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Research Paper:

Citizens' Action and Judicial Activism through Public Interest Litigation: Making the Constitutional Goals True?

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Commonly used Abbreviations

AIR	All India Reporter (Digest of legal cases in India)
CNG	Compressed Natural Gas
COI	Constitution of India
PIL	Public Interest Litigation
SC	Supreme Court
SCC	Supreme Court Cases (Digest of legal cases in India)

I. Introduction

A survey about India's performance almost sixty years after independence leads to a mixed appraisal. On the one side, democracy could prevail over (nearly) the entire period, and that despite the many challenges India had to phase in the post-colonial epoch. On the other side, it cannot be denied that the socio-economic record of India after independence is at most modest. Still, poverty remains an integral part of India's society. The majority of Indians does not have access to some of the most rudimentary goods, as clean drinking water, primary education, etc. Overall, it can be said that the legislative and executive branch of government have failed to implement some of the most important the constitutional goals and provide the majority of Indians with a decent livelihood, or, in other words, with minimum living standards.

However, there seems to be a ray of hope, which has developed in the aftermath of the Emergency. The Supreme Court of India has started to act as a social reformer in developing Public Interest Litigation (PIL). The judiciary opened the court rooms for the citizens to sue the state, and even started itself to embark upon an activist role, in the name of the people. In the 1980s, PIL was developed as a means to ensure the abidance of the state with regard to the most basic fundamental rights, in accordance with *Part III* of the Constitution of India (COI). A decade later, the judiciary made use of PIL in order to interfere more vigorously in the domain of policy-making. The Supreme Court started to act in sectors where the legislative has either neglected to pass the laws, or the executive has failed to properly implement them. This development happened, as Rudolph and Rudolph (2001b) underline, concomitant to the loss of political power by the center from the end of the 1980s.

This main goal of this paper is to underline the dynamics PIL has developed to transform India, ever since it was created by activist judges. At first, I will define the *de jure* constitutional goals as enshrined in the COI. The next section will briefly contrast the *de facto* situation, with the objective to demonstrate how the center has failed to implement some of the most essential constitutional goals. But the core of this paper lies on the concept of PIL. I will spend a big effort in showing how PIL was developed, in emphasizing on its salient features and in demonstrating how it has transformed from a tool that was designed to make the *Fundamental Rights* accessible to the poor people, into an effective tool of the judiciary for being involved in policy-making. For the latter, I will refrain my analysis to the example of the creation of environmental rights and the subsequent imposition of obligations on the state. Apart from studying this subject only with secondary literature, I will also refer to primary sources, consisting of Supreme Court cases. Like this, we can receive a more nuanced understanding of the dynamics PIL and activist judges have acquired in the aftermath of the emergency, and of their power they now encompass to transform India significantly.

The conclusion will wrap up the results and will put an outlook on the power of PIL of the judiciary and an active citizenry to transform India in accordance with the constitutional goals. We will see that although PIL encompasses an interesting quantum of power for being beneficial for India's poor masses, we should be careful in overemphasizing the prospects of PIL for India's social development. PIL together with an activist judiciary and well-spirited citizens is a desirable feature for controlling the government, but cannot serve as replacement for an effective legislative and executive branch of government, that 'serves' the people in their interests.

II. The Constitutional Goals and the Performance of the Indian State

> "At the core of our Constitution lies the essence of this Gandhian dream in the form of social justice and social democracy. Granville Austin has described the Indian Constitution as 'first and foremost a social document.' He further explained that, 'The majority of India's constitutional provisions are either directly arrived at furthering the aim of social revolution or attempt to foster this revolution by establishing conditions necessary for its achievement.' […] Today when there is so much talk about revising the Constitution or even writing a new Constitution, we have to consider whether it is the Constitution that has failed us or whether it is we who have failed the Constitution."[1]

In his address to the nation on the occasion of the 50th anniversary of the Republic of India, former President K.R. Narayanan hails the "socio-economic soul" of the COI. But he also insinuates upon another crucial point. He asks whether the constitution *per se* has failed, or whether it has not been properly implemented by the elected representatives. This observation deserves more scrutiny. We should at first define the constitutional goals, before looking deeper on the governments' overall performance with regard to these goals.

A.) The Constitutional Goals

A Constitution defines the ethic of a state and sets its goals. A *strictly textual* interpretation of the COI sheds light on the aims and objectives the Constitutional Assembly agreed upon for the future of India. For the purpose of this paper, I will restrict the analysis to the *Preamble, Part III (Fundamental Rights)* and *Part IV (Directive Principles of State Policy)* of the COI.

[1] Former President K.R. Narayanan in his address to the nation on the occasion of the 50th anniversary of the Republic of India in the Central Hall of Parliament, 27 January 2000. Online at www.india-seminar.com/2000/487/487%20narayanan.htm [November 25th, 2006]. The idea to introduce this chapter with this citation came from Rudolph and Rudolph (2001b), who used the last part of the same quote to introduce their work.

The COI has the distinct feature of being the longest written constitution on Earth (Cunningham 1991: 786).[2] It is a very liberal, modern[3] and progressive constitution, which was, *inter alia*, shaped by the colonial experience. The Preamble, which is not directly enforceable *per se* in the courts, gives an idea about the aims and objectives of the COI, that are phrased out more elaborately in the following sections.[4] It defines India as a "Sovereign Socialist Secular Democratic Republic". The terms "Socialist" and "Secular" were only included into the preamble with the *42nd Amendment* to the COI on December 18th, 1976. It is particularly interesting that Indira Gandhi decided to implement this Amendment during the Emergency, as it underscores her endeavor to eliminate "inequality in income and status and standards of life" (Shukla and Singh 1990: 2), and also implies that the Indian state thus far has failed on this question with, as Sathe (2002: 196) calls it, the "laissez-faire economy". In addition, the COI puts an emphasis on justice, liberty, equality and fraternity. For the purpose of this paper, the terms "socialism" and "equality" are of utmost interest. They imply that India, albeit a capitalist state in a broader sense, decided to include redistributive elements into the COI in order to alleviate poverty, giving herself the quality of being a welfare state.

