



## Public Interest Litigation in India and South Africa: A comparative analysis

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### ABSTRACT

Public Interest Litigation (PIL) has emerged as an important legal mechanism for promoting social justice and ensuring the protection of constitutional rights, particularly for marginalized communities. This paper undertakes a comparative analysis of the development and functioning of PIL in India and South Africa. It examines the historical emergence of PIL, the evolution of locus standi, the nature of issues addressed, the procedures for initiating PIL, and the remedies granted by courts. The study highlights that while the Indian model evolved mainly through judicial activism and procedural flexibility, the South African model is constitutionally entrenched and operates within a more structured framework. The comparison demonstrates how different institutional approaches can shape the role of courts in advancing access to justice and governmental accountability..

## 1. INTRODUCTION

Judicial activism has gained its prominence in many legal systems in present times. It implies deciding a case beyond the literal meaning so as to promote a judge's political preference. Public Interest Litigation is regarded as one of the more relaxed and justice-oriented approaches adopted by an activist judiciary. It essentially addresses the grievances concerning public interest, primarily in light of the rights of a particular community in society through the liberalization of locus standi, the extent of which varies from one legal system to another.

The United States is considered as the pioneer of Public Interest Litigation which thereafter was transmitted to different nations. Despite a decline in the PIL litigation in the US, India since the late 1970s, spearheaded in the PIL journey. There has also been a concomitant development of PIL in other Asian and African nations. Democratization is regarded as one important factor contributing to this growth. Since 1994, South African Courts played an important role in safeguarding the political/constitutional rights of individuals established after the transition to democracy. However, while democratic institutions have become firmly established, meaningful social and economic transformation has progressed more slowly. Even after attaining democracy many communities continue to experience significant inequality and limited access to basic amenities and resources, leads to dissatisfaction with the state's ability to address these challenges. In this context, PIL has emerged as an effective tool for addressing and redressing the challenges faced by marginalized groups by challenging the government policies and advocating for their constitutional rights. However, what is to be borne in mind is that the trajectory and ambit of the development of PIL in different nations would be at a different pace since no universal standard or model prevails thereby adding value to the current attempt of comparative analysis.

In the instance of the dearth of scholarship on comparative PIL in Asia and South Africa, the authors aim at contrasting the divergences and convergences seen in the PIL practices of India and South Africa. India is chosen for it is democracy and for being infamous in its laudable experiment with the development of PIL in Asia. While the South African model is constitutionally entrenched. Section 38 of the South African Constitution<sup>1</sup> explicitly recognizes public interest standing, thereby institutionalizing access to courts for civil society organizations and affected communities.

The comparative analysis will primarily be in light of the emergence and development of PIL in both nations. This would constitute an important consideration in determining the legitimacy of the origin as well as the continued use of such a power. Thereafter, ideas centering on the varied approaches to rights, the extent of constitutional or statutory protection, and enforcement of rights in both nations will be examined. This will be followed by elucidating and contrasting certain procedural underpinnings of the PIL models in both nations, on lines of the nature of matters adopted, the extent of relaxation of locus standi, different initiating procedures in PIL matters, and stand of the judiciary. Through this, the authors aim at concluding the ideal way forward *viz.* which model could possibly act as an effective vehicle to address right disparities in other developing nations.

## PIL in India and South Africa: Setting the Scene

### II.1 India

PIL can be defined as litigation in which the public or the community at large has some pecuniary or legal right or interest.<sup>2</sup> Public interest action is concerned with the grievance of public with government policy or action whereas private interest litigation, which has dominated legal landscape, is concerned with individual's rights and obligations. PIL was developed in the 1960s in the socio-political environment of the civil rights movement in the United States, and it was used by civil organisations to help the disadvantaged segment of society.<sup>3</sup> Emergence of PIL can be linked to the modern era where individual rights are no longer prioritized instead priority is given to protection of the interests of groups. This emergence in USA inspired Indian lawyers to pursue "public interest" cases especially against failure of government, administrative bodies and institutions that fail to redress the grievances of marginalized segment of society.<sup>4</sup> In India during the mid-1970s, the legal system was damaged in numerous ways by the declaration of 1975 Emergency. In the subsequent judgment of *ADM Jabalpur v. Shiv Kant Shukla*,<sup>5</sup> the Court followed a very positivist approach and these were regarded as the darkest hour of the Indian judiciary. Further, in light of the supersession of judges, to reclaim its legitimacy, the Court adopted an activist approach and this led to the development of PIL in India.<sup>6</sup>

The founding fathers included different provisions in the constitution to establish an independent judiciary to ensure that fundamental rights did not become empty promises. Regarded as an arm of social revolution, the Court took on itself to serve justice to the marginalized.<sup>7</sup> The Part III and Part IV were regarded as two wheels of the chariot of social revolution.<sup>8</sup>

Part III (Article 13-32) of the constitution lays down various civil and political fundamental rights along with their limitations. Indian judiciary has always interpreted these rights in an expansive manner, which has increased the kinds of violations that PILs can seek to remedy. For the realization of rights framers added Article 32 and 226,<sup>9</sup> the power to approach Supreme Court and High Court directly for effective remedy, respectively. However, neither the holder of the fundamental rights waives them<sup>10</sup> nor they can be curtailed through amendments, if that amendment is against the basic

<sup>1</sup> The constitution of Republic of South Africa, 1996, Section 38: Enforcement of rights "38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members."

