



# The Universality, Peculiarity, and Sustainability of Indian Public Interest Litigation Reconsidered



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## ARTICLE INFO

*Article history:*  
Accepted 30 July 2017

*Key words:*  
public interest litigation  
judicial activism  
human rights  
socioeconomic rights  
social justice  
India

## SUMMARY

Since the first decade of the 2000s, there has been serious concern that public interest litigation (PIL) in India, which was launched by the Supreme Court in the late 1970s to protect the rights of weaker sections of the society, has come to be occasionally used against them instead. Can PIL in India truly serve as a model for other developing countries in promoting the basic rights of their citizens? Reconsidering the conditions that enable the judiciary to engage in judicial activism through PIL, this paper argues that writ jurisdiction is the key factor in considering the peculiarity and sustainability of Indian PIL, as the unique development of its jurisdiction has contributed to increased power for judges in delivering social justice to society and has also opened the possibility of judges pursuing their own agendas through the resulting informalization of procedure and remedy.

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## 1. Introduction

Public interest litigation (PIL) in India, which the Supreme Court of India (SCI) began in the late 1970s with the aim of delivering justice to the vast weaker sections of Indian society, has been widely studied as the most progressive judicial activism in the world.<sup>1</sup> While PIL seems to have become deeply rooted in the Indian legal system and society nearly four decades after its start, the focus of the activism has largely shifted to general public issues, such as environment and good governance, and away from the rights of the disadvantaged.<sup>2</sup> Furthermore, since at least the first decade of the 21st century, criticisms have been put forward that PIL has come to instead be occasionally used against the poor and the vulnerable in the very name of public interests.<sup>3</sup> This calls into question the view that Indian PIL offers a model for developing countries that suffer from political inertia toward the basic rights of their citizens.<sup>4</sup>

<sup>1</sup> There are numerous articles and books on PIL in India. For a detailed account, see Ahuja (1997), Sathe (2002), Deva (2009) and Divan (2016), for example.

<sup>2</sup> In the 2010 decision in *State of Uttaranchal vs Balwant Singh Chauhal & Others* (Civil Appeal No. 1134–35 of 2002), the SCI itself argued that there have been three phases in PIL in India based on the subject matter of litigation. Phase I largely focused on cases relating to the weaker sections of the society, Phase II mainly dealt with cases relating to environmental issues and the current Phase III primarily looks at cases involving issues of good governance, especially transparency in public administration.

<sup>3</sup> For example, see Bhushan (2004, 2009) and Ramanathan (2014).

<sup>4</sup> For example, Tiruchelvam and Coomaraswamy (1987, p. 186) argue that “Judicial activism can be an important strategy to overcome all forms of oppression, exploitation, impoverishment, unjustifiable on any model of societal development in Africa and Asia”.

In order to understand why and how these changes in PIL have been taking place and to offer key materials in considering whether this judicial activism is sustainable, this paper reconsiders the conditions that have made such activism possible and, based on the clarification of its universal as well as peculiar features, attempts to identify the core factors that enable the superior judiciary (the SCI and High Courts) to pursue PIL as well as the driving force of the shift in its focus. Here, the universality of Indian PIL means its commonality or reproducibility as a model; its peculiarity refers to its specific and unreproducible features; and its sustainability concerns whether the system can remain effective and available for dealing with the social challenges raised in PIL cases. This paper considers the changing trends in PIL in particular and the varied judicial attitudes in engaging in judicial review, from judicial activism to judicial self-restraint. We discuss how this variation is in general a function of three main foundations that are not mutually exclusive and overlap to some extent. These include the jurisdictional foundation, the organizational foundation, and the political-economic foundation. Based on this framework, the paper finds, first, that the jurisdictional foundation, particularly the so-called writ jurisdiction, of the higher judiciary has been steadily strengthened by the judiciary itself, while the organizational foundation and the political-economic foundation have reflected the changing power balance among the branches of government in particular and the political and economic development of society in general. Our second argument is that it is the jurisdictional foundation, the writ jurisdiction in particular, that enables the

higher judiciary to enjoy its incredibly wide and strong discretion regarding commencement, procedure, and remedy in PIL. This power in PIL is, in one sense, a materialization of the informalization of litigation and can be used for either conservative or progressive causes. Thus, the jurisdiction should be understood as the most significant peculiarity that underlies the judicial activism in India and, therefore, is the key factor in considering its sustainability.<sup>5</sup>

The article is organized as follows. The next section considers the jurisdictional foundation. It delineates both the universal and peculiar features of Indian PIL by analyzing it in terms of models of litigation and shows that the writ jurisdiction conferred by the Constitution to superior courts is especially important. In Section 3, we scrutinize the organizational foundation of the judiciary, arguing that the organizational evolution of the judiciary must be situated within the broader balance of power among the branches of the government, which interacts with changing judicial perception regarding the role of the judiciary. Section 4 tries to show that changes in judicial approach to the exercise of judicial review have reflected the development and transformation of Indian society. The last section provides a brief discussion of the findings and implications of this paper.