[2] The COI has more than 390 articles (plus sub-articles) and requires, as the author says, more than 180 pages in print. The length of the COI can be explained with the complexity of center-state relations in India, which take the overwhelming majority of Articles in the Constitution. Jain (2003: 12) gives a more detailed account and points out that the constitution has 441 Articles and 12 Schedules and "is probably the longest of the organic laws now extant in the world". It is interesting to note that hardly any publication displays the full text of the COI in one unity. Mehta's (1990) book is one of the only publications doing so (as the author claims) and an excellent reference for having the full text of the COI as of 1949, along with all amendments till 1990 (cross-referenced within the constitutional text) within one single publication.

[3] Jain (2003: 11) points out that the COI could build upon the experiences of different countries in constitution-building and cites in particular the examples of the Western liberal democracies of the USA, Canada and Australia, along with the unwritten British Constitutional Law.

[4] In *Golak Nath v. State of Punjab, AIR 1967 SC 1643, 1655*, the court says: "It [the preamble] contains in a nutshell, its [the constitutions'] ideals and its aspirations. The preamble is not a platitude but the mode of its realisation is worked out in detail in the Constitution."

Part III of the COI comprises the *Fundamental Rights* of the citizens (Art. 12-35), which are mostly in accordance with the (unbinding) *Universal Declaration of Human Rights* from 1947. They can be grouped into the following categories, in accordance with the subtitles of *Part III*: *Right to Equality, Right to Freedom, Right against Exploitation, Right to Freedom of Religion, Cultural and Educational Rights and Right to Constitutional Remedies*. Additionally, as Jain (2003: 973) points out, the *Right to Property* "is now very much diluted and is secured to some extent by Arts. 30-A, 31-A, 31-B and 31-C." Previously, it was enshrined in Art. 31, but the *44th Amendment* to the COI under the auspices of the Janata Coalition (April 30th, 1979) omitted the explicit Fundamental Right to Property of Art. 31 and reformulated it into a more mitigated form (into a legal right without fundamental character). All these *negative human rights* should safeguard the citizens from arbitrary state action and ensure that they can realize their full human potential. In other words, the state should refrain from limiting the freedom and liberty of the individual citizens. Through Art. 32 (*Right to Constitutional Remedies*), these rights are directly enforceable at the Supreme Court of India.

Part IV of the COI, the *Directive Principles of State Policy* (Art. 36-51), is the most interesting section for identifying the constitutional goals that are aimed towards achieving a social transformation and a 'better state'. As opposed to the preceding *Fundamental Rights* section, Art. 37 *unambiguously* says that the

> "provisions in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".

In other words, these principles are *compulsory guidelines* for the state in making laws and policies (the administration is *strictly* bound by them), but they are not legally enforceable by the citizens. Thus, they can be classified as 'non-enforceable *positive*

human rights', where the state is actually obliged to do something specific. In particular, Art. 38 underlines that the state should endeavor to transform India into a welfare state. The subsequent articles lay down further obligations towards the state, just to name a few, to ensure "adequate means of livelihood" (Article 39(a)), to promote a distributive economic system (Art. 39(b) and 39(c)), to eschew a concentration of wealth (Art. 39(c)), and the protection of the environment (Art. 48A).[5] In short, the "Directive Principles are designed to usher in a social and economic democracy in the country" (Jain 2003: 1595). They have redistributive quality and impose policy-obligations on the state to institute procedures towards the improvement of the situation of the poor over the course of time. The ultimate goal is to achieve a welfare state, where equal citizens can realize their full potential in a decent livelihood. Or as Jain (2003: 1595) says, "in a poor country like India, political democracy would be useless without economic democracy". Chatterjee (1995: 210) adds that "the elements of a concept of "welfare" had already superseded those of pure freedom and were available to the political leadership in India when it began the task of constructing a state ideology." And, as the Supreme Court ruled in 1980, *Part III* and *Part IV* can be seen together as "the core of social revolution [under the Indian Constitution]"[6]

This short excurse into the COI was intended to give an introduction of some of the most salient constitutional goals of the Indian state after independence. Let us now briefly analyze how the Indian state responded with its policies towards these goals.

[5] Jain (2003: 1607-1632) is an excellent reference to delve deeper into these provisions and understand their dynamics.

[6] I am extremely grateful to (Dam and Tewary 2005: 384), who lead me to this succinct sentence of the Supreme Court. They refer to *Minerva Mills Ltd v Union of India AIR 1980 SC 1789, para. 56*.

B.) Implementing the Constitution: How did the State perform?

In the preceding section, we have identified the India's constitutional goals. But as it is so often, the *de facto* situation is different from what it is supposed to be *de jure*. Let me ask a very simple question: is there sufficient evidence to assert that Indian governments since independence have pursued their policies in accordance with the constitutional goals? Or has the state "failed the constitution"?

Overall, India has done quite well after independence. Compared to its neighbors and many other post-colonial states, democracy has become deeply rooted in the Indian state and society.[7] Ethnic conflict has never seriously endangered the integrity of the Indian Union and have never really questioned the newborn Indian nation state *per se*.[8] But when it comes to the constitutional goals that are related to the socio-economic development of India and to providing a decent livelihood[9], the appraisal is rather modest, and it is far-fetched to claim that India has undergone a full-fledged and radical social transformation. This appraisal is closely related to the failure of the Indian state to foster land reforms and a real redistribution of assets and power, and to provide the necessary goods for a decent livelihood after independence.