<sup>2</sup> Christine M. Forster & Vedna Jivan *Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience*, 3(1) *ASIAN JOURNAL OF COMPARATIVE LAW* 6 (2008).

<sup>3</sup> For example, *Brown v Board of Education of Topeka* (1954) 347 US 483, which is credited with birthing the PIL movement in USA. The landmark case successfully challenged and overturned precedents, which had hitherto supported the segregationist policies in education.

<sup>4</sup> Forster and Jivan, *supra* note 8, at 3.

<sup>5</sup> (1976) AIR 1207 (SC)

<sup>6</sup> SP SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS* (Oxford, 2003).

<sup>7</sup> GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* (Oxford, 1966).

<sup>8</sup> *Samatha v. State of Andhra Pradesh*, (1997) 8 SCC 225

<sup>9</sup> INDIAN CONST., art 32.

<sup>10</sup> *Bheshwar Nath v. C.I.T.*, AIR 1959 SC 149.

structure of the constitution.

Similarly, Article 142 empowers the Courts to issue decrees and orders for the purposes of “doing complete justice in any cause or matter pending before it.” And these orders or decrees are enforceable throughout India through Article 141, which mentions, “Law declared by the Supreme Court shall be binding on all Courts within the territory of India” and Article 144 that requires all the authorities to “act in aid of the Supreme Court.” Along with these provisions, Part IV of the constitution lays down directive principles though not justiciable but they 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.*”<sup>11</sup> According to Justice Bhagwati, substance of Articles 38 and 39 i.e. “reduction of inequalities in status and poverty” and “the distribution of society’s resources to serve the common good” is the core of PIL, which has enabled the judiciary to expand its capacity in PIL matters.<sup>12</sup> However, it should be noted that directives have played a crucial role in development of environmental PIL matters.

### Phases of PIL in India

Development of PIL in India can be broadly divided into three broad phases on the basis following four variables:

Who initiated PIL cases,

What was the subject matter or focus of PIL,

Against whom the relief was sought, and

How the judiciary responded to PIL cases.<sup>13</sup>

Usually public-spirited persons filed PIL cases in the initial phase (late 1970s-early 1980s), and the subject matter of these cases was linked to the rights of underprivileged segments of society such as child bonded laborers, inmates, and women, among others. In these cases, remedy was sought against government actions that violated fundamental rights and the judiciary answered by recognising and realizing the rights of the aggrieved, by directing the government to correct the purported claims. During this period, PIL development became an instrument to achieve the social revolution hoped by framers of the Indian Constitution.

In 1990s, another phase of PIL evolution began in India, that saw the filing of PIL cases becoming more institutionalized as specialized non-governmental organisations or lawyers began to regularly present subjects of public interest to the Court. The scope of the issues was extensive, including the right to education, sexual harassment at workplace, environmental preservation, good governance, and government accountability. It's worth noting that the petitioner sought relief not just against the state but also against private actors during this stage. The judiciary's response was courageous and unconventional in this phase because, rather than simply interpreting fundamental rights, Courts began to legislate by issuing guidelines<sup>14</sup>. For example, they took the implementation of these guidelines seriously by overseeing government investigative agencies and punished public servants who disobeyed the direction with contempt. There was a lot of misuse of PIL as the boundaries of PIL widened, to the point where the Court had to inflict fines on petitioners for exploiting PIL for private purposes.<sup>15</sup>

In third phase i.e. 21<sup>st</sup> century, the current phase, any person can initiate case, any issue can be the subject matter, PIL can be filed almost against anyone for instance, challenging constitutional validity of Indo-US civil nuclear agreement<sup>16</sup>, one can see that judicial response to these cases were to restraint in issuing directions to the government and limiting PIL cases in the Courtroom. Although, the expansive scope of PIL cannot be rolled back but it is possible for the Court to take more measured and selective interventions in future.

