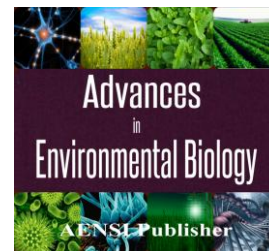




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### Access to Justice for Conservation of the Biodiversity: An Important Component of Environmental Justice

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#### ABSTRACT

For conservation of the biodiversity and for maintaining an essential balance between all flora and fauna and the achieving the ultimate goal of sustainable development, access to justice is a must. Only because of easy and fast institution and disposal of environmental pollution and degradation cases, these objectives can be achieved and poor and marginal people can get justice. It is also notable that the right to access to justices is crucial for right to information and right to participate in environmental decision-makings. The solution lies in relaxing the requirement of locus standi to pave the way for public interest/social interest litigation, which the Indian Apex Courts have evolved and are practicing. Nevertheless, it has to be so only in genuine cases. The authors suggest that the Indian practice should be internalised by other states, but with necessary safeguards. The Australian practice of Law Clearing Houses and the Canadian practice of providing mitigation or exemption on cost are also good practices for others to emulate. The authors feel that in order to provide funding for public interest cases, every state should create a fund and extend legal and procedural support through legal aid clinics.

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### INTRODUCTION

#### Prelude:

Conservation of the biodiversity and maintaining the naturally existing balance among them are crucial for survival of the human kind. Rather looking at the importance of the biodiversity with the future rise of human population, the biodiversity has to be enriched so that food, medicinal and other needs of the people around the world could be fulfilled. These can be possible, if people have sufficient access to information, participation in environmental decision-makings; and at the top of all, the aggrieved and sufferers must have easy an access to justice, and a justice system should be designed for fast disposal of cases. They are together under the guise of right to life, a fundamental right enshrined in all constitutions of civilised countries, are known as components of environmental justice, a combination of third generation environmental rights.

Environmental justice requires fair treatment of all irrespective of caste, creed, color, race and national origin or financial position with respect to the development and enforcement of environmental laws and policies. Thus, laws and policies should be made and implemented without any fear or favour to any person or class of persons. All must have right to access to relevant environmental information, right to express their views on environmental decision- makings and right to access to justice. It has been observed in many countries, especially developing and least developed countries that laws and policies are world class, but their implementations, for whatever reasons, are poor. And because of that, the poor and marginalised people are adversely affected, and have to sacrifice their lives for the wrongs committed by others. In such cases, only polluters are not responsible for the loss of lives but the enforcement authority of the government, department of environment, department of industries or Municipal Corporation, as the case may be, should be held responsible. Perhaps, keeping this in mind the Environment Protection Agency of the United States of America has been keen to provide healthy environmental conditions to all irrespective of any discriminative element stated above. The Agency has come out with multifarious strategies on the 20<sup>th</sup> Anniversary of the 'Environmental Justice' Movement. Notable among them are: Establishment of National Environmental Justice

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Advisory Council to provide recommendations to the EPA from time to time; Developing Environment Justice Plan, 2011-2015 to provide a road map for advancing environmental justice across the agencies and Federal Government; Allocation for Environmental Justice Grants to provide funding to projects addressing environmental justice; Establishment of Federal Interagency Working Group to integrate environmental justice imperatives in various development programs; creation of Environmental Justice Achievement Awards to notable organisations; Developing a Tribal and Indigenous Peoples Environmental Justice Policy to address their environmental concerns; and Creating a Sustainable Community for sustainable development.

The Plan Environmental Justice 2014 of the United States Focuses on: 1. Protect the environment and health in overburdened communities. 2. Empower communities to take action to improve their health and environment. 3. Establish partnerships with local, state, tribal, and federal governments and organisations to achieve healthy and sustainable communities. They jointly lay emphasis on public participation in environmental-decisions. According to the EPA, it can be achieved when: (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; (2) the public contribution can influence the regulatory agency's decision; (3) their concerns will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.

#### *Aarhus Convention:*

In order to achieve the imperatives of environmental justice, markedly to facilitate access to justice, the European Community made a Convention. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998, which is commonly known as Aarhus Convention and which is now of global importance since its treaty norms are of great importance to all countries of the world. It has three dimensions: 1. Review with respect to information request. 2. Review with respect to project(s) decision-making that requires public participation. 3. Challenges to breaches of environmental law (see Article 9 of the Convention). Among these, the third point is the most important as it provides redress opportunity to aggrieved persons who objected to any project or suggested substantial changes in the EIA report and the authority concerned either ignored them or gave little importance to them. There can be an appeal to the higher administrative authority, including the Minister; or the aggrieved persons may go to the regular court of justice. Article 9(5) aims to address concerns over the high level of expense often associated with review by courts. To this end, the Convention requires that each Party to the Convention to consider the establishment of what are described as 'appropriate assistance mechanism' in order to 'remove or reduce financial and other barriers to access to justice'. Presumably, this provision contemplates some form of legal aid or other financial assistance and expert assistance [1]. It is notable here that the Aarhus Convention does not preclude the affected parties from opting for speedy justice like public interest litigations (PIL), which are common in India, the Philippines and many other countries, where *locus standi* is relaxed in matters of the interest of general public. It means in such situations, a case can be brought by an NGO or individual environmentalist for protecting the interests of the public who are affected or might be affected by any proposed project of development. If an individual fights the case or a group of individuals or NGO or a group of NGOs, the poor suffers are relieved of all kinds of financial burden of the litigation. It instills and strengthens the participatory democracy for sustainable development by making public participation as *sine qua non* in decision-making on environmental matters, by guaranteeing right of access to environmental information and by providing opportunity to access to justice (see Article 1 of the Convention) [1]. These have to be based on 'floor' not 'ceiling' basis" and should be available free from fear or favour. It lays a sound foundation for ordinary people independently or through non-governmental organisations (NGOs) to push the authorities for protection of the environment. In this context, *suo motu* participation of NGOs can also be of great importance [20].