The success of land reforms with the ultimate goal to achieve more equality in 'the heart of India', along with access to rudimentary public goods, is a determining

[7] The Emergency, Indira Gandhi's 'authoritarian experiment', along with her resulting defeat in the 1977 elections, is paradoxically another proof that democracy as a system of rule and 'a way of order' in India is uncontested; Indian voters rebuked any anti-democratic approach (see also Nandy (1980: 118); Kaviraj (1998: 79)).

[8] I am aware that this is a very audacious statement. However, thinking about almost 60 years of Indian independence, I do not see any evidence that 'the idea of India' has ever been in trouble. Partition, probably the most traumatic experience on the subcontinent, did not bring post-colonial India down. Several autonomy and independence movements, from the North East to Punjab and Kashmir, have never endangered the existence of India as a whole.

[9] When I talk about a 'decent livelihood', I am referring to a broad set of issues, comprising poverty alleviation, free primary education, adequate labor conditions, enjoyment of a clear environment, *inter alia*.

indicator for assessing whether or not India has carried out a successful social transformation.[10] Let me delve a little deeper in this subject matter and explain why I believe that the Indian state has failed when it comes to some of the constitutional goals.

India opted for a centralized state model after independence in order to implement the progressive constitutional goals. In order to make the constitution work on the country side and thus provide the citizens with a decent livelihood, there is a need for a comprehensive social transformation in implementing radical land reforms (along with breaking up prevailing semi-feudal social structures, the abolishment of *zamindars*), and a need for giving the citizens access to a broad set of public goods (education, clean drinking water, etc.). On these questions, however, every elected Indian government has blatantly failed, from the beginning till date.[11] The reasons during Nehru's time that prevented land reforms, *inter alia*, were related to the federal distribution of power (the Union States were responsible for land issues), judicial conservativism, and the emphasis on large-scale industrial development.[12] The Green Revolution, which was carried out under the auspices of Indira Gandhi, did not lead to a social revolution on the country side, but to "a newer segment of rich farmers" (Kaviraj 1998: 53; see also Corbridge and Harriss 2001: 81). And also under Indira Gandhi's authoritarian rule, a social transformation did not occur, although she justified the emergency, *inter alia*, on the grounds to carry out a social revolution (Corbridge and Harriss 2001: 87). Subsequent governments have not done significantly better in cracking down semi-feudal structures

[10] We should keep in mind that the vast majority of Indians lived and is living in rural areas. Fighting rural poverty and promoting rural development is one of the main targets of the international institutional system (the World Bank, the UN) for combating poverty.

[11] We should keep in mind that the effects of radical (social) reforms, no matter in what area, are often only felt with a significant time delay. In this context, the failure of the Nehru administration definitely can be seen as a crucial point that determined the further path of the social development of India.

[12] For opinions related to the failure to carry out land reforms, see for instance (Chatterjee 1995; Kaviraj 1998: 59-60; Corbridge and Harriss 2001: 63-64).

and initiating a 'real social revolution', as we know today. Neither the leaders of the Congress Party, who had ruled India for decades with absolute majorities and thus possessed a fair amount of effective political power, nor successive governments were successful in implementing land reforms for achieving a more egalitarian society.

The record does not look better when it comes to making certain public goods available and thus furnish the citizens with a decent livelihood. Environmental degradation, in both rural and urban areas, encumbers the citizens in their social development. Many people do not have access to clean drinking water and pollutant-free air and are thus living under hazardous conditions. Preference is often given to rapid economic development, on the cost of the people's habitat. But the Indian state itself has failed to act as a reformer and create a body of laws that is directed towards providing the citizens with a decent livelihood, or to implement the existing laws.

Today, we are even further from an area-wide social transformation of India and thus from seriously implementing the concordant constitutional goals. After the economic liberalization in 1991, the center is surrendering power in favor of private actors and is also devoluting power towards the union states (and local governments), who are increasingly determining the economic and social well-being of their respective territories (Rudolph and Rudolph 2001a). And, in the era of coalition governments at the center, with the concomitant loss of effective power, it remains doubtful whether a radical social revolution, which is directed towards more equality in India, can be implemented at all in the future.[13] There is the need for a new generation of politicians and other courageous

[13] Already after Indira Gandhi's death, there were signs for institutional decay (as a result of the concomitant decline of authority of the Congress Party), which makes it increasingly difficult to implement policies, that are directed towards India's socio-economic problems (Manor 1988). As it can be inferred from Manor's analysis, the decline of central authority and effective power will even be more accurate in

actors, who have effective power to initiate radical steps and are ready to shift paradigms in favor of achieving the set of constitutional goals (especially *Part IV* of the COI) that I have outlined above. But it remains doubtful whether groundbreaking and area-wide social reforms can ever be enforced in the future, realizing the perpetual decline of effective power at the center, the reallocation of political power to other entities and actors, and the prevalent dominance of the neo-liberalism in India's economy. Who else than a strong central government possesses effective power to crucially reform India into a more *equal* society, and who else could be an agent of a radical social transformation and make sure that the constitutional goals are implemented? For good reasons, I doubt that the private economy will take the role to redistribute wealth in the future. Indeed, it is idealistic to believe that the economic liberalism approach India has subscribed to (under pressure) will lead to a more equal society, as there are indications that the disparities between rural and urban areas and between different regions in India, *inter alia*, are rising (Dealton and Dreze 2002).[14] Who can compensate for the loss of political power of the legislative and executive branch at the center?