## II. South Africa

The development of public interest litigation in South Africa has been closely linked to the country’s constitutional transformation following the end of apartheid. While India’s PIL emerged largely through judicial innovation and activism, the South African model is firmly grounded in constitutional provisions adopted after the transition to democracy. The Constitution of the Republic of South Africa, 1996 established a comprehensive Bill of Rights and explicitly expanded access to courts by allowing individuals, groups, and organisations to approach courts in the public interest. This constitutional framework reflects a deliberate commitment to promoting accountability, protecting fundamental rights, and

<sup>11</sup> INDIAN CONST., art 37.

<sup>12</sup> PN Bhagwati, *Judicial Activism and Public Interest Litigation* 23 *COLUM J TRANSNAT’L L* 561, 570 (1985).

<sup>13</sup> SURYA DEV, *Public Interest Litigation in India, A quest to achieve the impossible?* in PUBLIC INTEREST LITIGATION IN ASIA (Routledge, 2010).

<sup>14</sup> See *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011; *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610

<sup>15</sup> See *Janta Dal v. H S Chowdhary*, (1992) 4 SCC 305, *S.P.Anand v H.D. Deve Gowda* (1996) 1 SCC 734

<sup>16</sup> Pranab Dhari Samanta and Tanu Sharma Another “Scientist” Googly: SC to Hear PIL on N-deal before Talks, Indian Express, May 16, 2007, <http://www.indianexpress.com/news/another-scientist-googly-sc-to-hear-pil-o/31060/>.

facilitating social transformation through the legal system.

At the same time, public interest litigation in South Africa operates within a framework that emphasises constitutional governance and institutional balance. Courts have generally adopted a cautious approach when reviewing government policies, particularly in matters involving resource allocation and socio-economic rights. As a result, the trajectory of public interest litigation in South Africa differs from that of India: while the Indian experience is often characterised by expansive judicial activism, the South African approach tends to focus on ensuring that government policies are reasonable, lawful, and consistent with constitutional obligations.<sup>17</sup>

#### The Role of Judiciary and Government Structure

Despite the strong constitutional foundation, the development of public interest litigation in South Africa has been shaped by the country's broader socio-economic challenges. The legacy of apartheid has resulted in persistent inequalities and significant disparities in access to housing, healthcare, and other essential services. Consequently, public interest litigation has often been used by civil society organisations and advocacy groups to challenge government policies and to seek judicial enforcement of socio-economic rights guaranteed under the Constitution. The judiciary, particularly the Constitutional Court, has therefore played a crucial role in interpreting these rights and in defining the scope of the state's obligations.<sup>18</sup>

PIL in South Africa operates within a constitutional framework that emphasises the separation of powers and the protection of fundamental rights similar to Indian context. The **Constitution of the Republic of South Africa, 1996** establishes a constitutional democracy in which legislative authority is exercised by Parliament, executive authority by the national government, and judicial authority by independent courts. Within this institutional structure, the judiciary performs an essential role in ensuring that legislative and executive actions remain consistent with constitutional principles and the rights contained in the Bill of Rights. Courts therefore function not only as institutions for dispute resolution but also as guardians of constitutional legality and accountability.<sup>19</sup>

An important feature of the South African constitutional system is the power of courts to review legislation and executive conduct for compliance with constitutional norms. The **Constitutional Court**, which is the highest authority on constitutional matters, may declare legislation or government action invalid where it conflicts with the Constitution.<sup>20</sup> This authority has allowed courts to play a central role in enforcing constitutional rights through public interest litigation. For example, in *Government of the Republic of South Africa v. Grootboom*, the Constitutional Court considered the government's obligations under the constitutional right of access to adequate housing and held that the state must adopt reasonable measures to progressively realise that right.<sup>21</sup> Similarly, in *Minister of Health v. Treatment Action Campaign (No. 2)*, the Court ordered the government to remove restrictions on the distribution of the antiretroviral drug Nevirapine and to expand access to treatment aimed at preventing mother-to-child transmission of HIV.<sup>22</sup> These decisions illustrate the judiciary's role in evaluating state policies where constitutional rights are implicated.

Access to courts for such claims is facilitated by the Constitution's expansive rules on standing. **Section 38 of the Constitution** allows individuals acting in their own interest, persons acting on behalf of others, members of a group or class, and organisations acting in the public interest to approach a competent court when rights protected by the Bill of Rights are infringed or threatened.<sup>5</sup> This provision significantly lowers procedural barriers and enables civil society organisations and advocacy groups to initiate litigation aimed at protecting broader public interests. The Constitutional Court emphasised the importance of generous standing rules in *Ferreira v. Levin NO*<sup>23</sup>, noting that constitutional litigation should promote access to justice and the enforcement of rights.

Courts have also recognised that public interest litigants should not be discouraged from bringing constitutional claims due to the risk of adverse costs orders. In *Biowatch Trust v. Registrar, Genetic Resources*,<sup>24</sup> the Constitutional Court held that litigants acting in good faith to enforce constitutional rights should ordinarily not be ordered to pay costs if their claims are unsuccessful. This approach reflects the broader objective of encouraging civil society participation in constitutional litigation.