Access to information covers both 'active' and 'passive' information. Thus, authorities are duty bound to provide information on request, and also disseminate it to the general public by various means. In case a development plan is mooted, all environmental information are supposed to be provided to the general public living in the vicinity of the proposed project and might directly or remotely be adversely affected by it. If a person or a group of persons require any additional information, it has to be furnished (see Article 4 of the Convention). In this connection the following points are notable: 1. This right is available to all. 2. Information has to be provided as soon as possible. If justified, the time can reasonably be extended. 3. Information can be provided in any form. 4. Charges, if any, have to be reasonable. 5. Information can be denied if denial is in the interest of national defence, protecting international relations, ensuring public security, maintaining commercial confidentiality (except for withholding information on emissions which is relevant for the protection of the environment), protecting intellectual property right, or guaranteeing personal privacy. 6. Public interest is an important factor. 7. Refusal supported with reasons should be issued in writing. 8. In case of any dispute, the matter has to be referred to any higher authority. 9. Possibly, information should be released by Internet. 10. Authorities have to be up to date and should regularly disseminate environmental information through regularly published reports or by any other suitable means.

One of the important aspects of the Aarhus Convention is access to justice. It has three dimensions: 1. Review with respect to information request. 2. Review with respect to project(s) decision-making that requires public participation. 3. Challenges to breaches of environmental law (see Article 9 of the Convention). Among these, the third point is the most important as it provides redress opportunity to aggrieved persons who objected to any project or suggested substantial changes in the EIA report and the authority concerned either ignored them or gave little importance to them. There can be an appeal to the higher administrative authority, including the Minister; or the aggrieved persons may go to the regular court of justice. Article 9(5) aims to address concerns over the high level of expense often associated with review by courts. To this end, the Convention requires that each Party to the Convention to consider the establishment of what are described as 'appropriate assistance mechanism' in order to 'remove or reduce financial and other barriers to access to justice'. Presumably, this provision contemplates some form of legal aid or other financial assistance and expert assistance [1]. It is notable here that the Aarhus Convention does not preclude the affected parties from opting for speedy justice like public interest litigations, which are common in India, the Philippines and many other countries, where *locus standi* is relaxed in matters of the interest of general public. It means in such situations, a case can be brought by an NGO or individual environmentalist for protecting the interests of the public who are affected or might be affected by any proposed project of development. If an individual fights the case or a group of individuals or NGO or a group of NGOs, the poor suffers are relieved of all kinds of financial burden of the litigation.

The treaty norms of Aarhus Convention presumably provide a basis for streamlining public participation imperatives in EIA laws with respect to local developmental plans and other developmental activities in all countries. This has been stated in point 40 of the declaration at the close of the Ministerial Conference on the Aarhus Convention in the following words: "We regard the Aarhus Convention, which provided recognition for citizens' right in relation to the environment, as a significant step forward both for the environment and for democracy. We encourage all non-signatory states to take appropriate steps to become parties to the convention" [20]. Political leaders have hailed the Convention as an ambitious venture in environmental democracy provided the three aspects detailed in the Convention are properly adhered to [2 and 12]. Kofi Annan, the former Secretary General of the United Nations put this as: "Although regional in scope, the significance of the Aarhus Convention is global. It is by far the impressive elaboration of principle 10 of the Rio Declaration, which stresses the needs for citizen's participation in environment held by public authorities. As such it is the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations". This has been cited in United Nations Economic Commission for Europe Press Release of 29 October 2001. At the discussion session, the Denmark's Minister for Environment and Energy remarked that the Convention laid a sound foundation for ordinary people to push for environmental progress in all of our countries. He further said that criticism was essential to democracy...to direct the process of involvement, to give voice to the general public, inspiration to political parties and governments and to provide an informed critical, corrective, NGOs involvement is essential [20]. However, the right can be best be ensured to general public, especially the affected people, by active information dissemination, meaningful participation of the public concerned and efficient involvement of NGOs. Mary Robinson, United Nations High Commissioner for Human Rights, in her keynote address, which was distributed at the NGO session, also stressed on these aspects. She wrote: "To secure that (fundamental right) we need to have access to environmental information and so I welcome the proposed convention making such access binding – and I look forward to the implementation of the details of the convention. We do not need fine rhetoric or well-written conventions that gather dust; we need determined, immediate and true follow up to the expressed wishes of the parties involved. With proper access to information I believe that there will be a dramatic increase in the demand for public participation in environmental decision-making. The opportunity for the public, individuals or more usually NGOs, to become involved must be built in so as to allow full participation from the beginning of the process e.g., in the scoping of an environmental impact statement and not just in commenting on it if once completed. This will put demands on national and local authorities but it will also lead to better environmental management and to sustainable development. Another meeting points of the rights is in the area of access to justice...I regard NGOs as having a public interest 'watch dog' is vital in all our societies and is in need of our strong support" [20].

The decision on conclusion of the Aarhus Convention by the EC was adopted on 17 February 2005 by 'Decision 2005/370/EC'. It became a party to it in May 2005. The EU through its Directive 2003/35/EC and 'Directive 2003/4/EC' has enforced the treaty norms of the Aarhus Convention. With the result of that the Directive 85/337/EEC on EIA, which had been earlier amended by Directive 97/11/EC. On 24 October 2003, a proposal for a Directive of the European Parliament and of the Council on Access of Justice in environmental matters was presented. This proposal was the part of the 'Aarhus Package'. This was adopted in September 2006 [14].

