam - it has been suggested that the Court felt intimidated by the amount of material placed before it. Nalini Jayal, Indian National Trust for Art and Cultural Heritage, interview, New Delhi, 5/8/93. The judges have been praised for their restraint, in not impinging on legislative or executive functions, in *P Nalla Thampy Thera op cit* note 86. See Prakash, Anand (1984) at 332. For an indication of the limits of judicial review generally see *M/s Dwarkadas Marfatia and Sons v Board of Trustees of the Port of Bombay* AIR 1989 SC 1642 and *Hindi Hitrashak Samiti and others v Union of India and others* AIR 1990 SC 851, where it was held that Article 32 of the Constitution cannot be used to indicate a policy preference.

¹²⁹ The Bihar Legal Support Society petitioned the Supreme Court, asking it to admit appeals in cases where bail/anticipatory bail had been refused in the High Courts, citing exceptions made to consider the bail applications of industrialists. Justice Bhagwati held that the Supreme Court was not a regular court of appeal, justifying his order with reference to public interest litigation:

It is, therefore, not correct to say that this Court is not giving the “small men” the same treatment as the “big industrialists”. In fact, the concern shown to the poor and disadvantaged is much greater than that shown to the rich and well-to-do because the latter can on account of their dominant social and economic position and large material resources, resist aggression on their rights where the poor and deprived just do not have the capacity or will to resist the fight.

suffused Upendra Baxi's seminal article on PIL, that PIL would continue to uncover injustice,¹³⁰ gave way to less rigorous activism.¹³¹ The exercise of judicial discretion in determining the import of "public interest" has rarely been informed by comprehension of the context in which legally articulated problems arise. Moreover, the relative ineffectiveness of the judiciary to resolve the problems brought before it was exposed, as calls for implementation of its orders were repeatedly ignored.¹³² Fears that PIL would undermine judicial authority have been partly realised, as many have been disillusioned by the experience of using PIL.

Towards a Definition

The vast range of issues and the numerous procedural changes led Marc Galanter to describe cases of the early 1980's, that sought to actualise the promises of justice in the Constitution, as "a series of unprecedented and electrifying initiatives".¹³³

Order D/-19/11/86 by Chief Justice P N Bhagwati in *Bihar Legal Support Society v Chief Justice of India* (1986) 4 SCC 767 at 769.

¹³⁰ He wrote:

the results of SAL irritate the Big Men. No matter how irate (as was Jagannath Mishra, the Chief Minister of Bihar, on the Supreme Court's swift probe in the Bihar Blindings), they cannot so easily manipulate public opinion in their favour as the court.

Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Baxi, Upendra (ed) (1988), 387-415 at 408.

¹³¹ For his vision of an activist judge, see Baxi, Upendra (1987) at 173.

¹³² For example see *Bandhua Mukti Morcha op cit* note 13 and the petition later filed asking the Court to ensure the implementation of its earlier directions, *Neeraja Chaudhary op cit* note 30. For a discussion of implementation, see the discussions of 'The Contribution of PIL' in chapters three and four, and chapter seven.

¹³³ Galanter, Marc, 'The Changing Legal Environment and the Prospects of the Strategic Use of Law by India's Disadvantaged', (A Report to the Ford Foundation, New Delhi, 20/9/89) at 2.

While avoiding the need for a rigorous definition, he described the aim as seeking to “use judicial power to protect excluded and powerless groups (like prisoners and migrant laborers) and to secure entitlements that were going unredeemed”.¹³⁴

Defining the cases in terms of procedure is relatively unproblematic.¹³⁵ Procedural characteristics that help to identify a PIL include *locus standi*, the method of filing the petition, the availability of an accessible alternative forum/remedy, a conciliatory procedure in the courtroom, an expansion of the scope of the litigation and innovations in the nature of the directions given.

A greater dilemma arises when the issues addressed are analysed. Interviewed in 1992, Justice Bhagwati described two kinds of PIL that were to be found in the Indian courts:

The first is the one I developed, for weaker sections. This is the one which fascinated me. It was for vulnerable groups who for lack of awareness, resources etcetera were deprived access to justice. This was not PIL but SAL because it was intended to promote social action amongst the target groups. In this way it differed from PIL. The other form of PIL is Public Interest causes like in the US, England and anywhere else. For example, in S P Gupta's case where the independence of the judiciary was threatened. Unlike this SAL was meant for enforcement of collective rights of classes of people and groups. Ordinary procedure cannot do justice to these kinds of problems.¹³⁶

The parameters of what constitutes public interest have nowhere been defined for the purposes of PIL,¹³⁷ with the exception of the disparate category of issues that were included in the PIL guidelines of the Supreme Court.¹³⁸ The judges, at the apex of the hierarchy of gatekeepers to the Court, have neither constructed a definition, nor have

¹³⁴ *Ibid.*

¹³⁵ The problems that do arise have been discussed in the relevant sections, above.

¹³⁶ Justice P N Bhagwati, interview, New Delhi, 15/4/92.

¹³⁷ See Jain, D C, 'The Phantom of "Public Interest"', (1986) 3 SCC (J) 30 at 31.

¹³⁸ See chapter five and Appendix B for a full listing of the guidelines.

they adhered to a uniform cognition of the public interest.¹³⁹

More profound are the problems that attend any discussion why, and for whom PIL was evolved. It is at this point that Upendra Baxi's objection to the meaning implied by PIL, as opposed to SAL, is most instructive. When viewed from the perspective of social activism, and the urge to provide justice to indigent groups, then the actual scope of PIL has ventured far from SAL. Rajeev Dhavan has further narrowed the definitional paradigm:

public interest law is part of the struggle by, and on behalf of, the disadvantaged to use 'law' to solve social and economic problems arising out of a differential and unequal distribution of opportunities and entitlements in society. In an effort to procure 'justice between generations' it is also concerned with preventing the present and future needless exploitation of human, natural and technological resources.¹⁴⁰

He then stipulated that public interest law can only be described as such when it is conceived not just on behalf of the disadvantaged but with their involvement.¹⁴¹ The use of law in the public interest is therefore defined not just by the content/intent but also by the mobilising potential of using law, and the kind of legal services provided.

Calling SAL 'creeping' jurisdiction, Upendra Baxi noted that few SAL matters had resulted in a final verdict.¹⁴² Because this creeping jurisdiction gradually

¹³⁹ See *Life Insurance Corporation of India v Escorts Ltd. and others* (1986) 1 SCC 264 at 274. It is interesting to note that in the order of the Madras HC in 1994 in a case on wetlands, Justice Kanakaraj held:

it is not a public interest litigation in the strict sense of the term. This is a case initiated by a Consumer Action Group strictly for the purpose of protection and improvement of human environment.

without elucidating the parameters of PIL. *Consumer Action Group v Union of India and others* as discussed in 'Environment and Resources' in chapter four.

¹⁴⁰ Dhavan, Rajeev, 'Whose Law? Whose Interest?' in Cooper, Jeremy and Dhavan, Rajeev (eds) *Public Interest Law*, (Basil Blackwell, Oxford, 1986), 17-48 at 21.

¹⁴¹ *Ibid.* at 21, italics in original.

¹⁴² Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Baxi, Upendra (ed) (1988), 387-415 at 401.

takes over the role of the administration in a particular arena,¹⁴³ he prescribed that:

It is the task of the SAL entrepreneurs to ensure that these issues are ultimately reached with the desired results¹⁴⁴

However, the what is desired varies as the articulation of concern for the 'public interest' has varied greatly amongst the vast array of petitioners who approach the court, as amongst the lawyers, the judges, the media and between/within political parties, according to their perspectives and priorities. A notion of the public interest as a homogeneous and intelligible goal has proven to be fallacious. The cases in this thesis are thus selected for discussion using the Court's own definitions of PIL.

Some definitional parameters can be established. PIL is a form of litigation which differs from ordinary litigation on two fronts: the manner in which the petition is brought to court and the subject matter of the petition. The petition is usually filed as a representative action, and access to justice is facilitated. The treatment of the petition in Court often departs from the strict adversarial procedure, for example by the appointment of independent commissions of enquiry for fact finding, by monitoring the case, by the expansion of the litigation or by the directions given. The proceedings are often monitored by the courts which may ask for periodic reports to enable it to keep abreast of the results of orders. The relief sought may involve a large body of people, and is not for specific benefit of the petitioner. The nature of the relief asks the Court to consider those disempowered by the political, administrative and legal process.

In practice, since it was first evolved, PIL has extended beyond these parameters, as cases involving a myriad of broad 'public interest' issues have come

¹⁴³ Baxi uses the provision of medical attention to blinded undertrials and the improved conditions in Agra and Delhi Protective Homes for Women as examples (see the Khatri and Upendra Baxi v. State of U.P.). There are many such examples of the administration by the court, together with cases in which the court has taken on the character of a legislative body. When speaking to Lotika Sarkar, co-petitioner in the Agra Protective Homes case, in early 1991, new concerns created by the this creeping jurisdiction become apparent. Once a final judgement is delivered, the fear expressed was that the situation in the home may revert to that which existed prior to monitoring by the court.

¹⁴⁴ Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Baxi, Upendra (ed) (1988), 387-415 at 401.

within the scope of this litigation. In the following two chapters, the cases discussed include those that defy even a broad definition of PIL, despite having been described as such by judges or petitioners. Nonetheless, the judicial process has been realigned to accommodate social justice considerations, but only within PIL. This new form of litigation has become an increasingly attractive option, in the midst of awkward and lengthy legal proceedings for other forms of litigation. While it may have been SAL that the judges and petitioners of the early 1980's intended to introduce, it is the broader remit of PIL that has gained popular credence.

Chapter Three - Case Studies #1

Cases are discussed in the following two chapters according to issues rather than legal doctrine or a particular time period. As issues were the initial mobilising principle for the use of PIL, they are used as the focal point for the analysis.¹ Most of the cases discussed in this chapter are concerned with the disadvantaged/deprived and marginalised/excluded (see chapter one). Most of the cases through which PIL was introduced in the Supreme Court and High Courts are found in this chapter, with some exceptions in chapter four. The analysis begins with petitions filed on 'Prisons and State Institutions', the concern of the first PIL petitions heard. 'The Armed Forces' are then considered, to give an overview of issues raised and the response of the Courts to the agencies of law and order. As 'Injustices Specific to Women' were amongst the issues to gain prominence by the early 1980's, they are discussed next. Analysis of cases relating to 'Children' cover a range of issues, salient to the other sections in this chapter, is followed by an evaluation of the litigation on 'Labour' and 'Bonded Labour'.

Each of the issues is analysed in the same, that is linear, manner. After a discussion of the context in which each injustice arose, and of its articulation in law, are sections evaluating 'Access to Justice', 'The Court's Response' and 'The Contribution of PIL'. The only exception to this is the section entitled 'Judges, Courts, Lawyers' in chapter four, as many of the cases relate to the judicial process and cannot be analysed in the same terms as other PILs. A brief account of the methodology used to research the thesis is given before the case studies.

¹ Included amongst the cases are numerous documents, including unreported court orders, which are only available in India. These can be found in Ahuja, Sangeeta (1995).

Methodology

While the documents of reported cases were easily available, they did not entirely answer questions about who was using law, why and with what results. Using the reported cases as a starting point, fieldwork began with a list of petitioners, advocates and judges who had been involved in PIL. Initially, it was envisaged that the thesis would be concerned, primarily, with petitions filed for the marginalised and excluded.² However, the range of issues and the breadth of discussion, prompted flexibility in research strategy and analysis, whilst the first three categories of cases defined in chapter two remained the focus of fieldwork. The following is a brief survey of the varied aspects of field research, conducted during a total of 26 months in India.³

PIL has not been confined to the Supreme Court in Delhi: research was conducted in several states: Haryana, Gujarat, Maharashtra, Rajasthan, Karnataka, Tamil Nadu, Madhya Pradesh, Assam, Meghalaya, Himachal Pradesh and Kerala. These states were chosen as the northern/central states were relatively well represented in cases to the Supreme Court.⁴ The single most important aspect of methodology were insights from conversations and interviews that were to equip me with the information and penetration necessary to situate the personalities involved in PIL and the particularities of the political context and legal culture. Initially, academics were

² See the discussion of issues in chapter two.

³ The Economic and Social Research Council generously sponsored two fieldtrips; the first from December 1990 to March 1991, and the second from January 1992 to April 1992. I then lived in India from October 1992 to May 1994, having received a Ford Foundation grant to write a casebook on PIL.

⁴ For example, many of the reported cases on prisons related to Bihar. Moreover, discussions indicated that the Patna High Court was not sympathetic to social justice considerations, and that therefore PIL was not flourishing. Conversely, the relatively few reported cases from the Supreme Court concerning Kerala and the abundance of High Court cases reported in Kerala Law Times (KLT) and Kerala Law Journal (KLJ), and informed the decision to research there.

the focus of research.⁵ Discussions ensued with Judges, lawyers, court administrators, bureaucrats, librarians, editors of law reports and a wide variety of petitioners including social and political activists, and journalists.

During a three month period from January 1991 to March 1991, eighteen of the twenty-four judges sitting on the Supreme Court were interviewed.⁶ Much of the response to these semi-structured interviews was rhetorical, but perspectives on PIL were instructive and insight was gained into the issues of concern within the Supreme Court. In addition, interviews with retired Supreme Court judges⁷ and sitting judges of High Courts continued throughout the period of research. Research in the courts extended to the Registries where PIL is managed and significant discretion exercised.⁸

Discussion with lawyers and visits to Non-Governmental and Voluntary Organisations were both demanding and rewarding. Some were reluctant to engage with a researcher from abroad whose motivations appeared obscure. Research findings in the thesis are reflected by the experience of conducting research. Suspicion of the researcher is justifiable when asking politically sensitive questions. Ambivalence about foreign funding (see chapter six) is easily projected onto the recipient of foreign funds. The relevance of academic research in the face of widespread violations of rights which require urgent action, is difficult to recognise.

There are still many gaps in the research. It had originally been planned

⁵ During fieldwork I was to discuss PIL with academics in the Indian Law Institute, the University of Delhi, the Institute of Advanced Legal Studies in Pune, the National Law School University of India in Bangalore, Cochin University and University of Gujarat, amongst others.

⁶ References and quotations have been given in code, to protect the confidentiality of the interviewees.

⁷ Including Justice V R Krishna Iyer, Justice P N Bhagwati and Justice D A Desai.

⁸ See 'Administering Justice' in chapter five. During my first fieldtrip, I visited the High Court in Ahmedabad, Gujarat, but did not call upon the Registry - I was only subsequently to realise the vital insight that could be gained from analysing the role of the administration of the Court in the management of PIL.

that a few cases would be studied in their entirety, accounting, first-hand, for the perspective of the potential beneficiaries of PIL.⁹ This was not possible because those beneficiaries who were accessible work with or have links with organisations, are a small minority, and cannot be taken as a sample.¹⁰ Other insoluble difficulties were encountered, such as differences in language. To include potential beneficiaries into the ambit of research would have required much unstructured and relaxed discussion time and could not be combined with research in the offices of busy lawyers, a heavy schedule of appointments and the need to be near a telephone for repeated return calls. I have had to rely on discussion with other participants in PIL or on other written studies for this aspect of research. Limitations inherent in the conduct of research are illustrated by the letters I sent to all the regional editors of the All India Reporter - only one reply was received from Goa.

The division of the cases in chapters three and four into issue-based sections is itself a product of field research. Whilst commonalities do exist between the cases, as already seen in the general categorisation of cases (see chapter two), the differing legal management of issues is of central concern. Conspicuous by its absence is a section discussing cases filed for tribal and “untouchable” peoples. Recognised as constituting the most disadvantaged groups of people, they are the easiest people to displace and to harass. PIL seems to be ideally conceived for people who have rarely been able to approach the courts themselves. There is no separate chapter because there is no one story. Grouped together under the official descriptions “Scheduled Caste”, “Scheduled Tribe” and “Other Backward Classes”, the people who constitute

⁹ This reflects Bryant Garth's conclusion, after a study of class actions in the USA, that there is a need to consider:

not just what happens in lawyers' offices and courts, and not just the results, but also the complex situation of the persons whose statuses are constructed and lives inevitably affected by the filing and conduct of litigation.

Garth, Bryant, 'Power and Legal Artifice: The Federal Class Action', *Law and Society Review*, Vol 26 No 2, 1992, 237-271 at 269. Some aspects of this are presented in the case studies.

¹⁰ Accessibility was limited partly because the constant flux in the labour market encourages migration, and documentation of residence and workplace are rarely kept, in the few occasions that such documents had existed.

these groups could not be more diverse.¹¹ The case chapters are riddled with cases relating to tribal peoples.¹² One study of bonded labourers put the percentage from scheduled castes and tribes at 86.6%.¹³ The cases relating to slum dwellers, prisoners, and those displaced by development projects, are examples of in which scheduled castes and tribes have a disproportionately high stake.¹⁴

Prisons and State Institutions

The duty of the State to ensure the well-being of those in its care is nowhere more apparent than in relation to prisons and other state institutions. Removed from the rest of society, as a punishment, for protection or for care, the inmates of such institutions are dependent upon the State for all aspects of their life. It is because the State has failed to treat such people with a semblance of dignity that these cases have come before the Court. Cases relating to prisons and prisoners, mental health and detention,¹⁵ hospitals¹⁶ and institutions for women¹⁷ all reveal a

¹¹ The term “scheduled” refers to the schedule in the constitution in which the designated communities are listed.

¹² I use this terminology not to create the sense that all “tribal” people display similar identifying characteristics, but because this is the term used in many of the petitions and judgments.

¹³ Marla, Sarma *Bonded Labour in India: A National Survey on the Incidence of Bonded Labour, Final Report, January 1981* (Academy of Gandhian Studies, Hyderabad, 1981).

¹⁴ In addition to those documented, many other cases have been filed. For example in the Kerala High Court on behalf of people from the Kuchar community in the Kelakam-Kannur whose person and property had been attacked at the behest of local landlords, after allegations of theft of some arika nuts had been denied. A X Verghese, advocate, interview, 8/93. Another case was filed on behalf of people from the Irula community, traditional snake catchers who extract snake venom for a serum. The petition challenged the imposition of a royalty on the income made from the serum. Sriram Panchhu, advocate, interview, Madras, 4/93.

¹⁵ *Rudul Sah v State of Bihar* AIR 1983 SC 1086; *Veena Sethi v State of Bihar and others* (1982) 2 SCC 583; *Sant Bir v State of Bihar* 1982 (1) SCALE 144 [668]; *B R Kapoor and others v Union of India and others* AIR 1990 SC 752; *S P Sathe v State of Maharashtra*; *Rakesh Chandra Narain v State of Bihar* 1986 (Supp) SCC 576, AIR 1989 SC 348 and 1993 (4) SCALE 103 [509]; *E Chidambaram v State of Bihar*; *People's Council for Social Justice and others vs State of Kerala*; *Sheela Barse v*

common concern.¹⁸ Various strands of concern can be identified including the long pendency of criminal cases,¹⁹ the use of fetters, handcuffs and solitary confinement,²⁰ torture,²¹ the exploitation of prison labour,²² conditions in prisons,²³ the courts' concern that the petitioners approach an appropriate forum,²⁴ access to prisons,²⁵ sentencing, detention and parole.²⁶

Union of India and another (1993) 4 SCC 204.

¹⁶ *Free Legal Aid Committee, Jamshedpur v Mahatama Gandhi Memorial Medical College Hospital, Sakchi, Jamshedpur* 1987 (1) SCALE 327 [1321]; *Parmanand Katara v Union of India and others* AIR 1989 SC 2039; *Siddha Raj Dhadda v State of Rajasthan* AIR 1990 Raj 34; *E Sharma v State of Assam and others* AIR 1992 Gau 58; *Social Action and Legal Aid Society v State of Kerala and others; Paschim Banga Khat Majoor Samity and another v The State of West Bengal and another; Niamathulla v State of Kerala* 1992 (2) KLT 699; regarding a diagnostic clinic for CT scanning; *C V Sathyan v State of Kerala & others*.

¹⁷ *Upendra Baxi v State of Uttar Pradesh and another* (Agra protective home) 1982 (1) SCALE 84 [502], (1983) 2 SCC 308 and (1986) 4 SCC 106 / AIR 1987 SC 191; *Vikram Deo Singh Tomar v State of Bihar* AIR 1988 SC 1782; *Chinnamma Sivadas v State (Delhi Admn.)* 1992 (3) SCALE 31 [85].

¹⁸ In the section on 'Children' there are cases on prisons, many of which highlight many of the same issues as those in this chapter.

¹⁹ *Hussainara Khatoon and others v Home Secretary, State of Bihar* (1980) 1 SCC 81, (1980) 1 SCC 81, (1980) 1 SCC 93, (1980) 1 SCC 98, (1980) 1 SCC 108 and (1980) 1 SCC 115; *Kadra Pehadiya and others v State of Bihar* AIR 1981 SC 939; *Mathew Areeparmtil & Ors v State of Bihar & Ors* AIR 1984 SC 1854 / 1984 (2) SCALE 85 [402]; regarding conditions in Aizwal Central Jail.

²⁰ *Prem Shankar Shukla v Delhi Administration* (1980) 3 SCC 526; *Kishore Singh Ravinder Dev etc. v State of Rajasthan* AIR 1981 SC 625; *Aeltemesh Rein v Union of India* (1988) 4 SCC 54.

²¹ *Sunil Batra (II) v Delhi Administration* (1980) 3 SCC 488; *Rakesh Kaushik v B L Vig, Superintendent, Central Jail, New Delhi and another* AIR 1981 SC 1767; *Anil Yadav and others v State of Bihar and others* 1982 (1) SCALE 43 [278] and (1981) 1 SCC 622; *Khatrri and others v State of Bihar and others* (1981) 1 SCC 623, (1981) 1 SCC 627, (1981) 1 SCC 635, (1981) 2 SCC 493 and 1983 (2) SCC 266.

²² *In the matter of: Prison Reforms Enhancement of Wages of Prisoners etc* AIR 1983 Ker 261; *Poola Bhaskara Vijayakumar v State of Andhra Pradesh and another* AIR 1988 AP 295; *Gurdev Singh and others v State of Himachal Pradesh and others* AIR 1992 HP 76.

²³ Regarding prisoners in Karnataka; a letter detailing conditions in Ranchi Central Jail; *In Re: A Prisoner* 1993 (2) KLT 10; for an inquiry into jail conditions in Srinagar.

²⁴ *In Re the Petitions of Nawal Thakur, a convict kept in the Kulu Jail* (1984) 3 SCC 572.

²⁵ *Sheela Barse v State of Maharashtra* (1983) 2 SCC 96, (1987) 4 SCC 373.

²⁶ *R M Tewari v Home Secretary, State of U P & Ors* 1991 (1) SCALE 71 [249]; *Simranjit Singh Mann v Union of India & Anr* 1992 (2) SCALE 102 [506]; *Karamjeet Singh v Union of India* JT 1992 (5) SC 598; *V J Jayakumar Abraham v State of Kerala & others*.

The first question to be raised when examining how the issues have been framed, is - who has been removed from society and why? The failure of the criminal justice system to dispense justice quickly and the questionable methods by which the mentally unstable have been committed to institutions and jails, has led to a situation where many people have been confined without a valid reason and with little attention paid to their needs. The undertrial (remand) prisoner has been a particular focus in the cases, as many have been detained for lengthy periods, without having their guilt tested. The majority of such inmates belong to economically and socially disadvantaged sections of the population, to scheduled castes and scheduled tribes, easily intimidated and harassed by officials. The second consideration is to examine the conditions of this confinement. Provided with few basic amenities, such as water and clothing, the inmates of State institutions have had to live in appalling conditions. Violent and corrupt, these institutions foster many of the characteristics which initially led to the imprisonment of an individual.

It was investigative journalism that was the catalyst in framing these issues. More and more journalists began to investigate the conditions in jails, exposing the delays in trials, and the incidence of torture and deprivation. These revelations were supported by a series of judgments given by the Supreme Court, mainly by Justice Krishna Iyer, in which the rights of prisoners had begun to be enunciated and criminology discussed in ways that were new to the Court.²⁷ Responding to this situation, petitions were filed by advocates and letters sent to the Court by prisoners and legal aid organisations.

The legal framework governing prisons and other institutions is comprised of old manuals and enactments, for example the Prisons Act, 1894.²⁸ The ethos of punishment as a deterrent, the lack of accountability of the administration and

²⁷ See 'PIL Begins' and 'Gaining Access to Justice' in chapter two for discussion of these cases. Also see Gonsalves, Colin; Desai, Mihir and Cox, Jane, *Leading Cases on Prisoner's Rights*, (A Legal Resource Centre Publication, Bombay, [198?]); Ganesh, M S, 'Public Interest Litigation Concerning Prisons' in Gandhi, P K, *Social Action through Law*, (Concept Publishing Company, New Delhi, 1985), 127-135.

²⁸ Amendments have been made, for example in the Delhi manual which was "modified" in 1988,

the unwillingness to provide prisoners with any facilities has been exacerbated by the overcrowding endemic in jails. The petitions demonstrated how the prison administration, like the criminal justice system, was not functioning correctly, if at all.

Similarly, it was only by the enactment of the Mental Health Act, 1987 that the Indian Lunacy Act, 1912 was superseded. Many “sane” persons were confined, as the separate categories of criminal and non-criminal lunatics were not based on sound criteria and the elaborate procedure for release was prolonged by a mal-functioning administration. Much the same situation has existed in hospitals and institutions for women. It is government-run institutions, established for the care of those unable to afford private facilities, or without a family willing or able to impart the necessary care, that have been the subject of petitions.

Access to Justice

As prisons and prisoners were the subject of the first PIL matters, the Court can be seen taking its first tentative steps in broadening the scope of its jurisdiction and relaxing procedural barriers. Access to justice had been the major obstacle preventing those confined from approaching the Court. By invoking Article 39A of the Constitution and discussing the need for legal aid, the Court responded to the horrific situations brought before it. For the first time, Supreme Court judges conceded that the Court had only concerned itself with a small proportion of the population.²⁹

The first recorded public interest litigation order in the Supreme Court came in a *habeas corpus* case filed by an advocate on the basis of a news report.³⁰ On being appraised of the facts of the case, the Supreme Court relaxed the procedural rule

²⁹ In *Kishore Singh Ravinder Dev op cit* note 20 at 627 Justice Krishna Iyer referred to the elitist strands and lucrative slant of the Court.

³⁰ *Hussainara Khatoon op cit* note 19. Also see the discussion 'PIL Begins' and 'Gaining Access to Justice' in chapter two.

that a *habeas corpus* petition be filed with a power of attorney or by a close relative. The distinction between a letter-petition, which could be sent by an aggrieved individual, and a PIL has never been fully clarified because of the genesis of the letter-petition in *habeas corpus* proceedings. The letter became the key to gaining access to the Court, and often the Court was urged to, and did, give orders covering a whole class, be they prisoners or undertrials. The first PILs were in the form of letters from convicts which departed from the standard plea in *habeas corpus* letter-petitions.³¹ By appointing advocates as *amicus curiae* and directing that legal aid be made mandatory, the Court welcomed the cases brought before it.³²

The common practice of filing *habeas corpus* petitions has continued, but with the exception of the first, notable, cases which pioneered the way for future cases, none have been studied. The mass of litigation on *habeas corpus* matters could itself be the subject of a thesis. The Supreme Court itself has acknowledged its inability to deal with the volume of complaints received, stating that the High Court should first be approached.³³

The *locus standi* of the petitioners in this chapter has rarely been questioned. The marked division between the academics, journalists, advocates or legal aid committees, and the inmates whose rights are in question, has meant that *mala fides* was unlikely.³⁴ Similarly, the justiciability of the issues have been clear in the

³¹ Many letters were sent to individual judges, for example to Justice Bhagwati in his capacity as Chairman of CILAS. One such letter was sent by the Free Legal Aid Committee, Jamshedpur regarding the case of an undertrial inmate of a Bihar Jail who had been waiting for nine years for her trial. The letter told that she had delivered her child in jail and that her son had spent eight years in prison and asked that she be released on a personal bond. See [anon], 'Undertrial Woman in Bihar', *PUCL Bulletin*, Vol 1 No 7, Nov 1981, 30.

³² As in *Sunil Batra (II)* *op cit* note 21, *Gurdev Singh* *op cit* note 22 and *Kishore Singh Ravinder Dev* *op cit* note 20.

³³ In *In Re the Petitions of Nawal Thakur* *op cit* note 24 the Supreme Court considered neither the justiciability of the complaints was not questioned, nor the *locus standi* of the petitioners, when directing the letters to the relevant High Court.

³⁴ In the only case in which the *locus standi* of the petitioners was questioned, *E Sharma* *op cit* note 16, the petition was not concerned with indigence.

light of constitutional provisions. Nonetheless, the Court refused to allow third party interference in death sentence cases on the ground that it was up to the convicted persons to file for themselves.³⁵

Gaining access to the courts may have become easier, but an examination of a case on non-criminal lunatics shows how access has not necessarily been quickly available.³⁶ The letter in question was sent to the Chief Justice of India on 27/1/89, it was received by the Public Interest Litigation Cell of the Supreme Court 16/2/89,³⁷ an office note was put up to Justice G L Oza on 7/4/89 and finally on 11/4/89 it was ordered that the letter be treated as a petition. The arbitrary nature of the procedure for admitting a PIL petition is highlighted, as Justice Oza could have refused to admit the letter as a writ petition had he chosen to take the advice offered by the Registry (see chapter five).

The Court's Response

In many of these cases, the Court has proceeded without an appropriate conception of the context of the grievance. There are only two recorded instances in which a sitting judge has visited a jail to see in person the conditions there. In the first case filed by Sunil Batra³⁸ which was not a PIL, Justice Krishna Iyer visited Tihar Jail, Delhi and in the case filed by Smriti Acharya, two judges of the Mizoram Bench of the Guwahati High Court visited Aizawl Central Jail. Initially, ad-hoc orders were given, with very little rhetoric, unlike those given in other notable PILs.³⁹

³⁵ *Simranjit Singh Mann and Karamjeet Singh op cit* note 26.

³⁶ *Sheela Barse op cit* note 15.

³⁷ For an analysis of the functioning of this cell see Chapter 5.

³⁸ *Sunil Batra (I) v Delhi Administration and others* (1978) 4 SCC 494. In this case the petitioner-prisoner complained of being kept in solitary confinement, while under sentence of death. The Court, in a detailed judgment, discussed jail conditions and the rights of prisoners.

³⁹ For example in *Anil Yadav and Khatri op cit* note 21, both on the same incidents of torture, the Court dealt with the cases separately, giving similar orders, but without linking the two.

The Court's activism in this area has been self-critical, both admitting and depicting the failure of the criminal justice system, a judicially caused failure. By stating that speedy justice is a fundamental right, the Court acknowledged that the rights of undertrials were violated by delays and procedural difficulties.⁴⁰ Moreover the legislative framework in which the Court has had to operate has been criticised, and the Court has noted the need to amend the Prisons Act, 1894 and to overhaul the Prison Manual.⁴¹ However, the Court declined to issue a direction to the State to implement the Mental Health Act, 1987, on the grounds that it was not within the powers of a court.⁴² The activism has been limited in other ways, as there is very little evidence of any action taken against prison administrators, despite the Court's acknowledgement that prison officers responsible for violations of constitutional and statutory rights need to be punished.⁴³

There have been developments in the law relating to prisons. The conditions of confinement of undertrial prisoners were greatly improved as the Court held that they could not be held in fetters or tortured, and relaxed bail procedure. The Court has held that Article 21 of the Constitution incorporated the right to a speedy trial⁴⁴ and in many cases the right to free legal aid was stressed. Although the applicability of Article 23 of the Constitution to prison labour has been considered, no consensus has emerged.⁴⁵ Similarly, the prisoner's right to society and not to be

⁴⁰ In addition to the cases in this chapter, many other petitions have been filed - eg. *Govind Mukhoty v Delhi Administration* (W P No 1119 of 1982) filed in the Supreme Court referring to the conditions under which 35 undertrial foreigners were confined in Tihar Jail, Delhi, and by the PUCL in the J & K HC asking for a list of detainees lodged in various jails. See Imroze, Parvez, 'Srinagar PUCL', *PUCL Bulletin*, Vol 11 No 12, Dec 1991, 16-17.

⁴¹ For example see *Kishore Singh Ravinder Dev op cit* note 20.

⁴² *E Chidambaram op cit* note 15.

⁴³ See *Sunil Batra (II)*, *Anil Yadav* and *Khatris op cit* note 21. In the last reported order in *Khatris*, in 1982, the Court directed that the trial of the police officials must go on speedily. There has been no subsequent reported order stating the results of any trial.

⁴⁴ *Hussainara Khatoon op cit* note 19.

⁴⁵ The exploitation of prison labour was first referred to by the Supreme Court in *Sunil Batra (II) op cit* note 21. See *In the matter of: Prison Reform, Gurdev Singh and Poola Bhaskara Vijayakumar op cit* note 22.

placed, unnecessarily, in solitary confinement was asserted by the Court,⁴⁶ but access to prisons has not been clearly conferred as a right.⁴⁷

While realising the unsuitability of putting “lunatics” and children in prison, the Court has limited its response to condemning such practices and has provided little alternative.⁴⁸ Nonetheless, notable orders have been passed, which have been repeatedly used in later cases.⁴⁹ The procedure for a declaration of sanity has been discussed⁵⁰ and the conditions in institutions for the mentally ill⁵¹ and for women⁵² have been chronicled by the Court. Responding to the inaction of local administrative bodies, control of some institutions has been removed from the local arena,⁵³ and in one case, recognising the treatment of non-criminal lunatics as a national problem, the Court expanded the scope of the case by impleading all states.⁵⁴ For the first time, compensation was awarded for the abuse of a fundamental right,⁵⁵

⁴⁶ *Sunil Batra (II)* *op cit* note 21.

⁴⁷ *Sheela Barse* *op cit* note 25. Also see *Prabha Dutt v Union of India* (1982) 1 SCC 1. Petitions have been filed in the Madras HC challenging the refusal of the Jail Administration in the State of Tamil Nadu to provide facilities to lawyers to meet prisoners and to conduct interviews and challenging the validity of circulars issued by the Inspector-General of Police which stated that lawyers should not be allowed to interview prisoners. The HC passed orders declaring that lawyers should be given all safeguards in conducting confidential interviews with prisoners. S S Vasudevan, advocate, interview, Madras, 4/93.

⁴⁸ In *Kadra Pehadiya* *op cit* note 19 the Court ordered that the undertrials stand trial even though they were only aged between nine and eleven when arrested, and in *Hussainara Khatoon* *op cit* note 19 the Court noted that women were held in “protective custody” in prisons.

⁴⁹ See *Veena Sethi* *op cit* note 15.

⁵⁰ *Rudul Sah* *op cit* note 15.

⁵¹ *Rakesh Chand Narain* *op cit* note 15

⁵² *Upendra Baxi* *op cit* note 17.

⁵³ *B R Kapoor* *op cit* note 15 and *Rakesh Chand Narain* *op cit* note 15.

⁵⁴ *Sheela Barse* *op cit* note 15.

⁵⁵ Although the issue of compensation for violation of Article 21 of the Constitution was raised in *Anil Yadav* *op cit* note 21 and *Khatri* *op cit* note 21, it not until *Rudul Sah* *op cit* note 15 that compensation was awarded. Whilst not a PIL, this case has had seminal importance for PILs filed on many issues.

a practice that was to gain some credence.⁵⁶

Many of the cases on non-criminal lunatics can be described as ideal-type PILs.⁵⁷ From their antecedents and method of gaining access, to the kinds of issues raised, the petitioners brought issues of the disadvantaged and deprived to the Court. The development of these cases in Court has shown remarkable perseverance, given the unresponsiveness of the concerned authorities and the abuses of rights brought to the fore. Commissions have been appointed, enquiries conducted and the cases have been monitored by the judges.⁵⁸

The investigation and monitoring that has been taken on by the Court has been supplemented by the affirmation of the Court's power to intervene and decide with reference to the issue before it. In one case, the Court appointed four separate commissions to monitor implementation,⁵⁹ whilst in another the Rajasthan High Court affirmed its duty to investigate in a case, in spite of being unable to order the Government to constitute a commission of enquiry.⁶⁰ In this context, the Court discussed rules of evidence,⁶¹ and mobilised the media in support of its orders.⁶² Nonetheless, the Court's inability to appreciate poverty is reinforced by an order from Kerala. It was held that even a skinflint could afford the Rs.2 needed for a homoeopathic consultation.⁶³

⁵⁶ In *Paschim Banga op cit* note 16 the Court awarded compensation, while acknowledging that its order may have wide-reaching financial implications.

⁵⁷ *Upendra Baxi op cit* note 17, *Rakesh Chandra Narain op cit* note 15 and *Sheela Barse op cit* note 15.

⁵⁸ For other examples, see *B R Kapoor* and *Rakesh Chandra Narain op cit* note 15.

⁵⁹ *B R Kapoor op cit* note 15.

⁶⁰ *Siddha Raj Dhadda op cit* note 16.

⁶¹ See *Khatrri op cit* note 21 and *Siddha Raj Dhadda op cit* note 16 for a discussion of newspapers as evidence.

⁶² *Parmanand Katara op cit* note 16.

⁶³ *Niamathulla op cit* note 16.

The Contribution of PIL

Violations of rights continue in jail and other institutions under state control. The innovative decisions that have been made have had little lasting effect, with the exception of individual instances of a home or hospital or prison, and the catalytic role of the courts' orders has not been realised. As one petitioner noted, monitoring a case can only affect the situation in one state institution, and described the aim of the case on the Agra Protective Home⁶⁴ as being to find model rules for the whole country:

We were very fortunate with Agra, there has been real progress. The District Magistrate visits the home and reports each month. I never have any regrets about the case. I do have fears, that these injustices will continue. It is not enough because it is just one home in one huge country. The rules need to be accepted state-wise, and we will argue for this in the next hearing. First let them accept it for Agra and then we will ask for U P and the whole of India. There shouldn't be any difficulty. The U P State Counsel thinks it should cover the whole of U P.⁶⁵

However, the case may be finally decided, and the fear remains that the situation will revert to the days before Court intervention highlighted the ineffective, irresponsible and even callous administration.

Certain decisions, because of their more generalised nature, have effected changes in the status of enacted law and procedure. By stating that hospitals cannot refuse to treat "medico-legal" cases, in which injury has to be reported to the police, a new precedent has been set.⁶⁶ However, the Court has often stopped short of giving a meaningful order. For example, the constitutional validity of the Indian Lunacy Act, 1912 has not been considered. A critique of the Court's orders noted that in addition to not examining the validity of the 1912 Act in the context of Article 21

⁶⁴ *Upendra Baxi op cit* note 17.

⁶⁵ Lotika Sarkar, interview, New Delhi, 22/1/91.

⁶⁶ *Parmanand Katara op cit* note 16. See the section on 'Consumer Issues' for: *Cosmopolitan Hospital & Anr v Vasantha P Nair* 1992 (3) SCALE 59 [228].

of the Constitution, there were many other problems. The Court orders focussed on the institution and not on the inmate. The basic reason for the petitions' existence (the violation of fundamental rights) was obscured, and at no point in the litigation did the Court consider the rights of the mentally ill.⁶⁷

After the Bhagalpur blindings, although the police officers concerned were arrested, those who disclosed the facts were victimised.⁶⁸ This resistance of the administration to the problems of the underprivileged was echoed by the Court when adivasi undertrials, after being detained for many years, were warned not to take the law into their own hands and instead to depend on the criminal justice system.⁶⁹ In the absence of an effective legal system, can the Court expect law and order to be upheld? Moreover, the courts demonstrate little awareness of the reasons for resorting to crime, and the criminals, and preventive steps that could be taken.

The difficulties of the petitioners cannot be underestimated. When filing the case regarding non-criminal lunatics in Aizwal Central Jail, one petitioner described how the authorities changed all the figures and details in their documents, that related to the implementation of the 1987 Mental Health Act. She was then threatened with a defamation suit.⁷⁰ One analyst of the cases filed for undertrials in Bihar noted that the official figures available for the number of such prisoners did not reveal the true situation, and that the cases only related to a tiny proportion of the affected people.⁷¹ Again, in the cases on the Bhagalpur Blindings, the State was

⁶⁷ See the discussion of *B R Kapoor op cit* note 15 in Muralidhar, S 'In House and Out Rights: Is institutionalisation subversive of the rights of the mentally ill?', *Legal Perspectives*, No 25, 34-38. Also see Muralidhar, S, "An Empirical Evaluation of the Implementation of the Supreme Court Orders Concerning the Hospital for Mental Diseases, Shahdara, Delhi", (unpublished LLM report, University of Nagpur, 1991). At the time that this analysis was written, although the Mental Health Act, 1987 had been enacted, it had not been notified.

⁶⁸ See Dhagamwar, Vasudha, 'Trends in Public Interest Litigation: Straws in the Wind', monograph, ILS Law College, Diamond Jubilee Volume 1985, 17-25 for a discussion of *Khatari* and *Anil Yadav op cit* note 21.

⁶⁹ *Mathew Areeparmtil op cit* note 19.

⁷⁰ Smriti Acharya, interview, Pune, 4/93.

⁷¹ Dhagamwar, Vasudha (1985).

obdurate in its response:

the Bihar Government adopted an attitude of obstruction if not hostility. Police and jail officials who disclosed the facts were victimised, the press was accused of sensation mongering, and told not to make the police nervous and the people insecure.⁷²

Although some exceptions do exist to the squalid and violent institutions described in the petitions, notably an institution called 'NIMHANS' in Bangalore and Tihar Jail in New Delhi, they are not the norm.⁷³ Little has resulted from the numerous orders given by the courts. Thus, in the introduction to a casebook on prisoners' rights, the cases documented were described as merely of academic interest, or perhaps appealing to "the brooding spirit of law [and] the intelligence of a future day".⁷⁴

The Police

The cases in this section encompass concern for the maintenance of law

⁷² *Ibid.* at 20.

⁷³ See Rahman, M, 'Wages of success', *India Today*, 31/5/95, 42-45.

⁷⁴ Justice Hughes as quoted in Gonsalves, Colin; Desai, Mihir and Cox, Jane ([198?]) at 2. For repeated calls for the implementation of Supreme Court directives see 'Report of a Seminar on "Criminal Justice in India. Problems and Perspectives", 6-8 May 1994, SCOPE Convention Centre, New Delhi', (Law Commission of India, 1994). Although concern was initially articulated on the political arena, when the SC began to give judgments, they seems to be little consequence. See 'Prevention of Delay in putting up Challans of Undertrials in Court', *Lok Sabha Debates*, Series 6 Session 7 Vol 22, 21/2/79, 98-99; 'Steps taken to expedite Court Proceedings in respect of undertrial prisoners', *Lok Sabha Debates*, Series 6 Session 7 Vol 27, 9/5/79, 70-71; 'Supreme Court Directive Regarding Release of Undertrials in States', *Lok Sabha Debates*, Series 6 Session 8 Vol 28, 11/7/79, 162-63; 'Supreme Court Observation in Sunil Batra's case', *Lok Sabha Debates*, Series 7 Session 2 Vol 15, 8/4/81, 165-67; 'Supreme Court observation re. undertrial Prisoners in Jails', *Lok Sabha Debates*, Series 7 Session 2 Vol 12, 19/2/81, 185-6; 'Supreme Court's orders re: release of Tihar Juvenile prisoners', *Lok Sabha Debates*, Series 7 Session 7 Vol 42, 16/11/83, 150-1.

and order (morchas or demonstrations and rallies,⁷⁵ riots,⁷⁶ police protection,⁷⁷ general⁷⁸), petitions filed after the Chief Judicial Magistrate of Nadiad was publicly handcuffed and humiliated by the police,⁷⁹ the incidence of custodial violence,⁸⁰ police firings and deaths in “encounters” with the police,⁸¹ police negligence,⁸² investigations and corruption.⁸³ With the exception of complaints that the police and administration

⁷⁵ *Rupinder Singh Sodhi and another v Union of India and others* AIR 1983 SC 65; *Sankaranarayanan and others v State of Kerala* AIR 1986 Ker 82; *Supreme Court Bar Clerks Association (Regd) v Delhi Administration and others* 1991 (2) SCALE 194 [1042].

⁷⁶ *Rajendran v V Vayalar Ravi and others* 1983 KLT 100 and *T A Rajendran v State of Kerala* 1984 KLT 113; filed by Madhu Kishwar and others on the Delhi riots in 1984; *Peoples Union for Democratic Rights and another v Ministry of Home Affairs* AIR 1985 Del 268; *R Gandhi and others v Union of India and another* AIR 1989 Mad 205 and *State of Tamil Nadu v R Gandhi and others; Nathulal Jain, Advocate and others v State of Rajasthan and others* AIR 1993 Raj 149.

⁷⁷ *Hindustani Andolan and others v State of Punjab and others* AIR 1984 SC 582.

⁷⁸ *P M Antony v Distt. Collector & Ors* 1986 (2) SCALE 290 [1254].

⁷⁹ *In the Matter of Complaint received from Delhi Judicial Service Association Tis Hazari Court, Delhi* 1989 (2) SCALE 119 [654], 1989 (2) SCALE 140 [748] and 1989 (2) SCALE 174 [877] together with *Delhi Judicial Service Association, Tis Hazari Court, Delhi v State of Gujarat and others* AIR 1991 SC 2176.

⁸⁰ *D K Basu v State of West Bengal and Ashok K Johri v State of U P; Social Action and Legal Aid Society v State of Kerala and others; Rajasthan Kisan Sangathan v State of Rajasthan and others* AIR 1989 Raj 10; *SAHELI, a Women's Resources Centre through Ms. Nalini Bhanot and others v Commissioner of Police, Delhi and others* AIR 1990 SC 513; *Peoples Union of Democratic Rights through its Secretary and Anr v Police Commissioner, Delhi Police Headquarters & Anr* 1989 (1) SCALE 114 [599]; *Sunil Gupta and others v State of Madhya Pradesh and others* (1990) 3 SCC 119; *Pratul Kumar Sinha v State of West Bengal; “Re Death of Sawinder Singh Grover”* 1992 (3) SCALE 15 [34]; *Secretary, Hailakandi Bar Association v State of Assam*. Although relating to the Enforcement Directorate and not the police, “*Re Death of Sawinder Singh Grover*” has been included in this section.

⁸¹ *Chaitanya Kalbagh and others v State of U P and others* AIR 1989 SC 1452; *People's Union for Democratic Rights v State of Bihar and others* AIR 1987 SC 355; *P V Kapoor and another v Union of India and another* 1991 (3) Delhi Lawyers 391 (DB); *R S Sodhi, Advocate, People's Union for Civil Liberties v State of U P & Ors* 1991 (2) SCALE 81 [463]; *People's Union for Civil Liberties (PUCL) v Union of India & others; All India Democratic Women's Association v The State of Tamil Nadu and others*.

⁸² *Supreme Court Legal Aid Committee, through its Hon'y Secretary v State of Bihar and others* (1991) 3 SCC 482.

⁸³ *State of West Bengal and others v Sampat Lal* (1985) 1 SCC 317; *Association for Protection of Public Rights and Interest through its Secretary v State of Bihar and others and Union of India and another v Association for Protection of Public Rights and Interest through its Secretary Shri Sachidanand Singh and another; Punjab and Haryana High Court Bar Association Chandigarh through its secretary v State of Punjab and others* 1993 (4) SCALE 147 [636].

has been inefficient in its duty to maintain law and order,⁸⁴ most of the cases document allegations of abuse or misuse of police power.

Members of the police force are considered to hold civil posts, within the meaning of Article 311 of the Constitution. The police force is governed by central Police Regulations, 1943 and local regulations, framed under the Police Act, 1861, which prescribe the internal procedures and disciplinary measures.⁸⁵ In most instances, police powers are determined by the Code of Criminal Procedure, 1973.⁸⁶

The petitioners in the PIL cases filed against the police have largely been advocates and organisations concerned with civil liberties, who, in the absence of another forum have invoked the Fundamental Rights. While accepting the need for a police force, cases have been filed out of concern for the misconduct of those acting to uphold state power, both in negative and positive terms.⁸⁷ The inaction and for tacit complicity of the police during riots has been challenged,⁸⁸ along with the acts committed in the line of duty including “encounters”⁸⁹ and custodial violence.⁹⁰

⁸⁴ For other cases on this issue see the section on 'Bonded Labour' for *Kameshwar Prasad Sharma*, 'Slave President', *Bandhua Mukti Morcha*, Bihar 1983 (2) SCALE 160 [897] and 1983 (2) SCALE 161 [897] in which the Court directed that police protection be provided to the petitioner and villagers. Contrast with the case of *Pradeep Prabhu* in the section on 'Environment and Resources' filed because of police harassment of tribal cultivators, the case of *Self Employed Women's Association and others* in the section on 'Urban Space', filed because of police harassment of vendors and *Janwadi Mahila Samiti and another* (Crl W P No 221 of 1988) in the section on 'Injustices Specific to Women', filed after a woman activist was injured during a demonstration after a police lathicharge.

⁸⁵ Also applicable are the rules made under section 241 of the Government of India Act, 1935 in so far as they are consistent with the Constitution.

⁸⁶ Certain states, such as Nagaland, and areas are exempt from specified provisions of the Code.

⁸⁷ See the section on 'Injustices Specific to Women' for petitions filed complaining of rapes by members of the police: Rameezabee; *P Rathinam v State of Gujarat* 1987 (2) SCALE 317 [1464]; *In the matter of: Judicial Enquiry into Gang-Rape Demanded, and, Concerted Demand for Judicial Probe* (1988) 1 GauLR 489. In *Niloy Dutta v District Magistrate, Sibsagar District* (1991) 2 GauLR 217, the Court issued guidelines on the interrogation of women by the army and police.

⁸⁸ In addition to those documented, a petition was filed in the Supreme Court in 1992 by the PUCL after the Seelampur riots in Delhi.

⁸⁹ During “encounters” with terrorists or secessionist groups, the police have killed people all over the country. In the petitions, these killings have been challenged as unnecessary and described as extra-judicial.

In the petitions on law and order the court has been asked to arbitrate between fundamental rights when a conflict is perceived. While one case argues that the freedom of movement is paramount, another highlights the limitations of the freedom of expression.⁹¹ The difference in the perception of the petitioners displays both the difficulties faced by the administration in the management of public spaces and the limitations placed on dissent.

Detailing encounter deaths in different parts of India, one petition demonstrates how recourse to the law was taken to solve a predominantly political problem, resistance to dissent by the police.⁹² In spite of being discouraged, by Justice Bhagwati, from bringing this issue to the Supreme Court,⁹³ the petition was filed as it was felt there was nothing to be lost by approaching the Courts.

The media has been a catalyst in raising many of the issues. It was after reading of the situation of Sikhs in Coimbatore after the riots in 1984 that an advocate made an enquiry into the matter and a case was filed. Similarly, the petition filed after the Mandal riots by advocate P V Kapoor was motivated by an issue of the video magazine *Newstrack*. The attention given to the Nadiad incident bolstered what was to become one of the seminal PIL cases relating to the police. News reports detailing incidents of custodial violence formed a major part of the petition filed by D K Basu in the Calcutta High Court.⁹⁴

⁹⁰ See the section on 'Prisons and State Institutions' for cases on custodial violence, specifically *Sheela Barse op cit* note 25.

⁹¹ See *Rupinder Singh Sodhi op cit* note 75 and *Hindustani Andolan op cit* note 77 respectively. Also see *Supreme Court Bar Clerks Association op cit* note 75.

⁹² *Chaitanya Kalbagh op cit* note 81.

⁹³ One of the petitioners described how he, Rajni Kothari and Claude Alvares had gone to see Justice Bhagwati at the insistence of Ganshyam Pardesi. K Manoharan, interview, Madras, 13/4/93.

⁹⁴ Even the *Supreme Court Legal Aid Committee op cit* note 82 petitioned the Court in response to a newspaper article.

Access to Justice

Media attention on the issues brought to the Court has enabled easier access and raised the profile of the issues. For example, the publicity afforded to the devastating effects of riots, police firings and custodial violence have given the petitions a validity that they may otherwise have lacked.⁹⁵ The Court has responded to letters as writ petitions,⁹⁶ but, in view of the PIL guidelines it is unclear whether the petition would have been admitted without the intervention of the Supreme Court Legal Aid Committee.⁹⁷ As in cases in many other sections, the Court refused to consider a specific request that it direct the government to institute an inquiry under the Commissions of Inquiry Act, 1952.⁹⁸

The Court's Response

The variable responses of the courts is illustrated by the orders in the petitions on riots, as each High Court has responded differently. The lack of consistency extends throughout the cases on the police.⁹⁹ Moreover, there is little correlation in the courts' response to the petitions filed on behalf of Sikhs after the riots which followed Prime Minister Indira Gandhi's assassination.

Protecting its own officers and asserting support for its own institution,

⁹⁵ In "*Re Death of Sawinder Singh Grover*" *op cit* note 80 the Court responded to a news report by registering a case *suo moto*.

⁹⁶ For example *Rajasthan Kisan Sangathana op cit* note 80.

⁹⁷ *All India Democratic Women's Association op cit* note 81. For the full text of the guidelines, see Appendix B, and for a discussion see chapter five.

⁹⁸ *Peoples Union for Democratic Rights op cit* note 80. Similarly, in responding to the Nadiad incident, the Court noted that the enquiry ordered had been for the benefit of the Supreme Court and not within the meaning of the 1952 Act. In this way, it was careful not to overstep the prescribed judicial function.

⁹⁹ In *Nathulal Jain op cit* note 76 the Rajasthan High Court dismissed the reference to the Railways Act, 1890, but in *Pratul Kumar Sinha op cit* note 80 the Calcutta High Court invoked the same act to support its direction that a solatium fund be established.

the Supreme Court's response to the Nadiad incident was both detailed and exhaustive.¹⁰⁰ When alerted of the treatment of a Chief Judicial Magistrate, who had been handcuffed, paraded in the streets and photographed, on the charge of having breached the prohibition law in Gujarat, the Court acted with uncommon speed. From the beginning of the litigation, the issue was articulated with reference to the judiciary, rather than as another instance of institutional violence by the police. A series of unusually rigorous and comprehensive orders followed. In October 1989, the Court ordered the transfer of the relevant officers and ordered that a copy of the order be published in the newspaper media. Contempt powers were assumed on behalf of the lower judiciary as the Court upheld the rule of law by the courts in the face of an encroaching "Police Raj". Criminal cases were directed to be lodged against the police officers concerned, who were to be arrested if they failed to appear in Court. Because of the conflict over what had actually happened, a High Court judge was appointed as commissioner to enquire into the matter.

The inclination of the courts to pay specific attention to questions concerning the judiciary is seen repeatedly. After filing a petition on custodial deaths in the Calcutta High Court, advocate D K Basu became a judge of the Court. In a lengthy judgment¹⁰¹ he dealt with questions already raised in his earlier petition, accepted that there is widespread abuse of power by the police, and dwelt on the security of the High Court. Enquiries into incidents of custodial violence have also been ordered in the case filed by Saheli, the Peoples' Union for Democratic Rights¹⁰² and by the Rajasthan Kisan Sangathan, and compensation has been awarded, but there is little evidence of any action taken against members of the police force.

In a number of cases the Court has ordered that a Central Bureau of Investigation (CBI) enquiry be conducted. For example in both the cases filed by the

¹⁰⁰ *In the Matter of Complaint received op cit* note 79.

¹⁰¹ *Pratul Kumar Sinha op cit* note 80.

¹⁰² This was the first case to be heard by the Indian Peoples Human Rights Tribunal, a non-governmental organisation.

Hailakandi Bar Association and by the All India Democratic Women's Association, the Court has expressed its dissatisfaction with the way in which enquiries have been conducted by the state and the police. In both cases fresh enquiries were ordered. However, in other cases, such as the in petition filed by Chaitanya Kalbagh, the Court directed that the petitioners approach the State Governments. However, as respondents to the petition, the State Governments would be unlikely to provide any relief.

Although there is little evidence that the police has been punished for the crimes committed by its personnel, the Court has awarded compensation in many of the cases in this section,¹⁰³ in an ad hoc, if sympathetic, manner. After the award, disbursement of compensation has been more problematic. In some instances, the Court has attempted to ensure that the compensation awarded was actually paid,¹⁰⁴ whilst in another the Supreme Court has stayed the disbursal of the compensation pending an investigation to determine the recipients.¹⁰⁵

The importance of relevant information has been stressed¹⁰⁶ and the Court has questioned the veracity of investigations by the police¹⁰⁷ whilst having to trust and hope in the integrity of the CBI. Corruption in the ranks of the police has thus been underscored by the Courts as much as by the petitions.¹⁰⁸

¹⁰³ See *R Gandhi op cit* note 76, *Rajasthan Kisan Sangathan op cit* note 80, *People's Union for Democratic Rights op cit* note 80, *R S Sodhi op cit* note 81 and the *Supreme Court Legal Aid Committee op cit* note 82.

¹⁰⁴ See *R Gandhi op cit* note 76. However, in the case filed after the Arwal firing, the SC stated that compensation would not be payable and in the petition filed by advocate P V Kapoor, the Delhi HC directed the Delhi police to pay compensation because of the way in which injured persons were treated after the firing, but not for the firing itself.

¹⁰⁵ *R S Sodhi op cit* note 81.

¹⁰⁶ *Social Action and Legal Aid Society op cit* note 80.

¹⁰⁷ *Association for Protection of Public Rights op cit* note 83.

¹⁰⁸ For example, in *Punjab and Haryana High Court op cit* note 83 the Supreme Court ordered a CBI enquiry because of the alleged inefficiency of the police.

The Contribution of PIL

Some instances of the abuse of police powers have been acknowledged by the courts and compensation awarded to the victims. However there are many examples of cases where the Court has refused to recognise police transgressions. Overall there has been an unwillingness by the courts to make police officers into adversaries. Cases have remained pending and the courts have not monitored the proceedings taken against police officials. The nexus between the police and the judiciary, as parts of the same state structure can be seen in cases where the powers of the police have been upheld, directly or tacitly.¹⁰⁹ It is only in the lengthy judgment given by Justice D K Basu, a judgment which was subsequently stayed, that efforts were made to include voluntary or social action groups in ensuring the safety of those in custody, and the pivotal role of the lawyer was recognised, when they were described as the saviours of the victims of custodial violence.¹¹⁰

Compensation awards have often been arbitrary and disbursement has been erratic making orders of the Court meaningless. It was only when the judiciary itself was threatened by the police, by the Nadiad incident, that police officials were punished by the Supreme Court. Unlike any other case of police excesses, the Court ordered the punishment of the police officers concerned and issued guidelines for the arrest of any judicial officer.¹¹¹ As with the orders in the previous section on 'Prisons and State Institutions' there have been no amendments in the laws governing police behaviour and no limitations prescribed for the exercise of police power.

¹⁰⁹ See *P V Kapoor op cit* note 81 and *Chaitanya Kalbagh op cit* note 81.

¹¹⁰ *Pratul Kumar Sinha op cit* note 80.

¹¹¹ *In the Matter of Complaint received op cit* note 79.

The Armed Forces

Most of the cases relating to the armed forces are concerned with battalions stationed in areas of the north-east.¹¹² The first section details challenges to the constitutional validity of the Assam Disturbed Areas Act, 1955 and the Armed Forces (Special Powers) Act, 1958,¹¹³ the second details the three petitions and some of the many applications filed in the Guwahati High Court after the army operation in Oinam village, Senapati District, Manipur called “Operation Bluebird”,¹¹⁴ and a disparate collection of cases.¹¹⁵ Although there have been cases from other areas of the country where the army has been deployed, information on these has not been readily available. In addition to the cases appended to this section, petitions have been filed in response to rapes allegedly committed by members of the armed forces in the

¹¹² Interviews were conducted and case material collected during fieldwork in Guwahati and Shillong in June 1993.

¹¹³ *Inderjit Barua v State of Assam and another* AIR 1983 Del 513; *Human Rights Forum, Manipur & another v Union of India*; *Naga People's Movement for Human Rights v Union of India*; *People's Union for Democratic Rights (PUDR) v Union of India*; *People's Union for Human Rights (represented by Ramesh Kumar Jain and others) v Union of India and others* AIR 1992 Gau 23; *Editor, “Boodhbar” v Union of India and another*. The challenges to the 1958 Act by the People's Union for Democratic Rights (PUDR), the Naga People's Movement for Human Rights (NPMHR), Inderjit Barua and the Manipur Human Rights Forum have been pending in the SC since 1983 and are due to be listed before a constitutional bench. The appeal filed by the People's Union for Human Rights (PUHR) has been tagged onto these petitions, together with that filed by the Editor “Boodhbar”, which was tagged onto the PUHR petition.

¹¹⁴ *Naga People's Movement for Human Rights (NPMHR) v Union of India and others* AIR 1990 Gau 1; *Civil Liberties and Human Rights Organisation (CLAHRO) v State*; *Manipur Baptist Convention and another v Union of India and others*. The petitions were tagged together by the High Court for final hearing. Members of the NPMHR and the Manipur Baptist Convention Women's Union (MBCWU), the petitioners in two of the cases, formed a common platform, the Co-ordinating Committee on the Oinam Issue (COCOI), along with others, from which they were able to deal with issues of concern to all the groups.

¹¹⁵ Included in this section are *Sebastian M Hongray v Union of India* AIR 1984 SC 571 / 1984 (1) SCALE 106 [629] and AIR 1984 SC 1026; two cases with the cause title *H N Wanchoo v State of J & K*; a petition filed by the PUCL in *J & K*; another case with the cause title *H N Wanchoo v State*; *Gautam Uzir v State of Assam and others*; cases from Mizoram: *C Thangmura v Union of India*; *People's Union for Civil Liberties (PUCL) v Union of India and others*; *Vanlalhruala, Chairman, Aizawl Bazar/Town Damaged Committee v Union of India*.

north-east¹¹⁶ and to prevent women from being abused in custody or during interrogation¹¹⁷ and the detention of children.¹¹⁸

A survey of the relevant statutory law reveals the extent of the powers conferred on the armed forces in the north-east. Both the Assam Disturbed Areas Act, 1955 and the Armed Forces (Special Powers) Act, 1958 give wide ranging powers to the army. The term “disturbed area” is not defined and protection is afforded to those acting under the Acts. Similarly, members of the Assam Rifles, one of the major battalions of the army stationed in the north-east, have been empowered by the Assam Rifles Act, 1941 to act in place of the police. The Assam Disturbed Areas Act, 1955 was enacted to make better provision for the restoration and maintenance of public order in those areas of Assam considered to be disturbed.¹¹⁹ With the division of the State of Assam, the Act has subsequently been adopted by other states, including Nagaland and Meghalaya. The Armed Forces (Special Powers) Act, 1958, as amended in 1972 and 1986, empowers the Governors of the States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura to declare any area within their state to be a “disturbed area”, as protection against internal disturbance.¹²⁰

¹¹⁶ For example, see the section on 'Injustices Specific to Women' for *All India Democratic Women's Association and another v State of Tripura and others*.

¹¹⁷ In addition to the Supreme Court order in *Editor, "Boodhbar" op cit* note 113, which has been included in the section on challenge to enactments, and duplicated in the section on 'Injustices Specific to Women', the order of the Guwahati HC in the *Niloy Dutta v District Magistrate, Sibsagar District* (1991) 2 GauLR 217 has only been included in the chapter on 'Injustices Specific to Women'.

¹¹⁸ See the cases on 'Prisons' in the section on 'Children' for *Kamaladevi Chattopadhyay v State of Punjab and another* AIR 1984 SC 1895.

¹¹⁹ Section 3 confers powers on the state government to declare areas to be “disturbed areas”, Section 4 confers powers to fire upon person contravening certain orders, for the maintenance of public order, Section 5 confers powers to destroy arms, fortified positions and hideouts and Section 6 provides for the protection of persons acting under sections 4 and 5 by specifying that:

No suit, prosecution or other legal proceeding shall be instituted except with the previous sanction of the State Government against any person in respect of anything done or purporting to be done in exercise of the powers conferred by section 4 and 5.

¹²⁰ Section 3 confers the power to declare areas to be disturbed areas, if an area is:
in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary.
Section 4 confers special powers on the armed forces, including the power to use force against persons

In the north-east these enactments have been used by the State in aid of the civil power in sensitive border areas to protect national security, and manage the problems raised secessionists demands, corruption, tribal identity and the influx of people from outside the area, in particular refugees from Bangladesh. The increased army presence and inability of people in the area to vent grievances against army personnel, has led to the use of the writ jurisdiction of the High Court.¹²¹ The constitutionality of both the 1955 and the 1958 enactments have been challenged in petitions filed by human rights organisations and individuals in the Guwahati High Court.

Writ petitions have been filed in response to specific occurrences. In July 1987, the Assam Rifles Camp at Oinam village, Senapati District, Manipur, was attacked by certain unknown persons, believed to be members of the National Security Council of Nagaland (NSCN), an organisation committed to the secession of Nagaland from the Union of India. Nine soldiers were killed, three others were seriously injured and a large quantity of arms and ammunition was stolen. In response, the Assam Rifles launched 'Operation Bluebird' to recover the arms and ammunition. The petition contended that the army operation was begun even though the FIR, reporting that arms had been looted, was not filed until a week after the attack, and described the three month "reign of terror" that was unleashed in Oinam and the surrounding areas.¹²²

or places, to enter and search without warrant and, in section 4(c):

arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;

Section 5 specifies that arrested persons are to be made over to the police with the least possible delay, Section 6 provides protection to persons acting under Act:

No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

¹²¹ See Luithui, Luingham and Haksar, Nandita, *Nagaland File*, (Lancer International, New Delhi, 1984) for a study of the political situation in Nagaland, from the perspective of the petitioners. Both authors were members of the Naga People's Movement for Human Rights, an organisation that declared itself to be committed to the secession of Nagaland from the Union of India in 1993.

¹²² Included in the contentions were claims that in the course of just a few weeks fifteen people were shot dead after being subjected to torture; that all the villagers, including pregnant women, the sick, and paralysed persons were made to stand for months in playgrounds exposed to torrential rains and scorching heat; that six babies died, as did many others; that hundreds were beaten; that people

Moreover, it was alleged that the army had taken over the civil administration, and had arrested government personnel, including the District Collector. The petitions filed asked the Court to strike down the enactments, to vindicate the rights of the people, provide compensation and punish the guilty men.

As those challenging the legitimacy of State power do so with a particular vision of civil society, and at considerable personal risk, the network of human rights activists is connected throughout the region.¹²³ Most of the petitions are also connected in some way, and the court orders received in one case, have informed and determined the content of other petitions filed. Care has been taken to frame petitions carefully and in detail so as to ensure that the case will be given due consideration by the Court.

Access to Justice

The standing of the petitioners to bring issues, relating to army powers, before the courts has not been questioned at all. Mostly filed with the help of a supportive advocate,¹²⁴ or by advocates themselves,¹²⁵ the grievances were framed for adjudication by the Court and in a form acceptable to it.¹²⁶ Access to justice issues were raised, when the Naga People's Movement for Human Rights asked the Guwahati High Court to prevent the Assam Rifles from prolonging the procedure for the

were subjected to the many kinds of torture and degradation; that labour was extracted from the residents of the area; that women were raped and assaulted.

¹²³ Fieldwork led to extensive discussion with members of Manab Adhikar Sangram Samiti and with NPMHR, PUHR, PUDR and PUCL activists, all of whom knew one another's work and provided the others with support when necessary. Inevitably, factions had also arisen because of the differing approaches to political action, and interpersonal relationships.

¹²⁴ For example, the petitions filed by the NPMHR were compiled with the support and efforts of advocate Nandita Haksar.

¹²⁵ For example, the PUHR membership was de facto confined to lawyers.

¹²⁶ The petition *Editor, "Boodhbar"* op cit note 113 contained detailed legal submissions referring to national and international law.

provision of legal aid, and another petitioner noted that rich and powerful petitioners had been able to get legal redress.¹²⁷ Nonetheless, there was one instance of a telegram being registered as a petition in the Guwahati High Court during the proceedings of the case filed by the *Manipur Baptist Convention Women's Union*.¹²⁸

The Court's Response

The petitions filed challenging enactments were pending in 1995, as are those filed on the Oinam Issue. In the only order given regarding the constitutional validity of an enactment, the Delhi High Court upheld the Assam Disturbed Areas Act, 1955.¹²⁹ Although pending in appeal in the Supreme Court, the order in this case has prevented other petitions from being filed in the Guwahati High Court challenging the constitutional validity of this enactment, and has therefore created fissures between human rights activists in the region, as many felt that the petition was neither framed nor argued with enough care.