Taken together, these institutional features demonstrate how the interaction between the judiciary and the broader governmental structure supports the development of public interest litigation in South Africa. While courts remain mindful of the constitutional principle of separation of powers and the policymaking authority of the legislature and executive, they

<sup>17</sup> Joe W. (Chip) Pitts III, Public Interest Law in South Africa, 22 Stan. J. Int'l L. 153 (Spring 1986).

<sup>18</sup> *Ibid*

<sup>19</sup> The constitution of Republic of South Africa, 1996

<sup>20</sup> The constitution of Republic of South Africa, 1996, **Section 172**.

<sup>21</sup> Govt of the Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC).

<sup>22</sup> Minister of Health v. Treatment Action Campaign (No. 2), 2002 (5) SA 721 (CC).

<sup>23</sup> 1996 (1) SA 984 (CC).

<sup>24</sup> 2009 (6) SA 232 (CC).

also ensure that governmental policies remain consistent with constitutional rights and obligations. PIL therefore functions as an important mechanism through which civil society organisations and affected communities can seek judicial enforcement of constitutional guarantees.

While PIL in India largely developed through judicial innovation and the gradual relaxation of procedural rules by the Supreme Court, the South African framework reflects a more explicit constitutional design. The post-apartheid Constitution deliberately broadened access to courts and empowered the judiciary to review legislative and executive action in order to safeguard the rights contained in the Bill of Rights. Consequently, although both jurisdictions utilise public interest litigation to advance social justice and governmental accountability, their institutional foundations differ significantly, the Indian model emerged primarily through judicial activism, whereas the South African model is firmly embedded within the constitutional structure established after the democratic transition.<sup>25</sup>

### **PIL IN SOUTH AFRICA: EMERGENCE AND THE FRAMEWORK**

The development of public interest litigation in South Africa must be understood in light of the country's broader political and constitutional transformation. During the apartheid era, access to justice for large sections of the population was severely restricted due to discriminatory legislation, the doctrine of parliamentary sovereignty, and limited judicial review. The legal system formally recognised elements of the Roman-Dutch common law tradition, yet the dominance of racially discriminatory statutes meant that courts had little ability to challenge legislation or provide effective remedies for those adversely affected by apartheid policies.<sup>26</sup>

Within this restrictive legal environment, early forms of public interest law began to emerge through the efforts of legal organisations committed to expanding access to justice. The establishment of institutions such as the Centre for Applied Legal Studies (CALs) at the University of the Witwatersrand in 1978 and the Legal Resources Centre (LRC) in 1979 marked an important moment in the institutionalisation of public interest law in South Africa. These organisations sought to use strategic litigation as a means of assisting disadvantaged communities who lacked the resources or knowledge necessary to pursue legal remedies. Their work was based on the premise that legal representation and access to courts could be expanded to groups historically excluded from the legal system.<sup>27</sup>

Despite these initiatives, the apartheid legal order significantly limited the effectiveness of public interest litigation. Parliamentary sovereignty prevented courts from invalidating legislation, and the judiciary's role was largely confined to interpreting statutes rather than evaluating their constitutionality. As a result, legal advocacy often relied on creative statutory interpretation or procedural arguments rather than direct constitutional challenges to discriminatory laws.<sup>28</sup> These structural limitations contributed to widespread scepticism among many South Africans regarding the ability of courts to deliver meaningful social change.

The democratic transition of the early 1990s fundamentally altered this legal landscape. The adoption of the Constitution of the Republic of South Africa, 1996 replaced parliamentary sovereignty with a system of constitutional supremacy and entrenched a comprehensive Bill of Rights. This transformation significantly expanded the scope of judicial review and enabled courts to evaluate legislation and executive conduct against constitutional standards. The Constitution also introduced an expansive framework for access to justice, particularly through section 38, which allows individuals, groups, and organisations to approach courts to enforce rights contained in the Bill of Rights. This provision broadened the traditional rules of standing by permitting litigation in the public interest and by allowing representative actions on behalf of affected communities.<sup>29</sup>

The new constitutional framework created fertile ground for the development of modern public interest litigation in South Africa. Civil society organisations, legal clinics, and non-governmental organisations increasingly began using litigation as a strategic tool to enforce constitutional rights and challenge government policies. In many instances, these cases have addressed issues affecting vulnerable communities, including housing, healthcare, refugee protection, and access to basic services. Public interest litigation has therefore become an important mechanism for holding government institutions accountable and for ensuring that constitutional rights are realised in practice.<sup>30</sup>

At the same time, scholars note that public interest litigation in South Africa continues to face practical and institutional challenges. Many individuals lack the resources necessary to pursue legal action, and the number of organisations capable of conducting strategic litigation remains limited. Funding constraints, limited legal expertise, and broader political

<sup>25</sup> Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* 33–35 (Juta 2010); Pierre de Vos & Warren Freedman eds., *South African Constitutional Law in Context* (Oxford Univ. Press 2014).