III. The Emergency, the Development of PIL, Activist Judges and Well-Spirited Citizens

In the preceding section, we have identified that the legislative and executive powers of the central state were rather unsuccessful in implementing some of the most

the era of coalition governments, since several forces will have to bargain among each other for identifying the lowest common denominator and thus for attaining an overall alliance at the center. This has a crucial influence on the central state's capability to effectively pursue policies that help India to transform socially.

[14] Although there are many indications that absolute poverty has declined, the same does not imply that society is becoming more equal. I will not delve into the Indian poverty debate at this point of time. The new edited book Deaton, A. and V. Kozel (2005). The Great Indian Poverty Debate. Delhi, Macmillan, is an excellent reference with multifaceted opinions on this topic.

important constitutional goals. And the prospects for the future in this question are rather modest. The center is gradually losing power, yielding to private actors and state governments, which miss the authority of a central institution to supervise the implementation of the constitutional goals as a whole. This rather daunting appraisal leads to the question whether there is any nostrum for effectively accomplishing the constitutional goals and work towards a modern, egalitarian society, along with a decent livelihood for the people.

Let us turn our attention to the Supreme Court of India, the 'watchdog' over the COI. The Supreme Court has developed the concept of PIL, a mechanism that can be used as a channel by the citizens to avenge any failure of the state to ensure the achievement of and the abidance with the constitutional goals. The following section gives a short survey on the history under what premises PIL was developed, and introduces PIL's salient features.

A.) The development of PIL

PIL was developed by activist judges in the aftermath of the Emergency,[15] as reaction to Indi(r)a's authoritarian experiment, or as Rudolph and Rudolph (1987: 112) call it, her "constitutional dictatorship". As it can be inferred from Feldman (1992: 44), it was the result of a certain constitutional ethic that these judges had developed in view of the prevailing power relations in the Indian society. In short, it is "a bold but controversial response [by the Supreme Court] to the perceived implications of social inequality and economic deprivation" (Peiris 1991: 66).

[15] For a clearer account on the evolution of PIL, see Mohapatra (2003: 20-22, 64).

Before the emergency, the courts did not really stand out as social reformers. Rather, they obviated any attempt of parliament to abolish *zamindars* and carry out land reforms, in insisting on the Right to Property in accordance with Art. 14, 19 and 31 of the COI (Rudolph and Rudolph 1987: 109).[16] Thus, the courts prevented an early social revolution in interpreting the *Fundamental Rights* as superior to the economic and social rights of *Part IV* of the COI, and determined India's future indirectly. Sathe (2002: 106) summarizes the role of the courts in the early independence very succinctly:

> "Although the Indian judiciary by and large was considered to be impartial and principled, its jurisprudence had been essentially of the property owners, princes, political leaders, and at the most the civil servants. […] For the common people the Court was an elitist institution that supported the political establishment."

All this changed during the Emergency. Former Prime Minister Indira Gandhi argued that *Part III* of the COI (in particular the right to property) and the respective judicature hindered her from carrying out the social revolution,[17] which prompted her to call for the State of Emergency and suspend the *Fundamental Rights* (Rubin 1987: 373). The Emergency also meant the temporary suspension of the courts' authority to review laws and administrative acts and thus to be a 'bastion of checks and balance of power'. Indeed, Indira Gandhi went on direct confrontation with the courts.

It is no surprise that the court's attitude and role in post-emergency India changed dramatically as consequence. This was the time the court came to the fore and reinterpreted the COI in order to adopt a position as a social reformer. With a couple of spectacular decisions, the legal mechanism of PIL was born.

[16] As mentioned in *supra* Section II.A, the Right to Property was previously enshrined as an explicit Fundamental Right in Article 31 of the COI, and omitted after the Emergency by the Janata Coalition.
[17] Indira Gandhi was under immense pressure to make the social revolution, that had thus far not occurred, reality, as she won the 1971 exactly for those grounds (Cassels 1989: 510).

B.) A liberal *locus standi*

As the name implies, PIL is a legal proceeding, which is initiated in the interest of the public. In both Anglo-Saxon and Continental Law, the right to appear as a plaintiff in front of the court requires that he can prove that he *himself* is affected by an act of the state or by the failure of the state to act. This principle is called "standing" *(locus standi)*. In other words, a person must prove that the legal principle of *locus standi* is fulfilled for their cases to be admitted to court.

Now, the main problem begins. Although the constitutional goals are very progressive in India, they are hardly accessible for the vast majority of the people, because they either do not know about their (constitutional and other) rights, or they do not have the resources for undergoing the tedious task to call upon the courts. While the courts were initially very reluctant to relax the principle of *locus standi*,[18] the judicature became very innovative in the aftermath of the Emergency. It all began in 1981 with the *Fertilizer Corporation Kamangar Union v. Union of India*[19] case, where Chief Justice Krishna Iyer of the Supreme Court clearly expressed that the *locus standi* needs to be liberalized.[20] But the real tacit revolution occurred in the famous and much-cited case

[18] In *G.C. College, Silchar v. Gauhati University AIR 1973 SC 761, 762*, the Supreme Court refused to admit a petition from the Governing Body of the College and a reader of the College, objecting to the Resolution of the "Academic Council of the Gaulati [sic!] University" that envisaged to "prescribe[s] Assamese as the medium of instruction in the College under the jurisdiction of the Gauhati University" (*para 2*). The applicants claim that the resolution interferes with the cultural and educational *Fundamental Rights* of Art. 29 (rights of minorities with regard to nondiscrimination at the admission to college) and Art. 30 (right of minorities to establish and administer educational institutions). The Supreme Court's "objection is that the petitioners have got no standing to file the writ petition" (*para 3*) and consequently denied admission to further legal proceedings. See also Craig and Deshpande (1989: 358).

