

Judge, Don't Hammer The PIL

PRASHANT BHUSHAN

Supreme Court advocate

From Tehelka Magazine, Vol 5, Issue 17, Dated May 03, 2008

TWO RECENT judgements of the Supreme Court on judicial activism and PILs have expectedly generated a spirited controversy within the Supreme Court and outside about the scope and limits of the court's jurisdiction in PILs and about judicial activism in general. That is why a threejudge bench of the Supreme Court has decided to review the issues and lay down guidelines for PILs and judicial activism.

The term Public Interest Litigation was coined in the late 1970s when the Supreme Court began to entertain petitions on issues of general public interest or in the interest of the weaker sections of society. Simultaneously, the courts also proceeded to give a liberal interpretation of the fundamental rights, particularly the right to life and liberty. It was held that the rights included the right to live a dignified life and therefore included the right to food, water, shelter, education, healthcare, a clean environment, etc. Acting on this basis, the courts gave various directions to the authorities to improve the conditions of inmates of jails and asylums, for the payment of minimum wages to workers, to clamp down on child labour, bonded labour and mindless deforestation, or for cleaning up rivers and preventing air pollution, for road safety, for access to information about election candidates, for instituting police reforms, etc.

The principle evolved by the courts was that every power was coupled with a duty and therefore, where the authorities had a right to act, they also had a duty to act to protect the rights of citizens. Thus, if people of an area were being denied access to drinking water because of government inaction, the court could direct them to act to apply their mind to it, and if there was a practicable way of providing it, they could direct the authorities to do so. It was of course understood that matters of policy would be left to the executive and that where an issue was a matter of expert opinion, the court could not push its own views over that of the experts of the executive. If expert bodies of the government had examined the matter and recommended solutions, and if the government had no plausible explanation for not implementing the solutions, they could direct the government to implement them.

Thus, in the police reforms case, the court acted after it found that the corruption of the police system was leading to a gross violation of the citizens' right to life. As many as four expert committees of the government had examined the problems in the previous 25 years and all had agreed on certain solutions. Yet, these were not being implemented due to a lack of political will

and a desire to keep the police as a pliable instrument available to those in power.

It is true that there have been excesses of judicial activism. The directions issued by the court to implement the scheme of interlinking of rivers is a case in point. Though the government's expert committees which had examined the scheme earlier had rejected it as unfeasible, the court, without even allowing the state governments to respond to the petition, directed the Central government to take up the scheme costing more than Rs 6 lakh crore and complete it within 10 years! This is not the only case of judicial excess. There have been some other such cases.

But that is no justification for Supreme Court Justice Markanday Katju's sweeping remarks in two of his recent judgements. In a case of employees of a golf club (not a PIL), he goes on to gratuitously say how recent orders of the courts regarding nursery admissions, unauthorised schools, supply of drinking water to schools, free beds in hospitals on government land, road safety, etc., were beyond the powers of the judiciary and pertained exclusively to the executive or legislative domain. He goes on to say, "If the legislature or the executive are not functioning properly, it is for the people to correct the defects by exercising their franchise properly in the next elections and voting for candidates who will fulfil their expectations." According to this precept, if the court is confronted with a situation where the police watch people being raped and murdered in broad daylight without acting, the court should express helplessness and ask the petitioner to vote to change the government in the next election!

Justice Katju proceeds in the same vein in his latest order while dismissing the petition of NGO Common Cause, which sought directions on road safety like separate lanes for non-motorised traffic and speed governors for commercial vehicles. These directions were sought on the basis of reports of the Central Road Research Institute and IIT Delhi, which had pointed out that more than 80,000 lives and Rs 32,000 crore were being lost annually to avoidable road accidents. When he questioned the maintainability of this petition, he was informed that this precise issue had been settled by a larger bench of the court in MC Mehta's case (regarding road safety) in the following terms: "It is obvious that it is primarily for the executive to devise suitable measures and provide the machinery for rigid enforcement of those measures to curb this menace. However, the inaction in this regard of the executive, in spite of the fact that this writ petition is pending since 1985 and the menace continues to grow, it has become necessary for this court to also issue certain directions."

Yet, the judge ignores this larger bench's judgement binding on him by saying that this has been overruled by a larger seven-judge bench judgement (P. Ramachandra Rao). Amazingly, this seven-judge bench judgement not only does not say anything whatsoever about MC Mehta's judgement on road safety or the principles laid down about the entertainability of such petitions, it expressly says

that "the larger question of the powers of this court to pass orders and issue directions in public interest or in social action litigations, specially by reference to Article 32, 141, 142 and 144 of the Constitution, is not the subject matter of the reference before us and this judgment should not be read as an interpretation of those articles of the Constitution laying down, defining or limiting the scope of the powers exercisable by this Court." But Katju still cites this judgement to say that it overrules a specific and binding judgment on road safety!

DESPITE THE fact that specific directions like separate lanes for non-motorised traffic were being sought, Justice Katju says, "The concern of the petitioner is that many people die in road accidents. But many people also die due to murders. Should the court issue a general directive that murders should not be committed in the country?" He ends his judgement with a flourish: "Unfortunately, the truth is that many PILs are being entertained by many courts as a routine and the result is that the dockets of most of the superior courts are flooded with PILs, most of which are frivolous or for which the judiciary has no remedy. As stated in Thaware's case, public interest litigation has nowadays largely become "publicity interest litigation", "private interest litigation", "politics interest litigation", or the latest trend, "paisa interest litigation". Much of the PIL is really blackmail."

On what basis does the judge make such sweeping statements, which are clearly not true? He should surely be aware, having been the Chief Justice of the Delhi High Court, that PILs are heard by only one or two of the more than 20 benches of the High Court and that too only on one day in a week. Yet he says that the court's dockets are flooded by PILs. And what percentage of PILs have been found to be filed in private or political interest or for blackmail? Not even a miniscule percentage.

It is true that many half-baked or misconceived PILs are filed, but they can be, and usually are, dismissed by the courts in the first hearing. But for a judge of the court to use his office to defame an important tool crafted by the courts in public interest, and against settled law, is gross judicial indiscipline.

On April 21, Katju stayed an Allahabad High Court order restraining construction in a public park, by saying that this amounted to the court restraining the legislature from passing a law. When informed that he had himself passed such orders in the High Court, he said that he had become wiser now! Unfortunately, such late and whimsical wisdom has created a great deal of confusion about PILs in the high courts. Hopefully, some of it will be cleared when a larger bench frames the guidelines for PILs and judicial activism.