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## Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables

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## ARTICLES

### EFFECTIVENESS OF ENVIRONMENTAL PUBLIC INTEREST LITIGATION IN INDIA: DETERMINING THE KEY VARIABLES

*Michael G. Faure\* and A.V. Raja\*\**

#### I. INTRODUCTION<sup>1</sup>

Recent law and economics literature has paid attention to a phenomenon, which has mainly been developed by the Supreme Court of India, of allowing law suits in the public interest, defined as Public Interest Litigation (“PIL”).<sup>2</sup> In a number of studies, Raja and Xavier have shown that, as far as environmental harm is concerned, the Supreme Court of India has played an instrumental role in reducing the increase of pollution levels, specifically concerning the ambient air quality in Delhi.<sup>3</sup> There is convincing empirical evidence

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1. We are grateful to the participants at the Asia-Link Conference in Hyderabad (Feb. 29, 2008), at the Metro Seminar (Maastricht, Apr. 24, 2008), and at the 26th Annual conference of the European Association of Law & Economics in Rome (Sept. 2009) for useful comments on an earlier version of this paper.

2. T.C.A. Anant & Jaivir Singh, *An Economic Analysis of Judicial Activism*, ECON. & POL. WKLY., Oct. 26, 2002, at 4433 (India).

3. Angara V. Raja & Francis Xavier, *Economic Efficiency and Public Interest Litigations (PIL): Lessons from India* (Munich Personal RePEc Archive, MPRA Paper No. 3870, 2007) (paper presented at the first annual conference of the Asian Law and Economics Association, Seoul National University, Seoul, South-Korea 2005) (Germany) [hereinafter Raja & Xavier, *Economic Efficiency*]; Angara V. Raja & Francis Xavier, *Efficiency and Strategic Behaviour: The Case of Mass*

that PIL can be effective in environmental cases. Yet, PIL raises a few interesting questions: What specific features of the legal institutions in India make it possible for the Supreme Court to play this positive role in awarding environmental protection? How has the Indian judiciary been able to effectively protect the environment, but courts in other developing countries have not? In order to answer these important questions, which may have important implications for the role of legal institutions in other developing countries, it is necessary to identify the key variables that make PIL work in India.<sup>4</sup>

To identify the specific conditions and circumstances that can play a positive role in promoting an increase of social welfare, specifically a reduction of pollution levels, PIL must be analyzed from a broader law and economics framework. Such an approach to the analysis of PIL is yet to be undertaken, but is necessary to indicate when PIL can play this positive role.<sup>5</sup> Such an analysis needs to put PIL in a broader perspective by comparing it to other environmental legal instruments, which may reveal the circumstances under which PIL produces comparative benefits.

The methodology we apply to answer the above questions will be both theoretical and empirical. At a theoretical level, the strengths and weaknesses of existing approaches to environmental problems in developing countries like India will be briefly reviewed. When some of the weaknesses of these traditional approaches have been identified, one can understand why and where PIL may play a role in

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Torts (2005) (unpublished manuscript, on file with the University of Hyderabad Department of Economics) (India) [hereinafter Raja & Xavier, *Efficiency and Strategic Behaviour*]; Angara V. Raja & Francis Xavier, *Regulatory Failure and the Economic Efficiency of Public Interest Litigation* (2007) (unpublished manuscript) [hereinafter Raja & Xavier, *Regulatory Failure*].

4. PIL was not invented in India, rather it has its origin in the U.S. Moreover, there are experiences with environmental PIL in Pakistan and Bangladesh. See JONA RAZZAQUE, *PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN INDIA, PAKISTAN AND BANGLADESH* (Eric W. Orts & Kurt Deketelaere eds., 2004) (Neth.).

5. The PIL in India generally has already received a lot of attention. See, e.g., Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495 (1989). The possibilities of judicial activism in the environmental area have also been widely studied. See, e.g., Ayesha Dias, *Judicial Activism in the Development and Enforcement of Environmental Law: Some Comparative Insights from the Indian Experience*, 6 J. ENVTL. L. 243 (1994) (U.K.). However, so far less attention has been given to the precise circumstances under which environmental PIL may be effective.

environmental policy. Indeed, at a theoretical level several important questions arise. For example, how can the Indian Supreme Court enforce decisions that reduce the emissions of certain pollutants upon a large number of polluters? We will look at how the Supreme Court of India has dealt with specific practical problems and potential weaknesses of PIL.<sup>6</sup> The empirical analysis will focus on the Supreme Court of India's experience with PIL.<sup>7</sup> We will discuss what significance the results seen in India have for other countries, and whether it is possible, at the theoretical level, to predict the circumstances and conditions under which PIL can be expected to play a positive role in environmental policy enforcement in other countries. By transposing elements of PIL in India to a more general level, we will critically examine its effectiveness. This examination begins by noting that pollution levels have decreased as a result of case law of the Supreme Court of India; we continue by considering the cost associated with this form of pollution abatement, and whether PIL is an effective instrument if other mechanisms, such as public enforcement or private litigation, are available. At a theoretical level, some ideas still have to be formulated concerning the circumstances where the comparative benefits of PIL may be strong.

This article will draw upon the earlier work of Raja and Xavier where PIL was analyzed from an empirical perspective.<sup>8</sup> The results of that earlier work will now be reformulated by addressing the relevance for the general environmental law and economics doctrine. This naturally puts a few limits on the current approach:

1. We will not engage in actual modelling of the Indian Supreme Court decisions but rely on earlier work in that respect.

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6. In order to analyze this, we will make use of the rich body of literature on judicial activism in India, even though our article will merely focus on environmental PIL. For more information on the much broader phenomenon of judicial activism, see SATYA P. SATHE, *JUDICIAL ACTIVISM IN INDIA* (2002).

7. See Anant & Singh, *supra* note 2 (analyzing the efficiency of judicial activism).

8. See Raja & Xavier, *Economic Efficiency*, *supra* note 3.

2. We only address PIL in the field of environmental policy and not the rich case law of many other fields, such as human rights.<sup>9</sup>
3. The goal of this article is not to provide a final judgement on the efficiency or legitimacy of the decision making of the Supreme Court of India.<sup>10</sup> The latter is important since, notwithstanding the empirical evidence of success, there has also been some critical literature with respect to the judicial activism, particularly from the perspective of accountability and legitimacy. Some have blamed the Supreme Court for engaging in “judicial legislation.”<sup>11</sup> Although we will briefly summarize these criticisms, we merely aim at examining the phenomenon of PIL within the traditional environmental law and economics framework.
4. We will not conduct a comprehensive examination of Indian environmental statutory law or environmental jurisprudence;<sup>12</sup> we will only briefly discuss some of the environmental cases as illustrations of the economic analysis, which is central to our study.

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9. See SATHE, *supra* note 6, at 25-62 (discussing the evolution of PIL from a historical perspective and also addressing other fields of law than environmental problems); see also Bharat Desai, *Enforcement of the Right to Environment Protection Through Public Interest Litigation in India*, 33 INDIAN J. INT'L L. 27 (1993); Siri Gloppen, *Public Interest Litigation, Social Rights and Social Policy*, WORLD BANK, Dec. 12, 2005, available at <http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Gloppen.rev.3.pdf> (qualifying Public Interest Litigation as “social rights litigation”).

10. See generally Venkat Iyer, *The Supreme Court of India*, in JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 121-68 (Brice Dickson ed., 2008) (analyzing the judicial activism engaged in by the Supreme Court of India and its differences with PIL).

11. Satya P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & POL'Y 29, 84-87 (2001).

12. See Julia Mijin Cha, *A Critical Examination of the Environmental Jurisprudence of the Courts of India*, 10 ALB. L. ENVTL. OUTLOOK J. 197 (2005) (detailing the environmental jurisprudence of India); SHYAM DIVAN & ARMIN ROSENCRANZ, *ENVIRONMENTAL LAW AND POLICY IN INDIA: CASES, MATERIALS AND STATUTES* (2nd ed. 2001) (detailing India's environmental laws) (India); see also C.M. ABRAHAM, *ENVIRONMENTAL JURISPRUDENCE IN INDIA* (1999) (Neth).

This article is structured as follows: first, in Section II, we briefly summarize the traditional approaches, their weaknesses and traditional answers to environmental problems in order to explain the role of PIL. In Section III, we briefly address and define the phenomenon of PIL and in Section IV, we address the traditional law and economics justification for the requirement of standing (as a major obstacle against PIL). Section V analyzes the potential strengths and weaknesses of PIL from a theoretical law and economics perspective and, subsequently, Section VI provides a brief overview of how Indian PIL works in practice. Next, Section VII addresses how the Indian Supreme Court has dealt with some of the practical problems that arise from a theoretical perspective. We provide an analysis of and formulate key conditions for the role and place of PIL in an efficient environmental policy in Section VIII and conclude in Section IX.

## II. TRADITIONAL APPROACHES TO ENVIRONMENTAL POLICY: WEAKNESSES AND REMEDIES

### A. *Environment Standard Setting*

The first step in setting environmental policy is to define ambient quality standards in order to determine the ideal pollution levels in a specific environmental component, such as air, soil or water.<sup>13</sup> These are referred to as ambient quality standards in the U.S. or environmental quality standards in Europe.<sup>14</sup> In the public interest model of environmental policy, the next step is to use a cost-benefit analysis to determine how specific standards should be set so that the desired environmental quality can be arrived at.<sup>15</sup> The result of this process is that subsequent emission standards or emission limit values are established.<sup>16</sup> An important difference between ambient

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13. See MICHAEL FAURE & GÖRAN SKOGH, *THE ECONOMIC ANALYSIS OF ENVIRONMENTAL POLICY AND LAW: AN INTRODUCTION* 188-93 (Edward Elgar 2003) (discussing the optimal standard setting to control environmental pollution using ideal pollution levels).

14. Compare 42 U.S.C. § 7409 (2006) (referring to air quality standards as “ambient air quality standards”) with 2008 O.J. (L 348) 105 (EU) (using “environmental quality standards” for water policy).

15. See FAURE & SKOGH, *supra* note 13, at 192-93.

16. Emission limit values in Europe are defined as “the mass, expressed in terms of certain specific parameters, concentration and/or level of an emission,

quality standards and emission limit values is that the ambient quality standard is often (although this can differ based upon the legal system concerned) an ideal standard that should be reached in order to achieve an acceptable environmental quality level.<sup>17</sup> Ambient quality standards are, therefore, standards that address the regulator or licensing authorities, not individual polluters.<sup>18</sup> It is the task of the licensing authorities to take these ambient quality standards into account when setting emission limit values; an example of this is the granting of specific emissions permits to firms.<sup>19</sup> Hence, emission limit values, not ambient quality standards, are enforced upon individual polluters.<sup>20</sup> For example, if a firm were prosecuted for violating the ambient quality of the air or water surrounding his factory then to prove liability a causal link would have to be established between the firm's pollution level and the deterioration of the ambient quality. Hence, the difficulties of proving causation are avoided by focusing environmental policy on emission limit values.<sup>21</sup>

### *B. Private or Public Enforcement?*

The next question the literature addresses is how these emission limit values are enforced upon polluters. The first—also the strongest, cheapest and easiest—solution is to use private law remedies like nuisance, tort or, in rare environmental cases, contract law. However, Shavell offers many reasons why private enforcement of these standards may not work: the damage may be too widespread, resulting in low damage amounts to individual victims even if the totality of the damages is very high.<sup>22</sup> These circumstances produce, in the words of Schäfer, a “rational apathy” on the part of the

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which may not be exceeded during one or more periods of time.” Council Directive 96/61, art. 2(6), 1996 O.J. (L 257) 26.

17. See Jan H. Jans & Hans B. Vedder, *European Environmental Law* 373-82 (3d. 2007) (Neth.) (detailing both types of standards).

18. See *id.* at 374-76.

19. See *id.* at 378.

20. See *generally id.* at 376-82 (describing sources that are affected by emission limits).

21. See Marc Pallemmaerts, *The Proposed IPPC Directive: Re-regulation or De-regulation*, EUR. ENVTL. L. REV. 174-79 (1996) (discussing the impacts on changes in how emission limit values are set in the European Union).

22. Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 357, 372-74 (1984).

individual victims.<sup>23</sup> Therefore, none of them are motivated to take on the expense of litigation. Moreover, a private lawsuit may never be brought due to problems with causation or latency, which is characterized by long time laps between the emission and the actual occurrence of harm.<sup>24</sup> These problems are especially prevalent in environmental cases. Additional problems include insolvency and the identification of polluters.<sup>25</sup> For the foregoing reasons, there is a strong case for public enforcement of environmental standards.

### C. Enforcement in Developing Countries

However, the third step in the literature illustrates, especially in so far as developing countries are concerned, the many weaknesses in the traditional public enforcement model. Failures can occur at the standard-setting level, particularly through the influence of private interest, resulting in suboptimal regulatory solutions.<sup>26</sup> Moreover, many failures can occur at the enforcement level.<sup>27</sup> Sometimes these failures are rather innocent, for example, due to the fact that enforcement agencies lack capacity or instruments to act against polluters; in other cases, a collusive relationship between enforcers and environmental polluters inhibits effective enforcement of environmental standards.<sup>28</sup> Even in developed nations, ample evidence of these collusive practices exists, resulting in under-enforcement of environmental standards.<sup>29</sup> Where there are outright

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23. Hans-Bernd Schäfer, *The Bundling of Similar Interest in Litigation. The Incentives for Class Action and Legal Actions Taken by Associations*, 3 EUR. J. L. & ECON. 183 (2000).