[19] *AIR 1981 SC 344.*

[20] See also Craig and Deshpande (1989: 358), who refer to the same case in *supra fn. 19*, where Krishna Iyer ruled (for himself and P.N. Bhagwati in a minority opinion beginning on *351, para. 27*): "We have no doubt that in competition between Courts and streets as dispensers of justice, the rule of law must win the aggrieved person for the Law Court and wean him from the lawless street. In simple terms, *locus standi* must be liberalized to meet the challenges of the times." (*para 38*, italic in original).

S.P. Gupta v. Union of India[21], where the Supreme Court relaxed the issue of *locus standi* and allowed petitioners to claim their rights in accordance with the Right to Constitutional Remedies (Article 32). Judge P.N. Bhagwati, the second prominent "activist judge" when it comes the creation of PIL by the Indian Supreme Court, ruled:

> "It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, **any member of the public can maintain an application for an appropriate direction**, order or writ […]in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Art. 32"[22]

In the same ruling, P. N. Bhagwati continues that "procedural technicalities" should not thwart "public spirited citizens" to act "*pro bono publico*" on behalf of those who cannot seek the court's assistance if any of their *Fundamental Rights* is breached by the state through illegal action or forbearance. Also, the Supreme Court insists that new methods have to be innovated to provide "access to the large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning". For that reason, he points out that the court will entertain "letters for judicial redress and treat[ing] them as writ petitions", along with the recommendation and that the High Courts will follow this precedent.[23]

We have learned from the *Gupta Case* that the Supreme Court would allow novel mechanisms for ensuring that the constitutional rights of the people are not breached and thus the constitutional goals are achieved. The decision to accept informal letters, telegraphs from victims of state oppression or from *any* concerned member of the public,

[21] *AIR 1982 SC 149.*
[22] *AIR 1982 SC 149, 188, para. 17.* My emphasis.
[23] *AIR 1982 SC 149, 189, para. 17.*

be it journalists, social workers or NGOs, is also called "epistolary jurisdiction". In a later verdict, the Supreme Court enforced its opinion and pointed out that the traditional rules of the Anglo-Saxon Law on *locus standi* do not suit the social and cultural circumstances of India (Peiris 1991: 68).[24] But the truly most astounding innovation in this regard is the ability of the court to become active itself. The Courts do not have to be addressed directly by concerned citizens. A newspaper article or something that circulates in the public and reaches the court, indicating a severe breach of *Fundamental Rights*, is sufficient for the Court to engage in "*suo moto* action" (Centre for Development and Human Rights 2004: 246), in an "inquisitorial manner rather than relying on the petitioner to provide evidence to support the claim" (Feldman 1992 :53), and reading the article as a writ petition. The arduous task of supplying evidence is conducted by the court, which significantly increases the reach of constitutional rights to India's citizens. Centre for Development and Human Rights (2004: 245) summarizes aptly:

> "The appointment of commissioners by the court to collect data in support of a petition, where the petitioner lacks the professional expertise to collect such information, is the most valid example of the unorthodox process of PIL. In PIL, the courts combine the function of an ombudsman and a human rights court."[25]

This stands in line with the main conclusion of many authors that the establishment of PIL in India was entirely led by activist judges (Cassels 1989: 497; Antony and Indian Social Institute 1993: 11; Sathe 2002: 198; Mohapatra 2003: 143). They had identified that the existing means and remedies were not sufficient for the people to claim their constitutional goals and reinterpreted the COI accordingly.

I want to mention one very recent development, which is quite interesting in terms of the barriers that have to be trespassed in order to call upon the Supreme Court. Since

[24] The author refers to *Forward Construction Co. v. Prabhat Mandal (1986) 1 SCC 100, 104.*
[25] It is interesting that I found almost exactly the same citation while verifying some points of this paper in (Mohapatra 2003): 24.

October 2006, the Supreme Court allows petitioners to file petitions through the internet. The facility is called "efiling" and can be accessed through the webpage of the Supreme Court.[26] Of course, this does not really facilitate the access for the poor people directly, but those who want to take action on their behalf now have easier access for filing writ petitions. This is definitely a commendable step of the Supreme Court to further increase its reach and allow 'concerned and well-spirited citizens' to act in the public interest and for supporting the disadvantaged people.

This section gave an introduction of PIL, how it developed in aftermath of the Emergency, the functioning and the idea behind. It showed how the constitutionally secured *Fundamental Rights* are from now on enforceable by any member of the public, on behalf of those who do not have proper access to the courts. There are many more cases where PIL was used as an effective channel to address the court in order to achieve justice and the enforcement of *Fundamental Rights*, especially with regard to prisoners' rights, the prohibition of bonded labor, childrens' and women's rights. But probably more interesting is the increasing interference of the courts into the sphere of governance, in disregard of Montesquieu's "Division of Power" between the three organs of government. Rudolph and Rudolph (2001b: 134) and the Centre for Development and Human Rights (2004: 236) point out that after the Supreme Court had created and defined the rules for PIL, there was a shift of focus from the *Fundamental Rights* to the *Economic and Social Rights* from the mid-1980s onwards, and thus an increasing interference into the sphere of governance.

[26] The webpage of the Supreme Court is http://supremecourtofindia.nic.in/ [December 01, 2006], and the direct link is http://tempweb97.nic.in/sc-efiling/index.html [December 01, 2006]. On the main page the court says that "[f]acility to file cases in the Supreme Court through Internet is available w.e.f. 2nd October, 2006". I tried to register the same day for this facility I accessed the page last, but so far, it did not work for technical reasons.

