

“Should China Learn any Lessons from the Indian Experience of Public Interest Litigation?”

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Abstract

Privatization in China led to compromising of social welfare objectives within the state and therefore a lot of public interest litigations emerged. However, Chinese law doesn't prescribe for any specific procedural basis for PIL yet there are five schools of thought upon which Chinese PIL system is based. Making a comparative study between the Chinese and Indian PIL filing system, few obstacles have been identified under the Chinese legal system and suggestions have been given incorporating the social welfare interest as given under the Indian law.

Background of the Rise of PIL in China

In the early 1980s the social and economic activities in China were deeply controlled by the Central Government. Personal interests were subordinated to political interest and most of the social conflicts were resolved through state intervention. However, due to the privatisation of the state owned enterprises there emerged a new class of the entrepreneurs. Yet, they also increased social polarisation and widened the gap between rich and poor. Gradually, the state withdrew from its commitments of social welfare, particularly where social welfare was an obstruction to economic development. This led to the rise in social conflict and therefore many citizens started using PIL as a means of resolving their difficulties.

The Concept of PIL in China

Given that PIL in China is a new form of litigation, no specific procedural or constitutional basis for PIL currently exists in the Chinese law. However, five schools of thought have been identified:¹

¹ Public Interest Litigation in China: A New Force for Social Justice, CHINA LABOUR BULLITEN, October 10, 2007 http://www.clb.org.hk/en/files/File/research_reports/Overview_of_PIL_2.pdf

1. **Economic public interest:** This school restricts PIL to cases concerned with the economic public interest, cases that claim the actions of an individual or group have damaged the interest of the public in material terms. This school seeks to use PIL as a means of better regulating the conflicts between different economic interest groups.
2. **Administrative litigation:** This school notes that since most PIL targets the misconduct or nonfeasance of government institutions, if cases brought in the public interest do not involve the misconduct or inaction of the government they should be regarded as civil cases, not PIL.
3. **Public interest, not private interest.** This school argues that PIL should include both civil and administrative litigation. It refers to cases where “a specific branch of the government or an individual, empowered by the law, brings another party, who has endangered the interests of the public... to the attention of the court.” This is currently the most commonly accepted view in China.
4. **Social action:** This school argues that PIL is not only a legal action, but also a social action with the ambition to expose social injustice and to reform society. Therefore, more resources and support should be given to the under-privileged social groups to pursue social justice through PIL.
5. Any case to protect public interest. This view adopts the widest interpretation suggesting that any legal action designed to protect the interest of the state or the public should be regarded as PIL.

Impact and Prospects of PIL in China

Although PIL has become increasingly common in China over the last decade yet the outcome in most of the cases go against the plaintiff. Few major obstacles are as follows:

1. As per Article 108 of Civil Procedure Law, the plaintiff needs to have a direct interest in order to bring the case under the ambit of PIL. This criteria was introduced to prevent the abuse of legal process however many plaintiffs cannot demonstrate a direct interest due to social or economic reasons and as a result these cases are rejected by the Court.
2. Administrative law of China does not give jurisdiction to Courts over an “abstract administrative act” i.e. the Court cannot question the legal basis of the law or strike

down a law as unconstitutional, it can only assess whether the law has been properly implemented or not.

3. PIL currently has no legal or constitutional procedural basis in China.
4. Because PIL is relatively a new concept and conceptually different from traditional civil cases, this deters many lower-level courts from accepting PIL cases.
5. Although few prominent lawyers take on PIL cases for no fee to boost their reputation in the society, many are reluctant because the plaintiff is not seeking significant financial compensation and thus it becomes difficult for the lawyers to cover their costs.

