

# **PUBLIC INTEREST LITIGATION: A MATTER OF JUSTICE AN ASIAN PERSPECTIVE**

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## **1. INTRODUCTION**

### **1.1 PIL as a component of the justice system**

For some time courts in many developing countries faced a challenge of considerable proportions. Prime amongst this was their image as being in the service of the rich. The indigent were often dragged through its portals as unwilling suitors, usually as defendants or accused. This perception gravely undermines access to justice. Where grievances go undressed for this reason, the proper functioning of the rule of law is in jeopardy.

Public Interest Litigation (PIL) seeks to correct this judicial image in the eyes of its poorer citizenry and thus restore the rule of law in the justice system. The courts in India and some Asian countries have generally adopted PIL as an essential component of its justice delivery system. In some areas the achievements have been quite spectacular. For example, the South Asian judiciary is said to lead the world as a guarantor of the legal protection of sustainable development and the environment.<sup>1</sup> The courts in these countries have expanded on substantive rights and removed the constraints of procedural law inhibiting access to the courts. The judicial approach displays an

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<sup>1</sup> Nicholas A. Robinson, 'A Common Responsibility: Sustainable Development and Economic, Social and Environmental Norms', 4 Asia Pac. J. Env'tl. L. 195, 195 (2000). Some suggest that today, South Asia leads the world in public interest litigation jurisprudence, not America or Europe: Werner Menski et al., Public Interest Litigation in Pakistan 109 (2000). See also Parvez Hassan, In Pakistan, the Judiciary Leads the Way, 15 Env'tl. F. 48 (1998). All cited in Parvez Hassan and Azim Azfar, 'Securing Environmental Rights through Public Interest Litigation in South Asia', 22 Va. Env'tl. L.J. 215.

ecological understanding and sensitivity and, as well, a willingness to build bridges whereby all citizens, and not just the strong, may approach the courts for vindication of their rights.<sup>2</sup>

## 1.2 What is Public Interest Litigation?

What is public interest litigation? It may be easy to know when such litigation is presented. Yet defining has taxed the judicial mind. Some say it is a 'nebulous concept' and beyond definition. Others try to define it by delineating its characteristic features. A judge in Australia identifies it by the public character to which the litigation relates evidenced by: properly bringing proceedings to advance a public interest; that proceedings contribute to the proper understanding of the law in question; and have involved no private gain.<sup>3</sup>

The effect of the decision is really the crucial determining factor. Whether the action is brought by a singular individual or an organization or as a class action, or even where the remedy sought may benefit the applicant directly, the litigation may yet be in the public interest if the impact of the decision will serve the wider public interest.

As Lord Diplock said in the English House of Lords:

There would be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public spirited tax-payer, were prevented by out-dated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get unlawful conduct stopped.<sup>4</sup>

This dictum was adopted in Malaysia in the leading public interest litigation case, *Mohamed bin Ismail v Tan Sri Haji Othman Saat* in these terms:

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<sup>2</sup> Parvez Hassan and Azim Azfar, 'Securing Environmental Rights through Public Interest Litigation in South Asia, 22 Va. Env'tl. L.J. 215. Also citing Nicholas Robinson, 'we see [in South Asia] that the quest for sustainable development is part and parcel of the judiciary's older quest, the pursuit of justice': preceding note, at p. 200.

<sup>3</sup> *Oshlack v Richmond River Council* (1997) 152 ALR 83.

<sup>4</sup> *IRC v National Federation of Self-Employed and Small Businesses Ltd*, [1981] 2 All ER 93, at 105.

‘... if they (public authorities) transgress any law or constitutional directive, then any public- spirited citizen, even if he has no greater interest than a person having regard for the due observation of the law, may move the courts and the courts may grant him the appropriate legal remedy in its discretion’.<sup>5</sup>

### 1.3. The value of PIL

This paper discusses the values that PIL, properly channeled, advances. The ensuing discussion elaborates on these critical values. They may be summarized as follows. PIL:

1. Provides effective judicial protection of weaker sections of community.
2. Makes officialdom accountable.<sup>6</sup>
3. Makes real the considerations of transparency in decision-making processes.
4. Remedies democracy deficit.
5. Creates structures for change: force the pace.
6. Allows the most effective proponents to bring cases: promotes effectivity in use of judicial institutions.
7. Allows diffused interests to be represented: air, water, environment, biodiversity, and such like.
8. Ensures access to justice.
9. Allows for participative justice.<sup>7</sup>
10. Ensures government acts according to its established duty to abide by and enforce legal norms.
11. Protects and sustains democratic governance and the rule of law.

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<sup>5</sup> [1982] 2 MLJ 133 at 136, *per* Wan Yahya J.

<sup>6</sup> ‘The scope for ventilation of matters of legitimate public concern and public declaration in support of accountability is a vital task for the courts and other public entities charged with finding legal resolution for infringement of social rights’: Durbach A, ‘Test Case Mediation - Privatising the Public Interest’ (1995) 6 Aust Dispute Resolution J 233 at 238.

<sup>7</sup> *A.B.S.K. Sangh (Railway) v. Union of India*, A.I.R. 1981 S.C. 298, 317.

#### 1.4. Why PIL makes sense from a justice perspective in Asian countries

Asian countries have in the past few decades been engaged in efforts to 'develop' economically. The nature of the development brought in its wake widespread consequences on a scale hitherto unknown. And on a populace that was more deprived than the rest. For example, projects to build dams to supply energy involuntarily displace the less privileged people in a country in numbers that are staggering. The Bakun dam in Malaysia would flood a near pristine forested area the size of Singapore; and displace its 100,000 native habitants. The Three Gorges dam in China will flood an area in which live 1.2 million people.

In other situations, fundamental rights that affect the very support system of life are impaired: the right to housing, and the provision of basic human needs of clean air, water and sanitation. Generally those affected have little or no means, nor capacity, to have their concerns addressed. Bureaucracies move on regardless. The ultimate forum for redressing grievance and seeking justice,<sup>8</sup> the courts, are practically beyond reach as the traditional method of litigation is expensive and wracked by procedural obstacles. Also the collective nature of the rights affected are less amenable to redress through an individualistic western model rights based approach which many Asian countries inherited from their colonial predecessors.<sup>9</sup> This eschewed group court litigation on behalf of others. The litigant had to show that he was peculiarly and especially affected by the damage, over and above the rest of the members of the public.<sup>10</sup> The classical judicial reasons for this was the fear that the court system would be open to abuse by

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<sup>8</sup> 'The root principle of law married to justice, is *ubi jus ibi remedium* (where there is a grievance there is a remedy)': *Shiv Shankar v State of Haryana* AIR 1980 SC 1037.

<sup>9</sup> *A.B.S.K. Sangh (Railway) v. Union of India*, A.I.R. 1981 S.C. 298, 317: 'Our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions access to justice through 'class actions,' 'public interest litigation,' and 'representative proceedings' [sic]. Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions'.

<sup>10</sup> 'Where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right': *Boyce v Paddington Borough Council* [1903] 1 Ch. 109, *per* Buckley J.

busybodies and cranks and the court drowned by the flood of worthless litigation; as well that people committed to an agenda would needlessly pursue others causing them great inconvenience and expense. The Attorney General, as the repository of the public interest, was the only one who had the right to initiate action where there was collective widespread damage. The Asian judiciary began to reject these arguments as inapplicable quite early on. In Malaysia it was said that though the gates to litigation to allow standing were opened, there was no flood.<sup>11</sup> The apex courts of India and Pakistan said that failure to accord standing, given the socio-economic and political infrastructure, will amount to an abdication of judicial authority.<sup>12</sup> The Indian Supreme Court considered it a ‘mockery of the Constitution’ if strict adherence to the adversarial procedure led to injustice, especially where litigants are unevenly balanced in social or economic strength.