The new Directives are being enforced in EU countries via necessary amendments in relevant legislations. Thus, in England for example the Town and Country Planning (Environment Impact Assessment) (England and Wales Regulations) 1999 has suitably been amended. The norms are being given effect by courts also. For

example, in *R (on the application of Hareford Waste Watchers Ltd.) v. Herefordshire County Council* [2005] EWHC 191 (Admin) and [2005] PLSCE 29, the claimant company had been formed to oppose the construction of a waste-treatment and recycling facility in an industrial estate. Following the submission of a planning application, the Council granted full planning permission, subject to conditions. This was objected on the ground that relevant information was not provided to the affected persons. Elias J quashed the planning permission saying that the Council had not conclusively found that the development would not have significant environmental effect. The authorities were wrong to grant permission subject to conditions. Article 3(2) of the 1999 Regulation provides that planning should not grant planning permission 'unless they have first taken the environmental information into account' [3]. However, the British courts have ruled in a number of cases that where an appropriate body comprising representatives from the public takes decision of development, public participation is not necessary [24 and 37]. In *R v. Secretary of the State for the Environment, Transport and the regions (ex parte Alconbury)* [2001] UKHL 23, reminded it by saying that it was the role of the elected representatives to take decision on behalf of the local communities they represent. The authors are of the opinion that it is no more tenable in light of the Aarhus Convention. European Countries that have not yet been brought within the fold of the European Union but are members of the Aarhus Convention are also enforcing the treaty norms by making suitable laws or by making required amendments in the existing legislations [2 and 12]. It can now be said that due to costs hike and delay of the project, in many cases, proponents are in a hurry and want to projects started soonest possible. In some cases, authorities also want to start certain projects without any delay, and sometimes prefer developments on environment or/people.

#### *Principle 10:*

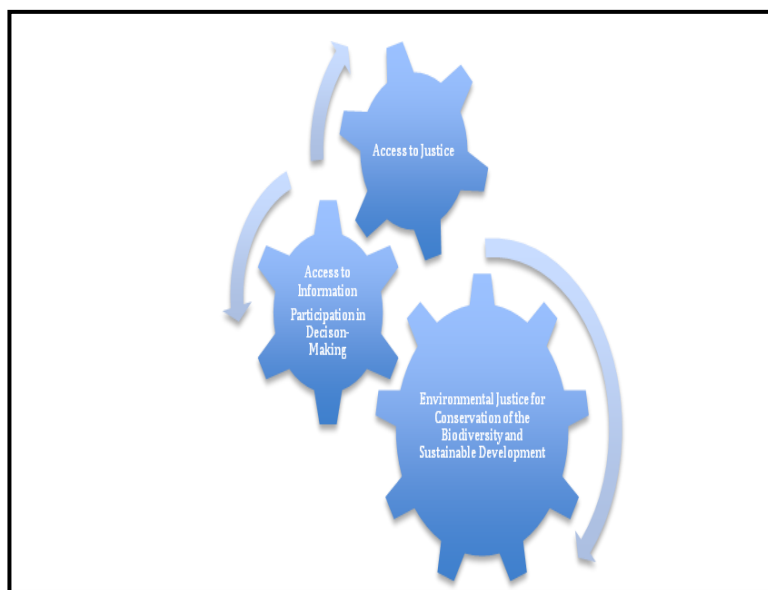
Principle 10 of the Rio declaration, 1992 accentuates the basic idea of public participation for ensuing environmental justices with appropriate emphasis on access to justice. It states, "Environmental issues are best handled with participation of all concerned citizens, at the relevant levels...At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities ... and the opportunity to participate in decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided".

This principle, thus, has four pillars: appropriate access to information; opportunity to participate in decision-making process; enhance public awareness; and effective access to judicial and administrative proceedings. By virtue of the first pillar, people should not only have access to information but the access should be appropriate, and the information should be widely available. The fourth pillar requires access to justice by providing opportunity to have access to both judicial proceedings and administrative proceedings. It means people should have freedom to institute cases without any technical or legal impediment. This Principle is becoming a parameter for sustainable development in many countries. For example, in Cuba, the principal instruments of Cuban environmental management, such as the National Environmental Strategy, the National Programme for Environment and Development, the Law on the Environment and other legal instruments have provisions to implement these imperatives [23]. The authors are of the opinion that this implies that with respect to environmental matters, the requirement of *locus standi* should be relaxed by the courts, where a larger group of people are affected or can be affected. It will be appropriate to leave the question of applicability of *locus standi* to the courts. Access to justice to administrative decisions will require from the authorities of the DOE/EPA, as the case may be, to take feedback from the public and to be transparent in decision-making. If the right(s) of the people at this level is violated, they should have right to invoke writ jurisdiction of higher courts of the country.

Principle 10 has been strengthened by the Rio+20, which might all states to incorporate its requirements in their laws and policies, has been honestly internalised by 69 countries. Actually, the most bothering aspect of development and its impact on the environment and human health is that there has to be transparency in the process, and many states do not want to release all information to people. What is now warranted is that right to information has to be recognised as fundamental rights of citizens as that can be the sufferer from the errant developmental activities. It is for this reason it is emphasised that Principle 10 should be given due importance by the UN bodies, especially UNEP and UNDP and a larger number of states. But the problem is that the UNEP is not popular in many countries. It is for this reason the United States wants it to be status of UNEP with a broader mission and power [4]. So far the EU countries have shown the best results, which can be a benchmark for other countries. Under the auspices of the United Nations Economic Commission for Europe (UNECE) lots of work is underway to implement sustainable development imperatives [35]. The authors are of the opinion that Principle 10 is for greater public participation in development activities, which will always be for health development where people as a whole will benefit; a partisan development, which prefers one class on the other class or only serves the vested interest of the country, is not good. Among the developing countries South Africa and Malaysia are giving due importance to Principle 10. This is unfortunate that many states are not enthusiastic about the Rio+20, which is the scheduled to be held in June 2012, is unfortunate. This is the time to join hands

and to sincerely work for sustainable development. A first “zero draft” of the outcome document, *The Future We Want*, was published in January 2012. It focuses on the UN brief that the central themes should be the green economy and the UN’s institutional framework for sustainable development. All states should seriously study it and come out with viable briefs so that after discussions, an amicable solution to issues could be reached [22]. States should maintain environmentally related pollution release and transfer register (PRT Register) within the premises of Principle 10 and the Aarhus Convention. [38] It will require states to collect all information about pollution releases and transfers, register them, and provide access to it to the people. This helps in many countries to experts from the public, especially members of NGOs to help department of environment officials to keep up the Agenda 21 and Local Agenda 21 requirements.

