

# AN ECONOMIC ANALYSIS OF THE EFFICIENCY AND FUNCTIONING OF JUDICIAL ACTIVISM (PILS) IN INDIA

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*"A little incursion into law-making interstitially, as Holmes put it, may be permissible."*<sup>1</sup>

## 1. INTRODUCTION

It is from this concept that judicial activism emanated and found expression through judgments of 'activist' judges. The Indian judges have taken upon themselves the task of ensuring maximum freedom to the masses and in the process, to galvanize the executive and the legislature to work for public good.<sup>2</sup> One of the meanings of judicial activism is that the function of the court is not merely to interpret the law but also to mould it according to the passion for social justice.<sup>3</sup>

It has been argued that 'Judicial Activism', by the Hon'ble Supreme Court in particular, has been substituted for the improper functioning of the executive and the legislature. The matters include environmental protection, human rights, fundamental rights, public welfare rights, compensation for the victims, etc. Such a 'Constitutional coup' where one institution (judiciary) replaces the other (the legislative and the executive), is arguably against the doctrine of separation of powers or minimization of the 'transaction costs'.

The researcher will discuss how the judiciary in India has played an active role in guaranteeing various welfare rights to the public at large. Judicial activism in the form of Public Interest Litigation (PIL) has made easy-accessibility to justice in every corner of the society. It will show how the judiciary has stepped in whenever the legislative and the executive failed or lacked in ensuring the public welfare rights in the society.

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<sup>1</sup>Justice BN Srikrishna, 'Highways and Bye-Lanes of Justice' (2005) 8 SCC (J) 3.

<sup>2</sup> Arpita Saha, 'Judicial Activism In India: A Necessary Evil' (2008) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1156979](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156979)&[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1156979](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156979)&http:>/ accessed 3 October 2012.

<sup>3</sup> *Sukh Dass v Union Territory of Arunachal Pradesh* AIR 1986 SC 991; *Sheela Barse v Union of India* AIR 1986 SC 1773.

This constitutional entrenchment of public welfare rights through the process of judicial activism is a success. However, the integrity of the separation of powers along with a proper, balanced spending of the State funds has to be maintained and justified in an economic framework, especially in a developing country like India.

## 2. TOOLS USED FOR ECONOMIC ANALYSIS OF JUDICIAL ACTIVISM

### 2.1 TRANSACTION COSTS

The Transaction Costs approach was first designed by economist, Ronald Coase as part of the theory of the institutional structure (firm) and functioning of the economy. According to him, transaction cost is the mandatory consideration for the basic understanding of the working of an economic system and a fundamental basis for establishing an economic policy.<sup>4</sup> Transaction is whenever there is a transfer of any kind of goods and services between provider and user and the “cost of using the price mechanism” of such transaction to that transfer comprises transaction cost as per Coase, which is not only monetary but also in the form of resources, time, energy and other similar factors used by either party in the transaction.<sup>5</sup> As observed by Coase, transaction costs can be three types, *viz.* (a) search and information costs, (b) bargaining and decision costs, and (c) policing and enforcement costs.<sup>6</sup> Thus, all kinds of cost, not only monetary but also in terms of resources and other factors required in a particular transaction would comprise transaction costs. There is no singular definite definition of transaction costs but what is important to understand is that the transaction costs are dependent on the governance or structure of the transaction i.e. on how the transaction is conducted. Similarly, in the context of judicial activism, transaction costs are calculated on the cost of the price mechanism necessary for the processes. Transaction costs can be either internal to the organisation i.e. when it occurs within an organisation, costs include managing and monitoring personnel and procuring inputs; or transaction costs can be external to an organisation i.e. while buying from an external provider, costs will consist of source selection, contract management, and performance monitoring.<sup>7</sup> Judicial activism consists of both internal and external transaction costs.

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<sup>4</sup> Ronald H Coase, ‘The Concise Encyclopaedia of Economics’ (2008) <<http://www.econlib.org/library/Enc/bios/Coase.html>> accessed 28 June 2014.

<sup>5</sup> *ibid.*

<sup>6</sup> *ibid* (n 4).