The Oinam litigation has been protracted by the procedure of hearing evidence and the miscellaneous petitions filed by the Assam Rifles during the pendency of the petitions.¹³⁰ The Guwahati High Court refused to accept newspapers as evidence as they had not been verified by the journalists concerned, possibly because of the politicisation of the print media, and the Court contradicted itself on the criteria for the institution of an enquiry by the Court.¹³¹ It was in one of the appeals from the

¹²⁷ *Vanlalhruala op cit* note 115.

¹²⁸ *Op cit* note 113.

¹²⁹ *Inderjit Barua op cit* note 113.

¹³⁰ *Naga People's Movement for Human Rights and Manipur Baptist Convention op cit* note 114.

¹³¹ In an order D/-15/12/87, after rejecting the newspaper evidence, Justice Hansaria concluded, at 15:

There is no doubt in our mind that in a case of the present nature, we would be justified in ordering enquiry only on existence of two conditions: (i) compelling circumstances; and (ii) full satisfaction about establishment of a *prima facie* case relating to violation of fundamental rights. This apart, an enquiry to be ordered by us cannot be omnibus; it has to be

High Court's order in this litigation that a short, but important, judgment was given by the Supreme Court which tacitly acknowledged the excesses committed by the armed forces.¹³² This order has been widely referred to in the Oinam cases and provided a point of reference when the case was taken to the United Nations.¹³³

Only one *habeas corpus* petition has been included in this section - that filed by Sebastian Hongray, complaining that two people had been abducted by the armed forces.¹³⁴ The importance of this judgment to PIL has been great, and it has been referred to in numerous other cases.¹³⁵ Exemplary costs were awarded and the Court held the respondents in civil contempt of court. Tentatively reacting to petitions filed in the Jammu and Kashmir High Court, including those relating to extra-judicial

confined to specific act(s). Further, it has to be by a person, body or agency which commands confidence of both the sides. Though the first condition seems to exist in the present case, we are not satisfied, in view of our aforesaid analysis of the materials on record, about the existence of the second of the aforesaid conditions. We have pointed out about the dearth of materials put on record which is in sharp contrast with those supporting the case of respondents No.1 and 2. The prayer for enquiry is therefore presently rejected.

Justice Sangma reinforced this conclusion:

the State of Manipur stated ... that the Government has directed the district administration to assess the alleged damages to the property etc. and that the report thereof was being awaited. I believe that by the word "etc" they mean to include the alleged excesses to the lives and limbs of innocent people.

¹³² Editor, "Boodhbar" *op cit* note 113.

¹³³ See United Nations Document CCPR/C/SR.1039, 'Summary record of the 1039th meeting, held at Headquarters, New York, on Tuesday, 26 March 1991: Human Rights Committee, 41st session', (monograph, United Nations, New York, 1/4/91), United Nations Document CCPR/C/SR.1040, 'Summary record of the 1040th meeting, held at Headquarters, New York, on Tuesday, 26 March 1991: Human Rights Committee, 41st session', (monograph, United Nations, New York, 1/4/91), United Nations Document CCPR/C/SR.1041, 'Summary record of the 1041st meeting, held at Headquarters, New York, on Wednesday, 27 March 1991: Human Rights Committee, 41st session', (monograph, United Nations, New York, 2/4/91) and United Nations Document CCPR/C/SR.1042, 'Summary record of the 1042nd meeting, held at Headquarters, New York, on Wednesday, 27 March 1991: Human Rights Committee, 41st session', (monograph, United Nations, New York, 2/4/91); Amnesty International, 'India: examination of the second periodic report by the human rights committee', (AI Index: ASA 20/05/93, March 1993).

¹³⁴ See Haksar, Nandita, "Armed Forces (Special Powers) Act 1958. A Report on Human Rights Violations in North East India", (New York, March 1991). This unpublished paper described how between 27/11/90, when Assam was declared to be a disturbed state under the Act, and 10/3/91 ninety-nine *habeas corpus* petitions had been filed on behalf of people arrested and tortured by the armed forces.

¹³⁵ For example, see *Bhim Singh, MLA v State of J & K and others* AIR 1986 SC 494 / (1985) 4 SCC 677.

killings, the High Court has instituted enquiries. Responding to allegations that the Border Security Force had illegally opened fire, the Guwahati High Court directed that the injured persons receive any necessary specialised treatment, without deciding on the legality of the firing.¹³⁶ Similarly the High Court acknowledged the illegality of certain acts carried out by members of the armed forces in Mizoram by ordering that the pending compensation be paid.¹³⁷

The Contribution of PIL

The Court has been constrained by the paramount considerations of national security and law and order when giving its orders. The restrictions have meant that very few substantive results have been realised. Even where enquiries have been instituted and orders given, the administration has been slow in implementing these orders. The petitions filed by H N Wanchoo, a noted activist from Jammu & Kashmir who later died, illustrate this point:¹³⁸

His petitions to the High Court of Jammu and Kashmir were for judicial enquiry into the killing of innocent Kashmiris by the security forces, the torture of detainees in custody, rapes committed by soldiers, information regarding numbers and identities of detainees and conditions in jails.

It is a matter of shame that he met with no success. Even when the High Court passed directory or mandatory orders in response to his petitions, the local administration simply did not obey them. The orders of the High Court were ignored brazenly, unblushingly and insolently.¹³⁹

Some of the petitioners have used law, through PIL and *habeas corpus* petitions as a mechanism to expose the injustice of the system of governance,

¹³⁶ *Gautam Uzir op cit* note 115.

¹³⁷ See *People's Union for Civil Liberties op cit* note 115 and *Vanlalhruala op cit* note 115.

¹³⁸ See Varadarajan, P M, 'H N Wanchoo', *PUCL Bulletin*, Vol 13 No 1, Jan 1993, 16.

¹³⁹ *Ibid* at 16. See also Sachar, Rajinder, 'Kashmir - Need for a Better Understanding', *PUCL Bulletin*, Vol 13 No 7, July 1993, 15-16.

including the courts. The existing feeling that the Constitution has little relevance to the peoples of border areas, for example of the north-east, has been reinforced by the ineffective use of PIL. Practical problems have been compounded by prevalent corruption and political complexities. When asked why he was unable to secure the compensation requested in the PIL cases from Mizoram, the advocate for the petitioners stated that if he tried to speed up the development of the case in Court, the judges would assume that he has a financial stake in the outcome of the litigation, and treat the petitions accordingly.

With the exception of one order,¹⁴⁰ little has resulted from the challenge to enactments. As the petitions on the Oinam issue remained pending, the NPMHR, despairing of the legal process, approached the United Nations with its grievances. Hearings before the Human Rights Committee lasted for two days, on March 26 and 27, 1991. After the hearings, members of the NPMHR documented the event:

We went in the hope that the Government of India might modify its attitude under international pressure. We were successful in raising concern among human rights organisations about the anguish of our people. But we are not sure whether the attitude of the Government of India will change.

At the Human Rights Committee we discovered that although India has acceded to the International Covenant on Civil and Political Rights which guarantees the Right to Self-determination but India has interpreted it to mean the right is only for people "under foreign domination and that these words (Article 1) do not apply to sovereign independent States or to a section of the people or nation - which is the essence of national integrity"¹⁴¹

It is unsurprising that in a paper presented to the UN Committee on Human Rights, Nandita Haskar, the advocate for the NPMHR stated:

There is no possibility for the vast majority of people living in disturbed areas to reach either a lawyer or the court. The High Court is too far, the expenses are prohibitive and justice is slow. There is also an anti-tribal bias in the Bar and Bench. The Court is slow to give relief when rights of tribal peoples are affected. Even when the High

¹⁴⁰ Editor, "Boodhbar" *op cit* note 113.

¹⁴¹ 'NPMHR goes to the United Nations', 1991. See 'International Influences' in chapter one.

Court gives relief it is limited.¹⁴²

She noted that the (now deceased) Major General responsible for the atrocities committed on Nagas in Manipur during Operation Bluebird had been given Republic Day honours, inspite of the cases pending against him in the Guwahati High Court. Even the National Human Rights Commission set up by the Government in 1993 has not been empowered to hear complaints against the armed forces. Certainly the framework within which the courts have felt able to operate has been limited, but PIL can certainly be described as a last resort for people who feel the force of the strong arm of the State.

Injustices Specific to Women

The petitions filed specifically relating to gender and women's issues relate to violence, challenges to enactments,¹⁴³ discrimination,¹⁴⁴ prostitution¹⁴⁵ and a collection of diverse cases.¹⁴⁶ Violence has taken many forms - non-specific,¹⁴⁷

¹⁴² Haksar, Nandita (1991) at 27.

¹⁴³ Petitions on Muslim personal laws - *Susheela Gopalan & Others v Union of India* and *Shehnaaz Sheikh and others v Union of India*; *Madhu Kishwar and others v State of Bihar and others* 1991 (2) SCALE 148 [794]; *Mary Roy v State of Kerala & Ors* 1986 (1) SCALE 36 [250] and a case filed by Mary Roy against the District Collector, Kottayam.

¹⁴⁴ *Brij Bala v State of H.P. and others* (1984) 2 SLR 408; a petition challenging amniocentesis testing; *Catholic Association of Bombay and others v State of Maharashtra and others*.

¹⁴⁵ *Sheela Barse; Gaurav Jain v Union of India and others* AIR 1990 SC 292 and 1991 (1) SCALE 201 [963]; *People's Council for Social Justice v State of Kerala and others*; *Vishal Jeet v Union of India and others* AIR 1990 SC 1412 / (1990) 3 SCC 318; *Bholanath Tripathi v State of U.P.* 1990 (Supp) SCC 151.

¹⁴⁶ The petition filed on contraception; *Kasturi Lal Sharma v State of U.P.* 1990 (Supp) SCC 748; *Anjalakshmi v State of Tamil Nadu and others*.

¹⁴⁷ *Coomi Kapoor, Ashwini Sarin, Arun Shourie v State of M P and others* and the case relating to unwed mothers in Thiruvelli.

harassment for dowry,¹⁴⁸ sati,¹⁴⁹ rape,¹⁵⁰ the army and the police¹⁵¹). Many of the cases were filed in response to the broad-based failure of the legal system to resolve the grievances of women,¹⁵² the writ jurisdiction of the Court in PIL has been mobilised for some of the worst instances of injustice. These cases were filed in tandem with the growth of the women's movement and investigative journalism, the support of some legal successes¹⁵³ and an increasing tendency to look towards the Court.

¹⁴⁸ The petition filed by Saheli after a woman had died; *Neelam Varma and others v Union of India; State (Delhi Administration) v Laxman Kumar* AIR 1986 SC 250; *Joint Women's Programme v State of Rajasthan* AIR 1987 SC 2060; *All India Democratic Women's Association v State of Haryana and others*; the murder of Shashi Bala for dowry.

¹⁴⁹ *All India Democratic Women's Association and Janwadi Mahila Samiti v Union of India and others* and *Shree Rani Satiji Mandir and others v Union of India*.

¹⁵⁰ Relating to the gangrape of Rameezabee by policemen; *P Rathinam v Union of India and another* 1987 (2) SCALE 317 [1464] and 1993 (2) SCALE 126 [631]; *In the matter of: Judicial Enquiry into Gang-Rape Demanded, and, Concerted Demand for Judicial Probe* (1988) 1 GauLR 489; *All India Democratic Women's Association and another v State of Tripura and others*; *All India Democratic Women's Association v Union of India and others* and *Gudalure M J Cherian & Ors v Union of India & Ors* 1991 (2) SCALE 241 [1305]. One of the earliest PIL cases on rape was in the form of a letter sent by advocate R S Sodhi to the Hindustan Times, which was registered as a petition in the SC. Lotika Sarkar, Centre for Women's Development Studies, interview, New Delhi, 4/91. A seminal case that was to initiate debate and legislation on rape was that of Mathura, a young girl raped by two policemen. After the Supreme Court judgment, *Tukaram and another v The State of Maharashtra* (1979) 2 SCC 143, acquitting the accused head constable, Tukaram and the constable, Ganpat of the charge of rape, there was a public outcry. This prompted a group of four legal academics to write a letter to the Chief Justice of India complaining of the "cold-blooded legalism" of the Supreme Court. See Baxi, Upendra; Dhagamwar, Vasudha; Kelkar Raghunath and Sarkar, Lotika, 'An Open Letter to the Chief Justice of India', (1979) 4 SCC (J) 17. See Dalvi, C R, 'The Mathura Case', *New Quest*, Vol 27, May-June 81, 141-150 for an example of the hostility towards Mathura and her case; also see 'Decision of Supreme Court in case of Tukaram Vs. State of Maharashtra', *Lok Sabha Debates*, Series 7 Session 2 Vol 2, 18/3/80, 165-166. Although nothing resulted in this particular case, the law of rape was subsequently amended.

¹⁵¹ *Janwadi Mahila Samiti and another v Union of India*; *Editor, "Boodhbar" v Union of India and another*; *Niloy Dutta v District Magistrate, Sibsagar District* (1991) 2 GauLR 217.

¹⁵² For background material see Dhagamwar, Vasudha, *Law Power and Justice*, (Sage Publications, New Delhi, second edition, 1992); Sathe, S P, *Towards Gender Justice*, (Research Centre for Women's Studies, Bombay, 1993); Sivaramayya, B, *Inequalities and the Law*, (Eastern Book Company, Delhi, 1984); Kapoor, Ratna (ed), 'Special Issue on Feminism and Law', *National Law School Journal*, Vol 1, 1993. Also see Quintillan, Emelina O and Tiongco, Jose M, *An Introduction to Women in International Law*, (Pilipina Legal Resources Center, Philippines, 1991).

¹⁵³ See for example *Air India v Nergesh Meerza & Ors*. 1981 (3) SCALE 192 [1275] / AIR 1981 SC 1829.

Women's groups have most often framed the issues for the Court, or have intervened in cases to give them a PIL character.¹⁵⁴ One of the strategies of the All India Democratic Women's Association (AIDWA) and of non-political organisations, like Saheli and the Joint Women's Programme, has been to activate the judiciary and use law to get specific reliefs.¹⁵⁵ Framing the issues for resolution within the existing legal framework has often been difficult. The petition filed by *Manushi* for the women of the Ho tribe asked for the court to confer individual property rights on the women, a concept alien to the tribe. Codification of laws has changed the focus of rights to such an extent that deciding to use law for the women of the Ho tribe compromised their own conception of their grievance.¹⁵⁶

By focusing on certain issues, the media has been an important factor in inspiring petitioners and courts. The attention given to the death of Roop Kanwar on the funeral pyre of her husband (sati) and reports on the sexual activity of nuns have brought sati and the right to privacy, respectively, to the fore.¹⁵⁷ Many of the cases in this section have been filed as a result of newspaper articles, for example after the sale of a girl called Kamala, and after reports of rape in the press.

Women have been abused in a variety of ways, as demonstrated by the

¹⁵⁴ In addition to the cases documented, other petitions have been filed. For example the Women's Legal Aid Cell, Gauhati filed a petition in the Guwahati HC on behalf of a woman who was raped and murdered. A relative of the woman had approached the Cell but did not want to be involved in legal proceedings. On production of a false medical certificate the accused had been allowed to go out on bail until his illness was cured. The HC responded to the writ petition by cancelling the bail, and transferring the petition to the original District Court. Suniti Sonowal, Women's Legal Aid Cell, interview, Gauhati, 6/94. See also the section on 'The Police' for *SAHELI op cit* note 80 and *All India Democratic Women's Association op cit* note 81 for examples of other cases filed by women's organisations.

¹⁵⁵ In addition to the documented cases, a petition was filed in the Madras High Court in 1992 or 1993 by a Joint Action Committee of Women's groups regarding the depiction of women in posters displayed film and cinema theatres. Geeta Ramaseshan, advocate, interview, Madras, 15/4/93.

¹⁵⁶ Madhu Kishwar, interview, New Delhi, 1/91. Also see Kishwar, Madhu, 'Public Interest Litigation: One Step Forward, Two Steps Backwards', *Manushi*, No 81, Mar-Apr 1994, 11-23; Kishwar, Madhu, 'Toiling without Rights: Ho Women of Singhbhum', *Economic and Political Weekly*, 17/1/87, 95-101.

¹⁵⁷ For a case specifically relating to the girl-child, see *Brinda Karat and another v The State* in the section on 'Children'.

cases on violence. The harassment of young women for dowry has become an increasing problem, because of the expectation of substantial “gifts” of money and material goods from a woman's natal family, not just at the time of marriage, but for years later, have led to numerous, alarming reports on “dowry deaths”.¹⁵⁸ The cases on sati¹⁵⁹ and rape reveal other patterns of violent behaviour. All but one of the cases on rape are concerned with gang-rape by policemen or members of the armed forces. The need for accountability and legality in the actions of police and army personnel is highlighted in the last set of cases on violence.

The petitions filed challenging enactments, as violative of the constitution, provide an insight into the problems and inequities of the existing legal framework. Because of the sensitive nature of the issues raised, in both political and social terms, petitioners perceived the Court as the only forum which has the power to manage the grievances impartially. Challenges to the Muslim Personal Laws (Application) Act, 1937 and the Muslim Women (Protection of Rights on Divorce) Act, 1986 point to the discriminatory nature of the provisions.¹⁶⁰ Challenges to the Chhota Nagpur Tenancy Act, 1908 and the Travancore Christian Succession Act, 1902 are concerned with land and property distribution. Similarly, the cases on discrimination provide an insight into the many forms that discrimination can take. The cases on prostitution demonstrate how not all the cases have been filed in support

¹⁵⁸ There are provision and specific legislation making the giving or receiving of dowry and illegal act. For example, see the Dowry Prohibition (Amendment) Act, 1986. See Jethmalani, Rani, *Dowry and the Law - Subversion of Human Rights* in Gandhi, P K, Social Action through Law, (Concept Publishing Company, New Delhi, 1985), 114-126.

¹⁵⁹ For a discussion of the issues, see Narasimhan, Sakuntala, *Sati: A Study of Widow Burning in India*, (Viking, New Delhi, 1990). The Commission of Sati (Prevention) Act, 1987 defines sati in section 2 (c):

“sati” means the act of burning or burying alive of -

(i) any widow along with the body of her deceased husband or any other relative or with any article, object or thing associated with the husband or such relative; or
(ii) any woman along with the body of her relatives irrespective of whether such burning or burying is claimed to be voluntary on the part of the woman or otherwise

Also see Dreze, Jean, *Widows in Rural India*, (Development Economics Research Programme, London School of Economics, Aug 1990) and the cases on family pensions, as discussed in 'Public Policy and Administration' in chapter four.

¹⁶⁰ See Flavia, *Give Us This Day Our Daily Bread: Procedures and Case Law on Maintenance*, (Majlis, Bombay, 1992) for general background information to the petitions on Muslim personal law.

of women. Even amongst the petitioners, perspectives have differed. One petitioner displayed little sensitivity to prostitute women; by grouping them with goondas and hooligans. This petition displayed disregard for women in need of greater protection of the law and not of further marginalisation.¹⁶¹

Access to Justice

The *locus standi* of women's groups has been upheld by the Court, both as petitioner and as intervenor. The case of the dowry death of Sudha Goel,¹⁶² although not a PIL, deserves mention because women's organisations intervened compelling the Supreme Court to reconsider the verdict of the High Court. Other interventions by such groups can be found in the case of the rape of Rameezabee and in the petitions challenging Muslim Women (Protection of Rights on Divorce) Act, 1986. Petitions challenging this particular enactment have been filed both as PILs and as cases by aggrieved women raising issues beyond the scope of the individual grievance.

On rape, there are cases filed by advocates, women's organisations and taken up *suo moto* by judges.¹⁶³ After the rape of two nuns in Gajraula, two petitions were filed, one by an advocate in Madras and the other by AIDWA. While hearing the petition by the advocate, the Court rejected the petition filed by AIDWA. This was in disregard of the attempts made by the organisation to resolve the case locally, before filing the petition. Moreover, the Court failed to acknowledge that the nuns on whose behalf the petitions were filed, had given their consent and support to AIDWA's petition. It was felt that the Court had not considered all the relevant factors when

¹⁶¹ *People's Council for Social Justice op cit* note 145.

¹⁶² *State (Delhi Administration) op cit* note 148.

¹⁶³ Pressure was exerted in the case of the rape of Mathura, *op cit* note 150.

deciding on the merits of the petitions.¹⁶⁴

The PIL content in the two letters which were registered as PILs is limited to the question of access to justice.¹⁶⁵ Not having been defined, the distinction between the letter-petition and PIL has remained blurred and any innovation in the procedure continues to be described as PIL. The case filed by Mary Roy is also difficult to locate. Her initial petition, challenging the validity of the Travancore Christian Succession Act, 1902 was not filed as a PIL, but as an aggrieved individual challenging an enactment. However, the developments after the Supreme Court judgment allowing her first petition and the continuing harassment she faced, caused her to become a PIL petitioner.¹⁶⁶ The petition she filed in the High Court of Kerala on behalf of Corpus Christi School was as a PIL.¹⁶⁷

The judicial process itself has been one of the major obstacles in getting effective access to justice. The Supreme Court noted the five month delay in listing one letter.¹⁶⁸ Similarly the petition filed for the Ho Tribe women was initially delayed by incorrect listings, and later, when the registry of the Supreme Court lost some of the papers relating to the case.¹⁶⁹ Other delays have been caused for petitioners, for example, when the Court directed that the petitioner approach the Allahabad High

¹⁶⁴ Kirti Singh, advocate, interview, New Delhi, 11/11/93. In the case of *Niloy Dutta op cit* note 151, a similar situation emerged, with lawyers filing petitions with a different perspective and for different reliefs. Niloy Dutta, advocate, interview, Guwahati, 8/6/94.

¹⁶⁵ *Brij Bala op cit* note 144 and *Anjalakshmi op cit* note 146. Both cases were registered as PIL letter petitions in the High Court registries, prompted a relaxation of procedures and were accorded preference in listings.

¹⁶⁶ Lekha Suresh, advocate, interview, Ernakulam, 19/8/93.

¹⁶⁷ For details of the controversy that ensued and of the subsequent litigation see D'Mello, Pamela, 'Report: Jesus Christ Superstar - Banned', *The Lawyers*, Vol 5 Nos 11&12, Nov-Dec 1990, 34-35; Roy, Mary, 'First Person: The Wages of Dissent', *The Lawyers*, Vol 7 No 6, June 1992, 12; Gita, J, 'Fighting for right of equality', *Indian Express*, 7/3/92; Venugopal, P, 'Undoing the 'excess' of a SC verdict', *Indian Express*, 12/6/92.

¹⁶⁸ *Bholanath Tripathi op cit* note 145.

¹⁶⁹ Madhu Kishwar, interview, New Delhi, 12/1/91.

Court, as a more suitable forum.¹⁷⁰

The Court's Response

One of the most striking characteristics of the cases challenging enactments has been the delays in listings. Exacerbated by rising communal violence and the sensitive nature of the issues, petitions challenging the Muslim Women (Protection of Rights on Divorce) Act, 1986 have been grouped together and remain pending. Similarly the petitions filed on sati have been pending inspite of the efforts of the advocates dealing with the cases. The complexity and sensitive nature of these cases - in political and social terms - provides a plausible explanation for the continued delays. Individual relief to those petitioners with a personal stake in the outcome of the litigation has not been forthcoming.

In a number of cases relating to violence, the Court has taken up the issue and monitored the progress of the case. In the dowry case filed by the Joint Women's Programme, the Court, *obiter*, suggested that dowry cells be established. Recognising the failure of the lower judiciary and the enforcement agency to deal with instances of dowry violence the Supreme Court directed that the verdict of the lower court be implemented.¹⁷¹ Commissions of enquiry have been appointed by the Court, recognising that the collection of evidence may otherwise be insufficient.¹⁷²

In the Guntaben rape case¹⁷³ the investigation ordered by the Court took

¹⁷⁰ *Kasturi Lal Sharma op cit* note 146.

¹⁷¹ *All India Democratic Women's Association op cit* note 148.

¹⁷² See *Catholic Association op cit* note 144. In addition to those documented, another petition was filed in the High Court of Madras in 1983 or 1984 asking the Court to inquire into a suspected dowry death. An enquiry was ordered. Pennurimai Iyakkam, an organisation working in the slums and the Democratic Women's Association were impleaded in the petition. Meanwhile the husband was convicted for life in the Sessions Court, acquitted in appeal to the High Court and an appeal was filed in the Supreme Court by the state. S S Vasudevan, advocate, interview, Madras, 14/4/93.

¹⁷³ *P Rathinam op cit* note 150.

the evidence of 584 persons.¹⁷⁴ The CBI investigation took many years to be completed and the Court had to concede that there may have been a deliberate delay in the proceedings by the state. Moreover, there is no evidence that the policemen found to be guilty were prosecuted, and it is notable that, although the rape took place in 1986, it was not until 1993 that the Court awarded compensation. In another case the Guwahati High Court awarded an “ad hoc interim ex-gratia payment” without waiting for the guilty police officers to be punished.¹⁷⁵ In the Gajraula rape case the Court did not award compensation, and even refused to suggest that the CBI investigate the incident.¹⁷⁶

In a series of three orders, two in the Supreme Court and one in the Guwahati High Court, on the extent of army and police powers, the Courts have tacitly accepted the allegations that women have been sexually abused and harassed by members of the forces.¹⁷⁷ In spite of the tentative approach to dealing with cases filed against the army and the police,¹⁷⁸ the Court has ordered that guidelines be framed for the interrogation of women and has issued directions on the treatment of women so as to ensure their safety.

The petition filed on behalf of unwed mothers asking the Court to order the Government to conduct DNA testing was dismissed, with the Court “hoping” that the tests would be conducted.¹⁷⁹ This discretion, exercised by the courts in dealing with PIL petitions, is most apparent when the Madras High Court sat out of hours to

¹⁷⁴ See [anon], ‘Amnesty International: The Case of Gunta Behn’, *PUCL Bulletin*, Vol 8 No 9, Sept 88, 4-8 & 27.

¹⁷⁵ *In the matter of: Judicial Enquiry into Gang-Rape Demanded, and, Concerted Demand for Judicial Probe*. Also see the section on ‘Environment and Resources’ for the case of the *Rajasthan Kisan Sangathan v State of Rajasthan and others* AIR 1989 Raj 10.

¹⁷⁶ *All India Democratic Women's Association op cit* note 150.

¹⁷⁷ *Janwadi op cit* note 149.

¹⁷⁸ See the sections on ‘The Army’ and on ‘The Police’, *supra*.

¹⁷⁹ See case re: unwed mothers, *op cit* note 147.

hear about the plight of a young bride, whose fiancé had been imprisoned.¹⁸⁰

As in cases brought to the Court as regular matters, the courts' response to the PIL petitions relating to prostitutes has not considered the women as people in need of sympathetic treatment. The children of prostitutes have been ordered to be separated from their mothers¹⁸¹ and the Court ordered that one woman be put in a rescue home, without considering the conditions that persist in such homes.¹⁸² However, the Supreme Court did direct the enforcement of Acts that would safeguard the interests of the girl-child and asked the government to enquire into the devadasi and jogin traditions,¹⁸³ even while refusing to direct that a CBI enquiry be instituted.¹⁸⁴

The Contribution of PIL

With the exception of the orders given on the army and the police, the Court has limited its role to reacting to injustices brought before it in a piecemeal fashion. When petitioning the Court, many of the women's groups hoped to vindicate the injustices done by getting a favourable Court order. This has been possible in few of the cases. Even where the Court has directed enquiries and/or awarded compensation, this has taken many years.¹⁸⁵ The cases speak for themselves, indicating

¹⁸⁰ *Anjalakshmi op cit* note 146.

¹⁸¹ *Gaurav Jain op cit* note 145.

¹⁸² *Bholanath Tripathi op cit* note 145. See the section on 'Prisons and State Institutions', in particular the cases on institutions for women.

¹⁸³ The devadasi tradition is one in which girls are given or sold to a temple as dancers, and are compelled to become prostitutes. The jogin tradition is similar.

¹⁸⁴ *Vishal Jeet op cit* note 145.

¹⁸⁵ Referring to a PIL case, the Minister of Health and Family Welfare, responding to a question in the Lok Sabha regarding hearings before the Drugs Controller (India) at 40:
the concerned firms, Voluntary Organisations, Doctors etc. have submitted voluminous documentary evidences .. Decision in the matter will be taken after examining the documents received at the hearings.

the ways in which resort to law can be a futile experience. The importance of the media in highlighting issues and informing the courts has been noted, when the Supreme Court expressed its concern that the High Court had been affected by the publicity given to the case.¹⁸⁶ In one order, the response of the State Government in tending to the needs of the women who had been raped was described as a show of respect to the Court's anticipated verdict.¹⁸⁷ This seems to be an exception. The Rameezabee case is a discouraging example of the use of law. The women's group in Bangalore which took up the rape issue became disenchanted with the legal process and did not follow up the case. Rameezabee herself has become disillusioned with the interference of women's organisations, the press and the legal system.¹⁸⁸

The dynamics of the sati case reveal some of the reasons for the erratic and tentative response of the Court to the cases filed. Subsequent to the last documented order in 1989, the respondents made a statement that while they do not believe in Sati-da (sati murder), they do believe in Sati. This position has been echoed by the National Commission for Women. Women's organisations then vehemently protested against what was perceived as an endorsement of the worship of the "pure woman".¹⁸⁹ The Supreme Court has refused to become embroiled in this issue, simply by not hearing the case.

At the time when the amniocentesis petition was filed, proposed amendments and bills were introduced in the Lok Sabha and the Maharashtra Assembly to ban amniocentesis tests, which were being used to determine the sex of

By not stipulating a time frame for the examination of these "voluminous" documents, implementation could be protracted. See 'Supreme Court judgement reque of Oestrogen and Progesterone', *Lok Sabha Debates*, Series 8 Session 8 Vol 29, 30/7/87, 39-40.

¹⁸⁶ *State (Delhi Administration) op cit* note 148.

¹⁸⁷ *In the matter of: Judicial Enquiry op cit* note 150. Contrast with *Munna and others v State of Uttar Pradesh and others* (1982) 1 SCC 545, a case on prisons in the section on 'Children', *infra*.

¹⁸⁸ See Kannabiran, Vasantha, 'More About Rameeza', *Sangarsh*, Vol 1, 1; Donna, 'Rameeza Bee - Justice Denied', *Sangarsh*, Vol 2, 3.

¹⁸⁹ Kirti Singh, advocate, interview, New Delhi, 11/11/93.

foetuses, so that female foetuses could be aborted. Nothing happened as a result of the petition or the bills,¹⁹⁰ but even if acts were passed they would not circumvent the problem. Without any mobilisation on the issue and support for a ban on popular sex determination tests, there is little that can be done by the Court. Thus, the actual effect of some orders belies their seeming intent. Having been approached by a woman who had not been permitted to compete for the post of patwari, the Court directed that she be allowed to compete fairly for the post through the District Employment Exchange.¹⁹¹ It is unlikely that Kumari Brij Bala will ever be considered because of the numbers of people registered in the exchange.¹⁹²

The limitation of the courts in dealing with injustices specific to women have to be seen in the light of all the cases in PIL. The petitions that relate to the woman in other contexts are found in all the other sections on urban space, labour, bonded labour, the environment etc.¹⁹³ Again the recurring theme of land distribution is illustrated by the cases filed regarding the Travancore Christian Succession Act, 1902 and the Chhota Nagpur Tenancy Act, 1908 in the context of gender rights.¹⁹⁴ The

¹⁹⁰ Gopinath, Deepti, 'Comment: Amniocentesis Petition Admitted', *The Lawyers*, Vol 1 No 10, Oct 1986, 14.

¹⁹¹ *Brij Bala op cit* note 144.

¹⁹² Bina Agarwal noted, "one rarely hears of a woman *tehsildar* or *patwari* being appointed for land record keeping and revenue collection." Agarwal, Bina, *A field of one's own. Gender and land rights in South Asia*, (Cambridge University Press, Cambridge, 1994) at 485.

¹⁹³ See [anon (ed)], *Women in Politics: Forms and Processes*, (Friedrich Ebert Stiftung, New Delhi, 1992) for a collection of papers by members of women's research and development organisations, and Venkateswaran, Sandhya, *Living on the Edge: Women, Environment and Development*, (Friedrich Ebert Stiftung, New Delhi, 1992).

¹⁹⁴ See Agarwal, Bina, 'Gender and Legal Rights in Agricultural Land in India', *Economic and Political Weekly*, Vol 30 No 12, 25/3/95, A39-A56 at A52.

Removing the noted legal inequalities is likely to involve a continuing process of contestation and struggle. In this context, on the one hand there have been some significant cases, such as those filed by Mary Roy and Madhu Kishwar. By drawing upon constitutional guarantees of sex equality to challenge persisting gender inequalities in enactments concerning inheritance, these cases have opened up yet another chapter in the contestation over women's legal rights in land that began almost a century ago. (This is important even though (as noted) the judgement in Mary Roy's case evaded the issue, and a judgement in the case filed by Madhu Kishwar is still pending.) On the other hand, the placing of most land reform laws beyond challenge on constitutional ground, through their inclusion in the Ninth Schedule, has taken away a major means of changing the gender-unequal land-related legislation still

difficulties of having to deal with the legal system and its actors has been accentuated in this section. The biases of the legal profession and the legal system function to further disadvantage women, adding complexities that transcend social or economic class.

Children

Petitions have been filed concerning children in prisons,¹⁹⁵ in institutions,¹⁹⁶ child labour,¹⁹⁷ inter-country adoption¹⁹⁸ and the girl-child.¹⁹⁹ As children are unable to litigate for themselves, these cases form a distinct category, separate from other PILs. Most of the children on whose behalf petitions have been filed do suffer from the social and economic disabilities that were identified by the courts in the early PILs on prisons and prisoners. However, children form an even more

prevailing in many states.
Also see Agarwal, Bina, (1994) at 224-225.

¹⁹⁵ *Munna and others v State of Uttar Pradesh and others* (1982) 1 SCC 545; *Sanjay Suri & Anr v Delhi Administration, Delhi & Anr* 1987 (2) SCALE 276 [1257]; *M C Mehta v State of Orissa and others*; *Kamaladevi Chattopadhyay v State of Punjab and another* AIR 1984 SC 1895; *Sheela Barse and another v Union of India and others* (children in jails) 1986 (2) SCALE 1 [1], AIR 1986 SC 1773 / (1986) 3 SCC 596 and 632; *Supreme Court Legal Aid Committee v Union of India and Others* (1989) 2 SCC 325 / AIR 1989 SC 1278, 1989 (2) SCALE 73 [400].

¹⁹⁶ *Sheela Barse v Secretary, Children's Legal Aid Society and others* (children's home) (1987) 3 SCC 50 / AIR 1987 SC 756; *Gautam Uzir and another v Assam Seva Samity and others*.

¹⁹⁷ *Rajangam, Secretary, District Beedi Workers' Union v State of Tamil Nadu and others* (1992) 1 SCC 221; *Bandhua Mukti Morcha v Union of India and others* (child labour) 1986 (Supp) SCC 553; *Sheela Barse v Union of India*; *M C Mehta v State of Tamil Nadu and others* (1991) 1 SCC 283 / AIR 1991 SC 417, 1991 (2) SCALE 82 [464]. Also see *Sheela Barse v Secretary, Children's Legal Aid Society and others* *ibid*.

¹⁹⁸ *Laxmi Kant Pandey v Union of India* (1984) 2 SCC 244, AIR 1992 SC 118.

¹⁹⁹ *Pratul Kumar Sinha v State of Orissa* AIR 1989 SC 1783; *Brinda Karat and another v The State*. For other cases relating to children see the section on 'Injustices Specific to Women' for *Gaurav Jain v Union of India and others*, *Vishal Jeet v Union of India and others*, the case on amniocentesis testing and the cases challenging enactments. Also see the section on 'Education' and on 'Prisons and State Institutions', in particular for *Kadra Pehadiya and others v State of Bihar*.

disadvantaged class. Unable, by definition, to petition the courts themselves, they have had to rely on the *parens patriae* role of the state. The cases for children have mobilised PIL in an attempt to force the state to acknowledge this role by focussing on the non-implementation of statutory and constitutional provisions for children.

The Constitution has recognised the special needs of children in Articles 15(3), 24, 39(e), 39(f) and 45. It was using the mandate provided by these articles and by the Children's Acts of different states,²⁰⁰ that the cases on prisons were filed. It was only in 1986 that juvenile justice issues were codified in a central enactment, the Juvenile Justice Act, 1986. All the cases on children in prisons were filed before 1986, and reflect the concerns that were later to form the basis of the legislation. The illegal confinement of children in jails for long periods, the treatment of mentally and physically handicapped children and the conditions in jails were all brought to the attention of the Court by journalists or because of news reports.²⁰¹ Similar issues were raised in the cases relating to institutions, again at the instance of a journalist or of news reports.

The Juvenile Justice Act was passed to provide a uniform legal framework for juvenile justice and to prevent children from being lodged in jails and police lock-ups. It provides for the specialised treatment of children who are victims of social mal-adjustment, delinquency or neglect, and sets up a machinery for the treatment and care of such children, including Juvenile Courts, Juvenile Welfare Boards and Observation Homes. Norms and standards of juvenile justice administration, different from the usual criminal procedures, have been established for the investigation, trial and detention of children, and special offences have been

²⁰⁰ The Children's Act, 1960 was applicable to Delhi and the other Union Territories and all the states, except Nagaland, had their own acts. The Juvenile Justice Act, enacted in 1986 is based on the 1960 Act. For a survey of laws relating to the child and other papers see: *Report of a Seminar: Rights of the Child*, (National Law School of India University, Bangalore, 1990).

²⁰¹ For other cases on prisons see the section on 'Prisons and State Institution'.

defined. Voluntary agencies are included in the care and treatment of these children.²⁰²

Another special legislation was passed to protect the rights of the child, the Child Labour (Prohibition and Regulation) Act, 1986.²⁰³ This Act prohibits the employment of children in certain industries and regulates their employment in others. For the purposes of the Act, a child is defined as a person who has not completed fourteen years of age. This Act allows child labour to continue in certain industries, repealing the Employment of Children Act, 1938 which totally prohibited the employment of children, defined as any person below the age of 15. By lowering the age of a child to 14, the new Act denies the protection of legislation to those between 14 and 15 years of age. No minimum age of employment is set, so it is possible that a child as young as four may be employed in permissible industries, and no regulation with respect to children working in the unorganised sector, for example domestic workers. The Act includes expanded standing provisions in section 16(1), which states:

Any person, police officer or Inspector may file a complaint of an offence under this Act in any Court of competent jurisdiction.

A Schedule is annexed to the Act specifying the occupations and processes prohibited under it. Both these sections can be supplemented by the Central Government.²⁰⁴

²⁰² For a discussion of children in prisons see the *National Expert Committee on Women Prisoners Report. Volumes I and II* (Ministry of Human Resource Development, 1987). The Committee was chaired by Justice V R Krishna Iyer.

²⁰³ See Burra Neera, 'Legislation: Old Flaws in New Indian Child Labour Bill', *Lawasia Human Rights Newsletter*, Vol 1 No 5, March 1987, 7-8; Mathew, P D, 'Laws Relating to Child Labour' (unpublished paper presented at 'Workshop on "Child Labour in India"', Indian Social Institute, New Delhi, 9/8/86). Barse, Sheela, 'Child Labour in Powerloom Industry at Bhiwandi', (unpublished paper presented at 'Workshop on "Child Labour in India"', Indian Social Institute, New Delhi, 9/8/86); Barse, Sheela, 'Children Playing With Fire in Glass Factories of Firozabad', (unpublished paper presented at 'Workshop on "Child Labour in India"', Indian Social Institute, New Delhi, 9/8/86); papers presented at 'International Seminar on Child Labour', (Gandhi Labour Institute, Ahmedabad, 4-7/12/87. 'Special Issue: Child Labour in India', *The Lawyers*, Vol 3 No 7, Aug 1988.

²⁰⁴ When the Act was notified, occupations and processes were prohibited including: Occupations - the transport of passengers, goods or mail by railway, and certain employments related to railways. Processes - bidi-making; carpet-weaving; cement manufacture; cloth printing, dyeing and weaving; manufacture of matches, explosives and fire-works; mica-cutting and splitting; shellac manufacture; soap manufacture; tanning; wool-cleaning; building and construction industry. Read in conjunction with Article 24 of the Constitution, this schedule permits the employment of children in industries not specifically mentioned, even though they may be hazardous.

Apart from these enactments, other labour laws are applicable to child labour and the issues that have been raised are complex.²⁰⁵ Used in specific industries, child labour displays all the features present in the adult labour force. Many are working in bondage or in the unorganised sector and there are labour touts and contractors. A study published in 1992 noted the links between caste, illiteracy and bondage in the incidence of child labour:

Indications are that most child labourers belong to the illiterate groups, small and middle peasants, most of whom are from among the scheduled castes and tribes. These are also the groups to which most bonded labourers belong.²⁰⁶

A distinction was made between the child worker and the child labourer. Whereas the latter is one who is involved in full-time work in order to survive and makes a direct contribution to the economy of the family, the child worker works part time within the family whilst still making a full time direct contribution to the family economy. The exact number of child labourers is not known, but:

Their working conditions, the process through which they enter the work force, the exploitation and hazards under which they work, their low wages and efforts made to keep them illiterate and poor, show that it is a vested interest and not a harsh reality that some would like to call it.²⁰⁷

The litigation on child labour began in 1983, before new legislation was passed. A series of newspaper reports appeared investigating child labour in the fireworks and match factories of Sivakasi, in Tamil Nadu.²⁰⁸ The reports noted that children were employed, illegally, despite both industries having been scheduled as hazardous for children in the 1938 Act. A national debate, on the employment of

²⁰⁵ For other references to child labour see the section on 'Labour' for *Labourers Working on Salal Hydro Project v State of Jammu and Kashmir and others* (1983) 2 SCC 181 and the section on 'Public Policy and Administration' for *Kishen Patnayak and another v State of Orissa* AIR 1989 SC 677 and, generally, the section on 'Bonded Labour'.

²⁰⁶ Fernandes, Walter, 'Child Labour and the Processes of Exploitation', *Indian Journal of Social Work*, Vol 53 No 2, April 1992, 171-190, at 171-172.

²⁰⁷ *Ibid* at 186.

²⁰⁸ See Varghese, Jose, *Law Relating to the Employment of Children in India*, (Socio Legal Resource Centre, Secunderabad, 1989) at 4.

children in Sivakasi in particular and on child labour in general, began, after which a petition was filed by advocate M C Mehta. Again in April 1984, news reports exposed the forced child labour employed in the Mirzapur carpet industries. These reports detailed the abduction and sale of children from Palamu district of Bihar to a carpet weaver of Mirzapur District of Uttar Pradesh and prompted Bandhua Mukti Morcha to file a petition.²⁰⁹

Access to correct information and data presents a perennial problem that is particularly harmful in the context of children, who cannot themselves approach the courts. The State has denied the incidence of child labour in industries where it is known to be common.²¹⁰ Many of the petitions in this section have relied on newspaper reports in the expectation that the Court would take the initiative in responding to injustices perpetrated upon children.

Access to Justice

Reacting to news reports and to letters sent by Sheela Barse and Rajangam, it appears that the Supreme Court has not permitted any obstacles to dealing with the cases on children. Even in a matter filed by M C Mehta on child labour that had been finally disposed of the Court took *suo moto* notice of newspaper reports of an accident in the area.

The Court's Response

In procedural terms the Supreme Court has responded flexibly to the

²⁰⁹ Varghese, Jose (1989) at 4. See the section on 'Bonded Labour' *infra* for details of this organisation.

²¹⁰ Varghese, Jose (1989) at 6. whereas the Union Labour Minister stated that there were no children below the age of 14 years working in the potteries of Khurja, social worker, Neera Burra, had identified about 5,000 children below 14 years of age in those very potteries.

petitions filed. Enlarging the scope of petitions, the Court has admitted to the existence of problems relating to children on a large scale.²¹¹ In all the prison cases, and some others enquiries were ordered and the Court has monitored the progress of the case and the implementation of its orders.²¹² Whilst the Court ensured the well-being of Ameena, an under age girl who had been married to a Saudi Arabian husband,²¹³ in another case the Court expressed its limitations, stating that it was only able to monitor implementation of its orders because Tihar Jail was located in Delhi, which indicates that proximity to the Supreme Court was a factor in ensuring better implementation.²¹⁴

It is not only the implementation of the Supreme Court's own orders that were monitored, but also the implementation of the existing statutory framework.²¹⁵ Interesting directions have been given. In the case of the Children's Home in Bombay, the Supreme Court held that the home could be treated as "the state" within the meaning of Article 12 of the Constitution, thus making all the fundamental rights available against the state, also available against the administrators of the home.²¹⁶ This was an important statement because there have been few instances where the Court has been prompted to discuss the scope of Article 12 of the Constitution in PIL matters, most of which have been filed against the State or its instrumentalities (see chapter seven).

In the area of child labour, notwithstanding the innovations of procedure, the Court has responded with a rhetoric in support of the child that has been undermined by its actual orders. Although the employment of children in the

²¹¹ See *Sheela Barse op cit* note 195 and *Rajangam op cit* note 197.

²¹² *Gautam Uzir op cit* note 196.

²¹³ *Brinda Karat op cit* note 199.

²¹⁴ *Sanjay Suri op cit* note 195.

²¹⁵ For example, see *Munna op cit* note 195.

²¹⁶ *Sheela Barse op cit* note 196.

manufacture of matches had been banned by the Child Labour (Prohibition and Regulation) Act, 1986, the Court justified its continuance in the context of packing matches away from the site of manufacture, because the “tender hands of the young workers” were more suitable to the task.²¹⁷ The Court permitted, without exception, the employment of children in an industry in which child labour had been prohibited, and directed that children only be paid a percentage of the minimum wage.²¹⁸ Moreover, the Court tacitly permitted illegal practices to continue by directing that the State authorities decide whether contract labour be employed and take responsibility for the phasing out of child labour - a practice for which the authorities ought to have been held answerable. The liability of the Sivakasi industries to ensure the well-being of the labourers was translated simply into the payment of compensation and insurance, absolving other responsibilities for the safety of workers.²¹⁹

Detailed principles and norms for inter-country adoption have been framed, with the help of specialist organisations.²²⁰ Nonetheless, areas of concern were not resolved. For example, while the Court did consider the question of the future of the children adopted abroad, after they reach majority, no direction was made providing for a support framework for these young people.

Even though none of the orders detailed in this section have been from the High Courts, there is evidence that the High Courts have responded to issues relating to children.²²¹ In the appeal filed by Sheela Barse from the order of the Bombay High Court, on a children's home in Bombay, the Supreme Court expanded the scope of the earlier High Court orders, whilst censuring the Bombay High Court

²¹⁷ Ignorance of working conditions led the Court to assume that separation of the processes of manufacture and packing was possible. *Rajangam op cit* note 197 at 285.

²¹⁸ *Ibid.*

²¹⁹ For example, see *M C Mehta op cit* note 195.

²²⁰ *Laxmi Kant Pandey op cit* note 198. See Anthony, M J, 'Can Supreme Court judges assume role of law-makers?', *The business and Political Observer*, 27/11/91.

²²¹ See *Munna and Sanjay Suri op cit* note 195.

from making disparaging remarks against the petitioner, and ordering that she be paid Rs.5,000 costs.²²² It is not just in this case that journalist and activist, Sheela Barse, encountered the displeasure of a Court. When approaching the Supreme Court to get relief for children in prisons, she had been compelled to make repeated trips to Delhi only to find that the case had been adjourned. Her frustration led to a disagreement with the advocate-on-record for the case, who successfully applied to the Court to be discharged. Taking over the case as a petitioner-in-person, Sheela Barse again faced repeated adjournments. Expressing her disillusionment with the Court's inability to ensure compliance and the unbearable delays, four years after filing the appeal she attempted to withdraw her case.²²³ Disregarding this protest, which highlighted the ineffectiveness of judicial proceedings, the Supreme Court admonished the petitioner for attempting to thwart the public interest and asked the SCLAC to take over the case. Although it responded out of concern for those affected by the petition, the Court failed to acknowledge Sheela Barse's efforts in bringing the case to court and supplying detailed information. Few subsequent orders have been reported, as the new petitioners were unable to attend to this case with the diligence of Sheela Barse.

The Contribution of PIL

If the cases are examined within the framework of judicial activism, then it can be observed, generally, that the Supreme Court has responded to the needs of children. Conversely, if the cases are examined from the perspective of the needs of children, then the Supreme Court's response would have to be described as superficial. However, it is only through using the Courts that statutory institutions were set up under the Juvenile Justice Act, 1986.²²⁴ The follow up of the litigations has been a problem. For example, like most petitioners to the Court for children in

²²² *Sheela Barse op cit* note 196.

²²³ *Sheela Barse op cit* note 195.

²²⁴ *Supreme Court Legal Aid Committee op cit* note 195. See 'Consumer Issues' for the case concerning the implementation of consumer protection legislation, *Common Cause, A Regd Society v Union of India & Ors* 1989 (2) SCALE 98 [541].

prisons, M C Mehta was unable to follow up the case after the children were released from jail and the question of rehabilitation of released children was never raised.²²⁵

In the cases on prisons and institutions, the Court has been willing to assert its judicial role vis-a-vis the state authorities, and has extended its concern even to discuss the character of an ideal jail.²²⁶ The superficiality of the Court's response is most apparent in the cases on child labour, both through the orders themselves and an examination of the legal process, with its delays. The Court has been unable to mobilise the State to the necessary extent, as is apparent from the petition filed by Rajangam.²²⁷ The legislation that regulates rather than abolishes child labour, has allowed the violations of the rights of the child to remain unchecked.²²⁸ Thus with a compromising legal framework and a judiciary which has proven its unwillingness to tackle the causes and consequences of child labour, it is unsurprising that these cases are still pending in the Supreme Court.

International Covenants have been an important reference point for the Court in discussing child labour.²²⁹ The mobilisation of the issue outside the Court has focussed on these covenants and on the foreign exchange issue by encouraging foreign importers of finished products, such as carpets, not to purchase goods made with child

²²⁵ *M C Mehta op cit* note 195.

²²⁶ *Sanjay Suri op cit* note 195.

²²⁷ The Court's role has been perceived as positive in the press, for example: [anon], 'Ban on child labour in beedi trade', *Times of India*, 20/11/90.

²²⁸ The committee appointed by the Supreme Court in *M C Mehta op cit* note 197 reported that none of the court directions were being implemented. See [anon], 'Sivakasi units flouting SC directions', *Indian Express*, 19/11/91, in which it was reported:

Though a statement was made on behalf of the Tamil Nadu government that children are not employed in firework factories the committee found the children working in these even on Sundays.

Also see Bhatnagar, Ramesh, 'Welfare fund for child workers likely', *Times of India*, 21/11/91.

²²⁹ Such as the United Nations Convention on the Rights of the Child, 1989.

labour.²³⁰ The importance of education and other welfare provisions has also been highlighted.²³¹ The expansion of standing in the courtroom has led to liberal procedures to be included in the Child Labour (Prohibition and Regulation) Act, 1986.²³² Aside from these incremental gains, it is impossible to gauge the effects of litigation on the extent of child labour, just as the situation of children released from prisons needs more study. In real terms it would seem that the situation of the girl-child as prisoner, labourer and sexual object remains much the same, as litigation has had little effect.

²³⁰ 'Carpets at What Cost' (pamphlet, Consumer Unity and Trust Society, Calcutta, 1993). [anon], 'Carpet industry bans child labour', *The Pioneer*, 22/7/93 reported that the Carpet Export Promotion Council adopted a voluntary code of conduct to eliminate the use of child labour.

²³¹ Sengupta, Amit, 'The education option to end child labour, *The Pioneer*, 20/5/93.

²³² Section 16 of the act states that "Any person, police officer or Inspector may file a complaint of an offence under this Act in any Court of competent jurisdiction".

Labour

The petitions filed on labour can be categorised into sections on the closure of industry,²³³ the unorganised sector,²³⁴ health and safety,²³⁵ and the rest of the cases.²³⁶ All the cases on labour should be examined together with the cases in the sections on 'Bonded Labour' and 'Urban Space', in which cases relating to bonded labour, hawkers and street vendors can be found.²³⁷

Most of the PIL cases filed for workers have been for those in the unorganised sector, where the structure of the industry is not easily identifiable. In this sector the state has taken upon itself a *parens patriae* role, assuming that labour

²³³ *Fertilizer Corporation Kamagar Union (Regd.) Sindri and others v Union of India and others* AIR 1981 SC 344; *Workers of M/s Rohtas Industries Ltd. v M/s Rohtas Industries Ltd.* (1987) 2 SCC 588.

²³⁴ *Hira Lal & Anr v Zilla Parishad, Kanpur & Ors* 1982 (1) SCALE 123 [545]; *Sanjit Roy v State of Rajasthan* AIR 1983 SC 328; *People's Union for Democratic Rights (PUDR) and others v Union of India & Ors* 1982 (1) SCALE 158 [817] and AIR 1982 SC 1473 / 1982 (1) SCALE 159 [818]; *Labourers Working on Salal Hydro Project v State of Jammu and Kashmir and others* (1983) 2 SCC 181 and (1984) 3 SCC 53; *Ram Kumar Misra v State of Bihar and others* AIR 1984 SC 537; for contract workers in Kandla Port; *Rohit Vasavada and Anr. v General Manager, IFFCO, Kalol and Ors.* 1983(2) GLR XXIV(2) 1529; *Nagendra Dutt Jagudi v State of U.P.* 1987 (2) SCALE 306 [1301]; for the workers on the Sabarmati Coal site in Ahmedabad; *Special Works and Research Centre through Sanjit Roy and others v State of Rajasthan* 1986 (Supp) SCC 561 and 1986 (2) SCALE 232 [905]; *Lok Adhikar Sangh v State of Gujarat and others*; *Valiben Bhikhabhai Parmar and others v Dena Bank and others*; *Vidyulatta Vivek Pandit and others v State of Maharashtra and others* and *Vivek Raghunath Pandit and others v Inspector Incharge, Ganeshpuri Police Station and others.*

²³⁵ *M K Sharma and others v Bharat Electronics Ltd [BEL] and others* (1987) 3 SCC 231; regarding factory conditions in Kozhikode.

²³⁶ *Sand Carrier's Owners' Union and others v Board of Trustees for the Port of Calcutta and others* AIR 1990 Cal 176.

²³⁷ There are many relevant cases in other sections. For cases on Industrial Tribunals and Labour Courts see 'Judges, Courts and Lawyers' for *Inder Mohan v Union of India etc* [C W P No 2646 of 1982, Delhi]; *M C Mehta v Union of India and others* 1986 (Supp) SCC 562. For cases on prison labour, see 'Prisons and State Institutions' for *In the matter of: Prison Reforms Enhancement of Wages of Prisoners etc.* AIR 1983 Ker 261; *Poola Bhaskara Vijayakumar v State of Andhra Pradesh and another* AIR 1988 AP 295; *Gurdev Singh and others etc. v State of Himachal Pradesh and others* AIR 1992 HP 76. For a case of forced labour in police custody, see the section on the 'Police' for *Peoples Union of Democratic Rights through its Secretary and Anr v Police Commissioner, Delhi Police Headquarters & Anr* 1989 (1) SCALE 114 [599]. For cases on child labour see the section on 'Children'.

cannot take care of itself even when empowered by legislation. For example, provisions in the the Contract Labour (Regulation and Abolition) Act, 1970 and the Inter-State Migrant Workers (Regulation of Employment and Conditions of Service) Act, 1979 confer a duty upon the State to look after the well-being of workers. In spite of this the State has been the worst offender.²³⁸ Far from realising the rights of these workers, enactments such as the Rajasthan Famine Relief Works Employees (Exemption from Labour Laws) Act, 1964 have permitted labour laws and minimum wage standards to be legally suspended.²³⁹ Moreover enactments like the Contract Labour (Regulation and Abolition) Act, 1970 only confer rights on those workers paid by a registered contractor and it is only when an aggrieved worker brings violations of health and safety rules to the attention of the authorities, that action can be taken. Thus PIL has proven to be a necessary check on breaches of the rights of workers which would otherwise remain unchecked.²⁴⁰

The blurred distinction between litigation in the form of a class actions and that which can be identified as PIL, is apparent in many of the cases.²⁴¹ Numerous

²³⁸ In addition to the documented cases, a petition, *Arun Sinha v State of Bihar* (W P No 6352 of 1982) was filed in the Supreme Court in 1982 by the People's Union for Democratic Rights invoking the Inter-State Migrant Workers Act, 1979 on behalf of over 1.5 lakh migrant labourers from Orissa, employed by contractors at the behest of the State Government. Provisions of the 1979 Act had been suspended by the State Government. The then Director-General of the Union Ministry of Labour wrote:

Take for example, the procedure for filing a claim under [a] section of the Minimum Wages Act in the event of short payment. No doubt various claim authorities have been notified at different points but their number is small and the distance of thier headquarters from the place of employment is so long that it makes the task of filing claims extremely difficult. Besides, under the prevailing conditions where the relationship between the employer and the employee is so based more on economic and commercial considerations that otherwise and where an employee is confronted every moment with the prospect of instant discharge, dismissal and termination from employment, it is futile to expect him to file a claim

See Mishra, Lakshmidhar, 'Laws for Labour' in Gandhi, P K (1985), 104-113 at 112; Patel, Sujata, 'Contract Labour and Public Interest Litigation', *Economic and Political Weekly*, 17/12/83, 2151-2153.

²³⁹ In order to avoid having to pay minimum wages and provide facilities, projects would be deliberately conducted under this Act.

²⁴⁰ A general introduction to the issues of concern to many of the petitioners can be found in *Labour Movement and Legislations in India. A Manual for Activists*, (Society for the Participatory Research in Asia, Delhi, 1987).

²⁴¹ The two cases relating to the closure of industry, *Fertilizer Corporation* and *Workers of M/s Rohtas Industries op cit* note 233 are both class actions which have to be discussed because of the importance of the Court's judgments to PIL. Similarly, the case filed by the *Sand Carrier's Owners'*

class actions, for example on equal pay for equal work²⁴² and the regularisation of labour have been filed. The easily identifiable nature of industries in this sector, extensive unionisation and the precedent of class actions set by PIL laid the foundations for using law in this way.

Organisations and social action groups have played a significant role in bringing the situation of workers in the unorganised sector to the Court. Sanjit Roy of the Social Work and Research Centre (mistakenly called the Special Works and Research Centre in the reported judgment) has filed two cases, both on the payment of minimum wages. Similarly, the cases filed by the People's Union for Democratic Rights and the Lok Adhikar Sangh, were filed in response to written and oral reports of injustice. Those filed by the latter organisation were both in response to newspaper articles, as were the petitions filed for the workers on the Salal Hydroelectric Project and in the Kandla Port. Other petitions filed by the Self Employed Women's Association (SEWA)²⁴³ and the Vidhayak Sansad²⁴⁴ resulted from a long-term involvement with the people represented.

Union op cit note 236 has been discussed because of the Court's pronouncements on PIL. *M K Sharma op cit* note 235 has been accounted for, as it is perceived as a PIL, but is a class action. See chapter two for a discussion.

²⁴² For examples of class action cases on equal pay for equal work see: *Randhir Singh v Union of India and others* AIR 1982 SC 879; *Inder Pal Yadav and others v Union of India and others* (1985) 2 SCC 648; *Surinder Singh v Engineer-In-Chief, C.P.W.D.* (1986) 1 SCC 639; *Ram Kumar and others v Union of India and others* AIR 1988 SC 390; *Daily Rated Casual Labour employed under P&T Department through Bhartiya Dak Tar Mazdoor Manch v Union of India and others* (1988) 1 SCC 122; *Jaipal and others v State of Haryana* (1988) 3 SCC 354; *Federation of All India Customs and Central Excise Stenographers v Union of India* (1988) 3 SCC 91; *Halli Gowda and others v Managing Director, K S R T C and another* AIR 1989 SC 1117; *Bhagwati Prasad v Delhi State Mineral Development Corporation* AIR 1990 SC 371; *Ram Sukh and others v State of Rajasthan and others* AIR 1990 SC 592; *Food Corporation of India Workers' Union v Food Corporation of India and others* AIR 1990 SC 2178; *Grih Kalyan Kendra Workers' Union v Union of India and others* AIR 1991 SC 1173; *Sandeep Kumar and others v State of Uttar Pradesh and others* AIR 1992 SC 713.

²⁴³ See the section on 'Urban Space'.

²⁴⁴ See the section on 'Bonded Labour' for other cases filed by this organisation together with the Shramjeevi Sangathana in Thane District, Maharashtra.

Access to Justice

Allowing letters as writ petitions meant that early PIL cases filed by Sanjit Roy and the People' Union for Democratic Rights were admitted by the Court.²⁴⁵ Again the difference between letter-petitions and PIL cases has to be noted. Although the original letter regarding the closure of an industry was sent by the workers themselves, the PIL character of the litigation was affirmed when examining the nature of the grievance and the fact that access to justice was only possible for these workers after procedural rules had been relaxed.²⁴⁶

In one of the earliest expositions of PIL Justice Krishna Iyer discussed standing and linked it with the nature of the grievance brought to Court.²⁴⁷ The right of a worker to approach the Court questioning the closure of an industry was upheld. The Court also discussed the scope of PIL and *locus standi* in its notable judgment in the Asiad Games workers case.²⁴⁸ However, the High Courts have not always followed the precedent sent by the Supreme Court.²⁴⁹

Only one case was rejected on the grounds that an alternative forum was available.²⁵⁰ Similarly, after granting interim relief in the petition, the Gujarat High Court directed the petition to the Industrial Tribunal.²⁵¹

²⁴⁵ Other cases such as *Workers of M/s Rohtas Industries op cit* note 233, *Ram Kumar Misra op cit* note 234 and *Rohit Vasavada op cit* note 234 originated in letters.

²⁴⁶ *Workers of M/s Rohtas Industries op cit* note 233.

²⁴⁷ *Fertilizer Corporation op cit* note 233.

²⁴⁸ *People's Union for Democratic Rights op cit* note 234.

²⁴⁹ For example when the availability of *locus standi* was limited by the Calcutta High Court in *Sand Carrier's Owners' Union op cit* note 236.

²⁵⁰ In *Vidyulatta Vivek Pandit op cit* note 234, after originally asking the Labour Commissioner to appear in Court, the Bombay High Court asked the petitioners to approach the Industrial Tribunal.

²⁵¹ *Valiben Bhikhabhai Parmar op cit* note 234.

The Court's Response

One of the first cases in which the Court ordered an inquiry and monitored the implementation of its orders was in the Asiad Games case, notable for the Court's innovative treatment of the procedural impediments to access to justice and also for the Court's order in which importance was given to the Directive Principles of State Policy. The scope of forced labour in Article 23 of the Constitution was expanded to include the compulsion of economic circumstances.²⁵² Subsequently, this order was used to declare the Rajasthan Famine Relief Works Employees (Exemption from Labour Laws) Act, 1964 as unconstitutional under Article 23 of the Constitution²⁵³ - the first time that this Article had been used in this way.²⁵⁴ In a concurring judgment, Justice Pathak upheld the order but stated that the Act violated Article 14 of the Constitution rather than Article 23. This difference of perspective between the judges reflects a general and continuing disparity about how to deal with issues relating to the “have nots”. Few later judgments have been as resourceful when analysing fundamental rights for workers.

Commissions have been regularly appointed, and in one case two separate commissions were appointed,²⁵⁵ to provide the information and insight that would otherwise not be available. Not only has the Court been unable to rely on the State for adequate information,²⁵⁶ the Court has itself had to take on the responsibility of monitoring the implementation of its orders.

While on occasion the government has been praised for its co-operation

²⁵² *People's Union for Democratic Rights op cit* note 234.

²⁵³ *Sanjit Roy op cit* note 234.

²⁵⁴ Contrast with *Poola Bhaskara Vijayakumar op cit* note 22.

²⁵⁵ For the workers on the Sabarmati Coal site in Ahmedabad, *op cit* note 234.

²⁵⁶ For example *Workers of M/s Rohtas Industries op cit* note 233.

during the Court's enquiries and in implementing the Court's orders,²⁵⁷ most of the cases have been characterised by a reluctance to cooperate. The obduracy of the State machinery is more glaringly apparent in other cases, such as that of the Sabarmati coal workers, when the government was unwilling to frame a statutory scheme on the grounds that it would not be successful, without analysing or attempting to rectify the causes of the anticipated failure. The Court could only “trust” that necessary action would be taken by the State, but was disappointed by the results. In another case, the Court was compelled to monitor the implementation of its order, to appoint a committee and directed the sugar factories to pay the costs of the litigation.²⁵⁸

The Court has had to analyse various enactments before giving orders, decide which of the many labour laws would be applicable in the case under consideration and, before assigning responsibility for the implementation of its judgments, decide who would be responsible for the implementation of the provisions of the Acts.²⁵⁹

The nebulous distinction between bonded labour and other forms of exploitation was made apparent by the courts.²⁶⁰ However, the judicial comprehension of labour issues has been poor, lacking clarity and sensitivity to the workers themselves. Without considering that the Labour Commissioner may be hiding the existence of bonded labour from the Court, the statement that there was no bonded labour was accepted at face value.²⁶¹

²⁵⁷ In *Hira Lal and Special Works and Research Centre op cit* note 234. As the latter petition was filed after the court's order, because the government flouted the Supreme Court's directions in *Sanjit Roy op cit* note 234, the praise seems misplaced.

²⁵⁸ *Lok Adhikar Sangh op cit* note 234.

²⁵⁹ *Ibid*, the Court had first to decide who were the principal employees before determining their duties. In *Labourers Working on Salal Hydro Project op cit* note 234, contractors and sub-contractors were directed to register themselves as contractors under the Contract Labour (Regulation and Abolition) Act, 1970 so that provisions of the Act would apply to them.

²⁶⁰ See *Ram Kumar Misra, Rohit Vasadava, People's Union for Democratic Rights and Sanjit Roy op cit* note 234.

²⁶¹ In *Labourers Working on Salal Hydro Project op cit* note 234 reference was made to the employment of children, and to the applicability of the Bonded Labour System (Abolition) Act, 1976.

A number of specific legal developments have ensued. The right of workers to demonstrate has been upheld.²⁶² Responding to the fear of radiation, the Court has held that while there was no immediate danger to workers, Bharat Electronics Limited should provide insurance.²⁶³

The Contribution of PIL

Just as the issues brought to the Court related to the non-implementation of labour laws, the use of legal mechanisms has resulted in the non-implementation of the Court's judgments. There has been sympathy and, in some cases dynamism in the Court, for the workers, but this in itself brought little in the way of substantive results.

The landmark judgment in the Asiad case²⁶⁴ received much attention at the time and has been quoted in innumerable later cases. Despite this there was no change in the conditions of work on the Asiad construction sites. By the time orders had been passed by the Supreme Court, few workers remained, as the time taken for the Court to act was just too long. The court-appointed ombudsmen visited the construction sites when most of the work had been completed and the majority of the unskilled migrant labourers had already left. Following the main Supreme Court order, when labour inspectors started supervising the work, it was found that the contractors were still bypassing the laws, that they were preventing the workers from reporting their situation to the ombudsmen and that they were attempting to hide major accidents. At least 100 major accident cases were treated at one nursing home alone

²⁶² *Vivek Raghunath Pandit op cit* note 234.

²⁶³ *M K Sharma op cit* note 235. Contrast with *Nagendra Dutt Jagudi op cit* note 234 in which the Court ordered that criminal proceedings be initiated against the management. See the section on health in the section on 'Public Policy and Administration' for a case filed by M C Mehta on radiation in which the Supreme Court directed that insurance cover be provided for the employees at risk. Also see 'Children' for *Rajangam op cit* note 197.

²⁶⁴ *People's Union for Democratic Rights op cit* note 234.

during the 18-month period ending in July 1982.²⁶⁵

In legal terms, the orders on labour have displayed little innovation. With the exception of the ruling in the *Asiad* case which clarified the scope of Article 23 of the Constitution and used the Directive Principles of State Policy, there have been few incisive comments. As in most of the other sections, the lack of comment or criticism of the statutory framework which governs labour relations is conspicuous. Relief has been provided on a case by case basis, whilst the broader issue of liability and the duty to protect workers has not been considered. One major innovation of PIL for workers has been procedural, in the wide acceptance of class actions.²⁶⁶

The way in which the case on the workers of Sabarmati coal site was brought to Court reflected on the eventual outcome, as have the differences in the approach of activist groups working in the area. This petition had been filed by a group of lawyers, the Lok Adhikar Sangh, apparently without consulting or informing the Ahmedabad Women's Action Group, a social action group which was already working in the area.²⁶⁷ Members of the women's group felt that the petitioner's focus was to secure a legal victory, but not on the implementation of that victory. Reports indicate that the case was eventually withdrawn at the request of the management, who had superficially fulfilled the requirements of the Court order.