## **2. THE LEGAL INFRASTRUCTURE FOR PIL: LESSONS FROM, AND FOR, ASIAN COUNTRIES**

### **2.1 Establishing PIL as a critical component in the justice system**

Public interest litigation, which envisages challenge to governmental transgression of public rights, is a vital concomitant of the justice system. If not permitted, there would be a grave lacuna in the public law system.<sup>13</sup> Justice, broadly understood, requires rebalancing the distribution of legal resources, increasing access to justice for the disadvantaged, and imbuing formal legal guarantees with substantive and positive content.

To advance these critical components, there must be the necessary legal support structures in place. PIL is an important starting point. But it needs a

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<sup>11</sup> *Tan Sri Othman Saat v Mobamed bin Ismai* [1982] 2 MLJ 177 (SC).

<sup>12</sup> *State v. M.D. Wasa*, 2000 C.L.C. 22 (Lahore) 471, 475(HC): ‘The rationale behind public interest litigation in developing countries like Pakistan and India is the social and educational backwardness of its people, the dwarfed development of law of tort, lack of developed institutions to attend to the matters of public concern, the general inefficiency and corruption at various levels. In such a socio-economic and political milieu, the non-intervention by Courts in complaints of matters of public concern will amount to abdication of judicial authority’.

<sup>13</sup> Lord Diplock, see footnote 4.

comprehensive legal architectural framework to function effectively. This implies, no less, a change in judicial attitudes, the broadening of constitutional rights and the revision of existing procedural rules. Additionally, new remedies need to be shaped to achieve effectual and optimal results. Many Asian countries, while committed to building a strong governance ethos, in particular accountability and transparency, are handicapped by weak institutional structures and an even weaker enforcement culture. PIL provides an avenue for change. Indeed without PIL as an entrenched critical component in the justice system, the proper functioning of the rule of law is in question. Establishing it in this schema then becomes a sacrosanct democratic task for all players involved in the justice delivery system: the citizenry working individually or through civil society organizations, the judiciary, lawyers, members of the bureaucracy and the government.

What does this practically entail? The following discussion focuses on the essential legal infrastructure that must be constructed for the proper functioning of PIL in Asian societies.

The discussion is dealt with under two broad heads: first, the effective enforcement of existing legal norms; and, secondly, the creation of new judicial norms.

## **2.2.Enforcing Existing Legal Norms**

### **(a) A Proactive and Independent Judiciary: Fulfilling the Constitutional Promise**

Courts function within a constitutional democracy founded on the rule of law. There are values inherent in this political and legal construct. It becomes the duty of the judiciary, in the exercise of its collective adjudicatory skills in cases before it, to advance these values. This requires judicial creativity; sometimes, even judicial courage. It may not be a matter of simply searching for the presence or absence of a particular provision in the constitution. This is not in itself dispositive of the nature or strength of the right. In any event constitutions were drafted at a time long gone by. They have to be made relevant to the era of an awakened citizenry. The aphorism that ‘constitutions are alive and for all time’ can only be realized by judges cognizant of their role to advance

the values of justice and the proper functioning of the rule of law. Case law is replete with examples where the judiciary, in countries lacking comparable constitutional provisions, has implied constitutional rights even in the absence of a textual provision. In Asia, the constitutions of India, Pakistan and Bangladesh have no provision protecting the environment. Yet the judges developed one of the most advanced environmental protection jurisprudence in the world.

The Supreme Courts in these countries, in a series of creative steps, responded to the clarion call for justice to be done, by first recognizing that the traditional system of litigation, highly individualistic and adversarial, was ill-suited to meet the collective claims of the underprivileged. It relied on the wide power in the Constitution and other sources (such as the Directive principles, in India) to develop an appropriate method to advance and protect fundamental rights. It used this power to foster a public interest litigation system to fulfill the constitutional promise of social and economic order based on equality. Proactive and enlightened members of the judiciary exercised their acumen to rebalance the distribution of legal resources, increase access to justice for the disadvantaged, and imbue formal legal guarantees with substantive and positive content.

Judges dismantled archaic and irrelevant procedural processes where they were barriers to access to justice. Substantive content was expanded to ensure that the social, political and economic rights guaranteed to its citizens were not thwarted. Judges devised new remedies (investigative expert panels) and cooperative styles, antithetical to the adversarial trial process. Judges delved into areas beyond their traditional fields and searched for sustenance for their decisions from international 'soft-law' declarations and treaties. At centre stage of all these changes was the judge furthering the democratic charter of justice.

This was pithily captured by a Malaysian judge:

This dictum was adopted in Malaysia in a case reputed to have ushered in public interest litigation:<sup>14</sup>

In a Government so firmly founded on the principles of justice and the rule of law, the Judiciary cannot idly stand as a silent and stony pillar of democracy. The court, in its role as a public watch dog, is not expected to turn a deaf ear to the prevailing public outcry against corruption and abuse of administrative powers by authorities or their officials, however high in rank.

This then is the overarching role that a judge must commit to in order to fulfill his or her oath of office in a functioning constitutional democracy based on the rule of law.

### **(b) Enforcing Implicit Procedural Constitutional Rights;**

In *Bandhua Mukti Morcha v. Union of India*,<sup>15</sup> the Indian Supreme Court acted on a mere letter by the petitioners in place of the usual formal writ petition. The Court justified the alteration in the rules of procedure not as an exception tailored to necessity but as an affirmative constitutional duty to further the protection of fundamental rights. Constitutions frequently are the source of the procedural rights necessary for citizen organizations to pursue their advocacy work. Constitutional provisions on fundamental rights like freedom of association and speech implicitly include rights to access to information, public participation, and legal standing.

### **(c) Broadening Key Constitutional Provisions**

i. Giving the constitutional provisions on life and liberty a broad substantive component.

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<sup>14</sup> *Mohamed bin Ismail v Tan Sri Haji Othman Saat*, see footnote 5.

<sup>15</sup> AIR 1984 SC 802.

Several Asian apex courts based at least on the common law tradition, pioneered by India, have given the constitutional provisions on liberty a broad substantive content – to encompass a wide array of rights ranging from personal dignity to quality of life and right to a decent livelihood. Any limitations on this expanded concept had to be justified as necessary. This shifts the burden of proof to the alleged transgressor of the right.

Article 21 of the Indian Constitution provides that, "no person shall be deprived of his life or personal liberty except according to procedure established by law." The Supreme Court said that this right to life is meaningless unless accompanied by the guarantee of certain social rights which make the opportunity to live life with dignity equally available. In *Frances Mullin v. Union Territory of Delhi*, the Court interpreted the 'right to life' expansively. It held that the right to life

"includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter... Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live..."<sup>16</sup>

In a later case, the Court held that the right to live with human dignity derives its substance from the Directive Principles provided in the constitution.<sup>17</sup> This has been expanded to include the protection of more than the mere survival or animal existence.<sup>18</sup> The judges held that the right to life includes the right to live with human dignity, and the provision of minimum sustenance, shelter, and those other rights and aspects of life which make life meaningful and worth living.<sup>19</sup>

This broadening of the constitutional conceptual framework provided the impetus for public interest litigation of major proportions.

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<sup>16</sup> [1981] 2 S.C.R. at 529.

<sup>17</sup> *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802, 811.