<sup>7</sup> ‘Transaction Cost Economics’ <[http://www.rand.org/content/dam/rand/pubs/monograph\\_reports/MR865/MR865.chap2.pdf](http://www.rand.org/content/dam/rand/pubs/monograph_reports/MR865/MR865.chap2.pdf)> accessed 28 June 2014.

## 2.2 PUBLIC GOODS AND EXTERNALITIES

At the microeconomic level, the two most important and controversial roles of the Government are: (a) providing public goods and (b) dealing with the market failure due to externalities.<sup>8</sup> Government interference is driven by the idea of the failure of marketplace to provide public goods or handle externalities.<sup>9</sup> PIL, a mechanism by the judiciary to enforce public welfare rights can be said to be a pure public good. Pure public goods have two distinct characteristics 1. 'Non-excludability' i.e. when goods are consumed by non-payers, they cannot be excluded from the benefits of the good of service and 2. 'Non-rivalrous consumption, that is, where goods may be consumed by many at the same time with no additional cost.<sup>10</sup> In the present scenario, the question arises whether the Government's mechanism of PILs in the judiciary to guarantee public welfare rights is a public good, rather public service or not? As already discussed above, PILs deal with issues that impact the public at large. The Government provides it in the service of the public. However, that alone doesn't mean that it becomes a public good in an economic context. To understand the same, one should analyse it with respect to the above-mentioned intrinsic features of public goods. It cannot be privately provided because if the Government attempted charging individuals for the enforcement of regulations and policies passed by the judiciary in PILs, thereby giving it the non-excludability angle, it gives rise to a free-rider problem. A free-rider problem is one where each person will seek to "free-ride" by allowing others to pay for the enforcement of the policies and regulations devised by the Courts in PILs, meant for the public at large. Similarly, charging certain individual or groups of individual for the effective implementation of those policies and excluding the ones who are unwilling to pay from the impact of such welfare policies, would not lead to maximization of the cost utility because the impact is so large that such exclusion is inefficient in the way that the non-payers could enjoy the welfare-impact without increasing the cost or reducing anyone's enjoyment resulting in non-rivalrous consumption. Thus, PILs can qualify as Public Goods. One classic example is the codification of rules and regulations on safety of women at workplace through the Sexual Harassment Act and Rules, 2013 laid down by the Indian Judiciary in the landmark judgment of *Vishakha v. State of Rajasthan*,<sup>11</sup> which was filed as a public interest litigation. So, in this case all the women at the work place benefit from the legislation, though they might not have made any kind contribution towards the codification of it.

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<sup>8</sup> 'Public Goods' <<http://www2.pitt.edu/~upjecon/MCG/MICRO/GOVT/Pubgood.html>> accessed 28 June 2014.

<sup>9</sup> Tyler Cowen, 'Public Goods and Externalities' <[www.ezconlib.org/library/Enc1/PublicGoodsandExternalities.html](http://www.ezconlib.org/library/Enc1/PublicGoodsandExternalities.html)> accessed 28 June 2014.

<sup>10</sup> *ibid.*

<sup>11</sup> *Vishakha v State of Rajasthan AIR 1997 SC 3011.*

Externalities exist whenever the benefit or cost of consuming goods impact individuals who are not actually consuming it and the relevant costs and benefits are not reflected in the market prices.<sup>12</sup> Externalities can be of two types: (a) Positive Externality<sup>13</sup> where one person gets benefit from the other person's actions, viz. benefits of cleaning up a polluted lake by its owner will be enjoyed by the people living in its vicinity and none of them can be charged for such benefits while, (b) Negative Externality<sup>14</sup> is when one person's action causes harm to the other person, as in the Delhi Air Pollution case, which was again a PIL, where the factory owners did not consider the cost of harms caused due to pollution in the process of production which was much more than the tax they were paying for the pollution caused by the production. Positive Externality and Free-Rider Problem can be said to be the two different sides of the same coin.<sup>15</sup>