24. See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986) (exploring the influence of time on court cases); see also Michael Faure & Paul Fenn, *Retroactive Liability and the Insurability of Long-tail Risks*, 19 INT'L REV. L. & ECON. 487, 497-98 (1999) (discussing the consequences on insurability). Latency is traditionally advanced as an argument in favour of regulation. See Shavell, *supra* note 22.

25. See Steven Shavell, *The Judgement Proof Problem*, 6 INT'L REV. L. & ECON. 43-58 (1986) (examining the consequences of insolvency for the effectiveness of liability).

26. Anthony Ogus, *Regulatory Arrangements and Incentives for Opportunistic Behaviour*, in ECONOMIC ANALYSIS OF LAW IN CHINA 151, 158 (Thomas Eger, Michael Faure & Naigen Zhang eds., 2007).

27. *Id.* at 153.

28. *Id.*

29. *Id.* at 152-53.

corruption problems, like in many developing countries, public enforcement will fail to be effective.<sup>30</sup>

The fourth step taken by the law and economics literature is to address the weaknesses of standard setting mechanisms. The traditional answer offered to overcome the particular weaknesses of standard setting mechanisms or enforcement tools has been to suggest the use a combination of instruments that are less vulnerable to these problems.<sup>31</sup>

For example, Shavell argued that private enforcement through tort rules should *supplement* regulation because regulations may quickly become outdated, they cannot cover every possible situation, and there may never be one hundred percent enforcement.<sup>32</sup> Hence, tort rules would serve a complementary function to back up the weaknesses in regulation. Also, Schäfer argued that, in systems where enforcement capacity is lacking, there may be less reliance on vague standards, which require the administrative capacity for implementation and enforcement, and a greater use of specific rules.<sup>33</sup> In addition, Ogus persuasively argued that when enforcement is inefficient because of corruption problems, one should move to policy instruments that are less vulnerable to collusive practices.<sup>34</sup> For example, the court system is less vulnerable to corruption than public enforcement mechanisms.<sup>35</sup>

The law and economics literature has, for a few decades, pointed out the shortcomings of command-and-control regulation and has, therefore, advocated the use of market-based instruments, such as marketable emission permits and environmental taxes.<sup>36</sup> However, the use of these economic instruments may not be particularly wise in developing countries, especially if they grant a large amount of

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30. See *id.* at 154-58; see Anthony Ogus, *Corruption and Regulatory Structures* 26 L. & POL'Y 329, 331 (2004).

31. See NEIL GUNNINGHAM & PETER GRABOSKY, *SMART REGULATION, DESIGNING ENVIRONMENTAL POLICY* (1998) (UK) (overview of the possible remedies and their combinations).

32. See Shavell, *supra* note 22.

33. Hans-Bernd Schäfer, *Rules versus Standards in Rich and Poor Countries: Precise Legal Norms as Substitutes for Human Capital in Low-income Countries*, 14 SUP. CT. ECON. REV. 113, 114 (2006).

34. See Ogus, *supra* note 26.

35. See *id.*; see also Ogus, *supra* note 30.

36. See, e.g., CHARLES D. KOLSTAD, *ENVIRONMENTAL ECONOMICS* (1999).

discretion to administrative authorities, where administrative capacity may be lacking, where relatively large sums of money (i.e., environmental taxation) is to be transferred, or where serious corruption problems may arise. For these reasons, an optimal environmental policy system for a developing country may be more restrictive than otherwise advisable.<sup>37</sup>

#### *D. The Potential of Public Interest Litigation*

While the earlier proposals and remedies were useful, they do not always provide a practicable solution for India. For example, from earlier studies it appeared that an alternative solution, private enforcement by environmental victims where collusive practices at the enforcement level prevented remedying the harm, was often not possible in cases where the harm remained widespread and individual victims lacked the incentive to file a law suit, since this would lead to recovery of a relatively small damage award.<sup>38</sup> This phenomenon is known as “rational-disinterest.” These studies also indicated that class action suits, although theoretically possible, often were not initiated in India because the transaction costs for the group to get organized were simply too high.<sup>39</sup>

A third reason why a private legal remedy may not always work is demonstrated by the following hypothetical example: assume there is a polluter who is easily identifiable but whose pollution causes harm in the vicinity of the industry. The pollution will be felt most intensely by those who live around the factory and less intensely by those who live progressively further away. The damages suffered by the victims are not uniform, but the totality of the damages can be large. The victims of the pollution have various levels of power and incentives to litigate due to their differing income levels. Therefore, each victim may not file a lawsuit and a class action suit may fail to

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37. See Michael Faure, Marjan Peeters & Andri Wibisana, *Economic Instruments: Suited to Developing Countries?*, in ENVIRONMENTAL LAW IN DEVELOPMENT: LESSONS FROM THE INDONESIAN EXPERIENCE 218, 247 (Michael Faure & Nicole Niessen eds., 2006); see also Michael Faure, *Environmental Rules Versus Standards for Developing Countries; Learning from Schäfer*, in INTERNATIONALIZATION OF THE LAW AND ITS ECONOMIC ANALYSIS 735-46 (Thomas Eger ed., 2008).

38. See Raja & Xavier, *Regulatory Failure*, *supra* note 3.

39. Schäfer, *supra* note 23.

emerge. A potential development of this scenario is that the polluter could try to identify the victim types who have the highest propensity to litigate. These potential plaintiffs would be those who: (1) are activists, (2) suffer high damages, and (3) have high income levels (and thus have the means to file a law suit). The polluter can prevent or avoid high litigation expenses by negotiating settlements with only the most probable litigants. The problem created by this from the social welfare perspective is that through these partial settlements the probability of litigation is considerably reduced, and the externalities of the pollution are only partially internalized.

This hypothetical example shows the potential of PIL: in PIL the litigant pool is an incredibly large set of people. The *ex ante* identification of these litigants would become too costly for the polluter. Hence, this opportunistic behaviour by the polluter is avoided.

Before addressing whether PIL can be an effective solution for the problems discussed in the foregoing paragraphs, we first have to identify what PIL is.

### III. WHAT IS PUBLIC INTEREST LITIGATION?

“Public Interest Litigation” in India was initiated by a few of the Judges of the Supreme Court, as a method to redress public grievances.<sup>40</sup> It was meant as a protective mechanism to redress basic violations of the human rights of the poor and the needy.<sup>41</sup> It was also a way to address concerns about government conduct or policy seen as contrary to the interests of the society.<sup>42</sup> More specifically, PIL was viewed as a solution to the problem of “access to justice” in developing countries where large sections of the population neither have the literacy nor the means to use the legal system to redress problems arising from violations of their fundamental rights.<sup>43</sup> Frequently, the poor and the underprivileged

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40. See Desai, *supra* note 9, at 28-29.

41. PIL has evolved over time. See Sathe *supra* note 11; see also DIVAN & ROSENCRANZ, *supra* note 12, at 133-53; SATHE, *supra* note 6, at 25-62, 195-248.

42. See Raja & Xavier, *Economic Efficiency*, *supra* note 3, at 7.

43. PIL, as such, is not of Indian but of American origin. We, however, focus in this article only on PIL in India. See Clark Cunningham, *Public Interest Litigation in the Supreme Court of India: A Study in Light of American Experience*, 29 J. INDIAN L. INST. 494 (1987) (comparing PIL in the United States and India).

are unwilling to assert their rights because of poverty, ignorance or fear of social or economic reprisals from the dominant sections of society.<sup>44</sup> These disabilities could be reduced if the law allowed a concerned citizen to sue in a court of law.<sup>45</sup> The classical theory requirement of *locus standi* precludes such a “representation,”<sup>46</sup> and thereby keeps the grievances of the poor from reaching the courts.

The report to the Indian Ministry of Law, Justice and Company Affairs by Justice Bhagwati and Justice Krishna Iyer<sup>47</sup> expressly recommended lowering the *locus standi* requirement as a means of allowing concerned citizens to file cases on behalf of the underprivileged.<sup>48</sup> As a result, the definition of “persons aggrieved” was broadened. The second modification to the standings doctrine was to allow a concerned citizen (or a voluntary organization) to sue, not as representative of others, but in his or her *own right* as a member of the citizenry to whom a public duty is owed, referred to as “citizen standing.”<sup>49</sup> The need for this standing was as a check on the abuse of executive authority in a modern welfare state.<sup>50</sup> In India, since the government’s regulatory competences give it enormous power, the misuse of power and authority is bound to happen.<sup>51</sup> At times, government policy or inaction may threaten the environment. In such cases, application of the traditional standing doctrine could preclude citizens from seeking protection.<sup>52</sup> Thus, the Supreme Court of India has expanded standing to enable citizens to challenge government actions in the public interest, even though the citizen himself suffered little or no harm.<sup>53</sup>

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44. See Gloppen, *supra* note 9, at 8-9.

45. See Raja & Xavier, *Economic Efficiency*, *supra* note 3, at 9.

46. *Id.* In many such cases, the affected may not even know the identity of the concerned citizen.

47. REPORT ON NATIONAL JURIDICARE: EQUAL JUSTICE-SOCIAL JUSTICE 61 (1977).

48. “On behalf” does not mean that it was in consultation with or with the consent of the affected people. Any concerned citizen who felt that an injustice was being perpetuated on large sections of society could move the courts.

49. DIVAN & ROSENCRANZ, *supra* note 12, at 136-37.

50. *Id.* at 137.

51. *Id.*

52. *Id.*

53. *Id.* at 215-20.

## IV. THE STANDING REQUIREMENT: ECONOMIC ANALYSIS

A. *Why Locus Standi?*

Traditional economic analysis defended the legal standing requirement, arguing that parties could only sue when they had an interest at stake and, except in the case of class action suits, for damages they personally suffered.<sup>54</sup> *Locus standi* is an admissibility condition that acts as a gatekeeper for the filing of cases.<sup>55</sup> The procedure determines who may submit a complaint under one of the legal instruments.<sup>56</sup> Traditionally, if a complainant does not have standing under the instrument, the complaint will be rejected by the judicial body on procedural grounds, without consideration of the merits.<sup>57</sup> A central issue of the standing doctrine is the nature of the injury alleged, that is, which substantive rights were violated.<sup>58</sup> Whenever substantive rights are not aligned with the procedural rights, the *locus standi* requirement becomes an obstacle.<sup>59</sup>

The traditional economic argument against expanding standing contends that it would lead to many, inefficient procedures, resulting in an inefficient use of the court system and potentially to over-deterrence. Thus, in the case of private law, a strict *locus standi* makes sense.

B. *Locus Standi in Public Law*

However, the arguments for broadening the scope of *locus standi* are different depending upon the nature of the complaints and the incentive structure that these provisions create. Increasingly, standing issues have attracted attention in public law actions, such as judicial review cases, and common law public nuisance actions.<sup>60</sup>

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54. *Id.* at 137.

55. ANNE VAN AAKEN, MAKING INTERNATIONAL HUMAN RIGHTS PROTECTION MORE EFFECTIVE: A RATIONAL-CHOICE APPROACH TO THE EFFECTIVENESS OF IUS STANDI PROVISIONS 4 (Max Plank Inst. for Research on Collective Goods Preprint No. 2005-16, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=802424](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=802424).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 5.

60. L.A. Stein, *The Theoretical Bases of Locus Standi*, in *LOCUS STANDI* (L.A. Stein ed. 1979).

For example, in the case of gross human rights violations, it has been observed that in countries which lack strong rights protections, their citizens are left with little means to redress their problems before an international body.<sup>61</sup> Since only those who are directly affected can file a case and these individuals often lack the means or incentive to litigate, the violations are not remedied. In the context of public law, it falls to the courts to undertake judicial review of all governmental actions. Therefore, it would not be appropriate for a court to refuse to determine such issues because the applicant would not benefit from the outcome.<sup>62</sup>

### C. *When Can Locus Standi Produce Adverse Effects?*

There are three distinct approaches to understanding why the standing requirement may not work in the interests of justice.

The first approach follows from a rational-choice perspective: apart from the problem of “rational disinterest,” discussed earlier, the verdict in a case with a large number of stakeholders takes on the nature of a “public good,” which would not be provided for, or is, at best, undersupplied by a rational victim.<sup>63</sup> Here, *locus standi* then becomes an impediment to the redress process.<sup>64</sup> We submit that the outcome of a case, where the affected population has no judicial access, results in a similar “failure.”

The second approach to the problem of *locus standi*, from a justice standpoint, stems from the concept of judicial review itself. Since, judicial review, broadly defined, is the power of a court to review the actions of public sector bodies in terms of their legality or constitutionality, it becomes imperative to have a mechanism that accomplishes this.<sup>65</sup> PIL can be seen as one way of bringing the

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61. See VAN AAKEN, *supra* note 55.

62. Mariam Hamidu, *The Open-door Approach to Locus Standi by the African Commission on Human and Peoples' Rights in Respect of its Non-State Complaints Procedure: In Need of Reform?* (2006) (unpublished LLM dissertation, Universidade Eduardo Mondlane) available at [https://www.up.ac.za/dspace/bitstream/2263/1213/1/hamidu\\_m\\_1.pdf](https://www.up.ac.za/dspace/bitstream/2263/1213/1/hamidu_m_1.pdf).

