



Public interest litigation and constitutional rights

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Abstract

Public Interest Litigation (PIL) is often described as a procedural simplification that permits constitutional courts to adjudicate group claims where there are no realistic alternatives to having access to the judiciary. While this is true, this description is incomplete. For example, in India, PIL served as a connection between enforceable fundamental rights and the real world obstacles that prevented individuals from asserting those rights; i.e., poverty, social disability, the threat of reprisals, and administrative delays.

This article will describe the constitutional structure that made PIL possible, identify the doctrinal developments with regard to standing and procedure that have enabled PIL, and explain how these developments relate to the enforcement of constitutional rights, particularly Article 21. This article will also outline the central tension in PIL law; namely, while courts can provide protection for rights and require constitutional justification for decisions made by other branches of government, courts cannot substitute for representative democracy.

This article concludes that PIL is at its most legitimate when it serves as a court of last resort (or jurisdiction of necessity) for demonstrated public harm, is grounded in identifiable and articulable constitutional rights, and provides remedies that are proportional to institutional competence.

Keywords: Public interest litigation, constitutional remedies, locus standi, Article 32, Article 226, continuing mandamus, Article 21

Introduction

The Indian constitutional model has a fundamental contradiction. It guarantees Fundamental Rights (which are enforceable) and at the same time it assumes that many types of harms will be addressed via political and administrative mechanisms in their usual form. However, these ordinary political and administrative mechanisms often fail the most disadvantaged segments of society, particularly when the harms they experience are diffuse, develop slowly, or become socially accepted. For example, for someone who is in bonded labour, being a pre-trial detainee or sleeping on a sidewalk; each of these individuals is experiencing a legal infringement and is also encountering obstacles that make it impossible to seek enforcement of rights (lack of funds, missing documents, fear of repercussions, and the sheer fatigue from living at the margin).

To address the gap that exists between the ability of the poorest to obtain relief in the ordinary political and administrative systems due to the dispersal of harm; the slowness of harm; and the social normalization of harm, Public Interest Litigation (PIL) emerged as a means of providing a remedy. The development of PIL was not based on any constitutional amendment that would add a new "PIL Clause". Rather, PIL emerged as an outcome of the judiciary and interpretive processes, and did not exist until the courts began treating access to justice itself as part of the rights enforcement process. During the Constituent Assembly debates regarding what would become Article 32, Dr. B.R. Ambedkar identified the right to appeal to the Supreme Court to enforce rights as the "heart and soul" of the Constitution, and something that ordinary legislation cannot take away. As such, the use of PIL is a direct outgrowth of the decisions made by the judges in India.

The Indian Constitution provides the mechanism that PIL uses. Article 32 grants the right to petition the Supreme Court to enforce the Fundamental Rights guaranteed under

the Constitution. Additionally, Article 32 gives the Supreme Court the authority to grant directives/orders/writs to enforce compliance with the rights granted under the Constitution. Article 226 grants similar powers to the High Courts of India, granting them the authority to grant writs to enforce compliance with the rights granted under the Constitution as well as for "any other purpose", making High Courts the primary first responders to the majority of public law disputes in India.

Therefore, PIL is best understood as a means of utilizing the provisions contained within Articles 32 and 226 to ensure that constitutional remedies become available to persons who have been systematically excluded from the legal system, by relaxing procedure and standing. A thoughtful approach to PIL is necessary since PIL is not a neutral institution. Instead, PIL represents a redistribution of institutional power. The admission of a PIL by a court implies that the court has accepted standing without the requirement of having suffered personal injury and has determined that the subject matter of the PIL warrants the expenditure of limited judicial time. Therefore, a justification for the type of access provided by PIL must be articulated by the courts. Further, the constitutional values that are advanced by admitting a PIL and the safeguards to be established to preclude PIL from becoming a means of governing by petition must also be articulated. As such, PIL can be viewed as a constitutional response to the existence of asymmetry in the distribution of resources between the state and individual rights holders. The state possesses the capacity to litigate through lawyers; the state has files; and the state has time. Conversely, many rights holders do not possess such resources. Thus, PIL serves to reduce this inequality of resources by providing representation; relaxing pleading requirements; and permitting fact-finding to occur in ways that do not require the injured party to have the capacity to litigate.