²⁶⁵ 'ASIAD 82', (monograph published by Gobinda Mukhoty, President PUDR, Delhi, Oct 1982) at 5.

²⁶⁶ See *Hardoi Roadways (Private) Union, Hardoi and another v Cantonment Board, Shahjahanpur and others* AIR 1991 All 59 for an example of a case which demonstrated that class actions are still not wholly accepted. The Allahabad High Court refused to give *locus standi* to a Union of workers on the grounds that an individual can challenge the action of an authority.

²⁶⁷ In addition to this case, another petition from Gujarat involved a number of activist groups. It was filed in the Gujarat High Court by a co-operative society in Ahmedabad constituted of persons plying handcarts for carrying bales of cloth in the Maskati Cloth Market challenging the constitutional validity of the Cloth Markets or Shops Unprotected Workers (Regulation of Employment and Welfare) Rules, 1981 because certain areas were excluded from the scheme, which was framed without any application of mind as it can only operate if workers/employees are registered. The High Court appointed a Commissioner to look into the matter. An application was then filed stating that the petitioners were not handcart pullers and the petition was not filed bona fide. Another organisation in Ahmedabad, SEWA, then intervened in the petition.

Far from bettering the situation of the migrant sugar cane cutter, another unreported case brought by the Lok Adhikar Sangh appears to have worsened it. Even before the petition was filed, the State Government was aware of the conditions of work. In May 1986, the Rural Commissioner for Labour in Gujarat had stated in a memo:

... if some public litigation were to be filed for and on behalf of these migrant workers, the Government could be placed in the most embarrassing position.²⁶⁸

Even after the intervention of the High Court, the State Government did not co-operate. Moreover, as noted by an analyst of the case:

The biggest problem seems to me to be the fact that the Lok Adhikar Sangh was not content with the role of advocate, but in the second instance started to negotiate with employers as defender of the migrants' interest. Once they had succumbed to this predilection they found themselves in a position in which they entered into agreements on behalf of clients who had not given permission for them to do so and who were scarcely aware of what was being done in their name.²⁶⁹

The Court's orders were flouted and the factory owners became more sophisticated in the methods of exploitation of the workers. An appeal was filed by the management of the co-operative factories, and the litigation continues. It seems that many of the workers have lost the employment they had. It is in this instance that the strength of entrenched business interests in the maintenance of the cheapest possible labour force is most visible.

The judgments in both the cases filed by Sanjit Roy mobilised many social action groups within Rajasthan and resulted in a series of judgments on

²⁶⁸ Quoted in Breman, Jan, 'Agribusiness and Labour in South Gujarat', (Institute of Commonwealth Studies, London, unpublished paper for discussion, presented on 21/10/88) at 9. Also see Breman, Jan, 'Seasonal Migration and Co-operative Capitalism. Crushing of Cane and of Labour by Sugar Factories of Bardoli', *Economic and Political Weekly* Special Number Aug 1978, 1317-1360; Breman, Jan, 'I am the Government Labour Officer ...' State Protection for Rural Proletariat of South Gujarat', *Economic and Political Weekly*, 15/6/85, 1043-1055; [anon], 'Exploitation continues despite the laws', *The Hindu*, 13/12/86. For a detailed study of these labourers see Breman, Jan, *Of Peasants, Migrants and Paupers. Rural Labour Circulation and Capitalist Production in West India*, (Oxford University Press, Delhi, 1985).

²⁶⁹ Breman, Jan (1988) at 17-18.

minimum wages in the Rajasthan High Court.²⁷⁰ The Supreme Court judgments have been used in lower courts, providing support for those who seeking change through the administration, and raising the status of the petitioning organisation and providing a justification for action. Implementation of the judgments themselves has been monitored by the Social Work and Research Centre, which had prepared for a successful outcome in the Supreme Court.²⁷¹ In the cases that have had some success, this can be attributed to the work of non-governmental organisations, rather than to the administration.

Bonded Labour

Available documents of petitions filed relating to bonded labour are easily categorised into those filed by the organisation Bandhua Mukti Morcha,²⁷² those relating to the Raipur area of Madhya Pradesh,²⁷³ those relating to the Thane District of Maharashtra,²⁷⁴ and a collection of disparate cases from the rest of the country.²⁷⁵

²⁷⁰ See [anon], *Minimum Wages in Government Sponsored Rural Employment Programmes*, (Institute of Development Studies, Jaipur, 1991).

²⁷¹ Sanjit Roy himself described how he sent the first letter to the Supreme Court after being assured by Justice Bhagwati that the Court would treat the matter sympathetically. Sanjit Roy, interview, Tilonia, 16/2/92.

²⁷² *Kameshwar Prasad Sharma, 'Slave' President, Bandhua Mukti Morcha, Bihar v State of Bihar and others* 1983 (2) SCALE 160 [897], 1983 (2) SCALE 161 [897] and 1993 (2) SCALE 31 [127]; *Bandhua Mukti Morcha v Union of India & Ors* (Haryana Mines I) AIR 1984 SC 802 / (1984) 4 SCC 161, 1991 (1) SCALE 79 [295] and AIR 1992 SC 38; *Bandhua Mukti Morcha, through Chairman, Swami Agnivesh v State of Haryana & Ors.* (Haryana Mines II) 1983 (1) SCALE 121 [543]; *Bandhua Mukti Morcha v State of Tamil Nadu* 1986 (Supp) SCC 541.

²⁷³ *Chattisgarh Krishak Mazdoor Sangh v State of M P & Ors.* 1984 (3) SCALE 93 [603]; *Upendra and others v State of M P and another* 1986 (Supp) SCC 558; *Rajinder K. Sail v State of M.P.* 1988 (1) SCALE 176; *Balram & Ors v State of M P Etc.* 1989 (2) SCALE 125 [667].

²⁷⁴ Included in this section are details of two petitions with the same cause title, which were heard together: *Vivek Pandit v State of Maharashtra*.

All the cases invoke the Bonded Labour System (Abolition) Act, 1976 which was enacted to give effect to Article 23 of the Constitution by providing for the release and rehabilitation of bonded labourers. The Act states that a bonded labourer is one who has incurred a bonded debt under the bonded labour system.²⁷⁶ The Act also states that any worker to whom the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 and the Contract Labour (Regulation and Abolition) Act, 1970 would apply and who is working in conditions specified in section 2(g) would be classified as a bonded labourer under the Act. The Act also provides for the establishment of vigilance committees at district level for the implementation of the Act and for punishments for offenders.²⁷⁷

Bonded labour exists in many industries and can take many forms. A report of the Anti-Slavery Society, in 1841, estimated that ten million people were working in conditions of debt bondedness, and indicated that this figure may be inadequate.²⁷⁸ In a study of bonded labour in agriculture published in 1981, 2,617,000 bonded labourers were identified in ten states.²⁷⁹ The study described how 97.5% of

²⁷⁵ *Neeraja Chaudhary v State of M P* AIR 1984 SC 1099 / 1984 (1) SCALE 148 [874]; *Mukesh Advani v State of M P* AIR 1985 SC 1363; *P Sivaswamy v State of T N* 1983 (2) SCALE 45 [240] and (1988) 4 SCC 466; *State of Karnataka and others v Taluk Labour Union (Regd.)*; *T Chakkalackal v State of Bihar* JT 1992 (1) SC 106; details of cases in the Madras High Court.

²⁷⁶ Section 2(g) defines the bonded labour system as where an agreement is entered into between a debtor and a creditor under a number of conditions, and with specified effects. The conditions are broadly: in consideration of an advance; in pursuance of any customary or social obligation; in pursuance of an obligation devolving on him by succession; for any economic consideration; by reason of birth in any particular caste or community.

²⁷⁷ Punishments are laid out in sections 16-20 of the Act: for the enforcement of bonded labour or for the advancement of bonded debt - up to three years imprisonment and also fine up to Rs.2,000; for the extraction of bonded labour - up to three years imprisonment and also fine up to Rs.2,000 (out of which a payment of Rs.5 is to be given to the bonded labourer for each day worked); failure to restore the property of a bonded labourer - up to one year imprisonment or fine up to Rs.1,000 or both (out of which a payment of Rs.5 per day is to be given to the bonded labourer for the time that property was not restored); abetment has the same punishment as the offence.

²⁷⁸ [anon], 'Slavery in British India', *Anti-Slavery Reporter*, XXXIII, Vol II No 6, 24/3/1841. Population estimates for 1850 range from 183 to 247 millions, see Visaria, Leela and Visaria, Pravin, 'Population (1757-1947)' in Kumar, Dharma and Desai, Meghnad (eds), *The Cambridge Economic History of India. Volume 2: c.1757-c.1970*, (Cambridge University Press, Cambridge, 1983), 463-532.

²⁷⁹ Marla, Sarma *Bonded Labour in India: A National Survey on the Incidence of Bonded Labour, Final Report, January 1981* (Academy of Gandhian Studies, Hyderabad, 1981).

the bonded labourers identified were men and 2.3% women. The five most common ways to become bonded were: inter-generational bondage; child bondage;²⁸⁰ loyalty bondage; bondage through land allotment; widow bondage. Two types of bondage were identified in the study - customary (traditional) bondage where the relationship between the bonded labourer and the landlord is characterised by a high degree of paternalism and personalisation, and modern bondage in which the relationship between debtor and creditor is more impersonal and complex. It was found that bonded labour was a phenomenon which could be structurally identified with the scheduled castes and scheduled tribes, as 86.6% of the bonded labourers came from the under-privileged sections of harijans and adivasis (scheduled castes: 61.5%, scheduled tribes: 25.1%).²⁸¹

Together with labour laws, the Bonded Labour System (Abolition) Act, 1976, provides legal protection and support for those labourers recognised as bonded labour under the Act. However, it was not until social action groups, working for the release and rehabilitation of bonded labour, began to petition the Supreme Court that the protection of this Act was used. Nothing had been done for such labourers by the local administration, which, at best, denied the existence of bonded labour and often supported its use. The labourers themselves, unaware of their rights and unable to engage with the legal process, were not in a position to petition the court. Journalists and organisations took note of the powerlessness of these labourers, and of their legal rights. Approaching the Supreme Court became the only solution to a structurally entrenched problem.

Bandhua Mukti Morcha began working with bonded labour in 1981 and was immediately successful in releasing some of the bonded labourers working in the stone quarries of Haryana. The release of these labourers generated reactions both in

²⁸⁰ See the cases on child labour in the section on 'Children'.

²⁸¹ Also see Mehta, Piareylal, 'Constitutional Philosophy of Bonded Labour in India: Myth and Reality', *Indian Social Legal Journal* Vol 15 Nos 1&2, 1989, 125-143.

Parliament and the media and gave the labourers themselves a sense of their rights.²⁸² As no money was made available for the rehabilitation of the released labourers and the administration was unresponsive, the organisation decided that a case should be filed.²⁸³ Hopes about what could be gained from the Court were high as it was envisaged that the labourers would be identified, released and rehabilitated.²⁸⁴

A similar situation arose at about the same time in Thane District of Maharashtra. While working with bonded labourers in 1981, Vivek and Vidyulatta Pandit found that the administration was both apathetic and ignorant of the existence of bonded labour.²⁸⁵ The Government of Maharashtra, without constituting Vigilance Committees, as prescribed by the Act, to investigate the existence of bonded labour, claimed that there were no bonded labourers in the state.²⁸⁶ Unable to mobilise adequately the administration and labourers through the organisation, Vidhayak Sansad, the Pandits visited Justice Bhagwati, then a sitting judge of the Supreme Court, in May 1983. After listening to their story, the judge suggested that a letter be written to the Supreme Court. However, it was decided not to approach the Court immediately. Instead, with the support of only a few politicians and a large portion of the press, 200 bonded labourers in the area were freed. It was not until December 1983 when the magnitude of the problem and the limitations of local action were realised, that it was decided to take recourse to law. After meeting with Justice

²⁸² [anon], 'Agnivesh rescues bonded labour', *PUCL Bulletin*, Vol 1 No 2, May 1981, 20.

²⁸³ In addition to the documented cases, other petitions have been filed. W P No 1628 of 1983 was filed by Bandhua Mukti Morcha in the SC on behalf of bonded brick kiln workers in Haryana.

²⁸⁴ For documentation and analysis of these cases see 'Bonded Labour and its Abolition. Volume 1: Report', (National Centre for Human Settlement and Environment, New Delhi, [1986?]); 'Bonded Labour and its Abolition. Volume 2: Documents. Part I: Statutes, Reports and Circulars', (National Centre for Human Settlement and Environment, New Delhi, 1987); 'Bonded Labour and its Abolition. Volume 2: Documents. Part II: Case Material', (National Centre for Human Settlement and Environment, New Delhi, 1987).

²⁸⁵ When the Commissioners appointed by the Court visited the area, they found that the Collector of Thane District was not aware of the Bonded Labour Act and that no provisions for rehabilitation had been made.

²⁸⁶ The denial of the existence of bonded labour was reported in several newspapers of the time including the Nagpur Times on 2/1/83.

Bhagwati again, two letters were sent to the Court on his advice - one asking for the identification of bonded labourers and the other for their release.

In Chattisgarh (Raipur)²⁸⁷ political and organisational activity developed together as a struggle was begun by bonded labourers and activists both inside and outside the courts.²⁸⁸ It is only in this group of cases that bonded labourers were themselves parties to the petitions. All the petitions were similar in content as the petitioners were linked through social action groups and organisations.

The definition of bonded labour has given rise to confusion. The administration itself has not been clear about who is a bonded labourer.²⁸⁹ One member of the Madhya Pradesh cadre of the Indian Administrative Service noted that the confusion about the definition of bonded labour could be seen from the various circulars periodically issued by the government. He noted that these circulars would often highlight the presence of physical force and confinement as a necessary ingredient of bonded labour, contrary to the Act.²⁹⁰ Thus, it was the Supreme Court that was approached for a number of reliefs, first to identify the bonded labourers, then to order their release and to provide them with proper rehabilitation.²⁹¹

²⁸⁷ Most bonded labourers in this region are Kamiyas, and the debts of the father are passed on to their sons.

²⁸⁸ For example see Sail, Rajendra K 'Madhya Pradesh: Released Bonded Labourers form a Trade Union' *PUCL Bulletin*, Vol 9 No 4, Apr 1989, 7-9.

²⁸⁹ For other cases in which bonded labour was discussed see the section on 'Labour' for: *Ram Kumar Misra, Rohit Vasavada and Labourers Working on Salal Hydro Project op cit* note 234.

²⁹⁰ Julaniya, Radhey Shayam, 'Bonded Labour. Experiences and Views of an Administrator', [(unpublished paper, 1989?)].

²⁹¹ See Noorani, 'Public Interest Litigation', *EPW*, [?], 1568-1569; Radhakrishnan, K, 'Public Interest Litigation on Bonded Labour', *Andhra Law Times* (1986) 1 J 8-12.

Access to Justice

The only major obstacle to gaining access to the courts has been the limited knowledge of the writ jurisdiction of the courts and of the statutory and constitutional provisions available. Once that hurdle was overcome, with the specific encouragement of judges like Justice Bhagwati and the national media, letters were sent to the Supreme Court from all over the country. The cases from Tamil Nadu are an example of the kinds of cases filed outside the Supreme Court. Filed by the High Court Legal Aid Committee (HCLAC), these petitions have often taken the form of *habeas corpus* petitions, asking for the release of labourers from bondage.

The Court's Response

The letter sent to the Supreme Court in 1981 by Bandhua Mukti Morcha led to one of the most important judgments in PIL. Delivered on December 16, 1983 many months after the hearings had concluded, the main judgment was given by Justice Bhagwati, with concurring judgments by Justice R S Pathak and Justice A N Sen.²⁹² Dismissing objections to the admissibility of the petition, the Court stated that there would be a presumption of bondedness if it were found that the labour in question was forced. The Court realised that to ask each labourer to provide proof of debt-bondedness would be untenable, and held that whenever the existence of forced labour is proven, the onus would be on the employer to discredit this claim. After a detailed examination of the relevant enactments, the labourers in question were defined as interstate migrant labourers as well as bonded labourers. Twenty-one directions were issued outside the scope of the original petition and the State of Haryana was lectured about the need to be more responsive and to perform the role of a welfare state. During the course of the litigation the Court monitored its directions and appointed a number of commissions of enquiry. Even with the Court's efforts, the case has been protracted, marked by the continuing intransigence of the employers and the

²⁹² *Bandhua Mukti Morcha* (Haryana Mines I) *op cit* note 272.

administration.

The appointment of commissions, the monitoring of progress and the resistance of the administration form a common theme that runs throughout the orders. Monitoring rehabilitation became a more onerous task than was anticipated,²⁹³ and implementation of the Act has been repeatedly ordered.

Although the terms of reference of the commissions appointed were clearly defined, the method of conducting the enquiry and the conclusions reached have often limited the Court's directions. In one enquiry report, all the allegations about the existence of bonded labour were found to be true but no criticisms were directed at the administration or the District Magistrate.²⁹⁴ Another enquiry found that although there was no bonded labour, labour laws were being flouted, a situation to which the Court responded with hopes and prayers.²⁹⁵ It is possible that the dangers of inquiring into allegations of the existence of bonded labour have affected the resulting reports. Members of one enquiry commission were threatened, "by the contractor and his henchmen", and needed police protection to complete their investigations.²⁹⁶

That courts are restricted by the information put before them is illustrated by a case filed by *Bandhua Mukti Morcha*.²⁹⁷ Originally concerned with providing protection and rehabilitation to released bonded labourers, the attention of the Court became focussed on allegations that the petitioner-organisation had

²⁹³ However the imperative to act was great. In *Neeraja Chaudhary op cit* note 275 the Court was compelled to monitor the rehabilitation of labourers it had released, describing the terrible choice between freedom and hunger forced upon them.

²⁹⁴ *Vivek Pandit op cit* note 274.

²⁹⁵ *Mukesh Advani op cit* note 275.

²⁹⁶ *Bandhua Mukti Morcha, through Chairman, Swami Agnivesh v State of Haryana & Ors.* referred to in Desai, A R (ed), *Violation of Democratic Rights in India. Volume I*, (Popular Prakashan, Bombay, 1986) at 185.

²⁹⁷ *Kameshwar Prasad Sharma op cit* note 272.

misappropriated funds. Without examining the matter in detail, the Court accepted in full the report of the District Judge, closed the monitoring of the case and refused to allow the petitioner to file any more applications. Other problems relating to enquiries have also been apparent, for example when the administration refused to testify to the existence of bonded labourers.²⁹⁸

In spite of the evidentiary problems and the burden of monitoring, one important result of the Court's intervention was the support given to the work of social action groups.²⁹⁹ These groups were used to monitor the implementation of the Court's orders and given an important role on the vigilance committees.³⁰⁰ Another feature of the Court orders in this section has been the tendency to direct the States concerned to pay the costs of the investigations ordered by the Court.³⁰¹ The links between legal aid and PIL, both methods of securing access to justice, were used to the advantage of bonded labourers.

The Contribution of PIL

There have certainly been a number of benefits from using PIL for bonded labourers. In Raipur, it was only after the Court's intervention that the first bonded labourers were released in 1983.³⁰² Migrant bonded labourers from other States

²⁹⁸ *T Chakkalackal op cit* note 275. Also see *Chattisgarh Krishak Mazdoor Sangh op cit* note 273 - it is interesting to note that the order given by the Court in this case was implemented three months before an election was to be held. Jose Verghese, advocate, interview, New Delhi, 25/2/92.

²⁹⁹ In the main judgment in *Bandhua Mukti Morcha* (Haryana Mines I) *op cit* note 272 and in *Neeraja Chaudhary op cit* note 275 the value of the work of such organisations was stressed. Also see *Centre of Legal Research and another v State of Kerala* AIR 1986 SC 2195, as discussed in 'Judges, Courts, Lawyers' in chapter four.

³⁰⁰ See *P Sivaswamy op cit* note 275.

³⁰¹ For example in *Upendra op cit* note 273 and *P Sivaswamy op cit* note 275. In *Bandhua Mukti Morcha* (Haryana Mines II) *op cit* note 272 and *Mukesh Advani op cit* note 275, CILAS was asked to pay the costs.

³⁰² Sail, Rajendra K, 'Madhya Pradesh: released bonded labourers form a Trade Union', *PUCL Bulletin*, Vol 9, No 4, Apr 1989, 7-9 at 9.

were returned home and there was a widespread feeling that law could be mobilised for the disadvantaged. The growth of activist groups, and credibility lent by successes in the form of Supreme Court judgments, meant that more bonded labourers became aware of their rights, and the obligations of the state towards them. It is certainly true that without the courts, the 1976 Act would not have been implemented at all, nor would its provisions have become known.

The interpretation of the Bonded Labour System (Abolition) Act, 1976 through the documented PIL orders permitted uncertainties as to what conditions determined the applicability of the Act.³⁰³ In a valuable case study, Oliver Mendelsohn described the real problem as one of deciding what constitutes forced labour rather than whether the forced labour could be said to derive from a loan.³⁰⁴ Mendelsohn went on to follow the fortunes of labourers working in the stone quarries:

By 1989, and despite a spectacular success in the form of the Supreme Court judgement, the Faridabad campaign had to be counted a failure. Very few workers had effectively been rehabilitated as bonded labourers; wages had risen only moderately; and health and safety conditions were scarcely different from a decade ago. Swami Agnivesh concedes this failure himself and has now abandoned organising in the quarries, though he persists with the residual litigation.³⁰⁵

He notes that the rehabilitation payments and packages were not realised for those labourers who were actually released, as the courts could only provide a one time solution. Attempts to sensitise the administration were critical. However, as bonded labour is not just a social or political issue, but also an economic issue, what was needed was a fundamental change in labour relations - a change that the courts could not effect.³⁰⁶

³⁰³ In *Bandhua Mukti Morcha* (Haryana Mines I) *op cit* note 272, Justice Bhagwati defined bonded labour as any labour which was forced by economic hardship, but did not define force.

³⁰⁴ See Mendelsohn, Oliver, 'Life and Struggles in the Stone Quarries of India: A Case-study', *Journal of Commonwealth and Comparative Political Studies*, Vol 29 No 1, Mar 1991, 44-71 at 49.

³⁰⁵ *Ibid* at 46. Swami Agnivesh confirmed this view in interview in New Delhi in February 1991 and 'The work of the Bonded Liberation Front', (seminar at the Centre of South Asian Studies, School of Oriental and African Studies, University of London, 6/11/91).

³⁰⁶ *Ibid*.

The procedural mechanisms for identifying bonded labourers have proven inadequate and innovative methods of manipulating the Act have been found. In a petition filed by the Santhal Pargana Antyodaya Ashram on behalf of 3,457 bonded labourers from three blocks in the Santhal Pargana region of Bihar, the Court appointed an enquiry Commission.³⁰⁷ Documentation from the Ashram described the problems in verification of debt-bondedness, which was done by community workers in the face of opposition from vested interests. Because of the fear instilled by the organisation and its support from the Supreme Court, the Commissioners reported an increase in the prevailing wage. However since the Court order, many local landlords began enrolling bonded labourers so that they could trade in 'rehabilitation aid'.³⁰⁸ Three cases of well-to-do farmers being officially enrolled as bonded labourers were documented.

Even though punishments have been provided for by the Act, few bonded labour keepers have been punished.³⁰⁹ None of the Court orders in PIL have directed that any action be taken by the lower judiciary against those who have flouted the provisions of the Act. In the main judgment in PIL for bonded labourers, the Court analysed the Act without mentioning the punishments for crimes committed in relation to bonded labour.³¹⁰ It is not just landlords, but the administrators and the legislators themselves who are violating the laws.³¹¹ A study of the Act noted that the cases

³⁰⁷ W P (C) No 13450 of 1983 in the Supreme Court of India.

³⁰⁸ [anon], 'Class Litigation by Bonded Labour', *Sarokar* (Newsletter of the Santhal Pargana Antyodaya Ashram, B. Deoghar - 814, Bihar), Vol I No 1, July 1985, 1-2.

³⁰⁹ The first ever reported conviction under the Bonded Labour System (Abolition) Act, 1976 was not until 27/2/87 when a landlord from Thane was sentenced to three months' rigorous imprisonment and fined Rs.2,000. See [anon] '3-month RI for landlord', *Indian Express*, 12/3/87; Vinayak, R, 'Liberated', *Illustrated Weekly of India*, 10/5/87; Wagh, Dayanand, 'Loosening the Knot', *India Today*, 15/4/87.

³¹⁰ *Bandhua Mukti Morcha* (Haryana Mines I) *op cit* note 272.

³¹¹ W P of 1810 of 1984 was filed in the Karnataka High Court regarding landlords who keep bonded labourers for work in their fields and gardens. One such landlord was a Member of the Legislative Assembly.

against bonded labour keepers are kept pending for many years.³¹² These vested interests, which have prevented the Act from being implemented, have also prevented Court orders from being implemented. Landlords and politicians have been accused of perpetuating the practice of keeping labour in bondage.³¹³ Nonetheless, certain changes have been initiated:

The verification has instilled some fear in to the hearts of the bondmasters. In a society where police and courts have been used by the oppressors as means of coercion, it has also dispelled fear from the hearts of the oppressed. Culminating in May-June when the new crop cycle is about to begin, the verification has intensified the issues. There are interesting situations developing in different villages. That there has been a change including increase in prevailing wage ever since the organisational process began in 1982 is confirmed by the officers of the Commission.³¹⁴

Furthermore, the question of bonded labour has gained significance in national and international arena, adding to the growing force of national opinion against the bondage of workers.³¹⁵

³¹² Pandit, Vivek, "Bonded Labour System: Is there will to abolish it?", (unpublished paper, New Delhi, 8/2/90). See also Pandit, Vivek, "Bonded Labour and Voluntary Agencies", *People's Action*, Vol 5 No 6 in which Lok Sabha question No 2842 on 14/3/88 was referred to. Replying to a query about bonded labour, the Government stated that its records show that 64 bonded labourers in Gujarat and 823 in Kerala were identified and released. Pandit states that not a single case was registered against the culprits.

³¹³ See Sail, Shashi, 'Letters. Hunger Strike by Bonded Labourers', *The Lawyers*, Vol 4 No 1, Jan 89, 3; Sail, Rajendra, 'Letters. Supreme Court Order Ignored', *The Lawyers*, Vol 4 No 4-5, Apr-May 89, 4; Bhat, Nirmila, 'Warrants Attention', *The Lawyers*, Vol 2 No 6, June 87, 15; [anon], 'Madhya Pradesh: Rally Against Corruption by Bonded Labourers', *PUCL Bulletin*, Vol 10 No 4, Apr 1984, 22; Lakshmi, Viyaya, 'Amnesty under Fire', *PUCL Bulletin*, Vol 9 No 6, June 1986, 16; [anon], 'Rehabilitation of Bonded Labourers: Diary of Corruption', *PUCL Bulletin*, Vol 10 No 3, Mar 1990, 28.

³¹⁴ [anon], 'Class Litigation by Bonded Labour' at 1.

³¹⁵ See 'Action on directives issued by Supreme Court in its Judgement on Bandhua Mukti Morcha', *Lok Sabha Debates*, Series 8 Session 2 Vol 6, 13/5/85, 101-102; 'Implementation of Supreme Court Judgement regarding Bonded and Migrant Labour', *Lok Sabha Debates*, Series 8 Session 2 Vol 6, 13/5/85, 236-37; 'Supreme Court inquiries from Bihar Government on bonded child labour in Mirzapur (U.P.)', *Lok Sabha Debates*, Series 8 Session 7 Vol 22, 1/12/86, 142-43. Harlow, Carol and Rawlings, Rick (1992) have noted, at 242:

The Bonded Liberation Front, which came into being in India in 1981 to fight debt bondage .. is represented on ASI's [Anti-Slavery International's] committee and was in 1984 included in ASI's UN delegation on the subject.

Concluding Remarks

Focusing on issues concerning the disadvantaged/deprived and marginalised/excluded, most of the questions central to the study of Social Action Litigation (SAL), as opposed to PIL, have been raised in this chapter. The cases discussed display the concerns and the response, in the early 1980s, for social justice and for disadvantaged citizens. Most of the definitive statements on procedures, setting out the parameters of PIL, have been included in the case studies here. However, for each of the issues considered, the ambit has extended beyond the parameters of SAL. Even when considering state institutions, for example, the Courts have had to reject petitions on the grounds of *mala fides*. Some themes have emerged, and extend into the second set of case studies in chapter four, as the breadth of PIL, already conspicuous, becomes even more striking. These themes include the inability of the Court to respond to many of the petitions with adequate depth, the consistent non-implementation of court orders and the continuing crisis of the legal system.

Chapter Four - Case Studies #2

As PIL continued, a larger range of petitions were considered in the courtroom. Following from the issues discussed in chapter three, the cases in this chapter extend into environment/resource rights, the judicial process and the inconclusive category of cases “where PIL ends?”.¹ The case studies in chapter four differ from those in chapter three, in that most of the petitions discussed here were filed after PIL became an established legal mechanism. The same pattern of analysis, used in chapter three, is continued. Beginning with a discussion of the issue, ‘Access to Justice’, ‘The Court’s Response’ and ‘The Contribution of PIL’ are analysed. ‘Judges, Courts, Lawyers’ is the one exception, as the discussion relates to the judicial process and cannot be evaluated in the same linear manner.

The first three sections on ‘Urban Space’, ‘Environment and Resources’ and ‘Consumer Issues’, are interconnected, and have been considered concurrently. The discussion of ‘Urban Space’ encapsulates the potential dichotomy between PIL and SAL discussed in chapter two. Petitions concerning street vendors and pavement dwellers are set alongside public interest issues concerning construction, and also petitions filed outside the scope of PIL in any form. Most numerous are the petitions filed relating to ‘Environment and Resources’, a burgeoning area of legal action. The smaller sections on ‘Education’ and ‘Politics and Elections’ are followed by cases on ‘Public Policy and Administration’, which include a range of concerns which is as extensive as the response of the courts. The case studies are completed with an analysis of the petitions concerning ‘Judges, Courts, Lawyers’, and brief concluding remarks.

¹ See the categorisation of issues in chapter two.

Urban Space

Many of the problems arising in urban spaces, encompassing a wide range of issues and controversies and affecting all those who participate in the life of cities and towns, have been articulated for resolution by the Court. This section will set out the cases relating to hawkers and street vendors,² slum, pavement and hutment dwellers (hereafter referred to as slum dwellers),³ other housing issues,⁴ land and its use,⁵ recreational land,⁶ construction⁷ and municipal services.⁸ The competing interests

² *Self Employed Women's Association and others v Municipal Corporation of Ahmedabad and others* 1986 (2) SCALE 291 [1254] and *SEWA and another v Commissioner of Police and another; Bombay Hawkers' Union and others v Bombay Municipal Corporation and others* AIR 1985 SC 1206 / (1985) 3 SCC 528; *Footpath Dukandar New Lajpat Rai Market Patri Union (Regd.) and Ors v M C D & Ors* 1986 (2) SCALE 169 [711]; *Pramod Kumar v N D M C & Ors* 1987 (1) SCALE 305 [1300].

³ *Olga Tellis and others v Bombay Municipal Corporation and others* AIR 1986 SC 180; *K Chandru v State of Tamil Nadu & Ors* 1985 (2) SCALE 3 [31]; *Slum Dwellers of Slamagar and others, Pennurimai Iyakkam v State of Tamil Nadu; Karnataka Kolageri N S Sanghatana and others v State of Karnataka and others; Ram Prasad Yadav (Deceased) and Bombay Mineral and Allied Industries Employees' Union and Bombay Coal and Coke Workers' Union v Chairman, Bombay Port Trust and others* (1989) 2 SCC 378; the petition filed by SPARC and *Nazamunissa Shaukat Ali and another v Municipal Corporation of Greater Bombay and others; Scheduled Caste and Weaker Section Welfare Association (Regd.) and another v State of Karnataka and others* (1991) 2 SCC 604; for slum dwellers in Madras by the *Annai Sathyanagar-part B Hutment Dwellers Welfare Association*; regarding slum dwellers in Bhubaneswar.

⁴ *Desh Raj Khurana and others v Delhi Administration* 1987 (1) SCALE 321 [1313]; three petitions filed by Common Cause regarding Delhi Development Authority Flats, the Municipal Corporation of Delhi and plots of land for housing in Gurgaon, Haryana.

⁵ *V Lakshmipathy and others v State of Karnataka and others* AIR 1992 Kant 57; *S S Sobti v Union of India and others* AIR 1982 Del 51; *Bhaghubhai H. Devani v Porbander Municipality and others* AIR 1984 Guj 134; *Bangalore Water Supply and Sewerage Board, Bangalore v Mrs. Kantha Chandra and others* AIR 1989 Kant 1; *Forward Construction Co and others v Prahbat Mandal (Regd.), Andheri and others* AIR 1986 SC 391 / (1986) 1 SCC 100; *M B Sadashivaiah and others v City Improvement Trust Board, Mysore and others* 1988 (3) KLJ 91; *Sachidanand Pandey and another v State of West Bengal and others* AIR 1987 SC 1109; *Parisar Society Ltd and others v State of Maharashtra and others; Madras Citizens Progressive Council v The Secretary to Govt. of Tamil Nadu and other* AIR 1991 Mad 390; regarding the dereseration of plots in Bombay; *Foreshore Cooperative Housing Society Limited, Bombay v Nivara Hakk Suraksha Samiti Bombay and others* 1991 (1) SCALE 33 [109]; a challenge to parts of the "Development Control Regulations for Greater Bombay, 1991"; *Prof A Lakshmisagar and others v State of Karnataka and others* AIR 1993 Kant 121.

⁶ *T Damodhar Rao and others v Special Officer, Municipal Corporation of Hyderabad, and others* AIR 1987 AP 171; *Bangalore Medical Trust v S Muddappa and others* AIR 1991 SC 1902; *D D Vyas and others v Ghaziabad Development Authority, Ghaziabad and another* AIR 1993 All 57; *G K Salil v State of Kerala and others*.

of those at different points on the socio-economic scale are revealed. The petitions expose a bias against the poorer sections of the population, in part a consequence of the restricted availability of land, making it a scarce resource, and the policy and statutory framework in which problems are resolved.

As part of the impetus for the greater organisation of hawkers and street vendors in recent years, PIL was a starting point for using the legal system. The Court has been a suitable forum to begin a process of increased awareness for these groups, both easily identified for legal classification and with particularised problems.⁹ Creative evidentiary procedures, feeding from the unique climate of concern for the “disadvantaged and deprived”¹⁰ sustained by PIL, were mobilised by the expanding use of class actions.¹¹

⁷ *T N Rugmani and another v C Achutha Menon and others* AIR 1991 SC 983; two petitions with the cause title *Bombay Environmental Action Group and others v Pune Cantonment Board; Consumer Action Group and another v State of Tamil Nadu and others; Rajatha Enterprises v S K Sharma and others* (1989) 1 SCR 457; regarding the construction of the Sassoon Fish Harbour; challenging building permission for a multi storey building on grounds of St Mary's School, Bombay; *Palani Hills Conservation Council .. represented by its President Navroz Mody v State of Tamil Nadu and others; Palani Hills Conservation Council rep. by its Secretary Philippa Mukherjee v State of Tamil Nadu and others*.

⁸ *Municipal Council, Ratlam v Vardhichand and others* AIR 1980 SC 1622; a petition complaining of the contaminated water supply in Bangalore; *Citizens Action Committee, Nagpur v Civil Surgeon, Mayo (General) Hospital, Nagpur and others* AIR 1986 Bom 136; *Janki Nathubhai Chhara and another v Sardarnagar Municipality, Sardar and another* AIR 1986 Guj 49; *L K Koolwal v State of Rajasthan and others* AIR 1988 Raj 2; *Aparana Kashyap v State of H P and other* 1991 FLT 164 Vol 2 Part 3; *Ram Sahai Varma v State of M P and another* AIR 1989 MP 334; *M C Mehta v State of Orissa and others* AIR 1992 Ori 225; *Consumer Action Group v Commissioner, Corporation of Madras and another*.

⁹ The statutory framework and constitutional safeguards, led activist groups to believe that the problems of vendors and hawkers could be dealt with. One such group, the Self Employed Women's Association (SEWA), was encouraged to file a petition on behalf of a group of vegetable vendors in Ahmedabad because of the perception that the specific grievances could be managed by the Court. See *Self Employed Women's Association op cit* note 2.

¹⁰ See the categorisation of issues in chapter two.

¹¹ *Bombay Hawkers' Union op cit* note 2 has been included, having sprung from PIL, and contributed to procedural innovations. In addition to this case, and *Municipal Council, Ratlam* note 8, there are other class action petitions which have been included. In *Footpath Dukandar op cit* note 2 and *Pramod Kumar op cit* note 2, the court has blurred the boundary between class actions and PIL, by describing the petitions as PILs (see chapter two). This has enabled the Court to frame its order with less regard to established forms of legal reasoning - schemes have been framed and new legal remedies devised. In addition to these cases, *Scheduled Caste and Weaker Section Welfare Association op cit* note

The situation of slum dwellers is similarly poor.¹² Slums fall into two categories: authorised and unauthorised. In the former, the Slums Census, carried out by each local municipal authority, is the basis upon which slum dwellers get political rights, ration cards, electricity and water supplies. Despite these provisions, a permanent state of illegality exists as a parallel or “black” economy thrives.¹³ The colonies themselves are legally distinct from other types of housing, governed by special enactments and granted little protection. For those slums established on government land, the allocation of land is discretionary upon the state. While distributing its largesse, the state can denotify slums when land is required for other purposes. Unauthorised slums are even less desirable for their residents, as the State is absolved of even minimal obligations.

Inhabited largely by domestic servants, Class IV employees (manual workers), scavengers, unorganised and organised labour, slums have become an essential component of city life while at the same time being a source of embarrassment. Slum dwellers are in a constant state of indigence and insecurity, at the mercy of the police and other authorities, for example through wide powers of eviction, and illegal activities within the slums themselves. Even when notices of eviction have been issued, these mean little to the inhabitants as there is a constant flux within the slums and little knowledge of legal rights and procedures. Framing the issues for a petition has been a difficult task as the rights of slum dwellers in relation to the state are not absolute. Because of this the daily struggle of slum dwellers is not something that the courts have been asked to, or have even attempted to, deal with.

The first major PIL case on slums, and one of the landmark cases in

3 has been included because of the Supreme Court order, overturned the High Court order, by stating that a PIL petition would be appropriate in such a situation.

¹² See Desai, A R and Pillai, S Devadas (eds), *Slums and Urbanisation*, (Popular Prakashan, Bombay, 2nd edition, 1990); Venkataramani, R, 'Litigation for the Slum Dweller' in Gandhi, P K (1985), 142-145.

¹³ For example, licences are difficult to obtain for basic utilities and trade.

PIL, *Olga Tellis*,¹⁴ was filed in reaction to horrific evictions and to the defencelessness of the evictees. Other cases have tried to prevent increased poverty caused by evictions - the theft of belongings and the lack of alternative accommodation.¹⁵ In this way the petitioners have attempted to carve out rights and have forayed into a legal system, often without the necessary information or documentation, perhaps only hoping for temporary, fragmentary relief.

The cases on 'other housing issues' have to be read in tandem with cases in other sections, as housing encompasses more than the slums and residential colonies discussed here, but protective homes and custodial institutions,¹⁶ as well as concern for displaced persons.¹⁷ Petitions relating to housing epitomise the transition from 'social action' to 'public interest' litigation and the shift of emphasis from the use of PIL for the "have-nots", to its use as a mechanism to gain access to justice in any matter of public interest.¹⁸

Numerous petitions on 'land and its use' have been filed, mostly in the High Courts.¹⁹ Having unsuccessfully approached the municipal authorities, petitioning the Court in a PIL has been an easy and accessible strategy. The restrictions of standing in statutory provisions and the limited response available from lower courts

¹⁴ *Op cit* note 3.

¹⁵ In addition to the cases documented petitions have been filed in the SC asking the Court to prevent evictions and/or to provide alternative accommodation to the residents of slums in Delhi, for example, *K K Neogi v Delhi Administration* W P No 8988 of 1981) filed for the residents of Gole Market (in which the demolition of the slum was stayed), and others filed for the residents of Seemapuri, Minto Road and Motia Khan. See Desai, A R (ed), *Violation of Democratic Rights in India. Volume I* (Popular Prakashan, Bombay, 1986). Such petitions were also filed in the HCs. For example in a Madras case, the Court held, in 1990, that the authorities should not evict slum dwellers without providing them with an alternative site, because of the imperative of due process. S S Vasudevan, advocate, interview, Madras, 4/93.

¹⁶ See the sections on 'Prisons and State Institutions' and on 'Children' in chapter three.

¹⁷ See the section on 'Environment and Resources', *infra*.

¹⁸ See the petitions filed by 'Common Cause', *op cit* note 4.

¹⁹ See the cases on politicians in the section on 'Politics and Elections' for *B M Gangadhariah v H D Devegowda* AIR 1989 Kant 294.

has increased the tendency to use the writ jurisdiction of the High Court for a myriad of issues not relating to poverty. Unlike the cases relating to hawkers, vendors and slum dwellers, on-going mobilisation and organisation is not a feature of the cases on land and its allocation. Even organisations like the Bombay Environmental Action Group (BEAG) have had little long term involvement in the issues relating to the dozens of cases it has filed,²⁰ in spite of a long-standing concern for environmental issues.

Cases filed by environmental organisations, on urban land use and constructions, have emerged from a broader concern for the evolution of the city itself. The need to ensure that a city has “lungs” (green spaces) and recreational areas, that the cultural heritage is preserved,²¹ and that corruption in city life is checked, are concerns that have motivated organisations and individuals to frame issues so that they become amenable to resolution in court. Access to relevant information is vital in order to check specific violations, which have to be demonstrated according to specified legal criteria. Links have been made between different petitioning groups, such as Parisar, in Pune, and BEAG, enabling the latter to file cases relating to civic concerns in Pune. Information is easier to access when contacts are shared and knowledge pooled. For example, by providing copies of government orders to the Court, at considerable effort, the Consumer Action Group in Madras, has ensured that the Court will heed its petitions.²²

The theme of competing interests between social classes that emerges in this section, also manifests itself in a struggle between the citizen and the municipality, in the cases on municipal services. The courts have been asked to check the incompetence of the municipal authorities in maintaining cleanliness and providing

²⁰ In two such cases, for example, the Court stayed construction activity. One case challenged the proposed construction plans by the defence services in Colaba, and another challenged the constructions along the coastline of Raigad District, across the harbour from Bombay. Shyam Chainani, interview, Bombay, 19/3/92.

²¹ See the case on 'Heritage' in the section on 'Environment and Resources' *infra*.

²² Sriram Panchu, advocate, interview, Madras, 15/4/93.

basic utilities. The first such case was heard in the Supreme Court in 1980,²³ having come, in appeal, from the Magistrate's Court. Integral to the relaxation of procedural mechanisms that initiated PIL, this case has been included in the discussion. All the cases on municipal services, and indeed in this section as a whole, ask the Court to ensure that the municipality, as a part of the state, carries out its duties, and many have been filed in the relevant High Courts.

The complexity of the statutory framework for issues relating to urban space have demanded precision and care when framing petitions.²⁴ However, the prevalent concern for environmental concerns has motivated some of the petitioners to invoke Article 47 of the Constitution, a Directive Principle of State Policy.²⁵

Access to Justice

Neither the *locus standi* of the petitioners in the cases on hawkers, vendors and slum dwellers, nor the justiciability of the issues raised, has been questioned by the courts. Standing was no longer contested when poverty or indigence was being brought to the attention of the Court, and pronouncements on access continued to advance till the mid 1980's (see chapter five). In a complex case concerning the fundamental rights of slum dwellers who had been evicted, two distinct groups (the People's Union for Civil Liberties and the Lawyers Collective) became involved in the litigation. The question of the *estoppel* of fundamental rights was definitively decided, as the Court stated these rights could not be suspended.²⁶

²³ *Municipal Council, Ratlam op cit* note 8, also see the discussion 'PIL Begins' in chapter two, and the survey of procedural provisions in chapter one.

²⁴ See chapter five for a discussion of lawyers and legal skills.

²⁵ For example see *G K Salil op cit* note 6. See Appendix A for the full text of Article 47 of the Constitution.

²⁶ *Olga Tellis op cit* note 2. The PUCL filed the original petition in the Bombay High Court, and responding to the State Government's concession that the deportation was illegal, made a statement, on behalf of the petitioners, that no claim to a fundamental right to live on the pavement was being made. Invoking a sophisticated economic argument, the Lawyer's Collective argued that the slum and

Before the expansion of standing had become widely accepted, High Courts were reluctant to foster some PILs that were being filed.²⁷ It is possible that the courts were being cautious - as the Supreme Court had itself acknowledged that a clash between two public interests is possible, and that someone always has to benefit.²⁸ By 1980, in its search for new remedies, the Court had widened the scope of its concern and the kinds of issues that would be justiciable.²⁹ Even in 1991, the Madras High Court upheld the standing of the petitioners when filing a petition in the nature of *vox populi*, the voice of the people.³⁰

Amongst the cases on land and its use is one of the most important cases on access to justice and justiciability. In 1987, deciding whether the land in question should be used for a zoo or for a hotel, the Court expressed its fear that its decision may be perceived as interfering in matters of public policy by usurping executive and legislative functions.³¹ It was suggested that guidelines be framed which would address the need for PIL litigants and the courts to exercise self-restraint in the kind of issues and cases litigated as PILs. This decision has been relied upon in many subsequent cases, providing judges with a useful precedent if a petition is to be rejected.³² Other notable legal developments occurred, for example when the Supreme Court held that *res judicata* would only apply to a PIL if the earlier litigation was also a PIL.³³

pavement dwellers have the right to squat on the pavements, and openly objected to the PUCL's earlier stance. The Supreme Court admitted the latter's petition, alleging violation of fundamental rights, in spite of the earlier petition, which had not claimed the violation of fundamental rights.

²⁷ For example see *S S Sobti and Bhaghubhai H. Devani op cit* note 5.

²⁸ *Forward Construction Co op cit* note 5.

²⁹ *Municipal Council, Ratlam op cit* note 8.

³⁰ *Madras Citizens Progressive Council op cit* note 5.

³¹ *Sachidanand Pandey op cit* note 5.

³² For example, when considering the justiciability of deciding the legality of a construction, under PIL, in *T N Rugmani op cit* note 7, the Court referred to *Sachidanand Pandey op cit* note 5 to hold that while a petitioner may have *bona fides*, the issue raised may not be maintainable.

³³ *Forward Construction Co op cit* note 5.

The Court's Response

An examination of the cases relating to urban space epitomises judicial reaction throughout the case studies. For example, the courts have been unable to provide any lasting relief for slum dwellers, but all the petitions filed on municipal services (drainage, sanitation etc) and recreational land have been allowed and directions issued. Seen within the broader framework of the cases on labour and bonded labour (see chapter three), the Court's response to problems of hawkers and vendors has been sympathetic. The Court has become involved in monitoring the formulation of schemes and in urging recalcitrant municipal corporations into action.³⁴ Recognising the importance of the issues involved, one case was referred to a five judge bench.³⁵ The need for evidence when passing orders has led to a focus on establishing the identity of those affected.³⁶ However, from early on, the beginnings of a tendency for the Court to prioritise the prevention of public nuisance on public streets over considerations of poverty is apparent.³⁷

Similarly, in *Olga Tellis*,³⁸ the Supreme Court held that pavements were primarily for pedestrians. In this key judgment for PIL, Justice Chandrachud discussed fundamental rights in a way that had not previously been done by the Court and held that fundamental rights cannot be waived. In response to the plea of the petitioners regarding fundamental rights, a new precedent for judicial rhetoric was set in a judgment which held that the right to livelihood was included in the right to life under Article 21 of the Constitution. In reality, nothing was provided for the pavement and slum dwellers themselves. When considering the substantive aspects of the case, the Court was less innovative. While acknowledging that the evidence before it was

³⁴ For example, *Footpath Dukandar op cit* note 2.

³⁵ *Pramod Kumar op cit* note 2.

³⁶ *Self Employed Women's Association op cit* note 2.

³⁷ *Bombay Hawkers' Union op cit* note 2.

³⁸ *Op cit* note 3.

insufficient, the Court did not address the need for it to use reliable data. Arguments put forward by advocate Indira Jaising were not referred to, and after expressing deep concern about the situation of pavement dwellers, the Court did not even allow them the right to be heard before being evicted. It was held that any slum could be moved if the land occupied was needed for a “public purpose”. Thus the Court's declaration on fundamental rights was not translated into concrete relief or into the formulation of rights and duties in relation to the pavement dwellers. Even if the Court had ordered some specific reliefs, by the time the judgment was given they would have been redundant. Four years had lapsed since the evictions were carried out.

Litigating for pavement dwellers after this judgment, a worker of the Society for the Promotion of Area Resources Centres (SPARC) in Bombay, noted:

Right after Olga Tellis did a census in 1985, we learnt from Olga Tellis not to go straight to the court, of course. The judgement had declared that the right to life included the right to livelihood, but in the judgement the court declared that these pavement dwellers were illegal. There was nothing before saying they are illegal, and this ambivalent situation was better.³⁹

The judgment has effectively prevented SPARC from being able to challenge eviction, so the activists focussed on the theft of the belongings of the evictees by employees of the municipality.⁴⁰ When, in an unprecedented move, Justice Sujata Manohar of the Bombay High Court took evidence and allowed the petition,⁴¹ she went no further than provide specific relief, expressing her regret that she felt unable to frame guidelines covering future evictions.

Much of the litigation on slums has centred upon factual disputes, which are difficult to decide definitively. Stay orders have been passed preventing evictions, and the court has defined the length of residence in a slum as a factor which

³⁹ Mona Daswani, SPARC, interview, Bombay, 16/3/92. Olga Tellis, as referred to by Daswani, was the journalist who reported the evictions, and who later appeared on the cause title of the case.

⁴⁰ The work of SPARC and other such organisations is discussed in Friedmann, John, *Empowerment. The Politics of Alternative Development*, (Blackwell, Cambridge MA, 1992), specifically footnote 5 at 144.

⁴¹ Nazamunissa Shaukat Ali *op cit* note 3.

determines rehousing. The Court has conferred discretion upon the State Governments and municipalities, effectively empowering the same officials described as offenders in the petitions. A few positive legal pronouncements have been made.⁴² However, when faced with the eviction of slum dwellers in Bhubaneswar which had been ordered to ensure that land could be made available to Members of the Legislative Assembly, Members of Parliament, Ministers and High Court judges, the Orissa High Court appointed an enquiry, but did not act immediately. As the Supreme Court noted in 1989, when faced with a similar issue:

It is not possible for this Court to say that whether there would be greater injury to public interest by the removal of the unauthorised hutment dwellers or by preventing the Port Trust from putting its own land to proper use.⁴³

The Courts have been more sympathetic to environmental considerations than to the needs of slum dwellers.⁴⁴ In one case the Court held the State accountable for the existence of pollution before it received any affidavits from the respondents.⁴⁵ The cases on recreational land were decided on environmental considerations. Envisioning promenades in the local park⁴⁶ and ensuring that public land is put to correct use in the context of statutory provisions, the Court has been strident about the need for protection of the environment. It was only in one case that the Court considered the need to encourage tourism to be the primary consideration, overriding concerns for the environment.⁴⁷

⁴² For example, the Court modified the stance taken in *Olga Tellis op cit* note 3, when after consideration of the Directive Principles of State Policy it held, in *Scheduled Caste and Weaker Section Welfare Association op cit* note 3, that slum dwellers do have a right to be heard. In *Slum Dwellers of Slamagar op cit* note 3, the Supreme Court held that slums dwellers were to be moved to sites located at reasonable distance from the place of employment of its residents.

⁴³ *Ram Prasad Yadav (Deceased) and Bombay Mineral and Allied Industries Employees' Union and Bombay Coal and Coke Workers' Union* (1989) 2 SCC 378 at 381-382.

⁴⁴ See *Parisar Society op cit* note 5.

⁴⁵ *V Lakshmipathy op cit* note 5.

⁴⁶ *D D Vyas op cit* note 6.

⁴⁷ *Sachidanand Pandey op cit* note 5. Cases on 'tourism', an emerging concern, are discussed in the section on 'Environment and Resources' *infra*.

The right to life under Article 21 of the Constitution was further expanded to include the right not to be slowly poisoned by a polluted atmosphere.⁴⁸ Even in some of the orders on land use and constructions, which are characterised by detailed discussion of statutory and constitutional provisions, the scope of environmental concerns was evident.⁴⁹

The Contribution of PIL

The judgments on hawkers and vendors in PIL sparked off a series of cases in the Supreme Court. Brought as class actions, these cases have elaborately decided upon the rights and duties of the hawkers/vendors and of the municipalities. The law has advanced beyond PIL as these groups have become more organised and aware of the possibilities of legal action. Whatever the gains, the limitations of legal action for poverty issues is also apparent. That the Court could not prevent the repeated harassment of vendors by the police illustrates the importance of an on-going struggle in which the use of law is only one element.⁵⁰ Details of a petition on behalf of street vendors in Raipur underlines the sharply polarised interests dealt with in this section:

Raipur Municipal Corporation has started the eviction of small shopkeepers and vendors for “illegal encroachment”. Armed with an order from the MP High Court, and misinterpreting the *Olga Tellis* case judgement of the Supreme Court, the Municipal Administrator, Ajay Nath, and the Commissioner R. D. Pandey, have rendered many self-employed people jobless and site-less. In the name of “beautifying the city” the administration has discriminated in favour of the rich and

⁴⁸ *T Damodhar Rao op cit* note 6. In this case the Court noted that, because of the development of environmental law, Article 21 of the Constitution had been distanced from the preoccupation with the individual, echoing a concept that had been introduced in *Municipal Council, Ratlam op cit* note 8.

⁴⁹ For example, the in response to the petitions filed by the Palani Hills Conservation Council, *op cit* note 7.

⁵⁰ *Self Employed Women's Association op cit* note 2. As the petitions are still pending in the Court, and ensuring implementation of the orders has been difficult, SEWA paid less attention to the law. Alternative sites were found for some of the vendors, police brutality was highlighted through demonstrations and much work has been done to increase awareness. Ela Bhatt, interview, New Delhi, 4/2/91.

powerful in the city. While on the one hand, small vendors have been shifted to Shastri Bazar, the rich business community's "illegal encroachment" particularly at Sadar Bazar has been spared by the Raipur Municipal Corporation.⁵¹

The Court has not applied itself to the many problems of slums, and has confined itself to piecemeal relief. Having been defined as illegal, the legal position of pavement dwellers has often been worsened by legal intervention on their behalf. Moreover, for those working in slums, like SPARC, litigation has been an intolerable burden. Some educational benefit has been gained from the slum cases, the severe limitations of legal action have been learnt, but in the use of law to get immediate relief, like the stay of evictions, PIL has been a useful strategy. The significant contribution of slum cases is found in *Olga Tellis*,⁵² as the Court's pronouncements on fundamental rights have been widely quoted. However, the endemic poverty that has led to the formation of slums has not been mentioned by the courts, and the continual immiserisation and criminalisation of slum dwellers has never been addressed.⁵³

Thus, in the clash between interests, PIL rarely benefitted those in most need of judicial intervention. It has however encouraged the courts to be responsive to the environmental concerns for urban space.⁵⁴ PIL has made little difference for

⁵¹ PUCL&DR (Raipur), 'Letters: Ruthless Demolitions in Raipur', *The Lawyers*, Vol 2 No 7, July-Aug 1987, 4.

⁵² *Op cit* note 3.

⁵³ See the section on 'Prisons and State Institutions' in chapter three for cases which can be more fully understood in the context of urban problems:

Since the main reason why most of the undertrials are in jail is because they have not been able to avail of the bail order, the Lawyers Collective has set up a network of lawyers practising in Metropolitan Magistrates courts all over the city, to appear on behalf of those who are unrepresented. They attempt to release them on personal bond and then to see that they are represented at the trial stage. One problem is that most undertrials are "homeless". They do not have a permanent address and live on pavements, slums or at a railway station. Since 50% of the population of Bombay lives in slums, this should not be surprising, but for the law this means they do not have a permanent place of residence, though they have been born and brought up on the pavements.

Gopinath, Deepti, 'Warrants Attention: Prison Rights Project', *The Lawyers*, Vol 2 No 10, Oct 1987, 16-17.

⁵⁴ This is apparent in the case of the Sassoon fish harbour in Bombay - after the Court stayed construction, the project was amended to make a provision for a garden.

those who wish to litigate on land use and construction issues, unless environmental issues have been raised. Once access to justice has been gained, these cases have been dealt with as regular petitions. In two important judgments, in the cases filed by the Bombay Environmental Action Group against the Pune Cantonment Board, the Court held that access to information must be provided, not just to the group in question but to any social action group or interest group or pressure group. It is now possible for any such group to demand to see any sanction, grant or plan approved by the local authority. Given that the municipality is involved in every aspect of urban life, being able to provide the Court with proof that, for example, regulations are being flouted, increases the chance of a favourable verdict.

Even in the cases filed by organisations in this section, concrete details have not been available on the implementation of judgments of the Court. However, this is one area of concern in which the petitioner can see if the Court's directions have been carried out, for example, if a slum has been cleared or if a building has been constructed.

Environment and Resources

The cases on resources and environmental issues have been combined to form a single, large, section. Interconnected, these cases relate both to the environment in which we live and to our relationship with that environment. Just as eco-systems are affected both by pollution and by changes in the way in which people live, connections are apparent between the manner in which development is taking place and all the elements of the eco-system. Thus the cases on big dams have brought two seemingly different issues to the Court - environmental concerns about the policy

of big dams, and concern for those people who will be displaced.⁵⁵

The cases in this section are considered in categories: roads and bridges,⁵⁶ information,⁵⁷ heritage,⁵⁸ tourism,⁵⁹ livelihood,⁶⁰ people and land,⁶¹ wildlife

⁵⁵ An extensive literature exists on dams in particular, and environmental policy in general. See Thukral, Enakshi Ganguly, *Big Dams, Displaced People*, (Sage Publications, New Delhi, 1992); Fernandes, Walter and Thukral, Enakshi Ganguly, *Development, Displacement and Rehabilitation*, (Indian Social Institute, New Delhi, 1989); Bandyopadhyay, J; Jayal, N D; Schoeletti, U and Singh, Chhatrapati, *India's Environment. Crises and Responses*, (Natraj Publishers, Dehra Dun, Second Edition, 1987); Agarwal, Anil; D'Monte, Darryl and Samarth, Ujwala, *The Fight for Survival. People's Action for Environment*, Centre for Science and Environment, New Delhi, 1987); Viegas, Philip and Menon, Geeta, *The Impact of Environmental Degradation on People*, (Indian Social Institute, New Delhi, 1989); *State of India's Environment, A Citizen's Report: Floods, Flood Plains and Environmental Myths*, (Centre for Science and Environment, New Delhi, 1991); Nayar, K D, 'Environment and International World Views. Two Steps Backward', *EPW*, 3/3/90, 457-462. Other influential writing includes Shiva, Vandana, *Staying Alive*, (Kali for Women, New Delhi, 1988); Shiva, Vandana, *The Violence of the Green Revolution*, (Research Foundation for Science and Ecology, Dehra Dun, 1989); Agarwal, Anil and Narain, Sunita, *Towards Green Villages*, (Centre for Science and Environment, New Delhi, 1989). For a discussion of the PIL cases see du Bois, Francois, "'Well-being" and "the Common Man": A Critical Look at Public Interest Environmental Law in South Africa and India' in Robinson, David and Dunkley, John (eds), *Public Interest Perspectives in Environmental Law*, (Wiley Chancery, London, 1995), 135-152; Dias, Ayesha, 'Judicial Activism in the Deelopment and Enforcement of Environmental Law: Some Comparative insights from the Indian experience', *Journal of Environmental Law*, 1994, 243-262. Some of the unreported cases documented have been taken from Singh, Gayatri; Anklesaria, Kerban and Gonsalves, Colin (eds), *The Environmental Activists' Handbook*, (Colin Gonsalves, Bombay, 1993).

⁵⁶ *State of Himachal Pradesh and others v Umed Ram Sharma and others* AIR 1986 SC 847; *B Sakarama Somayaji v Assistant Commissioner, Kundapura, D.K. and others* AIR 1992 Kant 364; *P K Raghavan & others v State of Kerala & others*.

⁵⁷ *M C Mehta v Union of India* (Information on the environment) AIR 1992 SC 382.

⁵⁸ *B. V. Narayana Reddy and others v State of Karnataka and others* AIR 1985 Kant 99; the case filed by M C Mehta about the Taj Mahal.

⁵⁹ *Professor Sergio Carvalho v The Staff of Goa and three others* 1989 (1) GLT (276) and 1989 (1) GLT (266); *Jairaj v Chief Conservator of Forest and others*; *Niyamavedi v State of Kerala and others* AIR 1993 Ker 262.

⁶⁰ *Social Work and Research Centre, Banswara and another v State of Rajasthan and others* AIR 1987 Raj 26; *Andhra Pradesh Adimajati Seva Sangham and others v Guntur Municipal Council and others* AIR 1987 AP 193; *V Srinivasan v State of Tamil Nadu and others*; *Kerala Leprosy Patients Organisation Committee v State of Kerala and others* AIR 1992 Ker 344.

⁶¹ Petitions relating to forest and tribal lands in Maharashtra: *Sharad Patil, President, Satya Shodak Gramin Kastkari Sabha and three others v State of Maharashtra*; *Ratanji Motiram Mavchi and four others v State of Maharashtra and another*; *Pradeep Prabhu and others v State of Maharashtra and others*. Petitions relating to the rest of the country: *Banwasi Sewa Ashram v State of Uttar Pradesh* (1986) 4 SCC 753 / AIR 1987 SC 374, 1991 (2) SCALE 38 [261], AIR 1992 SC 920 and 1993 (1) SCALE 103 [613]; *Sudip Mazumdar v State of Madhya Pradesh* 1994 (2) SCALE 25 [329], also see

and animals,⁶² pollution and environmental degradation,⁶³ big projects and the environment,⁶⁴ big dams,⁶⁵ mines and quarries,⁶⁶ and on the Sriram gas leak.⁶⁷ The

the order discussed in Chapter 1; *P Bawa Chaudhary v State of M P & Ors* 1989 (2) SCALE 200 [1012]; *Kutti Padmarao, Gen Sec v State of A P* 1986 (Supp) SCC 573; *Kota Shivaram Karanth & Ors v State of Karnataka & Ors* 1987 (1) SCALE 185 [691] and JT 1992 (3) SC 167; *People's Union for Civil Liberties (PUCL), Mizoram Branch and another v State of Mizoram and others*; *C Thangmura v State of Mizoram and others*; *Social Reformation and Development Club by its Secretary Shri Leishangthem Kumar Meetai v State of Manipur, through the Secretary (Revenue) Government of Manipur, Imphal & Others* (1992) 1 GauLR 163; *Hundung Victims of Development through its convenor Mr David Mahung v North Eastern Council and others*; *A Public interest litigation by intervenor - Paharu Ram Boro on behalf of the Tribal public of Boko (Kamrup) Tribal Belt v Nilima Kalita and others*; *Molly Madhavan v State of Kerala*.

⁶² Filed by the Aaranyak Nature Club; *The Social Action and Legal Aid Society v The State of Kerala and others*; *Satyavani and another v A P Pollution Control Board and others* AIR 1993 AP 257.

⁶³ There are several groups of cases: general, forests, wetlands, fisheries, water, air and noise. General: *Chhetriya Pardushan Mukti Sangarsh Samiti v State of U.P. and others* AIR 1990 SC 2060; *Mathew Lukose v Kerala State Pollution Control Board* 1990 (2) KLT 686; *Environmental Lawyers' Movement and others v State of Kerala and others*. Forests: *V M Abraham v State of Kerala and others*; *Bibhab Kumar Talukdar v State of Assam*; *Geetha Timbers, Chalakudy v State of Kerala and others* AIR 1991 Ker 350 / 1990 (1) KLT 402 (F.B.); *K K Vasant v State of Karnataka and another* AIR 1992 Kant 256; *Environmental and Ecological Protection Samithy v Executive Engineer* 1991 (2) KLT 493 and *Executive Engineer v Environmental & E.P. Samithi* 1993 (1) KLT 800. Wetlands: *People United for Better Living in Calcutta - Public and another v State of West Bengal and others* AIR 1993 Cal 215; *Consumer Action Group v Union of India and others*. Fisheries: regarding prawn fisheries in Chilika Lake. Water: *S Ravinder Singh Kaleka and others v Union of India and others* AIR 1984 P & H 235; *M C Mehta v Union of India* (pollution of the River Ganges) (1987) 4 SCC 463, (1988) 1 SCC 471, 1988 (1) SCALE 99 [441], 1991 Supp (1) SCC 181, 1991 (2) SCALE 87 [478] and 1992 (1) SCALE 42 [196]; *Environment Protection Council v Union of India and Ors* 1986 (2) SCALE 231 [904]; *Subhash Kumar v State of Bihar and others* AIR 1991 SC 420 / (1991) 1 SCC 598; *F K Hussain v Union of India AND Attakoya Thangal v Union of India* AIR 1990 Ker 321 / 1990 (1) KLT 580; *Rajiv Singh alias Lallan Singh v State of Bihar and others* AIR 1992 Pat 86. Air: *M C Mehta v Union of India and others* (1991) 2 SCC 137; *M C Mehta v Union of India and others* (air pollution of Delhi - vehicles and industries) 1992 Supp (2) SCC 85, 1992 Supp (2) SCC 86 and (1992) 3 SCC 25; *V Subramanian v Union of India and another* 1990 (Supp) SCC 77; *Murali Purushothaman v Union of India* 1993 (1) KLT 595. Noise: *Dr Y T Oke, Secretary, Anti Noise Committee, Bombay and others v State of Maharashtra and others*; *Rabin Mukherjee and others v State of West Bengal and others* AIR 1985 Cal 222; *Consumer Action Group v State of Tamil Nadu and others*.

⁶⁴ *Bombay Environmental Action Group and another v State of Maharashtra and others* AIR 1991 Bom 301 and *Dahanu Taluka Environment Protection Group and another v Bombay Suburban Electricity Supply Company and others* (1991) 2 SCC 539; *Goa Foundation and another v Konkan Railway Corporation and others* AIR 1992 Bom 471; *All Goa Citizens Committee for Social Justice and Action and others v Union of India and others*; *Consumer Action Group and others v Union of India and others*.

⁶⁵ Regarding Silent Valley, Kerala: *Society for Protection of Silent Valley and another v Union of India and others*. Machhu, Gujarat: *Consumer Education & Research Centre (CERC) & Ors v State of Gujarat & Ors* 1981 GLR (XXII) 712. Koel Karo, Bihar: *V P Lakra and another v State of Bihar and others*. Karjan, Bihar: *Karjan Jalasay Yojana Assargrasth Sahkar Ane Sangarsh Samiti v State of Gujarat and others* 1986 (Supp) SCC 350. Tehri, Uttar Pradesh: *Tehri Bandh Virodhi Sangarsh Samiti*

cases cannot be read in isolation as there much overlap between the issues raised.⁶⁸

The statutory framework concerning environmental protection includes the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981.⁶⁹ The Constitution (Forty-second Amendment) Act, 1976 introduced environmental issues into the Constitution, through the fundamental duties, and in 1986 the Environment (Protection) Act was enacted.⁷⁰ However, the legal context of environmental action is much wider than these enactments, including

and others v State of U P and others (1990) 2 Supp SCR 606. Narmada, Gujarat: *Chhatra Yuva Sangharsh Samiti v State*; filed by the Lok Adhikar Sangh. Hasdeo Bango, Madhya Pradesh: *Gramin Sewa Sanstha v State of M P and others* 1986 (Supp) SCC 578. Sharavati, Karnataka: *Honnavaara Taluka Parisara & others v State of Karnataka & others*. Chimony, Kerala: *A X Varghese v State of Kerala*.

⁶⁶ *Rural Litigation and Entitlement (R L & E) Kendra, Dehradun and others v State of Uttar Pradesh and others* AIR 1985 SC 652, 1985 (2) SCALE 25 [119], (1987) 1 SCR 637 / 1985 (2) SCALE 113 [906], AIR 1987 SC 359, 1987 (2) SCALE 164 [790], AIR 1988 SC 2187, AIR 1989 SC 594, (1990) 3 SCR 72 and AIR 1991 SC 2216; *Krishna Nagar Gram Panchayat Tadepaeli v State of A P & Anr* 1983 (2) SCALE 125 [735]; *Kinkri Devi and another v State of Himachal Pradesh and others* AIR 1988 HP 4; *Mukthi Sangarsh Movement v State of Maharashtra and others* 1990 (Supp) SCC 37; *Tarun Bharat Sangh, Alwar v Union of India and others* AIR 1992 SC 514 and 1994 (2) SCALE 68 [516].