63. VAN AAKEN, *supra* note 55, at 50.

64. *Id.*

65. See ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES AND THE UNITED STATES, A COMPARATIVE ANALYSIS (René J.G.H. Seerden ed., 2d ed. 2007); PUBLIC ENVIRONMENTAL LAW IN THE EUROPEAN UNION AND THE

courts the claims of unlawful exercise of power or violation of rights by a government entity. Equally important is the harm caused by the failure of the government machinery to be a check on unlawful activities, resulting in hardship for the citizens whose fundamental rights need to be protected by the courts.

The third approach to the above issue can be stated as an answer to the following question: Should the failure of the executive to enact and enforce laws in the public interest be redressed through the judiciary? In the words of Justice Krishna Iyer:

The categorical imperative for stability in democracy is, therefore, to see that every instrumentality is functionally kept on course and any deviance or misconduct, abuse or aberration, corruption or delinquency is duly monitored and disciplinary measures taken promptly to make unprofitable for the delinquents to depart from the code of conduct and to make it possible for people, social activists, professional leaderships and other duly appointed agencies to enforce punitive therapeutics when robed culprits violate moral-legal norms.<sup>66</sup>

The term “judicial activism” has been given to the more active role that the judiciary plays in ensuring that the State “does its job.” However, this could be viewed as a third approach to the problem of *locus standi*, albeit an oblique one: democracy itself is the ultimate means to make governments accountable, but in countries where participatory democracy is still in its infancy, and given that its civil society is not yet strong, using the judiciary and the powers that it wields through judicial review may prove to be a cost minimizing solution. Thus, PIL and relaxing *locus standi* become important ingredients in this process.

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UNITED STATES, A COMPARATIVE ANALYSIS (René J.G.H. Seerden, Michiel A. Heldeweg & Kurt R. Deketelaere eds. 2002).

66. V.R. KRISHNA IYER, JUSTICE AT CROSSROADS 265 (1994).

#### D. Potential Dangers of Relaxing Locus Standi

However, giving “public spirited” citizens the right to move courts can have other negative effects.<sup>67</sup> First, it is not yet clear that there would be a substantial number of citizens who would choose to move the courts on the behalf of an affected community. That is, a rational choice theory does not explain why a citizen would do so. The same arguments that apply to the undersupply of public goods, apply here as well. If, however, there is a private gain to the person or persons who initiate PIL, it becomes imperative to know what these gains are. The danger remains that PIL may be used to serve private interests. In such a case, the judge has to decide whether to admit the case or not. If a large number of cases were to be filed, this would prove to be an extra cost to the judiciary.<sup>68</sup> These costs must be weighed against the litigation’s potential benefits, both the *ex post* as well as *ex ante* deterrence that it can create. The next section deals exclusively with PIL, analyzing its costs and benefits from a law and economics perspective.

#### V. PUBLIC INTEREST LITIGATION: A LAW AND ECONOMICS PERSPECTIVE

This section will look more closely at the precise workings of PIL, as defined in Section III, by asking a few questions using traditional law and economics methodology. This section addresses how PIL will or should theoretically deal with issues, such as information advantages, administrative costs and, more particularly, what the comparative benefits of PIL are. We also discuss some of the potential problems from an economic perspective. Without examining in exhaustive detail, we will introduce how some of the issues we identify as key variables from an economic perspective are dealt with in Indian PIL. Then, in Section VI, we address the way PIL functions in India. We deal with the way the Indian Supreme Court handles these questions and problems in more detail in Section VII.

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67. Cha, *supra* note 12, at 209 (holding that this expanded doctrine of *locus standi* may end up harming, not helping, the judicial process).

68. *Id.* at 210 (“[L]iberalization of standing can result in a flood of litigation (delaying trials), may lead to an abuse of the liberal standing for personal gains and to a loss of legitimacy by the courts.”).

### A. Plaintiffs

The key feature of PIL is that, as a result of an expanded standing definition, a plaintiff need not demonstrate a personal interest in the litigation. Interest is defined broadly; thus, anyone claiming to have an interest in a particular issue can, in principle, act as the plaintiff, vastly increasing the number of potential litigants. Theoretically, the positive impact is that this larger plaintiff pool can enforce the regulation, remedying the type of regulatory failure (i.e., under-enforcement) described above. However, the increased pool of plaintiffs does not explain what particular incentives the litigant(s),<sup>69</sup> who initiate the PIL, have to outweigh the costs they incur. In India, this is not as large an issue as elsewhere since in India the procedures for initiating a lawsuit through PIL have been simple, flexible and inexpensive.<sup>70</sup>

One of the leading cases in this respect is *S.P. Gupta v. Union of India*, in which Justice Bhagwati relaxed the rules of *locus standi* and allowed standing for public-spirited citizens, both for those wishing to expose the cause of the poor and oppressed (i.e., representative standing) and for those wishing to enforce performance of public duties (i.e., citizen standing).<sup>71</sup> Because plaintiffs are able to initiate a case by merely sending a letter, the costs of initiating a procedure can be relatively low, which could increase deterrence of environmental violations.<sup>72</sup> Some report that there may even be too many cases. According to Krishnan in March 2007, there were 40,000 cases pending before the Supreme Court of India.<sup>73</sup> This raises concerns of judicial economy and whether mechanisms should be built in to deter plaintiffs from bringing frivolous suits.<sup>74</sup>

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69. It could also be a group of “concerned citizens” or even NGOs that move the courts.

70. See Sathe, *supra* note 11, at 74.

71. See Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19(3) J. ENVTL. L. 293 (2007).

72. See Sathe, *supra* note 11, at 74-75.

73. Jayanth K. Krishnan, *Scholarly Discourse, Public Perceptions, and the Cementing of Norms: The Case of the Indian Supreme Court and a Plea for Research*, 9(2) J. APP. PRAC. & PROCESS 285 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1003811](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003811).

74. See generally STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 389-470 (2004) (providing a summary of the general economic literature).

Nonetheless, while the high increase in the number of potential litigants may cause the administrative costs of litigation to escalate because plaintiffs now have little barrier to litigate, the greatly inflated litigant pool can also have a positive environmental effect, since these potential litigants act as a strong deterrent to potential polluters.

### *B. Defendants*

Many public interest suits are brought against the government or public authorities, with the object of compelling the authorities to take specific action.<sup>75</sup> In most cases, the litigant seeks to induce the authority to undertake measures, forcing polluters to reduce their emissions of specific pollutants or even to relocate to other areas. In such cases, the question arises whether litigation takes place only against the government or is it raised against the polluting industries, as well. In the first case, the outcome can affect the businesses participating in the regulated industries that do not have the opportunity to argue before the court; this may contribute to the quality of the decision-making. In the second case, the administrative costs of the procedure could increase significantly. Sathe argues that in PIL, there is no longer a traditional adversarial procedure, but rather the defendant (usually a public authority) is required to cooperate with the court in a collaborative effort towards truth finding.<sup>76</sup>

Can the court have enough information to set environmental standards when the interests of the regulated industries are not represented?<sup>77</sup> From a legal perspective, this raises questions concerning the legitimacy of the decision-making. From an economic perspective, the question arises whether the court will be sufficiently informed without the involvement of the affected industry, especially when the decision would effectively lead to setting a new environmental standard.

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75. See Raja & Xavier, *Regulatory Failure*, *supra* note 3.

76. See Sathe, *supra* note 11, at 77-78.

77. See Anant & Singh, *supra* note 2, at 4438.

### *C. The Court*

From a theoretical perspective, many questions arise as to the role of the courts in PIL. With specific regards to the issue of the role of the courts and whether the polluting industry is to be involved in the PIL, in India, specifically in the New Delhi air pollution case, the industry was the second defendant in the case. Therefore, the potential problem of not involving the industry did not arise.

#### 1. Informational Advantage

While an initial question is what the court's role is in shaping environmental policy, given the existing instruments, a distinction should be made between the situations where the court merely enforces existing regulation on the one hand and where the court clearly goes further on the other. The latter occurs when either the legislation is silent or when, as a result of judicial review, the court sets aside lenient regulation. A useful distinction is made by Anant and Singh, who argue that various forms of judicial activism exist.<sup>78</sup> These distinctions are helpful in examining what role courts engaged in PIL should have in promoting social welfare and where their involvement becomes problematic.<sup>79</sup> They distinguish:

- Interpretational judicial activism: in this case, courts only interpret legal documents, such as the constitution or statutes.<sup>80</sup> For example, the interpretation of procedural law which is used to uphold human rights could qualify as interpretational judicial activism.
- Legislative judicial activism: in this case, the court takes on the function of legislator and creates a statute.<sup>81</sup> An example of this form of judicial activism can be seen in a case adjudicated by Supreme Court of India, where it issued a rule to

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78. *Id.* at 4437.

79. *Id.*

80. *Id.*

81. *Id.*

prevent sexual harassment in the workplace since there were no specific laws on point.<sup>82</sup>

- Executive judicial activism: in these cases the court executes statutes, essentially replacing the executive branch of government. The vehicular pollution case in Delhi, which we will discuss in detail below,<sup>83</sup> is considered an example of executive judicial activism.<sup>84</sup>

The role of the court and its need for information on the optimal environmental solution will be different when the court *merely* interprets the constitution or a statute than when it replaces the executive or legislator.

The crucial question from a law and economics perspective is what the comparative advantage of the court is as far as information on environmental standards is concerned. Traditional law and economics literature states that setting emission standards involves a complicated process of weighing the costs and benefits of various measures and this is usually considered a process better undertaken by specialized environmental agencies than by courts that lack a technical background in environmental matters.<sup>85</sup> However, the regulator may not set the environmental standard in the public interest, and in the specific case of India, there is much empirical evidence of regulators watering down of technical environmental standards as a result of effective lobbying by private interest.<sup>86</sup> The question then arises in PIL whether there are solutions available at lower information costs to the court, by seeking expert involvement. Otherwise, courts set standards inefficiently, which could lead to higher costs. As far as courts are merely enforcing existing regulation, the danger of uninformed decision-making is less apparent. However, if regulation is inefficient as a result of the influence of private interest, the courts may not be able to engage in environmental judicial activism, when it could not go further than merely confirming the regulatory standard. Some literature reports of

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82. See Iyer, *supra* note 10, at 145.

83. See *infra* Sections VII.B., and VII.C.1.

84. Anant & Singh, *supra* note 2, at 4437.

85. See Shavell, *supra* note 22.

86. Raja & Xavier, *Economic Efficiency*, *supra* note 3.

Supreme Court cases where the Court demanded that limestone quarries be closed down “as they were hazardous to the environment.”<sup>87</sup> In those cases, the question naturally arises on what basis the court comes to such decision-making.

The question that follows, then, is why the Indian Supreme Court is better equipped and better informed to set environmental standards in the public interest than administrative agencies.<sup>88</sup> A partial answer is that administrative agencies are apparently subject to capture. This, however, fails to explain how the Supreme Court solves its traditional information deficiency since judges have no specific environmental knowledge that makes them experts who are able to set efficient environmental standards.<sup>89</sup>

## 2. Legitimacy

From a legal perspective, an equally economically relevant question arises as to the legitimacy of the decision-making of the court, especially when the decision reaches much further than what the parties’ facts necessarily involved.<sup>90</sup> Critics of judicial activism have argued that it violates constitutional principles, even going so far as to characterize the practice as “ad hoc-ism and cheap populism.”<sup>91</sup>

## 3. Independence

A related question is why the courts, and not the legislation or administrative agencies, set environmental standards in the public interest.<sup>92</sup> The traditional answer, from a legal perspective, is that the independence of the court guarantees that it will act in the public

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87. *Id.* at 8 n.14; *see also* Desai, *supra* note 9, at 33; Cha, *supra* note 12, at 203.

88. *See* Anant & Singh, *supra* note 2, at 4438 (arguing that “judicial modes of processing information are not equipped to make technical choices or sample the distribution of preferences in a society”).

89. Also, Anant and Singh are critical of using executive or legislative failures as justification for judicial activism by the courts since it breaches the separation of powers and could raise social costs. *See id.* at 4438-39.

90. *See* Sathe, *supra* note 11. The PIL is especially criticized from the perspective of the separation of powers doctrine. *See* IYER, *supra* note 10, at 144-50; Cassels, *supra* note 5, at 509-15.

91. IYER, *supra* note 10, at 122.

92. Ogus, *supra* note 30.

interest.<sup>93</sup> Traditional law and economics literature has analyzed the circumstances in which the courts can be expected to act independently.<sup>94</sup> It is worth further examination to determine why the Indian Supreme Court has been able to act in the public interest, whereas other developing country Supreme Courts, such as the Indonesian Supreme Court, have been shown to be captured by the existing political elite.<sup>95</sup> Some legal theorists have argued that since achieving independence in 1947, the Indian Supreme Court has avoided capture and maintained judicial independence, always acting in the public interest.<sup>96</sup> Although it is not within the scope of this article to analyze why the Supreme Court of India and not other, similar courts have been found to act in the public interest, the institutional conditions that make this possible are worth further examination from a law and economics perspective since they constitute the basis for the success of PIL.<sup>97</sup>

#### 4. Court versus Executive

Following the definitional framework provided by Anant and Singh, most of the environmental PIL cases can be considered examples of executive judicial activism.<sup>98</sup> To the extent that the court, in decisions concerning PIL, effectively takes the place of either politicians or bureaucrats, the question also arises why these individuals accept this behaviour by the court. Legal reports indicate that there have been many attempts, most notably by Indira Gandhi,

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93. See Mark Ramsayer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994).

94. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); Ramsayer, *supra* note 93; Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary*, 13 INT'L REV. L. & ECON. 349 (1993).

95. See SEBASTIAAN POMPE, *THE INDONESIAN SUPREME COURT: A STUDY OF INSTITUTIONAL COLLAPSE* (2005).

96. See Krishnan, *supra* note 73.

97. See John Clifford Wallace, *Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives*, 28 CAL. W. INT'L L.J. 341, 341-51 (1998) (offering a comparative perspective on judicial independence, comparing the U.S. and some Asian courts).

98. Anant & Singh, *supra* note 2, at 4437.

to overturn the Supreme Court's PIL decisions.<sup>99</sup> Some politicians, including the current Prime Minister, appear to chastise the Supreme Court against what has been perceived as "judicial overreaching."<sup>100</sup> In contrast, others argue that political players have never seriously challenged the power of the Supreme Court of India.<sup>101</sup> One explanation for this phenomenon may be that the politicians simply do not mind the situation whereby the judiciary *de facto* acts as a regulator or at least as an executive.<sup>102</sup> Moreover, in some environmental PIL cases, one can argue that the court is merely executing prior Parliamentary orders or decisions to provide environmental protection, where the executive had failed to fulfill this duty.

In a situation, like India, where regulator capture is a significant risk, environmentally active politicians seeking re-election and in need of special interest support, may appreciate that the Supreme Court sets environmental standards that the politicians could not achieve. Under these circumstances, the actions taken by the Supreme Court, whose Judges serve life appointments, could be seen as an effective remedy against regulatory capture by special interest groups. The fact that politicians accept and abide by the judicial decisions, notwithstanding their spoken objections, may support the hypothesis that Supreme Court activism even serves the interests of some politicians.<sup>103</sup>

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99. See Krishnan, *supra* note 73, at 267. For instance, Indira Gandhi declared a state of emergency when the Court found her guilty of corrupt electoral practices in the general election. See Iyer, *supra* note 10, at 122.

100. See Krishnan, *supra* note 73, at 288.

101. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES. CONSTITUTIONAL COURTS IN INDIAN CASES 98 (2003) ("India's experience demonstrates the ability of a court to challenge political authorities, even in difficult political circumstances.").

102. Shubhankar Dam, *Green Laws for Better Health: The Past that Was and the Future that May Be – Reflections from the Indian Experience*, 16 GEO. INT'L ENVTL. L. REV. 593, 595 (2003-2004) ("Not only has the judiciary assumed the role of a law-maker, but also policy maker and, at times, that of an implementing agency.").

103. Another interesting hypothesis that is being explored is that court interventions have the effect of making information of neglect or non-enforcement by government agencies public. Invariably, Supreme Court interventions are given wide publicity in the media and the press. Governments cannot afford to ignore this and should take action to quell public outrage. See *Angara V. Raja & Xavier*

*D. What the Supreme Court Orders and Against Whom*

Under the framework of Anant and Singh,<sup>104</sup> it can be argued that where the court is not merely engaging in statutory interpretation its orders have a legislative or executive effect. Indeed, it seems that in PIL, orders often direct the government to take regulatory measures.<sup>105</sup> In some cases, the courts specifically indicate how the executive branch should act, in effect acting in the regulator's place.<sup>106</sup> This role of the Supreme Court has been called "judicial legislation."<sup>107</sup> It is legislative to the extent that the court acts in the legislator place. In other cases, direct orders, specified by the court, are provided to the executive to take specific measures.<sup>108</sup> As previously discussed, similar questions arise as to the efficiency of this judicial environmental standard setting.<sup>109</sup>

*E. How to Enforce an Order*

Concerning enforcement of judicial orders, two closely related, important issues emerge: first, who is the defendant and, second, how is a court order enforced.<sup>110</sup> A review of Indian case law illustrates that there have been some cases brought against public authorities.<sup>111</sup> Other cases, however, are brought against polluters who did not comply with earlier orders.<sup>112</sup> In cases where the Court has issued orders, it has been known to send notice of the order directly to various industries.<sup>113</sup> The question here is how to effectuate efficient

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Francis, *Courts, Media and Civil Society in Regulating the Regulator: Lessons from Delhi Air Pollution Case* (2009).

104. Anant & Singh, *supra* note 2, at 4437.

105. *See, e.g., id.*

106. *See, e.g., Dias, supra* note 5, at 245-46.

107. *See Sathe, supra* note 11.

108. *See, e.g., Dias, supra* note 5, at 245-46.

109. In fact, in environmental PIL, the courts can intervene in a variety of ways, whereby in some cases they merely monitor implementation of existing policies or clarify ambiguities in a specific legislation, whereas in others they fill normative gaps in existing legislation. For an overview of the ways in which courts can intervene in environmental cases through PIL, see *id.* at 249.

110. *See Desai, supra* note 9, at 36-39.

111. *See id.*

112. *See id.*

113. *See Mehta v. Union of India*, 16 INT'L LAB. L. REP. 179, 190-91 (1997) (describing an instance where the Court sent individual notices to 8,378 industries).

compliance with the order. Various mechanisms have been described in the law and economics literature to enforce the effective execution of a court order. One possibility is to hold a perpetrator of a court order in contempt,<sup>114</sup> but the costs of this practice have the potential to be very high, at least when the order has to be executed. Other possibilities include the use of a penalty payment, that is, a payment owed by the perpetrator for every time period (e.g., a day, week, or month) he remains in violation of the court order.<sup>115</sup>

On the issue of enforcing compliance with court orders, a distinction should be made between orders addressed to the government and orders addressed to polluters. An order addressed to the government leads to regulatory action, which subsequently affects polluters. Here, enforcement costs may be lower since the order only has to be addressed to the specific executive administrative agency or branch. Whether such orders will lead to great compliance by polluters is less certain because now the executive agency will set new regulations.

In contrast, an order directly addressed to the polluters may lead to greater compliance. This is especially true if all violating polluters could be held in contempt, but in these cases enforcement costs would be substantially higher.

## VI. PUBLIC INTEREST LITIGATION IN INDIA

### A. *Potential Remedies in Environmental Cases*

As a starting point, it should be noted that the development of environmental PIL in India should be set against the background of the country's dramatic increase in environmental degradation. It was recently reported that poor environmental quality in India is directly responsible for twenty-five percent of all preventable illnesses, including acute respiratory diseases.<sup>116</sup> Other studies show a close relationship between genetic disruptions and exposure to vehicular pollution in India.<sup>117</sup>

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114. See Desai, *supra* note 9, at 37.

115. See *id.* at 38.

116. For these and other alarming facts, see Dam, *supra* note 102, at 594.

117. *Id.*

In India, a citizen has three civil remedies to choose from to obtain redress for environmental damages:<sup>118</sup> (1) a common law tort action against the polluter; (2) a writ petition to compel an agency to enforce the law and to recover damages from the violator; or (3) an application for compensation under the National Environmental Tribunal Act of 1995 or the Public Liability Insurance Act of 1991.<sup>119</sup>

Civil damage awards and incentives for private litigation may be limited by sub-optimal damage compensations, the lengthy adjudication of cases, and chronic inflation.<sup>120</sup> Therefore, when the pollution source and the victims are well identified,<sup>121</sup> plaintiffs with standing seem to prefer seeking injunctions over civil damages.<sup>122</sup>

Public nuisance law provides a helpful analogy to understanding the PIL model that has evolved.<sup>123</sup> Since a public nuisance interferes with a public right, it is not tied to the violation of private property rights.<sup>124</sup> Furthermore, every affected citizen can make use of this remedy.<sup>125</sup> On using the remedy of public nuisance, Krishna Iyer observed, “[a]t issue is the coming of age of that branch of Public Law bearing on community actions and the court’s power to force

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118. See generally Michael R. Anderson, *Individual Rights to Environmental Protection in India*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 199 (A. Boyle & M. Anderson eds. 1996) (discussing the instruments to compensate victims of environmental damage in India); Michael R. Anderson, *Public Interest Perspectives on the Bhopal Case: Tort, Crime or Violation of Human Rights?*, in PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW 154-71 (David Robinson & John Dunkley eds. 1995); DIVAN & ROSENCRANZ, *supra* note 12, at 91-132; Michael R. Anderson & Anees Ahmed, *Assessing Environmental Damage Under Indian Law*, 5 R. EURO. COMMUNITY & INT’L ENVTL. L. 335-41 (1996).

119. See ABRAHAM, *supra* note 12, at 37-60 (discussing the possibility of using the doctrine of public nuisance in Indian environmental jurisprudence).

120. See DIVAN & ROSENCRANZ, *supra* note 12, at 88-89 (“Damages awarded in tort actions in India are notoriously low, and pose no deterrent to the polluter. Lengthy delays in the adjudication of cases combined with chronic inflation dilute the value of any damages that a successful plaintiff may receive.”).

121. See *id.* at 134-41.

122. See *id.* at 89.

123. See *id.* at 91-92.

124. See *id.*

125. *Id.*

public bodies under public duties to implement specific plans in response to public grievances.”<sup>126</sup>

### B. *The Writ Jurisdiction*

Under Articles 32 and 226 of the Indian Constitution, the specific writs of jurisdiction that empower the Supreme Court of India to issue direction orders are the writs of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*.<sup>127</sup> Writs of *mandamus* have been successfully used to command action by a public authority when it was found that the authority failed to carry out its duties.<sup>128</sup>

PIL is an extension of the writ jurisdiction; the difference being twofold: (1) that the court may initiate action in the public interest if the concerned judge becomes aware of any violations; and (2) the *locus standi* is relaxed so that any public-minded citizen can move the court.<sup>129</sup>

### C. *Characteristics of Public Interest Litigation*

The following are some of the salient characteristics of the PIL process in India:<sup>130</sup>

- (a) “Public Interest Litigation has recently adopted the notion of a *continuous mandamus*. This involves securing compliance through periodic ‘interim’ directions. Here the court does not formally admit the

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126. *Ratlam v. Vardhichand*, A.I.R. 1980 S.C. 1622, reprinted in DIVAN & ROSENCRANZ, *supra* note 12, at 114-19.

127. For a detailed discussion, see IYER, *supra* note 10, at 123-25; see also DIVAN & ROSENCRANZ, *supra* note 12, at 123-27; RAZZAQUE, *supra* note 4, at 186-90.

128. See, e.g., *Rampal v. State of Rajasthan*, A.I.R. 1981 R.A.J. 121, reprinted in DIVAN & ROSENCRANZ, *supra* note 12, at 124-26. Residents of a town filed a petition showing that the Municipal authorities failed to discharge their duties in the removal of stagnant waters and garbage. The court directed that the Municipal authorities not only remove the cause of the public nuisance in the locality but also construct the proper sewers and drains for the discharge of such water. *Id.*

129. See Ayesha Dias, *Environmental Law, Policy and Practice in India*, 2 ENVTL. LIABILITY 86, 88-89 (1994); see also Desai, *supra* note 9, at 29-31.

130. In this article, we mainly focus on the application of PIL in environmental cases, but its scope is much broader than simply environmental law. For an overview, see Iyer, *supra* note 10, at 143.

petition, but prods the recalcitrant agency to perform its duty within a time frame. The case is posted every few months to monitor the agency's performance and for further interim directives."<sup>131</sup>

- (b) Parties and official agencies may be joined, and even substituted, as the litigation unfolds;<sup>132</sup> thus, new and unexpected issues may emerge that modify the case.
- (c) The expanded status includes at least two different kinds of standing recognized by the Supreme Court: (1) "Representative Standing" or to represent the poor and underprivileged; or (2) "Citizen Standing" in cases of Executive inaction or abuse.<sup>133</sup>
- (d) PIL may be dismissed if it is found to be motivated by private interest.<sup>134</sup> Here, the court usually imposes costs on the litigant. In the case of *Subhash Kumar v. State of Bihar*, the Court explicitly noted that:

Personal interest cannot be enforced through the process of this court under Art.32 of the Constitution in the garb of Public Interest Litigation. It is the duty of this court to discourage such petition and to ensure that the course of justice is not obstructed or polluted by unscrupulous litigants by invoking the extraordinary jurisdiction of this court for personal matters under the garb of the Public Interest Litigation.<sup>135</sup>

- (e) The Court has the inherent power to appoint independent commissions to verify case facts.<sup>136</sup> When

131. See DIVAN & ROSENCRANZ, *supra* note 12, at 132.

132. Iyer, *supra* note 10, at 141-42.

133. Early environmental cases decided by the Supreme Court of India, that stand as examples of citizen standing cases, resulted in the closure of Lime Stone quarries in the Dehera Dun region, the installation of safeguards at a Chlorine Plant in Delhi, and the closure of Polluting Tanneries on the Ganga River. See DIVAN & ROSENCRANZ, *supra* note 12.

134. *Id.* at 141.