It is notable that the 3 pillars of the Aarhus Convention cannot work well unless people have enough orientation in environmental matters. For Europe, it may be so important because the European people are by and large environmentally conscious. They are capable to take actions by themselves. The question of environmental education is of great importance in developing and least developed countries, as people there are not enough environmentally conscious. It is for this reason involvement of NGOs has proven to be important. Even in countries, where *locus standi* is not relaxed for public interest litigations – they are known as *locus standi* countries – NGOs can take those, who have suffered from polluting activities, to the court and can provide all facilities to them to fight the case. Where *locus standi* are relaxed in public interest, by the courts, they can simply file case repetitive suits and bring justice to poor people. In fact there cannot be conservation of the biodiversity, which is crucial for survival of the humankind, and sustainable development without internalising the 3 pillars of the Aarhus Convention added with 1 pillar, i.e. environmental education, of Principle 10 of the Rio Declaration; and among them, access to justice works as stimulant for the other pillars, provided it is made easy for those who suffer from environmentally irresponsible acts on the part of the polluters and connivance inertness on the part of those who are responsible for implementing the laws made for abatement and control of environmental degradation affecting the biodiversity. It can be depicted as:



**Fig. 1:** Access to Justice for the Conservation of Biodiversity and Sustainable Development.

Among the 3 pillars of the Aarhus Convention and the 4 pillars of Principle 10, access to justice is crucial. It is because if the first 2 pillars have not been adhered to by any government agency, the aggrieved people, who might suffer from the decision will have right to move to the apex courts and get justice from it. But if they go to the regular courts, they might have to spend lots of money and time and might have to undergo tremendous amount of stress. If the sufferers are poor, they might remain silent sufferers. In this kind of situation easing the justice process become essential tool for ensuring environmental justice to these people. On the contrary, due to degradation of the environment and its processes the biodiversity will be adversely affected and then people will be the ultimate sufferers, i.e. polluted air and water quality can cause health hazards to the people, and adversely affect the flora and fauna, which will, in turn, bring sufferance to the people. How it can be done is discussed below.

*Access to Justice:*

*Locus Standi:*

Access to justice is now a well-recognised third generation environmental right for ensuring environmental justice. This can be attained apex courts, regular courts and specialised courts (commonly known as environmental courts or green courts). But the problem is that a person, who has standing to sue or *locus* to sue or *locus standi* (a legal capacity to challenge an act or decision) can bring a case. A representative suit can be brought only on permission of an appropriate authority, which in commonwealth countries is AG. In environmental matters, a relatively large number of people are affected, but they remain silent sufferers because they have no capacity to bear the cost of justice. This kind of situation can be averted and justice can be brought to their doorsteps if the requirement of *local standi* is relaxed and representative suits do not have to pass through the Attorney General's Chambers (hereinafter the AG). In one similar situation, Lord Denning granted injunction where an obscene programme was to be telecast and there was not enough time to take permission from the AG (see *Attorney General on the Relation of McWhirter v. Independent Broadcasting Authority* [1973] 1 All ER 689). The Canadian Supreme Court also gave the same ruling and granted injunction order to stop aerial spraying on health grounds (see *Palmer v. Nova Scotia Forest Industries* [1983] 2 DLR 397. Under the Canadian State of Ontario's Environmental Bill of Rights 1993, any resident in Ontario may bring an action against anyone who has contravened or will imminently contravene any environmental law which has caused or will imminently cause significant harm to the environment, if the authorities fail to respond to his complaint of contravention or the response given is not reasonable. This provision overrides the *locus standi* requirement in the state). In general, in Britain, courts have been assessing the question of standing of environmental organisations using varying considerations such as their long standing association with the subject matter, status as a consultant during the planning process, local interest, financial investments and the general importance of the subject matter. The recent cases reveal that the prayer for *certiorari* and *mandamus* are treated as public interest remedies and that in such cases, the courts take liberal approach [11 and 34]. The position in the United States has favorably different fervor [30]. In view of this, citizen suit provisions were incorporated when Congress found that public participation was necessary in the enforcement of environmental laws. But the courts' attitude remained the same in the pretext of the need to meet the constitutional mandate [26, 27, 32 and 34]. It is worth noticing here that the idea of public interest litigation is the invention of the American judicial system. It emerged in the 1960's, in the socio-political context of civil rights movement in the United States as a distinctive form of litigation. It was distinctive because its proponents actively and openly championed not just the individual rights of the plaintiff but the collective rights of the group to which the group to which the individual belonged [8]. In India and some other countries [18], *locus standi* is relaxed in environmental pollution matters where public interest/social interest is considered to be involved. This gave rise to development of the PIL jurisprudence, which is a kind of constitutional adjudication in pursuit of constitutional justice, promoting the concept of welfare state, as the courts in any country it ensures powers and functions of the state within the limits like rule of law, good governance prescribed by the constitution of the state. It is a supplement to the regular justice system, civil and criminal, of a state. It is limited to the stance of grave violation of human rights affecting relatively larger number of people. It helps protect and develop certain human rights. Public interest litigation is actually a means to bring justice to the doorsteps of poor and indigent people who cannot bear the cost of justice. It has been said by the Supreme Court of India in these words: "The majority of the people of our country are subjected to this denial of 'access to justice' and overtaken by despair and helplessness, they continue to remain victims of an exploitative society where economic power is concentrated in the hands of a few and it is used for perpetuation of domination over large masses of human beings..... The strategy of public interest litigation has been evolved by this Court with a view to bringing justice within the easy reach of the poor and disadvantaged sections of the community" (see *Bihar Legal Support Society v. The Chief Justice of India* AIR [1987] SC 38). On the same note, Justice P.N. Bhagwati observed "Even while retaining the adversary system (adhering to the requirement of *locus standi*), some changes may be effected whereby the judge is given a greater participatory role in the trial so as to place the poor, as far as possible, on a footing with the rich in administration of justice" [6].