However, the workaround represented by PIL also produces its own set of distortions. For example, a petitioner may advocate for a particular group without actually being representative of that group. In addition, the court may rely upon reports rather than evidence obtained through a trial-like proceeding. Finally, a dispute may be framed in terms of rights even though the true nature of the conflict concerns differing policy priorities. These risks are not hypothetical. The jurisprudence of PIL demonstrates a recurring attempt to preserve the "public" aspect of public interest litigation. This article explores the connection between PIL and constitutional rights. It is simple to describe the basic PIL argument found in this article. A PIL approach is justified when it is used by a court as a means of necessity to remedy identifiable public harms that may be constitutionally enforceable through constitutional law. The larger and more difficult issue, however, is methodological. To be more precise, courts must develop standards to determine when PIL will provide the opportunity to bring the matter into court (i.e., an open door); when it will effectively close off such opportunity (i.e., a closed door); and what type of remedies are appropriate in order to protect the interests of all parties involved, while also protecting against overstepping institutional competence.

PIL's Constitutional Architecture

1. Standing and the shift from personal injury to public injury

The typical connection between the injured party and litigant with respect to the writ tradition has been severed somewhat by PIL. A first step in moving toward PIL was a broader reading of *locus standi* (standing) so that private citizens and organizations could sue on behalf of others unable to advocate their own legal interests. It is most closely related to the "judges' transfer" litigation and the Supreme Court decision holding that procedural barriers should not be used to bar substantive rights when there is a constitutional requirement for protection of vulnerable groups.

This is not saying that all citizens have the right to litigate on anything they want. Rather, it is conditional. When the groups affected by a legal wrong are economically disadvantaged, marginalized, socially handicapped, or otherwise unable to initiate a court action and when it can reasonably be demonstrated that a public wrong or public injury has been committed, then the usual standing requirements may be waived. The rationale here is based upon function. Legal wrongs remain wrongs regardless of whether victims are silent, illiterate, fearful or simply exhausted.

Language regarding access to justice strengthened the above rationalization. In *Fertilizer Corporation Kamgar Union*, the Court examined the concept of access jurisprudence and acknowledged that strict standing requirements can, under certain circumstances, negate the ability of the judiciary to provide meaningful review. While the Court denied relief in this case on the basis of merit, the significance of this decision lies in its framing of the issue: standing is not merely a technical barrier; rather, it is a threshold issue related to the constitutional purpose.

2. Article 32 and Article 226 as engines of enforceability

A major problem with this is that the PIL has often been presented as a Supreme Court centred development due to Article 32 providing a means of enforcing Fundamental Rights and thus, a means of enforcing remedies for

Fundamental Rights. However, the High Courts' writ jurisdiction under Article 226 is also very important. This is because High Courts have a much broader writ jurisdiction than the Supreme Court and because they are more likely to be involved in cases which are geographically local. Thus, the constitutional design of PIL is, in effect, double barreled. One part of the design involves a national court of law which may be accessed through the medium of a claim to a Fundamental Right and remedies, while the second part of the design involves state level courts which have a wider range of writ jurisdiction. Two obvious implications arise from these two aspects of the design. First, the success of PIL will depend upon how courts construe the terms "appropriate proceedings" and whether they will choose to give preference to constitutional substance over procedural form. Second, PIL is not limited to one type of harm. It can involve addressing unconstitutional state violence, the unlawful detention of people, exploitative working conditions, environmental deterioration, and failures of good government which directly affect rights.

Hussainara Khatoon is an early and highly influential case illustrating the potential of PIL to provide remedies for systemic problems. In this case, the petitioner's allegations of prolonged detention and systemic delays in trials led the Court to treat continued detention under such conditions as a violation of Article 21. The case is most commonly cited for its association of speedy trial and legal aid with Article 21. However, its significance to the potential of PIL lies primarily in procedure. By treating systemic illegality as a violation of the rights of thousands of detainees who would be unlikely to bring their own individual petitions, the Court was able to address a systemic failure of the rights regime in a way that would have required each detainee to individually challenge the same structural failure if a rights regime had relied on individuals filing complaints to enforce their rights.