C.) Transforming the *Directive Principles* into *Fundamental Rights*

As we have noted in *supra Section II.A.*, the *Directive Principles* are not directly enforceable in any Indian court, as Art. 37 *unambiguously* states. But as Dam and Tewary (2005: 384) point out, the Supreme Court had earlier created a 'virtual unity' between *Part III* and *Part IV* of the COI, thus rejecting *Fundamental Rights* to be superior to the *Directive Principles*.[27] In actual fact, this does not simultaneously supersede Art. 37. But it is astonishing to see how the Supreme Court teleologically 'overruled' this provision of the COI and thus underlined its role as a social reformer. In 1986, it read the *Directive Principles* into the *Fundamental Rights* Section and made them directly enforceable through a wide interpretation of the *Right to Life* (Art. 21), in conjunction with the *Right to Constitutional Remedies* (Art. 32). In the much cited and stunning case *Olga Tellis v. Bombay Municipal Corporation*[28], it rules that "the right to life which is guaranteed by Art. 21 includes the **right to livelihood**"[29]. The Supreme Court continues that Art. 39(a) and Art. 41 (both *Directive Principles*) oblige the State to secure the livelihood to its citizens and take the necessary steps to provide the citizens with employment in case of unemployment, respectively. Then the court maintains that

> "Article 37 provides that the Directive Principles, through not enforceable by any Court, are nevertheless fundamental in the governance of the country. The Principles contained in Arts. 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. […] But, **any person, who is deprived of his right to livelihood** except according to just and fair procedure established by law, **can challenge the deprivation as offending the right to life conferred by Art. 21**."[30]

[27] The authors refer to *Minerva Mills Ltd v Union of India AIR 1980 SC 1789, para. 56*, where it is said that "to give absolute primacy to one over the other [would be] to disturb the harmony of the Constitution". See also *supra fn. 6*, where the same case is cited in a similar context.
[28] *AIR 1986 SC 180.*
[29] *Supra fn 27, 193, para. 32.* My emphasis.
[30] *Supra fn 27, 194, para. 33.* My emphasis.

We can learn from this verdict that the *Right to Life* of Art. 21 includes a *Right to Livelihood*, which itself covers wide sections of Part IV of the COI, thus assigning the *Directive Principles* the status of legally enforceable *Fundamental Rights* under the aforementioned conditions. In other words, Art. 37 becomes void when the court sees it as pertinent that any of the rights of *Part IV* includes a *Right to Livelihood*. This opens the door for the Supreme Court to act as a political and social reformer in certain issues.

In the next section, I will have a look at the response by the Supreme Court towards environmental degradation. Again, the executive and the legislative have failed to provide the people with the requisite laws and protection in order to safeguard their livelihood. Rather, environmental rights in India were created by lawyers and activists from other available resources (Anderson 1996). This example elucidates the Supreme Courts' power to act as a political and social reformer and to use PIL to become involved in policy-matters. We will see that "[i]n the era of unstable, short-lived coalition governments in the 1990s", the Supreme Court "helped to repair and correct the Indian state" (Rudolph and Rudolph 2001b: 132). We will discover some stunning decisions that were led by activists who addressed the Supreme Court through the means of PIL. This activism resulted in a revolution of environmental law and was imperative in the protection of the livelihood for many people in India.

D.) Indirect Policy-making: the Case of the Environment

The condition of the environment in India is rather devastating. This has a severe impact on the livelihood and health of the people, as they often lack access to pollution-

free air, clean drinking water, *inter alia*. The quest development and "maximum growth" happens often on the cost of the environment, since environmental regulations do, in certain instances, interfere with economic and industrial development. Nevertheless, it cannot be denied that there is a need for a comprehensive body of legislation that protects the environment per se and thus the livelihood of the people and makes development more sustainable. Reality suggests that the legislative powers have been rather reluctant to pass sufficient appropriate laws, and that the executive was not serious in implementing existing laws. Thus, the state has been rather ineffective in protecting their citizens from a detrimental environment.

The *Directive Principle* of Art. 48A, which says that "The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country", was introduced into the COI in 1976 (Vashishth 1999: 13-14). Additionally, Art. 51A[31] says that "It shall be the duty of every citizen of India – […] (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures". The protection of the environment and, more broadly speaking, the provision to protect the citizens from an environmental degradation of their livelihood, is another constitutional goal, which has not been seriously implemented.

Again, the *Right to Constitutional Remedies* (Art. 32), in connection with the *Right to Life* (Art. 21), was instrumental to overrule the provision that the *Directive Principles* are not directly legally enforceable (Art. 37). In *Subhash Kumar v. State of Bihar*[32], another case that was invoked through a PIL, the court ruled that the "Right to live is a Fundamental Right under Art. 21 of the Constitution and it includes the right of

[31] Art. 51(A) is the only article belonging to *Part IV(A)* of the COI, comprising the *Fundamental Duties of every citizen*.
[32] *AIR 1991 SC 420.*

enjoyment of pollution free water and air for full enjoyment of life".[33] Interestingly, the Supreme Court had initially already framed environmental regulations towards the private sector in *M.C. Mehta*[34] *v. Union of India*[35]. In this case, the Supreme Court ruled that there need to be "minimal environmental standards" for industries, thus acting again in an area the center had failed and imposing environmental regulations towards the private sector and protecting citizens from the degradation of the environment. The administration was urged to follow the 'policies' of the Supreme Court, which the latter 'invented' from the constitutional provisions, and crack down polluters. We can see from these examples that environmental (case) law, regulations and rights were created from the Supreme Court, rather than from the legislative branch. And most importantly, these rights were derived from the *Fundamental Rights* of the COI, assigning them highest priority. The need to implement the constitutional goals caused the Supreme Court to intrude into policy-related matters.