<sup>18</sup> *Puttappa Honnappa Talavar v. Deputy Commissioner*, A.I.R. 1998 Karn. 10, 11; *Samatha v. State of Andhra Pradesh*, A.I.R. 1997 S.C. 3297, 3302 (the right to life includes social and economic empowerment).

<sup>19</sup> *Samatha v. State of Andhra Pradesh*, A.I.R. 1997 S.C. 3297.

On the basis of this expansionary interpretation, the Indian Supreme Court has invalidated unreasonable restrictions on the right to travel, and upheld the rights of traditionally powerless persons such as prisoners, bonded labourers, pre-trial detainees, rickshaw operators, children, migrant labourers, inmates of workhouses, pavement dwellers, rape victims, inmates of mental institutions, small farmers, workers facing plant closures, and victims of environmental degradation.

In Pakistan the Supreme Court in *Shehla Zia v. WAPDA*, held that the right to life guaranteed by Article 9 of the Constitution of Pakistan included the right to a healthy environment.<sup>20</sup> The Constitution makes no reference to environmental rights. These rights were upheld through an innovative process of interpretation that regards the wide language of fundamental rights in the constitution

‘as living tissue from which legal principles can be created in order to meet the needs of an evolving society’.<sup>21</sup>

This innovative model of rule formulation ushered in a flourishing of PIL in Pakistan.

In Bangladesh, the Constitution also makes no reference to environmental rights. Yet its apex Court broadened the ‘right to life’ to incorporate these rights.<sup>22</sup>

In Malaysia, the Indian Supreme Court decisions on the expanded definition of ‘life’ were incorporated through case law into its constitutional jurisprudence.<sup>23</sup>

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<sup>20</sup> P.L.D 1994 S.C. 693.

<sup>21</sup> Parvez Hassan and Azim Azfar, ‘Securing Environmental Rights through Public Interest Litigation in South Asia, 22 Va. Env’t. L.J. 215.

<sup>22</sup> *Farooque v. Bangladesh*, 1997 B.L.D. 17, P 33.

Where there are well-developed codes of law and systems for policing it, there is less need to rely on broad constitutional guarantees to provide the substantive basis for protection. The judicial role is likely to be more supervisory. In the European environmental law context, for example, this is the position. The emphasis then has been on access to justice, including public access to environmental information, and the public's role in the enforcement of environmental laws designed for their protection. The Aarhus Convention of 1998 deals precisely with these. Article 9 requires member states to ensure that members of the public with a sufficient interest have access to a court of law or other 'independent and impartial body established by law' to challenge 'the substantive and procedural legality of any decision'. The procedures must 'provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive'.<sup>24</sup>

ii. Recourse to international rights regime

The Asian courts' expansion of the scope of public interest law was achieved in no less measure by going beyond the domestic legal regime and embracing universal rights and values reflected in international regimes. Thus eminently domestic concerns like eviction of the homeless and the landless, were seen in the larger concerns relating to the universal human right to housing.<sup>25</sup> This locates the constitutional rights within a larger universal context and enlarges their ambit.

The Supreme Court of India frequently relies on international treaties and precepts to inject new life into its Constitution. A famous example was the *Vellore*

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<sup>23</sup> *Tan Teck Seng* [1996] 1 MLJ 261(CA); *Hong Leong Equipment* [1996] 1 MLJ 481(CA); *Ketua Pengarah Jabatan Alam Sekitar & Ors v Kajing Tubek & Others* [1997] 3 MLJ 23 (CA).

<sup>24</sup> See Handbook on Access to Justice under the Aarhus Convention, published by the Regional Environmental Centre for Central and Eastern Europe ('REC'): includes case studies from 19 countries illustrating the practical problems arising for access to justice under Article 9 such as: the role of NGOs, rules as to standing, financial guarantees for interim relief, delay, and costs.

<sup>25</sup> Peter Cicchino, Opening Remarks, First Annual Peter Cicchino Awards for Outstanding Advocacy in the Public Interest Panel Discussion, 2001, 9 Am. U.J. Gender Soc. Pol'y & L. 15.

*Citizens' Welfare Forum* case<sup>26</sup> in which the court held that principles of 'sustainable development', including the 'precautionary principle' and the 'polluter pays' principle, were part of Indian law.

The Sri Lankan Supreme Court in *Bulankulama v. Ministry of Industrial Development*, anchored its decision on significant pronouncements on sustainable development and the incorporation of international treaties in domestic law.<sup>27</sup> In the *Eppavela* case in 2000, the Sri Lankan Supreme Court found that a Government proposal to lease a phosphate mine to an American company for 30 years conflicted with principles of sustainable development and had not been subject to adequate environmental assessment. It emphasised the importance of public access to environmental information, drawing on the policies of the European Commission and the Rio Declaration to provide positive content to the fundamental rights guaranteed by the constitution

The Pakistan Supreme Court in *Shehla Zia v WPDA*, cited earlier, said the Rio Declaration '*would serve as a great binding force*'. It applied the precautionary principle adopted in the Rio Declaration and as applicable to the needs of a developing country. The Court said:

‘According to it (the precautionary principle) if there are threats of serious damage, effective measures should be taken to control it and it should not be postponed merely on the ground that scientific research and studies are uncertain and not conclusive. It enshrines the principle that prevention is better than cure. It is a cautious approach to avert a catastrophe at the earliest stage. Pakistan is a developing country. It cannot afford the researches and studies made in developed countries on scientific problems particularly the subject at hand. However, the researches and their conclusions with reference to specific cases are available, the information and knowledge is at hand and we should take benefit out of it. In this background if we consider the problem faced by us in this case, it seems reasonable to take preventive and precautionary measures

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<sup>26</sup> AIR 1979 SC 1360.

<sup>27</sup> 7 S. Asian Env'tl. L. Rep. 1 (Jun 2002).

straightaway instead of maintaining status quo because there is no conclusive finding on the effect of electromagnetic fields on human life. One should not wait for conclusive finding as it may take ages to find it out and, therefore, measures should be taken to avert any possible danger and for that reason one should not go to scrap the entire scheme but could make such adjustments alterations or additions which may ensure safety and security or at least minimise the possible hazards'.<sup>28</sup>

The court also relied on the concept in international environment documents of 'sustainable development'. It said that a balance had to be struck between economic progress and prosperity and minimising possible hazards.

Of course this implies that judges must be familiar with the universal concepts in these international instruments, their relevance and how they could be adapted to advance the public interest in the case before them. This must mean in the long term, the phasing out of the 'insular' judge oblivious to the impact of universal values and international instruments on national adjudication.<sup>29</sup>

### **2.3 Altering judicial norms in radical ways**

#### **(a) Forging new tools: abandoning the traditional approach**

The effectivity and wide ambit of PIL would have been hampered without the development of new and innovative mechanisms in support. In *Bandhua Mukti Morcha v. Union of India*,<sup>30</sup> the Indian Supreme Court explained the need to abandon the traditional approach to the judicial process in order to 'forge new tools' to give meaningful content to the fundamental rights of the large masses of the people. Justice Bhagwati said:

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<sup>28</sup> PLD 1994 SC 693, 710-711.

<sup>29</sup> Gurdial Singh Nijar, 'The Application of International Norms in National Adjudication of Fundamental Rights', in *Proceedings of the 12<sup>th</sup> Malaysian Law Conference*, Bar Council Malaysia, Kuala Lumpur, 2005, p.52.

<sup>30</sup> A.I.R. 1984 S.C. 802, 815.