Similarly, *People's Union for Democratic Rights (PUDR)* is a prominent example of the use of PIL to enforce rights through the enforcement of labour protections associated with large public projects. The Court permitted the PUDR to pursue a public interest posture and found that enforcement of labour protections was of constitutional importance when enforcement was linked to dignity and nonexploitation. In this case, PIL served as a conduit for enforcing rights in circumstances where individual workers would be unlikely to litigate against contractors and state agencies with greater resources and influence. Thus, the petition successfully transformed what was perceived by many as routine labour conditions into a constitutional issue regarding the exploitation of dignity.

In *Bandhua Mukti Morcha*, the Court used the constitutional right to freedom from exploitation and the right to be free from unreasonable restrictions on personal liberty to respond to lived exploitation. The Court found that a communication by the organization was sufficient to trigger the procedures for invoking the provisions of Article 32, and emphasized the procedural flexibility of the procedures available to victims of oppression or those who were unable to secure normal legal assistance.

3. Rights protection through PIL: Article 21 and beyond

The PIL's most controversial and substantial issue with regards to Article 21 is the expansion of the rights ecosystem for Article 21 through interpretative techniques which link life and dignity with livelihood, shelter and housing, health and fair procedures. This was possible, in

part, due to PIL as it allows the court to view issues as a pattern rather than an isolated incident.

In *Olga Tellis*, we saw how Article 21 was interpreted to include livelihood interests and how the eviction policy was evaluated based upon the concepts of fairness and procedure. The case is certainly not simply about the court preventing eviction; it is about the role of constitutional review in requiring State agencies to explain why their decisions regarding people's lives and dignity were made. The burden of explaining these decisions is important because those who are affected will likely not have the time, resources or education to prepare polished pleadings and present elaborate evidence.

The examples from environmental and public health matters illustrate how PIL has the ability to transform the type of diffuse harm caused by industrial and pollution-based problems into concrete constitutional issues. In litigation concerning hazardous industries (including the oleum gas leak) by M.C.Mehta, we see how willing the judiciary has been to challenge the high risks associated with certain types of industry activity and to propose compensatory and regulatory responses. While this can be uncomfortable because it presents technical governance issues in constitutional terms, the reason for doing so is clear: some types of harms will never be able to be challenged through individual lawsuits and many State agencies will never take steps to correct foreseeable failure without strong institutional pressure being applied.

While PIL's rights-oriented work is certainly focused on Article 21, other articles of the Constitution can also be invoked depending on the circumstances. For example, if a State agency acts arbitrarily or irrationally in such a way as to consistently harm a particular class of individuals, Article 14 can be invoked. Similarly, if a State agency uses regulations, policing, or licensing policies to create a chilling effect or place an unfair burden on a particular group of individuals, Article 19 can be invoked. Finally, Articles 23 and 24 are commonly invoked in labour and trafficking cases, particularly when consent is difficult to obtain due to poverty and/or coercion. As noted above, the use of a procedural method by PIL makes it possible for individuals to invoke these rights even though they may be unable to individually litigate them.

One of the critiques of PIL still remains relevant. While PIL can sometimes utilize the Directive Principles as a means of interpreting the meaning of a right (especially with regard to Article 21), it does not automatically convert all of the Directive Principles into directly enforceable rights. Some courts have criticized PIL for creating rights where none existed before (by using the Directive Principles as a form of interpretive context). While the criticism is not always accurate, it is certainly not frivolous. It highlights the fact that the legitimacy of PIL depends on careful legal analysis, the creation of a direct link to the text of the Constitution and restraint in those areas where the remedy appears to be a policy design.

4. Remedial techniques: continuing mandamus, commissions, and "fact finding by proxy"

A fundamental element of PIL creating visible governance was the simultaneous development of PIL's remedial toolkit. Conventional litigation normally produces a single final judgment, after which, the process of enforcing that judgment is transferred to an entirely separate jurisdiction.

By comparison, PIL litigation normally generates no single final judgment. Instead, PIL courts would issue orders for directions, require parties to submit regular compliance reports, list various items on a periodic basis; and continue to exercise jurisdiction over these issues. This common practice has been referred to as continuing mandamus.