⁶⁷ *M C Mehta v Union of India & Ors* (Sriram gas leak) 1985 (2) SCALE 151 [1280], 1986 (1) SCALE 23 [153], (1986) 2 SCC 176, (1986) 2 SCC 325 and (1987) 1 SCC 395. The Supreme Court's orders have received much attention, including Jain, D C, 'Case Analysis of M C Mehta & Another v. Union of India' AIR 1987 SC 1086, AIR 1988 J 52-55.

⁶⁸ See the section on 'Urban Space', supra, in particular the cases relating to the management of waste and water by municipal services.

⁶⁹ See Pathak, R S, 'Human rights and the development of the environmental law in India', *Commonwealth Law Bulletin*, July 1988, 1171-1180. See the section on 'International Influences' in chapter one.

⁷⁰ See Singh, Gayatri; Anklesaria, Kerban and Gonsalves, Colin (eds) (1993), Rosencranz, Armin; Divan, Shyam and Noble, Martha L, *Environmental Law and Policy in India: Cases, Materials and Statutes*, (Tripathi, Bombay, 1991); Ramakrishna, Kilaparti 'The Emergence of Environmental law in the Developing Countries: A Case Study of India', *Ecology Law Quarterly*, Vol 12, 1985, 907-935. Abraham, C M, 'The Effects and Defects of our Pollution Laws', 1986 KLT J 41-43; Sangal, P S, 'Some Recent Developments in the Field of Environmental Prospects for the Future', *Delhi Law Review*, Vol 13, 1991, 44-71; Robinson, Nicholas A, 'Marshalling Environmental Law to Resolve the Himalaya-Ganges Problem', *Delhi Law Review*, Vol 13, 1991, 1-25; Leelakrishnan, P, 'Law of Public Nuisance: A Tool for Environmental Protection', *Journal of the Indian Law Institute*, Vol 28 No 2, 1986, 229-231.

the Forest Conservation Act, 1980,⁷¹ legislation governing industry and insurance, company laws and contract laws. Other statutes have also been invoked to uphold rights to resources, for example the Land Acquisition Act, 1894 and state laws such as the Madhya Pradesh Displaced Persons (Resettlement) Act, 1985. Amendments to the Factories Act in 1987 and the enactment of the Public Liability Insurance Act, 1991 have been added to the available legal remedies.⁷²

In spite of the protection afforded by some of these statutes, the cases in this section show the State to be the worst offender, against people and the environment. For example, the national policies of water and land use fail to provide for basic needs, like adequate drainage, a problem compounded when such policies are translated into individual projects. PIL cases show how industrial policy has, on a number of occasions, failed to account for the human and social costs of projects, such as the alienation of people from their land.⁷³

Filed by social action groups, human rights organisations, voluntary organisations, advocates and individuals, the range of issues raised by petitions is vast. When framing an issue for adjudication by the courts, common problems have arisen. With no right to know, access to information has been difficult. Most petitioners have been unable to support their petitions with the necessary documentation, as there are few who have either the resources, or influence, to access the necessary information. As in all other sections, newspapers have been the major source of information for

⁷¹ See Fernandes, Walter and Kulkarni, Sharad (eds), *Towards a New Forest Policy*, (Indian Social Institute, New Delhi, 1983).

⁷² It is interesting to note that this enactment was passed after the question of liability had arisen in the courts because of the Bhopal gas leak in 1984 and the Sriram gas leak in 1985. See 'Supreme Court judgement in Sriram Food and Fertilisers Ltd. case', *Lok Sabha Debates*, Series 8 Session 8 Vol 26, 10/3/87, 194 - in response to a question about the need for legislation after the SC judgment on absolute liability, the Minister for Industry stated that the government was examining the question of an adequate compensation scheme. For an analysis of the Land Acquisition Act, 1894 see Vaswani, Kalpana; Dhagamwar, Vasudha and Ganguly-Thukral, Enakshi, *The Land Acquisition Act and You*, (Multiple Action Research Group, New Delhi, 1990).

⁷³ See D'Monte, Darryl, *Temples or Tombs? Industry versus Environment: Three Controversies*, (Centre of Science and Environment, New Delhi, 1985).

many petitions.⁷⁴

In the section on roads and bridges, the need for the state to provide adequate resources, to enable people to move freely and to communicate, is highlighted. In the one case on information, advocate M C Mehta petitioned the Supreme Court asking that people be made aware of their social obligation to the environment. Additional to the two documented cases on heritage, other cases have alluded to such concern.⁷⁵ A growing concern for tourism, its effect on people and on the environment, have prompted petitions to be filed.⁷⁶ Petitions have not just focused on environmental considerations when challenging attempts to develop tourist areas, but, like that filed challenging the pollution of the Taj Mahal, have pointed to the revenue gained from tourism in an attempt to persuade the Court to act.

The cases on livelihood and on people and land, chronicle poverty and the manner in which it can be exacerbated by policy.⁷⁷ Filed on behalf of “illiterate

⁷⁴ Including those filed the Social Action and Legal Aid Society, Bibhab Kumar Talukdar and Kinkri Devi.

⁷⁵ For example the petition filed by the Goa Foundation challenging the Konkan railway alignment mentioned that churches and temples would be affected by the rail-line. Another petition was filed in the Kerala High Court in 1993 by advocate A X Verghese challenging the extraction of marble by a Multi-National Corporation for export by cutting and exploding Sage Caves in Iduki District of Kerala. Admitting the petition, the Court issued a stay order. A X Verghese, advocate, interview, Cochin, 18/8/93.

⁷⁶ A petition *Mr Anilkumar v Government of India* (O P No 5779 of 1987-K) was filed in the Kerala High Court through the Manishada Nature Club on behalf of the people of Quilon District. While promoting tourism, the District Collector was apparently destroying centuries old mangrove vegetation by building a tourist complex. The petition asked the Court to prevent this construction. Another petition was filed in the Simla High Court in 1993 by SPOKE (Society for the Preservation of Kasauli and its Environs) challenging the legality of the construction activity in the area. The Court issued a stay on all construction activity in and around Kasauli, which included many government projects, including a rural water supply scheme. Many residents of Kasauli have been alienated by the organisation which they consider to be one of Delhi-based people who wish to preserve the area as their personal estate. See 'Kasauli Clash', *India Today*, 15/8/93. See the section on 'Urban Space' for similar petitions, such as that filed by the Palani Hills Conservation Council.

⁷⁷ Another petition was filed on behalf of fishermen in Madras whose catamarans (boats) had been confiscated by the administration, in an attempt to beautify the area. S S Vasudevan, advocate, interview, Madras, 13/4/93. A petition *Consumer Education and Research Society v Gujarat Water Supply and Sewerage Board and another* (S C A No 6895 of 1987) was filed in the Gujarat High Court because of the scarcity of drinking water in areas of Gujarat with a large tribal population. The petition invoked the Gujarat Water Supply and Sewerage Board Act, 1978 along with Articles 14, 21, 38, 39(c),

and gullible tribals” (the description used by the respondents in the petition filed by Andhra Pradesh Adimajati Seva Sangham) petitions have implicitly challenged the development⁷⁸ and environmental policies of the government, as in the series of cases filed on forest and tribal lands in Maharashtra.⁷⁹ These cases demonstrate how the creation of a legislative framework transformed people who had dwelt in the forests of Maharashtra for generations, with a relationship of interdependence with the land, into “encroachers”,⁸⁰ who then become the object of harassment and corruption.⁸¹ One

41 and 47 of the Constitution, asking the Court to direct the respondents to submit information about existing schemes for the supply of drinking water to certain villages and to ensure that adequate drinking water is supplied. The petition asked that the State be directed to take over the scheme from Panchayats which had been unable to maintain existing schemes because of the lack of financial resources, or of trained personnel.

⁷⁸ See *Hundung Victims of Development op cit* note 61

⁷⁹ Other petitions were filed which have also been grouped with these cases: a petition, *Pradip Prabhu v State of Maharashtra* (W P No 1106 of 1982), was filed in the Supreme Court by an activist of Kashtakari Sanghata who filed a documented petition in 1986. In a series of violent clashes from May to September 1982 activists of the organisation were attacked and later prevented from lodging First Information Reports (FIRs) at the local police station, in a systematic manner. The petition stated that the police were, themselves, burning the crops of these tribals on the basis that they were encroachers on the land. In 1983 the Supreme Court ordered that standing crops should not be burnt or destroyed by officers, nor should they be allowed to be burnt by anyone. Another such petition *Sitaaram Motiram Pawar and two others v State of Maharashtra and two others* (W P No 15206-15298 of 1984) was filed in the Supreme Court by a Bharatiya Janata Party (BJP) activist working in the adivasi area of Nashik District, with parallel contentions to those in Sharad Patil's petition. In an order D/-18/10/84 the Court ordered the respondents to stop destroying existing crops and to allow the adivasis to sow new crops. In a later order the Court held that any encroachments after its order in 1984 were liable to be removed, as the respondents claimed that encroachment was increasing at an alarming rate causing heavy damage to forests. Further petitions have been filed in the SC in 1989 by aggrieved groups of adivasis. The Court ordered that an enquiry be carried out by a retired District Judge. In a later order when hearing the application for stay, the Court, noting that the petition was lacking in certain material facts, asked the counsel for the petitioners to file a proper affidavit, and later asked that the documents establishing land titles of the petitioners be placed on record.

⁸⁰ Organisations petitioning the courts have asserted that these tribal peoples had already been fulfilling the objectives of the forest departments, for example in forest management, development, conservation and planting of trees.

⁸¹ A petition was filed in the Bombay High Court in 1989 by Shramik Mukti Sangathana, an organisation working with tribals, challenging the illegal alterations made in the mutations register which changed the title deeds in favour of tribals to the names of non-tribals, with specific reference to nine tribal members of the organisation, claiming standing under Order 1 Rule 8 of the Code of Civil Procedure, 1908. The petition was admitted and the Court issued a stay order. Vijay Sathe, interview, Usgaon, District Thane, 27/3/93. Other petitions have been filed: in the Bombay High Court on the same issue; in the Gujarat High Court, *P Rathinam v State* (W P No 304 of 1986), was filed asking the Court to dispose of a number of petitions filed in the High Court in 1984 and 1985, on behalf of the tribal cultivators challenging attempts to dispossess them; in the Kerala High Court in 1991 by the Girijan Samiti of Attapadi because fertile land belonging to tribals had been taken over by wealthy settlers,

case challenged the criminal cases filed in Uttar Pradesh against tribals for encroachment,⁸² while another described how tribals in Kerala, who had been relocated after having been displaced, were later accused of encroaching upon land that had been allotted to them.⁸³ It is in this section that the issue of resettlement and rehabilitation of those displaced by government policies or projects was first raised.⁸⁴ As in other sections, it is primarily indigenous peoples, including scheduled castes and scheduled tribes, who would benefit from the success of these petitions.

The link between international trade and corruption is apparent in the cases on wildlife and animals,⁸⁵ and also in the many cases relating to environmental degradation and pollution.⁸⁶ Petitions spanning concern for pollution and degradation in general,⁸⁷ to forests,⁸⁸ to fisheries⁸⁹ relate to other cases in this section and the

forcing them to move to land with little irrigation. Although 2000 tribals had submitted complaints under the Prevention of Alienation of Tribal Lands Act, 1975, nothing was done. The High Court ordered that these applications be disposed of as expeditiously as possible, but no land had been returned to the tribals by mid-1993. A X Verghese, advocate, interview, Cochin, 18/8/93.

⁸² *Banwasi Sewa Ashram op cit* note 61.

⁸³ *Molly Madhavan op cit* note 61.

⁸⁴ Another petition was filed in the Madras High Court by a group in Pondicherry, on behalf of those displaced when a new harbour changed wave patterns. The petition was dismissed. Sriram Panchu, advocate, interview, Madras, 15/4/93.

⁸⁵ A petition was filed in the Kerala High Court by advocate A X Verghese complaining that a destructive plant, the Australian Black Wattle, used in the tanning industry, planted in and around Iravikal National Park, would disturb the eco-system of the area, which was the habitat for many endangered species including the Nilgiri Tahr. The Court stayed any further planting within a 3 km radius of this national park, but did not order that existing plants be uprooted. A X Verghese, advocate, Kerala, 8/93. Another petition was filed in the Delhi High Court by the World Wildlife Fund for Nature against four major ivory marts which were violating the 1986 and 1991 amendments to the Wildlife (Protection) Act, 1972. These amendments prohibited the trade in animal articles including animal skins and ivory from Indian elephants, the trade imported ivory, and the display and storage of animal or ivory articles in commercial places. The Court directed that all ivory items in the premises of all ivory marts in the country should be placed in a separate room which is locked and sealed, with curtains across its window should be curtained. [anon], 'Newsfile: Ban on display of ivory', *The Lawyers*, Vol 8 No 10, Nov 1993, 31.

⁸⁶ See the section on 'Urban Space' for: *V Lakshmiopathy op cit* note 5.

⁸⁷ Other petitions have been filed: in the Karnataka High Court by the Transnational Centre and affected villagers alleging that the two large Birla pulp-fibre factories were polluting the air and the water of the Tungabhadra River, and affecting the local residents, cattle and crops. See [anon], 'Birla Plants Polluting the Tungabhadra', *The Lawyers*, Vol 1 No 11, Nov-Dec 1986, 26; in the Bombay High

section on 'Urban Space'. With the exception of one petition, the concern for air⁹⁰ and noise⁹¹ pollution is in relation to urban areas.

Court by villagers of Chitali, Ahmednagar Zilla Sheth Mazoor Union and the Centre for Human Ecology, Bombay, stating that the distillery in Chitali in Ahmednagar District, owned by Western Maharashtra Development Corporation, was emitting spentwash pollution into the village. The Aurangabad Bench of the High Court admitted the petition and the affidavit of the Maharashtra Pollution Control Board partly endorsed the contentions of the petitioners. The Board has decided to prosecute the distillery. See letter D/-20/8/93 from Benson George, Centre for Human Ecology, Bombay, to Rukmini Sekhar; W P (C) No 1228 of 1989, *People's Union for Civil Liberties v Union of India and others*, was filed in the SC in 1989 regarding pollution by the Cawnpore Sugar Works Ltd., Padrauna Factory Branch; in the Madras High Court in 1993 by Friedrich Schulze Buxloh and other residents of Auroville stating that garbage was being dumped by Pondicherry into Auroville, Tamil Nadu and that gastro-enteritis and typhoid had increased, violating the petitioner's right to a healthy environment. Sriram Panchu, advocate, interview, Madras, 15/4/93.

⁸⁸ In addition to the documented cases, other petitions have been filed: in 1988, in the Nagpur Bench of the Bombay High Court, the Bombay Environmental Action Group challenged the resolution passed by the Maharashtra Government in 1987 denotifying 3,500 sq km of forest lands in Vidarbha, which had been classified as "Zudpi Jungle" (scrub forest). This was passed despite the request from the Ministry of Environment and Forests, Government of India asking the State Government not to denotify the land. Shyam Chainani, interview, Bombay 19/3/92; in the Guwahati High Court, in 1988, Pranab Pathak challenged a contract allotted by the Government for the removal of twenty thousand trees of Bogai Khas, a reserved forest. The petition stated that as this forest did not contain twenty thousand trees, the contractor would fell many in nearby virgin forests to make up the numbers. During the pendency of the petition, Mr Pathak was threatened and advised to drop the case, but the High Court did issue a stay on the felling of the trees. Pranab Pathak, advocate interview, Guwahati, 5/6/93; in the Kerala High Court in 1989, a member of the Social Action and Legal Aid Society in Ernakulam, challenged the sale of part of a rain forest, a coffee plantation, at a "throwaway" price of Rs. 1.35 crores (the estimated price was Rs. 5 crores). Concerned at the general destruction of forests in Wynad District, the petition observed that because the estate was not easily accessible, any permit given could be easily misused and that corruption was rife. James Vincent, advocate, interview, Ernakulam, 17/8/93; in the Madras High Court, S Balasubramaniam, editor of Tamil weekly, *Ananda Vikatan*, detailed plans of Tamil Nadu Tea Plantation Corporation Ltd. Coonoor which was felling trees in order to expand its tea plantation area, in collusion with timber contractors and powerful politicians. The petition asked the Court to prevent the felling, after which the Court issued a stay order. See [anon], 'Felling of trees: Court restrains Govt.', *The Hindu*, 18/11/92, quoted in *Legal Perspectives*, No 25, 74.

⁸⁹ A petition was filed in the Guwahati High Court by Aaranyak Nature Club. In 1988 the Government had granted leases for the establishment of fisheries within forests (wetlands) - the habitat of many fish and birds - in violation of the forest enactments which state that no forest can be used for revenue purposes. The Court cancelled the fishery leases. Pranab Pathak, advocate, interview, Guwahati, 5/6/93.

⁹⁰ In addition to those documented, a petition was filed in the High Court of Karnataka (W P No 17780 of 1987) by the Samaj Parivartana Samudaya regarding the air pollution caused by toxic effluents emitted from the Mysore Cements Factory at Ammasandra.

⁹¹ Another petition was filed in the Madras High Court in 1988 by the Consumer Protection Council complaining of the noise pollution from the air horns of Government buses. R Gandhi, advocate, interview, Madras, 14/4/93.

Concern for the environment and for resource rights also merge in the cases on big projects and the environment, and on big dams.⁹² While some petitions focus on the viability of the project itself,⁹³ others have focused on the environmental aspects or the resettlement and rehabilitation of those displaced. Framing the petitions on dams, for resolution in the courtroom, has been difficult. One petition filed on behalf of oustees of the Narmada Project in Gujarat referred to the report of the Narmada Water Disputes Tribunal Award which gave exhaustive directions in the matter of rehabilitation of the displaced families, without making any distinction between lawful occupants of lands and those who could be identified as “illegally” cultivating forest lands/waste lands.⁹⁴ The lack of clarity in the policy on oustees, eligibility and levels of rehabilitation have initiated concern, while exacerbating difficulties in translating a perceived injustice into a legal wrong. Some petitioners

⁹² In addition to the documented cases relating to the Silent Valley project in Kerala, Machhu dam in Gujarat, Koel Karo and Karjan dams in Bihar, Tehri dam in U P, the Narmada project (Sardar Sarovar), Hasdeo Bango dam in M P, the Sharavati project in Karnataka and the Chimony dam in Kerala, other petitions have been filed: *Andhali, Maharashtra*: A petition was filed in the Bombay High Court invoking the Maharashtra Resettlement of Project Displaced Persons Act, 1976 which had been applicable to the dam project at Andhali, Satara, since 1978. Apparently none of the provisions of the Act had been enforced as people had been forcibly evicted, their property destroyed, and left destitute. See Gopinath, Deepti, 'No Rehabilitation for Project Affected', *The Lawyers*, Vol 2 No 2, Feb 1987, 15-16; *Kaptai, Mizoram*: A petition was filed in the Guwahati High Court in 1990 by C Thangmura, describing the situation of the Mizos and Chakmas who live along the Bangladesh/Mizoram border in the Chittagong Hill Tracts. The former state of East Pakistan had constructed the Kaptai or Karnapully dam, and later the Bangladesh Government had closed the outlet of the dam causing the water level to rise and inundating the border lands which were being cultivated by many Chakmas and Mizo people. The petition contended that while the Bangladesh Government had adequately compensated the affected people, the Indian Government had not. The Court was asked to direct the Government of Mizoram to pay compensation. Pranab Pathak, advocate, interview, Guwahati, 5/6/93; *Adukkom, Kerala*: A petition (O P No 16843 of 1992 *Meenachil Nadeethada Samrukshana Samithy v Government of Kerala*) was filed in the Kerala High Court challenging the proposed construction of Adukkom Dam, stating that the dam would have an adverse environmental impact, that it would not provide adequate irrigation and drinking water and that it could induce earthquakes.

⁹³ As in the petitions filed challenging the Konkan railway alignment and the route of the east coast road, a petition was filed in the Kerala High Court in 1988 by the Aaranyak Nature Club challenging the proposed construction of the Jogighopa-Gauhati railway line through a wetland called Deepor Bheel, the river basin and only natural water reservoir of Guwahati. This route was being used as the alternative involved higher costs, but the petition stated that not only is Deepor Bheel essential to the drainage of Guwahati, but it is the winter habitat of Siberian birds. Pranab Pathak, advocate, interview, Guwahati, 5/6/93.

⁹⁴ *Chhatra Yuva Sangharsh Vahini op cit* note 65.

have concentrated on rehabilitation⁹⁵ in preference to a focus on the policy on big dams or environmental considerations, as a pragmatic manoeuvre, expecting the Court to be more sympathetic.⁹⁶

Concern for the environmental effects of mines and quarries form a distinct group of cases, as does the petition detailing the litigation after the Sriram gas leak. There have been PIL elements to the litigation relating to the gas leak from the Union Carbide factory in Bhopal on 4/12/84. Civil and criminal cases were filed seeking, amongst other things, compensation for those affected by the leak. Applications in the form of PILs were filed during the pendency of the compensation claim, asking the Court for a number of reliefs: for information from Union Carbide Corporation on the leaked gas (MIC), for the restoration of medications and records that had been impounded, and for the closure of the Union Carbide Corporation research laboratory in Bhopal that had continued to function after the leak. After the the compensation claim was settled in 1989, by the Supreme Court,⁹⁷ review petitions were filed, some of which were in the form of PILs. Passing judgment on the review petitions, the Supreme Court stated:

When the settlement was reached a group of social activists, the Press and even others claiming to be trustees of society came forward to question it.⁹⁸

In addition, other PIL petitions were filed, including *Dr Nishit Vohra & Others v State of Madhya Pradesh and others*⁹⁹ which was concerned with the provision of medical relief and rehabilitation of the victims of the gas leak. The litigation that resulted from the Bhopal gas leak is in many ways the most important of the 1980s, representing a microcosm for the study of the Indian legal system, and even of the relationship of the Court to economic liberalisation. Numerous attempts were made to locate the

⁹⁵ *Karjan Jalasay Yojana op cit* note 65.

⁹⁶ Jose Verghese, advocate, interview, New Delhi, 25/2/92.

⁹⁷ *Union Carbide Corporation v Union of India* (1989) 3 SCC 38.

⁹⁸ *Union Carbide Corporation v Union of India* AIR 1992 SC 248 at 259.

⁹⁹ W P No 11708 of 1985.

relevant documents, because of the complexity of the PIL aspects of the Bhopal-related litigation and the massive scale of human suffering. As the relevant documentation has not been available, the PIL aspects of the litigation cannot be discussed here.¹⁰⁰

Access to Justice

Standing has not been an impediment in the petitions in this section, as only two have been rejected on this preliminary consideration.¹⁰¹ The litigation on the environment began after procedural questions had been resolved by the Supreme

¹⁰⁰ An extensive literature exists on all facets of the Bhopal gas leak. Much of the relevant material is cited in Cassels, Jamie, *The Uncertain Promise of Law: Lessons from Bhopal*, (University of Toronto Press, Toronto, 1993), as reviewed in Morehouse, Ward, 'Justice at Bhopal', *The Ecologist*, Vol 24 No 4, July-Aug 1994, 157. Also see Anderson, Michael R, 'Public Interest Perspectives on the Bhopal Case: Tort, Crime or Violation of Human Rights' in Robinson, David and Dunkley, John (eds) (1995), 153-171. For documentation and analysis see Baxi, Upendra and Paul, Thomas, *Mass Disasters and Multinational Liability: The Bhopal Case*, (N M Tripathi Pvt Ltd, Bombay, 1986), Baxi, Upendra, *Inconvenient Forum and Convenient Catastrophe. The Bhopal Case*, (N M Tripathi Pvt Ltd, Bombay, 1986), Baxi, Upendra and Dhanda, Amita, *Valiant Victims and Lethal Litigation. The Bhopal Case*, (N M Tripathi Pvt Ltd, Bombay, 1990) and Ramanathan, Usha, Thinking Mass Disaster Law, *Himalaya: Man and Nature*, Nov-Dec 1993, 1-5. Also see Muchlinski, P T, 'The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors', *Modern Law Review*, Vol 50 No 5, Sept 87, 545-587. Most of the November 1994 issue of *The Lawyers* appraises the continuing legal response to the gas leak, in particular see Jaising, Indira, 'Bhopal: The saga of a legal sellout', *The Lawyers*, Vol 9 No 11, Nov 1994, 4-10. Of particular interest is the *parens patriae* role adopted by the Government of India when the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 was passed. Many reports were published by organisations working for justice for gas affected people. See Agarwal, Anil; Merrifield, Juliet and Tandon, Rajesh, 'No Place to Run. Local Realities and Global Issues of the Bhopal Disaster', (Highlander Center and Society for Participatory Research in Asia, 1985), 'We Must Not Forget. A Plea for Justice for the Bhopal Victims', (International Coalition for Justice in Bhopal, Penang, 1987), 'Compensation Disbursement. Problems and Possibilities', (Bhopal Group for Information and Action, January 1992). More generally see Hazarika, Sanjoy, *Bhopal. The Lessons of a Tragedy*, (Penguin Book, New Delhi, 1986), Weir, David, *The Bhopal Syndrome. Pesticides, Environment and Health*, (Earthscan Publications Limited, London, 1987), Jones, Tara, Corporate Killing, *Bhopals Will Happen*, (Free Association Books, London, 1988), Morehouse, Ward and Subramaniam, Arun M, *The Bhopal Tragedy. What Really Happened and What it means for American Workers and Communities at Risk*, (A Preliminary Report for the Citizens Commission on Bhopal, Council on International and Public Affairs, New York, 1986); Dembo, David; Morehouse, Ward and Wykle, Lucinda, *Abuse of Power. Social Performance of Multinational Corporations: The Case of Union Carbide*, (New Horizons Press, New York, 1990).

¹⁰¹ *Chhetriya Pardushan Mukti Sangharsh Samiti* and *Subhash Kumar* *op cit* note 63 were both rejected on the grounds that the petitioner was not approaching the Court with *bona fides*.

Court. Given the number of cases documented, the proportion of cases in which the justiciability of the issue was limited was small,¹⁰² although three petitions were directed to an alternative forum.¹⁰³ The importance of PIL as a non-adversarial form of litigation has been stressed and procedures have been relaxed unselfconsciously by the courts. In the *M C Mehta* case on the pollution of the River Ganges, the Supreme Court took on the case under Article 32 of the Constitution by addressing the municipal corporation, and not the tanneries which were causing the pollution.¹⁰⁴

Letters have been routinely registered as writ petitions. One was dismissed without a hearing when the advocate appointed for the petitioner did not attend a hearing in the High Court.¹⁰⁵ Access has been limited for some petitioners because of financial constraints - having been unable to gain relief in the High Court, one organisation was unable to appeal to the Supreme Court, as it lacked the necessary funds,¹⁰⁶ affirming the “pathology” of the legal system.¹⁰⁷

The Court's Response

There are innumerable examples of the Court ordering commissions of enquiries and/or monitoring the development of the case, to ensure that its directions were carried out, including the celebrated litigation concerning limestone quarries in Dehradun.¹⁰⁸ That the courts have displayed enthusiasm and concern for the

¹⁰² *Niyamavedi op cit note 59*, the *Social Reformation and Development Club op cit note 61*, *K K Vasant op cit note 63* and *Tehri Bandh Virodhi Sangarsh Samiti op cit note 65*.

¹⁰³ *Kota Shivaram Karanth op cit note 61*, *V Subramaniam op cit note 63* and *Mukti Sangharsh Movement op cit note 66*.

¹⁰⁴ *M C Mehta* (pollution of River Ganges) *op cit note 63*.

¹⁰⁵ *A Public interest litigation by intervenor op cit note 61*.

¹⁰⁶ *Kerala Leprosy Patients op cit note 60*.

¹⁰⁷ See note 115 in chapter one for Mendelsohn, Oliver (1981).

¹⁰⁸ *Rural Litigation & Entitlement (R L & E) Kendra op cit note 66*.

environment and the resource rights of citizens is indisputable. The definition of the right to life in Article 21 of the Constitution has been refined. The Supreme Court has held that access to roads is access to life itself,¹⁰⁹ and Article 21 of the Constitution was described as the needle of the balance when discussing environmental and ecological questions.¹¹⁰ Non-justiciable constitutional provisions, such as Articles 48A and 51A(g) of the Constitution, have influenced the Court in its decision-making.

Nonetheless, the positive and welcoming response of the courts has not extended into the vision or creativity required by the issues raised in the petitions. The Court's response has been conditioned and limited by differing conceptions of the issues involved, such as environment or development. Although there has been a considerable acceptance of environmental considerations this has been done within norms formally codified in policy and legislation. In certain cases, the Court has extended its jurisdiction, stating that to enable an assessment of the environmental impact and viability of the project in question, it would need to be told of its economic viability and sources of finance.¹¹¹ However, the Bombay High Court has spoken of the petitioner's misplaced sympathy for heritage.¹¹² Whenever the question of national interest has been raised the Court has given preference to this argument.¹¹³ In the tussle between the state conception of "development" and the petitioners' conceptions of the "environment", concern for the realisation of development has prevailed.

Another conflict can be perceived as the Court has not acknowledged

¹⁰⁹ *State of Himachal Pradesh op cit* note 56.

¹¹⁰ *Environmental and Ecological Protection Samithy op cit* note 63.

¹¹¹ *People United for Better Living op cit* note 63.

¹¹² *Goa Foundation op cit* note 64.

¹¹³ Be it in relationship to tourist revenue (*Professor Sergio Carvalho op cit* note 59), employment and foreign exchange (*Sathyavani op cit* note 62), public funds (*Executive Engineer op cit* note 63), the importance of the power that will be generated by a thermal power project (*Bombay Environmental Action Group op cit* note 64) or economic and defence considerations (*Rural Litigation & Entitlement (R L & E) Kendra op cit* note 66).

the possibility of an integral relationship between people and the land which they inhabit. Less concern was shown for displaced people who were being killed or maimed when collecting scrap from an army firing range, than for the felling of trees.¹¹⁴ In a petition on the rehabilitation of oustees of the Narmada dam project, the Gujarat High Court described the petition as one which raised a non-legal issue.¹¹⁵ Similarly, the tribal “encroacher” in Maharashtra has been waiting for over a decade for substantive results from the Court and the environmental imperatives of creating sanctuaries and reserved forest areas have not been discussed in terms of people's right to common property resources. In one petition the High Court failed to respond to the plight of people with leprosy, who have been marginalised by society and the state, when it was held that the beggars caused a nuisance.¹¹⁶

A number of interesting directions have been given, for example when the Supreme Court extended the scope of a litigation,¹¹⁷ and the orders given while cases were being dismissed.¹¹⁸ In the case of the Sriram gas leak, Justice Bhagwati made observations that do not form part of the directions or order, on liability. Neither the scope of Article 12 of the Constitution was decided, nor was the liability of the company. Nonetheless, this kind of juristic activism, in its appraisal of judicial thought, has had advantages. Directions made by the Supreme Court outside the scope of a case (*obiter dicta*) are binding in law, and, as such directions are often irrelevant to the outcome of the case, they are rarely challenged in appeal.¹¹⁹

¹¹⁴ See *Sudip Mazumdar op cit* note 61 for detail of the order that wire fencing be erected.

¹¹⁵ *Chhatra Yuva Sangarsh Samiti op cit* note 65.

¹¹⁶ See *Kerala Leprosy Patients op cit* note 60 in which the Court ignored the discrepancies in the claims of the state government.

¹¹⁷ *Rural Litigation & Entitlement (R L & E) Kendra op cit* note 66.

¹¹⁸ See *Dahanu Taluka Environment Protection Group op cit* note 64 and *P K Raghavan op cit* note 56 - while dismissing the petition, the Kerala High Court urged that a road be constructed. In *V Srinivasan op cit* note 60, allowing the petition, the Court decided not to order that interest be paid on the wages owed to the recipients of help under the Rural Landless Employment Guarantee Programme in the hope that this saving, done at the expense of those with few resources, would be an incentive for the State to frame further schemes for the rural poor.

¹¹⁹ See Article 141 of the Constitution.

Evidentiary problems have been common,¹²⁰ and numerous commissions have been appointed.¹²¹ One litigation was transformed, in the courtroom, from a concern for environmental degradation, to one concerned with boundaries,¹²² and the case filed regarding the Chimony dam became simplified into a polarised question of trees versus the dam. The courts and petitioners have asserted that commissioners have not accounted for all relevant factors.¹²³ One enquiry commissioner, horrified at the way in which the Court had misused his report, returned the money given to him for his work.¹²⁴

There have been a number of cases in which costs were awarded and the expenses of those conducting the enquiry were paid by the respondents.¹²⁵ In a notable exception the petitioner was ordered to pay punitive costs for having approached the Court without *bona fides*, and not in the public interest.¹²⁶

The Contribution of PIL

The issues have been polarised into oppositions - development versus the environment, employment versus ecology, even trees versus a dam. Inherently, the Court has been unable to question the development paradigm. The interests of indigenous peoples have been differentiated from environmental considerations, both by the government and by the courts, leading to a situation where only one can be the

¹²⁰ In the petitions filed on forest and tribal lands in Maharashtra, the Supreme Court has repeatedly appointed enquiries and even ordered that a soil test be conducted to ascertain land titles.

¹²¹ See *Banwasi Sewa Ashram op cit* note 61.

¹²² *Tarun Bharat Sangh op cit* note 61.

¹²³ *Jairaj op cit* note 63, *Pradeep Prabhu op cit* note 61 and *Hundung Victims of Development op cit* note 61.

¹²⁴ See *Professor Sergio Carvahlo op cit* note 59.

¹²⁵ Conversely in *Professor Sergio Carvahlo op cit* note 59 the petitioners and respondents shared the costs of the enquiry.

¹²⁶ *Subhash Kumar op cit* note 63.

focus of attention. A bias is apparent as the needs of less visible tribal peoples have lessened in importance as a consequence of the focus on environmental problems. The courts have responded only when displacement, resettlement and rehabilitation concerns have been raised, and when neither development nor the environment are under threat.

It is through using PIL, that environmental activists and social action groups have learnt about law and its limitations. By the 1990's, PIL was being mobilised as one part of a struggle in which the Court was not the major arena. The delays, the unwillingness of the Court to respond to basic questions and the poor implementation of Court decisions, have informed this perspective. Of the six environmental controversies discussed in a 1993 survey of the environment,¹²⁷ documentation has been available for PIL cases filed in at least five: Chilika Lake in Orissa, the Narmada Project, the Konkan Railway, the East Coast Road and the Ganga Action Plan. It is interesting to note that law is mentioned in just two of the controversies, and it is only in an article by advocate M C Mehta that there is a lengthy discussion of the Supreme Court's directives in a case relating to the pollution of the River Ganges.¹²⁸ He notes that these directives only had the effect of controlling industrial pollution of the river, and not in implementing the broader-based Ganga Action Plan.

The limiting and limited nature of using PIL has been understood and internalised as the activist no longer places law at centre-stage:

legal action ... can serve to act as a brake/deterrent on the sponsoring project authorities. If a stay order is obtained from the court this itself sometimes gives time for matters to be discussed, compromises to be evolved and for the project authorities themselves to make changes in the project to minimise the adverse environmental impact. .. quite often

¹²⁷ 'Survey of the Environment', (*The Hindu*, 1993).

¹²⁸ Mehta, M C 'Ganga action plan: Tied up in red tape' in 'Survey of the Environment', 127-131. The fervour created by this case cannot be underestimated leading to a discussion in the Lok Sabha, 'Closure and shifting of industries following Supreme Court Judgement', *Lok Sabha Debates*, Series 8 Session 10 Vol 39, 10/5/88, 271-72.

the very threat of legal action is sufficient.¹²⁹

whilst valuing the opportunities that law provides:

It should however be kept in mind that although the legal scope [of PIL] is worth exploring, it must be accompanied by other forms of social action. ... Financial and other resources will be required to carry on a sustained long-term struggle. Teams of committed lawyers and legal activists must also exist. Although the counsel for the villagers .. has been able to involve journalists, social activists and academics in the issue .. he also says 'one cannot fight tanks with pillow cases'.¹³⁰

Implementing whatever orders have been issued has also become a focus. After the order on noise pollution in the petition filed by the Consumer Action Group, the All India Catholic University Federation distributed the order amongst all the groups in Tamil Nadu working with consumers.¹³¹ In the absence of implementation, a contempt petition could then be filed with material in support of the petition and pressure from the public.

Discussing the implementation of the Court's orders in *Banwasi Sewa Ashram*,¹³² Prem Bhai described how, although the case only related to one factory and many of the claims had not been allowed by the Court, 15,000 claims were filed in local courts as a result of this petition. However six other factories have caused displacement in the area. In response the Ashram, together with another organisation REALS,¹³³ has had to file local cases. Up to 1992, 213,000 cases were filed for the land entitlements of tribals in one district alone. The twenty-one advocates and fifty paralegals engaged in sorting out the displacement issues were insufficient. The non-implementation of Supreme Court directives and the recalcitrance of the administration

¹²⁹ Chainani, Shyam, 'Role of Civic Groups in Regional and Municipal Environmental Policy - An experience of the Bombay Metropolitan Region', (Bombay Environmental Action Group, 21/3/87) at 27-28.

¹³⁰ 'Battling 5 Star Tourism in the Courts: A Brief Report of the Agonda - Canacona Beach Resort in South Goa' in 'Dossier on Tourism and Law', (Legal Resources for Social Action & Equations, April-May 1993), 31-35 at 34.

¹³¹ Henry Tiphagne, interview, New Delhi, 31/7/93.

¹³² *Op cit* note 61.

¹³³ Rural Entitlement and Legal Services is probably the full name of the organisation.

thus led to tens of thousands of claims and counter-claims being filed at a local level.¹³⁴ Similarly, the petition filed by the Lok Adhikar Sangh would need local action for implementation of the High Court's orders, as, in violation of these orders, the Sardar Sarovar project authorities started removing people without full resettlement.¹³⁵ Construction of the dam continued and standards prescribed by the High Court and the Narmada Water Disputes Tribunal Award were flouted.¹³⁶ Despite the ban on blasting that eventually resulted from Kinkri Devi's petition, blasting continued.¹³⁷ Even the compensation awarded by the Supreme Court to the victims of the Sriram gas leak fell well within the scope the company's insurance cover, rendering futile the Court's pronouncement that compensation must have a deterrent effect, by encouraging the introduction of stricter safety mechanisms.

The one notable success in preventing a major project from being carried out was that of Silent Valley in Kerala where a dam was to have been constructed. The Kerala High Court did not uphold the claims of the petitioners, but support for the cause of the environmentalists, including that from the media and Prime Minister Indira Gandhi, eventually prevented the construction of the dam.¹³⁸

¹³⁴ Prem Bhai, interview, New Delhi, 9/4/92.

¹³⁵ Singh, Arjun, 'Narmada oustees: Doomed by the dam', *The Pioneer*, 22/6/93.

¹³⁶ [anon], 'Struggle intensifies in Narmada Valley: People Resist Police Terror, Leaders on Hunger Strike', *Legal Perspectives* No 29, 53-59 at 53

¹³⁷ Subhash Mendapulkar, SUTRA, interview, Himachal Pradesh, 12/7/93.

¹³⁸ Prof M K Prasad, interview, Ernakulam, 8/93. See also Prasad, M K, 'The Silent Valley Case: An Ecological Assessment', Leelakrishnan P (ed), *Law and Environment*, (Eastern Book Company, Lucknow, 1992), 116-125.

Consumer Issues

This short section with few cases - on services,¹³⁹ goods,¹⁴⁰ and on implementing the consumer protection legislation¹⁴¹ - should not be mistaken for an indication of the total number of cases on consumer issues or the power of groups representing consumers, as this area of law has burgeoned outside of the writ jurisdiction. . The cases on municipal services, hospitals, pollution and public administration,¹⁴² are examples of petitions that will affect the “consumer” in a broader sense of the term, as citizens who form a part of the environment and participate in a community.¹⁴³ The documented cases to be found here interpret the definition of a consumer in a narrow framework.¹⁴⁴

The Consumer (Protection) Act, 1986 was framed to provide redress for the consumer of goods or services. Section 2(1)(b) of the Act, describes a complainant

¹³⁹ *Consumer Education and Research Centre, Ahmedabad and others v State of Gujarat and others; P Nalla Thampy Thera v Union of India and others* AIR 1984 SC 74; *Akhil Bharatiya Grahak Panchayat v Andhra Pradesh State Electricity Board and another* AIR 1983 AP 283; *Akhil Bharatiya Grahak Panchayat (Bombay Branch) and others v State of Maharashtra and others* AIR 1985 Bom 14; *M Balagovindam, advocate v Union of India and another; Vinod Kumar Gupta v Indian Airlines and others* AIR 1984 J&K 35.

¹⁴⁰ *Ashok Kumar Mittal v Maruti Udyog Ltd. and another* AIR 1986 SC 1923.

¹⁴¹ *Common Cause, A Regd Society v Union of India & Ors* 1989 (2) SCALE 98 [541] / 1990 (2) SCALE 16 [94] / JT 1992 (3) SC 602 / 1991 (2) SCALE 273 [1446] / 1993 (1) SCALE 5 [17]; *Cosmopolitan Hospital & Anr v Vasantha P Nair* 1992 (3) SCALE 59 [228].

¹⁴² See the sections on 'Urban Space', 'Prisons and State Institutions', 'Environment and Resources' and 'Public Policy and Administration'.

¹⁴³ An oft cited example of an issue that crosses the boundary between consumer and environment issues can be seen in the petition filed in the Madras High Court in 1981 by advocate S S Vasudevan complaining of the impurity of the water supplied to the City of Madras for drinking purposes. The High Court ordered the Public analyst to submit a report and gave directions for the water to be purified. S S Vasudevan, advocate, interview, Madras, 14/3/93.

¹⁴⁴ In interview the founder of the Consumer Education and Research Centre noted “there is hardly any difference between environment and consumer issues so far as safety is concerned. To give the most often used, the most usual example of contaminated drinking water - what concern is this? Is it just a consumer issue or is it also concerned with the environment?”. Manubhai Shah, Consumer Education and Research Centre (Ahmedabad), interview, London, 15/5/92.

as

- (i) a consumer; or
- (ii) any voluntary association registered under the Companies Act, 1956 or under any other law for the time being in force; or
- (iii) the Central Government or any State Government, who or which makes a complaint.
- [(iv) one or more consumers, where there are numerous consumers having the same interest]¹⁴⁵

This provision, along with the relaxed standing provisions that were written into other enactments in 1986,¹⁴⁶ directed many of the grievances and challenges of the nascent consumer movement away from the use of PIL in the Supreme Court and High Courts.¹⁴⁷ Thus, with the exception of the cases on the *Consumer Protection Act*, 1986, all the petitions referred to here were filed before 1985.

Access to Justice

The Court conferred standing on the Consumer Education and Research Centre, to challenge a fare increase, and also on other consumer associations. In one instance, the Supreme Court considered the improvement of railway services to be outside the Court's jurisdiction and hindered by financial constraints, but nonetheless awarded costs.¹⁴⁸ In another case, the justiciability of the petition came under scrutiny when the Court recognised that PIL may lose credibility if it is mis-used for trivial private grievances, such as the refund of a wait-listed ticket for a journey on Indian Airlines.¹⁴⁹

¹⁴⁵ As added by an amendment in 1993.

¹⁴⁶ See 'Alternative and Corollary Innovations in chapter six.

¹⁴⁷ See Singh, Gurjeet, "Consumer Protection Law in India: A Socio-Legal Study", (PhD thesis, Department of Law, School of Oriental and African Studies, August 1993).

¹⁴⁸ *P Nalla Thampy Thera op cit* note 139.

¹⁴⁹ *Vinod Kumar Gupta op cit* note 139.

The Court's Response

Apart from a case in which guidelines were framed for the sale of Maruti cars,¹⁵⁰ it is only in the petition filed by Common Cause asking the Supreme Court to implement the Consumer Protection Act, 1986 that Court orders displaying some of the recognisable characteristics of a PIL are seen. The scope of the litigation was expanded and monitored and contempt notices were issued against the State Governments who did not respond to the Court.

The Contribution of PIL

Being able to use the relaxed standing provisions reinforced the value of consumer organisations, as in the early recognition of groups like the Akhil Bharatiya Grahak Panchayat, and Common Cause.¹⁵¹ This relaxation of procedures, combined with recognition of consumer issues, meant that legislation was framed to cope with the increasing demands. As many individual consumer issues or cases are not issues of large public interest, PIL would have been unsuitable as a mechanism to remedy of injustices perceived by the consumer.¹⁵² It has functioned as a springboard for ameliorating the lot of the consumer of goods and services, as it led to the legal recognition of the needs of consumers and to establishment of a new

¹⁵⁰ *Ashok Kumar Mittal op cit* note 140. Another petition was filed in the Supreme Court by Common Cause relating to the out of turn allotments of Maruti vehicles out of the discretionary quota to politicians and other personalities. The petition was not admitted. See Shourie, H D, *Common Cause: A romance with public causes* (monograph, New Delhi, 1993).

¹⁵¹ See the section on 'Public Policy and Administration' for the cases on pensions. Other petitions have been filed by this organisation in the Supreme Court. One highlighted the inefficiency and huge profits made by the telephone department; as a result of the petition, the telephone department was able to separate from the Department of Posts, enabling the telephone department to utilise its surplus for the improvement and expansion of its own services. Another, filed in 1988, challenged sections 36A, 36E and 46A of the Monopolies and Restrictive Trade Practices Act, 1969 as it excluded public sector enterprises and private consumers from its ambit - the petition was rejected as the Court felt that it had been prompted by private industry. See Shourie, H D, *Common Cause: A Romance with Public Causes* (monograph, New Delhi, 1993).

¹⁵² *M Balagovindam op cit* note 139.

judicial forum, the Consumer Forum.¹⁵³

Education

Cases, filed on aspects of education, can be seen in sections on policy,¹⁵⁴ schools,¹⁵⁵ admissions,¹⁵⁶ appointments,¹⁵⁷ examinations and cheating,¹⁵⁸ and other cases.¹⁵⁹ The petitioners, many of whom are individuals who would otherwise be unable to question certain decisions or the decision-making process, focus upon the higher education system. The right to education, prescribed by Articles 41, 45 and 46 of the Constitution, all Directive Principles of State Policy, has often been cited.¹⁶⁰

¹⁵³ For details see Singh, Gurjeet (1993).

¹⁵⁴ *Manubhai Pragaji Vashi v State of Maharashtra and others* AIR 1989 Bom 296; *Parents Forum for Meaningful Education and others v Central Board of Secondary Education and others*.

¹⁵⁵ *Pratap Kishore Misra v State of Orissa and others* AIR 1988 Ori 273; *Kedar Nath Singh Gautam v Secretary, Board of High School & Intermediate Education U.P. at Allahabad and another* AIR 1991 All 381.

¹⁵⁶ *Jitendra Nath Banerjee v West Bengal Board of Examination for Admission to Medical, Engineering and Technological Degree Colleges and others* AIR 1983 Cal 275.

¹⁵⁷ *Krishna Kant Jaiswal v Vice Chancellor, Banaras Hindu University, Varanasi and others* AIR 1984 All 350; *Balbir Singh Grewal and another v G D Tapase and others* AIR 1985 P & H 244; *Naginder Singh v Punjab University, Chandigarh and others* AIR 1990 P & H 157; *Biswajit Sinha & Another v Dibrugarh University, Represented by the Vice-Chancellor & 8 Others* (1990) 2 GauLR 374; *H K Chopra v Post Graduate Institute of Medical Education and Research, Chandigarh and others* AIR 1992 P & H 30; *Ajit Kumar v State of Bihar and others* and *Shambu Prasad Singh v State of Bihar and others*.

¹⁵⁸ *Allahabad University Teachers' Association and others v Chancellor, Allahabad University, Lucknow and others* AIR 1982 All 343; *Shivajirao Nilangekar Patil and others v Dr Mahesh Madhav Gosavi and others* (1987) 1 SCC 227; *Nandjee Singh v P.G. Medical Students' Association and others* (1993) 3 SCC 400; letter petition from Kerala.

¹⁵⁹ *J Mohapatra and Co and another v State of Orissa and another* (1984) 4 SCC 103; *State of Himachal Pradesh v Parent of a Student of Medical College, Simla and Others* (1985) 3 SCC 169 / AIR 1985 SC 910.

¹⁶⁰ For a survey of the law see Jayakumar, N K, 'Law of Education', *Annual Survey of Indian Law*, Vol 27, 1991, 535-550.

The cases relating to admissions and appointments reveal corruption. The limited places for higher education, and the status afforded to those in University and Polytechnic posts, has led to contentious litigation in the High Courts.

Gaining access to the information necessary to file a petition has often been difficult.¹⁶¹ Approaching the High Court was really a last resort for the Parents Forum, which had earlier tried to discuss its grievances with administrators of the Central Board of Secondary Education and with politicians.¹⁶²

The importance of education and educational policy has been evident in Supreme Court judgments in recent years. In two recent cases the right to education has been upheld. In 1992, Justice Kuldip Singh held:

“Right to life” is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue, The right to education flows directly from the right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to endeavour to provide educational facilities at all levels to its citizens.

The fundamental rights guaranteed under Part III of the Constitution of India including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and conscious of his individualistic dignity.¹⁶³

In effect, the Directive Principles of State Policy in Articles 41, 45 and 46 of the Constitution were held to be justiciable and incorporated into the fundamental rights, a point which was clarified in a subsequent case:

the provisions of Parts III and IV are supplementary and complementary to each other and that fundamental rights are but a means to achieve the goal indicated in Part IV. It is also held that the fundamental rights must be construed in the light of the directive

¹⁶¹ The Parents Forum for Meaningful Education and the Bihar State Progressive Democratic Students Union of India complained of problems in gaining access to many of the documents and evidence required to support their petitions.

¹⁶² Kavita Sharma, Parents Forum for Meaningful Education, interview, New Delhi, 26/10/93.

¹⁶³ *Mohini Jain v State of Karnataka & Ors* 1992 (2) SCALE 17 [90] at 94.

principles. ...

The right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the Constitution.¹⁶⁴

Despite this concern, with the exception of the petition filed by the Parents Forum For Meaningful Education, none of the PILs have asked the Court to consider the general framework of education policy.¹⁶⁵ Grievances, while motivated by broader concerns for the education system, have been articulated in terms of a particular injustice.

Access to Justice

The letter jurisdiction of the High Courts has been invaluable for those seeking immediate judicial redress, as in the case registered in the Kerala High Court in response to a letter complaining that an answer sheet had been leaked.¹⁶⁶

The *locus standi* of all the petitioners in the cases relating to appointments to educational posts has come under scrutiny. High Courts have held that PIL cannot be used to mask a conflict between two individuals,¹⁶⁷ and one petitioner was described as having malicious intent and was directed to pay Rs. 5,000 as punitive costs.¹⁶⁸ When admitting other petitions, the need for vigilance has been stressed.¹⁶⁹ There is little conformity in the directions - while in one instance, not only was the

¹⁶⁴ *Unni Krishnan, J P and others v State of Andhra Pradesh and others* (1993) 1 SCC 645 at 730 and 732.

¹⁶⁵ The petition filed by Ajit Singh, concerned with bias and nepotism in education posts, was not framed in a manner that highlighted its PIL content. The issues were later addressed in the petition filed by Shambhu Prasad Singh, *op cit* note 157.

¹⁶⁶ Also see *Manubhai Pragaji Vashi op cit* note 166.

¹⁶⁷ *Krishna Kant Jaiswal op cit* note 157.

¹⁶⁸ *H K Chopra op cit* note 157.

¹⁶⁹ See *Balbir Singh Grewal and Biswajit Sinha op cit* note 157.

principal of a school denied standing, the Court held that he had no legal right to approach the Court,¹⁷⁰ the Allahabad University Teachers' Association was given standing and a publishing company, acting in the public interest, was permitted to approach the Court.¹⁷¹

The definitional problems discussed in chapter two are prevalent here. Describing one case as “a sort of PIL”, the Court reinforced the internal ambiguities in the definition of PIL.¹⁷² An important precedent was set when the Supreme Court held that in a case of public importance, private litigation assumes the character of a PIL,¹⁷³ but circumscribed this in another case, stating that instances where “cases where what is strictly an individual dispute is sought to be converted into a public interest litigation should not be encouraged”.¹⁷⁴

The Court's Response

Although many of the petitions were decided on facts or after a discussion of the relevant enactments, the significant part of the courts' orders has been the decision on whether to admit the petition. Other legal points have been raised regarding the extent of the courts' powers.¹⁷⁵ The Bombay High Court linked the funding for legal education with the provision of legal aid, stating that legal education

¹⁷⁰ *Kedar Nath Singh Gautam op cit* note 155. Contrast with the cases on provided resources in the section on 'Environment and Resources' *supra*.

¹⁷¹ *J Mohapatra op cit* note 159.

¹⁷² *Biswajit Sinha op cit* note 157. The Calcutta High Court treated a petition filed as a class action by aggrieved candidate, Jitendra Nath Banerjee, as a PIL.

¹⁷³ *Shivajirao Nilangekar Patil op cit* note 158.

¹⁷⁴ *Nandjee Singh op cit* note 158.

¹⁷⁵ In *Biswajit Sinha op cit* note 157 the High Court affirmed its jurisdiction to decide upon the validity of the decision of a selection committee.

was vital if the goal of providing legal aid was to be realised.¹⁷⁶

Some issues were left to the discretion of administrative officers,¹⁷⁷ and the only inquiry instituted was in response to allegations of a leaked examination paper in Kerala. This caution is echoed in the Supreme Court judgment in the appeal filed by the State of Himachal Pradesh, an important decision for PIL. The High Court direction that legislation be framed to prevent the ragging of students was overturned by the Supreme Court on the basis that the court cannot usurp executive or legislative functions.¹⁷⁸

The Contribution of PIL

Despite the decisions on the Directive Principles on State Policy,¹⁷⁹ there has been little evidence of a widespread concern, in the courtroom, for the right to education and its provision for all people, even when the Court has been asked to do so. This hesitant response is a characteristic of all the orders on education issues, particularly because the courts have been confronted with many different types of

¹⁷⁶ *Manubhai Pragaji Vashi op cit* note 154. Other petitions have been filed on legal education, for example, O P No 16324 of 1992 *S James Vincent v Union of India and others*. Filed in the Kerala High Court in 1992, this petition, under Article 226 of the Constitution, asked the Court to stop the practice in Government Law Colleges of conducting three and five year courses simultaneously, to prevent three year courses from being conducted and to remove the restriction on the age of entry. See 'Judges, Courts, Lawyers', *infra*, for other cases in which PIL has been used to bolster the legal profession and the judiciary.

¹⁷⁷ In *Parents Forum for Meaningful Education op cit* note 154 the Delhi High Court left the unresolved issues to the discretion of the Central Board of Secondary Education, the very institution against whom the complaints had been filed and whose policies had been criticised by the Court in an earlier decision. In *Allahabad University Teachers Association op cit* note 158, the High Court left the matter to the discretion of the Chancellor, again the respondent to the petition. In *J Mohapatra op cit* note 159 the Supreme Court felt unable to give directions, but framed guidelines for the future.

¹⁷⁸ *State of Himachal Pradesh op cit* note 159.

¹⁷⁹ See *Mohini Jain op cit* note 163 and *Unni Krishnan op cit* note 164.

petitioner, and with various motivations.¹⁸⁰

Politics and Elections

Many petitions have been filed relating to elections¹⁸¹ and politics,¹⁸² by advocates, politicians, social workers and public spirited individuals. PIL has been used to challenge the legality of electoral and political decisions and events that cannot easily be questioned elsewhere and as yet another tactic in the political struggle. PIL has been used as another tool in the personal or political battles of those wishing to gain political power, or publicise their perspective.¹⁸³

¹⁸⁰ For example, the Chandigarh High Court held that a journalist and social worker had ulterior motives when approaching the Court in *H K Chopra op cit* note 157. The cases on reservation policy, of relevance to students, have been discussed in 'Public Policy and Administration', see the section on 'Public Policy and Administration', *infra*, for a discussion of *Indra Sawhney and Ors v Union of India and Ors* JT 1992 (6) SC 273.

¹⁸¹ *P Nalla Thampy Terah v Union of India and others* 1985 (Supp) SCC 189; *Anand Mohan v Union of India and others* AIR 1987 All 351; *A C Datt v Rajiv Gandhi and others* AIR 1990 All 38; *V.R. Sreerama Rao v Telagudesam, a political party, and another* AIR 1983 AP 96 and *V. R. V. Sree Rama Rao v Telagu Desam, a Political Party, and others* AIR 1984 AP 353; *Digvijay Mote v Union of India and others*; *D C Saxena v Union of India and others*.

¹⁸² Petitions on politics and corruption, and politicians. Politics and corruption: *Kailash Meghwal and others v State of Rajasthan and others* AIR 1983 Raj 182; *Madurai Adheena Peedathipathi, Madurai v State of Tamil Nadu* AIR 1984 Mad 241; *Duyal Chandra Bhuyan and others v Secretary to the Government of Assam, Panchayat and C.D. Department and others* AIR 1986 Gau 56; *A G Prayagi v State of M.P. and others* AIR 1987 MP 25; *Kallara Sukumaran v Union of India and others* AIR 1987 Ker 212; *Sunil Kumar Mondal and others v Union of India and others* AIR 1989 Cal 197; *Maharishi Avadhesh v State of U P* AIR 1991 All 52; *J Kapathianga v State of Mizoram and another* (1991) 1 GauLR 226; *I K Jagirdar v State of Karnataka and others* AIR 1992 Kant 175; *Bimal Prasad Das v Bijayananda Patnaik and others* AIR 1992 Ori 10; *Kamal Saikia v Union of India & Others*; *Kallara Sukumaran v Raghuchandra Bal* 1993 (1) KLT 699. Politicians: *Rajendran v Vakkom Puroshothaman* 1985 KLT 40; *K C Chandy v R Balakrishna Pillai* 1985 KLT 762; *Panna Lal Agyan and others v Hon'ble Speaker, Sri Balram Jaggad, and others* AIR 1988 All 167; *Vidadala Harindhababu v N. T. Ramarao, Chief Minister of the State of Andhra Pradesh, Hyderabad and others* AIR 1990 AP 20; *Dhronamraju Satyanarayana v N T Rama Rao and others* AIR 1988 AP 62 and *Dhronamraju Satyanarayana v N T Rama Rao and others* AIR 1988 AP 144; *B Purushotham Reddy v Nallapureddy Srinivasulu Reddy* AIR 1988 AP 178; *B M Gangadhariah v H D Devegowda* AIR 1989 Kant 294; *P N Dubey v Union of India and others* AIR 1989 MP 225; *Kashinath G Jalmi and another v Speaker and others* AIR 1993 SC 1873.

¹⁸³ As in *Maharishi Avadhesh ibid*.

Access to Justice

All but one petition was filed in a regular manner, putting forward detailed contentions.¹⁸⁴ Having discussed standing, in most orders the Court acknowledged the *bona fides* of petitioners,¹⁸⁵ while a few did not get a welcome reception.¹⁸⁶ Standing has not proven as much of an obstacle in the petitions, as has the question of justiciability and the Court's jurisdiction to hear the matter. Even in those cases where standing has been conferred on the petitioner, petitions have been rejected on the grounds of justiciability.¹⁸⁷ Dismissing a petition, the Court held that the oath of office of a Minister imposes a moral not a legal obligation.¹⁸⁸ Other petitions were rejected on both standing and justiciability.¹⁸⁹ In three petitions the courts cited alternative remedies as the reason for dismissing the applications,¹⁹⁰ or the delay in filing.¹⁹¹

¹⁸⁴ Sent in the form of a telegram by the Madurai Adheena Peedathipathi.

¹⁸⁵ P Nalla Thampy Terah, V R Sree Rama Rao, Kailash Meghwal, I K Jagirdar, Bimal Prasad Das and Kashinath Jalmi.

¹⁸⁶ See *Duyal Chandra Bhuyan op cit* note 182, *Anand Mohan op cit* note 181 and *A G Prayagi op cit* note 182.

¹⁸⁷ For example, *A C Datt op cit* note 181, *Kailash Meghwal*, *Kallara Sukumaran*, *Vidadala Harindhababu* and *Kashinath G Jalmi op cit* note 182. In *Panna Lal Agyan* and *P N Dubey op cit* note 182 the Court rejected the evidence submitted in the form of newspaper clippings.

¹⁸⁸ *K C Chandy op cit* note 182.

¹⁸⁹ *Anand Mohan op cit* note 181 and *A G Prayagi op cit* note 182.

¹⁹⁰ *A C Datt op cit* note 181, *D C Saxena op cit* note 181 and *P N Dubey op cit* note 182.

¹⁹¹ In *A C Datt op cit* note 181 the Allahabad High Court noted that the petitioner had manipulated the timing when filing his petition. Contrast with *I K Jagirdar op cit* note 182 in which the delay in filing the petition was condoned. In *Dhronamraju Satyanarayana op cit* note 182 the Court noted that, the evidentiary requirements in the writ rules had been relaxed.

The Court's Response

Given the availability of alternative remedies, the separation of powers in the constitutional scheme, and the nature of the issues brought, the response of the courts to petitions in this area has been limited. Having been asked to remedy the financial inequities of the election process, the Supreme Court felt constrained by the intent of the election laws from resolving a problem “regarded universally as an evil of big magnitude”,¹⁹² without referring to the Directive Principles of State Policy and other Supreme Court decisions that could have supported a more potent judgment. Again, when confronted with the alleged illegality of elections in Punjab, Jammu and Kashmir, and Assam, the Supreme Court, after holding that Article 324 of the Constitution, regarding the powers of the Election Commission, is amenable to judicial review, did not examine the facts of the petition, nor did it issue notice to the Election Commission.¹⁹³ When asked to consider the legality of the declaration of elections to the Rajya Sabha, the Delhi High Court raised wider issues relevant to the case, but chose not to expand the scope of the case.¹⁹⁴ Responding to a complaint about the illegal issue of citizen certificates to immigrants in Assam, the Guwahati High Court found the grievance to be substantiated, but gave no concrete directions.¹⁹⁵

Responding to petitions raising communal issues and problems, High Courts have made no substantive orders, considering that the questions raised were not justiciable - nonetheless the suggestions made and tone of the orders have depended upon the proclivities of the judges.¹⁹⁶

¹⁹² *P Nalla Thampy Terah op cit* note 182.

¹⁹³ *Digvijay Mote op cit* note 181. A similar petition was filed in the Madhya Pradesh High Court in 1993 by Satya Pal Anand. The Election Commission sought the transfer of this petition as it related to facts similar to a writ filed by the Commission in the Supreme Court. S Muralidhar, advocate, interview, 12/11/93.

¹⁹⁴ *D C Saxena op cit* note 181.

¹⁹⁵ *Kamal Saikia op cit* note 182. In *Bimal Prasad Das op cit* note 182, the Orissa High Court exonerated the Chief Minister of responsibility for his statement that corrupt officials be beaten.

¹⁹⁶ *Maharishi Avadhesh op cit* note 182 and *A C Datt op cit* note 181. See the cases on religion in 'Public Policy and Administration' *infra*.

In three cases, it was held that the Court cannot direct the government to appoint a commission of enquiry.¹⁹⁷ In only one instance was the petition allowed and concrete relief provided.¹⁹⁸ The Guwahati High Court held that the dissolution of 124 village councils was not lawful, as the villagers had not been given a hearing.

The Contribution of PIL

The petitions and their treatment reflect the growing misuse of PIL for motivations which the courts have not explored. In contrast with the cases on 'education', by conferring standing on many of the petitioners, the courts have avoided making controversial pronouncements on the *bona fides* of petitioners, who themselves have status in the community. Instead the Courts have rejected the petitions on the grounds of justiciability, and any directions given have been patchy. Even where the Court has recognised the need for intervention, for example when a bench of five judges was constituted to hear charges against the Chief Minister of Andhra Pradesh, the assistance of the Attorney General sought, as *amicus curiae*, and *prima facie* findings recorded, no substantial relief was granted.¹⁹⁹ The jurisdiction of the High Court was stretched to no avail, as it was unable to grant or mould reliefs. It is possible that the Courts have had a hidden agenda as by discussing the issues before rejecting the petitions, the manoeuvres of PIL petitioners and their motivations have been exposed.

The petitions in this section have attempted to use the legal process for issues that are not amenable to the judicial forum. Although by using PIL access to the courts became easier, no amount of procedural relaxation could entice the courts to adjudicate on matters which were beyond their jurisdiction or upon which they did

¹⁹⁷ *Kallara Sukumaran, Maharishi Avadhesh and Dhronamraju Satyanarayanan op cit* note 182. The latter case was unusual, as the Court appointed the Advocate-General, described as an officer representing the interest of the public, as *amicus curiae*.

¹⁹⁸ *J Kapathianga op cit* note 182.

¹⁹⁹ *Dhronamraju Satyanarayana op cit* note 182.

not wish to become involved.²⁰⁰ The political sensitivity of the issues and their complexity has meant that the legal forum, albeit an easy option, is not the most suitable.

Public Policy and Administration

The many cases filed on all aspects of public policy can be considered in groups on: health,²⁰¹ media,²⁰² religion,²⁰³ reservation policy,²⁰⁴ pensions,²⁰⁵ executive

²⁰⁰ An example of the vacillating approach of the courts is seen in a petition filed in the Karnataka High Court. It was contended that the former Chief Minister, Ramakrishna Hedge, had violated provisions of the Urban Land (Ceiling and Regulation) Act, 1976 when he granted permission for the sale of land at an undervalued rate to Revajeetu Builders and Developers because one of the partners in the company was related to him. The sale was quashed by a single judge, but a division bench upheld the validity of the sale on the basis that this was not the only instance where exemptions were given. The judges urged caution in PIL matters, referring to the many pseudo PILs filed. Another example is the petition filed in the Supreme Court in 1993 by the Jan Hit Abhiyan asking the Court to direct the Union Government and the CBI to investigate Harshad Mehta's allegation that he had paid Rs.1 crore to Prime Minister P V Narasimha Rao on 4/11/91. In an order in July 1993, Chief Justice M N Venkatachaliah and Justice S Mohan refused to list the matter for urgent hearing stating:

The country will also watch how the judicial processes are politicised.
See Ataulla, Naheed, 'The Karnataka Scene', *Sunday Times of India*, 6/9/92.

²⁰¹ General cases: *Vincent Panikulangara v Union of India* AIR 1987 SC 990; *Jagat Singh v Delhi Administration & Others* 1989 (2) SCALE 1498 [767]; *A S Mittal and others v State of U P and others* AIR 1989 SC 1570. On radiation: *M C Mehta v Union of India and others*; *Shivrao Shantaram Wagle and others v Union of India and others* (1988) 1 SCC 452 / (1988) 2 SCC 115. Relating to alcohol: *George Mampilly and another v State of Kerala and another* AIR 1985 Ker 24; *B Krishan Bhat v Union of India* (1990) 3 SCC 65; *Vypeen Vishamadhya Kootakola Virudha Samithy v State of Kerala and others*. On HIV/AIDS: *Lucy R D'Souza and others v State of Goa and others* AIR 1990 Bom 355; *T Vasudeva Pai v Union of India* 1990 (1) KLJ 403; "*Niyamakendran*" *v State of Kerala and others*; *Aids Bhedbhav Virodhi Andolan v Union of India and others*.

²⁰² *Ramesh s/o Chotalal Dalal v Union of India and others* (1988) 1 SCC 668; *Odyssey Communication Pvt. Ltd v Lokvidyayan Sanghatana and others* (1988) 3 SCC 410; *P Jagajeevan Ram and etc. v Government of India and others* AIR 1989 Mad 149 and *S Rangarajan v P Jagjivan Ram and others* (1989) 2 SCC 574; *M K Agarwal and another v Union of India and others* AIR 1994 Del 242.

²⁰³ General case: *Chandanmal Chopra and another v State of West Bengal* AIR 1986 Cal 104. Relating to the Ayodhya issue: *V M Tarkunde & Anr v Union of India & Ors* 1989 (2) SCALE 188 [937]; *Acchan Rizvi v State of Uttar Pradesh & Ors* 1992 (2) SCALE 85 [457], 1992 (2) SCALE 150

decision making,²⁰⁶ negligence²⁰⁷ and a disparate collection of issues.²⁰⁸ It is in this section that the breadth of PIL cases is displayed. Permeating every aspect of life, the administration has been criticised though the forum of the Court, with the expectation that the Court will be able to act on behalf of Indian citizens, whatever the issue.

The cases on health can be seen in groups on general cases and those on radiation, alcohol and HIV/AIDS. Concern for the health and well being of citizens

[706], 1992 (3) SCALE 65 [246], 1993 (1) SCALE 9 [28] and 1993 (1) SCALE 46 [174]; *Mohd. Aslam Alias Bhure v State of U.P. & Anr* 1993 (2) SCALE 196 [994]; filed after the demolition of the mosque.