‘It is necessary to depart from the adversarial procedure and to evolve a new procedure which will make it possible for the poor and the weak to bring the necessary material before the Court for the purpose of securing enforcement of their fundamental rights... . If we blindly follow the adversarial procedure in their case, they would never be able to enforce their fundamental rights and the result would be nothing but a mockery of the Constitution’.<sup>31</sup>

The substantive rights central to human dignity for large sections of the population would not likely have materialized without the innovation of procedural requirements, not, at least, at the same pace.<sup>32</sup> We now look at some of these creative changes.

## **(b) Changing the rules of standing**

### **i. De-linking standing and remedies**

Restrictive rules on standing – the right to bring an action - is a serious impediment for access to justice. Traditional requirement give standing only to those who are directly aggrieved. The poor and the ignorant have no understanding of their rights and the ability to engage powerful advocates on their behalf. The promise of ‘justice to all who seek it’ remains illusory for large segments of society in Asian countries. The traditional test for standing has its origins in the hypothetical question as to who would have had title to sue had this been a private law action for damages. Yet this has been described as an

‘...inappropriate in a public law context ... (This) retains a link between standing and remedies ... But this idea makes little sense when the applicant represents

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<sup>31</sup> At p. 815.

<sup>32</sup> G.L. Peiris, ‘Public Interest Litigation in the Indian Subcontinent: Current Dimensions’, 40 Int'l & Comp. L.Q. 66, 70 (1991).

the interests of a sector of the public. Success in the action may not in any practical way enure to the benefit of an individual who represents the public interest.<sup>33</sup>

ii. De-linking standing and justiciability

Lord Diplock in the *IRC* case noted earlier said that if he was convinced that the board had acted *ultra vires* he would have conceded standing. This, with respect, misses the whole purpose of granting threshold standing. According standing should be distinctly separate from the merits of the case.<sup>34</sup> It is an issue of access. As put aptly by a Malaysian judge:

‘to deny locus standi ... would be a retrograde step in the present stage of development of administrative law and a retreat into antiquity. The merits of the complaint are an entirely different matter...the principle that transcends every other consideration must be ex necessitate that of not closing the door to the ventilation of a genuine public grievance...’<sup>35</sup>

iii. Unsuitability of individualistic and adversarial traditional system of litigation

As earlier noted, the traditional system of justice with its adversarial and highly individualistic features is ill-suited to meet collective claims, especially those involving diffused rights (air, water, biodiversity) that are owned by nobody and yet may impact seriously on the life of large sections of the people. This is exacerbated in Asian societies. First, legal illiteracy is pervasive amongst the populace of developing countries. Those whose rights are breached often do not know of their entitlement to that right; even less know if the breach is amenable to a legal remedy.<sup>36</sup> They can hardly then be

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<sup>33</sup> Allars M, 'Standing: The Role and Evolution of the Test' (1991) 20 FLR 83 at 95.

<sup>34</sup> The UK House of Lords in the *IRC* case was

<sup>35</sup> *UEM v Lim Kit Siang* [1988] 2 MLJ at 45, *per* Abdoolcader SCJ (dissenting opinion).

<sup>36</sup> Gurdial Singh Nijar, 'The Legal Needs of the Rural Poor in Malaysia', vol. 5, 1978 JMCL, 251.

expected to be proactive in filing claims in courts. Also, courts are more likely viewed as a culturally alien institution – with its complex procedures and culturally alienating strange traditions. Secondly, the rights and claims are collective in nature and not perceived as individual claims.

For this reason, the opening for PIL in Asia was ushered in by a relaxation of the standing rule. The Indian Supreme Court described the rule in *S.P. Gupta v. Union of India* as of ancient vintage and arose during an era when private law dominated the legal scene and public law had not yet been born.<sup>37</sup> For this reason there has steadily been a relaxation of the rules on standing to allow surrogates to act on behalf of aggrieved persons. This is probably the single largest factor for the increase in public interest litigation.<sup>38</sup>

In Pakistan, the relaxation of standing rules led to the advent of PIL, beginning with the 1988 decision of the Supreme Court in *Benazir Bhutto v. Federation of Pakistan*.<sup>39</sup> The Court said it would dispense with the traditional standing requirement to allow a class or group of persons, otherwise unable to seek redress from a court, to seek to enforce their fundamental rights. This spawned, as in India, PIL to rectify numerous social ills.

In Malaysia, the trial judge in the first PIL case, cast the standing rule in very broad terms. Any body could bring an action not only on the ground that he had ‘sufficient interest’ in the subject matter, but as well, as a citizen to challenge any unlawful act of the administration, even if he has no greater interest than a person having regard for the due observation of the law.<sup>40</sup>

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<sup>37</sup> AIR 1982 SC 149, 185

<sup>38</sup> The same is true in western countries. The occurrence of public interest cases has grown significantly in Canada since the advent of the *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 through a significant relaxation of the standing rules: David Gourlay, ‘Access or Excess: Interim Costs in *Okanagan*’, 63 U.T. Fac. L. Rev. 111

<sup>39</sup> P.L.D. 1988 S.C. 416.

<sup>40</sup> *Mohamed bin Ismail v Tan Sri Haji Othman Saat*, [1982] 2 MLJ 133 at 136, *per* Wan Yahya J.

Although this wide ambit was modified to limit the standing to where there is an infringement of an individual right, the scope of the rule was nonetheless explicitly liberalized.<sup>41</sup>

This liberal trend was arrested in a later decision of the full bench of the apex court. In *UEM v Lim Kit Siang*, a 3-2 decision denied standing to an opposition leader who challenged the disbursement of public funds.<sup>42</sup> The earlier apex court decision was conveniently bypassed in an obscure explanation:

‘(it) represents the high watermark of the law of locus standi in Malaysia, beyond which the courts should be careful to tread’.<sup>43</sup>

The decision took the law back to the pre-1977 English position and ignored the great strides made world-wide in Administrative law; and which had been accepted by its apex court barely 2 years earlier. Indeed in an earlier presentation of the same case *Lim Kit Siang v UEM*,<sup>44</sup> a 3-judge bench of the same apex court had ruled that the same Plaintiff clearly had standing in respect of the same subject matter, after considering ‘a number of authorities both English and local’. There were no new circumstances to justify a complete denial of *locus standi* so shortly thereafter. The parties sued were the various arms of the Government and a private company with alleged links to the ruling party. And the applicant was the leader of the opposition in Parliament. The case challenged the legality of the award by the government of a billion dollar highway construction contract to the private company. In this factual construct it is easy to speculate as to why the grievance could not be allowed to be ventilated. This decision was to blast the locus standi law back to the days when unlawful decisions of the administration were insulated from attack. The decision has taken its toll. Later decisions

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<sup>41</sup> *Tan Sri Haji Othman Saat v Mohamed bin Ismail*[1982] 2 MLJ at 179

<sup>42</sup> [1988] 2 MLJ 12.

<sup>43</sup> [1988] 2 MLJ 24, *per* Salleh Abas LP.

<sup>44</sup> Quoted extensively in [1988] 2 MLJ 12.

reinforced this restrictive stance on standing.<sup>45</sup> In *Ketua Pengarah Jabatan Alam Sekitar and Anor v v Kajing Tubek*<sup>46</sup> the Court of Appeal left undecided on a technicality the locus standi of natives who challenged the legality of the process approving a billion dollar dam within their natural habitat in Bakun. The judge went on to say

‘Absent any statutory provision, locus standi -- or standing to bring an action for a declaration in public law -- is a matter of pure practice that is entirely for the courts to decide. The choice appears to really depend upon the economic, political and cultural needs and background of individual societies within which the particular court functions. As these are not uniform in all countries, and fluctuate from time to time within the same country, views upon standing to sue in public law actions for declaratory or injunctive relief vary according to peculiar circumstances most suited to a particular national ethos. I make these introductory remarks to demonstrate what I consider to be a vital policy consideration. It is this. When our courts come to decide whether to grant standing to sue in a particular case, they must be extremely cautious in applying decisions of the courts of other countries because the reasons for granting or refusing standing in those other jurisdictions may depend upon the wider considerations to which I have referred in the preceding paragraph’.