### 3. ANALYSIS OF JUDICIAL ACTIVISM IN INDIA

The transaction costs that arise while the Government implements the policies and decisions of the Judiciary in PILs to enforce certain rights of the public at large are utilized for the purpose of efficient functioning of the society. Thus, this leads to the presumption that in the absence of such transaction costs, the Government's act of implementing the policies will be redundant. In a system with separation of powers, the legislature has the role of creating the law and policy, while the executive executes them and the judiciary takes an interpretational approach to look into the validity of those laws and policies, and the loopholes and at the same time, assign liability if certain rights have not been attended or have been violated partially or fully.<sup>16</sup> But, very often, Governments rely on various power bodies like the bureaucracy while implementing the welfare policies and regulations that have come through judicial activism and have weak incentives to serve the consumers. Moreover, politicians may supply these "public services" guaranteed by such judicial activism to serve their own interests over the interests of the public when the government makes unnecessary expenses in the name of giving effect to a welfare policy given by a judiciary in a PIL matter and then, by compelling people to support projects they don't wish to, leading to the problem of "forced riders". All these put a huge question mark on the social as well as the economic (cost-effectiveness) impact of judicial activism through PILs in India.

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<sup>12</sup> Nick Sanders, 'A Brief Discussion of Public Goods and Externalities: Selected Topics from Chapter 15' <[http://njsanders.people.wm.edu/1A/Public\\_Goods.pdf](http://njsanders.people.wm.edu/1A/Public_Goods.pdf)> accessed 29 June 2014.

<sup>13</sup> *ibid* (n 12).

<sup>14</sup> *ibid* (n 12).

<sup>15</sup> *ibid* (n 9).

<sup>16</sup> 'Doctrine of Separation Of Powers, Introduction' <[www.legalquest.in/index.php/students/law-study-materials/45-administrative-law/407-doctrine-of-separation-of-powers.html](http://www.legalquest.in/index.php/students/law-study-materials/45-administrative-law/407-doctrine-of-separation-of-powers.html)> accessed 29 June 2014.

### 3.1 SOCIOLOGICAL IMPACT OF PILS:

A question that arises is whether judicial activism in the form of PIL and the actions of the Indian Judiciary in the arena of public welfare rights have effectively guaranteed these rights in the cases where the court intervened. The evidence in that respect is not overwhelming.

On the one hand, the possibility of a court to intervene in these cases is of course inherently limited by the fact that the court acts in individual cases only and does not have the same authority as the legislature or administrative authority to regulate the public welfare rights more generally. Therefore, the court cannot stop entirely the infringement of these rights or government lawlessness. Its actions in these areas are bound to be symbolic. There is some empirical evidence that the orders by the Hon'ble Supreme Court have led to a substantial guarantee of public welfare rights. As already discussed before, the decisions of the Hon'ble Supreme Court in the landmark cases, have led to substantial improvements in the status of the public welfare rights conferred to the society. The decisions of the Hon'ble Supreme Court like recognition of free primary education as a fundamental right, in *Unni Krishnan v. State of Andhra Pradesh*,<sup>17</sup> or the introduction of mid-day meal schemes in all public schools in *People's Union for Civil liberties v. Union of India*<sup>18</sup> have brought renaissance in the society. Thus, in the form of judicial activism, the judiciary has brought to light various dormant, but immensely important issues that have been ignored till date without being raised. However, at the same time, there are various factors that work against proper functioning of the judicial activism, viz. delays in the implementation of the court's decisions, insufficient investigation into matters leading to gross miscalculations in deciding the risks and the externalities that can affect the process. Further, it has been argued that such an encroachment by the judiciary onto the territory of the executive and the legislature is an absolute violation of the Constitutional Doctrine of the Separation of Powers. The Legislature and the Executive branches of the government are bodies responsible for the allocation of money into the schemes that they either legislate or implement.

### 3.2 COST-EFFECTIVENESS OF JUDICIAL ACTIVISM:

The costs associated with judicial activism *via* PIL, as they are modelled in economic

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<sup>17</sup> *Unni Krishnan v State of Andhra Pradesh* AIR 1993 SC 217.

<sup>18</sup> *People's Union for Civil liberties v Union of India* 2004 9 SCC 580; Paul O' Connell, 'Vindicating Public Welfare Rights, International Standards and Comparative Experiences' (Routledge Taylor and Francis Group, London and New York) 94.

analyses, can be either private or collective. The latter are those that result from the consequences of a legal decision on society.