It is actually the result of judicial activism. Courts under their original jurisdiction can *suo moto* take cognisance of anything wrong affecting public or can entertain petitions filed by a social active group or an individual representing the sufferers by relaxing the requirement of *locus standi* [19 and 33].

In India, public interest litigations are too easy to be instituted; it can be just by writing a letter to the court. The Constitutional Courts, exercising their jurisdictions under Article 32 and Article 226 as the case may be, register cases on it and issue summons to relevant parties, including government departments. However, courts have taken a cautious approach in order to eliminate cases filed with an object to cause harassment or to take revenge and balancing the values of development and environment; and before deciding, they have ensured all aspects through appointing expert commissions [5, 10 and 16]. The credit, along with others, goes to some judges notably Justice P N Bhagwati, for encouraging PIL litigations, and environmentalist Mr. M C Mehta, for instituting a large number of environmental PIL cases. PIL cases have been largely helpful in ensuring environmental justice to poor and indigent people. It has also been helpful in development of environmental law in the country.

Relaxing the requirement of *locus standi*, especially by High Courts and Supreme Courts has been quite helpful in various environmental cases. But it is not a matter of right of the applicant; it depends on the court at the preliminary hearing stage to relax or not to relax it. Relaxing the requirement depends on various factors, e.g. there is large scale and widespread pollution, which causing menace to a large number of people, the seriousness of the pollution, the litigation is genuine and there is no sinister tainted objective of the application, and the regular cases will not suffer. Courts can relax the requirement only when they deem it fit; otherwise, they can simply issue an order for the applicant to go to the regular courts. In other words, judicial activism can be a boost to PIL cases. IT will be appropriate here to have relatively detailed account of it.

#### *Position in Some Countries:*

Most of the commonwealth countries, notably Malaysia, claim to be *locus standi* countries and they do not relax this requirement even for greater interest of public. Some of them, particularly Australia and Canada, have devised certain other means to extend help to genuine public interest litigations. Nevertheless, there are some countries, notably India, have relaxed this requirement within the framework of their constitutions. This could be possible only due to a proactive role played by the top judiciary. In order to have a account of their practices, an exploratory study of some selected countries is essential.

#### *India:*

In India, PIL have played a vital role in development of the environmental jurisprudence. It started with the public interest litigation filed by Mr. M.C. Mehta in 1980s protection of the Taj Mahal from pollution caused by various industries around it. In 2002 the Supreme Court ordered 19 industries with 21 kilometers range to use cleaner fuel. Recently, the Supreme Court in *State of Uttaranchal v. Balwant Singh* 2010 (1) SCALE, 494, has mapped out the historical development of public interest litigation in the country. All cases have three stages of development: first phase, cases under right to life; second phase, cases on conservation of the nature and its processes; and third phase on transparency on the part of the government and public participation in environmental-decisions.

Access to justice in India is a fundamental right to citizens and a necessary component of administration of justice. Public interest litigation, which has now become an integral part of access to justice, secures environmental justice to all in general and to the poor in specific. Based on an analytical excise of the cases decided by the courts in India, the authors have sorted out the situations under which PIL can be entertained by the courts: The Court has found it to be an appropriate tool for environmental justice in the following situations: 1. Non-enforcement or non-implementation of law made for protection of the environmental law; 2. The scale of degradation of the environment amounts to infringement of fundamental right enshrined in Article 21 of the Constitution; 3. Other remedies, including the access to the 'green courts', are not appropriate; 4. The subject matter pre-eminently qualifies for intervention by the courts; and 5. Any other situation, which the Courts deem fit for allowing public interest cases/social interest cases. Keeping these imperatives in mind the Indian courts have relaxed the requirement of *locus standi* and instituted representative suits. But the courts have always kept in mind the justice has to be upheld in all cases. In order to ensure this, courts have based their decisions on reports of the commissions and opinion of experts in the subject matters appointed by them. They have been active, especially the Constitutional courts, even in the midst of criticism in the name of 'judicial overreach' or 'judicial tyranny' or being activist [7].

At this point of time there are a large number of PIL in India. It is not possible for the authors to discuss about all of them. However, some important ones, in which principles have been evolved, are: In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Others* (1981) 1 SCC 608, the Supreme Court held that right to life includes right to clean and hygienic environment. This right can be enforced simply by writing a letter by a public-spirited individual and social action group acting *pro bono pulico*. This has been said by the Supreme Court in *Kanpur Tanneries case* (see also *M.C. Mehta v. Union of India*, AIR [1987] SC 1086). The Supreme Court granted injunction order against lime quarrying in the *Doon Valley Limestone Quarrying case*, as it cause lime dust pollution in the big area, and ordered it to be carried out at other places through mining (see *Rural Litigation and Entitlement Kendra, Dehra Dun v. State of UP and others* [1985] 2 SCC 431; [1985] 3 SCC 614; [1986] Supp SCC 517; [1987] Supp SCC 487; [1989] Supp (1) SCC 504; [1989] Supp (1) SCC 537). The court asked the lessee to pay RS 300,000 to fund the monitoring committee set up by the Court. In *Kanpur tanneries case*, the Court issued an injunction order to close all tanneries, which do not have appropriate water pollution treatment plant, because they were responsible for pollution of the River Ganges. This left a large number of people unemployed; these people stage protest against the closure, as they did not have other source of income. Employees confronted the same problem when Madras High Court ordered for closure of 700 bleaching and dyeing units and effluent treatment plants in Tripur, and ordered the State to stop power supply to them. They could be opened only when they assure zero pollution to the Noyyal River. They were required to pay compensation to those who suffered from the river pollution in addition to pay for the cleanup activities. The Supreme Court upheld these in *Tirupur Dyeing Factory Owners Ass. v. Noyyal River A.*