Conditioning locus standi to sue ‘to peculiar circumstances most suited to a particular national ethos’ is unacceptable in a justice system founded on the rule of law. No ethos of a country should envisage denying access to its people to challenge the legality and propriety of governmental action. The fundamental right of access to justice is at stake.

The case law since the majority decision in UEM 2 reinforces the view of a leading authority on Malaysian administrative law that

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<sup>45</sup> *Abdul Razak Ahmad v Kerajaan Negeri Johor* [1994] 2 MLJ 297; *Abdul Razak Ahmad v MJB* [1995] 2 AMR 1177.

<sup>46</sup> [1997] 3 MLJ 23.

‘ ... the Malaysian law as to locus standi to seek judicial review of administrative action is ancient and antiquated and out of tune with modern developments in judicial thinking in the common law world’.<sup>47</sup>

In particular it is completely at odds with the development of the law in this important area with the rest of South Asia.

The majority decision in *UEM 2* suggested that the Attorney General was the repository of the public interest and his consent could be sought to institute a ‘relator’ action to vindicate the public interest if transgressed by the government. The judgments of the dissenting judges made clear that this was an impractical and unrealistic view, especially in a society where the AG was not answerable to Parliament. Executive action was being challenged. It was unrealistic to expect the AG, as the principal legal adviser of the executive, to give this consent. Indeed he would be derelict in his duty if he did not defend the suit vigorously.<sup>48</sup>

#### iv. Standing before the Courts in UK

The Courts in the common law tradition have relied historically on English case law. The liberalising of the standing rules in English has had its impact on these countries, although much of the South Asian jurisprudence marched well ahead after a time. All the same it would be useful to survey some of the decisions. Since the *IRC* case, the courts have increasingly liberalized their position on locus standi. The courts have been progressively moving towards the ideology of ‘public participation’ in administrative processes.<sup>49</sup>

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<sup>47</sup> MP Jain, *Administrative Law in Malaysia and Singapore*, 3<sup>rd</sup> Edn., 1997, MLJ, at p. 765.

<sup>48</sup> George Seah SCJ and Abdoolcader SCJ, at p. 35, 36, and 43. Also VC George J at the High Court: [1988] 1 MLJ at 58-59.

<sup>49</sup> MP Jain, loc cit, 2<sup>nd</sup> ed., at p. 515 citing, among others, *Covent Garden Community Asson Ltd v GLC* (1981) JPL 183.

In *Greenpeace (No 2)*<sup>50</sup> standing was given to Greenpeace to challenge an official decision to allow a company a variation in its licence to reprocess nuclear waste at its plant in Sellafield through a representative action. The judge established the existence of the standing on the grounds that 2,500 Greenpeace members lived in the local region where the plant was located. This fact was seen as carrying more weight than the presence of 400,000 members of Greenpeace living in the entire United Kingdom. For the High Court, sufficient interest in this case was established through geographical proximity.

In the *Pergau Dam* case,<sup>51</sup> this notion of sufficient interest was extended. It gave standing to a pressure group concerned with the distribution of aid to developing countries - The World Development Movement (WDM) - to challenge the government's decision to fund the building of the dam in Malaysia on the basis that it was not good value for the British taxpayer and the building of the dam itself was not a beneficial project to the Malaysian economy.

The value of the judicial review action in securing effective accountability of the executive in relation to substantive policy choices and ensuring procedural fairness - and the merits of the case were crucial to the court's decision on standing. If standing was not given '**there would be no alternative challenger.**' And WDM was not just a 'meddlesome busybody' but a credible and well established pressure group with a particular interest and expertise in the issue. The Court cited with approval the dictum of Diplock LJ in the *ex parte Federation of Small Businesses case*:

It would in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation or even a single spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to **vindicate the rule of law and get unlawful conduct stopped.**

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<sup>50</sup> [1994] 4 All ER 29.

<sup>51</sup> [1995] 1 WLR 386.

Standing was given to ensure that the **rule of law is maintained and the legality of executive actions guaranteed.**

It reformulated the real question as ‘whether the applicant can show some substantial default or abuse, and not whether his personal rights or interest are involved.’

The English experience suggests no evidence that applicants have abused judicial review proceedings. There has not been a growth in 'busybody' litigation. Procedural guarantees require applicants to establish a prima facie case before they can come before the court. The courts in England have signaled that they will welcome informed and targeted proxy actions by credible pressure groups on grounds of efficiency and expediency.

v. No other challenger

It was not essential that standing be given only if no one else could bring the proceedings. The judgments in these two cases were not to be so read, said the court in *R (Hammerton) v London Underground*<sup>52</sup> It is a relevant factor in standing and also later in the exercise of discretion but it is not an essential requisite for standing that there be no one else who could bring proceedings. The fact that the local authorities or English Heritage could have brought these proceedings but have chosen neither to do so nor to participate and claim that their functions are being usurped does not preclude Mr having standing. It may go to the merits of the case, or the availability of remedy but it does not preclude standing.

vi. Standing before the European Court of Justice

Greenpeace challenged a decision by the European Commission to fund the building of two power stations on the Canary Islands. There was a clear breach of the mandatory requirement to carry out an EIA before the project could commence.

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<sup>52</sup> [2002] All ER (D) 141.

Greenpeace argued that they had standing as they had participated in the process by making representations and providing evidence to the Commission on the effects of not carrying out the EIA. The ECJ in refusing standing said the submissions made by Greenpeace were unsolicited and they were not consulted in this open process.<sup>53</sup> They were not considered part of the 'formal' consultation process. Only if they were requested by the Commission to provide evidence, would it come within the contemplation of the decision-maker. Only then would it be directly and individually concerned.

Greenpeace also argued on the basis that environmental interests are shared values within the Community which must need respecting and defending. The Court rejected this and said that this showed that the applicants were affected in a general and abstract manner and had not participated in the decision-making process. They were not within the contemplation of the decision-maker.

The Court's restrictive view excludes those who independently will voice the concerns of a significant proportion of the population; also those not asked to participate, ***but who are directly affected by the decision***, will not have any **effective right of redress**. In a democratic system of public law, this is not an effective or satisfactory model for **judicial accountability** of decision-makers. This promotes a **lack of transparency in** decision-making within the European Community. By comparison with the English court's decision in *Pergau Dam* where standing was awarded because of the lack of any other responsible challenger, the *Greenpeace* judgment limits accountability of decision-makers before the European Court of Justice to those who would be in any event unlikely to challenge, given their already privileged participation in the consultation process.

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<sup>53</sup> The relevant provision was paragraph 4 of Article 230 of the EC which stipulates the criteria of direct and individual concern for *locus standi*. The threshold adopted by domestic courts is generally lower than this criteria under Article 230 EC.

### vii. Standing in other Jurisdictions

Other jurisdictions have also been active in promoting PIL through a relaxation of the rules of standing.<sup>54</sup>

#### (a) Other Parts of Asia

##### **Bangladesh**

A Bangladesh lower court disqualified a public interest enforcement petition in 1994 on the basis of standing. However, the Appellate Court over turned the decision two years later. Case law has created an extremely broad window of opportunity for public interest enforcers.<sup>55</sup> Public interest attorneys in Bangladesh have since filed actions against a range of ecological ills, including industrial pollution, vehicular pollution, unlawful construction, illegal felling of public forests, razing of hills, land use, and unlawful development schemes.