In order to underline the magnitude this approach of the Supreme Court has attained, and to understand the eye-catching consequences the influence the Supreme Court has on policy matters and thus on the daily life of Indians, we should turn to one case that has received worldwide attention in the media. In 1998, the Supreme Court, in

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[33] *Supra fn 32, 424, para 7.*

[34] If one studies environmental litigation in India, one will find out that many cases in this regard were initiated by writ petitions from M.C. Mehta. M.C. Mehta is a lawyer and activist who uses the Supreme Court as a channel to address environmental irregularities. In an article by Waldman (1996) in the Wall Street Journal, he is cited as following: "The Indian political system has collapsed, […] [o]nly the Supreme Court is functioning any more." (The article is available online at http://law.gsu.edu/ccunningham/fall03/WallStreetJournal-India'sSupremeCourt.htm [December 01, 2006]. We can infer from this citation that he has lost his faith in the legislative and executive and rather believes in constitutional remedies relating to the Supreme Court, when it comes to crucial questions as the environment. As Dam and Tewary (2005: 389) point out, M.C. Mehta is very well known for his activism in addressing the Supreme Court for cleaning up the Ganga River. The authors illustrate (in citing Divan) how Parliament has failed in the mandate in directing the administration for cleaning the river, while the Supreme Court has been far more effective in cleaning the river.

[35] *1987 4 SCC 463.*

another *M.C. Metha* case, laid the foundations for banning Diesel on public transport and converting buses and taxis into vehicles using the much environment-friendlier compressed natural gas (CNG), with a grace period March 2001.[36] The court had again acted on the basis of a PIL (filed in 1985!) and used the same cycle from the constructed Right to a Live*lihood* (Art. 21) over the *Directive Principle* of a wholesome environment to justify its decision (in 1998!). Although there were several delays in implementing the order, resulting from factors as the supply of CNG, the ineffectiveness of the administration to take appropriate steps, *inter alia*, this order was finally fully implemented (in 2001!). This happened under the resonant pressure of the Supreme Court that showed its teeth towards the Municipality of Delhi in impending with penalties and other serious consequences, if the order was not put into practice at the earliest convenience. The pros and cons of this issue have been debated to extent in the Indian public. But it remains factual from every neutral observer to the concerned citizens that it has become much easier to breathe in Delhi ever since this judgment was implemented.[37]

The CNG case elucidates that again the judicial branch had to become active in order to protect the public good of unpolluted air (and a clean environment), and hence the Right to a Livelihood. The Government of Delhi had blatantly failed to pass the appropriate policies for mitigating pollution and environmental degradation from vehicular traffic. This case shows that certain sectors were more effectively reformed by the judiciary rather than by the legislative and executive, who are actually the prime

[36] Unfortunately, I could not retrieve the original judgment, but had to rely on secondary literature (Dam and Tewary 2005: 390-91; Rosencranz and Jackson n.d.). The citation for the original case is *M.C. Mehta v Union of India (1998) 6 SCC 63 – Writ Petition No. 13029/1985*. The text of the writ petition is published on the webpage of Clean Air Initiative at http://www.cleanairnet.org/caiasia/1412/articles-69423_delhi_case.pdf [December 01, 2006].

[37] It would exceed the scope of the paper to discuss from a technical basis whether or not this judgment has effectually led to a drop in air pollution. The legal relevance of this judgment stands in the foreground.

agencies for implementing the constitutional goals. But the latter two had failed to pass the appropriate laws for the (creation and) reform of environmental regulations, or they just did not implement existing laws properly. Thus, the Supreme Court, in employing the new and innovative connection of PIL together with Art. 21, Art. 32 and *Part IV* of the COI, had to remind the other branches of their duties and had to become proactive in order to generate environmental standards and press for their implementation.

Effective judiciary power can be a milestone for protecting the citizens and reforming the society, as the environmental-related cases suggest. Rosencranz and Jackson (n.d.: 2)[38] summarize that "the history of environmental regulation in India has established the Court as a responsible and often effective instrument of environmental improvement." The example how the Supreme Court interpreted the constitutional provisions to enforce a right to a clean environment shows that citizens can effectively address the courts through PIL for putting pressure on the administration to enact policies that are in accordance with the constitutional goals.

IV. Conclusion and Outlook

This paper has shown how PIL emerged in the wake of the experiences with the Emergency. PIL has been developed by activist judges of the Supreme Court of India to address the failure of the state, when it comes to the constitutional goals. It has been gradually extended towards not only safeguarding the *Fundamental Rights*, but also towards implementing the *Directive Principles* and thus to interfere with the policy-making of the state, as the example of the environment has shown. Let me wrap up some

[38] This essay does not have any imprinted page numbers, but the citation appears on *page 2* of the text.

of the main implications PIL had for the citizens in the past, and let me embark upon the opportunities of PIL to be an effective means of social and political change in the future.