The use of continuing mandamus can be justifiable when there is on-going harm to the applicant; the respondent's compliance will need to be monitored; and all avenues of executive enforcement have been exhausted. However, as a result of using this method, the lines between institutions can become blurred. If a court continues to monitor the actions of the other party, it may start to take on administrative functions and lose its legitimacy as a judicial body. Therefore, the legitimacy of continuing mandamus rests in proportionality. The monitoring function should be used to ensure that the respondent complies with the requirements of the Constitution, rather than to usurp the role of executive discretion. While the concept of proportionality is often present in PIL cases, it is not always formally articulated as such. A related remedial approach is the use of guidelines in areas where multiple similar violations occur (e.g., custodial safeguards designed to prevent torture and illegal detention).

5. Filters for legitimacy of PIL - good faith, disclosure obligations, costs

As PIL has developed, it has become obvious that there have been many examples where the use of PIL was poorly reasoned. Several of these examples illustrate that PIL was not meant to provide a free pass for people to act out their own self-interests (or public relations), and the courts have a responsibility to protect their processes from such actions. One example of how the Court viewed this issue can be illustrated in the case of *Janata Dal v. H.S. Chowdhary*, wherein the Court rejected the argument that PIL could be treated as a blank check permitting anyone to get involved in the criminal justice system or otherwise dictate how investigations shall proceed. Thus, while PIL provides the ability to circumvent the requirements for standing, the dispute must still be deemed a public issue and the petitioner must have a valid basis to seek to direct prosecutorial action.

In *State of Uttaranchal v. Balwant Singh Chaufal*, the Court looked at the growth of PIL, and provided clear guidelines to assure that PIL continues to serve a true public interest, and thus to preclude the filing of frivolous petitions and to assure that all petitions filed relate to a legitimate public concern. This decision has been cited numerous times, primarily as the Court's effort to strike a balance: provide for the availability of PIL for persons who desire to obtain redress for violation of constitutional rights; and at the same time, deter individuals from utilizing PIL as a method of purposefully flooding the Court with what can best be described as "performance oriented" petitions.

The imposition of judicially imposed costs has also served as signals to litigants that they should limit their reliance upon PIL. In *Subhash Kumar v. State of Bihar*, the Court determined that the petitioner had brought the action to further his personal interests and not for the benefit of the public; accordingly, the Court assessed costs against the petitioner. Likewise, in *Ashok Kumar Pandey v. State of West Bengal*, the Court cautioned that PIL was not to be used as a vehicle for satisfying personal grudges, and further

stated that if it were used for such purposes, the Court would regard it as an abuse of process. These cases are important as they demonstrate that the Court views the integrity of PIL as a constitutional value, rather than simply a minor procedural preference. Misuse of PIL would result in diversion of limited judicial resources away from those individuals who have the greatest need to utilize writ jurisdiction.

Rules governing the institutions involved also evolved along with the doctrines applicable thereto. For example, the Supreme Court Rules, 2013 set out specific procedures for PIL, including disclosure requirements and a requirement that an affidavit be submitted prior to the filing of the petition stating that there is no personal gain, no private motive, nor any ulterior or oblique reasons underlying the filing of the petition. The Court's listing and review materials also demonstrate this focus by indicating that PIL petitions are subject to the same threshold standards as other petitions prior to consuming large amounts of judicial time. These institutional-based filters seek to shift the screening process earlier in the process so that weak petitions do not provide the impetus for the state to expend resources addressing non-public issues.

PIL's Relationship with Constitutional Rights: Patterns and Tensions

As a practical matter, PIL has used at least three recurring methods to enforce the right to justice:-

PIL has made "silent illegality" visible

Undertrial detention, bonded labour, hazardous industrial working conditions, and the forced removal of families from their homes and communities (as in forced eviction) are examples of illegalities that are not hidden; they are hidden in a legal sense because no one with the capability has pursued litigation against these illegalities.

PIL has expanded the possible forms of relief

Relief does not have to be merely the quashing of an order or the release of a detainee. It can take the form of guidelines, of monitoring, of directives related to the establishment of institutions and of targeted compensation. This kind of creative approach to remedies is often praised, but there is a risk that remedies that are too open-ended can create a series of unending supervisory projects that turn judicial time into a valuable public resource that is assigned by petition tactics rather than by principles of rational triage.