<sup>26</sup> Joe W. (Chip) Pitts III, Public Interest Law in South Africa, 22 *Stan. J. Int'l L.* 153, 158–61 (1986).

<sup>27</sup> *Id.* at 153–56

<sup>28</sup> *Id.* at 158–63.

<sup>29</sup> S. Afr. Const., 1996 Section 38.; David Cote & Jacob Van Garderen, Challenges to Public Interest Litigation in South Africa: External and Internal Challenges to Determining the Public Interest, 27 *S. Afr. J. on Hum. Rts.* 167, 170–71 (2011).

<sup>30</sup> David Cote & Jacob Van Garderen, *supra* note 35, at 167–69.



considerations can also affect the willingness of lawyers and organisations to pursue complex public interest cases.<sup>31</sup> Nevertheless, despite these obstacles, the post-apartheid constitutional order has significantly strengthened the institutional framework within which public interest litigation operates.

In this context, public interest litigation functions not only as a legal strategy but also as part of a broader process of democratic participation and social mobilisation. Litigation often complements advocacy, policy engagement, and grassroots activism, enabling civil society actors to challenge state action and promote the enforcement of constitutional rights. Consequently, the South African experience demonstrates how constitutional design, judicial independence, and civil society engagement collectively shape the development of public interest litigation.

### Contrasting the Procedural Underpinnings in India and South Africa

#### I. Locus Standi:

South Africa:

In contrast to the Indian model, where the liberalisation of standing was largely driven by judicial innovation, the South African framework derives its legitimacy directly from constitutional design. The Constitution of the Republic of South Africa, 1996 expressly broadens the rules of standing through section 38, which permits a wide range of actors to approach the courts when a right contained in the Bill of Rights has been infringed or threatened. The provision allows litigation by individuals acting in their own interest, persons acting on behalf of others who cannot act in their own name, members of a group or class, associations acting in the interest of their members, and persons acting in the public interest.<sup>32</sup>

The Constitutional Court has emphasised that these standing provisions must be interpreted generously in order to facilitate access to justice and promote the enforcement of constitutional rights. In *Ferreira v. Levin NO*, the Court recognised that the Constitution deliberately expands traditional standing rules to ensure that constitutional rights may be effectively vindicated.<sup>33</sup> As a result, public interest organisations, civil society groups, and community representatives frequently initiate litigation on behalf of affected populations. This constitutional framework has therefore institutionalised public interest standing as a central feature of South African constitutional litigation.

India:

By the 1980s, the Indian government had relaxed the rules and procedures governing PIL & provide ordinary people with the opportunity to engage with the legal system for the enforcement of rights<sup>34</sup>. The rule of Locus Standi in started to relax in 1978 in the case of *Sunil Batra v. Delhi Administration*<sup>35</sup> wherein the petitioner, a convict of death sentence wrote a letter to one of the Supreme Court judges that another prisoner is subjected to torture by the jail warden which was treated as the writ of Habeas Corpus by the Supreme Court judges & the action was taken subsequently.

Later in the case of *S.P Gupta v. Union of India*,<sup>36</sup> the court identified & defined the liberalized standing in PIL cases. Justice P.N Bhagwati stated that any member who has sufficient interest can maintain an action for judicial redress as long as the person is acting in a bonafide manner for the cause of justice, the person can seek appropriate order or writ. Justice Bhagwati further held that Article 32 & Article 226 of the Constitution of India are open to “anyone”. Hence the test propounded by Justice Bhagwati in the S.P Gupta case was any person with “sufficient interest” can approach the court for filing of PIL. The extraordinary relaxation of formal rules for filing PIL is relaxed to the extent that letters, postcards, telegrams, or even newspaper articles can be accepted as writ petitions<sup>37</sup>.

Thus, it can be inferred that PIL in India has the greater potential for the direct recognition of rights because of the relaxed procedures as to who can file PIL. Whereas South Africa adopts an expansive approach to standing, it is grounded in constitutional provisions rather than purely judicial innovation. Section 38 of the Constitution of the Republic of South Africa, 1996 expressly allows individuals acting in their own interest, persons acting on behalf of others, members of a group or class, and organisations acting in the public interest to approach the courts for the enforcement of rights contained in the Bill of Rights. While this provision broadens access to courts, PIL proceedings in South Africa generally follow more structured procedural requirements than the highly flexible and informal mechanisms developed by the Indian judiciary.