*Protection Ass. & Ors.* [2009] INSC 1624 case and justified them on 'precautionary principle' and 'polluter pays principle' saying that they are integral part of the national environmental law (The Supreme Court justified this by relying on its previous decisions: *Enviro-Legal Action v. Union of India* [1996] 3 SCC 212; *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715; *Civil Liberties v. Union of India* [1997] 3 SCC 433; *AP Pollution Control Board v. Prof. MV Naidu*, AIR 1999 SC 812; *MC Mehta v. Union of India* [2001] 9 SCC 142; *MC Mehta v. Union of India* [2004] 12 SCC 118). In order to provide jobs of the employees back to their jobs, the Court ordered State Governments to take necessary actions. The then Tamil Nadu government decided to reopen the dyeing plants, which was considered as the NGOs involved in this case as opposed to the directives of the Supreme Court. Making the basis of the 'polluter pays principle', The Supreme Court is imposing exemplary fine. In *Vendata Resources case*, the Supreme Court imposed a fine of Rs.100 crore on the company for air pollution (see *T.N. Godavarman Thirumulpadv. Union of India*, AIR 2005 SC 4256). In *Banwasi Seva Ashram v. State of U.P. and Ors.*, [1992] AIR 920, where a large number of *adivasi* household were displaced for facilitating construction of a dam and the compensation process was in a mess, the Supreme Court gave a comprehensive direction for their amicable rehabilitation. Disposing of the proceedings and the monitoring-process so far as the National Thermal Power Corporation (NTPC) was concerned, this Court, HELD: In order to ensure that the rights of the displaced people are determined in their respective holdings and they are properly and adequately compensated, NTPC) will take, in collaboration with the State Government, the following measures: etc. : (i) The NTPC shall submit a list of the evictees-claimants to the District Judge, Sonebhadra who shall be the final authority to finalise the list.(ii) One plot of land measuring 60' x 40' to each of the evictee-families be distributed for housing purposes through the district administration.(iii) Shifting allowance of Rs. 1500 and in addition a lumpsum rent of Rs. 3000 towards housing be given to each of the evictee-families. (iv) Free transportation shall be provided for shifting. (v) Monthly subsistence allowance equivalent to loss of net income from the acquired land to be determined by the District Judge Sonebhadra subject to a maximum of Rs. 750 for a period of 10 years. The said payment shall not be linked with employment or any other compensation. (vi) Unskilled and semi-skilled posts in the project shall be reserved for the evictees.(vii) The NTPC shall give preference to the oustees in employment in class III and IV posts under its establishment.(viii) The evictees will be offered employment through the contractors employed by the NTPC.(ix) Jobs of contractors under the administration of the NTPC be offered to the evictees.(x) The shops and other business premises within the NTPC campus be offered to the evictees. (xi) The NTPC shall operate for the benefit of the evictees selfgenerating employment schemes such as carpentry training (free tools to be provided after completion of training) carpet weaving training, sericulture, masonry training, dairy farming, poultry farming and basket weaving training etc. (xii) The NTPC shall provide facilities in the rehabilitative area such as pucca roads, pucca drainage system, handpumps, wells, portable water supply, primary school, adult education classes, health centre, Panchayat Bhavan, sports centres, electricity connections, bank and sulabh Sauchalaya complex etc.The Deputy Commissioner Sonebhadra shall supervise and ensure that the rehabilitation measures are fully complied with. The amount of compensation will be determined by the District Judge having the jurisdiction and the amount determined by him, as compensation, will be final. In *Banwasi Seva Ashram v. State of U.P. and Ors* [1987] AIR 374, where certain forests were notified as reserved forests, Adivasis were supposed to be relocated. But Adivasis claimed certain part of that lands area to be under their ownership and also customary relates related to that land area based on their customary rights. Since they were facing harassment from the State Government Officials, the Banwasi Seva Asharam, an NGO, files the public interest litigation for ensuring ownership claims and related of Adivasis. The Supreme Court ordered for Adivasis to remain in possession of lands subject to investigation by a high-powered committee, consisting of 1 High Court Judge and 2 officers. Court also ordered for appointment of adequate number of record officers and 5 Additional District Judges. The State Government will implement the decisions of these judges. In the whole process, the Adivasis will be given adequate legal aid by the State Government under the supervision of a Board of Commissioners. These two case show the judicial activism in the situation where forest inhabitants have to be relocated in order to facilitate non forest use of forests and where certain forest areas are declared as reserved forests and forest inhabitants are forced to move to another place without giving due recognition to their customary ownership rights and other forest related rights. In these cases, the Court also assessed the value of economic development and conservation of the environment and attempted to strike a meaningful balance between conservation of the environment and economic development in order to achieve sustainable development goals. There was similar situation in Delhi, which was considered to be one of the most polluted cities in the world due to user of diesel by seemingly large number of commercial vehicles. The Supreme Court ordered in an MC Mehta caseto convert all commercial vehicles to be run by using CNG with effect from 1 April 2000 (see *MC Mehta v. Union of India* [1998] SCC 648) [36]. By December 2002, the order was fully implemented. It is also because of the Supreme Court that all filling stations in Deli sell unleaded petrol. Looking at the conservation of the environment and need for abatement and control of environmental pollution for alleviating the sufferance of the poor of the country, the Supreme Court has created a 'Green Bench'.