²⁰⁴ *Akhil Bharatiya Soshit Karamchari ABSK Sangh (Railway) v Union of India and Others* (1981) 1 SCC 246; *Surendra Kumar Lanka & Ors v Union of India & Ors* 1992 (1) SCALE 47 [212]; *Indra Sawhney and Ors v Union of India and Ors* JT 1992 (6) SC 273; *National Federation of Blind v Union Public Service Commission and others* (1993) 2 SCC 411.

²⁰⁵ General cases: *D S Nakara and others v Union of India* AIR 1983 SC 130; “Common Cause” a Registered Society and others v Union of India AIR 1987 SC 210. On family pensions: *P K Martiyani v Regional Provident Fund Commissioner, Ahmedabad & Anr* 1983 (2) GLR XXIV (2) 927; *Poonamal and others v Union of India and others* 1985 (3) SCC 345; *Katheeja Bai v Superintending Engineer and others* (1984) 3 SCC 518; *Kochupennu Lakshmi v Chairman, Kerala State Road Transport Corporation, Trivandrum* AIR 1984 Ker 97; *Ram Pyari v Union of India and others* AIR 1988 Raj 124; *Thressia v K.S.E.B.* AIR 1988 Ker 206; *Brijithamma v State of Kerala* 1990 (1) KLT 399; *B Ramlamma v State of Andhra Pradesh* 1993 (1) SCALE 27 [90].

²⁰⁶ General cases: *Babubhai Jashbhai Patel and others v Union of India, New Delhi and others* AIR 1983 Guj 1; *D C Wadhwa and others v State of Bihar* AIR 1987 SC 579 / (1987) 1 SCC 378; *Rudraiah Raju K and others v State of Karnataka and others* 1986 (1) KLJ 164; *Jagram v Gwalior Town and Country Development Authority Gwalior and others* AIR 1987 MP 11; *Kishen Patnayak and another v State of Orissa* AIR 1989 SC 677 / 1989 (1) SCALE 4 [32]; *R R Delavai v Indian Overseas Bank and others* AIR 1991 Mad 61; *Vineet Kumar & Anr v Board of Control for Cricket in India* 1989 (2) SCALE 145 [764]; *R Palaksha v State of Karnataka and others* 1990 (1) KLJ 251; *Quilon District Private Bus Operators Association, Kollam-1 v State Transport Appellate Tribunal, Ernakulam and others* AIR 1992 Ker 267. On taxation: *R K Garg v Union of India and others* (1981) 4 SCC 675; *Common Cause, A Registered Society v Union of India and others* (1987) 4 SCC 44; *Vishwabharathi House Building Co-operative Society Limited and another v Bangalore Development Authority, Bangalore and another* AIR 1991 Kant 133. Relating to corporate finance: *N Parthasarathy v Controller of Capital Issues and another* (1991) 3 SCC 153; *Narendra Kumar Maheshwari v Union of India* 1990 (Supp) SCC 440. The Bofors cases: *Central Bureau of Investigation and Anr v Harinder Singh Chaudhary & Anr* 1990 (2) SCALE 244 [1172]; *Janata Dal v H S Chowdhary* 1991 (2) SCALE 71 [400] / (1991) 3 SCC 756 and (1992) 4 SCC 305 / 1992 (2) SCALE 67 [338].

²⁰⁷ *Jaram Singh v State of H P and others* AIR 1988 HP 13; *Gautam Uzir v Assam State Electricity Board (ASEB) and others; In Re: The news item under the caption “Boy sustains electric shock” published in the Meghalaya Guardian dt. 22.11.1991.*

²⁰⁸ *P Rathinam and another v Union of India and another; P N Narasimha Murthy v Regional Transport Officer and Licensing Authority for grant of Driving School Licence & another* 1990 (1) KLJ 143.

has led to a focus on specific instances of administrative failure and on the policy framework.²⁰⁹ These cases contain an implicit challenge to the development paradigm of the Government.²¹⁰ The problems of increasing alcohol abuse²¹¹ are reflected in cases on the sale of arrack in polythene sacks²¹² and the sale of “spurious” (adulterated) liquor.²¹³ Petitions relating to HIV/AIDS reflect widespread apprehension about responses to the spread of this virus and treatment of the affected patient. In a comprehensive petition, the Aids Bhedhav Virodhi Andolan have challenged the Court to respond to the discrimination against those practising homosexuality, while

²⁰⁹ Also see the section on ‘Injustices Specific to Women’ for cases relating to amniocentesis and contraception, the section on ‘Environment and Resources’ for innumerable cases on the detrimental effects of pollution and environmental degradation on health, the section on ‘Health and Safety’ in the section on ‘Labour’ and the cases on ‘Hospitals’ in the section on ‘Prisons and State Institutions’. For an example of a case in which medical charges have been paid, see *Rajiv Singh op cit* note 63, in which the Patna High Court ordered that compensation and the costs of treatment be paid to all those who suffered because of the discharge of effluents from a chemical factory. In addition to the documented cases, other petitions have been filed asking the Court to direct the State to provide basic preventive and curative health care. One such petition, *People’s Union for Civil Liberties v Union of India and others* (C W J No 9370 of 1989) was filed in the Bihar High Court asking the Court to direct that steps be taken to eradicate the widespread, killer disease Kalazar, to ensure that pesticide (DDT) is sprayed throughout the affected districts, to send a team of physicians and pathologists to each block to identify and treat the disease, to ensure an adequate supply of the drug Pentamedine, to institute an enquiry and to direct the central government to provide funds to the state government to deal with the disease. Other petitions were filed: in the Madhya Pradesh High Court by the PUCL regarding the huge number of deaths in the Bastar region of Chattisgarh from blood dysentery, see [anon], ‘News - Madhya Pradesh’, *PUCL Bulletin*, Vol 11 No 5, May 1991, 25; in the Kerala High Court by the Secretary General of the Indian Epilepsy Association challenging sections 4(b)(iii) and 5(ii) of the Hindu Marriage Act, 1955 which state that in order for a marriage to be valid, neither party should suffer from recurrent fits of epilepsy, and that epilepsy is a ground for annulment of a marriage. Bharucha, E P, ‘Haazir Hai’, *The Lawyers*, Vol 3 No 6, June 1993, 22-23.

²¹⁰ See the petitions filed relating to drugs manufactured by multi-national corporations, *Vincent Panikulangara op cit* note 201, and the irradiation of foodstuffs, *Shivarao Shantaram Wagle op cit* note 201. For a more general discussion, see the section on ‘Environment and Resources’ *supra*.

²¹¹ Other petitions have been filed in the Kerala High Court on this issue, including *B Krishnakumar and another v State of Kerala and others* (O P No 5272 of 1991), filed in 1991 by an advocate challenging the sale of arrack in polythene sachets. This policy had been introduced by the Government of Kerala in 1983-4 and was challenged on the grounds that adulteration of alcohol takes place causing tragedies such as that in Vypeen in 1982, that the sachets can be easily concealed by school children and college boys, that the packaging can be toxic and that the shelf-life of the arrack cannot be determined. The petition asked for a prohibition of the manufacture and sale of polythene sachets of arrack.

²¹² See *George Mampilly op cit* note 201.

²¹³ *Vypeen Vishamadhya op cit* note 201. Also see *Rudhraiah Raju* and *R Palaksha op cit* note 206.

expressing its concern for the spread of the virus.²¹⁴

All of the documented cases on the media, relate to film and television, recognising the importance of these media. Extensive government control²¹⁵ and the lack of standing to challenge decisions under existing statutory provisions, has left petitioners with little option but to mobilise the courts.²¹⁶ Prevalent fears about the repercussions of the introduction of foreign newspapers reflect a deeper concern about the activities of foreign organisations in India.²¹⁷ Media cases have been less important for PIL than the media itself, as it was newspaper reports that led to the earliest PILs being filed.²¹⁸ In this section alone, six cases were filed in this manner.²¹⁹ Although newspaper reports have not always been accepted as evidence,²²⁰ courts have taken notice of such reports, before taking upon themselves an investigatory role to enquire

²¹⁴ See Mehra, Madhu, 'Law penalises gays' sexual conduct', *The Pioneer*, 23/8/94; Glick, Robert A, *Law Ethics and HIV. Proceedings of the UNDP Intercountry Consultation, Cebu, Philippines 3-6 May, 1993*, (United Nations Development Programme, New Delhi, 1993); Huddart, Jenny and Lyons, Joyce V, *NGO Responses to HIV/AIDS in Asia. Case Studies*, (United Nations Development Programme, New Delhi, Oct 1992); 'Community Responses to HIV and AIDS. Experiences from India and Thailand', ((United Nations Development Programme, New Delhi, 1992); 'AIDS and Asia: a development crisis', (A United Nations Development Project Report, New Delhi, [1992?]).

²¹⁵ In addition, a petition was filed in 1989 in the Supreme Court by an organisation called Common Cause (see 'Consumer Issues', *supra*) claiming that the broadcast media was being misused and challenging the constitutional validity of the monopoly of Doordarshan and All India Radio. See Shourie, H D (1993).

²¹⁶ In addition to the documented cases, a petition was filed in the Supreme Court in 1991 by a group of advocates challenging the ban of an *Eyewitness* cassette purporting to carry interviews of suspected Kashmir militants who have alleged "barbaric treatment" of the Army in Jammu and Kashmir. [anon], 'Supreme Court to hear "Eyewitness' Plea"', PUCL Bulletin, Vol 12 No 1, Jan 1992, 17. Another petition was filed in 1991 in the High Court of Jammu and Kashmir by the PUCL challenging the telecasting of the extra-judicial confession of militants in a programme on Doordarshan and incidents of custodial violence and killings. Imroze, Parvez, 'Srinagar PUCL', *PUCL Bulletin*, Vol 11 No 12, Dec 1991, 16-17.

²¹⁷ *M K Agarwal op cit* note 202.

²¹⁸ For example, see *Hussainara Khatoon and others v Home Secretary, State of Bihar* (1980) 1 SCC 81, as discussed in 'Prisons and State Institutions' in chapter three.

²¹⁹ *Vypeen Vishamadhya, T Vasudeva Pai and "Niyamakendran" op cit* note 201, *P K Martiyani, Ram Pyari and Brijithamma op cit* note 205.

²²⁰ See *T Vasudeva Pai op cit* note 201. For another example see the section on 'Prisons and State Institutions' in chapter three for *Siddha Raj Dhadda v State of Rajasthan* AIR 1990 Raj 34.

into the facts. The Supreme Court has taken *suo moto* notice of newspapers reports and published letters.²²¹ Aside from being mobilised by the media, courts have mobilised the media to assist it in PIL cases.²²²

Amongst the cases on religion²²³ is one petition asking the Calcutta High Court to ban the Koran. The audacity of the demand is only matched by the detail of the arguments in the petition, and demonstrates the perception that PIL can be used for many grievances.²²⁴ Communal tensions in Ayodhya, even before the demolition of the Babri Mosque, were brought before the Court for resolution. PIL was mobilised in the absence of other effective methods of making the administration accountable and because of the failure of the administration to deal with growing problems and hostility.²²⁵

All the cases on reservation policy are more in the nature of class actions than PIL, mobilising the relaxed procedures available because of PIL. The Mandal judgment can only be described as a PIL because one of the petitions was

²²¹ *Ram Pyari and P K Martiyani op cit* note 205, For another example of this see the section on 'Injustices Specific to Women' in chapter four for *In the matter of: Judicial Enquiry into Gang-Rape Demanded, and, Concerted Demand for Judicial Probe* 1988 1 GauLR 489.

²²² For examples of the way in which the media has been mobilised, see chapter three for *Delhi Judicial Service Association v State of Gujarat & Anr* 1989 (2) SCALE 140 [748] in the section on the 'Police', *Sheela Barse & Another v Union of India & Others* (children in jails) 1986 (2) SCALE 1 [1] in the section on 'Children'. Also see *M C Mehta op cit* note 57. See the section on 'Prisons and State Institutions' in chapter three for *Sheela Barse v State of Maharashtra* (access to prisons) (1983) 2 SCC 96.

²²³ For examples of the many cases relating to religion, see the section on the 'Police': *R S Sodhi, Advocate, People's Union for Civil Liberties v State of U P & Ors* 1991 (2) SCALE 81 [463] and the section on 'Injustices Specific to Women' for cases on personal laws and Sati, relating to religion.

²²⁴ *Chandanmal Chopra op cit* note 203.

²²⁵ See Muralidhar, S, 'Countdown on the Ayodhya Litigation', *The Lawyers*, Vol 8 No 2, Mar 1993, 4-10; Dhavan, Rajeev, 'Its finest hour', *Frontline*, 18/11/94, 17-21. In addition to the existing cases, another petition, relating to Ayodhya and the media, was filed in 1993 in the Bombay High Court by two citizens against Mr Bal Thackeray of the Shiv Sena and the editor of *Saamana* for their writings before and during the riots in Bombay in January 1993. See [anon], 'Bombay Riots: Communalization of the State', *The Lawyers*, Vol 8 No 11, Dec 1993, 5-6. See *Maharishi Avadhesh v State of U P* and *A C Datt v Rajiv Gandhi and others* in the section on 'Politics and Elections' *supra*.

filed by an advocate²²⁶ - many had been filed by students directly affected by the policy.²²⁷ Similarly, the cases on pensions²²⁸ have been included because Common Cause, a voluntary organisation, was a petitioner, along with aggrieved pensioners. The cases on family pensions form a unique category of PILs, as the imagination of many judges was captured, leading to the initiation of cases *suo moto*.

The four sections on executive decision making - general, taxation, corporate finance²²⁹ - are a collection of disparate cases.²³⁰ A seminal case that brought the blatant abuse of constitutional powers by the then Governor of the State of Bihar, to the notice of the Supreme Court, was based on detailed research.²³¹ In another notable case, the appalling conditions of starvation in the District of Kalahandi were

²²⁶ *Indra Sawhney op cit* note 204.

²²⁷ See Galanter, Marc, *Competing Equalities: Law and the Backward Class in India*, (Oxford University Press, Delhi, 1984).

²²⁸ In addition to the documented cases, a petition was filed under Article 32 of the Constitution questioning the constitutional validity of the pensions given to Members of Parliament. See Shourie, H D (1993).

²²⁹ In addition to the cases documented, George Fernandes filed a petition in the Guwahati High Court regarding use and management of public money relating to the equity of Prag Bosumi Synthetics Ltd. Parag Kumar Das, editor *Boodhbar*, interview, Guwahati, 3/6/93.

²³⁰ Other petitions have been filed by members of the PUCL, in addition to those documented, including a one filed by Dr Yashpal Chibber based on a report in *India Today* of 28/2/91 which reported abuse of the provisions of the Indian Telegraph Act, 1885. The petition stated that phones were being tapped indiscriminately because no rules been framed under the Act to protect the citizen from improper interception and disclosure of information. [anon], 'Phone Tapping', *PUCL Bulletin*, Vol 11 No 4, Apr 1991, 4-5 & 13. A petition, *Parvez Imroz and another v Union of India and another* (W P No 20121/91) was filed in 1991 in the HC of Jammu and Kashmir, listing the Amnesty International Secretariat, London as the second respondent and asking the Court to direct that Amnesty International be allowed to visit the Kashmir valley and report on the human rights conditions there. Another petition was instituted in the Punjab and Haryana High Court in 1992 or 1993 by asking the Court to quash the notification under section 144, Code of Criminal Procedure, 1973, promulgated by the District Magistrate, Chandigarh and that the practice of repeatedly issuing such orders be stopped. Apparently prohibitory orders under section 144, which prohibited the assembly of five or more persons, processions, speeches, slogan shouting, dharnas etc., had been in operation in the Chandigarh, either in its entirety or in parts, from 1985. [anon], 'Newsfile: Litigation Briefs', *The Lawyers*, Vol 8 No 1, Jan-Feb 1993, 31.

²³¹ *D C Wadhwa op cit* note 206. The petition was based on a book - Wadhwa, D C, *Repromulgation of Ordinances: A Fraud on the Constitution of India*, (Gokhale Institute of Politics and Economics, Pune, 1983). For a discussion of the ordinance promulgating powers, and of this case in particular see Ray, Amal (1987) at 275-279; Rao, T Venkata Subba, 'Doctrine of Colourable Re-Promulgation of Ordinances: Wadhwa's Case, AIR 1987 SC 579', AIR 1988 (J) 49.

brought to the attention of the Court.²³² However the other three cases, concerning cricket, liquor distribution, corruption and the allocation of bus permits, again display the breadth of issues for which PIL has been mobilised.²³³ The taxation case filed by R K Garg bridges the gap between the PIL for the disadvantaged and deprived and PIL for broad public interest issues. This challenge to the Special Bearer Bonds (Immunities and Exemptions) Act, 1981 was not brought by an aggrieved person but through the expanded standing of PIL.²³⁴ The cases on corporate finance reflect the growing concern with the conduct of large corporations and financial institutions.²³⁵ As with the Mandal issue, the litigation on Bofors was clearly an attempt to get the Court to resolve a political issue.²³⁶

²³² *Kishen Patnayak op cit* note 206. This case cuts across many of the categories into which PIL petitions have been placed, involving labour, child labour and health issues within the scope of policy dealing with poverty. For a discussion in the context of basic needs, see Pande, B B, 'The Constitutionality of Basic Human Needs: An Ignored Area of Legal Discourse', (1989) 4 SCC (J) 1; Muchlinski, P T, '“Basic Needs” Theory and “Development Law”' in Snyder, Francis and Slinn, Peter (eds) (1987), 237-270. Petitions of similar breadth were filed in the Aurangabad Bench of the Bombay High Court by the Association for Consumer Action Safety and Health, together with S Krishnadas of the Human Rights Law Network. The petition referred to those affected by the earthquake of September 1993, in particular those in Latur and Osmanabad, asking the Government to provide health facilities, to provide basic amenities and to remove anomalies in the distribution of compensation. In an order in March 1994 by Justice N Chapalgaonkar and Justice M S Vaidya, the petitions were admitted. Quote from *The Hindu* of 22/3/94 in *Legal Perspectives*, No 61. Professor M D Nanjundaswamy, President of the Karnataka Raitha Sangha, filed a PIL in protest against the entry of foreign investors in India. He has asked the do direct the Karnataka government to file a suit questioning the usurpation of its power and jurisdiction that will result from the signing of the GATT (General Agreement on Tariffs and Trade) Treaty, as the states will lose their exclusive executive and legislative power, if the treaty is implemented, thus jeopardising the federal structure of the polity. He has also questioned the patenting of seeds, which would compromise farmers' rights to use the seeds produced by themselves, the affect the treaty would have on the sale of drugs. This detailed petition critiqued the process of negotiation, the provisions in the GAT treaty and the effect the treaty would have. Notice has been issued by Justice N Y Hanumanthappa. See [anon], 'Averting the GATTostrophe', *The Lawyers*, Vol 9 No 2, Feb 1994, 30-31.

²³³ In addition to the documented cases, a petition was filed under Article 32 of the Constitution in 1991 or 1992 by Common Cause. Mandatory directions were issued to all banks in the country to deduct income tax of 11.5% from the interest on deposits of more than Rs. 2,500. The petition stated that many of the people with these accounts have incomes which are below the income tax bracket, including old pensioners, widows and agriculturalists, and therefore challenged the Government's directions. See Shourie, H D (1993).

²³⁴ This case, like many others, does not include a discussion of standing but begins with an examination of the facts of the case.

²³⁵ Also see *Life Insurance Corporation of India v Escorts Ltd and others* (1986) 1 SCC 264.

²³⁶ See the section on 'Politics and Elections'.

Access to Justice

Identifying widowed women as marginalised, judges have been quick to respond to financial distress, registering letters as writ petitions. While other cases originated in letters,²³⁷ all but one of the *suo moto* actions related to family pensions.²³⁸ One of the earliest cases in which standing was discussed, relaxed and conferred on a large body of persons, has been included in this section because of its relevance to the emergence of PIL.²³⁹ It is not just the doctrine of *locus standi* that has preoccupied the courts, but also the justiciability of the issues raised.²⁴⁰ Dr D C Wadhwa, a Professor of Political Science, was permitted to approach the Supreme Court, but only for the general issue concerning the re-promulgation of ordinances and not to challenge specific declarations. However, advocate R K Garg's petition was admitted and decided upon without any reference to the standing of the petitioner to bring such a case. The courts have been unclear about the definition of PIL, for example, when a case brought by members of a housing society and ratepayers was described as a PIL.²⁴¹

Standing was denied to a petitioner who complained about the application for a permit for a driving school, on the grounds that no public interest was involved.²⁴² The Supreme Court has enunciated the limits of admissibility in PIL.²⁴³ Considering justiciability, it was held that the judicial forum was inappropriate

²³⁷ *Kishen Patnayak op cit* note 206, *Jaram Singh op cit* note 207 and *Gautam Uzir op cit* note 207.

²³⁸ *In Re: The news item op cit* note 207.

²³⁹ *Akhil Bharatiya op cit* note 204.

²⁴⁰ Standing was conferred in *George Mampilly op cit* note 201 and *Quilon District op cit* note 206 on the basis that an issue of public importance was being brought to the courts.

²⁴¹ *Vishwabharathi op cit* note 206.

²⁴² *P N Narasimha op cit* note 207.

²⁴³ For example, in *Janata Dal op cit* note 206.

to decide on many of the “technical and specialised matters” raised,²⁴⁴ that policy preferences or priorities should not be decided through the courts,²⁴⁵ and that the prayers in some petitions were outside the purview of the Court's jurisdiction.²⁴⁶ Nonetheless, when it has considered it necessary, the Court has responded.²⁴⁷ The inclinations of the judges hearing a petition have, largely, determined whether reactions were construed in a relaxed or rigid manner.²⁴⁸

The Court's Response

The range of responses from the courts match the range of issues upon which orders were made. The importance of freedom of speech and expression has been upheld.²⁴⁹ The State of Bihar has been prevented from permitting the abuse of the executive power through the repromulgation of ordinances.²⁵⁰ Judicial review has been exercised and the importance of the Directive Principles of State Policy has been stressed.²⁵¹ Reservation policy was examined in the famous Mandal judgment.²⁵² The Court considered the reservation of places in higher education establishments for members of Scheduled Castes, Scheduled Tribes and Other Backward Classes, entering

²⁴⁴ *Vincent Panikulangara op cit* note 201 and *Shivarao Shantaram Wagle op cit* note 201.

²⁴⁵ *B Krishan Bhat, Lucy D'Souza and National Federation for the Blind op cit* note 201.

²⁴⁶ *Chandanmal Chopra op cit* note 203, *R Palaksha op cit* note 206 and *Babubhai op cit* note 206.

²⁴⁷ In *P Jagajeevan Ram op cit* note 202 the Madras High Court stated that the jurisdiction of the courts in PIL could extend beyond the particular prayers in a case and the narrow bounds of statutory review, and in *R K Garg op cit* note 206 the extraneous questions relating to the Ordinance, which had lapsed, were considered because of the “considerable argument placed before the Court”.

²⁴⁸ While in *Vishwabharathi op cit* note 206 it was held by the Karnataka High Court that the question of delay does not arise in PIL, *Vypeen Vishamadhya op cit* note 201 was dismissed for this very reason. In *Kochupennu Lakshmi op cit* note 205 and *Ramesh op cit* note 202 procedural requirements of evidence were relaxed.

²⁴⁹ *P Jagajeevan Ram op cit* note 202.

²⁵⁰ *D C Wadhwa op cit* note 206

²⁵¹ *George Mampilly op cit* note 201 and *D S Nakara op cit* note 205.

²⁵² *Indra Sawhney op cit* note 204.

into the detail of what had become a complex and volatile political and social problem.²⁵³ A similar position occurred when the Court was asked to deal with the petitions filed on the Ayodhya issue, which was to escalate into communal conflict at the end of 1992, between factions of Hindu and Muslim communities. The brief directions given were monitored by the Court.

The cases on the non-payment of family pensions form a unique category in PIL. Brought to the attention of the Court by the aggrieved widowed woman herself or as a *suo moto* action, these cases formed an integral part of the PIL movement and the expanding access to justice.²⁵⁴ In a petition on the prevention of HIV/AIDS, the scope of the litigation was expanded and the Court issued a number of directions.²⁵⁵ Responding to the poverty in drought ridden Kalahandi, an investigation was conducted and two committees appointed - the second after the Supreme Court found the measures taken as a result of the first enquiry were inadequate.²⁵⁶

Having been admitted, the hearing of the petition asking the Court to ban the Koran was transferred to another bench after the original judge, Justice Kastagir, had given a press interview on the case. It was then dismissed on the preliminary grounds that the petition was not justiciable.²⁵⁷ A similar turn around can be seen in the case concerning the irradiation of imported butter, when after the petition was admitted and an enquiry ordered, it was dismissed on the grounds of justiciability.²⁵⁸ Such instances highlight the lack of cohesion on the bench.

²⁵³ See Galanter, Marc (1984) for an extensive discussion of the issues involved.

²⁵⁴ See Appendix B for the PIL Guidelines which lists family pensions as a PIL subject.

²⁵⁵ "*Niyamakendran*" *op cit* note 201.

²⁵⁶ Enquiries were ordered in other cases, including *Jaram Singh* and *In Re: The news item op cit* note 207.

²⁵⁷ *Chandanmal Chopra op cit* note 203.

²⁵⁸ *Shivarao Shantaram Wagle op cit* note 201.

In cases where the State or its authorities have been negligent, the courts have awarded compensation.²⁵⁹ In addition to directing that the widowed women be given their rightful dues, compensation has been given²⁶⁰ and costs awarded.²⁶¹ These awards have been discretionary, and in one instance granted on humanitarian considerations to those whose eyesight had been damaged,²⁶² even though the issue of negligence was not discussed. The Court has directed that guidelines be framed.²⁶³ The case filed by M C Mehta on radiation was monitored by the Court which directed that insurance cover be provided for the employees at risk.²⁶⁴

One notable judgment was when the Supreme Court struck down section 309 of the *Indian Penal Code*, 1860 which made an attempt to commit suicide a punishable offence.²⁶⁵ It was held that:

It is a cruel and irrational provision, and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ingnominy because of his failure to commit suicide. Then an act of suicide cannot be said to be against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society.

²⁵⁹ *Jaram Singh and Gautam Uzir op cit* note 207. In addition to the documented cases, a petition was filed based on a letter sent to the Guwahati High Court in 1988 by an advocate asking that *suo moto* action be taken on the basis of a newspaper article which appeared in a local newspaper, *Dainik Asom* on 27/7/88. This article reported the death of a two year old child who fell through an uncovered manhole into a drain under the footpath. An enquiry was instituted as the Court observed that "A young life was lost due to the negligence of Gauhati Municipal Corporation". Gautam Uzir, advocate, interview, Guwahati, 6/6/93.

²⁶⁰ *Katheeja Bai, Thressia and B Rarmlamma op cit* note 205.

²⁶¹ *Ram Pyari op cit* note 205.

²⁶² *A S Mittal op cit* note 201.

²⁶³ *Ibid* and "*Niyamakendran*" *op cit* note 201, *Katheeja Bai op cit* note 205 and *Jagat Singh op cit* note 201.

²⁶⁴ See the section on 'Labour' for *M K Sharma and others v Bharat Electronics Lts [BEL] and others* (1987) 3 SCC 231, another case where the Court directed that workers be insured against the harmful effects of radiation.

²⁶⁵ *P Rathinam op cit* note 208.

The Contribution of PIL

The Court's response has been varied. The Bofors case has significance for the course of PIL as the limitations of using PIL as a way of gaining access to the courts were enunciated.²⁶⁶ The Court stated that PIL cannot be a panacea for all ills, stressing that it was primarily intended for issues relating to the un/under-represented. Conversely, in another political controversy relating to the Mandal Commission, the Supreme Court formed a bench of nine judges, and promptly gave a long judgment after the petition was listed before many other pending matters, thus diffusing a volatile political situation.²⁶⁷ One group of petitions had brought the public interest aspect of the issue of shares and debentures to the Court, which held that it was not necessary to decide on the *bona fides* or *mala fides* of the applicants.²⁶⁸ In this way, the Court was able to provide support to the other institutions of the state by mobilising PIL as a strategy to resolve political issues.

In other cases, where less has been at stake, the obligation of the state has been emphasised.²⁶⁹ The Court expanded the parameters of class action and gave a judgment in support of government pensioners as a class.²⁷⁰ With the exception of cases in which policy matters were decided, there have been difficulties in

²⁶⁶ *Janata Dal op cit* note 206. The Supreme Court refused to allow advocate H S Chowdhary standing on the grounds that he was attempting to influence the course of the investigation into the allegations of corruption. The advocate for H S Chowdhary complained about the treatment of the petition in the courts, as it was only after more than forty hearings that it was dismissed by the Supreme Court on preliminary grounds. Moreover, the Supreme Court described Chowdhary as a proxy for the accused, without hearing the petitioner himself. Mitta, Manoj, 'From Public to Proxy', *The Sunday Times of India*, 6/9/92. It is interesting to note that the Court, while quashing the *suo moto* investigation of the High Court, did not go into the reasons for this - it seems that the Supreme Court considered that the issue was just not justiciable.

²⁶⁷ *Indra Sawhney op cit* note 204.

²⁶⁸ *Narendra Kumar Maheshwari op cit* note 206.

²⁶⁹ *Vincent Panikulangara op cit* note 201.

²⁷⁰ *D S Nakara op cit* note 205, a labour law decision on pensions. See Baxi, Upendra, 'Socialism for the Superannuated: A Critique of Nakara', AIR 1983 (J) 105. The parameters set were to be limited by later decisions: *Krishan Kumar v Union of India and others* (1989) 2 SCC 504 and *Krishena Kumar v Union of India and others* (1990) 4 SCC 207.

implementing the few substantive decisions given. Having directed that disposable syringes be provided throughout Kerala to prevent the spread of HIV/AIDs, the Court was virtually ensuring that its orders could not be carried out.²⁷¹ As each syringe costs Rs.4 the amount that would needed to be spent in Kerala would be more than the entire budget for primary health care for the state.²⁷²

Judges, Courts, Lawyers

There has been a substantial amount of case law in PIL on all aspects of the judiciary and the legal system, on judges,²⁷³ contempt of court,²⁷⁴ courts,²⁷⁵

²⁷¹ "Niyamakendran" *op cit* note 201.

²⁷² K S Madhusoodanan, advocate, interview, Ernakulam, 17/8/93.

²⁷³ The cases have been sub-divided into: S P Gupta and after: *S P Gupta, V M Tarkunde, J L Kalra and others v President of India and others etc [amended to Union of India and others]* 1981 (Supp) SCC 87 / AIR 1982 SC 146; *Subhash Sharma and others v Union of India* 1991 Supp (1) SCC 574; *Supreme Court Advocate-on-Records Association and another v Union of India* 1993 (Supp) SCALE [87] / (1993) 4 SCC 441, and also 1993 (1) SCALE 111 [658], 1993 (2) SCALE 43 [174] and 1993 (2) SCALE 66 [305]; *K Ashok Reddy v Government of India and others* (1994) 2 SCC 303. The Ramaswami cases: *Sub-Committee for Judicial Accountability v Union of India and Ors.* 1991 (2) SCALE 160 [844]; *Krishnaswami v Union of India & Ors* 1992 (1) SCALE 87 [484] and 1992 (2) SCALE 66 [311]; *Sarojini Ramaswami v Union of India & Ors* 1992 (2) SCALE 65 [257]; *Capt. Virendra Kumar, Adv v Shiv Raj Patil, Speaker, Lok Sabha* 1993 (3) SCALE 61 [303]; *Lily Thomas, Advocate v Speaker, Lok Sabha & Others* 1993 (3) SCALE 105 [543]. Appointments/vacancies: *V M Tarkunde v Union of India and others* (1983) 1 SCC 428; *Subir Chowdhury v Union of India and others* AIR 1984 Cal 7; *K P Verma v State of Bihar and others* AIR 1989 Pat 276; *All Kerala Poor Aid Legal Association v Chief Justice* 1990 (1) KLT 1; *M L Sachdeva v Union of India & Anr* 1990 (2) SCALE 196 [926]; *Kumar Padma Prasad v Union of India and others* AIR 1992 SC 1213; *R Gandhi v State of Tamil Nadu and another*; *R K Jain v Union of India* 1993 (2) SCALE 168 [843]. Conditions of service: *All India Judges' Association v Union of India* (1992) 1 SCC 119 and (1993) 4 SCC 288; *M L Puri v Punjab and Haryana High Court, Chandigarh and others* AIR 1993 P & H 287. General: *R J Mehta v His Lordship the Chief Justice, Venkat Srinivas Deshpande and others* AIR 1982 Bom 125; *Arun Kumar v Union of India* AIR 1982 Raj 66; *Gautam Uzir and another v State of Assam and another*; *Dalip Singh Gill v Union of India and others* AIR 1993 P & H 263; *Hon'ble Chief Justice, High Court Madhya Pradesh, Jabalpur & Ors v Mohan Kumar & Ors* 1993 (4) SCALE 154 [656] and 1994 (1) SCALE 18 [82].

²⁷⁴ *Charan Lal Sahu v Union of India and another* (1988) 3 SCC 255; *B Purushotham Reddy v Nallapureddy Srinivasulu Reddy* AIR 1988 AP 178; *P N Duda v P Shiv Shanker* (1988) 3 SCC 167; *Captain Virendra Kumar v Union of India* 1993 (3) SCALE 97 [492].

lawyers and legal aid.²⁷⁶ Unlike the cases in the other sections, these represent attempts by the judges to sort out their own house, define their powers and duties, and to ensure that their role in state functioning is secure. Most of the cases are concerned with public interest questions of the judiciary itself, to which the courts have responded in detail. After the lengthy exposition of PIL, standing, justiciability and procedures in *S P Gupta*,²⁷⁷ access to the courts for issues relating to the judiciary has been facilitated by the courts, as advocates embraced the potential that PIL offered.

The legal system was ready for the introspection and commentary that PIL brought (see chapters one and six). The politicisation of judicial appointments,²⁷⁸ the connections between judges and advocates (in the form of family relations and regional affiliations), the potential for corruption,²⁷⁹ and the status and power available

²⁷⁵ *Inder Mohan v Union of India etc*; *M C Mehta v Union of India and others* 1986 (Supp) SCC 562; *S P Sampath Kumar v Union of India and others* AIR 1987 SC 386; *Social Action and Legal Aid Society v Union of India and others*.

²⁷⁶ *Free Legal Aid Committee, Jamshedpur v State of Bihar* 1990 (1) SCALE 45 [145]; *Ranjan Dwivedi v Union of India* 1983 (1) SCALE 111 [487]; *Rajendran v Ayyappan* 1985 KLT 307; *Centre of Legal Research and another v State of Kerala* AIR 1986 SC 2195; *Aeltemesh Rein v Union of India* (1988) 4 SCC 54; *Satish Chandra Misra v State of U P and others* AIR 1990 All 119; regarding the appointment of law officers in Bombay, Nagpur and Aurangabad.

²⁷⁷ *Op cit* note 273.

²⁷⁸ See, for example, Gupta, Anupam 'Cover Story: The Judges' Transfer Policy', *The Lawyers*, Vol 9 No 2, Feb 1994, 4-10.

²⁷⁹ In addition to those documented, other petitions have been filed: in the Madras High Court by a social worker referring to an article which appeared in the *Hindustan Times* on 26/3/91, reporting advocate Shanti Bhushan's statement that the former Attorney General Parasaran had confided in him that half a dozen judges of the Court were corrupt. The Court was asked to direct a CBI probe to find out the names of the judges and to take further action against them. In an order by Justice Baktavatsalam, it was held that the Court cannot act upon statements which are hearsay, and the petition was dismissed. See Devil's Advocate, 'Adaalat Antics: By the Judges for the Judges', *The Lawyers*, Vol 6 No 7, July 1991, 32. A petition was filed in the Allahabad High Court challenging the proposed appointment of Justice A P Singh (brother of former Chief Justice of India, K N Singh) and Justice K N Sharma to the High Court. The petition contained allegations of corruption against the former and stated that there were several contempt of court petitions pending against the latter. Refusing to entertain the petition, the Court suggested that since a similar petition was pending in the Supreme Court regarding the appointment of A K Srivastava to the Guwahati High Court, the petition may be filed in the Supreme Court. A petition was then filed in the Supreme Court, but before it could be heard, oath was administered to Justice A P Singh and so his name was deleted from the petition. See Devil's Advocate, 'Adaalat Antics: How Justice A. P. Singh Made It', *The Lawyers*, Vol 6, No 12, Dec 1991, at 32. Another petition was filed in 1992 by the President of the Sikkim Citizen's Forum stating that the Chief Justice of the Sikkim High Court, B N Misra had concealed his income in a tax return. The

to those deciding cases in the courts, have perpetuated the biases of the system. The court machinery itself had exacerbated the problems - unable to cope with the number of petitions filed, the long pendencies of cases, the bias inherent in many of the laws and within the system itself, unequal access to justice has persisted for most (see chapter five). The cases in this section have not been filed to benefit the disadvantaged and deprived specifically. While requests for the provision of free legal aid²⁸⁰ and the establishment of more Labour Courts,²⁸¹ would facilitate access to justice, the issues raised in many of the cases aimed to ensure the integrity of the legal system.

The cases on judges have led to discussions with implications not just for the specific issue in question but for the judicial process. As indicated in chapter one, the 1970s had witnessed the overt use of judicial appointments to indicate the support or displeasure of the government.²⁸² The judgment in the petitions brought by S P Gupta and the subsequent petitions were framed in response to the erosion of autonomy in the judiciary and the policy of transferring judges. Petitions filed relating to allegations of corruption made against Justice V Ramaswami, relating to appointments and vacancies, concerned with conditions of service, and those of a general nature, have contributed to the discussion. The sanction of judges' strength was held to be justiciable²⁸³ and the Court has directed that vacancies in courts be filled.²⁸⁴ In a judgment in the Delhi High Court, the argument that financial considerations affect the decision to establish more courts was discounted and the appointment of

petition came up for hearing in the Supreme Court to decide whether it should be heard there or in another High Court, as the Sikkim High Court had only two judges. See [anon], 'Newsfile: Litigation Briefs', *The Lawyers*, Vol 7 No 10, Oct 1992, at 31.

²⁸⁰ *Centre of Legal Research op cit* note 276.

²⁸¹ *Inder Mohan op cit* note 275.

²⁸² See Baxi, Upendra, *The Indian Supreme Court and Politics*, (Eastern Book Company, Lucknow, 1980); Seervai, H M, 'The Supreme Court Judgment in the Judges' Case', (speech delivered at a public meeting on 28/1/82).

²⁸³ *Supreme Court Advocate-on-Records Association op cit* note 273.

²⁸⁴ *R K Jain and Subhash Sharma op cit* note 273.

more judges was ordered,²⁸⁵ and the Supreme Court has refined the interpretation of the constitutional provisions determining the requisite qualifications for a judge.²⁸⁶ When asked to adjudicate upon the conduct of Justice V Ramaswami, the procedures of investigation and impeachment were clarified in the Supreme Court. The independence of the judiciary was articulated²⁸⁷ and the need for judicial accountability enunciated.²⁸⁸ With continuing delays in the courts,²⁸⁹ persistent controversies about the appointment, qualifications and conduct of judges and of the independence of the judiciary and its accountability, it is unsurprising that these issues came to the courts as PILs.

The two documented cases on conditions of service are examples of the way in which PIL has been used to manage particularised interests. While justifying its orders within the framework of judicial independence and the “divine act” of dispensing justice,²⁹⁰ the courts have decided upon their own perquisites, retirement ages and types of cars.²⁹¹ Cases in other sections demonstrate the willingness of the

²⁸⁵ *Inder Mohan op cit* note 275. See ‘Consumer Issues’ for the case filed by Common Cause asking the Supreme Court to order the implementation of the Consumer Protection Act, 1986, *Common Cause op cit* note 141.

²⁸⁶ *Kumar Padma Prasad and Supreme Court Advocate-on-Records Association op cit* note 273.

²⁸⁷ See the majority order in *Supreme Court Advocate-on-Records Association op cit* note 273. A petition was filed in the Supreme Court objecting to the appointment of judges on Commissions of Enquiry, after sitting judges of the Supreme Court were appointed to conduct the Fairfax enquiry, described by the petition as essentially a political task. It was contended that such appointments had no connection with the judges’ judicial duties, so the Court was asked to quash the appointment of the Commission. See Jaising, Indira, ‘Editorial: Fairfax Enquiry’, *The Lawyers*, Vol 2 No 4, Apr 1987, at 2.

²⁸⁸ *Sub-Committee op cit* note 273.

²⁸⁹ A petition was filed in the Supreme Court in 1986 by an organisation called Common Cause stating that the pendency of criminal cases was violative of Article 21 of the Constitution. The petition contained suggestions for categories of cases and ways of dealing with their backlog. On admitting the petition, the Court impleaded all the State Governments and referred the matter to a Constitutional Bench. See Shourie, H D (1993).

²⁹⁰ Chief Justice Ranganath Misra in *All India Judges’ Association op cit* note 273 at 132.

²⁹¹ In addition to which other petitions have been filed, for example, in the Bombay High Court by Judges of the city civil court, asking the Court to direct the government to provide housing to them. In an order by Justice Pendse, the Court stated “do you want the people to believe that we judges are deciding cases for our own benefit?” and dismissed the petition. See Devil’s Advocate, ‘Adaalat Antics:

courts to act and issue directions when their own integrity is at stake.²⁹² Similarly, the Court has reacted strongly to any aspersions against itself.²⁹³ With the exception of the Law Minister, Shiv Shankar, the courts have censured those advocates who have dared to question the efficiency and integrity of the legal system, even though the malaise has been acknowledged by the Court itself. Despite the scandal surrounding the impeachment motion lodged against Justice Ramaswami in 1991, the courts have been unwilling to directly admit to the endemic problems of corruption and inefficiency in providing equal access to justice.

The core issues that can be identified in relation to lawyers are their conduct, privileges and the provision of legal services. The high status afforded to members of the legal profession, the lucrative nature of lawyering and the easy access

By the Judges for the Judges', *The Lawyers*, Vol 6 No 7, July 1991, at 32. Another petition was filed in the Punjab and Haryana High Court by advocate P S Patwalia demanding the allotment of houses to judges. In an order by Justice S S Sodhi and Justice K P Bhandari, the Court stayed all allotments of houses to government servants of category IV and above, until judges are suitably housed. A petition was filed in the Supreme Court asking for a direction that telephones be provided to sub-judges and that more petrol be provided for judicial officers who, under the Criminal Procedure Code, are required to tour the area. See Devil's Advocate, 'Aadalat Antics: More Litigation - For the judges, By the Judges, Of the Judges', *The Lawyers*, Vol 8 No 3, Apr 1993, 32. A petition was filed in the Andhra Pradesh High Court asking the Court to direct the government to provide all judges with airconditioned cars. Admitting the petition, the Court ordered that all judges be provided with the cars. See Devil's Advocate, 'Aadalat Antics: More News on Housing', *The Lawyers*, Vol 6 No 8, Aug 1991, 32.

²⁹² For example, see the section on 'The Police' for the Nadiad Incident, the only documented PIL case in which the Supreme Court has given specific punishments to the police officers who handcuffed a Chief Judicial Magistrate *In the Matter of Complaint received from Delhi Judicial Service Association Tis Hazari Court, Delhi* 1989 (2) SCALE 119 [654], for *Pratul Kumar Sinha v State of West Bengal* in which the Calcutta High Court discussed the security of the Court premises, and for *Punjab and Haryana High Court Bar Association Chandigarh through its secretary v State of Punjab and others* 1993 (4) SCALE 147 [636]. See *Manubhai Pragaji Vashi op cit* note 154, *Foreshore Cooperative Housing Society op cit* note 5, *Kallara Sukumaran op cit* note 182 and *B Purushotham Reddy op cit* note 182.

²⁹³ Other contempt actions have been initiated *suo moto*, for example a contempt petition (No 2 of 1993) was registered by the Chief Justice U L Bhat in the Guwahati High Court against the publisher and printer of the *North-East Times* in response to an article on 26/4/93 entitled 'Why are criminals going scot-free?'. The report stated that courts were allowing criminals and lawyers to take advantage of legal loopholes hence allowing criminals to be set free and that the police was not allowed to look into the background of every case. In an order D/-9/6/93 the respondents were held to be in Contempt of Court and the Court accepted the offer that an unconditional apology be published. Another petition filed in the Supreme Court by Common Cause about the functioning of the judiciary in the country, was dismissed *in limine* as the Court observed that there were already certain guidelines and norms laid down for judges. See Shourie, H D (1993).

to the courts, have led to a number of cases being filed.²⁹⁴ PIL cases have documented the incidence of lawyers strikes, and the need to prevent them.²⁹⁵ The mutually dependent relationship between advocates and judges is seen in a number of cases, when, for example, the Court was petitioned on behalf of judges.²⁹⁶ However, there have been a number of instances in which the judges have asserted their functional superiority, whilst delineating the parameters of PIL. Petitioner and advocate, Raj Kanwar, was described as a busybody and berated for attempting to prolong proceedings.²⁹⁷ The Court prevented an advocate from raising questions about judicial transfers that it considered could only be brought by an aggrieved judge.²⁹⁸ Similarly, when a PIL was filed on behalf of lawyers, it was held that PIL was “not to be thrust on abled section of society fully conscious of their interest and benefit”.²⁹⁹

²⁹⁴ See *M Balagovindam op cit* note 139, in which an advocate petitioned the Kerala High Court asking for preferential telephone connections. In addition to the documented cases, a petition was filed in the Madras High Court complaining that K Subramaniam, the Advocate General of Tamil Nadu, charged day fees of Rs.35,000/- from the Tamil Nadu Government for appearances outside of the State and challenging, in particular, the Rs.3 lakhs fee that he had charged for appearing in the Cauvery case. The Court dismissed the petition saying that fees payable to the Advocate General are in the nature of a contract and that the courts could do nothing about them. See Devil's Advocate, 'Adaalat Antics: AGs Fees Unconscionable', *The Lawyers*, Vol 7 No 2, Feb 1992, at 32. Another petition was filed in the Bombay High Court by advocate S Ragi Simhan challenging a the decision-making procedure for the designation of a senior advocate. The petition, filed in the public interest, even though Simhan had been passed over for designation himself, was admitted by Justice A C Agarwal and Justice N D Vyas. Simhan, S Ragi, 'The importance of being a senior advocate', *The Lawyers*, Vol 9 No 2, Feb 1994, 21-23.

²⁹⁵ *Hon'ble Chief Justice op cit* note 273. See the section on the 'Police' for the Nadiad Incident and *Punjab and Haryana High Court Bar Association Chandigarh through its secretary v State of Punjab and others* 1993 (4) SCALE 147 [636]. In addition to those documented, a petition was filed in the Supreme Court in 1989 by Common Cause challenging the frequent strikes by lawyers which cause serious damage to the interests of their clients, prevent speedy justice and thus violate Article 21 of the Constitution. The petition asked that the code of conduct for lawyers laid down by the Bar Council of India under the Advocates Act, 1961 should include a provision stating that lawyers cannot resort to strikes. On the suggestion of the Court, the Bar Councils and Advocates General of all the States were impleaded in the petition. The Bar Association of India and the Supreme Court Advocate-on-Records Association supported the contentions of the writ petition, as have all the Advocates General of the states, except one. See Shourie, H D (1993).

²⁹⁶ *M L Puri op cit* note 273.

²⁹⁷ *Krishaswami op cit* note 273.

²⁹⁸ *K Ashok Reddy op cit* note 273. This limits the the kinds of issues that could be brought by advocates, in their capacity as public interest litigants.

²⁹⁹ *Satish Chandra op cit* note 276 at 121.

Although the importance of legal aid has been stressed by the courts in a number of judgments,³⁰⁰ the Supreme Court held that Article 39A of the Constitution was not enforceable, and that one advocate-petitioner could not have legal representation of his choice.³⁰¹

The most important aspect of the judgments in this chapter are that, without PIL and the expansion of *locus standi*, none of the issues relating to judges would have been examined in the way that they were. In the cases spanning more than a decade, judicial review has been expanded to incorporate issues that were previously in the domain of policy, and not justiciable.³⁰² As a result of the Supreme Court's pronouncements the Government was compelled to bring in an amendment to the Administrative Tribunals Act, 1985.³⁰³ It was ensured that the vacancies on the Monopolies and Restrictive Trade Practices Commission were filled³⁰⁴ and that more Labour Courts and Industrial Tribunals were established.³⁰⁵ There was no question of approaching another forum to deal with these petitions, and the Court has examined, wholeheartedly, the issues raised. Information on judicial appointments would not have been made available, or indeed desirable, to the public without PIL.³⁰⁶

Together with the increase of the courts' jurisdiction has been a greater exposure of the biases and limitations of the Court. Although, in one case, the Kerala High Court was unwilling to admit to any bias in appointments,³⁰⁷ Justice Pandian of

³⁰⁰ See the chapter on 'Prisons and State Institutions' for examples.

³⁰¹ *Ranjan Dwivedi op cit* note 276.

³⁰² From *S P Gupta op cit* note 273, decided in 1981, to *Supreme Court Advocate-on-Records Association op cit* note 275, decided in 1993.

³⁰³ *S P Sampath Kumar op cit* note 275. This case has been described as advancing the 'basic structure' doctrine. Sudarshan, R (1990), endnote 81 at 68.

³⁰⁴ *M L Sachdeva op cit* note 273.

³⁰⁵ *Inder Mohan op cit* note 275.

³⁰⁶ *Supreme Court Advocate-on-Records Association op cit* note 273.

³⁰⁷ *All Kerala Poor Legal Aid op cit* note 273.

the Supreme Court provided a table to show the paucity of Scheduled Caste, Scheduled Tribe and women judges in the higher judiciary.³⁰⁸ In the same judgment in 1993, Justice Punchhi provided a well-articulated and thoughtful dissent to the majority order, which had asserted the supremacy of the Chief Justice of India's opinion in the appointment of judges. Justice Punchhi observed that the legislature, executive and judiciary must work together in the public interest, citing the example of a child who needs both parents, to illustrate how the majority judgment was an attempt to assert the judiciary's independence and powers, contrary to the constitutional scheme. It would seem that the Supreme Court tired of the discussion when, in 1994, the standing to raise questions about transfers of judges was limited to the aggrieved person.³⁰⁹ In 1992, the Supreme Court had given a comparable order, stating that only Justice Ramaswami could petition the courts with regard to the process of impeachment.³¹⁰ As Justice Bhagwati, commenting on the case, said:

“What has happened is a misuse of PIL. When I evolved PIL years ago, I never imagined it would be used for the personal interests of a Ramaswami”.³¹¹

In the cases alleging that Justice V Ramaswami and Chief Justice S K Jha were guilty of corrupt practices, the Supreme Court has been unable and unwilling to respond to the charges levelled. A sitting judge of the Supreme Court, Justice V Ramaswami was suspected of financial irregularities while he was Chief Justice of the Punjab and Haryana High Court. After the allegations were mooted, an impeachment motion was filed in the Lok Sabha (lower house of the Indian Parliament). The

³⁰⁸ *Supreme Court Advocate-on-Records Association op cit* note 273. See chapter six for a discussion of this.

³⁰⁹ *K Ashok Reddy op cit* note 273.

³¹⁰ *Krishnaswami op cit* note 273.

³¹¹ Quoted by Mitta, Manoj, 'From Public to Proxy', *The Sunday Times of India*, 6/9/92. In this article, Mitta also questioned the actions of Kapil Sibal, the advocate for Krishnaswami:

Sibal admitted in the court that Krishna Swami obtained all those documents from Ramaswami himself. How did Sibal justify that Krishna Swami's petition was a PIL? It is because Krishna Swami had come on behalf of a person who, by virtue of his high office, could not personally make his plea.

Supreme Court was petitioned, and asked only to adjudicate questions of law and jurisdiction, but was unable to influence the eventual outcome of the impeachment motion, which exonerated Justice Ramaswami, in spite of the finding of the Sub-Committee on Judicial Accountability which had found him to be guilty. The situation of Chief Justice Jha was somewhat different. Aggrieved by the alleged bias in the appointments made by him, in his capacity as Chief Justice of the Madhya Pradesh High Court, lawyers had begun to agitate and strike. Chief Justice Jha then approached the Supreme Court himself. The Court refrained from deciding upon the transfer of the Chief Justice and upon the issue of inter-bench transfers of the three High Court judges which had triggered off the agitation in Madhya Pradesh. The furore abated only when Chief Justice Jha died.

In the petition concerning the appointment of Kumar Padma Prasad to the Guwahati High Court, the High Court was censured by the Supreme Court for taking *suo moto* notice of corruption charges.³¹² The Supreme Court did not allude to these charges in its final order. That the petition asserting that the judiciary need not be consulted in the appointment of law officers in Bombay, Nagpur and Aurangabad, was dismissed, reinforces a tendency in the courts only to examine issues which it considers important for its integrity as an independent institution of the state. Moreover, the difference in the Supreme Court's response to the petitions filed by S P Gupta in 1981 and by the Supreme Court Advocates-on Records Association in 1993 indicates the different imperatives of the Court over time, and its relationship with other branches of governance.³¹³

³¹² *Kumar Padma Prasad op cit* note 273.

³¹³ For a discussion of the issues raised by these cases see Dhavan, Rajeev; Sudarshan, R and Khurshid, S, *Judges and the Judicial Power*, (N M Tripathi Pvt Ltd, Bombay, 1985).

Concluding Remarks

With the exception of 'Judges, Courts, Lawyers', the structure of the analysis in chapters three and four remains the same for each issue. What differs, throughout both chapters, is the perspective of the discussion. As the nature of the issues, their articulation as legal problems and their resolution in the courtroom are unique, the analysis has focussed on the particularities of the cases in each of the sections. By including considerations such as the manner in which the petition is framed and presented to the Court, the people involved, the evolution of legal doctrine and the political context, themes have emerged pertaining to court action. In procedural terms, innovations of remedy have been introduced, but these have evolved little since the early days of PIL. The response to issues has been diverse and unpredictable, with strident action in some instances belied by reticence in others.

Notwithstanding the imperatives of the issues, and their resolution in the courtroom, implementation has been consistently problematic, dependent upon factors beyond the control of the courts. Moreover, the delay and bias endemic in the legal system have remained.³¹⁴ In spite of these practical reservations, there has been a continuing discourse in the Court about what justice means, and how access to justice for all can be ensured.

It is in cases concerning public policy that the continuing judicial discourse on PIL is most apparent. Along with orders on other issues in this chapter, judges have enunciated the aims of PIL by rejecting petitions on preliminary grounds. The length of the judgment given in *Janata Dal*³¹⁵ is testament to the continuing concern on the part of some judges, that PIL be used for poverty-related issues. Judges took the opportunity to comment on PIL, as part of a continuing educative process about the use of law for those previously excluded from the judicial arena. The gravity

³¹⁴ For an analysis see chapter seven.

³¹⁵ *Op cit* note 206.

of orders which emphasise the limits of judicial review, provide a warning to potential PIL litigants, who may not have a focus on social justice.³¹⁶

The following two chapters explore questions raised in the case studies. In chapter five the pivotal role of the registries of the courts in the management of PIL petitions is explored. The case studies demonstrate that while the violation of rights continue,³¹⁷ PIL has been appropriated as another legal mechanism available to the lawyer and litigant. Chapter six explores this incongruity, central to the PIL/SAL discussion (see chapter two), by analysing the relationship between legal process and those involved in PIL. The motivation, expectation and perspective of the actors involved are appraised, and 'alternatives and corollary innovations' are discussed. Finally, the conclusions, in chapter seven, draw together the strands of concern observed in the case studies.

³¹⁶ See Chandanmal Chopra *op cit* note 203.

³¹⁷ Upendra Baxi has noted that:

Judicial discourse, inaugurated by active citizens' epistles to the Supreme Court now archives the growing lawlessness of the Indian state.

Baxi, Upendra (1991) at 82. Issues of continuing concern documented are documented in: Desai, A R (ed), *Violation of Democratic Rights in India. Volume I*, (Popular Prakashan, Bombay, 1986); Desai, A R (ed), *Repression and Resistance in India: Violation of Democratic Rights of the Working Class, Rural Poor, Adivasis and Dalits*, (Sangam Books Ltd, London, 1990); Desai, A R (ed), *Expanding Governmental Lawlessness and Organised Struggles: Violation of Democratic Rights of the Minorities, Women, Slum Dwellers, Press and Some Other Violations*, (Popular Prakashan, Bombay, 1991).

Chapter Five - Administering Justice

The Supreme Court and each High Court has a Registry which deals with all the administration arising from the management of legal documents and court procedure. This includes care of records, judges and courtrooms, the filing and listing of petitions and the supervision of the payment of any fees. The role of the registries of the courts has been vital for PIL, as much of its evolution has depended on the administration of petitions. With the relaxation of procedural rules, and the urgency of some of the issues raised, the registries have had to evolve mechanisms to manage PIL. The existing workload has been supplemented by the influx of letters, as judges have called for assistance in the monitoring of petitions and the distribution of costs.

The management of letters sent to the courts is of central concern. Even before PIL, courts had been sent letters asking for the resolution of grievances. However, with the onset of PIL, an increasing number of letters were received by the Courts, strengthening demands for the establishment of systems to process these letters.¹ The importance of the “epistolary jurisdiction”² of the courts in facilitating access to justice is apparent from the discussion of ‘letters as writ petitions’ in chapter two and the case studies in chapters three and four.³ Moreover, as petitions filed in a regular manner continue to be subject to the routine administrative procedures of the Court, a study of the management of letters by the courts and the skills of the lawyer responsible for the case (see chapter six) becomes indispensable.

When asked in the Lok Sabha in 1983 about the number of PIL cases

¹ See ‘Resistance to PIL’ in chapter two.

² Baxi, Upendra, ‘Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India’ in Baxi, Upendra (ed) (1988), 387-415 at 398.

³ In particular, the sections on ‘Access to Justice’.

pending in the Supreme Court, the information provided by the Registry put the number at seventy-two.⁴ This number was to increase over the next decade, concurrently with demands on the resources of the registries, making it impossible to accurately quantify the hundreds of PILs that are pending, or disposed of. Relying on data and information collected during fieldwork in India, this chapter considers the Registry of the Supreme Court and those of eight High Courts, located throughout India.⁵

The Supreme Court

In August 1985, during his tenure as Chief Justice, Justice Bhagwati established a PIL Cell in the Registry of the Supreme Court. Staff especially appointed to this Cell were to attend, systematically, to all the letters sent to the Court in the hope of being treated as PIL petitions. Because of the large numbers of letters received, addressed to the Court, the Chief Justice and other individuals, guidelines were framed to enable the staff to determine, consistently, which letters could be considered for treatment as PIL petitions.⁶ The Judge appointed to scrutinise PIL matters would finally decide if a litigation was to be initiated in response to a letter, using these guidelines. All the judges share the responsibility for overseeing PIL matters in rotation, so the decisions made differ according to the rota. This has continued to date, and a number of stages are involved when a letter arrives in the Court.

⁴ Lok Sabha Debates Seventh Series Volume XL, 16/4/83 'Public interest cases pending in Supreme Court' 54. Question from Shri Anbarasu to the Minister of Law, Justice and Company Affairs (Shri Jagan Nath Kaushal) at 54. There is a slight discrepancy in the figures as, in *P V Kapoor and another v Union of India and another*, Justice B N Kripal of the Delhi High Court noted that the number of petitions filed in the Supreme Court between 1980 and 1982 "appears" to be 75.

⁵ See 'Methodology' in chapter three. The information and analysis is not fully comparable, as the extent and type of co-operation differed in each Court.

⁶ See Appendix B for a full listing of these guidelines.

After being examined by registry staff, a large proportion of letters are immediately lodged (filed away) as being unsuitable for consideration as a PIL. Some are disposed of in a “miscellaneous” manner, and are accounted for in the section of lodged letter-petitions. All the remaining letters are then “put up” before the judge appointed to the task, together with a note summarising the complaint and indicating what action might be taken. Of letters seen by the judge, some are registered as writ petitions (W P in the table below), others are sent to the Supreme Court Legal Aid Committee (SCLAC) or the Legal Aid and Advice Board (LAAB) of the relevant State for further action, and some would be sent to the concerned department of the central or state government. Complaints relating to the police, either where action has not been taken, or complaints of police harassment, are forwarded to the Director General of Police in the relevant state and are accounted for in the section of letters sent to the concerned department. As the Supreme Court only has the facility to deal with letters written in Hindi and English, all other letters are initially discarded. In a country with many official languages and dialects, this effectively excludes those at any distance from the Supreme Court, with its base in a predominately Hindi-speaking part of North India.⁷ Petitions and letters on the same subject are grouped together⁸ by the Supreme Court Registry. The table below shows the number of letters received and the action taken on them.⁹

⁷ There have been repeated calls for the establishment of another branch of the Supreme Court in South India, or for the relocation of the Court in a more centrally. For examples of continual demands by legislators, see ‘Setting up of a Supreme Court Bench in South India’, *Lok Sabha Debates*, Series 6 Session 7 Vol 23, 13/3/79, 253-54; ‘Shifting the Supreme Court in a Central Place’, *Lok Sabha Debates*, Series 6 Session 7 Vol 23, 12-16.

⁸ This has occurred with PILs that have originated both in the form of letters and in the form of regular petitions, for example those filed relating to Sati or to the Muslim Women (Protection of Rights on Divorce) Act, 1986, as discussed in ‘Injustices Specific to Women’ in chapter three. Similarly in *Indira Sawhney and Ors v Union of India and Ors* JT 1992 (6) SC 273, as discussed in ‘Public Policy and Administration’ in chapter four, the Supreme Court received many letters and petitions, many of which were sent by aggrieved students.

⁹ All data supplied by the Registry of the Supreme Court. Numerical inconsistencies appear in the original figures.

PIL STATEMENT FROM 5/8/85 TO 30/42/94						
Total no of Letters received	W P	SCLAC	State LAAB	Concerned Dept	Misc/ Lodged	
5/8/85 to 31/3/88	57307	253	3044	15371	10783	24765
1/4/88 to 31/12/88	11195	46	214	2275	1908	7112
1989	16691	72	431	2857	2391	10807
1990	17878	27	445	2843	2518	12164
1991	17672	20	523	1775	2253	13037
1992	16822	18	1055	2072	1174	12473
1993	15779	40	1146	1941	1167	11235
1/1/94 to 30/4/94	6320 (1066 to be put up)	4	431	867	711	3239
Total	159666	480	7289	29947	22905	94832

While a number of PIL petitions have originated in letters, many are filed in a regular fashion, as the following statement shows. In recent years the majority of PILs have been filed in a correct form by an advocate, to avoid the uncertain outcome of sending a letter. Such regular petitions receive special treatment by the Supreme Court Registry, including the exemption from court fees. The onus on the Registry is compounded as PIL petitions impose a greater obligation to ensure Court orders (such as monitoring, investigations and the payment of costs) are carried out. In all other ways the passage of the petition through the Court is not distinguished from regular matters, and PIL petitions are not routinely given preference in listings,

except at the discretion of registry staff, or a judge.¹⁰

Statement of Public Interest Writ Petitions Civil & Criminal under Article 32 of the Constitution for the 5 years 1984-1988				Letters converted into writ petitions
Years	Total	Disposed	Pending	
1984	133	41	92	4
1985	118	48	70	34
1986	240	128	112	166
1987	167	43	124	63
1988	105	44	61	46
Total	763	304	459	313

The High Courts

In any consideration of the eighteen High Courts located throughout India,¹¹ the significance of regional particularities cannot be underestimated.

¹⁰ The courtcraft of a lawyer can ensure that listings are favourable to a client. See chapter six for a discussion.

¹¹ In all there are eighteen High Courts, as listed: High Court of Andhra Pradesh at Hyderabad; High Court of Assam at Guwahati (with benches at Imphal, Shillong, Aizawl, Kohima, Agartala) for Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland, Tripura; High Court of Bihar at Patna (with a bench at Ranchi); High Court of Gujarat at Ahmedabad for the Union Territory of Dadra and Nagar Haveli and Gujarat; High Court of Delhi at New Delhi; High Court of Goa at Panaji for the Union Territory of Daman and Diu and Goa; High Court of Himachal Pradesh at Simla; High

Differences can be identified according to issues and functional criteria, including ease of access to the court. Some generalisations can be made about the representation of problems in the courtroom: that communal problems are endemic in Uttar Pradesh; that political manoeuvres and violence are a problem in Assam; that concern for the environment and resource rights is prevalent in Kerala; that bonded labour is concentrated in specific areas, including Raipur in Madhya Pradesh and Thane District of Maharashtra. Many of the cases documented on prisons and injustices specific to women have been filed by groups or individuals in Delhi, because of relative proximity of the petitioner to the Supreme Court (see chapter three). Upendra Baxi, in interview, stressed the importance of mapping out the acceptance of PIL and social justice in each of the High Courts. He described the Gujarat, Kerala, Andhra Pradesh and Bombay High Courts as being progressive, and the Patna, Allahabad and Madras High Courts as not being so.¹² While this categorisation may have some validity, Jill Cottrell's conclusion, after examining 114 High Court cases, has been borne out.

This is very slim evidence on which to decide how far PIL has become a reality at the High Court level. Informal evidence suggests that substantial numbers of cases may be in the pipeline, at least in some states, and time will tell what part this type of litigation will play in establishing the accountability of the executive, and to whom.¹³

In those states where fieldwork has been conducted the variety of unreported PIL cases discussed (see chapters three and four) serves to indicate the large number of petitions filed throughout India. While the specific culture of each High Court, reflecting the distinctiveness of each state, does have a bearing on the success of a petition in the courtroom, there are many other determinants that have to be accounted

Court of Jammu and Kashmir at Srinagar (with a bench at Jammu); High Court of Karnataka at Bangalore; High Court of Kerala at Ernakulam for Kerala and the Union Territory of Lakshadweep; High Court of Madhya Pradesh at Jabalpur (with benches at Indore and Gwalior); High Court of Maharashtra at Bombay (with benches at Aurangabad and Nagpur); High Court of Orissa at Bhubaneswar; High Court of Punjab and Haryana at Chandigarh for Haryana, Punjab and the Union Territory of Chandigarh; High Court of Rajasthan at Jaipur (with a bench at Jodhpur); High Court of Sikkim at Gangtok; High Court of Tamil Nadu at Madras for the Union Territory of Pondicherry and Tamil Nadu; High Court of Uttar Pradesh at Allahabad (with a bench at Lucknow); High Court of West Bengal at Calcutta for the Union Territory of Andaman and Nicobar Islands and West Bengal.

¹² Upendra Baxi, Vice-Chancellor of Delhi University, Delhi, 5/8/93.

¹³ Cottrell, Jill, 'Courts and Accountability: Public Interest Litigation in the Indian High Courts', *Third World Legal Studies*, 1992, 199-213 at 213.

for. Factors not easily appraised, including the length of pendency and the management of the letters received by the courts, are of equal significance to the orders passed. If a grievance in a letter is not considered suitable for adjudication by the Court, or a petition is not listed, then orders cannot be given.

The numbers and nature of the PIL petitions heard in each High Court differs, and is also conditional upon the proclivities of the judges on each bench (see chapter six) and on the tendency to approach the courts for relief. Marc Galanter described how the use of writs differs between different states, estimating that in the Bombay High Court approximately 80% of the writ petitions are concerned with rent and tenancy of agricultural land, effectively transforming the court into a “court of appeals from a non-appealable land tribunal”.¹⁴ He observed the marked differences in the procedure for listing writ petitions, some are heard by division benches while others are heard by a single judge,¹⁵ an observation that has been vindicated by fieldwork. In Guwahati all PIL petitions are heard by a division bench, a decision taken because of the public importance of the issues raised, however, in other High Courts many PIL petitions are heard by single judge benches.

In an effort to harmonise the treatment of PILs filed in the form of letter petitions, a resolution was passed by the All-India Chief Justices Conference on January 1, 1991, that a PIL Cell be established in each High Court “to enable the poor, oppressed and economically or physically handicapped to seek judicial relief”.¹⁶ Aside from some newspaper reports on the conference, the resolution was not made public. Nonetheless, High Courts have responded. Data and information has been collected from the High Courts of Maharashtra, Karnataka, Tamil Nadu, Madhya

¹⁴ Galanter, Marc (1984) at 500.

¹⁵ See Galanter, Marc (1984) at 499.

¹⁶ Mahajan, Krishan, ‘Public interest litigation cell set up - HCs yet to implement resolution’, *Indian Express*, 3/1/92.