<sup>31</sup> Id. at 167–72.

<sup>32</sup> S. Afr. Const., 1996 Section 38.

<sup>33</sup> *Ferreira v. Levin NO*, 1996 (1) SA 984 (CC).

<sup>34</sup> Christine M. Forster & Vedna Jivan *Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience*, 3(1) ASIAN JOURNAL OF COMPARATIVE LAW 6 (2008).

<sup>35</sup> (1978) AIR SC 1675

<sup>36</sup> (1982) AIR SC 149

<sup>37</sup> B WADHERA, PUBLIC INTEREST LITIGATION. A HANDBOOK 61 (Delhi: Universal Law Publishing, 2003).



## II. Subject Matter of Cases

### South Africa:

The scope of public interest litigation in South Africa is closely linked to the substantive rights recognised in the Constitution, particularly the inclusion of enforceable socio-economic rights. Unlike many constitutional systems, the South African Constitution explicitly protects rights relating to housing, healthcare, food, water, and social security. These rights have provided a strong normative foundation for litigation aimed at addressing structural inequalities inherited from the apartheid era.<sup>38</sup>

The Constitutional Court has played an important role in interpreting these provisions and clarifying the obligations of the state. In *Government of the Republic of South Africa v. Grootboom*, the Court held that the state is required to adopt reasonable legislative and policy measures to progressively realise the right of access to adequate housing.<sup>39</sup> Similarly, in *Minister of Health v. Treatment Action Campaign (No. 2)*, the Court required the government to expand access to antiretroviral medication used to prevent mother-to-child transmission of HIV.<sup>40</sup> These decisions demonstrate how public interest litigation in South Africa often focuses on the enforcement of socio-economic rights and the evaluation of government policies affecting vulnerable communities.

### India:

In India, the scope of subject of Public Interest Litigations have been seen to expand over the years. Although the term 'Public Interest Litigation' was not back then imported in the Indian jurisprudence, one of the first cases in India i.e. *Hussainara Khatoon vs. State of Bihar*<sup>41</sup>, dealt with the inhumane conditions of the undertrial prisoners in the prisoners and also, on the issue of lack of legal aid to the prisoners. In fact, the Public Interest Litigation can be said to have rooted itself in India with the aid of prisoners rights.<sup>42</sup> Myriad cases such as *Sunil Batra v. Union of India* on the issue of solitary confinement, *Charles Sobhra v. Supt. Tihar Jail*<sup>43</sup>, where the conditions of the prisoners was in question, *SP Gupta v. Union of India*<sup>44</sup>, which is hailed as the case which officially brought PILs into the epistolary jurisdiction in India<sup>45</sup> are instances of same.

It is interesting to note that in India, PILs were brought in on account of the first generation of human rights i.e. right to life and right to fair trial.

In India, the subject matter of PIL slowly subsumed within itself the rights of the unorganised workers, bonded labourers and other related questions of the social justice. The landmark PILs filed during such time in this regard including *Bandhua Mukti Morcha v. Union of India*<sup>46</sup>, *Sanjit Roy v. State of Rajasthan*<sup>47</sup> on the issue of minimum wages. This assumed power was further widened by including in its ambit the environmental issues. Many of these PILs were filed by Mr. MC Mehta.<sup>48</sup> One of such cases<sup>49</sup> on the issue of water pollution and public nuisance due to the same. The court in this particular case gave the guidelines on the scope of subject matter of the PILs. These guidelines were included in the handbook released by the Supreme court on procedure of adjudication in the apex court.<sup>50</sup> The apex court in the said case laid down the scope of the PILs to cases involving

Labour laws such as issue of bonded labour or the non-payment of minimum wages

Prisoners rights and illegal actions of the police

Rights of vulnerable sections such as women, children and the backward classes

Environmental issues and right to food

Rights of victims of riots and Family pension

<sup>38</sup> Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* 29–34 (2010).

<sup>39</sup> Gov't of the Republic of S. Afr. v. Grootboom, 2001 (1) SA 46 (CC).

<sup>40</sup> Minister of Health v. Treatment Action Campaign (No. 2), 2002 (5) SA 721 (CC).

<sup>41</sup> Hussainara Khatoon v. State of Bihar (1979)

<sup>42</sup> Rajeev Dhavan, *Law As Struggle : Public Interest Law In India*, 36(3) JOURNAL OF THE INDIAN LAW INSTITUTE 302 (1994).

<sup>43</sup> Charles Sobraj v. The Suptd., Central Jail, Tihar, 1979 SCR (1) 512.

<sup>44</sup> SP Gupta v. Union of India, 1982 2 SCR 365.

<sup>45</sup> Dhavan, *supra* note 7.