I want to borrow one idea from Dembowski (2001: 3)[39], in order to underline the revolutionary force PIL contains. He underscores that the courtrooms have become a public sphere, where the "civil society and state interact in a rational, critical and rule-bound rather than merely in a hierarchical discourse". We can infer from this statement that the judiciary offers the public a forum, in which India's people are equal players with the state, when it comes to the constitutional goals and, in a wider sense, to politics. In the court room, they can directly call the state to account. Contrary, parliamentary representation remains sequestered from the people at the grassroots, and the people can only – to a very limited extent – exert influence on the decision-making at the center. Following up these thoughts, PIL is an effective initiative for the citizens of India for not only demanding their *Fundamental Rights* not to be breached, but also for influencing societal change, without relying on the slow and fragile political process. And thanks to the Supreme Court, who liberalized the *locus standi* and allowed public spirited citizens and activist judges to be the advocates of India's poor masses and thus established an alternative channel to connect the grassroots to India's political system, there is hope that a real social transformation can occur much faster than through solely relying on 'pure politics' from India's elected representatives. It remains fascinating to see how PIL was developed to be applicable beyond the *Fundamental Rights* Section of the COI, with an entire body of environmental legislation being created through citizens' and judicial

[39] This book was initially published by Oxford Publishers in Delhi, but had to be withdrawn from sale, due to pending legal inquiry against the author. Human Rights activists interpret this step as a move towards censorship and an encroachment of academic freedom. The German NGO *Asienhaus* has published an ebook on their website under http://www.asienhaus.de/public/archiv/taking_the_state_to_court.pdf [December 14th, 2006].

action –despite Art. 37. In turn, it remains sad to concede that the politicians have failed on creating a better society in protecting environment-related and other public goods.

Especially during the 'redefinition of India', in the era of coalition governments, decentralization, liberalization and the corresponding reshuffling of power, there is the need for an effective institution that ensures that the political transformation proceeds and that every change in the Indian landscape happens within the constitutional goals' latitude. As I have tried to show in the preceding sections, the judiciary in India does encompass the power to effectuate political change in favor of India's citizens, while strictly adhering to the constitutional goals. We could argue that a strong judiciary, which actively involves in politics and is an advocate of India's people, is a desirable condition.

However, *solely* relying on the judiciary to be a social and political reformer bears many problems. First of all, it depends how the individual judges define their constitutional ethic. Judges Krishna Iyer and P.N. Bhagwati were personalities, who had identified the 'social evils' of the Indian society and thus reinterpreted the COI in favor of the people, and maybe even overstepped their competencies. In this context, it can be desirable to have judges, who are biased towards interpreting the COI in the favor of the people, and who interfere with the legislative and executive powers of government, because the COI and politics should in the end serve the people. But what happens if a strong judiciary consists of mainly conservative judges, who interpret the COI rather against the people? And exactly this reverse trend is slowly discernible, as Shukla (2006: 3757) concludes in the context of the recent decision of the Supreme Court that slum dwellers do not have a right to a notice before eviction and demolition of their homes.[40] He contemplates that "from the beginnings of PIL as pro-poor and trying to effectuate

[40] The author refers to *Almira H Patel v. Union of India, AIR 2000 SC 1256.*

rights for the exploited, it is increasingly taking a diametrically opposite direction." [41] This shows that a sole reliance on the courts as social and political reformers in India can be a precarious affair. Moreover, the capacity and manpower of the courts to act as a comprehensive reformer is limited. Cassels (1989: 508) says that

> "[s]ome High Courts are reported to receive 50 to 60 public interest letters per day. In the fifteen months from January 1987 to 31 March 1988, the Supreme Court received 23,772 letters."

These numbers indicate that the courts are overwrought and can neither work efficiently towards swift decisions in all individual cases nor reform all sectors.

There is another problem with the effectiveness of PIL I have identified. Court rulings can be very innovative and positive for India's people. But what happens if the administration does not respond to them properly? Who forces the bureaucracy to abide to the court rulings in a prompt manner and to take the necessary proceedings? Again, we see that the power of the courts to cause political and social change can be limited. The CNG Case in Delhi, a highly politically charged case, was an exception. Here, the Supreme Court showed its teeth with menace and put pressure on the administration to implement the order in accordance with the verdict. But in the reverse side, we should note that the writ petition was filed in 1985, the verdict made in 1998, and the order only implemented in 2001. This casts doubt about the efficiency and effectiveness of the judiciary in general, and on the bandwidth the verdicts have in general.

Real 'across-the-board' political and social change can only have its nature in the initiatives of the legislative and executive branches of the government.[42] And if the

[41] See also the letter of Aggrawal (2006: 4220), who takes reference to Shukla's article and underscores how PIL "has failed to provide justice to those who need it most".

[42] This is not to say that citizens' action through civil society networks is not effective. However, the analysis here is confined to the institution of government.

legislative and executive fails, as it has been shown, in the implementation of the constitutional goals, there is the need for a force that puts them back into their place and reminds them of their constitutional duties. Thus, all three branches of government should actively cooperate in implementing the constitutional goals and should not compete about being the social reformer of India. Nevertheless, is not bad to have a strong judiciary as a 'governmental branch of surveillance' in this regard, although this can also be dangerous if the courts do not take a progressive stand towards reforming the society in favor of the people. And relying only on the courts would synchronically mean that 'pure politics', and maybe even democracy, have failed. But this does not undermine the positive role PIL and the courts can have in the future of India. The courts have proven that they can make a positive contribution to the social well-being of India and "have carved for itself a niche in the heart of the people", because "the people have reposed greater faith in judges than in the politicians" (Sathe 2002: 247). A country like India needs activist people who develop original remedies in order to achieve the constitutional goals. And if the activism actually derives from within the government, namely the judicative branch, we should be happy that judges vigorously remind the politicians of their duties and contribute their share to the future well-being of India. We can only hope that the positive trend of the 1980s and 1990s will be – against the aforementioned most recent tendency – carried on by the Supreme Court, so that the "Supreme Court *of* India [becomes] a Supreme Court *for* Indians" (Baxi 1994: 143)[43], and pays its contribution to the overall well-being of India's poor masses.

[43] Emphasis in original.

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