Pradesh, Assam, Himachal Pradesh, Kerala and Andhra Pradesh.¹⁷

Maharashtra

Even before the 1991 resolution, a Public Grievances Cell had been set up in 1986, following Justice Sujata Manohar's request to the Acting Chief Justice, on April 24, 1986:

We are receiving several complaints from the public as to injustice being experienced by them at the hands of the persons in authority, Government, semi-Governmental Organisations, Corporations and such others who either deliberately or due to some other reasons do not attend to their grievances. ... It becomes difficult for the Honourable Judges to take cognizance of such complaints unless they are properly scrutinized and streamlined through a proper channel.

On the authority of the Chief Justice of the High Court, a set of "Guidelines for the Admission of Letter Petitions as Writ Petitions" were produced. Specific grievances were listed, to determine which letters could be treated as writ petitions, and the procedure for the management of letters was prescribed.¹⁸

From the middle of 1986 to October 1990, 628 letter-petitions were received by the Cell, of which 209 were treated as writ petitions. Although the Cell had not been publicised, in a deliberate attempt to curtail the anticipated deluge of mail, the number of letter-petitions continued to increase. In spite of repeated requests for staff to deal with the workload, sent by the Registrar of the High Court to the Secretary to the Government of Maharashtra, Law and Judiciary Department, in 1986, 1990 and 1992, no reply had been received by March 1992. Staff seconded from other departments managed the Cell.

¹⁷ See 'Methodology' in chapter three. Data and information collected from Bombay for Maharashtra in March 1992, from Bangalore for Karnataka in December 1992, from Madras for Tamil Nadu in April 1993, from Indore for Madhya Pradesh in April 1993, from Guwahati and Shillong for the north-east region in June 1993, from Simla for Himachal Pradesh in July 1993 and from Ernakulam for Kerala in August 1993. Information on Andhra Pradesh is taken from Mohan, P Bhaskara, 'Public Interest Litigation - A Study', AIR 1993 J 17.

¹⁸ See Appendix B for a full listing of these guidelines.

Karnataka

A PIL cell was established on February 6, 1992 to monitor the letters sent to the High Court in the hope of being treated as PIL petitions. Before this date any letters went to an existing department, “Lower Courts Administration I”, where no records had been kept and none of the letters received had been registered as PILs. In a note dated December 11, 1992, the Section Officer of the Writ Scrutiny Branch stated “During this calendar year, this cell has received as many as 212 petitions/letters (through post) and in most of these cases no public interest is involved”. The letters were examined according to the PIL guidelines. Of these 212 letters, 158 had been scrutinised by December 1992, and three were registered as PILs: one from a prisoner, one registered as a *habeas corpus* petition and one relating to dowry harassment.

Files in the Registry established that while most of the letters could not be considered for treatment as a PIL, others which could were rejected, because they did not fall within the guidelines. Moreover, PIL matters were far outnumbered by *habeas corpus* petitions, as the note dated December 11, 1992 stated:

This Cell has also been receiving telegrams/petitions from the public alleging that the person referred to in the Telegram has been detained by the Police Authorities and such Telegrams are being registered as a matter involving public interest. During this Calendar year 112 such telegrams are being registered as writ petitions involving some public interest (Harassment by Police). It may also be stated here that whenever petitions involving public interest are being filed in Person by paying the prescribed Court Fee, the same is being registered as a writ petition, and thereafter posted before the Hon'ble Court for further orders.

Again, despite repeated requests, staff had not been sanctioned for the Cell, so existing staff had been assigned to the Cell.

Tamil Nadu

A PIL cell was set up on July 13, 1992, to scrutinise letter petitions according to the PIL guidelines. Between July 13, 1992 and March 31, 1993, 1545 letter-petitions were received, of which six were registered as PIL petitions, 47 were registered as *habeas corpus* petitions, nine were registered as criminal O.P. (original petition), one was registered as a criminal appeal and 368 were sent to the State Legal Aid and Advice Board. Of the 1114 remaining, many were lodged (filed away), and some were sent to the concerned authorities, for example to a District Judge, the Superintendent of the Central Prison or other jail authorities.

More than 50% of the letters complained of kidnap, torture, murder or false investigation by the police. All these letters were put before the public prosecutor and then before the Deputy Inspector General of Police who sends the letters on to the officer in charge of the district, the area Superintendent, or in the case of Madras, to the Commissioner of Police.¹⁹ A response to the papers sent was received by the High Court in approximately 15% of these cases. Without waiting for a reply, the Court files away the letters, as it considers its duty to have been done.

Requests have been made for staff for the PIL Cell. For example, a note prepared for the Registrar in early 1993 by the Deputy Registrar in his capacity as Head of the PIL Cell, recorded:

... the Government has been addressed in the High Court's ROC, letter No 1956-A/91-92 dated 21-11-91 for sanction of one post of A.E. in the scale of pay of Rs 2000-3200, one assistant in the scale of pay of Rs.1100-1660 and one post of Office Assistant in the scale of pay of Rs.750-945 for attending to the work pertaining to the Public Interest Litigation Cell in the High Court, Madras.

As no staff had been sanctioned, existing staff were appointed in charge of the cell.

¹⁹ This procedure exists in this and other High Courts in spite of the proven inefficiency of the police, as seen in *Punjab and Haryana High Court Bar Association Chandigarh, through its secretary* 1993 (4) SCALE 147 [636] and *Association for the Protection of Public Rights and Interest*, as discussed in 'The Police' in chapter three.

Madhya Pradesh, Indore Bench

PIL Cells have been established in the main bench of the High Court at Jabalpur and at both the benches at Indore and Gwalior. If either of the two latter benches considers that a letter could be registered as a PIL petition, it is sent to Jabalpur, as stipulated in an “Order from the CJ of the MP HC, Justice S K Shah”, issued in 1991:

All the letters/postal petitions received at the main seat or at the benches at Indore/Gwalior shall be processed and dealt with under my orders at main registry.

No letters/postal petitions shall be registered without my orders, irrespective of any directions of Bench of any Hon'ble Judge on his behalf.

The procedure was clarified in a “memo of 19/1/91 from Additional Registrar Jabalpur to the benches at Indore and Gwalior” stated:

I am directed by the Honourable the CJ to communicate that complaints received in respect of prisoners from Jail regarding their detention, habeas corpus, for remission, release on parole etc., harassment in detention by the Jail Authorities, the matters without reference to the Main Registry, be registered immediately and placed before the Hon'ble Court for orders.

In Jabalpur, all the letters received are scrutinised according to the PIL guidelines, by an assistant and by the Additional Registrar (Judicial), before being submitted to the Chief Justice for orders. If the Chief Justice considers that a petition should be registered, it is listed before the relevant bench for orders. Letters sent to the Indore bench, detailing injustices which are considered to fall within the guidelines, are forwarded to Jabalpur by registered post twice a month. From February 1, 1993 to April 15, 1993, 140 letters were received, of which 46 were sent to Jabalpur and 94 were bail applications which were registered in the High Court at Indore.²⁰

²⁰ A copy of each application was sent to the jail authority, upon whose recommendation bail was granted. Usually such letters were sent to the Court after bail had been denied, so few of these applications were allowed.

North-East

The Guwahati High Court covers the seven states of the North-East: Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Tripura. The main bench is located at Guwahati in Assam, and each of the other states has a permanent or visiting bench. A PIL Cell, established on February 12, 1992 to scrutinise letter petitions according to the PIL guidelines, began to operate on May 16, 1992. As all the letters received are sent directly to Guwahati, when approached for information, the Deputy Registrar at the Shillong Bench in Meghalaya suggested that the Registrar in Guwahati be approached for information. The Chief Justice, sitting on a Divisional Bench, would always hear PIL matters because of their public interest import. Between May 16, 1992 and December 31, 1992, 42 complaint petitions (the name given to letter-petitions) were received, of which: one was registered as Civil Rule (PIL)²¹ and three were registered as Civil Rule (*Habeas Corpus*).²²

Responding to some of the other letters received, the Registry called for a report from the concerned authority - the police in most cases - and sent a reminder if no response was received. The matter was only considered to be disposed of once a report had been received and examined by the Chief Justice. Although a sanction for staff had been requested, it had not been received so existing staff had been appointed to deal with letter petitions.

Discussion with Registry staff revealed that the existence of the PIL guidelines has limited the responsiveness of the High Court to complaints sent, although occasional exceptions had been made. An example of such an exemption was when a woman wrote to the High Court in distress because her husband was missing. Apparently, a petition had been registered, even though the issue did not fall within

²¹ See 'Environment and Resources' in chapter four, for *A Public interest litigation by intervenor - Paharu Ram Boro on behalf of the Tribal public of Boko (Kamrup) Tribal Belt*.

²² In all three, the Court asked for a report.

the PIL Guidelines.

Himachal Pradesh

The procedure of separately recording letters received by the Court was established by Chief Justice P D Desai in 1985. A total of 4421 letters were received by the High Court between 28 February, 1986 and 16 July, 1993. Details of each letter were entered into a ledger in alphabetical order of the sender. At first the High Court devised its own system of classification, but later this was done according to the guidelines issued by the Supreme Court. As little information on the letters was discernible from the ledger entries, a numerical survey was done of the letter “S”, chosen because it includes records of *suo moto* actions. Most of these *suo moto* actions were based on newspaper reports in local Hindi language dailies or in the *Indian Express*, and were concerned with the poor provision of municipal services. All of these newspaper articles were published between August 1989 and December 1990, having been brought to the notice of the Chief Justice by a Registrar of the High Court who was, in the words of another Registry employee “a socially conscious man”. The rest of the entries comprised of letters, more than ten of which would be received each day. Details were entered into the ledger, and comments added by the section officer, the marriage counsellor (if relevant) and the Additional Registrar. The file would then be sent to the Chief Justice for a decision on whether the letter should be registered as a writ petition, or dealt with in another way.

Of the 642 entries in the letter “S” for the period February 28, 1986 and July 16, 1993, 59 were registered as writ petitions, 55 were *suo moto* actions, two were registered as *habeas corpus* petitions, three were tagged with another petition, three were shown to counsel, in 39 “Form N” was issued, in seven “Form O” was issued, in three “Form Q” was issued, 107 were forwarded to the concerned authority,²³ 288 were filed (or lodged),²⁴ in 27 the petitioner was told to file a regular

²³ In some, the concerned authority was asked to submit a report.

writ petition in the High Court or a lower court, one was returned to the petitioner, in two no action was taken, in 27 the action taken in these entries was not written, 18 entries were indecipherable and there was one missing entry. The system of issuing Forms N, O and Q had been instituted in 1986, but by 1993 no one could remember what these categories were. In those letter-petitions in which the Court had asked for a response or an affidavit, the matter was pursued if no reply was received. In July 1993, the High Court Registry seemed unaware of the number of letter-petitions which had been registered by the Court as a list prepared of all disposed of PILs totalled 19 cases, only two of which were instigated by letters, both in 1993. It can be assumed that hundreds of PIL petitions that have been admitted are pending, awaiting action by the Court.

After the 1991 resolution, the State Government was requested to sanction staff for the cell, but no reply had been received. The staff already posted to look after the ledger continued to do so.²⁵

Kerala

No PIL Cell had been constituted for dealing with letter-petitions, but a person had been assigned to the task of dealing with the letters according to the PIL guidelines. It seems that the Registry had not contemplated setting up a separate cell for PIL. Notwithstanding personal requests to the Chief Registrar and the Chief Justice of the Kerala High Court, the ledgers of the High Court were not made available for research, and no data or information was forthcoming.

²⁴ In over half of which the registry had asked for an affidavit before deciding to file the letter.

²⁵ Also see Massey, I P, 'Movement of Judicial Activism and Social Change in Himachal Pradesh' in Bhatia, K L (ed), *Judicial Activism and Social Change*, (Deep & Deep Publications, New Delhi, 1989), 477-502.

Andhra Pradesh

A PIL Cell was opened on 23 October, 1991 to deal with the many telegrams and letters received by the Court. Over 100 cases were taken up by the cell by the end of 1992, of which 50 were *habeas corpus* petitions. The cases which have been taken up as writ petitions were handed over to LAAB, which then allotted them to an advocate.²⁶

Concluding Analysis

People all over India have been writing to the courts in the hope of getting redress, both those with a formal knowledge of PIL and those who perceive the courts as a place where justice is available. The response of the courts has depended upon the vision of the judges and the support of personnel in the registries. The PIL Guidelines, written by Justice Bhagwati, were intended to provide consistent parameters throughout the country. Conversely, their operation has limited litigation evolved as an open-ended mechanism to resolve injustices. The guidelines have never been amended, reviewed or analysed for their effectiveness. Few complaints are successfully registered as writ petitions as the practice of registering letters as writ petitions has become bureaucratised, separating PIL from the realities which it sought to address (see chapter two). This is most apparent in the analysis of the High Court at Madras, where the application of the guidelines has meant that allegations against the police are not dealt with by the Court, but are returned to the police department concerned.

Aside from the corruption, which has been documented in the PIL cases

²⁶ See Mohan, P Bhaskara (1993) at 23.

on 'Judges, Courts, Lawyers'²⁷ and the elite bias inherent in the courts, chronicled by the emergence of PIL, many practical problems remain within the court system. Attempts to persuade the government to release funds to staff the PIL Cells have generally been futile. The huge delays and arrears which clog the system and prevent cases from being dealt with speedily²⁸ have permeated the use of PIL. The process of a letter through a registry can mitigate against the effective resolution of urgent grievances. The Court itself is aware of the delays, and has held, when sent a letter complaining that a woman had been illegally confined:

If a matter of this nature is not considered urgent enough for being listed on a priority basis, no other matter deserves to be listed on a priority basis. We find that every other day matters where even the judgements of the lower courts are not filed and incomplete records are placed before the Court and we are required to adjourn the matters till the documents are filed.²⁹

Nonetheless, the procedures followed by the Supreme Court,³⁰ and by the Indore bench of the Madhya Pradesh High Court,³¹ belie this concern. More difficult to analyse are the reasons for lengthy delays in the listing of many of petitions discussed in the case studies. Whether attributed to the judge, the registry staff, the lawyer, or a more extensive collusion, these delays have remained endemic in the court system.

²⁷ See chapter four. Since it began in 1986 *The Lawyers* has documented and exposed the corruption and nepotism endemic in the court system.

²⁸ See Baxi, Upendra, *The Crisis of the Indian Legal System*, (Vikas Publishing House Pvt Ltd, New Delhi, 1982), particularly for the chapter on 'The Courts in Crisis' at 58-83; Dhavan, Rajeev, *Litigation Explosion in India*, (Indian Law Institute, New Delhi, 1986).

²⁹ In *Nilima Priyadarshini v State of Bihar* AIR 1987 SC 2021 at 2022. Responding to a letter received by the Court on November 21, 1986, the Court observed that the application had been placed before it on January 15, 1987, two and a half months after it had been received by the Registry, and described this as a mockery of the judicial process. It was directed that the matter of delay be put before the Chief Justice, that action be taken against the relevant officials and a machinery be devised to ensure that such aberrations would not be repeated. Also see *Bholanath Tripathi v State of U.P.* 1990 (Supp) SCC 151 in 'Injustices to Women' in chapter three when the Court acknowledged the unfortunate five month delay in the filing of the petition.

³⁰ See *Sheela Barse v Union of India* (non-criminal lunatics) (1993) 4 SCC 204, as discussed in 'Prisons and State Institutions' in chapter three, for details of the delay between the receipt of the letter and the posting of the petition.

³¹ In sending letters to Jabalpur only twice a month.

The criteria for admitting letters as writ petitions and for listing matters, has determined the profile of PIL, by ensuring certain types of petitions are heard, and that others are not. The impetus of judges who transformed the reception given to letters and PIL petitions, has resulted in the formation of a bureaucratic culture which has restricted the responsiveness of the courts to instances of injustice.

Chapter Six - The Court and the People

Telling the story from 1979 through the aspirations and motivations of the numerous people involved in PIL, the discussion is divided into two broad time periods. 'PIL Begins' spans the period to the end of 1986. The retirement of Chief Justice P N Bhagwati from the Supreme Court in 1986 is taken as an expedient point at which to break the analysis. His absence from the bench signalled the end of a period in which support for PIL was evident; it also ended the pioneering period in PIL, during which time PIL was established, and symbolised the waning enthusiasm for the potential effects of using PIL. In tandem with PIL, numerous other initiatives formed part of the focus on legal mechanisms to extend access to justice. These are surveyed in 'Alternative and Corollary Innovations' at the end of this chapter.

PIL Begins

The intent behind Social Action Litigation motivated the initiatives that led to the establishment of PIL (see chapter two). Concurrent initiatives by disparate people and groups fostered the relaxation of procedural norms and the introduction of concern for the disadvantaged/deprived and marginalised/excluded (see chapter two).

The political situation had fostered similar concerns in different regions:

The announcement of the Emergency on 26 June 1975 proved to be a supremely catalytic event. While political activists and intellectuals were ostracised and imprisoned, a major turning-point had been reached in the consciousness of what constituted 'democracy'. In an effort to stifle dissent, thousands were imprisoned - some for the entire 19 months that the Emergency lasted. The press was gagged, and a host of new legislations severely restricted both traditional and new and independent challenges to the centralisation of power - from habeas

corpus to the rise of a vigorous literature of dissent through politicisation of influential journals, and so on.¹

This chapter will examine the people who, witnessing the emergency, were to form the movement that nurtured PIL. Members of the bench and bar, activists and the press combined in an effort to realise the constitutional promise and to protect their own positions. This was to take place in the Supreme Court, ideally located in Delhi amidst judges, activist groups, politicians, administrators, and international agencies.

Significant participants in this elite community, legal academics, such as Upendra Baxi of Delhi University and Lotika Sarkar of the Centre for Women's Development Studies, supported PIL in direct and indirect ways. Direct involvement came in the form of PIL petitions and letters;² indirect involvement in the form of informal and conference discussions,³ and scholarly writing which increasingly focused on the exclusion of many from the legal system. Connections were made with PIL in the USA and other international developments, whose influence on Indian law is apparent.⁴ Rajeev Dhavan, having left his lecturing post at a British university, was the a key participant in the establishment of CILAS.⁵

The section begins with a consideration of 'Judges' and 'Lawyers'. After a discussion of 'Activism', the involvement of the 'Media' is evaluated. Finally the 'Funding' of PIL is reviewed.

¹ Kothari, Smitu, 'The Human Rights Movement in India: Crisis and Challenges' in Forsythe, David P (ed) (1989), 94-109 at 96.

² For example, see the section on 'Prisons and State Insitutions' in chapter three for *Upendra Baxi v State of U P & Ors* (Agra protective home) 1982 (1) SCALE 84 [502].

³ See the section on Funding, *supra*.

⁴ It has been observed that Upendra Baxi and Krishan Mahajan, a legal journalist: are exposed to international developments in the sphere of law and its use in society and who find themselves far surpassed in material affluence by even the mediocre practitioners take a plunge into the realm of 'social responsibility' and 'social relevance' with the gusto of a *crusader*.

See Gandhi, J S (1987) at 121.

⁵ See Dhavan, Rajeev, *Public Interest Law in India: A Investigative Report*, (Report to the National Committee for the Implementation of Legal Aid Schemes, New Delhi, 1981).

Judges

The discussion of access to justice in the Supreme Court of the 1970's was the preoccupation of only a few judges. Concern for civil liberties had been apparent in earlier decades, but little for distributive justice. George Gadbois has amply documented the homogeneity of Indian judicial decision making, connecting it with the characteristics of the Supreme Court judge during the first decade of constitutional government.⁶ Similarly, Marc Galanter has observed that judges and lawyers share a common legal education and a common professional milieu:

members of the higher judiciary possess some distinctive characteristics. They tend to be drawn from prosperous and high status families, to have been educated in elite institutions, to have had distinguished professional careers and, with few exceptions, very little political involvement.⁷

The composition of the judiciary changed little during the first three decades of constitutional government. Of the 352 High Court judges sitting in 1977, only four were members of scheduled castes and none was a member of a scheduled tribe.⁸ Women judges were more poorly represented. There were only two sitting prior to

⁶ Gadbois, George H, 'The Supreme Court of India as a Political Institution', in Dhavan, Rajeev; Sudarshan R and Khurshid, Salman, *Judges and the Judicial Power*, (N M Tripathi Pvt Ltd, Bombay, 1985), 251-267; Gadbois, George H, 'Indian Judicial Behaviour', *EPW*, Annual Number, January 1970, 149-166. His analysis is extended in Gadbois, George H, 'The Supreme Court of India: A Preliminary Report of an Empirical Study' in Grover, Verinder (ed), *Courts and Political Process in India*, (Deep & Deep Publication, New Delhi, 1989), 9-37. Whilst noting a confluence of judicial thought, Gadbois described the kind of man who became a Supreme Court judge:

a Hindu, birth in a socially prominent and economically comfortable family, legal education at a prominent Indian university or at one of the Inns of Court in London, more than two decades of private law practice before the High Court of the state of his birthplace, non-involvement in active politics and ten years of experience with consequent seniority as a member of a High Court.

Gadbois, George H, 'Selection, Background Characteristics, and Voting Behavior of Indian Supreme Court Judges, 1950-1959' in Schubert, Glendon and Danelski, David J (eds), *Comparative Judicial Behaviour*, (Oxford University Press, London, 1969).

⁷ See Galanter, Marc, *Competing Equalities: Law and the Backward Class in India*, (Oxford University Press, Delhi, 1984) at 481. Also see Dhavan, Rajeev (1977).

⁸ Galanter, Marc (1984) note 23 at 481.

1977, and six during 1977, after appointments were made.⁹

The impact of the appointments combined with the structure of the legal system, delineating a separation of powers between the legislature executive and judiciary,¹⁰ to determine the decision-making in the Supreme Court. Sobhanlal Datta Gupta observed:

the logic of the mode of composition of the Supreme Court makes it conservative in outlook and encourages it to adopt a legalistic, formal, non-sociological view of the laws. This outlook has been further nurtured by the way the judges are recruited in service.¹¹

In his analysis of judgments given by the Supreme Court between 1950 and 1959, Gadbois noted that only seven percent had dissenting opinions.¹² Of these, the largest proportion sought to uphold the rights of the citizen against the state. Rajeev Dhavan described these as token dissents, as they did not extend beyond the judgment in which they were given.¹³ However, in the mid-1970's, judges like Justice V R Krishna Iyer began to give judgments that ran counter to the prevailing tendencies in the Court.¹⁴ Appointed by Indira Gandhi at a time when poverty had become a political issue, as witnessed in the *garibi hatao* (remove poverty) initiative, Justice Krishna Iyer

⁹ Keshwaar, Sanobar, 'Women Judges: Who will make it to the Supreme Court?', *The Lawyers*, Vol 3 No 1, Jan 1988, 4-11.

¹⁰ This separation is indistinct in certain parts of India, for example in the north-east, and in institutions such as the panchayat (village gathering) nyaya panchayat (village courts). See Galanter, Marc and Baxi, Upendra, 'Law and Society in Modern India' in Galanter, Marc (1989), 54-91.

¹¹ Gupta, Sobhanlal Datta, *Justice and the Political Order in India. An Inquiry into the Institutions and Ideologies: 1950-1972*, (K P Bagchi & Company, Calcutta, 1979) at 131. He went on, at 187, to quote from S P Sathe who had observed:

"Although the judicial restraint is very credible, it is submitted that the restraint has stemmed more from a restricted view of the judicial function entertained by the Court rather than from a conscious effort to make the Constitution responsive to the needs of the society".

¹² Gadbois, George H (1970) at 151. He contrasted this with the United States Supreme Court in which over fifty percent of judgements have been dissensual.

¹³ Dhavan, Rajeev, *The Supreme Court of India: A Socio-Legal Critique of its Juristic Techniques*, (N M Tripathi Pvt Ltd, Bombay, 1977) at 31-32. For an analysis of the literature on the "ideological profiles of the Court in action", including a brief discussion of the work of George Gadbois, Sobhanlal Datta Gupta and Rajeev Dhavan, see Baxi, Upendra, *Towards a Sociology of Indian Law*, (Satvahan, New Delhi, 1986) at 110-112.

¹⁴ Dhavan, Rajeev (1977) at 33.

represented a new kind of judge in the courtroom.¹⁵

It was the politicisation of judicial appointments that was to facilitate PIL by allowing the introduction, on to the Court, of a few judges motivated by social justice considerations. Justice D A Desai became known for the pro-tenant stance he took in his judgments¹⁶ and Justice O Chinappa Reddy has been described as “a humanist”.¹⁷ The guiding principles of these judges were unusual. Justice V R Krishna Iyer, far from being guided by the dictates of the rule of law, was motivated by his own spirituality and the ethos of justice in Ancient India - he was unwilling to be bound by the confines of rule-mindedness or the structure of the court.¹⁸ Similarly Justice P N Bhagwati was motivated by his concern for social justice, in his encouragement of PIL.¹⁹

Even before PIL, the writ jurisdiction was more accessible than other criminal or civil remedies, being comparatively expeditious and cheap.²⁰ Examined in the context of the greater use of constitutional remedies, the development of PIL was

¹⁵ See chapter one for a discussion of the “committed” judiciary.

¹⁶ For a discussion of the controversy over the appointment of these judges see Dhavan, Rajeev and Jacob, Alice, *Selection and Appointment of Supreme Court Judges. A Case Study*, (N M Tripathi Pvt Ltd, Bombay, 1977).

¹⁷ See Venkataramani, R (ed), *Judgements by O Chinappa Reddy - A Humanist*, (International Institute of Human Rights Society, New Delhi, 1989).

¹⁸ Iyer, V R Krishna, ‘Public Interest Litigation’, (lecture delivered at the School of Oriental and African Studies, University of London, 10/5/88).

¹⁹ See Bhagwati, P N, ‘Judicial Activism and Public Interest Litigation’, (transcript of address delivered at Columbia University on 3/10/84, Jagrut Bharat, Dharwad, 1985), 1-23. The limitations of Justice Krishna Iyer’s vision, in terms of gender issues, has been noted by Bina Agarwal, who referred to a judgement he gave in 1980, whilst upholding the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950:

He argued: ‘no submission to destroy this measure can be permitted using sex discrimination as a means to sabotage what is socially desirable’. While admitting that the advantage granted to major sons and not to daughters was sex-discriminatory, he nevertheless justified the rule on the ground that in effective terms the entire land goes to the father as the tenure holder (and not to the son) ‘for feeding this extra mouth’. Presumably adult daughters didn’t need to be fed! Agarwal, Bina (1994) at 221.

²⁰ Galanter, Marc (1984) at 498-9.

not an aberration, but lay dormant in the hands of the Supreme Court judge.²¹ Not only are the courts bound by orders of the Supreme Court but also by the broader expressions of its judges in *obiter dicta*.²² In addition to judicial powers, the executive powers of a judge include powers of admission, scheduling cases for hearing, the formation of benches or panels, the grant of a stay order, powers of scheduling reasoned judgments and of allowing/disallowing a review.²³ It has been suggested that the Court was “activist” prior to the 1970's, in a technical sense, in displaying an inclination towards certain policy objectives (see chapter two). It was a particular type of judicial activism.²⁴ For some, the period after the emergency was the first time that the Court had displayed any “activism”. According to Upendra Baxi:

[an activist judge] is a judge who is aware that she wields enormous executive and legislative power in her role as a judge and this power has to be used militantly for the promotion of constitutional values.²⁵

A few judges, by fostering the use of the writ jurisdiction of the Supreme Court, began to challenge what Upendra Baxi described as the class bias in

²¹ See Agrawala, B R (1989) and Gadbois, George H (1989).

²² Such pronouncements could not be challenged in review as they did not affect the outcome of a case. Nonetheless, these pronouncements did enter law and were binding. See Article 141 of the Constitution and Galanter, Marc (1984) at 490.

²³ Baxi, Upendra, 'On the shame of not being an activist: thoughts on judicial activism' in Tiruchelvam, Neelam and Coomaraswamy, Radhika (eds) (1987), 168-178 at 169. He also mentions 'suggestive jurisprudence' by which judges communicate to lawyers, explicitly and implicitly, the way in which a case might be decided.

²⁴ Justice P N Bhagwati elucidated a distinction between the form of judicial activism existing in the Supreme Court in the first three decades of constitutional government, and the actions of judges in initiating and supporting PIL and access to justice:

technical activism may be contrasted with what I would like to call “Juristic activism”. Juristic activism is not concerned with the appropriation of increased power, but is concerned as well with the creation of new concepts

Bhagwati, P N, 'Judicial Activism and Public Interest Litigation', (transcript of address delivered at Columbia University on 3/10/84, Jagrut Bharat, Dharwad, 1985), 1-23 at 7. Also see the constitutional imperatives in chapter two,

²⁵ Baxi, Upendra, 'On the shame of not being an activist: thoughts on judicial activism' in Tiruchelvam, Neelam and Coomaraswamy, Radhika (eds) (1987), 168-178 at 172. Also see essays in Dhavan, Rajeev, Sudarshan, R and Khurshid, Salman, *Judges and the Judicial Power*, (N M Tripathi Pvt Ltd, Bombay, 1985).

the sentencing of offenders, and the non-implementation of enactments.²⁶ It has been suggested that PIL started in the district and High Courts, without attracting much attention.²⁷ However, Supreme Court judges, Justice Krishna Iyer and Justice P N Bhagwati have each been described as the “fathers of PIL”, the former having been the initial proponent of PIL and the latter because of his numerous, well-publicised judgments and orders.

Many of the aspects of concern to judges at the beginning of the 1980's can be seen in the section on 'Judges, Courts, Lawyers' (in chapter four), in the unfolding of PIL (in chapter one) and in writing within and outside the courtroom.²⁸ The perceptiveness and skill of Justice V R Krishna Iyer and then Justice Bhagwati in their *obiter dicta* fostered new perspectives and the scope of constitutional rights, such as Article 21 of the Constitution, was expanded. For the first time, the non-justiciable Directive Principles of State Policy were relied upon and Fundamental Duties taken into account in deciding cases.²⁹

In addition to these pronouncements on the substance of issues, the judges who supported PIL encouraged petitions to be filed and ensured that matters were heard (see chapters three, four and five). A number of organisations located the beginnings of their case in a conversation with Justice Bhagwati.³⁰ His role in CILAS

²⁶ Baxi, Upendra (1982) at 27-29.

²⁷ Referring to *P. K. Martiyani v Regional Provident Fund Commissioner, Ahmedabad & Anr.* 1983 (2) GLR XXIV(2) 927, as discussed in 'Public Policy and Administration' in chapter four, a petition initiated *suo moto* by Justice Thakkar of the Gujarat High Court in 1979, Upendra Baxi described this as one example of instances in which this judge acted *suo moto*. See Baxi, Upendra, 'On the shame of not being activist: thoughts on judicial activism' in Tiruchelvam, Neelan and Coomaraswamy, Radhika (eds) (1987), 168-178 at 176. Also see Agrawala, S K (1985) at 20 and '*Suo Moto*' in chapter two.

²⁸ See Bhagwati, P N (1985); Singh, Parmanand, 'Justice Sabyasachi Mukharji's Perception of Judicial Function in Public Interest Litigation - A Tribute', *Delhi Law Review*, Vol 13, 1991, 145-153; Gupta, Shrinivas, 'Judicial Universe of Justice Bhagwati', 1985 KLT (J) 69.

²⁹ For a discussion of these constitutional provisions, see chapter one and for a full listing see Appendix A.

³⁰ A number of activists have referred to encouragement from Justice Bhagwati: Bunker Roy sent a letter to the Court after Justice Bhagwati suggested that he do so (Bunker Roy, Social Work and Research Centre, Tilonia, 16/2/92) - see 'Labour' in chapter three for *Sanjit Roy v State of Rajasthan*

had ensured both his exposure to activist groups concerned with using law and in the press. Administrators in the Registry, recognising that PIL was being promoted by just a few judges, would assign PIL matters to them, ensuring a sympathetic hearing for petitions and letters.

The rift that had become apparent in the Supreme Court of the 1970's, before and during the emergency, was exacerbated by the use of PIL. The breach between judges imbued with concern for access to justice and those concerned with upholding the values that had motivated the Court, was expressed both within the Court and outside it.³¹ Justice V D Tulzapurkar,³² in a speech, set out the concerns of many on the Court. Similarly, Justice S Murtaza Fazal Ali and Justice E Venkataramiah, when raising what became known as the “ten commandments” in *Sudipt Mazumdar v State of Madhya Pradesh*³³ expressed reservations about the

AIR 1983 SC 328. Vivek and Vidyulatta Pandit met the judge in May 1983, and again in December 1983, before sending letter-petitions to the Supreme Court (Vivek Pandit, Vidhayak Sansad, interview, 25/3/93) - see 'Bonded Labour' in chapter three for *Vivek Pandit v State of Maharashtra*. A civil liberties activist described a meeting he had arranged with Justice Bhagwati, in the hope that something could be done about “encounter deaths”, but left feeling disillusioned:

We got a good impression of Justice Bhagwati and we thought he could help. He said, no, don't go in for these encounter death petitions, go in for a petition on minimum wages and I will appoint a commission. He also told us to file on bonded labour. Then we decided against it and thought that Justice Bhagwati was trying to please the Government.

Other petitions have reached the Court in an unorthodox manner because of this judge. When invited by Justice Bhagwati in 1981 to attend a CILAS meeting but unable to attend, Ela Bhatt sent a letter of refusal in which she questioned the purpose of legal aid, in the absence of relevant laws, except those which are anti-poor and anti-employment. She elaborated the substantive way in which laws take away rights and cited the example of the Manek Chowk hawkers. Justice Bhagwati treated the letter as a writ petition (Ela Bhatt, Self Employed Women's Association, New Delhi, 4/2/91) - see 'Urban Space' in chapter four for *Self Employed Women's Association and Ors v Municipal Council of Ahmedabad and Ors* 1986 (2) SCALE 291 [1254]. Other judges encouraged activist groups to use law, for example, during the opposition to the Silent Valley project in Kerala:

Justice Krishna Iyer suggested we go to the local court and if necessary we should go to the High Court, informally, in conversation. We could not think that the case would get admitted because of standing etc

(M K Prasad, KSSP, Ernakulam, 15/8/93) - see 'Environment and Resources' in chapter four.

³¹ See chapter one for background.

³² Tulzapurkar, V D (1983). See Gandhi, J S (1987) at 22 for a critique of this speech which he calls “veiled sycophancy”.

³³ See chapter one.

methods adopted by fellow judges, to nurture PIL.³⁴ Justice Tulzapurkar, who had upheld civil liberties in judgments under emergency rule, covertly referred to Justice Bhagwati³⁵ when he stated that a judge must decide without fear or favour:

Will anybody think that a Judge will do so if he sends fawning and flattering congratulations to political leaders on assumption of office?³⁶

Fears about the increasing caseload of the Court that may become unmanageable by the opening of the floodgates to the Court, about the appropriateness of certain judges being actively associated with PIL and the perceived bias of certain judges were to persist. In his famous concurring judgment in *Bandhua Mukti Morcha v Union of India and others* (Haryana Mines I),³⁷ Justice Pathak raised similar fears, whilst advocating a “judicious mix of restraint and activism” on the part of judges.³⁸ Some of these issues were addressed when PIL guidelines were framed, as PIL became an established and therefore more acceptable as a form of litigation. The divisions in the

³⁴ For detail and discussion see ‘Resistance to the changes’ in chapter two.

³⁵ See Seervai, H M, *Constitutional Law of India. Volume I* (N M Tripathi Pvt Ltd, Bombay, 3rd edition, 1983) at 1062-1063. He quotes from judgements and speeches given by Justice P N Bhagwati, to show the “other side” of this judge. When Indira Gandhi was defeated in the elections of 1977, Justice Bhagwati wrote in a judgement (quoted by Seervai at 1062):

Never in the history of this country has such a clear and unequivocal verdict been given by the people, never a more massive vote of no-confidence in the ruling party. When there is such crushing defeat suffered by the ruling party and the people have expressed themselves categorically against its policies, *it is symptomatic of complete alienation between the Government and the people. It is axiomatic that no Government can function efficiently and effectively in accordance with the Constitution in a democratic set up unless it enjoys the good will and support of the people. Where there is a wall of resentment and antipathy in the hearts of the people against the Government*, it is unlikely that it may lead to instability and even the administration may be paralysed. (italics supplied)

However, on her successful election in 1980, Justice Bhagwati wrote her a letter of congratulations which began (quoted by Seervai at 1063):

May I offer you my heartiest congratulations on your resounding victory in the elections and your triumphant return as the Prime Minister of India. It is a most remarkable achievement of which you, your friends and well-wishers can be justly proud.

It is a very difficult task which lies ahead of you, but I am sure that with your iron will and firm determination, uncanny insight and dynamic vision, grand administrative capacity and vast experience, overwhelming love and affection of the people and, above all, a heart which is identified with the misery of the poor and the weak, you will be able to steer the ship of the nation safely to its cherished goal and the glorious vision of the founding fathers of the Constitution will become a living reality.

³⁶ Tulzapurkar, V D (1983) at 17.

³⁷ AIR 1984 SC 802, as discussed in ‘Bonded Labour’ in chapter three.

³⁸ *Ibid.* at 841.

Supreme Court were to alter the reception given to PIL petitions:

In the midst of great opposition and sharp cleavage of opinions among the judges, the chief justice [Justice P N Bhagwati] has relentlessly projected a deep judicial concern for the liberation of the poor and the victimised. The interim direction jurisprudence developed by him seeks not only to fashion schemes for the immediate relief of the victims, it also contains proposals for the reform of the legal institution. O.Chinappa Reddy, G L Oza, D P Madon, R.N.Misra and Balkrishna Eradi JJ have all gone along with the chief justice.

R.S.Pathak J (as he was then) along with V D Tulzapurkar and S Mukherjee JJ have all favoured a very cautious approach in dealing with PIL petitions.³⁹

Lawyers

Historically, lawyers have played an important part in modern India. Mohan Karamdas (Mahatama) Gandhi and Jawaharlal Nehru were both lawyers, and many members of the Constituent Assembly had studied law.⁴⁰ As with judges, most lawyers were from more advantaged backgrounds and few were women. Thus the predisposition of lawyers working in the higher courts shaped professional concerns.⁴¹ Law since independence was conditioned by the specialist practice of formal law,⁴²

³⁹ Singh, Parmanand (1986) at 505.

⁴⁰ For further discussion see Gandhi, J S (1987) at 110-111; Schmitthener, 'Development of the Legal Profession in India' in Ghai, Yash; Luckman, Robin and Snyder, Francis (eds) (1987), 678-688; Derret, Duncan M, 'Lawyers as Leaders' in Pandey, B N (ed), *Leadership in South Asia*, (Vikas Publishing House Pvt Ltd, New Delhi, 1977), 55-82; Stig Toft, "A Study of Indian Lawyers", (unpublished Magister's thesis, Copenhagen University, June 1979).

⁴¹ See Galanter, Marc (1984) at 481; Anklesaria, Phiroze, 'Women and the Profession of Law', AIR 1985 J 1; Menon, Balagangadhara, 'Inequalities against Women - A Challenge for Women Lawyers', (1983) 2 SCC (J) 31.

⁴² Amongst others, Bernard Cohn has described this as "lawyer's law", law in the courtroom, as distinct from local law-ways and Indian legal culture. See 'Notes on Disputes and Law in India' in Cohn, Bernard, *An Anthropologist among the Historians and Other Essays*, (Oxford University Press, Delhi, 1990), 575-631 at 607-608. Also see Cohn, Bernard S, 'Some notes on Law and Change in North India', *Economic Development and Cultural Change*, Vol 53 No 1, Oct 1959, 79-93 at 93 where he noted:

Since British procedure and justice appeared capricious to the Indians, someone with a bad case was as prone to go to court as someone with a good case. The standard was not the justice of his case, but his ability to outlast his opponents.

which, during its operation in India, engendered corruption and an excessive focus on the tactics of lawyering.⁴³ Having observed that district court lawyers are unprofessional to an extreme, use touts to secure business and progress in their careers through intimate familial or caste networks, J S Gandhi concluded that similar orientations would be found in lawyers practising in the Supreme and High Courts.⁴⁴ To an extent this has been borne out by this fieldwork, as Supreme Court lawyers do use networks to further their practice. Whether this amounts to unprofessional behaviour depends upon the individual, as certain community networks are inevitable because of language and regional links.

In addition to the characteristics of legal practice, the hierarchy of lawyers in the Supreme Court and High Courts has shaped the functioning of the profession. This hierarchy consists of senior advocates, advocates-on-record and junior advocates.⁴⁵ The senior, who is designated as such by the Court, acts on the instruction

Khare has contrasted lawyer's law with native, indigenous law. He quotes Lon Fuller in *The Morality of Law*, (Yale University Press, New Haven, 1964) at 106 who has defined lawyer's law as "the enterprise of subjecting human conduct to the governance of rules" (at 74). Analysing the term, Khare then defines lawyer's law more fully as "a public institutionalized mechanism for maintaining public order, facilitating cooperative action, legitimizing power, authority and influence, and defining and reinforcing rights and responsibilities" (at 74). He further describes it as "'foreign' and .. profane. It does not integrate itself with the sacred order and is not 'born' out of *dharma*" (at 75), and later describes court law as "culturally symbolic of many 'vices' ranging from telling a lie and gambling to ruthlessness and individual oppression" (at 79). See Khare, R S, 'Indigenous Culture and Lawyer's Law in India', *Comparative Studies in Society and History*, Vol 14, 1972, 71-96. For further comments on the literary form taken by law, see chapter seven.

⁴³ *Ibid.* See Kidder, Robert L, 'Courts and Conflict in an Indian City: A Study in Legal Impact', *Journal of Commonwealth Political Studies*, Vol 11, 1973, 121-139; Nagpaul, Hans, 'The Legal Profession in Indian Society: A Case Study of Lawyers at a Local Level in North India', *International Journal of the Sociology of Law*, Vol 22, 1994, 59-76. Also see Kidder, Robert L, 'Formal Litigation and Professional Insecurity in Bangalore' in Ghai, Yash; Luckman, Robin and Snyder, Francis (eds) (1987), 697-707 at 703, where he observes:

Formal litigation imposes the need to develop a portfolio of alternative legal 'theories' which can first be examined for legal strengths and weaknesses, ranked into a set of priorities, prepared and protected like a 'fail safe' system, then altered innovatively as the events of litigation make some positions untenable. ... Many of the client's most basic assumptions about the relevance of events and facts will be shattered by the lawyer's decision to discard peripheral or legally irrelevant facts.

⁴⁴ Gandhi, J S (1987) at 118.

⁴⁵ In the Bombay and Calcutta High Courts there is a separate class of legal practitioners, known as solicitors, who prepare the case, but do not argue in Court.

of another advocate and argues before the Court. The advocate-on-record is permitted, after passing an examination, to file any application in Court on behalf of a party, and therefore deals with all the procedural matters. The junior assists either a senior advocate or an advocate-on-record. The critical role of the lawyer, in PIL, acting as a mediator between the court and the people, can only be understood according to the type of advocate in question, and therefore, the relationship that the advocate has with the client.

With a grand perception of their role and the concomitant sense of the centrality of law, lawyers were fundamental to the inception of PIL. When the state of internal emergency was declared in 1975, some lawyers protested. For example, N M Palkhiwala refused to continue to appear for Prime Minister Indira Gandhi in the Allahabad High Court in protest at the declaration of emergency, and the All India Bar Council and groups of lawyers challenged the changes.⁴⁶ Kidder, noting the propensity of lawyers to react as a group against a policy if it clearly threatens their economic interests, suggested that the agitation among city lawyers could have stemmed from the reduced amount of work available after the emergency measures were enforced.⁴⁷ However, members of the legal profession were not just reacting to the compromise of their professional autonomy. Leading constitutional lawyers, such as Ram Jethmalani, then President of the All India Bar Council, were threatened with imprisonment. For many others, the threats were realised.

Lawyers became involved in PIL in a number of different ways. Many were petitioners themselves, filing applications in response to newspaper articles. Their area of expertise was law, and legal provisions promised a resolution through the enforcement of legally defined rights. Kapila Hingorani, together with her husband and professional partner, wrote of the emotional response that led her to initiate

⁴⁶ See *N P Nathwani v The Commissioner of Police* 1975 (78) BLR 1, for a petition filed by lawyers in Bombay after they were prevented from holding a meeting to discuss "Civil Liberties and the Rule of Law under the Constitution".

⁴⁷ Kidder, Robert L, 'Law and Political Crisis: An Assessment of the Indian Legal System's Potential Role', *Asian Survey*, Vol 16 No 9, 1976, 879-897, at 892.

Hussainara Khatoon v State of Bihar,⁴⁸ after reading press reports in the *Indian Express*:

I started reading the article while sipping my tea. I felt choked. "How can such a situation exist in our country? We are lawyers of so many years' standing and we are not even aware of it, we must do something about it."⁴⁹

Some lawyers were office-holders in civil liberties organisations⁵⁰ and were themselves instrumental in initiating discussion of civil rights abuses on the public agenda, as well as in filing the petitions. From the inception of PIL these lawyers appear to differ from petitioner-lawyers,⁵¹ both in the motivation for filing petitions and in the general awareness of the issues raised. Of concern was the integrity of the judicial and criminal justice systems. Often senior advocates, they were imbued with a sense of constitutionalism and respect for the existing rule of law. In addition to these advocates, other senior, well-established lawyers became involved in PIL, often arguing cases in Court. They gave the initiatives a greater legitimacy and credibility in front of judges who might have been more dismissive of those with a lesser reputation.⁵²

Others had themselves gained perspective, that was to inform their future professional activity, whilst a part of the new politics discussed below. A younger generation than the civil liberties lawyers, many of these advocates had been involved in student politics, and brought their political commitment with them to the

⁴⁸ (1980) 1 SCC 81, as discussed in 'Prisons and State Institutions' in chapter three.

⁴⁹ Hingorani, Kapila, 'Public Interest Litigation', (unpublished article, New Delhi, [1987?]) at 3.

⁵⁰ Examples are V M Tarkunde and Govind Mukhoty in the Supreme Court and M A Rane in the Bombay High Court. V M Tarkunde was a member of the PUCL and the Citizens for Democracy, M A Rane a member of the PUCL, and Govind Mukhoty a member of the PUDR. Upendra Baxi has described the Citizens for Democracy, People's Union for Civil Liberties and PUDR as lawyer-led social action groups. See Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Baxi, Upendra (ed) (1988), 387-415 at 379.

⁵¹ Lawyers who are the petitioners in PIL petitions.

⁵² For example, Ram Jethmalani and Soli Sorabjee.

law.⁵³ Having often made a self-conscious decision to practice law for more disadvantaged sections of the community, they were struggling to varying degrees with the concept of constitutionalism and the prevailing modes of dispute settlement. As one such lawyer, Indira Jaising, stated:

India literally inherited a legal system because it was a colony. .. Much of my time in the legal profession has been spent trying to dismantle that system.⁵⁴

Excited at the prospect of the increased access provided by PIL, and by the support of judges, these lawyers actively participated in initiatives to file PIL cases, by activist groups and individuals with no formal constituency.⁵⁵ Other lawyers, less overtly committed to activist concerns, became involved because of personal connections with journalists, or activists.⁵⁶ The informal networks of schools and colleges provided connections between lawyers and activists, many of whom shared similar backgrounds.⁵⁷

Although the careers and aspirations of many lawyers were to flow from their involvement with PIL, for others it presented a threat. Many lawyers protested against the perceived explosion in the number of PIL cases:

⁵³ For example: Indira Jaising, a Supreme Court and High Court advocate and founder member of the Lawyers Collective in Bombay; Nandita Haksar, a Supreme Court and High Court advocate, member of the PUDR and later a member of the Naga People's Movement for Human Rights; Supreme Court advocate R Venkataramani; S S Vasudevan, an advocate in the Madras High Court; A X Verghese, an advocate practicing in the Kerala High Court.

⁵⁴ Jaising, Indira, 'Public Interest Litigation: The Lessons from India', (presentation on 'The future for civil litigation' at an International Conference, *Shaping the Future. New directions for legal services*, Legal Action Group, London, 12/11/94). The proceedings of this conference have been published. See Smith, Roger (ed), *Shaping the Future. New directions for legal services*, (Legal Action Group, London, 1995).

⁵⁵ For example, *People's Union for Democratic Rights PUDR and others v Union of India and others* AIR 1982 SC 1473, as discussed in 'Labour' in chapter three.

⁵⁶ See the section on the *dramatis personae* of PIL in Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Baxi, Upendra (ed) (1988), 387-415 at 395-398.

⁵⁷ For example, advocate Kapil Sibal appeared in the case filed by Sanjit Roy (Bunker Roy, Social Work and Research Centre, Tilonia, 16/2/92) and Swami Agnivesh of the Bandhua Mukti Morcha was able to contact advocate Govind Mukhoty, then member of the PUDR, through a college friend (Swami Agnivesh, New Delhi, 21/2/91).

senior lawyers were openly heard to say that if the Supreme Court thus wants to do social justice, it had better meet on the weekends.⁵⁸

The reaction, described by Upendra Baxi as ranging from indifference to indignation at what is perceived as a freak form of litigation,⁵⁹ contrasted with the overt support from others in the legal profession.

Concomitant with the differing ideological inclinations and status at the bar, a number of different types of legal practice in the Supreme and High Courts can be identified. Along with the successful urban lawyer (with a reputation and a large income) were those who conduct the routine work of the Court. Many focussed on the rule of law with the overwhelming belief that law could resolve injustice on a case-by-case basis,⁶⁰ whilst others were responding to instances of injustice and the populist demand for legal assistance. Emerging in the 1980's, with PIL and legal aid as the mainstay, was a new category of activist lawyers. PIL was to be found in all types of offices, but with different levels of commitment.⁶¹ The focus of the lawyer on the inherently formal procedures and requirements encouraged issues to be viewed as legal problems. Developments, parallel to the use of PIL, were taking place in the Supreme and High Courts. Within non-governmental organisations, "barefoot lawyers", as they came to be known, were predominantly concerned with access to justice. Support would be given to clients through the provision of legal education and the filing of

⁵⁸ Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Baxi, Upendra (ed) (1988), 387-415 at 409. This echoes the Congressmen of the nineteenth century, who worked for social uplift at the weekends. See Nossiter, T J, *Communism in Kerala*, ((C Hurst & Company, London, 1982) at 71.

⁵⁹ *Ibid.*

⁶⁰ Galanter, Marc, 'Making law work for the oppressed', *The Other Side*, Vol 3 No 2, Mar 1983, 7-15 at 12.

⁶¹ In a study of legal change in the US, Marc Galanter has noted:

The more close and enduring the lawyer-client relationship, the more the primary loyalty of lawyers is to clients rather than to courts or guild, the more telling the advantages of accumulated expertise and guidance in overall strategy.

See Galanter, Marc, 'Why the "Haves" come out ahead: speculations on the limits of legal change', *Law and Society*, Vol 9 No 1, Fall 1974, 95-160 at 114-115. For a study of lawyers in Britain see Scheingold, Stuart, 'The contradictions of radical law practice' in Cain, Maureen and Harrington, Christine B (eds), *Lawyers in a postmodern world*, (Open University Press, Buckingham, 1994), 265-283.

cases.⁶² Initially, initiatives of this kind contrasted sharply with the development of PIL which could only be situated in an urban, elite setting, and the proponents of which were not accountable to those represented by the petitions.⁶³ The dilemma of the urban lawyers committed to a different vision of society were to be sharply delineated by the practice of PIL.

Activism

The close link between human rights groups and law has been apparent from the start. Groups were formed in the early 1940's to provide legal aid to nationalists accused of sedition against the colonial authorities.⁶⁴ Initially, activist groups were more in evidence in the southern states of India, a region culturally distinct from northern states. In the late 1960's, the release of political prisoners from jail and the concern for the violation of the constitutional rights of some marginal groups and of political activists, were imperatives in the formation of regional civil liberties groups, by sympathizers of and participants in the Marxist-Leninist movement.⁶⁵ Opposition to the Congress (I) government gained momentum with social movements in the 1970's such as the agitation launched by Jayaprakash Narayan to counter Indira Gandhi. In 1975 the PUCLDR (People's Union for Civil Liberties and Democratic Rights) was formed. After the stifling of dissent under the emergency and the lull in the activity of these groups during the time of the Janata government

⁶² Galanter, Marc (1983) lists Rajpipla Free Legal Aid, the Legal Support Scheme operated by the Anand Niketan Ashram and the programmes of AWARE in Andhra Pradesh as organisations with schemes of barefoot lawyers and paralegals. See 'Alternative and Corollary Innovations' *infra*.

⁶³ Galanter, Marc (1983) at 12.

⁶⁴ See Kothari, Smitu, 'The Human Rights Movement in India: Crisis and Challenges' in Forsythe, David P (ed), (1989), 94-109 at 95. In interview, V M Tarkunde stated that the first such movement, the Civil Liberties Union, was formed in 1936 - see Kothari, Smitu, 'An Interview with V M Tarkunde' in Sethi, Harsh and Kothari, Smitu (eds) (1989), 133-149 at 133. Also see Haksar, Nandita, 'Civil Liberties Movement in India', *The Lawyers*, Vol 6 No 6, June 1991, 4-12 at 4.

⁶⁵ See Kothari, Smitu, 'The Human Rights Movement in India: Crisis and Challenges' in Forsythe, David P (ed), (1989), 94-109 at 95; Haksar, Nandita, 'Civil Liberties Movement in India', *The Lawyers*, Vol 6 No 6, June 91, 4-12 at 4

thereafter, civil liberties groups resurfaced with greater momentum. Having been disappointed by the expected revival of the democratic process after the emergency, by 1980 the activities of civil liberties groups, including the now divided Delhi-based PUDR and national PUCL, resumed. Both were to become important protagonists in PIL. The dilemma faced by such groups, which repeatedly resorted to law, has been encapsulated by Harsh Sethi:

Working within the bounds of our Constitution and operating with a single point charter that the laws of the land be respected and followed, most of their earlier activities, though causing momentary discomfort, rarely created waves. This applies to the dozen of earlier exposes of illegal detention, torture, encounter killings, indiscriminate firings - even to promulgation of draconian laws. Since the debates generated essentially remained confined to a small set, neither did they acquire significance, nor was it necessary to silence such criticism. If anything CRGs [civil rights groups] could always be pointed out as reflections of a healthy democratic polity.⁶⁶

The conflict between effectiveness and legality is recognisable in many of the groups that began to petition the Court. While recourse to law would ultimately reinforce the legitimacy of laws, it could not ensure the provision of basic civil and democratic rights.

Distinct from these civil liberties groups, with a predominantly middle-class urban elite membership, social action groups, without any overt political affiliations, began to be formed in the late 1960's, predominantly in southern states.⁶⁷ By the late-1970s these social movements gained strength and organisations such as the Social Work and Research Centre in Tilonia, Bandhua Mukti Morcha in New Delhi, Shramjeevi Sangathana in Maharashtra and Manushi in New Delhi began to emerge.⁶⁸ Concerned with specific groups of people, such as villagers of a particular

⁶⁶ Sethi, Harsh, 'Beyond the Fragments: The Civil Rights Groups Today' in Sethi, Harsh and Kothari, Smitu (eds) (1989), 73-82 at 75.

⁶⁷ Fernandes, Walter, 'Participatory Research and Action in India', *Social Action*, Vol 39, Jan-Mar 1989, 1-21 at 1.

⁶⁸ It cannot be assumed that these groups are comparable in terms of their structure and actions. For an overview, see Shah, Ghanshyam, *Social Movements in India. A Review of the Literature*, (Sage Publications, New Delhi, 1990).

region, bonded labourers or women,⁶⁹ these groups had a commonality of opposition to the structure of the modern Indian state, and had grown out of a post-emergency consciousness.

Variously identified as an alternative movement or the “New politics” by Rajni Kothari,⁷⁰ the emergence of activist groups has been attributed to the failure of the top-down model in managing society.⁷¹ Rajeev Dhavan has observed that all identified similar problems, and that all expressed an interest in developing greater legal skills in order to deal with these problems.⁷² The emphasis was on the rights of people, not just in terms of civil liberties but economic, social and community rights and on the causes and effects of poverty and marginalisation. Amongst those participating and analysing the developments was Harsh Sethi of the Centre for the Study of Developing Societies in New Delhi. His definition links civil rights and activist groups under the broad heading of human rights groups, and locates civil liberties (CL), democratic rights (DR) and human rights(HR) along a continuum:

CL and DR define the nature of the political terrain mediating the relationships between the state and the citizen. In the case of India, CL are rights which are guaranteed by the constitution, justiciable in courts via law. DR get reflected in the directive principles of state policy which provide indications of the directions in which the expansion of fundamental rights ought to take place. HR go beyond what any nation-state is willing to or is in a position to consider, and raise questions of

⁶⁹ Omvedt, Gail, *We will smash this prison!: Indian Women in Struggle*, (Zed Press, London, 1980); Kumar, Radha, *The History of Doing*, (Kali for Women, New Delhi, 1993); Reddy, R Narayana, 'Women's Movement: The Indian Scene' in *The Indian Journal of Social Work*, Vol XLVI No 4, Jan 86, 507-514; Patel, Vibuthi, 'Women's Liberation in India', *New Left Review*, No 153, Sept-oct 85, 75-86; Calman, Leslie J, *Toward Empowerment. Women and Movement Politics in India*, (Westview Press, Boulder, 1992). Madhu Kishwar described how it was only after the emergency that the women's movement developed “a more comprehensive and articulated perspective on the steady discrimination against women through the forces of the market and state policy”. See 'Annexure II - Summaries of Special Lectures' in Sethi Harsh, *Refocussing Praxis; Report of the UNU-UNDP Interaction Programme for Senior Action Researchers in South Asia*, (A SETU-Lokayan Report, 1987), 57-60 at 57.

⁷⁰ Kothari, Rajni, *Politics and People. In Search of a Humane India, Volume I*, (Ajanta Publications, Delhi, second edition, 1990) at 397.

⁷¹ 'The Grassroots Phenomenon' in Kothari, Rajni, *Politics and the People. In Search of a Humane India, Volume II*, (Ajanta Publications, Delhi, second edition, 1990), 401-413 at 402.

⁷² Dhavan, Rajeev, 'Managing Legal Activism: Reflecting on India's Legal Aid Programme', (unpublished paper, 1984) at 25.

an ontological nature, such as the rights of unborn generations.⁷³

The key choices of such groups, as identified by Upendra Baxi, were between reformism and revolution, autonomy and accountability, violence and non-violence, youth and age, direct action and law.⁷⁴ These theoretical and practical organisational dilemmas were to suffuse the concerns about the resort to law and compromises necessitated by the legal system.

For many Indian marxists, who formed a significant part of the civil liberties groups and participated in the new politics, law could do little more than expose the contradiction between the rhetoric and reality of the constitutional scheme. Using PIL could perhaps speed this process. For them, and for others, using the Constitution was akin to accepting the compromises made at the time of independence. Nonetheless, having witnessed the abuse of constitutional powers, and the strength of law as a tool of this legitimacy, it was recognised that a resort to legal measures might be apposite, indeed the only viable option given the violent means that had been used by the state to quell dissent (both in terms of physical and institutional violence).⁷⁵ It was hoped that the courts would provide an opportunity to participate in democratic processes, which had previously been denied in practice, consequently closing the gap between the ethics and legality. PIL was thus a social rather than a legal activity,⁷⁶ as the social costs of other forms of dissent had proved too costly. Implicit were choices for reformism, non-violence and law. The question of accountability was to arise later.

⁷³ Sethi, Harsh, 'Report on the Meeting: The Discussions' in Sethi Harsh (1987), 17-42 at 30.

⁷⁴ Baxi, Upendra 'Activism at the Crossroads with Signposts' in Fernandes Walter (ed), *Voluntary Action and Government Control*, (Indian Social Institute monograph series, New Delhi, 1986), 35-49 at 40-47.

⁷⁵ Rajni Kothari, referring to the anticipated model in which the state played a dominant role, attributed the discussion of voluntary organisation to the reappraisal of the role of the state:

Not just the ruling party and the government, but even the radicals, including the Marxists, whose theory told them that the State was the executive committee of the ruling class, believed that in India the State had to take on a pioneering, regenerating and liberating role. And, except for a few albeit strong sceptics, even the Gandhians accepted this assumption.

'Voluntary Organisations in a Plural Society' in Kothari, Rajni (Volume II, 1990), 414-434 at 414.

⁷⁶ Dhavan, Rajeev (unpublished, 1984) at 24.

The ascription of causation when analysing the use of law by activist groups must not be overstated. In particular, many of the activist groups had emerged as a response to social conditions. To attribute a formal vision of law and its potentialities to these groups would be impossible. It is only through the experience of using law, from the difficulties that they were to encounter, that a vision of what law could achieve was gained. One of the most striking features of PIL is the naivety with which law had been used. It was perceived by petitioners and legal professionals that recourse to the courts could redress wrongs and correct injustices. While the gap between legal discourse and reality was acknowledged, the distance between the two did not seem unbridgeable.

Other groups that had not emerged from the political left, nor from the student and other social movements that had burgeoned after the emergency, were pivotal at this time. Law was a central concern of the new public interest groups that had begun to gain momentum. The impetus for the Consumer Education and Research Centre in Ahmedabad was not a concern for civil rights or poverty, but rather for those issues which had been dealt with under PIL in the USA.⁷⁷ These new public interest groups were to become increasingly visible users of PIL. However, what was remarkable about all the groups that emerged was the convergence of interest in the late 1970's. The concerns about how law should be used, and by what means, characterised the groups and was to be reflected in the eventual successes and failures of PIL.

Media

The expansion of investigative journalism after the emergency period, promoted the recognition given to the issues that became the subject of PILs.⁷⁸ During

⁷⁷ Manubhai Shah, Consumer Education and Research Centre, interview, Ahmedabad, 17/2/91.

⁷⁸ For a critical study of the press in India see Dhavan, Rajeev, *Only the Good News*, (Manohar Publications, New Delhi, 1987).

the emergency, press freedom had been curtailed through a number of censorship orders and the enactment of the Prevention of Publication of Objectionable Matter Act, 1976.⁷⁹ Petitions had been filed, for example in the Bombay High Court, in an attempt to uphold the freedom of the press.⁸⁰ Many journalists had been imprisoned.⁸¹ Although influential, the post emergency press has been criticised for its eclecticism:

In an effort to claim their own power and find social and political status for a core of journalists, the press entered into mindless exposure. It did everything and nothing.⁸²

Citing Arun Shourie as an example, Rajeev Dhavan questioned whether he was trying to protect the institutions of democracy, or to assert his animosity for Indira Gandhi.⁸³

Whatever the impetus, it was the breadth of reporting and the growth of investigative journalism, after the emergency, that led to many PIL cases. Upendra Baxi in his early seminal study of PIL has taken a more sympathetic view, when he described the realisation amongst journalists that the curtailment of civil liberties under the emergency was analogous to the every day excesses of state power on citizens:

this print media transformation enabled activist social action groups .. to elevate what were regarded as petty instances of injustice and tyranny at the local level into national issues, calling attention to the pathology of public and dominant power group.⁸⁴

⁷⁹ See Sorabjee, Soli J, *The Emergency, Censorship and the Press in India, 1975-1977*, (Central News Agency, New Delhi, 1977); Sorabjee, Soli J, *Law of Press Censorship in India*, (N M Tripathi Pvt Ltd, Bombay, 1976).

⁸⁰ See *Binod Rao v Minocher Rustom Masani* (1976) 78 BLR 125 and *Shridhar Mahadeo Joshi v The State of Maharashtra* (1976) 79 BLR 289. For a citation of a petition filed by journalists, see *N P Nathwani op cit* note 46.

⁸¹ Dhavan, Rajeev (1987) at 57.

⁸² *Ibid.* at 8.

⁸³ *Ibid.* at 60.

⁸⁴ Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Baxi, Upendra (ed) (1988), 387-415 at 394. Also see [anon], 'Special Report: Press on Regardless or, how the Indian media pioneered the concept of public interest litigation', *The Sunday Times of India*, 6/9/92.

Press reports were to motivate the filing of petitions by journalists,⁸⁵ lawyers,⁸⁶ judges⁸⁷ and concerned individuals. Prisoners, bonded labourers and women were among those to be given attention in the print media.⁸⁸ In addition, the extra impetus given to social movements, such as the women's movement, by the publication of specialist journals including *Stree Sangarsh* and *Manushi*, were to provide support, exposure and a forum for the discussion of PIL.⁸⁹

Funding

The viability of PIL was shaped, in part, by the money available. While some lawyers did consent to work free and relaxed procedures enabled petitions to be filed without charge, especially for activist groups working in rural areas, the burden of the cost of PIL was debilitating. While the increase in legal aid funding through CILAS did enable some groups to use PIL, attempts by Rajeev Dhavan to establish a PIL cell as a part of CILAS in 1982 were unsuccessful.⁹⁰ Financial issues were important in the courtroom, in the appointment of lawyers to work *amicus curiae* and in the award and disbursement of costs. These costs, especially those rendered for the conduct of an investigation or to commissioners, were paid for by the government. As

⁸⁵ Arun Shourie, a prominent journalist of the time petitioned the Court and discussed the need for PIL in Shourie, Arun, 'Aide-memoir for the Hon'ble Supreme Court. On Why the Hon'ble Court Must Hear Us', (1981) 4 SCC (J) 1. As noted in chapters three and four, numerous other PIL petitions were filed by journalists.

⁸⁶ It was K F Rustamji's articles in the Indian Express of 8/1/79 and 9/1/79 that were to prompt Kapila Hingorani to file the case *Hussainara Khatoon and others v Home Secretary, State of Bihar* (1980) 1 SCC 81. Many others were to follow.

⁸⁷ *Suo moto* actions were usually prompted by newspaper reports.

⁸⁸ See for example, Mazumdar, Sudip, 'Undertrials: a living hell', *Seminar*, Oct 1984, 14-17. This was published as part of an issue entitled "Lawless Laws" and described as a symposium on the misuse of the judicial process'.

⁸⁹ The section on 'Injustices Specific to Women' in chapter three documents cases which were discussed in these journals.

⁹⁰ Chot Murada, Committee for the implementation of Legal Aid Services, interview, New Delhi, 12/3/91. See 'Alternatives and Corollary Innovations' *infra*.

a result of the limited finances available for PIL, the most controversial and widespread support for activism in general, and PIL in particular, came in the form of foreign funding.

Amongst the foreign foundations and organisations working in India, the Ford Foundation, a North American philanthropic organisation, has been the most visible in the funding of action groups using law. Funding of this nature had begun with programmes in the USA, for example when, in 1964, the Ford Foundation funded legal services in its Mobilisation for Youth in New York and in 1970 when it began to support PIL firms.⁹¹ Beginning its work in India, this foundation initially focused on developments in the USA as a justification for encouraging legal activism in India. One of the first recipients of funds by an organisation which was to enable the creative use of law, was given to the Consumer Education and Research Centre in Ahmedabad, after Manubhai Shah had convinced funding officers of the viability of his proposed legal strategy by citing USA legal decisions.⁹² The appointment of R Sudarshan to the Foundation, in the mid 1980's, was to remove much of the remaining inhibition for the funding of social action groups within the funding mandate.

Along with the funding of groups, support was forthcoming through the funding of conferences, which enabled groups of social activists to meet and discuss the potentialities in law. Justice P N Bhagwati and Upendra Baxi were amongst those who sought to promote PIL in this manner. In 1981 CILAS held a meeting which encouraged PIL petitions.⁹³ Other conferences were organised by the International Commission for Jurists⁹⁴ and the Ford Foundation.⁹⁵ Rajeev Dhavan, who has attended

⁹¹ See Handler, Joel; Hollingsworth, Ellen Jane and Erlanger, Howard S (1978).

⁹² Manubhai Shah, Consumer Education and Research Centre, interview, Ahmedabad, 17/2/91.

⁹³ Prem Bhai, Banwasi Seva Ashram, New Delhi, 9/4/92. See 'Access to Justice' in chapter two for details.

⁹⁴ 'Rural Development and Human Rights in South Asia' held in Lucknow in December 1981.