<sup>46</sup> Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802.

<sup>47</sup> Sanjit Roy v. State of Rajasthan, 1983 AIR 328.

<sup>48</sup> M.C. Mehta v. Union of India, (1986) 2 SCC 176, M.C. Mehta v. Union Of India, (1987) 1 SCC 471.

<sup>49</sup> M.C. Mehta v. Union of India, 1988 SCR (2) 530.

<sup>50</sup> Handbook on Practice and Procedure and Office Procedure, Supreme Court of India, 2017, <https://main.sci.gov.in/pdf/LU/ppop2017.pdf>



### Other matters of public importance

The Supreme court in the same judgement also laid down certain areas which were beyond the scope of PILs. These included:

Rent and service matters

Complaints against the governmental departments except in the aforementioned issues

Admissions to the educational institutions

Petition for quick disposal of cases which are already pending before the other courts

By the perusal of the areas recognised by the apex court, political reasons for the evolution of the PIL in India are apparent i.e. it gives impetus to rights in consonance with the socialistic principles and focuses on the vulnerable sections of the society.

### III. Initiation Procedure of PIL:

#### South Africa:

While the South African Constitution provides broad access to courts, the procedural mechanisms for initiating public interest litigation remain relatively structured when compared to the Indian model. Cases are generally brought through formal constitutional litigation procedures before the High Courts or the Constitutional Court. Civil society organisations, legal clinics, and public interest law organisations frequently play a central role in initiating such cases, often representing communities that lack the resources necessary to pursue litigation independently.<sup>51</sup>

Public interest litigation in South Africa is therefore commonly pursued through strategic litigation conducted by specialised organisations such as public interest law centres and human rights advocacy groups. These organisations often combine litigation with broader advocacy strategies, including policy engagement and community mobilisation. Consequently, litigation serves not only as a mechanism for resolving individual disputes but also as part of a broader effort to influence public policy and ensure the implementation of constitutional rights.<sup>52</sup>

#### India:

Since PILs in India were not introduced by the legislative mandate, there is no format provided any legislation or by laws. The apex court has time and again reiterated that there is no set format to be prescribed to unlike a plaint under Civil Procedure Code, 1872, the non-compliance of which leads to its rejection.<sup>53</sup> Further, in myriad judgements apex court has even deemed a letter<sup>54</sup> as a Public Interest Litigation (PIL) and in another case it deemed a postcard<sup>55</sup> as a Public Interest Litigation. Therefore, further eroding the need to comply with the requirements of a petition. However, the Apex court in the handbook on the rules of practice<sup>56</sup> does provide a model form prescribing the format for the PIL. The form specially requires an undertaking stating that there is 'no personal gain, private motive or oblique reason in filing the Public Interest Litigation'. Further, for every Respondent added, the petitioner is required to pay Rs. 50/- as court fees.

The rule book states that before the PIL is placed before the court, it is screened by the PIL Cell and only if it is covered by the subject matter as so enshrined in the guidelines as provided in the *MC Mehta case*<sup>57</sup>, only then the petition is placed before the court. Further, the letter-petitions have been separately recognised by the court and it is provided that such petition should be passed by the Registrar instead of a junior officer, as mandated in the other cases. Further, if any petition beyond the prescribed subject matter is filed, it is to be put before the court with prior approval of the Registrar.

### IV. Remedies:

#### India:

In India, the remedy granted by the Courts can be broadly categorized into three ways. Firstly, Indian courts have played quasi-legislative role by giving "legislative status" to the directions until the legislation was enacted. For instance in

<sup>51</sup> David Cote & Jacob Van Garderen, Challenges to Public Interest Litigation in South Africa, 27 *S. Afr. J. on Hum. Rts.* 167, 170–72 (2011).

<sup>52</sup> *Id.*

<sup>53</sup> Order 7 Rule 11, The Civil Procedure Code, 1908.

<sup>54</sup> B WADHERA, PUBLIC INTEREST LITIGATION. A HANDBOOK, (Delhi: Universal Law Publishing, 2003).

<sup>55</sup> Sunil Batra v. Delhi Administration, (1978) AIR 1765 (SC).

<sup>56</sup> Handbook on Practice and Procedure and Office Procedure, Supreme Court of India, 2017, <https://main.sci.gov.in/pdf/LU/ppop2017.pdf>

<sup>57</sup> M.C. Mehta v. Union Of India, 1988 SCR (2) 530.



*Vishaka & others v. State of Rajasthan & others*,<sup>58</sup> guidelines/directions for sexual harassment at workplace were given legislative value unless they were enacted by legislation. Similarly, in the case of *Laxmi Kant Pandey v. Union of India*,<sup>59</sup> Supreme Court gave detailed procedure regarding matters of adopting Indian children by foreign adoptive parents and this was given legislative status until inter-country adoption laws were enacted by legislation.