## 2. Jurisdictional foundation of the judiciary for pursuing PIL

In order to understand the unique features of PIL in India, it is important to analyze it in terms of the public law model of litigation, which was inspired mainly by the experience of public law litigation cases in the USA, which triggered serious debates about the role of the judiciary in cases involving public policy, particularly in the 1970s. These arguments are rather well known, and so we only briefly present the essence of the debates by drawing mainly upon the classic article of Chayes (1976), considering both the peculiarity and the universality of Indian PIL.

### (a) Indian PIL as a public law model of litigation

The traditional model of litigation has been described as having the following features, which reflect that litigation is basically designed to settle disputes between private parties about private rights. Litigation is bipolar and retrospective, and its process is initiated and controlled largely by disputing parties based on an adversarial process, rather than by the presiding judges. Additionally, remedy given through litigation is closely related to rights admitted, and so lawsuits are largely self-contained. In contrast, the public law model of litigation is understood as involving multi-dimensional interests relating to public policy. It is multi-polar and forward looking, and its process tends to be fashioned through collaboration among the court and parties. The judge plays an active role in organizing the lawsuit by, for example, inviting third parties. Remedy is also shaped flexibly so that it often has some legislative features, with significant impacts on non-parties to the litigation and society more widely. In addition, even after delivering judgments, judicial involvement often continues to enforce or administer its order. In short, the traditional model of litigation is characterized as a private, dualistic and formalistic means for solving disputes, while the public law model

is a public, multi-polar and flexible forum for addressing social issues.<sup>6</sup>

Due to these features, it is inevitable in the public law model of litigation that the requirements of locus standi (standing) of plaintiffs are relaxed to widen participation of third parties in the proceedings, to allow the active role of judges and to innovate remedial measures, provided that the courts wish to (or are perceived to be obliged to) actively address new types of disputes involving public interests. What then are the universal and peculiar aspects of PIL in India under the public law model?

The SCI has, on the one hand, stressed that PIL is a departure from the traditional model of litigation. In *People's Union for Democratic Rights vs Union of India* (AIR 1982 SC 1473), the SCI (Justice Bhagwati) argues that PIL "is a totally different kind of litigation from the ordinary character which is essentially of an adversary character" (paragraph 1:1, p. 1476). On the other hand, it is often argued that PIL in India is also different from the public law litigation of the USA both in terms of resources and subject matter, so that PIL in India, where the society is characterized by a lack of resources along with widespread poverty and ignorance, "cannot be based on the U.S. model" (Bhagwati, 1985, p. 569). Be that as it may, PIL in India shares various features that are abstracted as the public law model. Its distinctive legal characteristics in terms of the model can be analyzed according to five aspects, namely, standing, other threshold requirements, procedure, remedies, and substantive rights, which are briefly discussed in turn.

First, as in the public law model, requirements of standing, that is, whether plaintiffs are legally qualified to pursue and maintain their litigation, have been relaxed in PIL. In the Indian case, PIL is filed under the so-called writ jurisdiction of the higher judiciary, which is provided in the Constitution. Article 32 of the Constitution provides that people have a right to move the SCI when Fundamental Rights (FRs, Part III of the Constitution) are infringed and the SCI has the power to issue "writs, directives, orders in the nature of habeas corpus, mandamus, certiorari, prohibition and quo warranto" in order to enforce FRs against the state. In the case of High Courts, these can be issued not only for enforcing FRs but also "for any other purpose" (Article 226). Traditionally, standing in writ cases was basically only permitted to persons aggrieved by some action (or inaction) of the government. This requirement has been de facto removed in PIL cases, such that if a plaintiff can satisfy the court that he/she is acting "pro bono publico" (for the public good) (*S.P. Gupta vs Union of India* (the *Judges' Transfer* case), AIR 1982 SC 149, paragraph 17), then there would be no issues regarding standing in PIL.

According to Cunningham (1987), there are two types of standing: representative standing and citizen standing. The former means that someone represents the aggrieved who cannot him/herself make claims at the court. This representative standing

<sup>6</sup> The difference between the traditional model of litigation and the public law model can be further clarified using the concept of "Law and economics" (Ota, 1991). First, the public law model involves significantly sharper "asymmetries" between parties than the traditional model. As plaintiffs in the public law model are often scattered citizens, such as consumers, their information and resources to provide evidence and to pursue and maintain their petition are limited, while defendants tend to be government agencies or large private corporations with effectively unlimited resources. Thus, there exists an apparent lack of parity between parties in the public law model, while the adversarial procedure for the traditional model litigation is designed by assuming such parity. Second, the public law model tends to have more "externalities" (a cost or benefit imposed or conferred by actions of someone on third parties without their consent) than the traditional model of litigation. Of course, there are externalities even in the traditional law model, as the commencement of litigation inevitably has some impact upon society and the interpretation of law shown in a judgment itself would affect third parties through being referenced as precedent in future similar cases. Also, remedies given by courts might indirectly influence third parties who did not participate in the litigation. The point is that these externalities are quite large and more apparent in the public law model relative to the traditional model.

<sup>5</sup> Focusing on PIL as a slum demolition machine, Bhuwania (2016, p. 67) also argues that "the procedural departures of Public Interest Litigation ... have to be understood and foregrounded".

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