*Malaysia:*

Malaysian courts strictly follow *locus standi*. It flowed from *UEM v. Lim Kit Siang* [1988] 2 MLJ 12 and being adhered to in subsequent cases (see *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kaing Tubek and Ors. And otherappeals* [1997] 3 MLJ 23. In this case Justice Gopal Sri Ram ruled: “Although a litigant may have threshold *locus standi*...he may, for substantive reason be disentitled to declaratory relief”. He refused the declarations sought) [17, 21 and 29]. In *Lim Kit Siang*, in his remarkable dissenting judgment, Justice Abdoolcader described the majority decision as a ‘retrograde step in the present stage of development of administrative law and a retreat into antiquity...’ as it leads to ‘closing the door to the ventilation of a genuine public grievance...’.

With respect to a mandatory duty to make the EIA report available for public comments a liberal view has been taken in *Abdul Razak Ahmad v. Ketua Pengarah Kementerian Science, Technology dan Alam Sekitar* [1994] 2 CLJ 363. The court ordered to make the EIA report available to the plaintiff, as it would affect him specially and the residents of Johor in general. In fact, court recognised the *locus standi* of the plaintiff. In *Kajing Tubek & Ors v. Ekran Bhd. & Ors* [1996] 2 MLJ 388, the High Court took the similar view saying that it was the right of the plaintiff to take a copy of the EIA report and, therefore, he is entitled to take it. In appeal, the Court of Appeal recognised the right to get EIA report on demand and on payment or required fee, provided law allows it. Since in this case the Court of Appeal decided that the law of Sarawak would apply which did not provide for public participation in the EIA process, the claimant could not get it.

Representative suits in class actions, where the questions of facts and law are the same, are tenable even in countries, including Malaysia, and where *locus standi* is strictly adhered to, are different than PIL. In such cases, one person or a group of persons from the lot, who have common ground of a legal action, files a suit. In the United States, for example, for a legal action there should be injury, causation and redressability. There is a prohibition about third party standing except the class action within the legal framework of the Class Action Fairness Act 2005 (The following cases may be referred: *Jenkins v. Raymarks Industries* 782 F 2d 468 [1986]; *Amchem v. Windsor* 521 US 591 [1997]; *Ortiz v. Fiberboard Corporation* 527 US 815 [1999]). In Malaysia also the position is the same. It is notable that prior to the *Abdul Razak Ahmad* case, in *Jok Jou Evong v. Marabong Lumber Sdn Bhd* [1990] 2 CLJ 625, the High Court recognised plaintiffs’ right to bring representative suit although they were representing only one group of the affected residents. Similarly, in *Adong bin Kuwau & Ors v. Kerajaan Negri Johor & Anor* [1997] 1 MLJ 418, a representative suit was entertained by the High Court and an order for payment of compensation for loss of land and other related rights was made. On appeal, the verdict of the learned judge of the High Court was upheld by the Court of Appeal (see *Kerajaan Negri Johor and Anor v. Adong bin Kuwau and Ors* [1998] 2 MLJ 158.

In the Malaysian context, where due to poor enforcement of environmental law and some wrong administrative decisions, the conditions of environment in general and rivers of the Klang Valley in specific are fast deteriorating, courts should relax the requirement of *locus standi* in environmental matters where public at large suffer, and should encourage public interest/social interest cases (According to the Malaysian Environmental Quality Report 2005, 80 rivers were found clean, 51 were determined polluted and 15 rivers were found highly polluted. Among the pollutants, 43 were highly polluted by Amonical Nitrogen and 34 were highly polluted by suspended solids). This requirement should also be relaxed where public participation is, in effect, denied, and where conditions appended to approve EIAs are violated, and because of that people in general are suffering. It will help in ensuring environmental justice, because the only way to provide access to justice to those who cannot manage enough resources to bear the cost of justice. This will be in conformity with the third fundamental requirement of the Aarhus Convention. The apprehension that relaxing this requirement will open the floodgate of cases, and with the result of that, regular cases will be delayed has been proved to be false in India and elsewhere. In fact, representative suits have helped reduce multiplicity of cases. It is also notable that judges are careful and disallow phantom cases based on surmises or personal grudge. Other than imparting justice to aggrieved parties, PIL cases have been helpful in proper enforcement of law, especially environmental law, and development of environmental jurisprudence. India is one of the best examples of this. The other way to allow public interest litigation is to have appropriate legislation to facilitate it. The authors are of the opinion that the first choice is better because without special interest of courts, the object of such legislation cannot be achieved. It is appropriate to say that without judicial activism, public interest/social interest cases cannot yield the desired result.

*Some Other Countries:*

In order to ensure justice in environmental matters to poor and indigent, PIL are gaining grounds in some countries like Bangladesh (see *Dr. Mohiuddin Farooq v. Bangladesh and Others*, 22 BLD345; *Legal Aid and Services Trust v. Bangladesh (Secretary of Law, Justice and Parliamentary Affairs) and Another* 60 DLR (HCD) [2008] 234; and *Bangladesh Legal Aid and Services Trust v. Secretary, Ministry of Law, Justice and*