135. *Id.* (quoting the Supreme Court of India in *Subhash Kumar v. State of Bihar*, A.I.R. 1991 S.C. 420).

136. *Id.* at 148.

there are environmental problems, the courts frequently call upon the National Environment Engineering Research Institute (“NEERI”) to submit the reports.<sup>137</sup>

- (f) The judicial “notice of facts” reduces the litigant’s evidentiary burden. In the Ganga River pollution case, the Court did not wait for scientific proof on what the health effects on the exposed population would be or what property damage could result.<sup>138</sup> In the view of certain jurists and academics, the Court assumed that such injuries had either occurred or would likely occur and then proceeded to issue remedial directions.<sup>139</sup>
- (g) In a few recent PIL cases, the courts made reference to the “precautionary principle” to argue that there should be a “reversal of the burden of proof.”<sup>140</sup> The consequence of such a reversal is that the onus of proof is on the developer or the industry to show that its action is environmentally benign.

#### D. Perceived Weaknesses

There are also a few perceived weaknesses of the PIL in India.<sup>141</sup> The first, and most fundamental, issue raised by PIL is that the courts frequently overstep their jurisdiction and involve themselves in matters belonging to the executive and the legislature. This is often done in the name of upholding fundamental rights and protecting individual liberties. This, however, has not been overlooked by courts. In *Bandhua Mukti Morcha v. Union of India*,<sup>142</sup> Justice Pathak observed:

In the process of correcting executive error or removing legislative omission the court can so easily find itself

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137. *Id.*

138. *Mehta v. Union of India*, A.I.R. 1998 S.C. 1115 (India).

139. *Id.*

140. Dam, *supra* note 102, at 608, 612.

141. Here, we merely provide an overview of some of the potential weaknesses of PIL, as identified in the literature generally. Specific problems with PIL relating to environmental pollution cases will be further discussed in Section VII *infra*.

142. *Morcha v. Union of India*, A.I.R. 1984 S.C. 802. See also DIVAN & ROSENCRANZ, *supra* note 12, at 150-51.

involved in policy making of a quality and a degree characteristic of political authority, and indeed run the risk of being mistaken for one. An excessively political role identifiable with political governance betrays the court into functions alien to its fundamental character and tends to destroy the delicate balance envisaged in our constitutional system between its three basic institutions. It is a serious question whether in every case the same awesome respect and reverence will endure during different stages of affirmative action seeking to regulate the lives of large numbers of people, some of whom never participated in the judicial process.<sup>143</sup>

As for the second issue, there is very little theory that would explain why a public-minded citizen would move the courts into action. Certainly, this is an important question from a law and economics perspective. If rational choice theory is to be believed, then we must conclude that every public interest case also generates some private gains, separate and distinct from the interests in the case itself. In some cases, the primary mover of the litigation gains such favor with the courts that he is later considered an expert on such matters and may be sought out to help the courts in future cases. This, in and of itself, may not be a negative development but it has the potential to lead to problems. A much discussed case is that of M.C. Mehta, whose fame as the instigator of the PIL in the Delhi air pollution case and its subsequent success has led him to petition for "Environmental Studies" inclusion in the list of compulsory subjects taught in the curricula of all Indian undergraduate schools and colleges. The Supreme Court of India, rather than forwarding the petition to the Ministry of Education, proceeded to direct the University Grants Commission to implement the suggestion without any further delay.<sup>144</sup> At best, the propriety of the Court's action in this instance is questionable.

There is a further issue in India that the PIL cases that are filed and given consideration are only done because they can

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143. *Id.*

144. *See Mehta v. Union of India* A.I.R. 1992 S.C. 382 (1992); *see also*, DIVAN & ROSENCRANZ, *supra* note 12, at 151-52.

attract significant media attention, rather than because they concern issues of fundamental importance, but lacking in drama. In one such case, PIL was filed against a beauty pageant held in Kerala on the grounds that it was against the morality of Indian women.<sup>145</sup>

## VII. THE SUPREME COURT OF INDIA'S APPROACH TO DEALING WITH KEY ISSUES

To analyze the Supreme Court of India's many approaches to the issues raised in Section V from an economic perspective, we shall rely on both: (1) various studies stemming from environmental cases<sup>146</sup> that have dealt with the Indian experience of judicial activism,<sup>147</sup> and (2) Indian case law.

### A. Plaintiffs

Above, we noted that the Supreme Court has, in broad terms, considerably relaxed the standing requirement in Public Interest cases. Hence, the eligibility of a person to invoke the jurisdiction of the courts is very much enlarged. Access to the courts has been further eased by merely requiring that a prospective plaintiff write a letter to institute court proceedings.<sup>148</sup> Rajamani observes that public-minded individuals have utilized the courts for specific environmental purposes.<sup>149</sup> Such purposes have include the protection of the Taj Mahal from corrosive air pollution,<sup>150</sup> the reduced discharges into the Ganga River,<sup>151</sup> and the reduction of air

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145. See *Lawyers' Panel to Watch Over Beauty Pagent*, *TIMES OF INDIA*, Aug. 5, 2009, available at <http://timesofindia.indiatimes.com/india/Lawyers-panel-to-watch-over-beauty-pageant/articleshow/4858327.cms>.

146. See, e.g., RAZZAQUE, *supra* note 4; Rajamani, *supra* note 71; Armin Rosencranz & Michael Jackson, *The Delhi Case: The Supreme Court of India and the Limits of Judicial Power*, 28 *COLUM. J. ENVTL. L.* 223 (2003).

147. See SATHE, *supra* note 6; Sathe, *supra* note 11.

148. See DIVAN & ROSENCRAZ, *supra* note 12, at 142; Sathe, *supra* note 11, at 74-75.

149. Rajamani, *supra* note 71, at 295.

150. *Mehta (Taj Trapezium Matter) v. Union of India*, Writ Petition (C) No. 13381 of 1984.

151. *Mehta (Calcutta Tanneries' Matter) v. Union of India*, Writ Petition (C) No. 3727 of 1985.

pollution in Delhi and other metropolitan cities.<sup>152</sup> Individuals who wish to seek the Supreme Court in matters of the public interest to address a particular environmental concern do not encounter any difficulty as far as the formal *locus standi* requirements are concerned.<sup>153</sup> Then, we must ask why the rational apathy problem does not become a problem for specific citizens. The answer is that these citizens are willing to invest a lot of time and money in bringing cases in the public interest even though the results will potentially and subsequently allow a large number of third parties to free ride and benefit at the litigants' expense. Given the high number of cases that have effectively been brought, usually by a small group of individuals, one can argue that altruistic motives have provided sufficient incentives to bring these cases in the public interest.<sup>154</sup> Of course, personal interests, like the media attention that follows from the cases, may be the motivation promoting some to bring these actions.

Although it was not mentioned in these particular environmental cases, there is growing concern that the claims could be vexatious or frivolous<sup>155</sup> given the increasing number of cases before the India Supreme Court.<sup>156</sup> It has been observed that an increasing number of complaints are being lodged, claiming that litigants misused PIL for private reasons or simply to seek publicity.<sup>157</sup> As a result, some have questioned whether guidelines should be set to restrain and limit PIL.<sup>158</sup> These concerns, however, have been mostly been raised regarding development projects which can be needlessly delayed

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152. See, e.g., *Mehta v. Union of India Writ Petition (C) No. 13029 of 1985*.

153. *DIVAN & ROSENCRANZ, supra* note 12, at 139.

154. See generally, *DIVAN & ROSENCRANZ, supra*, note 12 (M.C. Mehta has acted as a plaintiff in over twenty cases).

155. However, in other cases courts have reacted against particular suits, arguing that they were merely brought in the private interest of the plaintiff and, therefore, not suited for PIL.

156. See *Iyer, supra* note 10, at 125 (reporting that at the end of October 2006 there were 38,675 cases awaiting hearing and disposal before the Supreme Court and that it can take five years or more for a case to be heard); see also *Cha, supra* note 12, at 210 (noting that the delay caused by the judicial backlog will be very harmful to environmental litigation since time is of essence in many environmental cases where continuous and irreversible environmental degradation is taking place).

157. *IYER, supra* note 10, at 150-52.

158. See *Rajamani, supra* note 71, at 321.

through PIL. As far as environmental cases are concerned, the claim has not made that personal interest would be at stake.

### B. Defendants

Generally, citizens that use PIL usually proceed against the State, asking that the State take a particular action where regulation has either been unsuccessful or lacked enforcement.<sup>159</sup> This is also true for environmental PIL cases. In most cases, then, the State plays an unusual defendant. Rather than disputing the allegations, the State must also be the court's helpful fact-finder.<sup>160</sup> In that sense, there is no traditional adversarial proceeding in PIL.<sup>161</sup>

PIL plaintiffs may then require the court to order the State to undertake particular action which may have consequences for third parties especially in environmental cases. These third parties are the industries who are usually involved and will have to take action subsequent to the court's order. Remarkably, the industries affected by the court's order often do not appear as defendants in the case.

Consideration of the two following cases helps to illustrate this.<sup>162</sup> In the first case, M.C. Mehta brought an action against Delhi air pollution, citing the dramatic consequences for human health.<sup>163</sup> After a long procedure and much consultation described below, the court ordered the entire city bus fleet to substitute the use of petrol or diesel for the alternative and cleaner fuel, compressed natural gas ("CNG").<sup>164</sup> Although some judicially-authorized consultation by the Environment Pollution Prevention and Control Authority ("EPCA") had taken place, the agency did not consult the private bus operators who were, obviously, affected by the case.<sup>165</sup> Private bus operators felt frustrated by their lack of access to the EPCA and to the court.<sup>166</sup> The private bus operators were more frustrated because they did not formally participate in the proceedings before the

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159. See Sathe, *supra* note 11, at 77-78.

160. *Id.*

161. *Id.*

162. See Rajamani, *supra* note 71, at 298.

163. *Id.* at 298-99.

164. *Id.*

165. *Id.* at 299.

166. *Id.* at 305.

court,<sup>167</sup> and were only notified by the Delhi government fifteen months after the court's order.<sup>168</sup> When stakeholders, who are regulated by a court's order, lack involvement in the court proceedings, information gathering and enforcement problems may result and impede efficient pollution reduction measures.

A similar problem arose in a municipal solid waste management case where, as a result of a court order, the Ministry of the Environment and Forestry ("MOEF") enacted municipal solid waste management and handling rules ("MSW rules").<sup>169</sup> Municipalities across India were not involved in court proceedings and subsequently failed to implement the orders and, subsequent, rules by the deadlines set by the MSW rules.<sup>170</sup>

In both cases, however, the court found a way of involving at least some of the stakeholders. The court has set up a committee specifically created to obtain stakeholder involvement, where possible.<sup>171</sup> Nevertheless, some jurists remain critical of the fact that, in many environmental cases, the court issues orders disadvantaging, and potentially harming, parties who are not formally involved in the proceedings.<sup>172</sup> An example of this can be seen in cases where the court has ordered the closure of polluting industries before the plant owners of such industries were involved and heard before the court.<sup>173</sup>

### C. The Court

#### 1. Information Advantage

##### i. Informational Needs in Cases of Executive Judicial Activism

One question we addressed above is how the Supreme Court of India is able to become involved in environmental policy, given the fact that traditionally administrative agencies are expected to have an

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167. *Id.* at 299 (noting that private bus operators accounted for almost 80% of the public transportation in Delhi).

168. *Id.* at 300.

169. *Id.* at 297.

170. *Id.* at 311.

171. *Id.* at 300-01.

172. IYER, *supra* note 10, at 148.

173. *Id.* (characterizing this as "clearly violative of the basics of natural justice").

informational advantage.<sup>174</sup> If the court were to merely force the government to execute legislated statutes, information problems should not arise, because the environmental standards would have already been set and the court would only be enforcing an existing statute.<sup>175</sup> To some extent, the environmental cases are directed against the government to compel it to fulfill its enforcement duty or to prevent any other illegal government activity.<sup>176</sup>

Hence, in these instances, the Supreme Court made use of existing environmental legislation and, through its actions, confirmed existing legislation, which largely remained ineffective due to a lack of enforcement.<sup>177</sup> One such example is a 1988 case brought by M.C. Mehta against tanneries for the pollution of the Ganga River.<sup>178</sup> The case was brought against tannery owners who were discharging waste-water from their factories into the surface water of the Ganga without first having been filtered by a water treatment plant, despite having been requested to do so for many years.<sup>179</sup> In this case, the court held that the Water Act, an existing statute, required the polluters to maintain proper waste-water treatment facilities; thus,

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174. See *supra* Section V.C.1. In the particular case of India, one should be careful with the assumption that the regulator has better information than the judiciary:

This environmental amnesia of the legislature is due, in a large part, to the absence of adequate scientific studies documenting the threats to health and environment and the future challenges. Authentic studies on the relationship between health and environment are few and far between and the few that are commissioned are often not given due attention. Knowledge on the current perceptions of threat to health from a polluted environment remains appallingly poor. This ignorance has kept the legislatures in a state of indifference to possible pollution hazards, immensely endangering public health.

Dam, *supra* note 102, at 598-99.

175. See also Cha, *supra* note 12, at 205 (stating that the statutes and legislation in India are well-defined and stringent, but the implementation and enforcement have not been efficient).