⁹⁵ 'International Workshop on Effective Uses of Law by Social Action Groups' held in Ahmedabad, from December 1981 to January 1982.

many of these meetings observed that although they recognised common issues:

many of the groups had very little in common. They differed greatly in the nature and style of their operations. They differed in respect of the comfort and discomfort they suffered and the danger they courted. While adopting the perspective of the disadvantaged, they differed in their relation to activist work. Their political alliances reflected gravitational pulls which gave rise to mutual suspicion and doubt.⁹⁶

Divisions emerged not just amongst those groups which were attending the conferences and receiving the funding, but within the broader human rights movement. Civil liberties groups, in particular, refused to take funds from foreign organisations or large corporations, for fear of being drawn into a spiral of expenditure that would compel them to shape their activities in a manner that would ensure further funds. Financial resources would equip an office and pay staff, and would mean that the recipient would be under pressure to ensure that funding continues. One example given was that once a computer is installed, money is needed at regular intervals to pay for air-conditioning. The administration of the funds would require an establishment capable of producing financial and progress reports, and of submitting repeat requests for funds. Underlying this was the fear that the mandate of funding agencies would support a particular kind of activism, ignoring certain difficult and politically sensitive issues. Many organisations felt insecure at not being able to dictate the conditionality of funding, and those that did receive funding were often dependent on the brokers, the main players in PIL in New Delhi, who had a personal relationship with the funders. The extent to which the form and substance of PIL in India has been led by the resources was to remain a subject of controversy. However, many of those groups that petitioned the Court from an organisational base, had to rely, initially, on the arbitrary method of sending a letter to the court (see chapter five), before later gaining the attention of a funding agency, and building a stronger organisational base.

⁹⁶ Dhavan, Rajeev (unpublished, 1984) at 29.

PIL Continues

The experience of using PIL after the mid-1980's warrants separate analysis. The constitution of the courts changed, lawyers' initial excitement at being involved in a new form of litigation waned, and the aspirations of petitioners were informed by the experience gained during the early part of the decade. V M Tarkunde, a civil liberties lawyer, described the changes:

For some time, there was a good deal of optimism because of this method of raising public issues. ... we are increasingly coming up against a sort of dead wall. If you are able to induce a court to give some compensation or relief, then people's interest is redeemed. More often now, there are investigations and nothing happens.⁹⁷

As with the former section, the involvement of 'Judges' is first discussed. The evaluation of 'Lawyers' involvement with PIL leads into the evaluation of 'Petitioners and Petitions'. The involvement of the 'Media' and aspects of 'Funding', after the establishment of PIL, complete this section.

Judges

The judicial response to PIL has changed and evolved over time. After the retirement of Chief Justice Bhagwati from the Supreme Court in 1986, few significant developments to further the cause of the activist, through PIL, have taken place in the Supreme Court.⁹⁸ Continuing support for social justice initiatives can be found in the High Court: Justice P D Desai was a known supporter of PIL during his

⁹⁷ Kothari, Smitu, 'An Interview with V.M. Tarkunde' in Kothari Smitu and Sethi, Harsh (eds), 133-149 at 145-146. This reply was in response to the question: "How do you view, particularly in the 1980s, the recourse to public interest litigation?"

⁹⁸ Compensation has been given more freely and greater access to justice achieved through the increased use of class action petitions.

tenure as Chief Justice of the Himachal Pradesh High Court, from 1983 to 1988,⁹⁹ Justice Hansaria was known for his support for PIL when in Assam.¹⁰⁰ Nonetheless, judgments of the Supreme Court show how the conceptual base of PIL has been further elucidated only in an effort to restrain its scope. Writing in 1987, Justice Bhagwati noted the reaction of many judges to the appointment of socio-legal commissions of enquiry:

This new strategy evolved by the Supreme Court was unorthodox and unconventional. It shocked the conscience of conservative lawyers and judges clinging to the worn-out values of Anglo-Saxon jurisprudence. They thought that what the Court was doing was heretical¹⁰¹

Judges faithful to the Anglo-Indian tradition were to remain in the majority on the Court, as Judges who might further the initiatives of the early 1980s were no longer appointed. One significant influence of PIL has been the effect upon judicial discourse. As seen in the case studies, the parameters of PIL have been refined. In interviews conducted in 1991,¹⁰² the reaction of sitting Supreme Court judges to questions about PIL was marked by rhetorical support, showing that PIL has gained a semblance of acceptability even amongst conservative judges.¹⁰³

As part of this support, all the judges described PIL as necessary to ensure justice was made available to the poor, and were in favour of the relaxation in the rule of *locus standi*. In spite of this sentiment, with the exception of two judges, there was little clarity about the origins of PIL, as a variety of different cases were

⁹⁹ See the discussion of Himachal Pradesh in chapter five.

¹⁰⁰ Niloy Dutta, advocate, interview, Guwahati, 8/6/93. Upendra Baxi also observed that wherever Justice Hansaria and Justice P D Desai are, they are progressive. Upendra Baxi, Vice-Chancellor of Delhi University, Delhi, 5/8/93. See 'High Courts' in chapter five.

¹⁰¹ Bhagwati, P N, 'Social Action Litigation: the Indian Experience' in Tiruchelvam, Neelam and Coomaraswamy, Radhika (eds) (1987), 20-31 at 25.

¹⁰² The identity of the eighteen sitting judges of the Supreme Court (total number of sitting judges at that time equalled twenty-five) interviewed between January and March 1991 has been withheld, as this was a condition of the conduct of the interviews.

¹⁰³ Eighteen of the twenty-four judges sitting on the Supreme Court were interviewed between January and March 1991. References to these interviews are given in code. For an example of the interviewing style of judges see Mitta, Manoj, 'Interview of the Fortnight: M N Venkatachaliah "All mercy is no justice"', *India Today*, 15/11/94, 42-44.

cited as the starting point. Similarly, there was little clarity as to the import of PIL. In response to an initial question about why PIL emerged, one judge asked “what did Justice Bhagwati say?”. Half of those interviewed were supportive of the other procedural innovations, such as the registration of letters as writ petitions and the institution of commissions. One judge was enthusiastic about PIL, to the extent that he stated that 95% of cases have had a good result.

Having expressed their support for PIL as a concept, other judges displayed a reluctant antagonism to PIL during interview. A hesitation to speak openly was apparent even in those judges who have demonstrated a hostility to PIL in their judgments. It was felt that PIL was interfering with the functioning of the Court as part of the constitutional scheme and as the upholder of the rule of law. The perceived fear that an undue burden was being placed on the Court was repeatedly voiced. The need for a formal definition of PIL was a theme that recurred as some judges no longer seemed willing to allow PIL to evolve according to the kind of petitions which were filed. PIL was perceived as messy, petty and lacking in legal depth. One judge laughed whilst referring to a petition asking that fluoride be banned from toothpaste, whilst another said:

PIL is also known as “Publicity Interest Litigation” .. Yesterday there was a person in court trying to stop the elections. It was a publicity stunt as that person wanted his name in the paper. Also there are a lot of unverified claims, for example about bonded labour. PIL is useful, for example to counter pollution in Delhi, but not for individual fights and not in adversarial cases. When the court gets a complaint about bonded labour, and investigation takes place, it is found that the workers are working voluntarily.¹⁰⁴

Some were concerned about the Court as a non-partisan institution which was succumbing to popular pressures:

The US Supreme Court and the House of Lords [in Britain] are effective because they are inaccessible. First an attempt to resolve the issue is made through lobbying and then through negotiation and compromise. Only then is a suit presented to the District Court. If and when it does reach the Supreme Court in the US it is not a live issue. The court has time to think in a balanced state of mind because the

¹⁰⁴ Justice AH2 in interview.

apex court is not controversial.¹⁰⁵

The fissures that had emerged in the Court in the early 1980's seemed to have become entrenched. While some were unequivocally supportive of PIL, others criticised the judicial response. The pride with which one judge told of his own involvement is noteworthy:

When I was Chief Justice in ____ I was entering the court and saw a woman distraught and crying. I stopped and asked her what the problem was. I often used to stop on the way to court in this way. She said that her husband and sons had been taken by the police and killed. I took her to the registrar where she filed a petition. As a result of this case from ____, ten police officers have been suspended and committed for trial. This judgement has had a salutary effect in all of the State of _____. One order has made the police more careful in handling people in custody.¹⁰⁶

When juxtaposed with the criticism that “everything is now a PIL”, and the repeated reservations expressed about the extent of PIL, the tensions within the bench are illustrated:

Before a Supreme Court judge would have a conservative outlook on PIL but in the Supreme Court with the problems of the country the philosophy and outlook of the court has been transformed. Great judges, of whom Bhagwati contributed the most, have sometimes gone too far in this direction. A balanced view is needed; it is not the court's function to take up the job of the executive¹⁰⁷

The concern about the use of PIL that has been articulated, has appeared in the form of concern about the parameters of judicial review, and the misuse of PIL, as seen in the case studies in chapters three and four.

It is possible that the judges were especially cautious in their responses because of the corruption charges that had been directed against Justice V Ramaswami

¹⁰⁵ Justice NK1 in interview.

¹⁰⁶ Justice AS1 in interview.

¹⁰⁷ Justice HN1 in interview.

at the time at which the interviews took place.¹⁰⁸ Reports about judicial corruption are inextricably linked to the tactics employed by lawyers. A list of corrupt practices compiled by a reader in psychology listed fourteen ways in which judges could exercise their discretion for unscrupulous ends.¹⁰⁹ Covert judicial manoeuvres compound the discord, and as Upendra Baxi noted in 1988, Justice Pathak's reservations in the leading bonded labour case,¹¹⁰ provides "a ruling idiom for governance of SAL" as the Court errs on the side of caution.¹¹¹ In a later article he went on to note:

care has been taken to ensure that the powerful dissident articulation of the violation of human rights in planning and development becomes an occasional rather than a growing permanent feature of judicial discourse; persons suspected of even remote tendencies towards activism are to be kept away from the high Bench.¹¹²

Changes on the bench have occurred, as the numbers of women judges on the High Courts have increased.¹¹³ Some judges with a stated concern for social justice continue to be appointed, as the considerations for appointment do allow for those who, whilst displaying judicial statesmanship and integrity, articulate their concern effectively. This concern has manifested itself in efforts to limit the misuse of PIL through judicial discourse.

¹⁰⁸ Chengappa, Raj and Rahman, M, 'Special Report: The Judiciary. Crisis of Credibility', *India Today*, 15/7/90, 18-23. Although a sitting judge, during the interview period Justice Ramaswami was not active, and there was much consternation about the events as they unfolded. See 'Judges, Courts, Lawyers' in chapter four.

¹⁰⁹ See [anon], 'Adalat Antics: Corruption Check-List', *The Lawyers*, Vol 6 No 2, Feb 1991, 32. The lists includes 'statutory provisions in favour of disfavoured party are overlooked'.

¹¹⁰ *Bandhua Mukti Morcha v Union of India and others* (Haryana Mines I) AIR 1984 SC 802, as discussed in 'Bonded Labour' in chapter three.

¹¹¹ Baxi, Upendra, 'Taking Suffering Seriously' in Baxi, Upendra (ed) (1988), 387-415 at 413.

¹¹² Baxi (1991) at 83-4.

¹¹³ See Keshwaar, Sanober, 'Women Judges. Who will make it to the Supreme Court?', *The Lawyers*, Vol 3 No 1, Jan 1988, 4-10. Nonetheless, only 2.8% of all Supreme Court and High Court judges were women, according to Government statistics published in 1988 and quoted in Agarwal, Bina (1994) at 499.

There appears to be little change in the social background of judges, who have been appointed. In a judgment in 1993, Justice S Ratnavel Pandian referred to tables showing the poor representation of scheduled castes, scheduled tribes, other backward classes and women on the benches of the High Courts,¹¹⁴ stating:

the right of entry into superior judicial office is not the exclusive prerogative or any particular coterie or privileged class or group of people. ... it is neither inheritable nor a matter of patronage.¹¹⁵

The patronage in judicial appointments has been shown to extend to the judicial function. Part of the growing concern over judicial corruption has highlighted prevalent nepotism. It has been alleged that in several High Courts, almost half of the judges have children or close relatives practising in the Court,¹¹⁶ whilst efforts by the bar to entertain sitting judges has become commonplace.¹¹⁷ The cases on 'Judges, Courts, Lawyers' (in chapter four) illustrate the concern about the judiciary, whilst also demonstrating the willingness of judges to use PIL for their own welfare.

Judges have been able to secure privileges outside of the courtroom. The use of sitting judges on commissions, appointed to investigate in PIL matters, or by the Government, has caused concern. J S Gandhi noted that such appointments could amount to political investments in these judges and an exchange of favours.¹¹⁸ The timing of some appointments is noteworthy - one judge was appointed as the

¹¹⁴ 'Statement in reply to parts (a), (b), (c) & (d) of Lok Sabha Unstarred Question No.4742 for 31.3.93 regarding sanctioned strength of Judges in High Courts and Supreme Court' and 'Statement in reply to parts (a) & (b) of Lok Sabha Unstarred Question No.1410 for Answer on 4th August, 1993', quoted in *Supreme Court Advocates-on-Record Association and another v Union of India* 1993 (1) SCALE 111 [658] at 141-2, as discussed in 'Judges, Courts, Lawyers' in chapter four.

¹¹⁵ *Ibid.* at 140.

¹¹⁶ Jaising, Indira, 'All in the Family', *The Lawyers*, Vol 8 No 10, Nov 1993, 22.

¹¹⁷ See issues of *The Lawyers* and Mahajan, Krishan, 'Legal Perspectives: Whisky Judiciary', *Hindustan Times*, 14/4/86.

¹¹⁸ Gandhi, J S (1987) at 24. Similar concerns have been expressed by others - see Jaising, Indira, 'Editorial. Fairfax Enquiry', *The Lawyers*, Vol 2 No 4, Apr 1987, 2. It is interesting to note that very soon after he completed the one-person enquiry into the Nadiad incident, Justice Sahai was appointed to the Supreme Court - see *Delhi Judicial Service Association, Tis Hazari Court, New Delhi v State of Gujarat and others* 1989 (2) SCALE [748], as discussed in 'Judges, Courts, Lawyers' in chapter four.

chairperson of a court-appointed commission soon after he retired from the bench.¹¹⁹ This allowed him to retain his official residence and the other benefits that accrue to sitting judges. Others who have supported PIL have gained much from their time on the bench. The “bio-data” of Justice Bhagwati testifies to his innovations while he was a sitting judge.¹²⁰

Lawyers

As more and more PIL petitions were filed, the involvement of lawyers increased. Many who became involved in PIL did so with little lasting commitment to social change through law, but with an eagerness to be involved in any new legal changes or merely as a method of gaining experience.¹²¹ In some High Courts, Kerala for example, PIL was often used by petitioner-lawyers for the experience, publicity and status it would bring. Others, while concerned with the issue and able to mobilise the Court into action, have had little direct connection with activist groups.¹²² With little or no accountability, the attention of many has been diverted to more lucrative matters. For a few, the realistic expectation of what law can achieve, and a lasting commitment to a particular group of people or issue, has determined the experience

¹¹⁹ *M C Mehta v Union of India & Ors* (air pollution of Delhi - vehicles and industries) 1991 (1) SCALE 104 [427], as discussed in 'Environment and Resources' in chapter four.

¹²⁰ In addition to the honours and awards, the numerous public service activities listed include member of and International Labour Organisation Committee, and chairman of the South Asian Task Force on the judiciary.

¹²¹ To quote from Upendra Baxi:

Lawyers only rhetorically stress outside and inside court rooms their role obligations in the achievement of the values of justice, equality and dignity for the most depressed and exploited classes in modern India. But there are plenty of seminar and symposia documents in which lawyers continue to dwell upon their favourite self and collective images as agents of social change.

Baxi, Upendra, *Towards a Sociology of Indian Law*, (Satvahan, New Delhi, 1986) at 113.

¹²² Individual lawyers such as M C Mehta have gained credibility as public interest lawyers because of the kinds of judgments gained in petitions filed and, latterly, his involvement with environmental action groups.

of lawyering for social change.¹²³ It is these lawyers, committed to a different vision of society, for whom PIL was to prove to be a microcosm of all the problems they had with the system of law.

The Lawyer's Collective, a group of lawyers in Bombay, emerged as a unique participant in PIL. Unlike lawyers working for other organisations, such as the PUCL and PUDR, members of the collective share a framework, refusing, for example, to take the case of an employer against an employee.¹²⁴ The magazine, *The Lawyers*, was first published by the collective in 1986, as a distinctive alternative to legal journalism and analysis.¹²⁵ It was this magazine that first exposed the corrupt practices of Supreme Court judge, Justice V Ramaswami, whilst providing a forum for the critical discussion of law and its potential for the activist. Like those in the collective, other lawyers, such as R Venkataramani of the Supreme Court, have established links with activist groups, from whom most of their practice comes. Few of these advocates are designated seniors, some preferring the status of advocate-on-record because of the direct access it gives to procedural matters.

The paradox of the lawyer working in this way is found in the form that legal practice takes. This has been described as a vicious circle because “the good lawyer is busy and the bad lawyer is not busy”.¹²⁶ Although the case studies have shown that the rhetoric of conciliation is often just that, the lawyer has remained preoccupied with the rhetorical support for issues raised in PIL petitions.¹²⁷ The need to establish credibility on the bar and bench, by learning courtcraft, dressing and

¹²³ For a discussion of litigating lawyers in the USA see Tigar, Michael and Levy, Madelaine, *Law and the Rise of Capitalism*, (Monthly Review Press, New York, 1977) at 328-9.

¹²⁴ Gandhi, J S (1987) at 150.

¹²⁵ Other journals, such as *Legal Perspectives*, published by Legal Resources for Social Action in Tamil Nadu, were a part of this effort.

¹²⁶ Lotika Sarkar, Centre for Women and Development Studies, interview, New Delhi, 22/1/91.

¹²⁷ A notable exception is the legal strategy employed by Indira Jaising in *Bombay Hawkers' Union and others v Bombay Municipal Corporation* AIR 1985 SC 1206 and *Olga Tellis and others v Bombay Municipal Corporation and others* AIR 1986 SC 180, as discussed in the section 'Urban Space' in chapter four.

speaking as a lawyer does, and by maintaining contacts, limits the involvement and empathy of the lawyer with the activist or those represented by the petitions filed.¹²⁸ Courtcraft encompasses the ability to manipulate the legal system to the benefit of a client, through its procedures (including the procurement of stay orders or adjournments), and by fostering interpersonal relationships with judges, registry staff and other lawyers.¹²⁹ For example, the ability to keep a petition pending is considered important, as this ensures that there is some form of redress, and that the remedy may be monitored. However, the composition of the judiciary and the bar, the orientation towards litigation strategies, and the process of the petition through the Court, limits the perceived transformative potential in law.¹³⁰ Marc Galanter's observation that lawyers are more concerned with discrete claims than a more wide-ranging selection of legal services, is also relevant for PIL.¹³¹

Petitioners and Petitions

The issues of concern to the petitioner who has filed a PIL petition are dependent upon the kind of petitioner and the nature of the issue brought to court. Increasing numbers of groups and individuals began to notice the possibilities and petition the Court.¹³² For example, public interest groups and environmental groups became important participants and individuals such as Sheela Barse and Rajendran,

¹²⁸ Efforts are made to circumvent the demands of professionalism by taking care over the location of the office, and ensuring that lawyers maintain an informal demeanour and dress when out of court. For example, A X Verghese is perhaps the only lawyer practising in the Kerala High Court at Ernakulam, whose office, Niyamavedi, is located in the old city of Cochin.

¹²⁹ See 'Petitions and Petitioners' below.

¹³⁰ As much of the bar functions according to parochial patronage, advocates from less represented groups such as women or tribal people, have encountered unique problems in managing the system. Only 3.6 per cent of advocates registered in the state bar councils in 1985 were women, according to Government of India statistics published in 1988, and quoted in Agarwal, Bina (1994) at 499. Some have concentrated on impact litigation, individual claims and conciliation.

¹³¹ See Galanter, Marc, 'New Patterns of Legal Services in India' in Galanter, Marc (1989), 279-294.

¹³² Alternative fora were provided, through the Consumer Protection Act, 1986, to groups, such as Common Cause, concerned with consumer protection.

activists working alone rather than within organisations, have filed numerous petitions. Although a number of petitions have been filed relating to the election process or to politicians, many have been concerned with the public interest, as interpreted spaciouly. The perception that certain cases, such as the Bofors litigation,¹³³ amount to the abuse of PIL and its appropriation for private causes, is evident:

Enlargement of the court's jurisdiction in the form of public interest litigation has given rise to proxy litigation where the litigants misuse the judicial process for personal gain, private profit or political or other oblique considerations.¹³⁴

Petitions concerned with the use of urban land use and the impeachment of Justice V Ramaswami,¹³⁵ and the case of *Sachidanand Pandey and another v State of West Bengal and others*,¹³⁶ have reinforced this perception. Lawyers have echoed this concern about the use of PIL by proxy for those representing private interests.¹³⁷

Jamie Cassels, in her study of PIL, noted that strategic considerations militate against litigative strategies aimed at social change.¹³⁸ The considerations she noted included the composition and ideology of the judiciary, the costs of litigation, and the unequal distribution of legal resources. The efficiency of PIL as a remedy for social ills has to be examined in relation to the progress of a petition through the court. The relationship of petitioners with the Court as an institution, as with lawyers and judges, is largely a function of structural and substantive problems encountered during

¹³³ See *Janata Dal v H S Chowdhary & Ors* 1991 (2) SCALE 71 [400], as discussed in 'Public Policy and Administration' in chapter four.

¹³⁴ [anon], 'Proxy litigation', *Hindustan Times*, 27/1/92.

¹³⁵ See 'Judges, Courts, Lawyers' in chapter four and Anthony, M J, 'Fighting private battles through public interest', *Business and Political Observer*, 8/1/91; Mitta, Manoj, 'From Public to Proxy', *The Sunday Times of India*, 6/9/92.

¹³⁶ AIR 1987 SC 1109, as discussed in 'Urban Space' in chapter four. This case is widely understood to be a cover for continued corporate rivalry between two major hotel chains.

¹³⁷ See Mitta, Manoj, 'From Public to Proxy', *The Sunday Times of India*, 6/9/92 in which he notes: Interestingly, perhaps ironically, senior advocate Kapil Sibal, who is himself criticised in legal circles for representing Krishna Swami, asserts that 90 per cent of the so-called PIL cases are not genuine.

¹³⁸ Cassels, Jamie (1989) at 496.

the pendency of a petition, and have informed the expectation of what can be achieved through PIL. The case studies in chapters three and four have indicated the different stages of concern to the petitioner. While it is these stages that are addressed here, the study of petitioners is restricted to those who have mobilised law in an attempt to bring about change as envisaged by Social Action Litigation.¹³⁹

The potential for direct access to the higher judiciary, relatively quick procedures and low costs, and the exposure of an issue in the media have determined the initial choice of using the forum of the Supreme Court or a High Court. In the absence of other fora on which to raise grievances, PIL provided a potential and seemingly viable solution. However, the very location of the courts has been inconvenient, if not obstructive. Those petitioners located at a distance have had to find legal representation in the relevant court, to expend time and money travelling and to negotiate with the demands of an urban metropolitan environment.¹⁴⁰ In the early days of PIL, when judges of the Supreme Court were promoting PIL as a strategy of the activist, many petitions were filed there. With the establishment of PIL in the High Courts more petitions have been filed in the state concerned. This has been encouraged by an overburdened Supreme Court,¹⁴¹ and preferred by many activists. The latter's preference has been influenced by the level of acceptance that PIL has gained in a High Court, the potential for an appeal, the generation of local publicity and awareness, and relative proximity to the site of the Court.

Framing an issue for legal resolution has often involved a compromise, as judges can only recognise legal wrongs. Legal needs have been described as:

¹³⁹ When PIL is used as a relatively accessible substitute for other ways of gaining access to justice, fewer insights can be gained about law and social change.

¹⁴⁰ The importance of the cost of the litigation and the hidden costs to petitioners who lose earnings cannot be underestimated. For example see 'Costs of (In)justice' in 'Legal System Judiciary and Democratic Rights; Papers for Second Annual Convention, January 23, 1983', (People's Union for Democratic Rights, Delhi) in which it was stated:

The minimum expenditure has to be incurred if one is approaching the Court is certainly above the government defined poverty line.

¹⁴¹ For example, see *In Re the Petitions of Nawal Thakur, a convict kept in the Kulu Jail* (1984) 3 SCC 572, as discussed in 'Prisons and State Institutions' in chapter three.

social constructs composed of a perception first, that something is wrong and, second, that what is wrong ought to be corrected through the legal system ... the final step is to persuade the sources of the law - courts, agencies, or legislatures - the need should be officially recognised as such.¹⁴²

The gap between incidence of injustice and its construct in terms of the law is the first essential step that has reverberated throughout the experience of using PIL. The conversion of the collective into the individual,¹⁴³ of the broad framework of an injustice into particularised legal norms,¹⁴⁴ and of the unrealistic into the manageable,¹⁴⁵ is repeatedly seen. For many, expediency has determined the form which a petition takes. One lawyer described how he would only file petitions relating to the resettlement and rehabilitation of project affected people, rather than challenge the project itself, because of the Court's anticipated sympathies.¹⁴⁶ The decision, by activist groups, to use PIL has presented lawyers with additional challenges. How much can a client be involved in making decisions that are critical to the progression of the litigation; how much room is there for discussion when, to an extent, the law dictates the possibilities?

Different perceptions of the essence of an injustice have added to the limitations of legal language. The conflict that arose between the petitioners in the seminal case of the Bombay slum dwellers¹⁴⁷ graphically illustrates this potential for disagreement amongst those working for human rights. For advocate Indira Jaising, the plea that there is a fundamental right to live on the pavement was non-negotiable,

¹⁴² Handler, Joel; Hollingsworth, Ellen Jane and Erlanger, Howard S (1978) at 185.

¹⁴³ Madhu Kishwar, Manushi, New Delhi, 12/1/91. She referred to case of the women of the Ho Tribe, as discussed in 'Injustices Specific to Women' in chapter three.

¹⁴⁴ Vijay Kumar, Tarun Bharat Sangh, New Delhi, 3/3/92 referred to such problems in *Tarun Bharat Sangh, Alwar v Union of India and others* AIR 1992 SC 514, as discussed in 'Environment and Resources' in chapter four.

¹⁴⁵ Pradip Prabhu, Kastkari Sangathana, Maharashtra, 27/3/93 spoke of the problems associated with cases filed on forest and tribal lands in Maharashtra, as discussed in 'Environment and Resources' in chapter four.

¹⁴⁶ Jose Verghese, advocate, New Delhi, 25/2/92.

¹⁴⁷ *Olga Tellis op cit* note 127.

despite the anticipated unresponsiveness of the Court to this plea which was later borne out.¹⁴⁸

PIL petitions, usually having been filed through an advocate and exempted from Court fees, have been readily admitted for hearing by the Court.¹⁴⁹ Even if admitted and listed for hearing, the petitioners, far from having their grievance addressed with some compassion, have been thrown into the fray of adversarial proceedings. The credibility of some, otherwise well-respected, petitioners has been questioned¹⁵⁰ and the veracity of claims has been questioned in a peremptory fashion. In 1992, the Advocate-General himself stated that:

From the Government we do not treat PIL as different. We have no special guidelines, values or procedures for a PIL. .. The Law Ministry has no business to have a department for PIL, there is no need or scope for funding of PIL. As a concept, it is like any other litigation.¹⁵¹

As with most petitions filed in the higher courts, the passage of a case is checkered with numerous applications. Usually filed along with the main petition

¹⁴⁸ This echoes the fragmented nature of activism, that had been implied by Upendra Baxi and discussed by Rajni Kothari:

in the case of these non-party political formations, the fragmentation is of a dual type: by focussing their energy on discrete micro settings they remain at a big remove from the macro processes of transformation, and even within the micro movements they remain isolated and alienated from each other. ... lacking in a larger comprehension and vision that could at once consolidate arenas of struggle and bring them together under a common banner and for a common goal. Without this larger perspective, it will not be possible to deal with the backlash from entrenched interests and classes which feel threatened but are not yet willing to negotiate structural changes in the distribution of power and access to resources and positions.

'The State, the People and the Intellectuals' in Kothari, Rajni (Volume II, 1990), 377-389 at 386-7.

¹⁴⁹ Instances where the Supreme Court has directed the petitioners to the High Court, or refused to admit the petition, on the grounds of *mala fides* or justiciability, have determined the parameters of "public interest" concern. See *Tehri Bandh Virodhi Sangharsh Samiti and others v State of U P and others* (1990) 2 Supp SCR 606, as discussed in the section on 'Environment and Resources' in chapter four.

¹⁵⁰ Referring to the litigation *Upendra Baxi op cit* note 2 co-petitioner Lotika Sarkar told how: during an Agra hearing state counsel claimed that myself and Upendra Baxi had been bribed by the landlord because he wanted the premises to be vacated. The Court issued strictures against the state counsel.

Lotika Sarkar, Centre for Women and Development Studies, New Delhi, 22/1/91. Sheela Barse faced similar problems with the petitions she had filed.

¹⁵¹ G Ramaswamy, Advocate General, New Delhi, 10/4/92.

is an application for immediate relief. Other applications filed during the pendency of the case are often used as a strategy to ensure that a petition is listed for hearing, by asking for directions from the Court in an interim order, or that the petition is monitored effectively. In this way, miscellaneous petitions are filed, including applications for modification or clarification of a court's order, amendment of a petition, impleadment or intervention. If it is felt that the respondent is disobeying the Court's orders, a contempt petition is filed.

Case documents provide unique insight into the lengthy process through which a petition travels.¹⁵² One petition filed by a women's group in June 1988, was listed before the Court eighteen times before the final judgment in December 1989.¹⁵³ The difficulties of arranging legal representation, the trauma of repeated delays and the sporadic support for a case from other organisations listed as petitioners, led an activist from the organisation to state "I would now think 100 times before going to court - its a terrible decision to make".¹⁵⁴ The case of the Agra Protective Home, filed by Upendra Baxi and Lotika Sarkar in 1981, tells a similar story, with forty-nine hearings up to April 1991, of which thirty were in 1981 and 1982.¹⁵⁵ The petitioners have expressed their appreciation that the petition was kept pending for monitoring, but fear the consequences of a final judgment. It was felt that conditions in the Home may deteriorate in the absence of supervision, and that the possibility of extending the litigation to other such homes would be lost.¹⁵⁶ In the case of the Bombay slum dwellers¹⁵⁷ filed 1981, there were twenty-five hearings before the judgment, one of which lasted for several days when arguments were heard. Organisational problems

¹⁵² All listing information is from the Registry of the Supreme Court of India and is correct up to March 1992. The information may not be exhaustive as it only records the documents available on file.

¹⁵³ *SAHELI, a Women's Resources Centre through Ms. Nalini Bhanot and others v Commissioner of Police, Delhi and others* AIR 1990 SC 513, as discussed in the section on 'Injustices Specific to Women' in chapter three.

¹⁵⁴ Elizabeth Vatsyayay, *Saheli*, New Delhi, 13/3/91.

¹⁵⁵ *Upendra Baxi op cit* note 2.

¹⁵⁶ Lotika Sarkar, Centre for Women and Development Studies, interview, New Delhi, 22/1/91.

¹⁵⁷ *Olga Tellis op cit* note 127.

were compounded as the legal protagonists were compelled to travel to Delhi for each hearing. It is not surprising that Bombay-based activist Sheela Barse attempted to withdraw her petition during the twenty-ninth hearing of the appeal in the Supreme Court, after there had been no improvement in the conditions in the children's home.¹⁵⁸

This lengthy process was found in all the available case documents. The first petition of the organisation Bandhua Mukti Morcha was filed in 1982. There were forty-one hearings up to June 1986, including one which lasted for thirteen days when arguments were heard. Thereafter the petition changed character as another petition, *Bandhua Mukti Morcha v State of Tamil Nadu*,¹⁵⁹ was tagged onto the earlier petitions. There were 30 more hearings up to September 1991.¹⁶⁰ In one case which the Court monitored over a number of years, there were eighty-three hearings between 1985 and January 1992,¹⁶¹ while in another there were forty-two hearings between 1986 and July 1991.¹⁶² In a petition filed regarding the resettlement and rehabilitation of people displaced because of the construction of a dam, there were ten hearings between 1985 and March 1986, after which it was pending. In the last order in the paperbook, of 4/2/86, the Supreme Court had issued directions and ordered that their implementation be monitored.¹⁶³ Despite a note attached to the petition, by the Registry, on 18/11/89 describing it as a “final hearing PIL matter”, the lawyer for the petitioner was glad that the petition had not been disposed of and a judgment given, saying that it is the

¹⁵⁸ See *Sheela Barse v Secretary, Children's Legal Aid Society and others* (children in jails) 1986 (2) SCALE 1 [1], as documented in 'Children' in chapter three. After the order reported AIR 1988 SC 2211 / (1988) 4 SCC 226, the cause title changed to *Supreme Court Legal Aid Committee*. A further thirteen hearings were recorded up to May 1991. See chapter five for a discussion of the problems of the courts.

¹⁵⁹ 1986 (Supp) SCC 541.

¹⁶⁰ *Bandhua Mukti Morcha op cit* note 110.

¹⁶¹ *Workers of M/s Rohtas Industries Ltd. v M/s Rohtas Industries Ltd.* (1987) 2 SCC 588, as discussed in the section on 'Labour' in chapter three.

¹⁶² *Rakesh Chandra Narain v State of Bihar* 1986 (Supp) SCC 576, as discussed in 'Prisons and State Institutions' in chapter three.

¹⁶³ *Karjan Jalasay Yogana Assargrath Sahkar Ane Sangarsh Samiti v State of Gujarat and others* 1986 (Supp) SCC 350, as discussed in 'Environment and Resources' in chapter four.

unlucky ones that have been disposed of by the Court.¹⁶⁴ The continued monitoring of the case was perceived as more important than a lengthy, rhetorical judgment.

There are many consequences of this kind of courtcraft for the petitioner. The number of hearings is compounded, adding to a strain on resources and a psychological strain on the subjects of the petition whose hopes may have been raised. While for some, monitoring the implementation of court directions is of greater importance, for others a final outcome is the only desirable result. For lawyers, the demands of legal practice have aggravated already existing communication problems with a petitioner.¹⁶⁵ Of the many petitions that have not been heard, some have been purposefully ignored by lawyers concerned about the orders that would be given by a Supreme Court in which PIL has lost favour.¹⁶⁶ Much depends on the commitment of the lawyer, in a context when all are overworked, and the level of understanding of the issues raised, and therefore of when Court intervention is most needed.

Evidentiary requirements are another hurdle for the petitioner, particularly in the absence of a constitutional right to information. As an ever increasing amount of relevant accurate information is often needed by the Court,¹⁶⁷ the importance of an efficient and supportive lawyer is intensified. The appointment of commissions of enquiry, as a dynamic response to such problems, has often

¹⁶⁴ Jose Verghese, advocate, New Delhi, 25/2/92.

¹⁶⁵ An unusual situation arose, in *Sheela Barse op cit* note 158 when communication problems lead to a stalemate between the petitioner and her advocate. The latter then gained the permission of the Court to withdraw from the case.

¹⁶⁶ After questions were raised about PIL in *Sudipt Mazumdar v State of Madhya Pradesh* (1983) 2 SCC 584, as discussed in 'Resistance to the changes' in chapter two and in 'Environment and Resources' in chapter four, Upendra Baxi described the strategy used to ensure that the petition remained pending:

I was in Surat at the time and got fifty-sixty organisations to intervene and ask for a free paperbook and that was the end of that.

Upendra Baxi, Delhi University, Delhi, 5/8/93.

¹⁶⁷ In *Karnataka Kolageri N S Sangathana and others v State of Karnataka and others*, as discussed in 'Environment and Resources' in chapter four, the Court directed the petitioners to file a list of those affected, putting pressure on both the advocate and on the petitioner organisation because of the time-bound nature of the request.

compounded the hurdles. The mandate of the commissions and the personnel appointed have, in certain circumstances, mitigated against resolving the grievance raised. Moreover, while costs have sometimes been forthcoming from the Court, these awards have not been consistent. During the course of its litigation, the Naga Peoples Movement for Human Rights filed common legal submissions in the Guwahati High Court, together with the Manipur Baptist Convention Women's Union, stating:

That the petitioners have incurred enormous debts in order to continue these cases. Several members of the petitioner organizations namely the Naga People's Movement for Human Rights (NPMHR) and Manipur Baptist Convention Women's Union (MBCWU) have set aside their other work for more than four years to work on this case. Under the circumstances they pray that this Hon'ble Court may direct the respondents to pay costs.¹⁶⁸

The burden of administration, photocopying, and fact-finding has been a common complaint. This has not always been understood by lawyers acting for petitioners in such cases, adding to the difference in the experience of and response to PIL. Leading constitutional lawyer, Ram Jethmalani responded to a question about these problems by saying:

Photocopying and changed listings - these are not serious hurdles. With a little organizational care, these can be managed. It is not so backbreakingly expensive.¹⁶⁹

The participation of intervenors¹⁷⁰ has changed the character of many cases. Interventions have been common in PIL petitions as the importance of the issues raised has encouraged organisations and individuals to participate in the proceedings, in a representative capacity. Although an intervenor has to remain within the parameters of a writ petition established by the petitioning party, the advantage of an intervention is that an issue has already gained the attention of the Court. In several

¹⁶⁸ C R No 1043 of 1987/337/91 and C R No 1355/87/338/91. Legal Submissions' as part of the litigation on the Oinam issue, *Naga People's Movement for Human Rights (NPMHR) v Union of India and others* AIR 1990 Gau 1 as discussed in 'The Armed Forces' in chapter three.

¹⁶⁹ Ram Jethmalani, advocate, interview, New Delhi, 12/2/92.

¹⁷⁰ A person who is not a *party* to a matter in court can, with the permission of the court, intervene in the proceedings if it is shown that the outcome of the case will affect such person in some way. An intervenor does not become a party, does not have an automatic right to be heard, but can file an affidavit. The intervenor is bound by the decision in the case, as if it were a party.

cases intervenors have added perspective and depth to the legal discussion in the courtroom. Interventions began in the very first PIL cases,¹⁷¹ and has been continued to be a strategy, for example, of women's groups.¹⁷² Other organisations have intervened, including the Association of Indian Automobile Manufacturers¹⁷³ and All God's Children Inc., Arizona, USA.¹⁷⁴

Even in those petitions where substantive orders or a judgment has been given, implementation has been poor, as demonstrated by the case studies in chapters three and four. In the absence of an organisation to monitor directions, or of the Court's own monitoring, there has been little certainty that any actual remedy will be forthcoming. Moreover the grievances of petitioners have not usually been addressed in full. With notable exceptions where the integrity of the judicial process has been challenged, contempt petitions have not resulted in any significant directions.¹⁷⁵ Seen in this context, PIL petitions have often fared very badly, with orders that are poorly implemented, contempt that is not issued and, for some, lengthy pendencies of over a decade.

The ideological framework in which law is used reflects the experience of using law and the practical context. Some have used law in the belief that it can only expose the inequities prevalent in society and in the legal system.¹⁷⁶ Whilst

¹⁷¹ The Citizens for Democracy intervened in the Bihar undertrial cases. See note 397 in Baxi, Upendra, 'Taking Suffering Seriously' in Baxi, Upendra (ed) (1988), 387-415 at 397.

¹⁷² See 'Injustices Specific to Women' in chapter three.

¹⁷³ *M C Mehta op cit* note 119.

¹⁷⁴ One of the many organisations that intervened in *Laxmi Kant Pandey v Union of India* (1984) 2 SCC 244, as discussed in 'Children' in chapter three, in addition to those that were impleaded.

¹⁷⁵ An unreported order D/-30/7/90 by Justice Ranganath Misra and Justice Kuldeep Singh, in *Workers of M/s Rohtas Industries op cit* note 161, epitomises the response:

Mr Ramaswami appearing for the Chairman of the Bihar State Electricity Board has explained the circumstances in which there was a delay in compliance with the Court's direction and he has given an assurance to the Court that special care will be taken to ensure that the supply of energy to Rohtas Industries would be carried out without undue interruption. In view of the assurance which we record, the contempt proceeding is dropped.

¹⁷⁶ For example, human rights activists in Assam use law in this manner.

subscribing to the belief that law can only mirror the divisions of a class society, PIL has been used to highlight the conviction that the constitution and laws are biased. Having been unable to secure the required relief, the Naga People's Movement for Human Rights declared its support for the secession of Nagaland from the Union of India, effectively frustrating its own efforts to use constitutional methods to record its dissent. Disenchantment with PIL after the *Asiad* judgment, which failed to order better working conditions in time, led the PUDR to draft a resolution not to use PIL in the absence of a people's organisation to ensure its implementation.¹⁷⁷ Lawyers, too, as urban professionals, have been anguished by the ineffectiveness of the only strategy which they know. PIL lawyer, Girish Patel, after the failure in substantive terms in petitions filed by him, in his capacity as a member of an urban-based civil liberties organisation, asked:

Where is my place? In the courtroom, with black-robed persons all around talking of the constitution, law and justice, oblivious of the lawlessness, injustice and oppression outside; or is my rightful place in the fields, slums, factories, mines or the forest, where the suffering masses directly experience unconstitutionality, illegalities and injustice?¹⁷⁸

In spite of the catharsis induced by PIL, petitions continue to be filed by all manner of petitioners. For social activists, the choices and consequences have become clearer, as many have become wise to the limitations of the law, the dependency upon the craft of the lawyer and sympathy of the judge, and the obstructions of legal process.¹⁷⁹ Environment groups are an example, combining local organisation with other forms of activity such as lobbying, with petitions filed in the Supreme Court and High Courts. By using PIL as part of a broader strategy, the expectations are lessened, and the opportunity for raising awareness and mobilising the people involved are increased.

¹⁷⁷ Yagnik, Achyut, 'Human Rights Movement: Some *Yakshaprashana*' in Sethi, Harsh and Kothari, Smitu (eds) (1989), 127-132 at 131. Similarly PUDR lawyer Nandita Haksar has left legal practice to participate in the Naga People's Movement for Human Rights and to teach human rights law.

¹⁷⁸ Patel, Girish, 'Dilemma of a PIL Lawyer', *The Lawyers*, Vol 3 No 7, July 1988, 18-19 at 18.

¹⁷⁹ See Dias, Clarence J, 'Problems and Challenges faces by Legal Resource Groups in South Asian Region', *Journal of the Indian Law Institute*, Vol 30 No 1, 1988, 63-68

Media

Continuing media coverage has reinforced the impact of PIL judgments. Although court orders or judgments may not in themselves motivate action, an account in the local or national press can be inspirational. Mobilising public opinion for people whose plight has not been told, for activists who had been viewed with suspicion,¹⁸⁰ and against the recalcitrance of the state, has aided those whose situation provoked the initiation of PIL. Petitions have continued to be filed in response to press reports. The cases themselves have demonstrated the influence of the media as Courts have ordered that details of directions or orders be published in the press.

Legal journalism has gained strength, with journalists like Krishan Mahajan continuing to provide a critique of the legal system in his column 'Legal Perspectives'.¹⁸¹ The poor implementation of Court orders has gained the attention of the media.¹⁸² The context in which petitions have been filed - activist groups and movements - have inspired others. Rashid Talib produced a series of six programmes for Doordarshan (the state controlled television company), entitled 'Citizens and the Law', which were produced and broadcast between January 1988 and June 1989.¹⁸³ Of the seven programmes produced, five were concerned with movements or organisations that had used PIL,¹⁸⁴ while the other two were concerned with issues that

¹⁸⁰ One activist working with and for bonded labourers described how:

We filed a petition at the right time. We had just set up the Shramjeevi Sangathana and because the petition was filed in the Supreme Court and commissioner came - this gave strength to the organisation. There were reports in the press saying that Vivek Pandit has gone to the Supreme Court and filed a writ and the government has to give Rs.5000 to a commissioner. This gave us strength in the area and standing in front of the bureaucracy.

Vivek Pandit, Vidhayak Sansad, Thane, 28/3/93.

¹⁸¹ See Gandhi, J S (1987) at 157-9.

¹⁸² Mahajan, Krishnan, 'Legal Perspective: Cautionary PIL', *Hindustan Times*, 10/3/86.

¹⁸³ Rashid Talib, Chittaranjan Television, interview, New Delhi, 6/4/92.

¹⁸⁴ These five were entitled 'Dawn over Tilonia', 'Bonded for Life?', 'Mary Roy's Crusade', 'E P Drugs - Anatomy of a Ban' and 'Creating a Wasteland'.

had not been taken to the Court.¹⁸⁵ While Doordarshan's concern was that the programmes reflect individual rights - they objected to the original series title 'Taking Suffering Seriously' - all the programmes reflected collective struggles. The endorsement of Justice Bhagwati, who appeared in the programmes, emphasised the legal potentialities.¹⁸⁶

The focus of much of the media attention has been on high profile issues of judicial corruption, on proxy litigation and instances where the writ jurisdiction has been used for private interests.¹⁸⁷ While useful, as a method of discouraging litigation outside the ambit of PIL, the comparatively little exposure of less sensational issues has led to criticism. Referring to legal reporters in the Supreme Court, Krishan Mahajan has described how many newspapers and agencies are:

using the Supreme Court as a training ground for their correspondents for a year or two and then promoting their correspondents to cover Parliament or some other Ministry.¹⁸⁸

Even in this milieu, the sensitisation of the media to legal issues has increased, as seen, for example, in the weekly section on 'Law' in the national daily newspaper, The Pioneer.

The exposure given to PIL judgments and orders in law reports has been critical. The official law reporters, which include the Supreme Court Reports and the High Court law reporters, publish all and only those judgments and orders which have been deemed "reportable".¹⁸⁹ Judges themselves indicate whether a judgment is

¹⁸⁵ Entitled 'Too Deep a Wound' about the tapping of pine trees for resin in Almora and 'Kusnur Satyagraha'.

¹⁸⁶ The slot allotted for the series, 10.20pm, was subsequently criticised as being too late for the illiterate audience that it hoped to reach. See Sabharwal, Jyoti, 'Right theme, wrong slot', *The Indian Post*, 9/6/89.

¹⁸⁷ [anon], 'Frivolous litigation costs petitioner Rs 10,000', *Times of India*, 28/5/93; Anthony, M J, 'Fighting private battles through public interest', *Business and Political Observer*, 8/1/91; Anthony, M J, 'Misuse of writ jurisdiction causes anxiety to SC judges', *The Business and Political Observer*, 11/12/91.

¹⁸⁸ Mahajan, Krishan, 'Legal perspectives: SC and media', *Hindustan Times*, 8/9/88.

¹⁸⁹ Vijay Kumar, Joint Registrar Supreme Court Cases, interview, New Delhi, 31/3/92.

to be reported, a practice which has been criticised by the Law Commission of India:

In our view the judges should have no voice in deciding whether a case should or should not be reported. In several States there is in vogue the practice of judges marking their judgements "A.F.R." *i.e.*, approved for reporting. This is a very unwholesome practice and should be stopped. A judge is too often inclined to a generous view of his own judgements and rarely hesitant to decide that it should be reported. Not infrequently judgements tend to become lengthy and somewhat pedantic because the judges think of the judgement's finding a place in the law reports.¹⁹⁰

The lack of a rational criterion has been noted by Krishan Mahajan:

The result is ad-hocism in the reporting of judgements with the public not even knowing what it has lost apart from completely destroying the court's comity in terms of precedent.¹⁹¹

According to Mahajan, this is an impasse which has been created because PIL is the domain of middle class professionals - "the middle class bureaucracy in the courts never realise the necessity of disseminating information about the various laws and judgements among the poor people".¹⁹² Even commercial law reporters, such as the All India Reporter (AIR) and Supreme Court Cases (SCC), both of which are more commonly subscribed to by lawyers of the Supreme and High Courts, publish judgments and orders at the discretion of the editor, taking note of whether judgments have been approved for reporting. The distinctive nature of the subject of PIL petitions, and legal content in the form of procedural relaxation, have ensured that PIL has received systematic attention in the Supreme Court law reporters once it became established, and more sporadic attention in the High Courts. Simultaneously, academic writing on PIL has burgeoned, in law journals within India and internationally, and in books.

¹⁹⁰ Law Commission of India, *Fourteenth Report, Volume I, Chapter 28* (Ministry of Law, Government of India, 1958) at 642.

¹⁹¹ Mahajan, Krishan, 'Legal Perspectives: Non-reportable', *Hindustan Times*, 23/3/87.

¹⁹² Gandhi, J S (1987) at 159 referring to Mahajan, Krishan, 'Middle Class PIL', *Hindustan Times*, 10/9/84.

Funding

Funding has continued to be the subject of much contention. As many of the organisations that were able to get judgments from the Court had done so with the benefit of funds, fears have continued to be voiced that PIL is a game conducted by elites. There does seem to be a correlation between the grant of funds and the success of a petition. However, much of this has been because of the potential for organisation activity outside the arena of law.¹⁹³ To an extent funding is controlled by the regulations that exist in the donor and the recipient country, and the mandate of the donor organisation.¹⁹⁴ Clearance under the Foreign Contribution (Regulation) Act, 1976 was withheld by the Home Ministry for many years for Ford Foundation funding of a proposed centre, the Public Interest Legal Support and Research Centre (PILSARC) to monitor PIL.¹⁹⁵ It was only in 1992 that clearance was given, and the reasons for this remain opaque.¹⁹⁶ The recipient of these funds, Rajeev Dhavan, has himself concluded, after a discussion of foreign funding, that:

¹⁹³ For the example of Banwasi Sewa Ashram in Uttar Pradesh, see the section on 'Environment and Resources' in chapter four.

¹⁹⁴ The Ford Foundation has continued to support legal initiatives, sponsoring conferences on PIL. One was held in Dhaka, Bangladesh in October-November 1992, hosted by the Ain o Shalish Kendra and Madaripur Legal Aid Association, and attended by senior legal professionals from India and Pakistan. The conference aimed to sensitise the Bangladeshi judiciary to PIL. Another conference was held on 'Public Interest Law Around the World'. See Hutchins, Thomas and Klaaren, Jonathan, *Public Interest Law Around the World. Report of a Symposium Held at Columbia University in May, 1991*, (Columbia Human Rights Law Review, Columbia, 1992). See Williams, David and Young, Tom, 'Governance, the World Bank and Liberal Theory', *Political Studies*, Vol 42 No 1, 1994, 84-100, for a discussion of the World Bank and the *modernising* intention of its policies which has interesting parallels with the Ford Foundation.

¹⁹⁵ Purewal, Jasjit, 'Stalling the people's access to justice', *Indian Express*, 22/8/89. Marc Galanter, commenting upon the Ford Foundation program of human rights and social justice, observed:

The support centre (PILSARC) which was to be the centerpiece of the Foundation's program failed to obtain approval by the Government of India - perhaps due in part to a new resistance to the use of foreign funding to support legal services projects.

Galanter, Marc, 'The Changing Legal Environment and the Prospects of the Strategic Use of Law by India's Disadvantaged', (A Report to the Ford Foundation, New Delhi, 20/9/89) at 3-4.

¹⁹⁶ An internal Ford Foundation memo written in 1991, stated:

The government's receptivity to appeals to unblock the Foundation's grant to PILSARC (FY87-\$275,000) has considerably brightened the prospects of providing community action groups responsible professional advice on legal strategies.

The only real and correct form of radical activism consists of people fighting for their own rights (oppressed activism).¹⁹⁷

Thus perception that the receipt of funds is a compromise remains, even for those to whom funding has been made available.¹⁹⁸ Justice Krishna Iyer, in an address to the Third Karnataka State Lawyers Conference, on 28-29 December 1983, echoed the concerns of many activists when:

He warned more than 1,000 lawyer delegates that the country's legal institutions were in imminent danger of takeover by the US intelligence agency the CIA, that legal aid was in danger of takeover by the Ford Foundation and that public interest litigation would probably now be run by multinational corporations.¹⁹⁹

The legal profession has received increasing attention from the Ford Foundation, with support for the establishment of the National Law School University of India at Bangalore,²⁰⁰ as have initiatives to move the focus away from the court-centred approach fostered by PIL.²⁰¹ Pervasive financial problems faced by many lawyers and activists remain, and the appeal of foreign funds grows stronger for many of those using law and PIL.

¹⁹⁷ Dhavan, Rajeev (unpublished, 1984) at 30. Dhavan has been critiqued for other inconsistencies in his formulation of reform and legal activism, see Gandhi, J S (1987) at 146-148.

¹⁹⁸ One legal organisation that declared itself to be against foreign funding, takes covert funds in the form of subscriptions, that do not have to be declared to the Indian government, or to other organisations. Rajni Kothari has noted that the agenda of the state is also influenced by donor agencies. See 'People's Action: A Conceptual Analysis' in Kothari, Rajni (Volume II, 1990), 393-400 at 399.

¹⁹⁹ Mahajan, Krishan, 'Legal Perspectives: End of the Road', *Hindustan Times*, 9/1/84.

²⁰⁰ The National Law School University of India has instituted original teaching programmes, including 'Human Rights' and 'the Rights of the Child'. Nonetheless, it has come under criticism, for example, for the "American style" recruitment of Bombay solicitors:

whatever happened to the commitment given ... that its students would join the legal profession to devote themselves to, or at any rate, be trained to do public interest law?

[anon], 'Aadalat Antics: National Law School in the news', *The Lawyers*, Vol 9 No 4, Apr 1994, 32. Contemporary legal education has received attention in: Gandhi, J S (1987); Dias, Clarence J, 'Dying of the Light: Legal Education reform in the 1990's', monograph, [(1990?)], 1-11. Indigenous initiatives do exist, for example the Bar Council of India's contribution to the establishment the National Law School and the establishment of an Institute for Public Interest Litigation in 1994. See [anon], 'Aadalat Antics: Public Interest Litigation', *The Lawyers*, Vol 9, No 2, Feb 1994, 32.

²⁰¹ In 1993-4, an Advocacy Centre was established in Pune, partially funded by the Ford Foundation.

Alternatives and Corollary Innovations

Along with the evolution of PIL, came other initiatives to make law more responsive to social justice considerations. The rhetoric of conciliatory forms of justice that had inaugurated PIL, strengthened moves to establish alternative modes of dispute settlement.²⁰² In addition to legal aid initiatives,²⁰³ informal methods of dispute settlement, tribunals and the district courts have been increasingly used, and innovative legal services are continually being refined. The government has responded to the relaxation of standing, by introducing changes in legislation, both newly passed, and through amendments.

In 1976, Justice Krishna Iyer had suggested that informal methods of settling disputes may be more appropriate and desirable:

Dispute processing is not by Court litigation alone. ... Litigation, whoever wins or loses, is often the funeral of both. We are a developing country and need techniques of maximising mediatory methodology as potent processes even where litigation has erupted. ... Should we have at all hinted to the advocates to resolve by negotiation or stick to our traditional function of litigative adjudication? In certain spheres, 'judicious irreverence' to judicialised argumentation is a better homage to justice.²⁰⁴

Having been established in 1980, legal aid continued to attract attention from judges, legislators and academics.²⁰⁵ Interest in the legal aid movement escalated concurrently

²⁰² As with PIL, the existence of alternatives in the USA may have strengthened initiatives in India. See Galanter, Marc, 'Justice in many rooms: courts, private ordering and indigenous law', *Journal of Legal Pluralism*, 1981, 1-47; Cappelletti, Mauro, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement', *Modern Law Review*, Vol 56, May 1993, 282-296.

²⁰³ See 'Access to Justice' in chapter one.

²⁰⁴ *Mumbai Kamgar Sabha, Bombay v M/s. Abdulbhai Faizullahbai and others* AIR 1976 SC 1455 at 1470.

²⁰⁵ For background see 'Access to Justice' in chapter one and Grover, Anand, 'The Right to Legal Aid', *The Lawyers*, Vol 1 Nos 11-12, Nov-Dec 1986, 5-10. For discussion of Legal aid in the 1980s see Bhagwati, P N, 'Social Action Litigation: Need For Setting Up Free and Independent Legal Aid

to PIL. The Supreme Court Legal Aid Committee was involved in PIL cases,²⁰⁶ and many of the letters sent to the PIL Cells were redirected to the legal aid boards.²⁰⁷ Some legal aid funds were used for Lok Adalats, people's courts run on a voluntary and conciliatory basis.²⁰⁸ In 1987 the Legal Services Authorities Act was passed, institutionalising legal aid with the establishment of the National Legal Services Authority to conduct, amongst other activities, lok adalats and public interest litigation,

Services In Urban And Rural Areas' in *Judiciary Under Seige. Report of Consultation on Asian Lawyers for Justice and Human Rights. Hong Kong October 24-27, 1983* (Christian Conference of Asia-International Affairs, Hong Kong, 1984); Reddy, O Chinappa, 'Socialism, Constitution and Legal Aid Movement in India', AIR 1986 (J) 9; Menon, N R Madhava, 'The Dawn of Human Rights Jurisprudence', (1987) 1 SCC (J) 1, at 2-5; Sarnaik, Seema, 'Legal Aid in Maharashtra', *The Lawyers*, Vol 1 No 2, Feb 1986, 9-12; Grover, Anand, 'The Right to Legal Aid', *The Lawyers*, Vol 1 No 11, Nov-Dec 1986, 5-8; Abraham, Susan, 'Tribals and Legal Aid', *The Lawyers*, Vol 2 No 4, Apr 1987, 19; Williams, Mark, 'Increasing Access to Justice', *The Lawyers*, Vol 5, No 1, Jan 1990, 4-12. The discussion of legal aid in the Lok Sabha, continued even after the spate of interest that followed the publication of the Bhagwati Committee report (chapter two) - see 'Legal Aid to poor provided in Supreme Court and various other Courts and allocation .. [of funds]', *Lok Sabha Debates*, Series 7 Session 7 Vol 37, 12/4/83, 167-69; 'Allocation of funds for Legal aid Scheme', *Lok Sabha Debates*, Series 8 Session 6, Vol 19, 5/8/86, 185-86.

²⁰⁶ See *Supreme Court Legal Aid Committee v Union of India & Ors* 1989 (2) SCALE 73 [400] in the section on 'Children' in chapter three.

²⁰⁷ See chapter five and Dixit, A K, 'Public Interest Litigation and Legal Aid', *Kanpur Law Journal*, 1986, 50-55.

²⁰⁸ In 1986, the then Minister of Law defined lok adalats:

Lok Adalat is a voluntary agency for settlement of disputes through conciliatory method. When the State Legal Aid and Advice Board is approached by one of the parties to the dispute, the Board approaches the other party and through persuasive measures, tries to motivate the other party for a compromise/amicable settlement. The matter is taken, if both parties are agreeable, before the Lok Adalat and a settlement is recorded if parties come to a mutual settlement. The final decree on such a settlement is then passed by the concerned court.

'Functioning of Lok Adalats in Gujarat', *Lok Sabha Debates*, Series 8 Session 7 Vol 21, 11/11/86, 250-52 at 252: Over two thousand cases pending in the lower courts of Gujarat were settled in Lok Adalats in two years, as detailed in "Lok Adalats", *Lok Sabha Debates*, Series 8 Session 4 Vol 10, 19/11/85, 193-94. For details of the schemes see 'Providing legal assistance to settle issues through conciliation', *Lok Sabha Debates*, Series 7 Session 7 Vol 49, 24/7/84, 90; 'Lok Adalats in Capital', *Lok Sabha Debates*, Series 8 Session 4 Vol 11, 10/12/85, 175-6; 'Statutory Status for Lok Adalat Scheme in States', *Lok Sabha Debates*, Series 8 Session 4 Vol 10, 19/11/85, 99; 'Lok Adalats in Uttar Pradesh', *Lok Sabha Debates*, Series 8 Session 8 Vol 28, 28/4/87, 18-29; 'Biggest Lok Adalat during 1987-88', *Lok Sabha Debates*, Series 8 Session 10 Vol 39, 4/5/88, 430-32. See Razdan, Vinod K and Razdan, Versha, 'People's Courts, Development and Justice', *Indian Socio-Legal Journal*, Vol 15 Nos 1&2, 1989, 145-150; Sinroja, Naresh M, 'Lok Adalats: A Cure Worse Than the Disease?', *The Lawyers*, Vol 7 No 3, Mar 1992, 11-12; Barhat, Virendra Singh, 'Judicial Courts v Lok Adalats', AIR 1987 (J) 5; Saxena, Manohar Raj, 'Legal Aid Scheme & Lok Adalat', AIR 1986 J 103.

described as “social justice litigation” in section 4(d) of the Act.²⁰⁹ Based on the draft bill proposed in the Bhagwati Committee Report,²¹⁰ the act caused consternation amongst judges and academics.²¹¹ Marc Galanter, referring to the Act, noted that while the reform energies of the early 1980's were channelled into PIL by prominent judges who were “patrons and instigators” of this form of litigation, their counterparts in the late 1980s were promoters of a new informalism.²¹² He further observed that the increasing incidence of Lok Adalats, and the Bhopal litigation, indicate a loss of faith in the formal legal process:

Instead what is offered is a program of palliation which is almost a photographic negative of the animating idea of public interest law [PIL]. PIL sought to be “strategic”; it sought to empower organizable constituencies of the disadvantaged. In contrast the new informalism [NI] addresses isolated individual victims. Where PIL sought to marshall facts by extensive investigation and to develop the law by pioneering cases, NI seeks compromises that obviate both factual and legal definition. Where PIL encouraged the development of new specialized expertise and wide dissemination of new knowledge, NI demands no expertise and generates no new knowledge. Where PIL sought to use the wider, radiating effects of legal action to bring large-scale movement toward constitutional ideals, NI eliminates

²⁰⁹ Parallels had been drawn with the Legal Services Corporation in the USA. See Leelakrishnan, P, ‘Access to Legal Service and Justice’, *Cochin University Law Review*, [(198?)], 473-483. Other statutory changes were made. Order X, rule 8(1) of the Supreme Court Rules, 1966, as amended on 16/2/86 (with effect from 2/7/83) provided that no fees were to be charged for matters filed by the SCLAC. A similar amendment was made on 26/7/87 with the insertion of rule 10-A(1) to order XVIII - see note 67 in chapter two for details.

²¹⁰ See ‘Access to Justice’ in chapter one.

²¹¹ Justice Krishna Iyer wrote an influential treatise shortly after the Act was legislated. Iyer, V R Krishna, *Legal Services Authorities Act - A Critique*, (Society for Community Organisation Trust, Madurai, 1988). Upendra Baxi protested at the little interest that was generated in activist circles:

There is not a scrap of expression of outrage by or among the activists. Even Ela Bhatt of SEWA, whose activist credentials brought her to the Rajya Sabha as a nominated member, and who has first-hand knowledge of the legal need of the unorganized, and Justice Bhagwati, an explosively activist justice now in his retirement, have failed, so far to protest at the governmental mockery of legal services, a conception assiduously promoted by him and others. Where are, one may ask, the activist voices protesting at this historic default? If one is not able to generate and impact on one's kindred in activism, how is one to be expected to transform or limit the state?

Baxi, Upendra, ‘Law, Democracy And Human Rights’ in Sethi, Harsh and Kothari, Smitu (eds) (1989), 101-117 at 115. Reference to newspaper articles criticising the legislation was made in ‘Legal Services Authorities Act’, *Lok Sabha Debates*, Series 8 Session 9 Vol 32, 18/11/87, 137.

²¹² Galanter, Marc (1989) at 4.

consideration of these general effects and confines its concern to specific cases.²¹³

Commenting on PIL and what he describes as other creative experiments in law (including legal aid, legal literacy and lok adalats), Upendra Baxi was prescriptive, believing that the institutions of law and order could be turned around to address poverty and injustice.²¹⁴ Some activist groups have found a focus on legal awareness and unconventional modes of practising law to be more relevant than a continuing focus on the inappropriateness of the *Legal Services Authorities Act*, 1987. 'Barefoot lawyers' and paralegals, often from within indigenous communities, committed to the provision of less hierarchical and alienating legal services have become more prevalent.²¹⁵ The need for such lawyers dedicated to a different vision of society was to be sharply delineated by the practice of PIL. As Jose Verghese, an advocate involved in PILs for tribal peoples, noted when referring to schemes of barefoot lawyers:

Before attempting to launch any public interest litigation a thorough knowledge of traditional ways of dispute settlement which existed and to some extent still prevalent among the tribals is necessary. The modern method of dispute settlement renders the tribals desperate and the difficulties to approach the system have alienated them further

²¹³ *Ibid.* at 14-15.

²¹⁴ Baxi, Upendra 'Activism at the Crossroads with Signposts' in Fernandes, Walter (ed) (1986), 35-49 at 47.

²¹⁵ Galanter, Marc (1983) has documented four organisations which "break from the prevailing atomistic style of legal services delivery": Rajpipla Free Legal Aid in Gujarat; the Legal Support Scheme for the Poor run by the Anand Niketan Ashram in Rangpur, Gujarat; AWARE in Andhra Pradesh; Consumer Education and Research Centre in Gujarat. It is interesting to note that all these groups have been involved in PIL. In a petition filed by Justice Krishna Iyer and heard by Justice Bhagwati, the right to free legal aid was discussed, and its pivotal role affirmed, as was the critical role of voluntary organisations:

the legal aid programme which is needed for the purpose of reaching social justice to the people cannot afford to remain confined to the traditional or litigation orientated legal aid programme but it must, taking into account the socio-economic conditions prevailing in the country, adopt a more dynamic posture and take within its sweep what we may call strategic legal aid programme, consisting of promotion of legal literacy, organisation of legal aid camps, encouragement of public interest litigation and holding of lok adalats or niti melas for bringing about settlements of disputes whether pending in Courts or outside.

Centre of Legal Research and another v State of Kerala AIR 1986 SC 2195 at 2196-7, as discussed in 'Judges, Courts, Lawyers' in chapter four.

away from the administration of justice.²¹⁶

While acknowledging that “the movement did grow from the top”, through PIL, he observed, that if the use of law with tribals is developed slowly, PIL can still be encouraged.²¹⁷ The use of such barefoot lawyers and paralegals has been critical for the implementation of orders given in PIL.²¹⁸

In addition to the new informalism and the provision of innovative legal services, other alternatives to the efforts to the use of the writ jurisdiction through PIL, exist within the legal system.²¹⁹ The potential for PIL has been mobilised at the district court level,²²⁰ and tribunalisation has continued to gain momentum.²²¹ Following from the procedural changes initiated by PIL, the newly legislated Child Labour (Prohibition and Regulation) Act, 1986,²²² Consumer (Protection) Act, 1986²²³ and the Environment

²¹⁶ Verghese, Jose, 'Legal Aid to the Tribals' in Gandhi, P K (ed) (1985), 136-141 at 137. The case filed asking the Court to give women of the Ho tribe the right to succession illustrates this point. See *Madhu Kishwar & Ors v State of Bihar & Ors* 1991 (2) SCALE 148 [794] as discussed in 'Injustices Specific to Women' in chapter three.

²¹⁷ *Ibid.* at 141.

²¹⁸ See the discussion of *Banwasi Sewa Ashram v State of Uttar Pradesh* (1986) 4 SCC 753 in 'Environment and Resources' in chapter four.

²¹⁹ See the survey of 'The Legal Framework' in chapter two.

²²⁰ Cases have been initiated in Dhule, Maharashtra, under section 91 of the *Code of Criminal Procedure*, when the Dhule District Court ordered the State to provide relief for victims of drought - and a state appeal to the Bombay High Court was rejected. Suryawanshi, Nirmalkumar, 'Social Action Litigation under Section 91 CPC', *The Lawyers*, Vol 2, No 1, Jan 1987, 20.

²²¹ Many of the cases refer to tribunals, specifically see *S P Sampath Kumar v Union of India and others* AIR 1987 SC 386, as discussed in 'Judges, Courts, Lawyers' in chapter four. An comprehensive overview of tribunals, commissions and other quasi judicial authorities is given in Sathe, S P, *Administrative Law*, (N M Tripathi Pvt Ltd, Bombay, fifth edition, 1991). Also see Sathe, S P, 'College Tribunals in Pune and Bombay: A Survey of De-Professionalised Dispute Settlement', *Journal of the Indian Law Institute*, Vol 29 No 4, 1987, 468-493.

²²² Section 16(1) states that “any person, police officer or Inspector may file a complaint of an offence under this Act in any Court of competent jurisdiction.”

²²³ Section 2(1) defines a “complainant” as either a consumer, or any registered voluntary association or the Central Government or any State Government or one or more consumers, where there are numerous consumers having the same interest. See Singh, Gurjeet (1993) and Nayak, Rajendra Kumar, *Consumer Protection Law in India*, (N M Tripathi Pvt Ltd, Bombay, 1991) for the use of this Act and the forums constituted under it.

(Protection) Act, 1986²²⁴ which were framed with expanded standing provisions. Amendments were made in 1986 to a number of existing statutes, widening standing provisions to allow registered consumer associations to file complaints.²²⁵ PIL was to foster a concern for human rights, which, in part, informed the Human Rights Commission,²²⁶ a quasi judicial authority, established in 1993 through the Protection of Human Rights Ordinance to monitor and investigate abuses of human rights.

Thus, the concern for access to justice that motivated the procedural innovations leading to the establishment of PIL, extended beyond this single form of litigation. PIL, the term given to the particular use of Articles 32 and 226 of the Constitution, was only one of the explorations of dispute resolution in contemporary India. In the context of these 'alternatives and corollary innovations' the centrality of

²²⁴ Section 19 states that a complaint can be filed by "the Central Government or any authority or officer authorised in this behalf by that Government" or "any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint, to the Central Government or the authority or officer authorised as aforesaid."