Secondly, generally court gives remedy in PIL matters by using their power conferred on them by Article 32 and 226 of the Indian Constitution, where Supreme Court and High court can issue “directions, orders and writs.” Also, Supreme Court for the purpose of “doing complete justice” has the power to issue orders and decrees under Article 142 of the Indian Constitution.

Thirdly, the order issued by the Court is to redress the grievances of the person litigating. But in PIL cases generally the litigating person is not the recipient of the remedy given by the Court instead person/group who has petitioned the PIL is supposed to have no personal interest as it is brought on the behalf of a particular segment of public who needs to be remedied. This issue was brought up in the case of *Gopi Aqua Farms v. Union of India*,<sup>60</sup> wherein shrimp breeders challenged previous decision regarding ban on certain shrimp culture which was effecting ecosystem and was contributing in pollution and the court held that principle of *res judicata* do not apply to PIL so, all the shrimp breeders are bound by the judgement.

Ordinarily Supreme Court uses Article 144 of the Indian Constitution; to oversee the implementation of the directions given by them in PIL cases for instance Court has set up various committees to check the working conditions of juvenile homes, conditions of inmates, etc. It should be emphasised here that the judiciary has attempted to govern the country by issuing numerous guidelines and monitoring their application, which has infringed on the notion of separation of powers as stated in the Constitution.<sup>61</sup> Since there is no principled approach chartered by Indian Courts there is lack of consistency in admitting PIL cases. On the one hand Hon’ble Supreme Court did not hesitate while intruding in the matter of policy question such as giving guidelines on Custodial torture<sup>62</sup> and sexual harassment of women at workplace<sup>63</sup>, on the other hand, Hon’ble Supreme Court clarified that it never directed Parliament to enact a Uniform Civil Code under Article 44 of the Indian Constitution.<sup>64</sup> This shows that there is selective selection with no clear basis.

South Africa:

The South African constitutional framework also provides courts with broad remedial powers when constitutional rights are violated. Section 172 of the Constitution authorises courts to declare legislation or conduct inconsistent with the Constitution and to grant “appropriate relief.”<sup>65</sup> This flexible remedial authority enables courts to craft remedies that address systemic rights violations while respecting the constitutional principle of separation of powers.

In practice, South African courts have developed a range of remedies in public interest cases, including declaratory orders, mandatory orders requiring the state to revise policies, and structural remedies aimed at ensuring compliance with constitutional obligations. For instance, in *Minister of Health v. Treatment Action Campaign (No. 2)*, the Constitutional Court ordered the government to remove restrictions on the distribution of antiretroviral medication and to implement a comprehensive programme to prevent mother-to-child transmission of HIV.<sup>66</sup> Through such decisions, courts have sought to ensure that constitutional rights are not merely symbolic but are realised in practice through concrete governmental action.

## Conclusion

Public Interest Litigation has become a crucial mechanism for protecting constitutional rights and addressing social inequalities. The comparative study of India and South Africa shows that while both jurisdictions use PIL to promote social justice and government accountability, their development and institutional foundations differ significantly.

In India, PIL evolved primarily through judicial innovation and activism. Courts relaxed procedural rules, expanded locus

<sup>58</sup> (1997) AIR SC 3011.

<sup>59</sup> (1987) AIR 232.

<sup>60</sup> (1997) AIR SC 811.

<sup>61</sup> INDIAN CONST., art 50: “State shall take steps to separate the judiciary from the executive in the public services of the State”.

<sup>62</sup> D.K. Basu v. State of West Bengal, AIR 1997 SC 610

<sup>63</sup> Vishaka v. State of Rajasthan, AIR 1997 SC 3011

<sup>64</sup> Lily Thomas v. Union of India, (2000) 6 SCC 224

<sup>65</sup> S. Afr. Const., 1996 Section 172.

<sup>66</sup> Minister of Health v. Treatment Action Campaign (No. 2), 2002 (5) SA 721 (CC).



standi, and adopted flexible approaches to ensure access to justice for marginalized communities. While this model greatly broadened the scope of rights enforcement, it has also raised concerns regarding misuse and judicial overreach.

In contrast, the South African model is constitutionally entrenched. The Constitution explicitly recognises public interest standing and provides courts with authority to enforce socio-economic rights while maintaining respect for the separation of powers. Consequently, the judiciary often adopts a more structured and cautious approach when reviewing government policies. Overall, both systems illustrate different pathways through which PIL can function as an effective tool for safeguarding rights and promoting accountability. Their experiences highlight the importance of balancing accessibility to courts with institutional restraint to ensure that public interest litigation continues to serve its fundamental purpose of advancing justice and constitutional governance..

### **References**

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