176. See Sathe, *supra* note 11, at 80; see Cha, *supra* note 12, at 207 (noting that there is criticism for the fact that the courts often do not look to the current legislation for answers to environmental problems, but instead prefer to create their own system of environmental protection).

177. Mehta (Calcutta Tanneries' Matter) v. Union of India, Writ Petition (C) No. 3727 of 1985.

178. *Id.*

179. *Id.*

supporting the correct execution of existing environmental legislation in India.<sup>180</sup>

However, problems with this approach arise where environmental legislation is overtly broad or ambiguous, lacking specific environmental standards.<sup>181</sup> The judicial activism of the court is, in those particular cases, specifically aimed at doing what the executive should have done, that is, executing the law.<sup>182</sup> This is what Anant and Singh refer to as executive judicial activism.<sup>183</sup> Information problems can clearly arise in these instances, since the legislator has merely defined a broad framework, and it is up to the executive to set specific standards using its informational expertise. Critics of the judiciary fulfilling this function, point to court decisions that establish unclear standards that fail to determine acceptable pollution levels. As an example, these critics cite the Court's vague prohibition against "severe pollution or resource degradation."<sup>184</sup> To the extent that the courts provide very specific orders to the executive on how to execute the environmental statutes, other questions arise as to where the court obtains information from and what the optimal environmental standards should be.<sup>185</sup> *Mijin Cha* states that "it is rare that courts rationally balance the struggle between environmental protection and economic development. Moreover, the courts have not

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180. *See Cha, supra* note 12, at 225-26.

181. *See Dam, supra* note 102, at 596-97 (stating that the source of environmental law in India is often international law (which is often rather vague), whereby declarations, treaties and conventions are negotiated for ratification, and which lay down many principles that still wait statutory interpretation). *See generally* DIVAN & ROSENCRANZ, *supra* note 12 (describing the development of environmental law in India).

182. *See* DIVAN & ROSENCRANZ, *supra* note 12. The problem is, however, that the Indian legislator often had a reactive approach to environmental problems and many statutes lacked an effective implementation. *See* Dam, *supra* note 102, at 598-601.

183. Anant & Singh, *supra* note 2, at 4437.

184. *See* Anderson & Ahmed, *supra* note 118, at 337; Cha, *supra* note 12, at 207.

185. Scholars have been critical of the expertise of the courts to act in highly specialised areas. For example, in a non-environmental related area, that of the management of blood banks, the court gave detailed directions on how the banks should collect the blood, store it and offer it for transfusion. There, the question was asked whether the court had the necessary expertise over such a highly specialized issue. Iyer, *supra* note 10, at 147-48.

determined whether there is any acceptable amount of pollution, or any level of risk that will not prove to be a violation.”<sup>186</sup>

*ii. An Example: The Delhi Vehicular Pollution Case*

In the Delhi vehicular pollution case, Mr. Mehta initiated the case, arguing that pre-existing environmental laws obligated the government to take steps to reduce Delhi’s air pollution in the interest of public health.<sup>187</sup> However, the case clearly demonstrates that the court was willing to go further than merely compelling government action, which it was already forced to do by law.<sup>188</sup> Since the court also determined how the air quality in Delhi should be improved, information problems concerning the court’s expertise, or lack thereof, can be raised. In the Delhi vehicular pollution case, the question of how the government should order polluters to reduce air pollution must be asked. There, the court went well beyond the mere contents of a positive duty to act by examining, *inter alia*, technologies worldwide, available technologies in India to order the conversion of the entire bus fleet in Delhi to CNG.<sup>189</sup> The vehicular pollution case does not stand alone as a singular example of the Supreme Court moving beyond mere execution of prior existing legislation; other cases demonstrate similar behavior.<sup>190</sup>

Certain jurists are critical of the court engaging in this practice because while they acknowledge that the court may be the arm of progress in environmental protection, but their action result in further alienating the court from the administration.<sup>191</sup>

*iii. Legal Basis*

The legal basis for the judicial activism by the Indian Supreme Court can be found in the possibility of judicial review provided for

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186. Cha, *supra* note 12, at 206.

187. See Rajamani, *supra* note 71, at 298.

188. *Id.*

189. *Id.*, at 298-99.

190. See, e.g., Mehta v. Union of India, Writ Petition (C) No. 4677 of 1985.

191. See Cha, *supra* note 12, at 217-18 (stating that by publicly criticizing the administration, the court reinforces the people’s distrust towards the administration).

in Article 13 (1) of the Indian Constitution.<sup>192</sup> Article 13 (2) further provides that states shall not make any law that takes away or abridges any of the fundamental rights and that laws made in contravention shall be void.<sup>193</sup> However, the cases discussed above illustrate that the Supreme Court of India does not merely “review” legislation, but goes much further by either legislating where the legislator has been silent (“legislative judicial activism”) or by executing the law where the executive fails to do so (“executive judicial activism”).<sup>194</sup> That raises, from an economic perspective, the type of information problems we refer to here.

#### *iv. Dealing with Information Problems*

The court has a variety of ways to deal with the information problem. For example, in the *Municipal Solid Waste Management* case, the court set up a committee involving both the Ministry of Urban Development (“MOUD”) and the Ministry of Environment and Forest (“MOEF”); the court can rely on the available expertise within these ministries.<sup>195</sup> Also in the Delhi vehicular pollution case, the court directed MOEF to set up a committee chaired by Justice Sankaria to assess technologies worldwide and available technologies in India in order to recommend “low cost alternatives for operating vehicles and reduced pollution levels in the metropolitan cities of India”<sup>196</sup> In both cases, the court relied on the input of stakeholders by having them serve on the committees. For example, in the vehicular pollution case, the committee contained high-ranking bureaucrats, an NGO, and a representative of the automobile industry.<sup>197</sup>

To some extent, these committees inform the court of appropriate measures to reduce pollution effectively, which the court issues as orders.<sup>198</sup> These orders often have a lasting influence.<sup>199</sup> In some

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192. See DIVAN & ROSENCRANZ, *supra* note 12, at 130-32 (providing examples of the application of judicial review in environmental cases); see also RAZZAQUE, *supra* note 4, at 186.

193. Sathe, *supra* note 11, at 38-39.

194. Cha, *supra* note 12, at 220 (stating that the Court goes much further and oversteps the power given to it through the doctrine of judicial review).

195. Rajamani, *supra* note 71, at 297.

196. *Id.* at 298.

197. *Id.* at 303.

198. See Cha, *supra* note 12, at 207.

cases, the Supreme Court follows a case on a long term basis and adapts its orders to incorporate increasing information provided by the committees.<sup>200</sup> Hence, the information provided by the committees and the adaptation of the decisions to this information enables, at least in theory, a learning process where the quality of the decision-making by the courts increases due to input by experts.<sup>201</sup>

## 2. Legitimacy

The strong involvement of the court over a long period of time effectively leads to the judiciary replacing the executive as environmental policy maker. This raises significant questions of the legitimacy and accountability of the court to fulfil this role. Sathe notes that the Indian Supreme Court not only makes law through statutory interpretation, but also in the sense that it “actually legislates.”<sup>202</sup> The Court thereby “transcended the limits of the judicial function and has undertaken functions which really belong to either the legislator or the executive. Its decisions clearly violate the limits imposed by the doctrine of separation of powers.”<sup>203</sup> This role of the court is criticized for the simple reason that the court lacks the institutional equipment for undertaking legislative or administrative functions,<sup>204</sup> and is considered a problem because judges are not elected, and therefore, not accountable to any constituency.<sup>205</sup> In some cases, the court seems to ignore legislation and sets up its own committee; for example, to report on the quality of the limestone quarries.<sup>206</sup> This is especially problematic in cases where the court

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199. See, e.g., *Mehta v. Union of India (Calcutta Tanneries' Matter)*, Writ Petition (C) No. 3727 of 1985; *Mehta v. Union of India*, Writ Petition (C) No. 4677 of 1985.

200. An essential feature of the PIL is the court's post-litigation monitoring of its orders. See Iyer, *supra* note 10, at 142.

201. Cha, *supra* note 12, at 221-22 (stating that the interventions of the court, even though well meant, are often ineffective since the courts do not possess the necessary expertise to deal with the issues at hand).

202. Sathe, *supra* note 11, at 88.

203. *Id.*

204. *Id.* at 89.

205. *Id.* at 105; see also Cha, *supra* note 12, at 210 (stating that by creating legislation the court bypasses the democratic process and has no accountability to the general public).

206. Cha, *supra* note 12, at 213.

does not enforce India's existing environmental legislation, but creates its own environmental rules.<sup>207</sup>

This is also clear in the environmental cases where the court establishes itself as the main protector of the environment and undertakes tasks that go far beyond the judicial function.<sup>208</sup> For example, in the Delhi vehicular pollution case, the court not only ordered the entire city bus fleet to convert to CNG but also considered the issue of CNG pricing.<sup>209</sup> Thus, in many cases where formal legislation is lacking, the court has no problem with making law; for example, by defining guidelines to prevent sexual harassment in the work place.<sup>210</sup>

The examples show that in practice the Supreme Court goes far beyond the traditional competencies of a judiciary, violating the separation of powers, which raises fundamental questions of legitimacy and accountability.<sup>211</sup>

Even commentators, who realize the terrible state of the environment in India and, accordingly, appreciate the courts' effort to improve environmental quality, are quite critical of the role played by the Court as a super-executive.<sup>212</sup> Dam is especially critical of the fact that the court introduced various principles, such as the polluter pays-principle and the precautionary principle, via case law into Indian environmental law even though these principles have had little or no history in India.<sup>213</sup> He therefore, qualifies the judicial activism in the environmental area as a "usurpation process."<sup>214</sup>

Still, one has to make a distinction between whether the legislation-like "judicial activism" violates the principle of the separation of

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207. *Id.* at 214 (stating that the court is in this way also taking away the power of the legislation from the legislature and granting it to the judiciary) (citing *Mehta v. Union of India*, Writ Petition (C) No. 860 of 1991).

208. *Rajamani*, *supra* note 71, at 318 (citing *Rosencranz & Jackson*, *supra* note 131).

209. *Id.* at 313.

210. *Id.* at 316-17.

211. This issue goes beyond the scope of this paper. For a detailed discussion of the legitimacy of judicial activism, see *SATHE*, *supra* note 6, at 249-311.

212. *See Dam*, *supra* note 102, at 605 ("Irrespective of the success or failure of such a course of action, the executive role of the court has been questioned, not without valid reasons altogether.").

213. *Id.* at 608, 612.

214. *Id.* at 609-10.

powers and whether the court has legitimacy in India. Given the fact that most authors agree that the Supreme Court often takes the place of the executive and even of the legislator, this judicial activism is undoubtedly problematic from the perspective of the separation of powers.<sup>215</sup> This raises questions about the accountability of the court for the decisions it makes, since it cannot, like the legislator, be held accountable through general elections for wrongful actions. It has to be distinguished, however, from the degree of legitimacy the court enjoys among the Indian public. In that respect, scholarship agrees that, thanks to the rhetoric about the need to protect the poor and the dispossessed, the Court undoubtedly was able to build up a strong legitimacy among the Indian public.<sup>216</sup> However, it is equally held that the Supreme Court's legitimacy "is a legitimacy acquired largely by default."<sup>217</sup> That, of course, refers to the fact that the Supreme Court has stepped in where the representative institutions have largely failed. The issue of legitimacy is very subjective. Where one author observes that the Supreme Court enjoys high legitimacy among the Indian public,<sup>218</sup> another states that the courts approach towards PIL results in a loss of legitimacy.<sup>219</sup>

### 3. Independence

We previously mentioned that it is easy to wonder how, in a developing country, such as India, with capacity and corruption problems in the executive branch,<sup>220</sup> the judiciary has apparently gained such a moral status that it can effectively act where politicians

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215. *See, e.g.,* Iyer, *supra* note 10, at 159.

216. *Id.* at 161-62.

217. *Id.*

218. *Id.*; *see also* G.H. Gadbois, *The Supreme Court of India as a Political Institution*, in *JUDGES AND THE JUDICIAL POWER: ESSAYS IN HONOUR OF JUSTICE V.R. KRISHNA IYER*, 250, 258-59 (R. Dhavan, R. Sudarshan & S. Khurshid eds., 1978).

219. *See* Cha, *supra* note 12, at 208 (stating that this is the case "due to what may be perceived as a biased and extra-jurisdictional approach").