²²⁵ Sections 12 and 20 of the Prevention of Food Adulteration Act, 1954, sections 25 and 32 of the Drugs and Cosmetics Act, 1940, section 11 of the Essential Commodities Act, 1955, section 10 of the Monopolies and Restrictive Trade Practices Act, 1969, section 72 of the Standards of Weights & Measures Act, 1976 and section 5C of the Agricultural Product (Grading & Marking) Act, 1937.

²²⁶ For extensive discussion of the commission see: Sathe, S P, 'Towards an Effective Human Rights Commission', *EPW*, 3/10/92, 2155-2156; 'The Human Rights Commission. A Critique', (People's Union for Democratic Rights, Delhi, monograph, 1993); 'Human Rights Commission. Statement and Proposals', (Consultation organised by Legal Resources for Social action, Asian Forum for Human Rights and Development, Public Interest Legal Support and Research Centre, New Delhi, 27-28/3/93); 'India: Human Rights Commission', *International Commission of Jurists: The Review*, No 51, Dec 1993, 7-9; Keshwaar, Sanover, 'The National Commission on Human Rights: Boon or Charade?', *The Lawyers*, Vol 8 No 5, June 1993, 4-6 & 8; Rao, Kavitha, 'Amnesty International on the National Human Rights Commission', *The Lawyers*, Vol 8 No 9, Oct 1993, 23 & 26. The *PUCL Bulletin* has carried numerous articles following the discussions and implementation of the commission, and making connections with PIL:

with such a commission coming into existence, the Courts might well take the easy option of passing the buck to it and refrain from directly entertaining cases of violation of civil liberties, thus reducing the efficacy of our already enfeebled Public Interest Litigation System

Sheth, D L, 'Human Rights Commission', *PUCL Bulletin*, Vol 12 No 10, Oct 92, 1-2 at 2. For a collection of newspaper articles, see 'Human Rights Commission. Dossier', (Legal Resources for Social Action, [1993?]). Details of the National Human Rights Commission (Procedure) Regulation, notified in March 1994, can be found in: [anon], 'National Human Rights Commission (NHRC) Notification', *PUCL Bulletin*, Vol 14 No 4, Apr 1994, 11-12. See 'The Armed Forces' in chapter three and chapter six for a discussion of the Terrorist and Disruptive Activities (Prevention) Act, 1987. In addition to those directly linked with procedures and issues central in PIL, other fora were being established, for example by the passing of the National Commission for Women Act, 1990.

PIL as the most viable option for securing greater access to justice, and therefore of more just law, is uncertain. However, the study of PIL has provided unique insight into the aspirations and motivations of legal professionals and petitioners and informs the study of the explorations and changes that have accompanied the use of PIL throughout India.

Chapter Seven - Conclusion

Public Interest Litigation is now an established legal mechanism in the Supreme Court and all of India's eighteen High Courts. Its significance has extended throughout the country. Petitions and court orders have addressed issues of importance for people from all strata of society, from every community and in each region. It has increased access to justice and has brought new issues onto the judicial fora. Constitutionally prescribed rights have been clarified and their ambit expanded. For the researcher, PIL has provided a means by which the operation of the legal system can be explored, and its effect upon access to justice evaluated, thus facilitating the evaluation of the viability of PIL as a mechanism to resolve injustice. It provides insight into a basic dilemma of the human rights activist, whether to advocate reform or revolution.

The initial contestation between the legislature and judiciary did not account for poverty issues, but reflected opposing perspectives on prominent questions of government, leading Prime Minister Jawaharlal Nehru to refer to the Court as the “third House of Parliament”.¹ The structure of the colonial state determined the parameters of the initial debate about the judiciary, leading to numerous constitutional amendments and the manipulation of judicial appointments. By the 1970's, political, social and legal factors coalesced to nurture a concern for access to justice. Concurrently, the potency of international influences was to bolster the preoccupation with human rights. Some members of the judiciary, legal profession and media, together with participants in political and social activities, disaffected by the influence of emergency rule and the emasculation of constitutional rights, turned to the previously unexplored potential in law and legal institutions. Public Interest Litigation

¹ Quoted in Hardgrave, Robert L and Kochanek, Stanley A, *India. Governemnt and Politics in a Developing Nation*, (Harcourt Brace Jovanovich, San Diego, fourth edition, 1986) at 93.

was the result.

The fundamental problems of definition, discussed in detail in chapter two, resonate throughout the thesis. The initial concern over procedures, including the *locus standi* of petitioners and the justiciability of the issues, has persisted, in the context of an ever expanding range of issues and petitioners. Upendra Baxi, in suggesting that PIL should be termed Social Action Litigation (SAL), underlined the conceptual differences between the two forms of legal action. Broad in its ambit, PIL is best described in procedural terms. SAL, however, implies a concern that legal institutions become more responsive to poverty and inequality, both in the kinds of decisions made and through the refinement of the decision-making process.

Five broad types of cases have been set out in chapter two: PIL for the marginalised and excluded; PIL for the disadvantaged and deprived; PIL for development/resource rights; where PIL ends?; PIL and the judicial process. These categories provide a useful base for the formulation of a definition, and for evaluation of the case studies, as they indicate trends in the resolution of grievances. Judges, in their capacity as gatekeepers to the courts, have been complicit in the extension of SAL into PIL, while remaining concerned about the use and application of this form of litigation. From remit of the issues, it is apparent that while SAL may have been the aim of initiatives taken in the late 1970's and early 1980's, it is the broader based PIL that has become established in the Supreme Court and High Courts. Hence, the term PIL is used throughout the thesis as the more accurate description of the litigation as a whole.

Although initially postulated in terms of the public and collective, rather than private and individual, the vision of a new form of litigation has not been sustained and many of the issues within SAL have not been resolved.² The “creeping jurisdiction” acquired by the Court over State institutions has advanced little since

² In a study of the USA, Scheingold, Stuart (1981) noted the propensity for judges to remain within liberal-capitalist boundaries, to avoid allocative problems and only to take initiative in policy matters, in a halting and incremental manner.

Justice Bhagwati retired in 1986.³ Many of the innovative procedures which were to facilitate access to justice have not become established, as the Court's overt enthusiasm for the use of conciliatory techniques has waned.

Judicial discourse has focused on the availability of the Fundamental Rights as a remedy for injustice. The scope of Article 21 of the Constitution has been expanded and some of the Directive Principles of State Policy have been included within the ambit of the justiciable Fundamental Rights. However, there has been little discussion of Article 12 of the Constitution, which defines the 'State' against which Fundamental Rights are available,⁴ nor has the discussion extended to incorporate concern for generational rights which have underpinned some of the appeals to law through PIL.⁵ By stressing economic and social rights, the significance of many civil and political rights has been sidelined.⁶

The importance of freedom of information, a matter that had gained significance during the emergency rule, has been emphasised but no precedent has been set.⁷ The right to know has not been categorically affirmed, which, in an adversarial system, where judges cannot always depart from established procedure, has had repercussions. As judges have only occasionally taken on an investigatory role to uncover the facts of a case, the onus has remained on the petitioner to present a case in detail. Without access to information, petitions have lacked convincing facts, thus,

³ Baxi, Upendra (1987) at 175.

⁴ In the case concerning the oleum gas leak, the Supreme Court shied away from a definitive pronouncement on Article 12 of the Constitution. See *M C Mehta v Union of India and Ors* (1987) 1 SCC 395, discussed in the section on 'Environment and Resources' in chapter four and *Sheela Barse v Secretary, Children's Legal Aid Society and others* (children's home) (1987) 3 SCC 50, discussed in the section on 'Children' in chapter three. The case law on Article 12 includes *Central Inland Water Transport Corporation Ltd. v Tarun Kanti Sen Gupta* AIR 1986 SC 1571.

⁵ See Kothari, Rajni 'Human Rights - A Movement In Search of a Theory' in Sethi, Harsh and Kothari, Smitu (eds) (1989), 19-29.

⁶ See Sen, Amartya, 'Freedoms and Needs. An argument for the primacy of political rights', *New Republic*, 10&17/1/94, 31-38.

⁷ See *Bombay Environmental Action Group v Pune Cantonment Board*, discussed in the section on 'Urban Space'.

by not facilitating the presentation of a detailed and informed legal argumentation, judicial discourse has not addressed one of the most exclusionary aspects of legal process.⁸

With notable exceptions,⁹ there has been little change to statutory provisions. Laws which contribute to the persistence of many of the problems brought to the courts have not been critically appraised, nor has the constitutionality of statutes been considered. Thus, as Chhatrapati Singh has noted, judges have not taken the opportunity to examine statutes such as the Land Acquisition Act, 1894, the Factories Act, 1947, the Mines (Regulation and Development) Act, 1947, town planning acts and municipal laws,¹⁰ even when their unsuitability has been illustrated by PIL petitions.

The veiled alliances between the agents of law and order (courts, advocates, police) are illustrated in the section on 'the Police' (see chapter three). There is no evidence of specific police officers having been condemned by the Supreme Court or a High Court, in PIL, with the exception of the Nadiad incident where the autonomy of the judiciary was under threat. The judiciary's preoccupation with its own establishment is reflected in the cases where some accountability of state

⁸ See Sathe, S P, *The Right to Know*, (N M Tripathi Pvt Ltd, Bombay, 1991).

⁹ For example in *P Rathinam and another v Union of India and another*, as discussed in 'Public Policy and Administration' in chapter four, the Supreme Court struck down section 309 of the *Indian Penal Code*, 1860.

¹⁰ Singh, Chhatrapati, 'Right to Life: Legal Activism or Legal Escapism' in Bhatia, K L (ed) (1989), 281-290 at 285. He stated:

The point is that the right-to-life-litigation are precisely those cases which have provided the judges the opportunity to scrutinise, repeal or amend the colonial laws which deprive the poor people of their livelihood.

For an example of the reluctance to assess legislation see the section on 'Injustices Specific to Women' in chapter three for petitions filed challenging the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and the Muslim Personal Laws (Application) Act, 1937. For a listing of the twenty-two laws which had been invalidated, out of the 2311 laws passed, between 1950 and 1985 see 'Laws struck down by Supreme Court', *Lok Sabha Debates*, Series 8 Session 5 Vol 15, 25/3/86, 170-6.

functionaries has been ensured.¹¹

The nature of judicial decision making is further revealed as the particular needs of tribal and indigenous peoples have not been recognised. Constitutionally defined, Scheduled Castes, Scheduled Tribes and Other Backward Classes have only been extensively discussed in the context of political controversy.¹² From cases about slums to resource rights and prisons, reticence is apparent in most judgments. Similarly, there are many nuances which the Court has yet to consider. For example, while the Court may be concerned with the environmental effects of pollution, it has not considered, thus far, the effects on mental health.¹³

The litigation on 'Environment and Resources' and 'Urban Space' expose the vulnerabilities of PIL as a strategy for social change. Even when orders have been given, few have been implemented. It is in the North American styled PIL, increasingly prevalent in the Indian Courts, that tangible successes have been achieved. The legislative changes providing wide standing provisions to approach the courts for environmental and consumer issues, have echoed the trends in the courtroom,¹⁴ as the orders implemented reflect the urban, elite base of the participants in PIL.¹⁵ The Court's reluctance to interfere in property relations, consistent since

¹¹ In particular see chapter four for *S P Sampath Kumar v Union of India and others* AIR 1987 SC 386 as discussed in 'Judges, Courts, Lawyers' and see *D C Wadhwa and others v State of Bihar* AIR 1987 SC 579 as discussed in 'Public Policy and Administration'.

¹² See *Indra Sawhney and Ors v Union of India and Ors* JT 1992 (6) SC 273 (the Mandal judgement) and the other cases on reservation policy in the section on 'Public Policy and Administration'. Also see *All Kerala Poor Legal Aid Association v Chief Justice* 1990 (1) KLT 1, discussed in the section on 'Judges, Courts, Lawyers'.

¹³ It is possible that recourse to law is not considered appropriate, that it is not equipped to appraise all the facets, or that judicial priorities are determined. For example, see the discussion of the court's treatment of *Olga Tellis and others v Bombay Municipal Corporation and others* AIR 1986 SC 180 in the section on 'Urban Space' in chapter four.

¹⁴ See 'Alternative and Corollary Innovations' in chapter five.

¹⁵ See Bardhan, Pranab, *The Political Economy of Development in India*, (Basil Blackwell, Oxford, 1984); Stern, Robert W, *Changing India*, (Cambridge University Press, Cambridge, 1993) in particular chapter three for his discussion of class.

independence, has continued in the resolution of PIL matters.¹⁶ Judicial decisions relating to land and its use, an issue central to many of the petitions, have been limited by the structure of the constitution, which protects many land reform laws from judicial review.¹⁷

Certain politically sensitive cases have remained pending, such as those relating to sati and police firings.¹⁸ Seen in tandem with the reluctance of judges to pass orders against individual administrators, police officers or bonded labour keepers, this kind of response is part of the concern not to antagonise those in power or to affix liability for injustice.¹⁹ However, in policy areas within the ambit of PIL, rather than the more narrowly defined SAL, the tendency of the Court to provide the role of an "opposition"²⁰ has continued. Constitutional provisions have continued to be mobilised by the judiciary to provide a critique of the administration.²¹ Stuart Scheingold's analysis of judicial decision making in the USA - that judges remain within liberal-capitalist boundaries, steer clear of allocative problems and take halting,

¹⁶ Any efforts that could have been made have been stymied by the existence of the Ninth Schedule to the Constitution. See chapter two.

¹⁷ . Bina Agarwal, analysing land legislations from a gender perspective, has noted:
the placing of most land reform laws beyond challenge on constitutional ground, through their inclusion in the Ninth Schedule, has taken away a major means of changing the gender-unequal land-related legislation still prevailing in many states.

Agarwal, Bina, 'Gender and Legal Rights in Agricultural Land in India', *EPW*, Vol 30 No 12, 25/3/95, A39-A56 at A52. See Baxi Upendra in Shah, Ghanshayam (ed) (1992) at 189 for a discussion of the ninth schedule.

¹⁸ See *Chaitanya Kalbagh and another etc v State of U P and others*, as discussed in 'The Police' in chapter three. Petitions filed challenging the constitutional validity of enactments, including those documented in 'Injustices Specific to Women' also in chapter three, have not been heard.

¹⁹ It is not just PIL, but other judgements that demonstrate the biases and proclivities of the bench. The quick release from Tihar Jail of the director of the Thapar group of companies has been criticised in the context of other orders of the Supreme Court, see Mahajan, Krishan, 'Legal Perspectives: Midnight Judiciary', *Hindustan Times*, 15/9/86. This analysis persists in additional documentation. See *Human Rights in India. The updated Amnesty International Report*, (Vistaar Publications, New Delhi, 1993) at 87.

²⁰ Sudarshan, R (1990) at 57.

²¹ Baxi, Upendra (1991) at 83. In Robert Stern's table of major political events in the Indian Union's history, from 1947 to 1992, many of the issues of the 1980's, including the Bofors affair, rising communalism and the Mandal commission report, have all been admitted, heard and extensively discussed by the Court. Stern, Robert W, (1993) at 181-183.

incremental initiatives in policy matters - is pertinent for PIL in India.²²

Broad themes can be deduced from the case studies. The Court has acted to ensure the implementation of statutes, has monitored cases and has repeatedly given orders indicating concern for social justice. However, the Court has not acted when asked to consider the remit of civil and political rights against the State, in terms of army and police action, and has deferred issuing directions that would, in effect, redistribute land to provide a broader base of land ownership and control. The separation of powers has been respected, and the Court has rarely adjudicated upon policy issues, politically sensitive cases or considered economic criteria.

The most persistent theme is the problem of implementation.²³ In many instances courts have responded to petitions and the directives given, if realised, would certainly have had some effect. One analyst of PIL, writing in 1985, identified three possibilities if orders are not implemented: the Court can either initiate proceedings for contempt of court, keep the case on file by issuing interim directions and monitoring implementation, or award compensation or exemplary costs for the violation of fundamental rights.²⁴ Through the case studies the weaknesses of all three options has become apparent. The imperatives of monitoring cases have been exacting and difficult to fulfil in all but a few cases. Compensation can be paid, but is not mandatory. Awards have therefore been dependent upon the discretion of the Court and the propensities of individual judges. Although it is possible to order punishments for contempt of court, under the Contempt of Courts Act, 1971,²⁵ there have been few

²² See Scheingold, Stuart A (1981).

²³ In a study of the USA, Stuart Scheingold expressed his strongest reservation to PIL their was implementation. He identified the potential for delay, the Court's reluctance to assuming administrative burdens and the nature of the opposition as determinants in implementation. Scheingold, Stuart A (1981) at 200.

²⁴ Agrawala, S K (1985) at 40.

²⁵ See section 12 of the Act and the discussion of 'Petitioners and Petitions' in chapter five.

instances where it has been used - or even threatened.²⁶ Occasionally, criminal contempt has been mobilised to chastise those who cast aspersions on the judiciary and courts.²⁷

Despite the efforts of some judges to ensure that procedures were instituted in the courts for the management of letters received as writ petitions, and of the rest of the PIL docket, the resultant administrative machinery has proven counter productive. The powers of admission and listing vested in the registries have often mitigated against the PIL litigant. The manner in which obstacles to gaining access to justice have been removed has determined the profile of PIL to a significant extent. Delays continue to be endemic and while the Court has recognised the damaging effect of long pendencies on any effort to increase access to justice, it has been unable to ameliorate the situation. The PIL petition is not automatically prioritised by the courts.

The aspirations, motivations and experiences of the people involved provide explanations for many of the questions raised during the study of PIL about the changing profile of the litigation, the contrasting nature of many of the judgments given, and the varying ways in which PIL has shaped the use of law for social change.

²⁶ On the rare occasions that civil contempt has been threatened, to elicit implementation, it does not appear to have been used. See *Common Cause, A Regd Society v Union of India & Ors*, in the section on 'Consumer Issues'. This practice can be noted in petitions filed in the regular manner. For example in *ML Sachdev v Union of India & Anr* 1990 (2) SCALE 196 [926], the Supreme Court found A N Verma, Secretary of Industry and Company Affairs, guilty of Contempt of Court, but held, at 928:

In recent times, instances of non-compliance with Court's directions have multiplied and it is necessary to curb such tendency of litigating parties. We, however, do not propose to impose any punishment in view of the offer of unqualified apology offered in paragraph 8 of the affidavit but hope and trust that there would be no recurrence of the conduct.

²⁷ See the section on 'Judges, Courts, Lawyers', *supra*. See Sathe, S P, 'Freedom of Speech and Contempt of Court', *The Lawyers*, Vol 3 No 10, Nov 1988, 17-19. Also see *Kameshwar Prasad Sharma*, 'Slave' President, *Bandhua Mukti Morcha*, *Bihar v State of Bihar and others*, as discussed in 'Bonded Labour' in chapter three. For a discussion of the use of contempt powers see Dhavan, Rajeev, *Only the Good News*, (Manohar Publications, New Delhi, 1987), 149-157, where he observed at 150-151:

The incidence of contempt petitions against those who criticise the judiciary has increased. Such petitions linger on to benefit the prestige of the contemnors. This reflects on the vulnerability of the judiciary, its own capacity for over-sensitivity as well as the manner in which the judiciary can be trapped by its own processes in an unequal battle with an unscrupulous adversary, on the latter's terms.

Despite the difficulties that were perceptible even during the initial euphoria, there was an assumption that the recourse to law is worthwhile.²⁸ Practical difficulties combined with disillusionment with legal doctrine have led to a revaluation of the strategy of using law. Although PIL was fashioned as a last resort for those unable to bring about change elsewhere or by other tactics, it has been considered most effective by those who use it strategically. Questions about levels of accountability of petitioners to those affected by the petitions, and the mobilisation of these groups, have thus gained prominence.²⁹

The organisational strategy of the petitioners has, both acted for and against the successful use of law. Emphasis on using law for political struggle has been ultimately disappointing, and, in some instances, may have postponed mobilisation at the “grassroots”.³⁰ Similarly, the emphasis on legal mechanisms,

²⁸ A parallel debate that took place within the law and development movement, the literature on which is extensive. In particular, see Trubek, David M and Galanter, Marc, ‘Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States’, *Wisconsin Law Review*, Vol 4, 1974, 1062-1102; Burg, Elliot M, ‘Law and Development: A Review of the Literature & a Critique of “Scholars in Self-Estrangement”’, *The American Journal of Comparative Law*, Vol 25 No 3, Summer 1977, 492-530; Snyder, Francis G, ‘The Failure of “Law and Development”’, *Wisconsin Law Review*, Vol 1982 No 3, 373-396; Dias, Clarence, ‘Law and the Development Process within the Asia-Pacific Reality’ in *My Rights, Whose Control? A Report of the Regional Consultation: Asia Pacific Women's Issues, Law and the Development Process, 26-30 August 1989, New Delhi*, (Asia Pacific Forum on Women Law and Development), 1-17. It has been observed that:

The evolution of “development law” is motivated, first, by a belief that the great inequalities of wealth between, and within, States are offensive to social justice and, secondly, by the conviction that law can be used to bring about a change towards greater justice.

Muchlinski, P T, ““Basic Needs” Theory and “Development Law”” in Snyder, Francis and Slinn, Peter (eds) (1987), 237-270 at 237. Also see Griffiths, John, ‘Is Law Important?’, *New York University Law Review*, Vol 54 No 2, May 1979, 339-374.

²⁹ See Scheingold, Stuart A (1981) at 204-207 for a discussion of law as a political tactic in the USA. Marc Galanter has observed, “those who seek change through the courts tend to represent relatively isolated interests, unable to carry the day in more political fora”. Galanter, Marc, ‘Why the “Haves” come out ahead: Speculations on the Limits of Legal Change’, *Law and Society*, Vol 9 No 1, Fall 1974, 95-160 at 135.

³⁰ See Lukacs, George, ‘Legality and Illegality’ in Ghai, Yash; Luckman, Robin and Snyder, Francis (eds) (1987), 745-749; Hutchins, Thomas and Klaaren, Jonathon, *Public Interest Law Around the World*, (Columbia Human Rights Law Review, 1992) at 3. Marc Galanter observed:

Although broader in scope than typical legal aid schemes, in crucial ways it replicates the prevailing atomistic style. Public interest litigation too is initiated and controlled by elites and is responsive to their sense of priorities. It carries no accountability to a specific client constituency nor does it imply a sustained commitment to such a constituency. Typically, it

necessarily a “top-down” approach when using the higher courts, has lessened the focus on other ways of holding the state accountable for its actions. At its most ineffective, PIL, having graphically exposed the inadequacy of the legal system in ensuring justice for all, has provided a justification for the sustenance of, often violent, emerging political movements.³¹

The legal concerns of the activist have rarely left the scope of a particularised case. The initial vision that PIL, or more properly SAL, would address the structure of the courts and legal process has not been realised. Upendra Baxi has therefore concluded:

while they take every salient problem to courts appellate, they fail to regard the problematic of the independence of the judiciary or its adequate infrastructure as problems serious enough to warrant their attention.

In these circumstances, all that the managers of the state have to do is to allow the SAL, as it were, to run its initial course and to deploy the growing internal critique of SAL to eventually de-legitimize it.³²

Baxi's statement has been borne out. PIL is no longer perceived as a solution, but is perceived as an arduous process, forcing involvement in a system that is at best unscrupulous, and at worst, threatens the motivation and credibility of both the petitioners and their perception of how injustice can be resolved.

Lawyers have been instrumental in the relationship between the PIL petitioner and the legal process; innovations are most apparent in the area of lawyering. Whilst PIL has been appropriated as another tool in the armoury of some

is an episodic response to a particular outrage. It does not mobilise the victims nor help them to develop capabilities for sustained effective use of law.

Galanter, Marc, 'New Patterns of Legal Services in India' in Galanter, Marc, *Law and Society in Modern India*, (OUP, Delhi, 1989), 279-294, at 291. See chapter six.

³¹ Parag Kumar Das, editor *Boodhbar*, interview, Guwahati, 3/6/93. He was referring to *Naga People's Movement for Human Rights (NPMHR) v Union of India and others*, as discussed in 'The Armed Forces' in chapter three, and the censorship of the press in Assam. See Dhavan, Rajeev, 'Means, Motives and Opportunities: Reflecting on Legal Research in India', *Modern Law Review*, Vol 50, Oct 87, 725-749.

³² Baxi, Upendra, 'Judicial Discourse: Dialectics of the Face and the Mask', *Journal of the Indian Law Institute*, Vol 35 Nos 1&2, Jan-June 1993, 1-12 at 11.

ambitious lawyers, it has also been used effectively by artful lawyers concerned with social change, who are able to manipulate the system. This has extended into local areas, where lawyers work alongside social activists, furthering endeavours to ensure the implementation of existing laws and court orders.

Thus, the continuing absence of a dependable framework in which a concern with poverty and injustice can be discussed and redressed is striking. PIL, embodying the benevolent facet of the judiciary, has remained discretionary, dependent upon complex bureaucratic procedures and upon the sympathy of judges. Usha Ramanathan's description of PIL as "compassionate jurisdiction"³³ seems appropriate. Whilst, through PIL the Court has gone some way to recognising the victim and acknowledging injustice,³⁴ one analyst came to a general conclusion that "in resolving conflicting interests, the victim all too often becomes an incidental event in the law".³⁵ Moreover, while procedural changes have had an impact, the extent to which the ethos of social justice has permeated the orders of the Supreme Court and High Courts outside PIL is questionable.

By concentrating on PILs originating in the writ jurisdiction of the Supreme Court and High Courts, this study has, necessarily, excluded consideration of litigation in lower courts.³⁶ With most litigation in India is concentrated in Magistrates' and District and Sessions Courts, it is here that concern for social justice also needs to be reflected.³⁷ The requirements of implementation have ensured that

³³ Ramanathan, Usha, 'Victimology: as if people mattered', (unpublished paper presented at the First Biennial Conference of the Indian Society of Victimology, Madras, 12-14/8/94), note 62 at 18.

³⁴ *Ibid.* at 9-10.

³⁵ *Ibid.* at 7.

³⁶ A few notable exceptions include *Municipal Council, Ratlam v Vardhichand and others*, as discussed in 'Urban Space' in chapter four and *State (Delhi Administration) v Laxman Kumar*, as discussed in 'Injustices Specific to Women' in chapter three, which came to the Supreme Court in appeal, via an appeal to the High Court.

³⁷ See Mendelsohn, Oliver, 'The Pathology of the Indian Legal System', *Modern Asian Studies*, Vol 15 No 4, 1981, 823-863; Agarwal (1994) where she documents the obstruction faced to the implementation of relatively progressive legislation. Referring to Madhu Kishwar, whose experience with PIL is discussed in the section on 'Injustices Specific to Women' in chapter three, Agarwal notes,

these courts are the site of struggle, for example, for the “barefoot” lawyer filing cases following a Supreme Court judgment.³⁸

The lower courts have a range of precedents set by the Supreme Court and High Courts, in PILs, from which to choose. While many orders can be relied upon in support of relaxing procedures, others can be referred to when procedures are sought to be strictly interpreted. The nature of the influence of PIL on the judicial decisions made in lower courts can only be observed in the relaxed standing requirements legislated in certain statutes.³⁹ PIL appears to have had little direct impact on the procedures and court rules of the lower courts, with the exception of existing statutory procedures mobilised for PIL in district courts. However, the extent of this form of legal action has not, as yet, been explored.⁴⁰

PIL has contributed to an increasing awareness of injustice from the village to the international community, despite its conduct being the preserve of urban elites. One result of the measures to increase access, which include legal aid and other initiatives, has been the knowledge imparted to some disenfranchised sections of society about the existence of rights and remedies, and of the legal process.⁴¹ A unique

at 274, “a common tactic is to initiate expensive litigation which few women can financially afford” - litigation that is largely conducted in the lower courts. Also see Baxi, Upendra (1987) at 176 where he raises the question of the “wider and sustained diffusion throughout the entire judicial system”, and Joseph, George and Desrochers, John, ‘Development, Human Rights and Action Groups’, (Centre for Social Action, Bangalore, 1985), where it is concluded, at 127:

The success of PIL as a movement largely depends on how lawyers are able to force the lower rungs of the judiciary to respond to PIL involving the common every day issues of the poor.

³⁸ See the discussion of *Banwasi Sewa Ashram v State of Uttar Pradesh* in ‘Environment and Resources’ in chapter four and in ‘Petitioners and Petitions’ in chapter five.

³⁹ Existing statutory provisions have been detailed in chapter two, and changes in standing requirements discussed in ‘Alternative and Corollary Innovations’ in chapter five.

⁴⁰ Gnanapragasam, Legal Resources for Social Action, interview, 12/4/93. See Suryawanshi, Nirmalkumar, ‘Social Action Litigation under Section 91 C P C’, *The Lawyers*, Vol 2 No 1, Jan 1987, 20 for details of a litigation in the Dhule District Court in Maharashtra.

⁴¹ The Self-Employed Women's Association in Ahmedabad, an organisation which has used law through PIL and other means, is one example of an organisation that has learnt from its initially litigation-orientated approach:

SEWA, continuing its struggle to open up communication and understanding between the poor and the legal system, has tried a two-pronged approach to touch both lawyers and its members.

insight has been gained into the legal system, and the game of law, together with an opportunity to understand how law can be deployed for new constituencies. The continuing involvement of both Justice Krishna Iyer and Justice Bhagwati in social justice initiatives, after their retirement, echoes the breadth of the influence of PIL. While Justice Krishna Iyer, a well-respected figure amongst social and rights activists, has concentrated his efforts within India by extending his patronage, Justice Bhagwati has become renowned as an international jurist.

The urge to participate on International fora, by manifesting the characteristics of a liberal democratic state, continues to inform the initiatives to increase access to justice, and to litigate on issues of global concern, in particular, the environment. That some issues have received attention outside India, including child labour and bonded labour,⁴² has encouraged the courts to evince sympathy.⁴³ Just as Indian PIL was, in part, informed by PIL in the USA, the Indian Supreme Court's activism has resonated throughout South Asia, strengthening the similar use of law in Pakistan, Bangladesh and Sri Lanka.⁴⁴

In collaboration with the legal aid committee of Gujarat High Court, SEWA brought the two groups together twice yearly in an effort to encourage social awareness in lawyers and increase rural women's knowledge of how the law has an impact on their lives.

Martens, Margaret Hosmer, 'Experience in organising women in the informal sector in India' in Martens, Margaret Hosmer and Mitter, Swasti (eds), *Women in Trade Unions. Organising the unorganised*, (International Labour Office, Geneva, 1994), 127-129 at 129, referring to a study of SEWA by S Selliah.

⁴² For a brief study of the activities of Anti-Slavery International, with whom Bandhua Mukti Morcha has established strong links, see Harlow, Carol and Rawlings, Richard, (1992) at 244.

⁴³ Similarly, the 'Alternative and Corollary Innovations' discussed in chapter five are strengthened by similar efforts elsewhere and the increasing attention paid to legal pluralism and interest in alternative dispute resolution. For example, see Cappelletti, Mauro, 'Alternative Dispute Resolution Processed within the Framework of the World-Wide Access-to-Justice Movement', *Modern Law Review*, Vol 56, May 1993, 282-296.

⁴⁴ See Gomez, Mario, *In the Public Interest. Essays on Public Interest Litigation and Participatory Justice*, (Legal Aid Centre University of Columbo, Columbo, 1993); Tiruchelvam, Neelan and Coomaraswamy, Radhika (eds) (1987); Khan, Mansoor Hassan, *Public Interest Litigation: Growth of the Concept and its Meaning in Pakistan*, (Pakistan Law House, Karachi, 1993). See note 194 in chapter six for Bangladesh. Initiatives similar to those in India have taken place worldwide. See *Public Interest Law Around the World* (1992) - also interesting for the links it makes between access to justice and foreign funding.

In spite of this influence, PIL in itself has not become a prominent or contentious issue on political fora. For example, little attention has been paid to PIL in the Lok Sabha (the Lower House of the Indian Parliament).⁴⁵ The extent of this disinterest is seen in the writings of former President of India, R Venkataraman, whose perceptions were largely shaped by the public focus on the misuse of PIL.⁴⁶ Complacent about the potentialities in the law, the legislators have had little reason to be wary of the Court's power. The controversy over the Terrorist and Disruptive Activities (Prevention) Act, 1987 illustrates this. In a judgment in 1994,⁴⁷ the Supreme Court upheld the constitutional validity of the Act, which had been criticised by many, including the National Human Rights Commission.⁴⁸ Nonetheless, when it was considered politically expedient, the Act was permitted to lapse by the Congress Government on May 23, 1995.

The conclusions reached give credence to the argument that the dramatic initiatives of the Supreme Court in the early 1980's are an appeasement to increasing vocal sections of society. It is at this point that:

⁴⁵ One of the few recorded instances is 'Public interest cases pending in Supreme Court', *Lok Sabha Debates*, Series 7 Session 7 Vol 40, 16/8/83, 54. M J Anthony observed:

So far there have been no vociferous protests in Parliament over this judicial activism.

Nor has the executive protested against affirmative stance of the judiciary as questioning the jurisdiction of the courts would only expose their role.

Anthony, M J, 'Legal scene: Can Supreme Court judges assume role of law-makers?', *The business and Political Observer*, 27/11/91.

⁴⁶ See Venkataraman, R, *My Presidential Years* (Indus Harper-Collins, India, 1994) at at 95 and at 521:

The Judge [Chief Justice of the Supreme Court of the Phillipines] wanted to know about the public interest litigation and how it helped justice. I told him that within limits it is a salutary system and secured speedy justice to the aggrieved. At the same time this tendency to abuse this extraordinary remedy needed to be countered lest it might degenerate into public nuisance litigation. I said that it was under reasonable control in India and that it had helped to voice public grievances which affected the whole or a class of people. There was a pleasant cultural show after dinner.

⁴⁷ *Kartar Singh v State of Punjab* 1994 (Supp) SCALE I. See the discussion on 'The Armed Forces' in chapter three.

⁴⁸ *Human Rights in India. The updated Amnesty International Report*, (Vistaar Publications, New Delhi, 1993); 'Nair criticises misuse of TADA', *The North East Times*, 12/7/94, reprinted in *Government runs amok in Assam*, (Ganatantrik Adhikar Sangram Samiti, Guwahati, Assam, 1994); 'TADA (P) Act must go', *PUCL Bulletin*, Vol XV No 5, May 1995, 1.

Analysis of the state helps us to determine to what extent the state is an instrument or expression of class rule, to understand the limits of dominance and purely through coercion, and to assess the role of law in the mediation of economic relationships and class domination.⁴⁹

The study of PIL provides a microcosm for the study of the entire legal system, and its relationship with the other institutions of the state. Debates over the suitability of the existing, formal legal order are most relevant when considered in tandem with the failure of the legal system to ensure that the rights of Indian citizens are upheld. From its formal structure and the assumption of rationality in legal reasoning,⁵⁰ to its day to day functioning, the legal system has consistently excluded many from its ambit. Correspondingly, for the state theorist and legal historian alike, PIL may prove to be the focal point which E P Thompson found in the “Black Act” of 1723, enacted in Britain, when he concluded that the eighteenth century “provides a text-book illustration of the employment of law, as an instrument and as ideology, in the interests of the ruling class”.⁵¹

The implicit opposition from the executive, which has consistently flouted the orders of the Court, is a major determinant in the evaluation of PIL. As the majority of petitions have been filed against the state or one of its functionaries, who are then asked to remedy injustices identified by the Court, it is on these that

⁴⁹ 'Part II: State, Law and Ideology - Introduction' in Ghai, Yash; Luckman, Robin and Snyder, Francis (eds) (1987), at 177. See 'Part II: State, Law and Ideology - Introduction' in Ghai, Yash; Luckman, Robin and Snyder, Francis (eds) (1987), at 177-182 for a brief but useful introduction to readings from Karl Marx and Antonio Gramsci. Also see Cain, Maureen and Hunt, Alan, *Marx and Engels on Law*, (Academic Press, London, 1979).

⁵⁰ Ranajit Guha's observations of the relationship between the peasant in colonial India and writing remains relevant when examining legal reasoning, because of its dependence on the written word:

He had learnt, at his own cost, that the rent roll could deceive; that the bond could keep him and his family in almost perpetual servitude; that official papers could be used by clerks, judges, lawyers and landlords to rob him of his land and livelihood. Writing was thus, to him, the sign of the enemy

Guha, Ranajit, *Elementary Aspects of Peasant Insurgency in Colonial India*, (Oxford University Press, Delhi, 1983) at 52. Also see Tigar, Michael and Levy, Madelaine, *Law and the Rise of Capitalism*, (Monthly Review Press, New York, 1977). For an introductory discussion of the Indian state, and its formation, see Mitra, Subrata Kumar, 'Between transaction and transcendence: The state and the institutionalisation of power in India' in Mitra, Subrata Kumar (ed), *The Post-Colonial State in Asia*, (Harvester Wheatsheaf, Hemel Hempstead, 1990), 73-99.

⁵¹ See Thompson, E P, 'Capitalism and the Rule of Law' in Ghai, Yash; Luckman, Robin and Snyder, Francis (eds) (1987), 57-69.

attention must be focused. While it cannot be generalised for the whole of India, Jan Breman's study based in Gujarat provides pertinent insight into the administration:

legal measures such as the regulations on dismissal, right to work, health insurance etc. which might provide real protection for the large part of the rural population of India which depends upon income from wage labour, either does not exist or exists only on paper, for example the rulings on minimum wages and working hours, equal pay for men and women and the prohibition of child labour. ... There is a general complaint that the landowning class arranges the work in such a way as to frustrate the realization of the object[ive] of these special regulations and provisions. That they succeed so well in doing so is partly due to the indisputable fact that the members of the middle and higher castes fill the executive positions in the regional government apparatus, and, for that matter, in the whole of social life.⁵²

In this instance, ineffective trade union intervention amongst contract workers in Gujarat, has contributed to the conditions in which such workers live.⁵³ Interviews conducted during fieldwork have supported Mendelsohn's conclusion, as petitioners and lawyers have repeatedly expressed their disaffection with restrained and inefficient administration.⁵⁴

However, elucidation of the judicial function in PIL has enabled some judges to begin to transcend the role ascribed to the judiciary, within the scheme of

⁵² Breman, Jan, *Of Peasants, Migrants and Paupers. Rural Labour Circulation and Capitalist Production in West India*, (Oxford University Press, Delhi, 1985) at xxii.

⁵³ Patel, Sujata, 'Contract Labour and Public Interest Litigation', (1983) 18 EPW 2151-2153 at 2151.

⁵⁴ This has led to a malaise where they become recalcitrant in their efforts to ensure the implementation of favourable court orders by petitioning lower courts. For example, referring, amongst others, to the decision of the Supreme Court in *Sanjit Roy v State of Rajasthan*, as discussed in 'Labour' in chapter three, Nikhil Dey observed:

The fact that every court decision has consistently held that workers on government employment programmes including Famine Relief Works must be covered by the notification, and that paying less than the minimum wage would be a violation of the workers fundamental rights seems to have been ignored by the State Government once again. The worker will have to approach the court to obtain a decision he/she has obtained several times before. The cost of this effort and delay to the worker is self-evident.

Dey, Nikhil, 'Minimum Wages in Rural Employment Programmes: The Legal Status' in Gianchandani, Deepak (ed), *Minimum Wages in Government Sponsored Rural Employment Programmes*, (Institute of Development Studies, Jaipur, 1991), 36-45 at 45. Also see *Banwasi Sewa Ashram v State of Uttar Pradesh* 1986 (4) SCC 753 as discussed in 'Environment and Resources' in chapter four and 'Petitions and Petitioners' in chapter five.

governance, through “the articulation of social contradictions”.⁵⁵ Thus, the rights upon which the legitimacy of the government is based, were to provide the space in which PIL was to emerge, and endure.⁵⁶ The experiences garnered through the 1980's have led some to seek more viable ways to resolve injustice, thus providing a point of appraisal for judges, lawyers, activists, funders, courts and issues.

While judges have been at the centre of PIL, the control of judicial appointments has remained a fundamental obstacle to stabilising this articulation. What has endured is the preoccupation with the judicial function and a continuing deliberation on judicial review and legal decision making, which has had import for all forms of litigation.⁵⁷ Whatever its shortcomings, PIL has highlighted the need for

⁵⁵ See Baxi, Upendra, 'On the Problematic Distinction between "Legislation" and "Adjudication": A Forgotten Aspect of Dominance', *Delhi Law Review*, Vol 12, 1990, reprint, 1-15. Thus, the tension between the rhetoric of legal equality and human rights in the Constitution, and its poor reflection in reality, has provided the leverage needed by judges and petitioners to extend the realm of law to those previously unrepresented in legal, or even political, fora:

If constitutional phrases mask the reality of the practices of power, they also remain important for struggles for justice. The extraordinary thing about Constitutions is that their rhetoric often provides potential to avenge the practices of powers; constitutional discourse, in its historic moments of articulation, structures both modes of legitimation of power and its delegitimation as well. Constitutional discourse is not simply a register of dominance; it also marks sites of resistance to domination.

Baxi, Upendra (1991) at 77. Similar conclusions have been reached by Joseph, George and Desrochers, John, (1985) and in Dhavan, Rajeev and Partington, Martin, 'Co-optation or Independent Strategy? The Role of Social Action Groups' in Cooper, Jeremy and Dhavan, Rajeev, *Public Interest Law*, (Basil Blackwell, Oxford, 1986), 235-260, in which the “new” entitlements that would emerge are discussed.

⁵⁶ S P Sathe's statement epitomises the excitement of the early days of PIL:

Gone are the days when the court's main occupation was right to property. Today's court is more concerned about violations of rights

Sathe, S P, 'Legal Activism, Social Action and Government Lawlessness', *Cochin University Law Review*, [(198?)]++, 362-382 at 369. In a thorough analysis of the foundations of modern law, Tigar and Levy observed contradictions of relevance to the study of PIL in India:

to assert that the eventual justification of legal ideology is in economic self-interest does not mean that there is a direct and immediate relationship between each element of legal ideology - or even each individually expressed command - and the economic self-interest of a particular group. To the contrary, it is precisely the contradictions between ideology and self-interest that permit insurgent groups to win partial and temporary victories within the parameters of existing law.

Tigar, Michael and Levy, Madelaine, *Law and the Rise of Capitalism*, (Monthly Review Press, New York, 1977) at 288.

⁵⁷ George Gadbois noted that in the area of prison reform and prisoners' rights, the court seems to have succeeded not only in placing prison reform on the nation's agenda of problems that need to be addressed, but in setting standards for how prisoners must be treated. In other words, the court appears to be acting in advance of the more political branches in

structural change in the distribution of resources, such as land, and the need for administrative and political will to bring about the necessary changes. It has contributed to national and international endeavours to provide universal access to justice. The Indian legal system can no longer be as deliberately and comprehensively exclusionary as it was before.

making prison-related public policy.

Gadbois, George H, 'The Supreme Court of India as a Political Motivation' in Dhavan, Rajeev; Sudarshan, R and Khurshid, Salman (eds) (1985), 250-267 at 256. Concern has been voiced about the extent of judicial action. See Anthony, M J, 'Legal scene: Can Supreme Court judges assume role of law-makers?', *The Business and Political Observer*, 27/11/91. While commenting on the letter petition regarding adoption (*Laxmi Kant Pandey v Union of India* in the section on 'Children' in chapter three), Anthony noted:

Parliament has failed to pass a comprehensive law on adoption so far, and every attempt to do so had floundered on hurdles set up by vested interests in each community. Where Parliament had failed the Supreme Court has succeeded, though the rules it has passed cover only a limited area of adoption - only that of Indian children adopted by foreign parents.

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Point to note:

- only date of first meeting recorded)

Smriti Acharya, SNDT Women's University, Pune, 5/12/93

Rani Advani, advocate, Ahmedabad, 13/2/91

Shakuntala Advani, Women's Legal Aid Cell, Guwahati, 15/6/93

Swami Agnivesh, Bandhua Mukti Morcha, New Delhi, 21/2/91

Tejinder Singh Ahuja, advocate, Delhi, 1/2/91

Justice Janaki Amma, People's Council for Social Justice, Ernakulam, 19/8/93

Vidya Bal, Nari Samata Manch, Pune, 6/12/93

Sheela Barse, Bombay, 24/1/92

Indrajit Barua, Guwahati, 7/6/93

Pachu Gopal Baruah, advocate, Guwahati, 14/6/93

Upendra Baxi, Delhi University, Delhi, 29/1/91

Vidyut Bhagwat, University of Poona, Pune, 5/12/93

Ravi Bhagwat, Parisar, Pune, 6/12/93

Justice P N Bhagwati, New Delhi, 15/4/92

Prem Bhai, Banwasi Seva Ashram, New Delhi, 9/4/92

Anupam Bhatia, New Delhi, 20/3/93

Ela Bhatt, Self Employed Women's Association, New Delhi, 4/2/91

Mahesh Bhatt, Lok Adhikar Sangh; advocate, Ahmedabad, 15/2/91

Subir Bhaumik, journalist *Anand Bazaar Patrika*, Guwahati, 2/3/93

Ajit Kumar Bhujan, editor *Shadin*, Guwahati, 8/6/93

Abha Bora, Guwahati, 7/6/93

Celine, Streelekha; Vimochana, Bangalore, 11/12/92

Shyam Chainani, Bombay Environmental Action Group, Bombay, 19/3/92

K Chandramouli, former Supreme Court Registrar; advocate, New Delhi, 12/1/91

K Chandru, advocate, Madras, 14/4/93

Jyotsana Chatterjee, Joint Women's Programme, New Delhi, 13/4/92

Chinmai Chaudhary, advocate, Guwahati, 7/6/93

Yashpal Chibber, PUCL, New Delhi, 18/3/91

Poornima Chikarmani, SNDT Women's University, Pune, 5/12/93

Maja Daruwala, Ford Foundation, New Delhi, 7/4/92

Anubha Das, Women's Legal Aid Cell, Guwahati, 15/6/93

Horon Das, advocate, Guwahati, 9/6/93

Parag Kumar Das, editor *Boodhbar*, Guwahati, 3/6/93

Mona Daswani, Society for the Promotion of Area Resources Bombay, Centre, 16/3/92

Justice D A Desai, Calcutta, 29/10/92

Krishna Devarao, Andhra Pradesh Civil Liberties Committee, Bangalore, 14/12/92

Vasudha Dhagamwar, Multiple Action Research Group, New Delhi, 14/3/91

Rajeev Dhavan, advocate, New Delhi, 15/1/91

Deven Dutta, Grahak Suraksha Sanstha, Guwahati, 10/6/93

Niloy Dutta, advocate, Guwahati, 8/6/93

George Fernandes, Indian Social Institute, New Delhi, 28/2/92

R Gandhi, advocate, Madras, 14/4/93

R K Garg, advocate, New Delhi, 31/3/92

Gnanapragasam, Legal Resources for Social Action, Chengalpattu, Tamil Nadu, 12/4/93

Neelam Gorhe, Pune, 5/12/93

Anand Grover, Lawyers Collective, Bombay, 23/3/92

Asish Gupta, journalist *Aajkal*, Guwahati, 3/6/93

Nandita Haksar, advocate; National Law School of India University, Bangalore, 12/12/92

Kapila Hingorani, advocate, New Delhi, 23/2/92

Justice V R Krishna Iyer, New Delhi, 12/1/91

Jeemon Jacob, journalist *Deepika*, New Delhi, 6/8/95

Harish Jagtiani, advocate, Bombay, 23/3/92

Indira Jaising, advocate, New Delhi, 9/4/92

Kamini Jaiswal, advocate, New Delhi, 6/4/92

Nalini Jayal, Indian National Trust for Art and Cultural Heritage, New Delhi, 5/8/93

Jayashree, advocate, Pune, 6/12/93

Rani Jethmalani, advocate, New Delhi, 25/2/92

Ram Jethmalani, advocate, New Delhi, 12/2/92

Manju Jugran, Self Employed Women's Association, New Delhi, 9/4/92

Yogesh Kamdar, PUCL, Bombay, 21/3/92

K G Kannabiran, advocate; Andhra Pradesh Civil Liberties Committee, New Delhi, 22/11/93

Rani Karan, Tilonia, Rajasthan, 17/2/92

Madhu Kishwar, Manushi, New Delhi, 12/1/91

Smitu Kothari, Lokayan, New Delhi, 6/2/91

Millon Kothari, National Campaign for Housing Rights, New Delhi, 26/11/92

Sharad Kulkarni, Maharashtra, 26/3/93

Vijay Kumar, Joint Registrar Supreme Court Cases, New Delhi, 31/3/92

Vijay Kumar, Tarun Bharat Sangh, New Delhi, 3/3/92

Vatsala Kumari, Trivandrum, 5/8/93

Sugatha Kumari, Trivandrum, 6/8/93

Jose Kuriakose, advocate, Ernakulam, 16/8/93

Madhusoodanan, advocate, Ernakulam, 17/8/93

Krishan Mahajan, journalist, New Delhi, 12/2/92

Ruth Manohar, Women's Voice; Karnataka Kolegari Nivasigala Sammyukta Sangathana, Bangalore, 16/12/92

K Manoharan, Madras, 13/4/93

P T Mathew, Indian Social Institute, New Delhi, 28/2/91

Siby Mathew, advocate, Ernakulam, 18/8/93

Babu Mathew, National Law School of India University, Bangalore, 13/12/92

T U Mehta, advocate, New Delhi, 21/2/92

M C Mehta, advocate, New Delhi, 6/2/91

Subhash Mendapulkar, SUTRA, Himachal Pradesh, 12/7/93

N R Madhava Menon, National Law School of India University, Bangalore, 8/12/92

Surojit Mitra, advocate, Guwahati, 3/6/93

Inder Mohan, PUCL, Delhi, 10/1/91

Mukul Mudgal, advocate, New Delhi, 14/4/92

Govind Mukhoty, advocate, New Delhi, 21/2/92

Chot Murada, Committee for the implementation of Legal Aid Services, New Delhi, 12/3/91

S Muralidhar, advocate, New Delhi, 12/11/93

Ravi Nair, South Asia Human Rights Documentation Centre, New Delhi, 30/7/93

K Nandini, advocate, Cochin, 18/8/93

Pancholi, N D, advocate, Delhi, 11/2/91

Sriram Panchu, advocate; Consumer Action Group, Madras, 15/4/93

Gourishyam Panda, advocate (Orissa), New Delhi, 31/7/93

Laxmi Kant Pandey, advocate, New Delhi, 20/2/92

Vivek Pandit, Vidhayak Sansad; Shramjeevi Sangathana, Maharashtra, 25/3/93

Vincent Panikulangara, advocate, Ernakulam, 16/8/93

P H Parekh, advocate, New Delhi, 8/4/92

Sheela Patel, Society for the Promotion of Area Resources Centre, Bombay, 17/3/92

Mina Patel, Self Employed Women's Association, Ahmedabad, 15/2/91

Pranab Pathak, advocate, Guwahati, 5/6/93

Ila Pathak, Ahmedabad Women's Action Group, Ahmedabad, 16/2/91

Patwardhan, Vidhya, Parisar, Pune, 6/12/93

Sujit Patwardhan, Parisar, Pune, 6/12/93

Pradip Prabhu, Kashtakari Sangathana, Maharashtra, 27/3/93

M K Prasad, KSSP, Ernakulam, 15/8/93

Mahesh Prasad, Supreme Court Legal Aid Committee, New Delhi, 17/1/91

Mr Raja, Tamil Nadu State Legal Aid and Advice Board, Madras, 13/4/93

Usha Ramananthan, National Law School of India University, Bangalore, 12/12/92

Geeta Ramaseshan, advocate, Madras, 15/4/93

G Ramaswamy, Advocate General, New Delhi, 10/4/92

Asha Ramesh, Joint Women's Programme, New Delhi, 11/3/92

M A Rane, advocate; PUCL, Bombay, 18/3/92

Rao, Prabhakar, Special Secretary Legal Affairs, Ministry of Law and Justice, New Delhi, 13/4/92

P P Rao, advocate, New Delhi, 15/1/91

Ravinder Ravi, Amnesty International, New Delhi, 18/1/91

R Ravi, Lokayan, Delhi, 29/1/91

Sanjit Roy also known as Bunker Roy, Social Work and Research Centre, Tilonia, Rajasthan, 16/2/92

Hrishikesh Roy, advocate, Guwahati, 10/6/93

Dipali Das Roy, Women's Legal Aid Cell, Guwahati, 15/6/93

Justice Rajinder Sachar, advocate; PUCL, New Delhi, 27/10/93

Jaya Sagade, University of Poona, Pune, 4/12/93

D Saraf, Consumer Education and Research Centre, Ahmedabad, 13/2/91

Lotika Sarkar, Centre for Women and Development Studies, New Delhi, 22/1/91

Mukunda Kan Sarma, advocate, Guwahati, 14/6/93

R P Sarmah, advocate, Guwahati, 14/6/93

Vijay Sathe, Shramik Mukthi Sangathan, Maharashtra, 27/3/93

S P Sathe, Institute of Advanced Legal Studies, Pune, 4/12/93

Navroz Seervai, advocate, Bombay, 16/3/92

S R Sen, advocate, Shillong, 11/6/93

Atul Setalvad, advocate, Bombay, 18/3/92

Harsh Sethi, Centre for the Study of Developing Societies, Delhi, 5/3/91

Haribhai Shah, advocate; PUCL; Rationalist Society, Ahmedabad, 15/2/91

Manubhai Shah, Consumer Education and Research Centre, Ahmedabad, 17/2/91

Kavita Sharma, Parents Forum for Meaningful Education, New Delhi, 26/10/93

Pravin Sheth, University of Gujarat, Ahmedabad, 15/2/91

H D Shourie, Common Cause, New Delhi, 18/1/91

M N Shroff, advocate, New Delhi, 26/2/92

Kapil Sibal, advocate, New Delhi, 22/2/92

Singh, Chhatrapati, Centre for Environmental Law, New Delhi, 3/8/93

Kirti Singh, advocate; All India Democratic Women's Association, New Delhi, 11/11/93

B Sivaramayya, Delhi University, Delhi, 4/1/91

Suniti Sonowal, Women's Legal Aid Cell, Guwahati, 15/6/93

D D Sood, advocate, Simla, 17/7/93

Soli Sorabjee, advocate, New Delhi, 11/4/92

A Subashini, advocate, New Delhi, 20/4/92

H Subhalekshmy, advocate, Ernakulam, 17/8/93

R Sudarshan, Ford Foundation, New Delhi, 17/3/91

Lekha Suresh, advocate, Ernakulam, 19/8/93

Pune Syedbhai, 6/12/93

Talib, Rashid, Chittaranjan TV, New Delhi, 20/2/92

Rajesh Tandon, Society for the Participatory Research in Asia, New Delhi, 17/11/92

V M Tarkunde, advocate; PUCL, New Delhi, 14/1/91

Henry Tiphagne, advocate; Consumer Rights Protection Council (Madurai), New Delhi, 31/7/93

Enakshi Tukhral, Multiple Action Research Group, New Delhi, 23/11/92

Gautam Uzir, advocate, Guwahati, 5/6/93 and 6/6/93

S S Vasudevan, advocate, Madras, 13/4/93

Elizabeth Vatsyayay, Saheli, New Delhi, 13/3/91

R Venkataramani, advocate, New Delhi, 17/1/91

A X Verghese, advocate, Cochin, 18/8/93

Jose Verghese, advocate, New Delhi, 25/2/92

James Vincent, advocate, Ernakulam, 17/8/93

Achyut Yagnik, SETU, Ahmedabad, 13/2/92

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Appendices

Appendix A Excerpts from the Constitution of India

Part III: Fundamental Rights

Article 12

Definition.-

In this part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

Article 13

Laws inconsistent with or in derogation of the fundamental rights.-

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any 'law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,-

- (a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
- (b) “laws in force” includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

[(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368]

Article 14

Equality before law.-

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15

Prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth.-

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

- (a) access to shops, public restaurants, hotels and places of public entertainment; or
- (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

[(4) Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]

Article 16

Equality of opportunity in matters of public employment.-

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or employment to an office [under the Government, or any local or other authority within, a State of Union territory, any requirement as to residence within that State of Union territory] prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointment or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Article 17

Abolition of Untouchability.-

“Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law.

Article 18

Abolition of titles.-

(1) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign state.

(3) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Article 19

Protection of certain rights regarding freedom of speech, etc.-

(1) All citizens shall have the right-

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions;
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India; [and]
- (f) [* * * *]
- (g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India,] friendly relations with foreign

State, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence].

(3) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of [the sovereignty and integrity of India or] public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of [the sovereignty and integrity of India or] public order or morality, reasonable restrictions on the exercise of the rights conferred by the said sub-clause.

(5) Nothing in [sub-clauses (d) and (e)] of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restriction on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of ny Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restriction on the exercise of any of the rights conferred by the said sub-clause, and, in particular [nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,-

- (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
- (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise].

Article 20

Protection in respect of conviction for offences,-

(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

Article 21

Protection of life and personal liberty.-

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 22

Protection against arrest and detention in certain cases.-

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply-

- (a) to any person who for the time being is an enemy alien; or
- (b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

- (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Providing that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

- (b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe-

- (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);
- (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
- (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

Article 23

Prohibition of traffic in human beings and forced labour.-

(1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class in any of them.

Article 24

Prohibition of employment of children in factories etc.-

No child below the age of fourteen Years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Article 25

Freedom of conscience and free profession, practice and propagation of religion.-

(1) Subject to public order, morality and health and to the other provision of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-

- (a) regulating or restricting any economic, financial, political or other secular activity associated with religious practice;

- (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.-The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation II.-In sub-clause (b) of clause (2), the reference to Hindus shall be construed including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Article 26

Freedom to manage religious affairs.-

Subject to public order, morality and health, every religious denomination or section thereof shall have the right-

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire movable and immoveable property; and
- (d) to administer such property in accordance with law.

Article 27

Freedom as to payment of taxes for promotion of any particular religion. - No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Article 28

Freedom as to attendance at religious instruction or religious worship in certain educational institutions.-

(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or to attend any religious worship that may

be conducted in such institution or in any premises attached there to unless such person or, if such person is a minor, his guardian has given his consent thereto.

Article 29

Protection of interests of minorities.-

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State of receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30

Right of minorities, to establish and administer educational institutions -

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Article 31A

Saving of laws providing for acquisition of estates, etc. -

- (1) Notwithstanding any thing contained in article 13, no law providing for
- (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or
 - (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
 - (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
 - (d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors or managers of corporations, or of any voting rights of shareholders thereof, or
 - (e) the extinguishment or modification of any rights accruing by virtue of any

agreement, lease or licence for the purpose of searching for, or winning any mineral or mineral oil or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent:

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.)

(2) In this article:

(a) the expression “estate” shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include

(i) any jagir, inam or muafi or other similar grant and in the States of (Tamil Nadu) and Kerala, any janmam right;

(ii) any land held under ryotwari settlement;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;)

(b) the expression “rights” in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, (raiyat, under-raiyat) or other intermediary and any rights or privileges in respect of land revenue).

Article 31B

Validation of certain Acts and Regulations.-

Without prejudice to the generality of the provisions contained in article 31A none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent legislature to repeal or amend it, continue in force.

Article 31C

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Saving of laws giving effect to certain directive principles.-

Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing (all or any of the principles laid down in Part IV) shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by (article 14 or article 19); and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

Article 32

Remedies for enforcement of rights conferred by this Part -

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Article 33

Power of Parliament to modify the rights conferred by this Part in their application to forces, etc.-

Parliament may, by law, determine to what extent any of the rights conferred by this part shall, in their application to,

- (a) the members of the Armed Forces; or
- (b) The members of the Forces charged with the maintenance of public order; or
- (c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or
- (d) persons employed in, or in connection with the telecommunication systems set up for the purposes of any force; bureau or organisation referred to in clauses (a) to (c) be restricted or abrogated so as to ensure the proper discharge of the duties and the maintenance of discipline among them.

Article 34

Restriction on rights conferred by this Part while martial law is in force in any area.- Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

Article 35

Legislation to give effect to the provisions of this Part.-

Notwithstanding anything in this Constitution

(a) Parliament shall have, and the Legislature of a State shall not have, power to make laws

(i) with respect of any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament; and

(ii) for prescribing punishment for those acts which are declared to be offences under this part;

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in subclasses (ii).

(b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

Explanation - In this article, the expression “law in force” has the same meaning as in article 372.

Part IV: Directive Principles of State Policy

Article 36

Definition - In this Part, unless the context otherwise requires, “the State” has the same meaning as in Part III.

Article 37

Application of the principles contained in this Part.-

The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Article 38

State to secure a social order for the promotion of welfare of the people.-

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Article 39

Certain principles of policy to be followed by the State.- The State shall in particular, direct its policy towards securing

- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
- (d) that there is equal pay for equal work for both men and women;
- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
- (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 39A

Equal justice and free legal aid.-

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Article 40

Organisation of village panchayats.-

The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

Note: See the 64th Amendment.

Article 41

Right to work, to education and to public assistance in certain cases.-

The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 42

Provision for just and humane conditions of work and maternity relief.-

The State shall make provision for securing just and humane conditions of work and for maternity relief.

Article 43

Living wage, etc., for workers.-

The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

Article 43A

Participation of workers in management of industries.-

The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry.

Article 44

Uniform civil code for the citizens.-

The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

Article 45

Provision for free and compulsory education for children.-

The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

Article 46

Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.-

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Caste and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Article 47

Duty of the State to raise the level of nutrition and the standard of living and to improve public health.-

The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health.

Article 48

Organisation of agriculture and animal husbandry.-

The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds and prohibiting the slaughter of cows and calves and other milch and draught cattle.

Article 48A

Protection and improvement of environment and safeguarding of forests and wild life

- The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

Article 49

Protection of monuments and places and objects of national importance.-

It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, (declared by or under law made by Parliament) to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

Article 50

Separation of judiciary from executive.-

The State shall take steps to separate the judiciary from the executive in the public services of the State.

Article 51

Promotion of international peace and security.-

The State shall endeavour to

- (a) promote international peace and security;
- (b) maintain just and honourable relations between nations;
- (c) foster respect for international law and treaty obligations in the dealings of organised people with one another, and
- (d) encourage settlement of international disputes by arbitration.

Part IVA: The Fundamental Duties

Article 51A

Fundamental duties.-

It shall be the duty of every citizen of India -

- (a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
- (b) to cherish and follow the noble ideals which inspired our national struggle for freedom;
- (c) to uphold and protect the sovereignty, unity and integrity of India;
- (d) to defend the country and render national service when called upon to do so;
- (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

- (f) to value and preserve the rich heritage of our composite culture;
- (g) to protect and improve the natural environment including forests, lakes, rivers, wild life and to have compassion for living creatures;
- (h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
- (i) to safeguard public property and to abjure violence;
- (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

Part V: The Union

Chapter IV - The Union Judiciary

Article 136

Special leave to appeal by the Supreme Court -

(1) Notwithstanding anything in this chapter, the Supreme Court may, in its discretion grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgement, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

Part VI - The States

Chapter V - The High Courts In The States

Article 226

Power of High Courts to issue certain writs-

(1) Notwithstanding anything in article 32 every High Court shall have the power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories direction, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue direction, orders or writs to any Government authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without -

(a) furnishing to such parties copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard;

makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

Appendix B - PIL Guidelines

Supreme Court of India: Guidelines to be followed for entertaining letters/petitions received in this Court as Public Interest Litigation

No petition involving individual/personal matter to be entertained as a PIL matters except as indicated hereinafter.

Letter-petitions falling under the following categories alone will be ordinarily be entertained as Public Interest Litigation:-

- (1) Bonded labour matters
- (2) Neglected children
- (3) Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of labour laws (except in individual cases)
- (4) Petitions from jails complaining of harassment for pre-mature release and seeking release after having completed 14 years in jail, death in jail, transfer, release on personal bond, speedy trial as a fundamental right
- (5) Petitions against police for refusing to register a case, harassment by police and death in police custody
- (6) Petitions against atrocities on women, in particular harassment of bride, bride-burning, kidnapping etc.
- (7) Petitions complaining of harassment or torture of villagers by co-villagers or by police from persons belonging to Scheduled Castes and Scheduled Tribes and economically backward classes
- (8) Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food, adulteration, maintenance of heritage and culture, antiques, forest and wildlife and other matters of public importance
- (9) Petitions from riot-victims
- (10) Family pension

All letter petitions received in the PIL Cell will first be screened in the Cell and only such petitions as are covered by the above-mentioned categories will be placed before a Judge to be nominated by Hon'ble Chief Justice of India for directions after which the case will be listed before the bench concerned. To begin with only one Hon'ble Judge may be assigned to this work and the number increased to two or three later depending on the workload.

Cases falling under the following categories will not be entertained as Public Interest Litigation and these may be returned to the petitioners or filed in the PIL Cell as the case may be.

- (1) Landlord-Tenant matters
- (2) Service matters and those pertaining to Pension and Gratuity
- (3) Complaints against Central/State Government Departments and Local Bodies except those relating to item Nos. (1) to (10) above

- (4) Admission to medical and other educational institutions
- (5) Petitions for early hearing of cases pending in the High Courts and Subordinate Courts

In regard to the petitions concerning maintenance of wife, children and parents, the petitioner may be asked to file a Petition under sec. 125 of Cr.P.C. or a Suit in the Court of competent jurisdiction and for that purpose to approach the nearest Legal Aid Committee for legal aid and advice

NEW DELHI
December 1, 1988

Chief Justice of India
(P N Bhagwati)

E S Venkataramiah

Sabyasachi Mukharji

Ranganath Misra

G L Oza

B C Ray

M M Dutt

K N Singh

S Natarajan

M H Kania

Guidelines for the Admission of Letter Petitions as Writ Petitions, Bombay High Court

- 1) Where a letter petition makes a grievance in respect of the life or personal liberty of the writer or anyone else, it should ordinarily be treated as a writ petition.
- 2) Where a letter petition makes a grievance in respect of the life or personal liberty of the writer or anyone else, it should ordinarily be treated as a writ petition.

Provided that a letter petition containing a grievance made on behalf of a class of persons may not ordinarily be treated as a writ petition unless the class of persons is a deprived class which does not have easy access to legal assistance.

- 3) Where a letter petition makes a grievance that would not properly be the subject matter of a writ petition, it should not be treated as a writ petition.
- 4) Where a letter petition makes a grievance that would properly be the subject matter of a writ petition but the grievance is not made on behalf of a class of persons and is not such that a class of persons would be interested in its redressal, the letter petition should ordinarily not be treated as a Writ Petition. Such a letter should be referred to a legal aid cell.
- 5) A letter petition containing a grievance that would properly be the subject matter of a Writ Petition may be treated as a Writ Petition even though it contains a grievance of an individual, if the individual is not in a position to have easy access to legal assistance, as for example, if he is in jail.
- 6) All such letter petitions whether received by individual Puisne Judges or by the Office shall be forwarded to the Public Grievances Cell of the Office for scrutiny. The letters so received shall be entered in a ledger by the cell.
- 7) The Public Grievances Cell shall classify the various letter petitions and shall endorse on each letter petition whether it should be treated as a Writ Petition or whether it should be rejected. The cell shall annex to each letter a very brief summary of the grievance contained in the letter.
- 8) Whenever the Public Grievances Cell suggests that the letter petitions should be treated as a Writ Petition it should endorse whether it should be considered on the Original Side or the Appellate Side and who, in its view, should be made the respondents.
- 9) All letter petitions shall after classification by the Public Grievances Cell, be placed before the Chief Justice or such other Judge or Judges as the Chief Justice may appoint for consideration of the recommendation of the Public Grievances Cell.
- 10) If the Chief Justice or the other Judge or Judges appointed by him for this purpose are of the view that the letter petition should be treated as a Writ Petition, the letter petition shall be numbered as a Writ Petition.
- 11) The letter petition shall thereafter be placed on board of the learned Judge or Judges assigned the work of considering Writ Petitions for admission. A notice shall be sent by the office to the petitioner as well as the respondents of the date on which the letter petition would be placed on board for admission.
- 12) If admitted, the letter petition shall thenceforth be treated in every respect as a writ petition.
- 13) Where a letter petition which is proposed to be admitted as a Writ Petition claims to be on behalf of a class of persons, such letter petition should be advertised in newspapers by the Court in the same manner as in the case of any other representative action.
- 14) The Court shall appoint a lawyer to represent the petitioner in such cases. The Court may direct such a lawyer to file a detailed affidavit in support of the petition.
- 15) A Judge who desires to have a news item in a news-paper or periodical or any such reported grievance to be treated as a Writ Petition should forward this

request to the Chief Justice for consideration.