PIL has compelled articulation of the minimum constitutional requirements of governmental action:

In many cases where PIL is raised, the complaint is not that there was a single wrong act committed by the state, but that there is a systemic flaw that causes the violation of rights to occur over and over again. In those situations, courts have to determine whether the Constitution allows for that level of predictability. Thus, review moves from being based on "the wrong act", to "the wrong system". As a result, remedies may have to be framed in a way that resembles structural reforms rather than traditional adjudications.

Drawing workable lines: when PIL should open doors and when it should not

There are some reasons why PIL continues to thrive; however, PIL will only remain valid so long as the judiciary

maintains the public element of PIL within bounds. To that end, PIL requires both threshold disciplines and remedial disciplines: the former concerning whether the court should even take up the issue at hand, and the latter concerning what the court should do if it does take up the issue.

Threshold Discipline: Threshold discipline refers to determining whether the Supreme Court should hear the PIL case at all. In general, PIL is not intended to function as a backdoor for service litigation cases that already have an appropriate forum. One obvious example of this is service litigation. In service litigation cases, the Supreme Court has typically held PIL cases to be not maintainable due to the fact that such cases represent essentially private grievances, and therefore there are specialized tribunals that deal with such grievances. Thus, the establishment of a threshold discipline for PIL is not simply a minor technical rule, but it represents a boundary marker: PIL is to be used for public injury that affects a large class of people who cannot reasonably bring a lawsuit regarding their injury, not for the packaging of private grievances as public grievances via a constitutional claim.

Remedial Discipline: Remedial discipline, on the other hand, refers to what the court should do after it agrees to hear the PIL case. Although many PIL cases appear to be public facing, they may actually be motivated by a variety of factors including vendetta, publicity seeking, or a desire to halt administrative actions that are considered routine. As such, the Supreme Court has continually emphasized that courts must carefully balance the risk of allowing public mischief to continue with the risk of using judicial process as a means of retaliating against individuals. While establishing a preliminary screening process to determine which PIL cases are worthy of consideration may lead to some meritorious cases being rejected due to lack of refinement, the alternative is far worse. If every dramatic filing is viewed as a matter of urgency and importance in the area of public interest, then PIL will cease to be a vehicle for remedy and will instead become a platform for performance.

The cautionary tone established above is particularly important when the Supreme Court uses the terms "publicity interest litigation" and "private interest litigation". *Kushum Lata v. Union of India* is a decision that is significant for its explicit warning that, absent regulation, PIL can easily become a tool for revenge and for carrying out private agendas. While the language of the *Kushum Lata* decision may be severe, the practical implications of the decision are simple and direct. Courts have limited time, and each frivolous PIL filing results in the diversion of attention away from serious issues of bonded labour, custodial violence, or illegal detentions.

Holicow Pictures Pvt. Ltd. provides additional support for the same concern by providing a vivid metaphorical illustration of how to handle the threat of misuse of PIL as a weapon. Specifically, *Holicow Pictures* states that courts must use great care when handling PIL, and that courts must also make sure that beneath the veneer of public interest, private animosity or publicity seeking is not present.

Conclusion

PIL is best understood as a form of constitutional engineering in a pressured environment. It provides increased access to writ remedies to individuals who have little hope of litigating in their own right and enables the

conversion of rights violations based on structure or silence into constitutional rights violations that can be enforced.

While PIL's most justifiable function is to protect those groups that are normally at risk of having their rights violated because they cannot rely upon the ordinary system of justice to do so; PIL also has an inherent danger to its success. This is the danger of PIL becoming policy-driven and subject to the interests of the private sector.

The solution to this problem is not to diminish PIL to such a point that it becomes irrelevant, but rather to provide the necessary principles to guide PIL. These principles include requiring bona fide action on the part of plaintiffs, providing factually supported cases, and ensuring that rights violations are being addressed (i.e., rights are anchored). Remedial orders should be limited to the court's ability to act (i.e., remedial orders should be tailored to institutional competence), exit routes should be created in order to limit continuing mandamus, and transparency should be recognized as a constitutional remedy, not simply a cosmetic addition to litigation.

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