From an economic perspective it is especially important to ask the question whether the PIL was cost-effective in the sense that the results were also reached at the lowest costs possible. This question has two separate aspects. On one hand the question arises whether the measures imposed as a result of the PILs were cost-effective, in the sense that the contents of the public welfare rights ordered by the court gave incentives to operators to reach the aspired level of enjoyment of public welfare rights by the members of the society, at the lowest cost possible. On the other hand, whether PIL is the lowest cost alternative to reach this particular goal. To start with the latter question, information on the transaction costs of PIL is not known. One could argue that these costs could be substantial, given that the judiciary has in some cases ordered several rulings, involved many committees, and followed-up a case over many years. The administrative costs for the functioning of the judiciary can, thus, be substantial. However, the essence of PIL is precisely that a plaintiff can start the proceedings at relatively low costs (writing of a letter). Moreover, these (administrative) costs of PILs should, therefore, not necessarily be larger than the costs of the functioning of a regulatory system. In the latter case, an administrative agency needs to intervene to formulate regulatory standards for the entire set up, install a monitoring, enforcement and compliance committees, etc.

PIL is an example of positive externality where the Government spends resources which is enjoyed by people at large without incurring any expenses and that is exactly the precise way of defining efficient production of a good i.e. greater production of a good when the added benefits are more than the added costs.<sup>19</sup> However, simultaneously, we must stop when the added costs exceed the added benefits. Summary of conditions for efficient production (1) all units of the good are produced for which the value to consumers is greater than the costs of production, and (2) no unit of the good is produced that costs more to produce than the value it has for the consumers of that good.<sup>20</sup>

While, at the same time, the idea of judicial activism is a huge expense to the State funds, firstly, in the way that often these cases are funded by the Government with the tax payers' money and thereafter, the expenses used up in the process of litigation and the expensive implementation of the same. Efficient functioning of the three separate tiers under the doctrine of Separation of Powers requires its own transaction costs, not only in monetary terms but also in terms of resources and other similar additional

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<sup>19</sup> 'Explain Externalities and Public Goods and How They Affect Efficiency of Market Outcomes' <<http://www.csun.edu/sites/default/files/micro9.pdf>> accessed 29 June 2014.

<sup>20</sup> *ibid* (n 9).

factors. It has been argued that, the transaction costs involved in the functioning of judiciary to step out of its territory and look over the performance over the other two tiers can be considered a drain of the economy. Judicial Activism not only affects the economy, but also minimizes the effective functioning of the legislature and the executive, also known as “unprincipled judicial activism”<sup>21</sup> which thereby, hinders maximisation of profits from the transaction costs spent by the Government on the other two tiers. While often the situation can be that the transaction costs used in the functioning of the legislative and the executive are minimized with a rise in the transaction costs for the judiciary, to overlook the performance of the former two bodies in case of judicial activism.<sup>22</sup> Moreover, there are other factors that have to be taken into consideration that might hinder the profit-maximisation process and one of them being insufficient information regarding the risks and externalities.<sup>23</sup> Further, the judiciary has, in many cases, taken expert opinion from various officials of the other two branches of the government while dealing with decisions that would normally be made by one of the other respective tiers, thereby, adding more to the transaction costs in the implementation process of the policies drafted in PILs.

### 3.3 EFFICIENCY

It is clear, by now, that even if one were to find some evidence that judicial activism in the form of PIL guarantees all the rights, one cannot be certain that they are guaranteed at their maximum efficiency. Indeed, we did not make any analysis whether the PIL is the ideal instrument to reach that goal of guaranteeing the rights at its apex. It is probably impossible to test in practice its efficiency in the sense that one could not test whether this is the legal instrument that optimally contributes to maximizing social welfare. What one can, at best, test is whether it has had any effectiveness in the sense that the rights were actually guaranteed. However, even if one were to find that there is such effectiveness, this does not say too much from an economic perspective for the simple reason that the price to guarantee those rights may have been much too high compared to alternative solutions. Hence, in addition to addressing the effectiveness of judicial activism, one should also pay some attention to its cost-effectiveness by addressing whether the goal set by the legislature of guaranteeing certain rights been reached at

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<sup>21</sup> David Lewis Schaffer, ‘When it comes to Judges, ‘Pragmatic’ Means Unprincipled’ *The Wall Street Journal* (New York, 9 May 2009) <<http://online.wsj.com/news/articles/SB124182908227302619>> accessed 29 June 2014.