In the *Farooque* case cited earlier, a leading environmental NGO, the Bangladesh Environmental Lawyers Association, was given standing to challenge irregularities in the country's Flood Action Plan. The organization's credible record in the subject of the impugned project gave it a sufficient interest in the matter. The interest had to be a bona fide espousing of a public cause in the public interest.

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<sup>54</sup> See for example: Earnest Makawa, "Experience of Malawi: Public Role in Enforcement," *Fifth International Conference on Environmental Compliance and Enforcement, Conference Proceedings* (Washington, U.S. EPA, 1998) at 169; Narayab Belbase, "Environmental Compliance and Enforcement Through Public Litigation in the Godavari Area in Nepal", *id* at 423; William Ringia, "Public Access to Environmental Information -- Legal and Practical Problems: A Case Study of Tanzania", *id* at 203; A. Oposa, "Intergenerational Responsibility in the Philippine Context as a Judicial Argument for Public Action on Deforestation", *Fourth International Conference on Environmental Compliance and Enforcement, Conference Proceedings* (Washington, U.S. EPA, 1996) at 521.

<sup>55</sup> See preceding footnote.

## **Philippines**

The Supreme Court of the Philippines in the *Oposa* case confirmed the right of a group of Philippino children to bring an action on their own behalf and on behalf of generations yet unborn complaining of excessive timber felling operations permitted by the Department of Environment. The complaint was based on the right to 'a balanced and healthy ecology' incorporated in the 1987 constitution. Public interest attorneys combine community organizing with legal counsel in what they call "meta-legal" strategies.<sup>56</sup>

### **(b) Other Countries**

#### **Columbia**

In Columbia, "popular actions" have been promoted as the best "collective procedural remedy for public injury and damage." These are based on old Roman law that stipulated that "the citizen was nothing more than an integral element of the populace, (who) defended the interest of the latter and his own interests, through popular actions." These actions have been incorporated in the country's civil code since its inception but only recently have they been recognized as a potential launching ground for environmental advocacy. A recent reform in the rules of civil procedure states that in the defense of natural resources and rural environmental elements, "the Judge may impose on the defendant in the decision the compensation of damages caused to the Community and all measures which are appropriate."<sup>57</sup>

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<sup>56</sup> Maria Paz G. Luna, "Enforcing Environmental Laws in a Developing Country: An Alternative Law Approach" (1998) 15 TAU Stud. in L. 177.

<sup>57</sup> Orit Marom-Albeck and Alon Tal, 'Upgrading Citizen Suits as a Tool for Environmental Enforcement in Israel: A Comparative Evaluation', 34 Isr. L. Rev. 373.

## **Mexico**

Federal law in Mexico creates a system whereby citizens can file informal complaints or petitions to draw the attention of the government to incidents or acts that "produce an ecological imbalance or environmental damage or which violate any environmental law provisions." Under the system the government is required to receive, investigate and respond to these complaints within specific time constraints. Complainants are entitled to receive a full report of the results of the verification check and the intended government response.

## **Chile**

In Chile the Court of Appeal in 1988 made orders to prevent a mining company polluting the beaches of an area north of Santiago. It relied on Article 19 of the Chile Constitution guaranteeing the right to live in an environment free from contamination. The company was given a year to put an end to the dumping of its mineral tailings into the Pacific Ocean.

## **Europe**

As noted earlier, the emphasis in recent years has on access to justice, including public access to environmental information, and the public's role in the enforcement of environmental laws designed for their protection. These issues were the subject of the Aarhus Convention 1998 on 'Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters'. Article 9 requires member states to ensure that members of the public with a sufficient interest have access to a court of law or other 'independent and impartial body established by law' to challenge 'the substantive and procedural legality of any decision'. The EU signed this Convention and is now in the process of ratifying it. Non-governmental organizations promoting environmental protection and meeting any requirements under national law are deemed to have an interest. Any decision on standing must be consistent with the objective of giving the public concerned wide access to justice within the scope of this Convention.

## Hungary

Not all jurisdictions on the continent show a broad approach to standing. The Hungarian Court has restricted the contribution of environmental NGOs by refusing them standing in cases not directly concerning 'environmental' law as defined by the Hungarian Environmental Protection Act. A claim by an environmental NGO to review the grant of a permit for a road scheme along the southern shore of Lake Balaton was rejected for lack of standing, because the law concerned was not explicitly 'environmental'.

[There were also similar developments on standing in jurisdictions as varied as Australia and Russia.]<sup>58</sup>

### b. Simplifying pleadings: 'epistolary' jurisdiction

The Indian Supreme Court, to encourage actions on behalf of the poor, wanted to make the writ petition process cheaper and easier. It waived all formal pleading requirements in PIL cases and instituted a system of "epistolary jurisdiction". This allows any person or organization to petition the court by simply writing a letter. In the *Bhagalpur Blinding* case, the Court was initially approached by an attorney, who had read of the incident in a newspaper, and who filed a letter with the Court seeking relief on behalf of the victims. Since then a number of lawyers, journalists and public interest organizations have taken up cases on behalf of victims and the dispossessed. This reform of procedural law, together with the relaxed rules on standing, started an era of public interest litigation of unprecedented proportions. Its tide has yet to ebb. Although these procedures were made more formal over time, the pleading rules for PIL remain largely flexible.

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<sup>58</sup> James Johnson, "Civil Enforcement of Environmental Laws in Australia", in *Proceedings of the Fifth International Conference on Environmental Enforcement* (Washington, D.C., U.S. EPA, 1998) at 436; Vera Mischenko and Erika Rosenthal, "Successful Environmental Enforcement in Russia: The First Successful Nation-Wide Case", in *Proceedings of the Fifth International Conference on Environmental Enforcement* (Washington, D.C., U.S. EPA, 1998) at 419.

Pakistan has followed India in allowing this jurisdiction.

**c. Adversarial fact-finding merged with co-operative fact-finding**

Again the Indian Supreme Court has shown how this works in practice. Instead of the usual cut and thrust of the adversarial trial process, for PIL cases it established fact-finding commissions. It required government defendants to co-operate to establish the facts. It virtually abandoned live testimony and the examination process in favour of requiring evidence by affidavits.

The Pakistan Supreme Court has also instituted this practice. It investigates the matter through a variety of techniques, ranging from calling of official record to deputing experts to probe and constituting socio-legal Commissions to investigate the matter. The Court then examines the reports submitted by the experts and Commissions and decides the case accordingly. In such cases the Court follows a certain procedural process. It regards the report as prima facie evidence and supplies its copies to the parties for rebuttal on affidavit. The Court then considers the report together with affidavit, if any, and proceeds to adjudicate the issues involved in the case.

**d. Expansion of the Court's remedial powers.**

The Indian Supreme Court has gone beyond the normal adjudicatory role in an adversarial trial in PIL cases. It has taken operational control of failing government institutions and required comprehensive efforts to mitigate the effects of past injustices.

For example, when rickshaw licenses were made available only to owners, not lessees, of the vehicles, the Court entertained a PIL petition on behalf of lessees who were too poor to purchase the vehicle. The Court persuaded local banks to provide ready credit to rickshaw workers seeking to become owners in order to permit the worker to qualify for the license. Similarly, in *Bandhua Mukti Morcha*, the Court required that significant, virtually lifelong remedial assistance be given to the newly freed bonded labourers. In *Laxmi Kant Pandey*, the Court even drafted detailed rules governing the

adoption of poor children by foreigners, down to the minimum daily caloric intake of the babies.