Chinese vis-à-vis Indian PIL System

India being a social welfare state which aims at the common good and security to all citizens the concept of Public Interest Litigation has a much widened meaning and purpose. With PIL gaining momentum in India, the Supreme Court relaxed the traditional rule of locus standi² and evolved a broad rule which now permits PIL at the instance of ‘public spirited citizens’ for the enforcement of constitutional and other legal rights of any person or group of persons who because of their poverty or socially or economically disadvantaged position are unable to approach the court for relief. Justice Bhagwati³ stated the rule regarding the PIL i.e. when it can be filed, **who can file it** and how it can be filed, which is influenced by the western understanding of Public Interest Litigation system in India. Whereas in China it is only the civil society members who may file the case. These civil society members may be a recognised non- governmental organisation or any registered organisation linked with the Communist Party of China. We see that due to less number of lawyers in China i.e. approx. 200 lakhs, there is not much talk about litigation rather mediation because you can’t make courts independent and give them power of judicial review when they don’t have lawyers. And when we look at their Code of Civil Procedure, the locus standi requirement is strictly followed by the Chinese Courts as only those persons who are directly affected by the inaction are allowed to approach the courts. Courts do not admit those cases involving sensitive political issues or human rights issues and victims of a large number of society are

² According to the traditional rule of locus standi, the right to move the court for judicial redressal is available only to those, whose legal right has been infringed.

³ S.P. Gupta and others v. President of India and others AIR 1982 SC 149.

never allowed to come before the courts because this is going to disturb the social harmony. And therefore, these cases are dealt in an administrative way meaning thereby compensate the people but do not let them file the case. On the contrary in India, the court has power to take affirmative action by issuing specific directions in cases of governmental inaction to perform its duties. The court also has power to award cost to the petitioner who has brought an important matter before the court for consideration.⁴ The court can also grant compensation to person who has suffered on account of the violation of their constitutional or legal right.

In India “private becomes public” i.e. any member of the public can maintain an application for an appropriate direction in the High Court under Article 226 or in case of breach of any fundamental rights to the Supreme Court under Article 32 of the Constitution. The purpose is to serve the interests of the weaker sections of the society who do not have sufficient access and awareness. But this is not a case in China as there “public becomes private” i.e. even if there is a public issue they frame it narrowly as a private issue inside the court but outside the court they frame it as a public issue i.e. in the form of a Public Interest Litigation. In China the PIL petition is not filed to claim the compensation but it used as a human right awareness instrument and it is the most dynamic feature of PIL system in China.

In India PIL is mostly **filed against** the State however it can be filed against anybody. On the contrary in China mostly a PIL is filed against a specific entity which is obligated to comply with certain legal mandate. Some of the examples from the India context are the bonded labour, contract labour, child labour etc where the authorities were directed to take steps for ensuring better enforcement of labour laws and for identification, release and rehabilitation of bonded labour.⁵ In *Hussainara Khatoon v. State of Bihar*⁶ the Court declared that the detenu has a right to speedy trial and free legal aid, under Article 21 of the Constitution. One of the most important judgments in the context of PIL in India is *M.C. Mehta v. Union of India*⁷ in which the court further widened the scope of PIL.⁸

⁴ P. Nala Thampy v. Union of India (1983) 4 SCC 598.

⁵ Neeraja Chaudhary v. State of Madhya Pradesh AIR 1984 SC 1099.

⁶ AIR 1979 SC 1369.

⁷ AIR 1987 SC 1087

⁸1) The court held that the poor in India can seek enforcement of their fundamental rights from the Supreme Court by writing a letter to any Judge. Also, such a letter does not need to be accompanied by an affidavit.

2) Under Article 32 the Court has power to grant compensation in appropriate cases where the fundamental rights of poor and disadvantaged persons are violated.

About what you file a PIL case in India is slightly different from China i.e. in China the issue you want to litigate upon has to be carefully picked up otherwise it won't be admitted by the Courts whereas in India you are free to pick up any issue which often leads to the misuse of power of filing a PIL.

3) The Court can appoint socio-legal commission or devise any procedure and forge any tool it deems appropriate for the enforcement of fundamental rights of the poor.