220. Corruption problems or (to put it mildly) the influence of private interests over the executive and, more particularly, the Central Pollution Control Board, the agency responsible for the implementation of environmental law in India, are well-documented: the members of the board have no tenure and no financial independence, *see* Dam, *supra* note 102, at 599, and "a corrupt liaison between the board and the industrial lobby has made the pollution law an ideal cover for private profit. Rather than punish, the laws protects polluters." *Id.* at 602.

and administrators fail. The traditional answer in law and economic scholarship is that this can only happen in an environment that guarantees the court's independence, preventing judges from being subject to the same corruption problems as politicians or bureaucrats.<sup>221</sup> It would go beyond the scope of this article to examine why it has apparently been possible to realize in India what has traditionally been a major problem in other south-east Asian developing countries, like Indonesia.<sup>222</sup> However, the cases previously mentioned show that the justices of the Supreme Court have no difficulty of acting *de facto* independently by ordering the government to take measures to reduce air pollution in Delhi,<sup>223</sup> or to reduce the discharge of polluting substances into the Ganga River.<sup>224</sup> Sathe provides a few historical reasons why the judiciary in India has, since the early years of the independence, developed itself as a defender of the young democracy.<sup>225</sup> Some guarantees suggested by law and economic scholarship are incorporated into the Indian model.<sup>226</sup> In this respect we can point to the fact that a judge may only be removed on the very specific grounds of misbehaviour or incapacity, which are assessed by a quasi-judicial body.<sup>227</sup> Politicians cannot remove a judge unless a charge of misbehaviour would have been found valid by the committee.<sup>228</sup> Also, the privileges or allowances, including the pension rights of the judge cannot be varied to his disadvantage after his appointment.<sup>229</sup>

In a recent study, Hayo and Voigt explain *de facto* judicial independence.<sup>230</sup> They develop parameters for examining both *de*

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221. See Eli Salzberger & Paul Fenn, *Judicial Independence: Some Evidence from the English Court of Appeal*, 42 J.L. & ECON. 831, 831-47 (1999).

222. See, e.g., POMPE, *supra* note 95.

223. See *Mehta v. Union of India*, A.I.R. 1998 S.C. 63.

224. See *Mehta (Calcutta Tanneries' Matter) v. Union of India*, Writ Petition (C) No. 3727 (1985).

225. Sathe, *supra* note 11, at 99-106.

226. Iyer, *supra* note 10, at 124.

227. *Id.*

228. *Id.*

229. *Id.*

230. See Bernd Hayo & Stefan Voigt, *Explaining De Facto Judicial Independence*, 27 INT'L REV. L. & ECON. 269, 269-90 (2007).

*juri* and *de facto* independence.<sup>231</sup> Not surprisingly, India scores reasonably well in that empirical test.<sup>232</sup>

Again, the independence and quality of the judiciary has to be compared with the independence of executive agencies. In that respect, the literature in India reports that the implementation by the Pollution Control Boards can be qualified as one "tale of inefficient implementation."<sup>233</sup> Notwithstanding severe health effects, like the consumption of arsenic contaminated water and the consumption of vegetables containing large quantities of pesticides, regulatory bodies always showed an aversion to challenge entrenched commercial interests.<sup>234</sup> It is not surprising that in this environment where the Pollution Control Boards have no functional or financial independence from commercial and political interests, better results are obtained through an intervention by the independent judiciary.

#### 4. The Court versus Executive

A question that we raised above asks how it is possible that the Supreme Court is able to do what it is doing, and why politicians and bureaucrats comply with the orders of the Court to such a large extent in environmental matters. Some of this has to do with the moral status of the Court resulting from its independence.<sup>235</sup> Another aspect is related to the instruments available to enforce its orders, which we will elaborate on in Section VII.E, but there are other reasons why politicians generally accept the Court's judicial activism. Sathe states that none of the political players have strongly protested against judicial intrusion into matters that essentially belong to the executive.<sup>236</sup> One reason may be that political players deem the courts to be better arbiters than politicians in matters involving conflict between various competing interests.<sup>237</sup> Thus, a traditional public choice explanation could be provided for the success of the Court: politicians may simply fear losing votes either when they favor environmental interests too strongly over the interests of trade

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231. *Id.* at 271.

232. *Id.* at 287.

233. Dam, *supra* note 102, at 601.

234. *Id.* at 601-05.

235. Sathe, *supra* note 11, at 89.

236. *Id.*

237. *Id.*

unions and industry, or the reverse could occur if they favour industrial interests too clearly.

Notwithstanding the fact that politicians do not generally criticize judicial activism, it has become a subject of controversy in India and some attempts have been undertaken to hinder the power of the courts.<sup>238</sup> However, none of these attempts has stopped judicial activism resulting from PIL in the environmental field.<sup>239</sup> One jurist has argued that even though the court may be inspired by the urge to protect public health, for example, against the carcinogenic effects of suspended particles in the air, “implementation of such norms cannot be achieved without the active and willing participation of the executive.”<sup>240</sup>

#### D. What the Supreme Court Orders

The specific environmental cases illustrate the orders of the Supreme Court. The orders are usually directed against the government or public authorities.<sup>241</sup> The Constitution gives the Supreme Court and the high courts the power to use “directions, orders or writs” for achieving the objectives of those articles.<sup>242</sup> Thus, the Court can issue specific orders to parties to act or refrain from taking specific action.<sup>243</sup> For example, in *Mehta v. India* the Court asked the government of India to explain why a large part of the toll tax and the visitor’s fees received from tourists visiting the Taj Mahal should go to the Agra Development Authority instead of being spent on the preservation of the Taj Mahal and the cleaning of the city of Agra.<sup>244</sup> As in the *Delhi Vehicular Pollution* case, the court ordered in July 1998 the entire city bus fleet to specifically replace petrol and diesel with CNG by March 31, 2001.<sup>245</sup>

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238. *Id.* at 30.

239. Iyer, *supra* note 10, at 163 (“[E]ven the bitterest critic of the judiciary will find it hard to deny is that neither the legislature nor the executive in India has ever resorted to a tactic of sidelining the Supreme Court by ignoring its interventions.”).

240. Dam, *supra* note 102, at 611.

241. *See, e.g., Mehta v. Union of India*, Petition (C) No. 3727 of 1985 (ordering the government to enforce an order requiring tanneries to set up treatment plants); *see also supra* Section VII.B.

242. INDIA CONST. art. 226.

243. Sathe, *supra* note 11, at 84.

244. *Id.* at 83.

245. Rajamani, *supra* note 71, at 299.

In many cases, the court orders that are directed at public authorities are very detailed and provide the authorities a clear instruction on how to follow the order.<sup>246</sup> For example, in the *Kampur Tanneries* case,<sup>247</sup> the Court asked the central government to direct all the educational institutions to teach lessons relating to the protection and improvement of the natural environment for one hour per week and instructed the central government to have textbooks written for that purpose and to distribute them free of costs.<sup>248</sup> In the *Calcutta Tanneries* case, the Court set a deadline for the closure of the polluting tanneries,<sup>249</sup> ordered the state government to set-up a unified single agency consisting of all departments concerned, and directed the state government to appoint an authority to assess the ecological loss.<sup>250</sup> These orders clearly show that the Court does not hesitate to explain to the executive exactly how it should act, which then casts doubt on the separation of powers.

### *E. Enforcement*

A crucial question is how one can guarantee that there is compliance with court orders. Article 141 of the Indian Constitution provides that the law declared by the Supreme Court shall be the law of the land.<sup>251</sup> The high courts have held that this is not only the case for the *ratio decidendi*, but even for the *obiter dicta* of the Supreme Court; the orders of the Supreme Court are therefore also the law of the land.<sup>252</sup> That, of course, does not immediately answer the question why defendants or third parties comply. The most important reason is that in India, there is a strong fear of being held in contempt by the court, a risk that the defendant and any others who are affected by the court's order run.<sup>253</sup> For example, in the *Delhi Vehicular Pollution* case, the Delhi buses that could not comply with the court's order to switch to an alternative fuel engine simply stayed off the roads to avoid being held in contempt.<sup>254</sup> Similarly, in the municipal

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246. See, e.g., *Mehta v. Union of India*, A.I.R. 1998 S.C. 103.

247. *Id.*

248. Dam, *supra* note 102, at 610.

249. *Metha v. Union of India* (1997) 2 S.C.C. 411.

250. Dam, *supra* note 102, at 610.

251. INDIA CONST. art. 141.

252. Sathe, *supra* note 11, at 86.

253. See *Desai*, *supra* note 9, at 37-39.

254. *Rajamani*, *supra* note 71, at 300.

waste case, municipalities across India reacted with panic to the threat of contempt proceedings and actively began implementing the court's orders.<sup>255</sup>

Of course, the court tries to facilitate compliance with its orders by, for example, providing an implementation schedule.<sup>256</sup> Particularly, in the municipal waste case, the Court ordered, compliance with the new MSW rules on October 3, 2000, which required the development of waste processing and disposal facilities by December 31 2003, improvement of existing landfill sites by December 31 2001, and the identification of landfill sites for future use by December 31, 2002.<sup>257</sup> Notwithstanding these timelines and schedules, municipalities underwent great difficulty to meet these court-imposed deadlines.<sup>258</sup>

In the *Delhi Vehicular Pollution* case, the Court used the instrument of the penalty payment to enforce its decision. The Court ordered private diesel buses to pay fines of Rupees 500 per day in case of non-conversion to CNG.<sup>259</sup>

One important aspect of the environmental PIL is that the Court, itself, monitors the compliance of its orders.<sup>260</sup> This involves the appointment of magistrates or other judicial officers to conduct periodic on-site visits whereby compliance is verified.<sup>261</sup> The results are reported back either to the Supreme Court or to a designated high court.<sup>262</sup> Thus, fear of formal penalties is likely not the only reason that third parties comply with court orders. Given the general respect for decisions of the Supreme Court, compliance with its orders seems to be a social norm.<sup>263</sup>

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255. *Id.* at 311.

256. *See* Desai, *supra* note 9, at 36-37.

257. Rajamani, *supra* note 71, at 297.

258. *Id.* at 311-12; *see also* Cha, *supra* note 12, at 206 (“[R]ulings and recommendations of the courts are in some cases ‘as impossible to implement and enforce as the current legislation.’”).

259. Rajamani, *supra* note 71, at 301.

260. Iyer, *supra* note 10, at 142.

261. *Id.*

262. *Id.*

263. *See* ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 438-40 (4th ed. 2004) (describing the importance of social norms as inducing compliant behaviour); ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBOURS SETTLE DISPUTES* (1991); ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

## VIII. ANALYSIS

A. *Efficiency versus Effectiveness*

## 1. Efficiency

Even if evidence proves that PIL in India reduces pollution levels, this does not mean that pollution levels would necessarily be reduced to efficient levels. Indeed, we did not make any analysis of what efficient pollution levels in India would be, and whether the PIL is the ideal instrument to reach that goal. In practice, it is probably impossible to test the efficiency of PIL, and specifically whether PIL is the legal instrument that optimally contributes to maximizing social welfare. There are, however, a number of papers by economists that have addressed the theoretical effect of PIL on social welfare. Anant and Singh do not make a specific welfare analysis, but suggest that judicial activism, which is broader than the PIL we address in our article, can have some virtues but may also lead to raising social costs.<sup>264</sup> In another paper, Mishra and Anant show that judicial activism can, under some circumstances, be welfare improving, whereas excessive activism may reduce welfare.<sup>265</sup> However, that paper merely models judicial activism under various circumstances.<sup>266</sup> Papers that actually examine whether PIL of the type developed by the Supreme Court of India increases or decreases social welfare have, to our understanding and research, not been undertaken yet. This may have to do with methodological problems in testing it empirically.

At best, one can test whether PIL has actually reduced pollution levels. Even if one were to find such environmental effectiveness,<sup>267</sup> this is conclusive from an economic perspective unless the price to reach a reduction of environmental pollution is the lowest compared to alternative solutions. Hence, in addition to addressing the environmental effectiveness of PIL, one should also consider its cost-effectiveness by addressing whether in this particular case the goal of

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264. Anant & Singh, *supra* note 2, at 4438-39.

265. Ajit Mishra & T.C.A. Anant, *Activism, Separation of Powers and Development*, 81 J. DEV. ECON. 457, 457-77 (2006).

266. *Id.*

267. See Section VIII.A.2.

reducing pollution levels set by the court or legislator has been attained at the lowest possible costs.<sup>268</sup>

## 2. Environmental Effectiveness

Whether PIL and actions of the Indian Supreme Court have effectively reduced pollution levels in the cases where the court intervened must be determined. The evidence is not overwhelming. On the one hand, the possibility that a court will intervene in a pollution case is inherently limited by the fact that the court can only act when a relevant case is brought and does not have the same ability a legislator or administrative authority has to regulate pollution levels more generally.<sup>269</sup> Sathe notes that the court “cannot stop entirely the degradation of the environment or government lawlessness. Its actions in these areas are bound to be symbolic.”<sup>270</sup> Nevertheless, there is empirical evidence that the Indian Supreme Court’s orders have led to a substantial reduction of pollution levels.<sup>271</sup> Raja and Xavier argued that the decisions of the Supreme Court in the Delhi vehicular pollution case have led to substantial improvements of the air quality in Delhi.<sup>272</sup> Also, Rajamani states that the decisions of the Supreme Court in the municipal solid waste management and Delhi vehicular pollution cases have led to visible improvements in solid waste management in cities and air quality in Delhi.<sup>273</sup> The same is argued by Dam; after first having described in detail the terrible state of the environment in India and the total inability of the legislator and executive to provide an adequate response, Dam qualifies the environmental case law of the Supreme Court as “a judicial cleaning-up of the environment.”<sup>274</sup>

Nevertheless, the actions of the Supreme Court in this respect do not go undisputed. Above, we mentioned that a lack of involvement of stakeholders, especially the defendants, led not only to frustration, but also to delays in the implementation of the court’s decisions.<sup>275</sup>

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268. See Section VIII.A.3.