In the *Vellore Citizens' Forum* case, in response to a petition complaining of pollution of the water supply to the claimants' area by untreated effluent from tanneries, the Court ordered the central Government to set up an authority and to confer on it the powers necessary to remedy the situation; it also established arrangements to enable families who had suffered to be compensated by the polluters.

As can be seen, the role of the apex Court goes beyond enforcing the government's duty to abide by, or to enforce, well-established legal norms.

As a commentator observed:

‘This resulted in the evolution of a new institution in the annals of constitutional courts. Instead of an adversarial organ operating on the model of an ordinary lawsuit, the Supreme Court in a PIL case appears to function as a combination of constitutional ombudsman and inquisitorial examining magistrate, vested with responsibility to do justice to the poor litigant before it by aggressively searching out the facts and the law, and by taking responsibility for fully implementing its decisions.’<sup>59</sup>

In Pakistan, the Supreme Court in *Shehla Zia v WPDA* stayed the construction of the grid station until further studies were done to establish the nature and extent of the threat posed by electro-magnetic radiation emitted by power plants. Drawing on the experiences of the Indian courts, the Supreme Court set up a commission of experts to study the technical dimensions and to submit a report in this respect. The public utility concerned was directed to adopt as a norm a public-friendly administrative approach in its future work. They were directed to publicise any future installation of any grid station

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<sup>59</sup> Burt Neuborne, ‘The Supreme Court of India, International J of Constitutional Law, Icon 1.3, July 2003, 476.

and/or transmission line through the media, invite objections and only finalise plans after public hearings of the objections.<sup>60</sup>

In Bangladesh, orders made include requiring the Government to convert petrol and diesel engines in government-owned vehicles to gas-fueled engines; and the withdrawal of hydraulic horns in buses and trucks. Also the withdrawal of two-stroke engine vehicles from City, the cancellation of licenses for nine-year-old three-wheelers, the provision of adequate numbers of compressed natural gas stations, and the establishment of a system for issuing fitness certificates for cars through computer checks.

An expansive approach to remedies is also illustrated by a Dutch case in which the Dutch Society for the Protection of Birds brought an action against the owner of a Romanian oil tanker, which had caused a large oil spill affecting thousands of sea birds in the North Sea. The society successfully claimed the costs of removing oil from the sea birds and maintaining bird asylums

#### Interim remedies: posting bond or undertaking for damages

Securing interim relief may require a bond or undertaking. This may be beyond the means of an NGO. In the UK *Lappel Bank* case, an NGO challenged the State's decision not to include Lappel Bank within a special protection area. The NGO was refused interim relief for temporary protection of the Lappel Bank, because it was unable and unwilling to compensate the port of Sheerness for losses in the meantime. Although it succeeded on the merits Lappel Bank was destroyed before final judgement was given.

This is contrasted with a German case relating to a part of the Baltic Sea motorway where an environmental NGO was able to obtain a temporary injunction to prevent possible damage to a protected area, without having to post a bond or give any undertaking as to damages, even though the court eventually ruled in favour of the Government.

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<sup>60</sup> PLD 1994 SC 693, 715.

## Delay

Delays can also effectively thwart a PIL. This is seen in a Spanish case where an NGO was denied access to inspection reports prepared by a Government agency relating to nuclear facilities. It started proceedings for judicial review in 1995 which were decided in its favour four years later by the court. By July 2002 the appeal was still pending and access to the reports had still not been provided.

## e. Costs

Costs in common law jurisdictions follow the event. The unsuccessful party pays the costs of the successful party. Further, the court has power to order that costs be paid as security before the substantive litigation begins. These rules 'serve as a formidable barrier to litigants who are bringing an (environmental) action in the public interest'. Justice Toohey of Australia noted in an extra-judicial comment:<sup>61</sup>

Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding of environmental litigation and the awarding of costs. There is little point in opening doors to the courts if litigants cannot afford to come in. The general rule that "costs follow the event" is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or a wealthy corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event it will be a factor that looms large in any consideration to initiate litigation'.

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<sup>61</sup> Toohey J in a 1989 address to a NELA conference on environmental law, cited by Stein J, 'The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law' (1996) 13 *EPLJ* 179 at 180; also cited in his judgment in *Oshlack v Richmond River Council* (1994) 82 *LGERA* 236 at 238. Also cited in Bates G, 'Costs of Litigation in Public Interest Environmental Cases' (1996) 13 *EPLJ* 335 at 338 and Bayne P, 'Costs Orders on Review of Administrative Action' (1994) 68 *ALJ* 816 at 817.

In similar vein, the Ontario Law Reform Commission of Canada argues that without reform to the costs rules, the relaxation of the standing rules might be "fatally undermined".<sup>62</sup>

In New South Wales, Australia, the Land and Environment Court in *Osblack*,<sup>63</sup> waived security for costs to public interest litigants. The trial judge justified a departure from the ordinary rule as to costs on the basis of the following special circumstances:

(i) The normal costs rule grew up in an era of private litigation. This should not apply to applications to enforce 'public law obligations'. Otherwise the relaxed standing rules would be of little use.

(ii) PIL's objective is to uphold 'the public interest and the rule of law'. but something more is required

(iii) The pursuit of PIL is motivated by the desire, in this case, to ensure obedience to environmental law and to preserve the habitat of the endangered koala. Also the appellant had nothing to gain from the litigation 'other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna.'

(iv) A significant number of members of the public share the litigant's stance appellant as to the development to take place on the site, and the preservation of the natural features and flora of the site. In that sense there was a 'public interest' in the outcome of the litigation.

(v) The basis of the challenge was arguable and had raised and resolved 'significant issues' as to the interpretation and future administration of statutory provisions; these issues had implications for the council, developer and the public.

The Court of Appeal held that the trial judge erred in taking into account irrelevant considerations and also in failing to conform to the High Court's decision in *Latoudis v Casey*.<sup>64</sup> This *Latoudis* decision held that the award of costs to a successful party

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<sup>62</sup> David Gourlay, locate citation.

<sup>63</sup> In *Osblack v Richmond River Council* (1997) 152 ALR 83 at 114-115 per Kirby J 115. He cites Toohey J with approval.

<sup>64</sup> (1990) 170 CLR 534.

in civil litigation is made not to punish the unsuccessful party but to compensate the successful party against which that party has been put by reason of the legal proceedings.

The Court of Appeal's decision has been described as an illogical conclusion. Because, although public purpose and the public interest is a relevant consideration in decision-making and law enforcement under the EP& A Act, it is considered irrelevant to the exercise of a judicial discretion to award costs arising out of proceedings brought under the Act.

As Kirby J notes, the section in the law 'is one of a number of provisions designed to increase the rights of access to the law and the courts of persons having a particular interest in, and commitment to, environmental concerns.' As such it represents:

‘a parliamentary conclusion that it is in the public interest that such individuals and groups should be able to engage the jurisdiction of the Land and Environment Court, although they have no personal, financial or like interest to do so. The removal of the barrier to standing might amount to an empty gesture if the public character of an applicant's proceedings could in no circumstances be taken into account in disposing of the costs of such proceedings, either where they succeeded or ... where they failed.’<sup>65</sup>

Costs in cases involving a trust fund or property are, in equity, treated as exceptions to the usual order as to costs and provides a precedent for departure from the usual cost following the event order. . Kirby J elaborates:

‘...a discrete approach has been taken to costs in circumstances where courts have concluded that a litigant has properly brought proceedings to advance a legitimate public interest, has contributed to the proper understanding of the law in question and has involved no private gain. In such cases the costs incurred have usually been described as incidental to the proper exercise of public administration. Upon that basis it has been

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<sup>65</sup> *Osblack v Richmond River Council* (1997) 152 ALR 83 at 114-115 per Kirby J 115. He cites Toohey J with approval.

considered that they ought not to be wholly a burden on the particular litigant ... The approach just described is not entirely dissimilar to that long taken in courts of equity in cases in which trustees and other litigants in a special position, who have properly brought a matter before a court, are spared costs orders against themselves personally'.