<sup>22</sup> TCA Anant and Jaivir Singh, ‘An Economic Analysis of Judicial Activism’ *Economic and Political Weekly* (Mumbai, 26 October 2002) Vol XXXVII No 43 <[http://www.epw.in/special-articles/economic-analysis-judicial-activism.html?ip\\_login\\_no\\_cache=00f940d297ffce3c645e6e9bd4ea14d6](http://www.epw.in/special-articles/economic-analysis-judicial-activism.html?ip_login_no_cache=00f940d297ffce3c645e6e9bd4ea14d6)> accessed 29 June 2014.

<sup>23</sup> *ibid.*

the lowest possible costs. Though contractual agreements have been observed as an alternative to overcome such public goods and externality problems, they fail at times. The costs of bargaining and striking a public contract in PIL matters may be very high which can drain the State funds. The agreement may collapse in cases where some parties to the agreement may seek to hold out for a better deal while in other cases it is simply, too costly to contact contract and deal with all the potential beneficiaries of an agreement.<sup>24</sup> In cases such as the Delhi air pollution case, factory owners might find it impossible to negotiate directly with each affected citizen to decrease pollution.

#### 4. JUSTIFYING JUDICIAL ACTIVISM IN INDIAN SCENARIO

The particular Indian experience combined with the framework addressed above shows that some indicators can be provided to the circumstances under which PIL may be effective; at the same time some indicators can also be given on how to increase the effectiveness of this PIL.

First, given the still-presumed superior informational advantage of regulatory and administrative authorities to guarantee public welfare rights in a cost-effective way, a standard setting through the judiciary should only take place as a second-best option when (*inter alia*, as a result of capacity or corruption problems) a standard setting through the regulation fails or is not enforced.

Secondly, the case of the Supreme Court of India shows that when standard-setting through the judiciary takes place as an alternative for regulation by the executive, guarantees should be provided that the judiciary has the necessary information to set cost-effective standards.

One way to do this is to make use of committees that can advise the court. One should, however, be careful that the judiciary does not intervene through its decisions in the functioning of the market, for example, by fixing prices for specific commodities like medicines, food commodities, stationery, construction materials etc.

Thirdly, in order to obtain both the guarantee of cost-effective standard setting and the guarantee of effective compliance and enforcement, a high stakeholder involvement in the decision-making by the court is needed, either by having the stakeholders involved in the committees or allowing them to provide information (e.g., status of people enjoying the rights, sections deprived of the enjoyment of those rights) on various alternative options to reach the goals desired by the court at different costs.

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<sup>24</sup> *ibid* (n 9).



Fourthly, reliance on the court and judicial activism *via* PIL only makes sense in cases where it is clear that problems that occur at the level of the legislator or the executive do not occur in the same way with the judiciary. Hence, when PIL is used as a method for ensuring public welfare rights and eradicating corruption problems with the executive, judicial independence should guarantee that better results can be achieved by standard-setting through the judiciary.

Fifthly, given the fact that a court only reacts in one particular case and in a reactive manner, standard setting as a result of PIL can only be a temporary solution to intervene when the political and legislative system (temporarily) fails. Ideally, the result of judicial activism should be to move the regulatory and administrative authorities to fulfil their task of setting cost-effective standards in the PIL and enforcing them in an adequate way as well. Indeed, in the long run only via standard setting through regulatory authorities' sustainable solutions can be achieved.

Economists Laffont and Meleu<sup>25</sup> have modelled the separation of powers as an instrument against corruption and have shown that the value of such separation is higher in developing countries.<sup>26</sup> Similarly, in a developing country like ours, the question then arises as to whether it is possible to solve the conflicts arising out of judicial activism. Though, there are various opposing theories, in the researcher's opinion, judicial activism in the form of PILs is an efficient and cost-effective method to deal with various important issues of public welfare in a developing country like India. While, at the same time, the question of the process being cost-effective should be answered on a context basis, that is each case should be thoroughly analysed by a committee or a group of personnel qualified to man the job and decide whether or not the case would be for the benefit of the public as a whole.

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<sup>25</sup> J Laffont and M Meleu, 'Separation of Powers and Development' *Journal of Development Economics* Vol 64, No 1 February 2001, pp 129-145.

<sup>26</sup> *ibid.*