269. Sathe, *supra* note 11, at 89.

270. *Id.*

271. Raja, *Economic Efficiency*, *supra* note 3, at 16-18.

272. See sources cited *supra* note 3.

273. Rajamani, *supra* note 71, at 319.

274. Dam, *supra* note 102, at 605.

275. Rajamani, *supra* note 71, at 299-300.

Rajamani contends that the Court's decision to force Delhi bus companies to convert to CNG initially led to chaotic situations where buses had to travel forty kilometres and spend several hours queuing up outside CNG dispensing stations, since too few were available, leading to fewer buses being available.<sup>276</sup> The central government also pleaded that there was a resulting shortage of CNG, which made it impossible to convert all vehicles within the time limits set by the court.<sup>277</sup>

Furthermore, the general propriety of courts' legislating efforts has been questioned.<sup>278</sup> The main concern being the overall development of healthy governmental practices; the fear is that the case law may invade the traditional domain of the other governmental branches, which may retard the evolution of a responsible bureaucracy.<sup>279</sup>

### 3. Cost Effectiveness

From an economic perspective, it is especially important to know whether PIL is cost-effective, in the sense that the environmental results are reached at the lowest costs possible. This question has two separate parts: (1) whether the measures imposed as a result of the Supreme Court ruling were cost-effective so that the contents of the environmental measures ordered by the court gave incentives to operators to reach the reduction of pollution levels at lowest cost possible; and (2) whether PIL is the lowest cost alternative to reach this particular goal.

#### *i. Cost Effectiveness of Public Interest Litigation*

Regarding PIL's affordability, information on the precise costs of PIL is not known. One could argue that these costs could be substantial, given that the Supreme Court has in some cases ordered several rulings, involved many committees, and, in one instance, had to follow-up on a case for many years.<sup>280</sup> The administrative costs

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276. *Id.* at 308. This constituted an equity problem since it was particularly the people relying on public transit who initially suffered from the decision.

277. *Dam, supra* note 102, at 611.

278. *Id.*

279. *Id.* at 611-12 (citing *Murli Deora v. Union of India* (2001) 8 S.C.C. 766) (highlighting the prohibition against smoking in public places, which the author doubts would have resulted through a judicial decision).

280. *Raja & Xavier, Economic Efficiency, supra* note 3, at 20.

required for a functioning judiciary, thus, can be substantial. In contrast, the essence of private interest litigation is that a plaintiff can start the proceedings at a relatively low cost, and that the administrative costs of PIL should not necessarily be larger than the costs of running a functioning regulatory system.<sup>281</sup> In regulation, an administrative agency needs to intervene to set regulatory standards for the entire industry, and it needs to install monitoring, enforcement and compliance systems. Hence, even without precise cost-benefit data, one can intuitively argue that the administrative costs of PIL should not necessarily be higher than the costs of reaching the same goals via the regulatory system.

There remains, however, a question as to whether PIL is filed by the same type of petitioners, what some would characterize as a “clique.”<sup>282</sup> The danger of having the same plaintiffs is that the court may hear only one particular type of argument, which could bear on, potentially negatively, the quality of the decision-making.<sup>283</sup>

#### *ii. Cost Effectiveness of the Measures Imported*

Rajamani notes that in the Delhi vehicular pollution case, the court imposed an extremely high cost option without examining whether lower cost alternatives were available.<sup>284</sup> She argues that even though CNG is an environmentally friendly fuel, it is also extremely costly and emits more greenhouse gases than a comparable diesel vehicle.<sup>285</sup> Notwithstanding the introduction of the CNG program, there still was a 21.3% increase in lung diseases in Delhi and a more than a 20% increase in asthma attacks,<sup>286</sup> thus, casting further doubt on the cost-effectiveness of the measure ordered by the court.

Rajamani formulates a similar criticism with respect to the Court’s ruling in the municipal solid waste management case.<sup>287</sup> She argues that the rules do not contain incentives either to promote recycling or to minimize waste since the rules basically permit the processing of waste through incineration, leading potentially to large emissions of

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281. Sathe, *supra* note 11, at 72-73.

282. Rajamani, *supra* note 71, at 305.

283. *Id.* at 305-06.

284. *Id.* at 308.

285. *Id.* at 312-13.

286. *Id.* at 312.

287. *See id.* at 309-14.

dioxins.<sup>288</sup> Moreover, Rajamani criticises the Court for imposing a relatively high-cost environmental solution, which may not correspond with the preferences of the citizenry, but rather to the preferences of the middle-class judiciary of which the Supreme Court in India consists.<sup>289</sup> A similar concern is raised by Iyer, who argues that PIL “has become a means for the advancement of middle-class concerns rather than an instrument for the liberation of the poor and the oppressed, as it was originally conceived.”<sup>290</sup>

### *B. Indicators for an Effective Public Interest Litigation*

#### 1. The Case of India

Having analyzed the cost-effectiveness of some of the environmental cases in which measures were ordered by the Supreme Court of India as a result of PIL, we have arrived at the following conclusions. Thanks to the Court’s PIL rulings, pollution levels in India have decreased, which probably would not have been realized through the existing legislative and regulatory system.<sup>291</sup> In that sense, some of these rulings must have been effective. On the other hand, the contents of the rulings may not always have been “optimal” in the economic sense, since the alternative imposed by the Court may not always have been the lowest cost option to achieve the stated goal.

Rajamani presents another nuanced conclusion. She argues that “in a system in which policy-makers and law-enforcers are perceived as apathetic, if not corrupt, and politicians are perceived as opportunistic demagogues rather than as visionary leaders” the Supreme Court of India has performed extremely well, as far as providing environmental protection is concerned.<sup>292</sup> This judicial activism is,

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288. *Id.* at 309-10.

289. *Id.* at 303.

290. Iyer, *supra* note 10, at 160.

291. Environmental PIL in India should always be examined against the background of the devastating environmental quality in India, the “environmental amnesia of the legislature,” and the capture of the executive and Central Pollution Control Board by private interest. Dam, *supra* note 102, at 598-602.

292. Rajamani, *supra* note 71, at 293.

therefore, qualified as a “*chemotherapy for the carcinogenic body politic.*”<sup>293</sup>

Given the many problems encountered at the regulatory level, the Supreme Court of India has, consequently and clearly, filled a gap where regulation failed. This seems to correspond with traditional environmental economic literature on the choice of instruments, since private law solutions are advanced where regulatory solutions have been unsuccessful.<sup>294</sup>

However, besides not being cost-effective, other criticisms are levied against environmental PIL, particularly where the judiciary tries to substitute judicial governance for executive governance, PIL is not the optimal approach to reaching sustainable environmental solutions. Here, the judicial decisions are reactive,<sup>295</sup> rather than proactive, possibly resulting in the underdevelopment of a responsible and independent bureaucracy.<sup>296</sup> Dam stresses this point by arguing that “it is unlikely that any of these decisions have sensitised the executive to act with greater alacrity in environmental matters. The only effect may have been to retard the possible evolution of responsible bureaucracy.”<sup>297</sup> Dam continues, “the cases have become a crutch, preventing the growth of strong bureaucracy. despite more than a decade of judicial activism there is no indication of a better performance by the Pollution Control Boards,”<sup>298</sup> and concludes “the future may not be as green as the court may wish for.”<sup>299</sup>

Given the inability of the judiciary to provide a long-term judicial oversight and given its inability to act proactively, the judiciary’s tendency to position itself as the main protector of the environment

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293. *Id.* at 295; *see also* Desai, *supra* note 9, at 40 (“The judiciary has to deal with these issues due to failure on the part of administration.”).

294. *See* GUNNINGHAM & GRABOSKY, *supra* note 31, 422-53 (discussing the mix of instruments).

295. Dam, *supra* note 102, at 598. Again this may generally be true, but in the particular case of India it is reported that “the legislature’s approach to pollution laws has been principally reactive.” *Id.*

296. Rajamani, *supra* note 71, at 315; *see also* Cha, *supra* note 12, at 215 (stating that by bypassing procedural standards and regulations, the court is contributing to the inefficiency of governmental action).

297. Dam, *supra* note 102, at 611.

298. *Id.* at 612.

299. *Id.*

can be counterproductive in the long run because no sustainable solution is achieved.<sup>300</sup>

While, as a result of judicial activism of the Indian Supreme Court, environmental quality may have slightly improved, general environmental conditions in India are still dramatic and often hazardous. India is likely to have forty-two million asthma patients by 2010 and serious threats to public health still occur as a result of pollution and hazardous waste.<sup>301</sup> This demonstrates that alone judicial activism is not enough; other legislative, regulatory and enforcement mechanisms are required to achieve sustainable environmental solutions.

## 2. In General

Lessons can be drawn from these environmental PIL cases, and these lessons can play a positive role in shaping future environmental policy, especially in developing countries like India. Previous writings have indicated that at certain branches and tiers of government, whether it be at the federal, state or local level, regulatory efforts can be ineffective because of capacity or corruption problems. Thus, it is important to choose the appropriate instrument and level of government to avoid those issues and successfully implement regulatory policy.<sup>302</sup> The result is that when capacity and corruption problems are considered, a secondary solution, which deviates from traditional law and economics solutions, may be chosen. The relative success of PIL in India fits into this strand of literature. Whereas the use of administrative or legislative regulation represents an ideal solution for environmental problems,<sup>303</sup> it may not be politically feasible where serious capacity or corruption problems exist. In those situations, it may be better to consider secondary solutions, if other levels of government or instruments are less vulnerable for the mentioned problems.

India's experiences show that where the legislative and administrative bodies are unable to implement an effective environmental policy, the judiciary, and more particularly the Supreme Court, has stepped in to provide this secondary solution. To

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300. See Rosencranz & Jackson, *supra* note 147, at 249.

301. Dam, *supra* note 102 at 594-95.

302. See Ogus, *supra* note 300; Ogus, *supra* note 26; Schäfer, *supra* note 23.

303. See Shavell, *supra* note 22, at 368-70.

a large extent, this complies with the suggestions made in the literature discussed.

However, it is equally clear that this second-best approach will likely only work for in the short term, with the long term objective being regulatory solutions. Indeed, given the reactive rather than proactive nature of court decisions and given the informational advantage regulators possess, court interventions may be effective only to the extent they act as a remedy to executive apathy. In the long run, the executive should step in to provide more sustainable solutions. Moreover, the India example shows that the judiciary may lack the necessary expertise and information to conduct a proper cost-benefit analysis, which is required to set cost-effective environmental standards. This is supported by the fact that the Supreme Court of India often does not engage in formal standard setting, but rather broadly prohibits "serious pollution."<sup>304</sup> To the extent that the judiciary's standards are ineffective, the executive may still have to step in and execute more precise standards. If all PIL achieves is stimulating the executive to take action where it previously abrogated responsibility, it still plays a significant and positive role in promoting sound environmental policy.

### 3. Lessons

Combining the experiences of the Indian cases with the framework provided in the law and economics literature discussed above, a number of lessons can be drawn out that point to the circumstances where environmental PIL may be effective. The following summarizes those circumstances in addition to outlining situations where PIL's effectiveness can be increased.

*First*, given the presumed informational advantage of regulatory and administrative authorities to set environmental standards in a cost-effective way, environmental standard setting through the judiciary should only take place as a secondary option; that is, when capacity or corruption problems threaten to render a regulation or standard unenforceable.

*Second*, the example of the Indian Supreme Court demonstrates that when judicial standard setting takes place, protections should be introduced to ensure that the judiciary has the necessary information

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304. See Cha, *supra* note 12, at 216-21.

to established cost-effective standards. One way to do this is to make use of advisory committees. However, one should be careful that the judiciary does not intervene in the functioning of the market, e.g., by fixing prices for specific commodities, like CNG.

*Third*, in order to obtain a guarantee of cost-effective standard setting and a guarantee of effective compliance and enforcement, high stakeholder involvement in the court's decision making is encouraged, either by having stakeholders involved in the committees or by allowing them to provide information, for example, as *amicus curiae*, on various alternative environmental options.

*Fourth*, reliance on the court and judicial activism via PIL only makes sense in cases where it is clear that the problems that occur at the level of the legislator or executive do not occur in the same way with the judiciary.<sup>305</sup> Hence, when PIL is used as a method for environmental standard setting, judicial independence should guarantee that better results are achieved.

*Fifth*, given the fact that a court only acts pursuant to the case raised before it, PIL-based standard setting can only be a temporary solution where the legislative and executive systems have failed. Ideally, judicial activism should trigger the regulatory and administrative authorities into action. Indeed, in the long run, sustainable environmental solutions are best achieved through regulatory standard setting.<sup>306</sup>

## IX. CONCLUSION

The Supreme Court in India is known worldwide for its judicial activism, especially in the environmental arena.<sup>307</sup> A plaintiff litigator, like Mr. Mehta, is now considered an environmental hero and many consider PIL as an excellent tool to further environmental

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305. In many developing countries, serious corruption or capacity problems arise with the judiciary as well. Hence, one can predict that in those legal systems PIL may not have the same success as in India. Above, we provided the example of Indonesia where serious problems with the judiciary exist and, not surprisingly, environmental PIL has not developed in the same manner as in India.

306. *Cf. id.* at 222 (stating that progress in environmental protection in India can only be achieved when the court tries to work with and not against the current legislative regime).

307. *See, e.g.,* Iyer, *supra* note 10, at 141 (quoting C.E. Cunningham's qualification of the Indian Supreme Court as "the world's most powerful court").