The concept of the trust is important in environmental law through the concept of 'ecologically sustainable development'. The concept defined as being 'able to meet the needs of the present without compromising the ability of future generations to meet their own needs' embraces the concepts of intergenerational equity, the precautionary principle and public participation. Each generation is both a custodian and trustee of the planet for future generations and a beneficiary of its fruits. This imposes the obligations to care as a *quid pro quo* for the right to use its bounty.<sup>66</sup>

Decisions subsequent to *Oshlack* have specifically rejected the 'public interest litigation' consideration for excluding costs. A commentator makes out a case for change in these terms:

What is required is the development of a more principled approach to costs orders in public interest litigation, particularly given that, 'in the environmental field ... it is more often the public interest which is under threat than the interests of particular individuals'. This would require: greater attention to the legislative framework within which costs orders are to be made; adverting to international legal principles, where appropriate, to inform the interpretation of municipal environmental law, which is often the result of international treaties and agreements; and making use of principles of costs orders relating to trusts.<sup>67</sup>

In Brazil, a civil law jurisdiction system, the equivalent PIL class action representatives do not have to pay the opposing defendant's attorney's fees, costs and expenses if they lose, unless the litigation was in bad faith. In addition, class action

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<sup>66</sup> Brown Weiss E, *In Fairness to Future Generations* (1988) cited in Boer B, 'Institutionalising Ecologically Sustainable Development: The Roles of National State and Local Governments in Translating Grand Strategy Into Action' (1995) 31 *Willamette LR* 307 at 319.

<sup>67</sup> Kellie Edwards, 'Note: Costs and Public Interest Litigation After *Oshlack v Richmond River Council*,' 21 *Sydney L. Rev.* 680.

plaintiffs do not have to advance the payment of court costs, fees, experts' fees or any other expenses. With these relatively simple adjustments from classical civil law dogma, the Brazilian legislature disposed of financial barriers that inhibit access to justice. This has maximised the effectiveness of the class action device.<sup>68</sup>

The Indian Supreme Court outlawed the need for security of costs in public interest cases.<sup>69</sup>

In Canada, in *British Columbia (Minister of Forests) v. Okanagan Indian Band*,<sup>70</sup> the Supreme Court ordered the respondent government to fund, in advance, the full cost of the public interest litigants – an Indian band.<sup>71</sup>

#### **f. A Strong PIL Bar**

It cannot be emphasized enough that especially in developing countries PIL needs a strong and committed Bar to flourish.. By and large the profession appears contentedly oblivious that professional responsibility demands as well a commitment to serve the public. In the context of the US, the first public interest lawyers to renounce the traditional role of the lawyer in favor of an honest declaration of direction were the government-funded lawyers for the poor: ‘unlike his corporate law counterpart, the legal service program lawyer has explicitly stated that he is concerned with public policy.’ Presently, PIL in the Asian milieu is initiated by lawyers from the private bar who have a deep personal sense of professional responsibility to the wider good. Often this professional commitment comes at a price. For there to be the possibility of ethical

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<sup>68</sup> Antonio Gidi, ‘Class Actions in Brazil - A Model for Civil Law Countries’, 51 Am. J. Comp. L. 311.

<sup>69</sup> *Prem Chand v Excise Commissioner*, UP AIR 1963 SC 996.

<sup>70</sup> [2003] 3 S.C.R. 371.

<sup>71</sup> Criticised by David Gourlay, ‘Access or Excess: Interim Costs in *Okanagan*’, 63 U.T. Fac. L. Rev. 111: he says that interim costs are too blunt an instrument by which to attain the goal of universal access to justice. He argues that Parliament has a clear institutional advantage, as compared to the courts, in making polycentric distributional decisions; so it should be left to Parliament to shape a systemic solution to any perceived lacuna in funding for public interest litigation.

evolution in the definition of professional responsibility, there must be a deliberate institutional commitment of resources to, and respect for, the public interest. Until such an ethical change has been accomplished, the status of public interest work by the private bar will remain extremely precarious.<sup>72</sup>

### **3. Impact of PIL: New Structures in the Judicial System**

There may be a need to establish new infrastructures to deal with PIL. In India, for example, there was a huge burst of this form of litigation. More than 23,000 PIL letters were registered in Court over a fifteen-month period between 1987 and 1988. In response, the Court established an internal 'PIL Cell' administrative unit, to process these cases. The cell reviews PIL petitions, routes the purely local petitions to similar cells established by the high courts of the states, retains the petitions of national importance, appoints *pro bono* counsel, and supervises the initial fact-finding process. In appropriate cases, the matter is referred to the Court for interim relief.

### **4. Tangible success**

The PIL movement appears to have had tangible successes in assisting many thousands of poor persons to invoke the rule of law to better their lives in South Asian jurisdictions. It also rescued the courts, especially the Indian Supreme Court from the disrepute into which it had fallen because of both its perceived supine posture in the pre-emergency era as a court for the rich and its failure to protect basic rights during the 1975-1977 emergency. PIL provides a model for courts struggling to balance the transformative aspect of law against the law's natural tendency to favour those rich enough to invoke it.

### **5. Criticism**

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<sup>72</sup> David A. Marcello, Book review: *The Lawyer, the Public, and Professional Responsibility* by F. Raymond Marks, Kirk Leswing and Barbara A. Fortinsky, Chicago, Illinois: American Bar Foundation, 1972, 47 *Tul. L. Rev.* 929

But PIL has not been free from criticism. There are complaints that PIL shifts the Court from an organ of constitutional review, to an administrative mechanism responsible for enforcing the existing laws. Moreover, critics argue, in a judicial system already burdened by vast backlogs, the massive infusion of PIL petitions presents an insuperable logistical challenge. Critics also point out that, at best, PIL is cosmetic, covering a grim reality with a facade of occasional, highly publicised justice. For example, argue critics, for every 5,000 bonded labourers freed and assisted by a PIL case such as *Bandhua Mukti Morcha*, 100,000 new labourers are placed in bondage each year. This may even increase cynicism as the solutions through PIL are not attained.<sup>73</sup> Finally, serious questions have been raised about the collapse of separation of powers inherent in turning the constitutional court into an examining constitutional magistrate.

## 6. Conclusion

Despite the criticisms, PIL stands as a remarkable example of the capacity of a committed judiciary to transform law into a force for change. In India, some of its initial fervour was lost with the retirement of two of its most avid proponents – Supreme Court Judges Bhagwati and Krishna Ayer. Disenchantment also followed the realization that the massive socio-economic problems of third world societies needed more than progressive declarations and innovative remedies in PIL suits. PIL litigation shows how there can be a remarkable mobilisation of judicial resources on behalf of the poor. The experience of the courts from a wide diversity of jurisdictions surveyed in this paper point the way to the practical options for judiciaries in Asian countries who still have some distance to travel in their quest to make democracy, constitutionalism and the rule of law relevant to the weakest segments of a society and provide real justice for all.

Kuala Lumpur  
8<sup>th</sup> October 2006.

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<sup>73</sup> Arun Shourie, *Courts and their Judgments*, Rupa & Co, 2001, p. 404.