*Parliamentary Affairs*, 61 DLR (HCD) [2009] 109); Tanzania (see *Mitikila v. Attorney General* HCCC No. 5 [1993]. In this case, the Court ruled: "It is not the type of litigation which is meant to satisfy the curiosity of the people, but it is a litigation which is instituted with a desire that the Court would be able to give effective relief to the whole or a section of the society...the condition which must be fulfilled before public interest litigation is entertained by the Court is that the court should be in a position to give effective and complete relief. If no effective relief can be granted, the court should not entertain public interest litigation".); Uganda (see in the case of *TEAN v. AG and NEMA*, Misc. Application No. 39 [2001], where the Court acted in a proactive manner to ensure that warning on the cigarette packets is conspicuous. It further stated that smoking pollutes the environment, which causes health hazards to people in general.); South Africa (see *Ferreira v. Levin NO and Others*; *Vryenhoek and Others v. Powell NO and others* 1996 (1) SA 984 (CC), *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others*, 1996 (3) SA 1095 (Tks) 1106, *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others*, 1999 (2) SA 709 (SCA), *De Cock v Minister of Water Affairs et al*, 2005 (12) BCLR 1183 (CC) (direct access to Constitutional Court refused); *Direct Mineral Development: Gauteng Region and Another v Save the Vaal Environment and Others*, 1999(2) SA 709 (SCA); *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd*, 2008(2) SA 592 (C) (common law rules on standing to bring class action) and *Ngxuza and Others v Perm Sec, Dept of Welfare Eastern Cape and Another*, 2001 (2) SA 609); Pakistan (see *Benazir Bhutto v. Federation of Pakistan*, PLD 1988, SC 416; *Begum Bhutto v. Chief of Army Staff*, PLD 1977 SC 657; *Mohammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473) [15]; and the Philippines (see *Oposa v. Factoran, Jr.*, GR No. 101083, 224 SCRA 792. This case became the milestone of public interest litigation in the Philippines. In this case, a class suit was allowed, which was filed on behalf of the unborn children by their parents for protecting their rights in the forests of the country as the common heritage of the people of the country, and the Supreme Court allowed determined the suit to have been legally filed and recognised the rights of unborn in the forests of the country. This case was really an epoch-making decision, which became an authority for justifying such intergenerational equity in other countries. In *Chavez v. Public Estates Authority*, 33 Phil. 506 [2002], relaxation of the requirement of *locus standi* for protecting public interests got strength from the Supreme Court) [28]. In these countries, the requirement of PIL are being entertained in genuine case where suffer but cannot go to the court because of their poverty.

In Australia, they are considered to be an important tool for ensuring justice to the poor. For example, in New South Wales, there is a Public Interest Law Clearing House, which is a non-profit and membership-based organisation active throughout the New South Wales. It extends help, in genuine cases to individuals, group of individuals (community) and NGOs through pro bono legal assistance and sustainable advocacy on various issues, including environmental matters. In conjunction with this, Community Legal Centers and the Legal Aid Commission of New South Wales provide essential legal services to a large number of indigenous clients by engaging private legal firms and barristers in the pro bono work. The Public Interest Law Clearing House has, thus, been able to promote universal access to justice, as its mission is centered on bringing the justice gap in New South Wales. Queensland and Victoria also have similar law Clearing Houses [25]. In Canada, public interest cases have been patronised by the Supreme Court in stating that trial courts must take into account 'public benefit' and 'access to justice' while crafting cost orders in public interest cases. It is actually in line with the cost jurisprudence developed in the United States of America and some Commonwealth countries. In *British Columbia (Minister of Forests) v. Okanagan Indian Band* 2000 BCSC 1135, var'd [2001], 95 BCLR (sd) 273, aff'd [2003] 3 SCR 371, the Supreme Court of Canada ruled: "... some considerations should be given to allowing the court greater discretion to relieve parties of costs consequences in circumstances where a costs award following the event would have the overall effect of reducing access to justice. In cases of public importance...the more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance". This ruling of the court has been an encouragement to PIL as when the cost of litigation soars, *access to justice* suffers; this then might be a matter of discouragement to public interest/social interest cases. The author is of the opinion that funding the cost in genuine cases of public interests, most notably cases on conservation of the environment in general and protection of natural resources in particular will be an impetus to access to justice. Commenting on this landmark decision of the Supreme Court, Chris Tollefson *et al*, in their article, rightly conclude: "To the extent that we share a commitment to promoting access to justice, particularly in public interest cases, we have a shared interest in the development of a costs jurisprudence that recognises the realities of public interest litigation. The adverse implications of the traditional indemnification approach to costs allocation in public interest litigation are well documented and long recognised within our own legal system and analogous ones. In this sense, the Supreme Court's decision in *Okanagan Indian Band* is both timely and builds on an existing jurisprudential framework. Mindful of the broader context in which this decision has been rendered, and of the public interest values that are at stake in this area of the law, we hope that courts and legislators will now turn to the task of building on the framework the Supreme Court has articulated" [9]. The author is of the opinion that the Canadian Supreme Court should

have taken a liberal approach on standing also. Both together can bring justice to poor people faster than before. The Supreme Court perhaps kept this in mind while deciding the dispute in the case of *Attorney General of Canada v. Downtown Eastside Sex Workers United Against Violence Society* [2012] 2 SCR 524: 2012 SCC 45. The Advocacy Group challenged a broad range of laws violating various rights of prostitutes. The Court of Appeal granted right to standing to it, which was endorsed by the Supreme Court. The Court said that these women should have their day in the court. The Canadian Civil Liberties Association intervened in the case and argued: "the courts should not treat public interest litigants as exceptional but rather apply an approach that recognises the underlying purposes behind public interest standing. In Association's view, more liberal rules for public interest standing addresses the need to enhance access to justice before the courts, to ensure that legislation and government actions are effectively reviewed and makes the best use of judicial resources. They also took the position that a public interest litigant should not be denied standing merely because of an existing or ongoing case in another jurisdiction. This became an issue during proceedings because of ongoing litigation in Ontario in the Bedford Case, a case, which Association has also intervened in. While the Supreme Court of Canada noted that existence of parallel litigation is a relevant factor for the courts to consider, it is not a sufficient basis to deny the rights of public litigants in bringing forth their claim elsewhere". The author agrees with the Association's view.

#### *Arguments against Public Interest Litigation:*

The cause of action for instituting public interest/social interest cases is supposed to be open. However, for the sake of clarity and certainty in law, the reasons for which such cases can be brought must be known. It is for this reason that the Indian Supreme Court has issued guidelines, which clearly enunciate the instances covering a wide range of areas tending to violate human rights of general public, which qualify for letter-petition. One of them is: 'petition pertaining to environmental pollution, disturbance of the ecological balance...maintenance of heritage ...forest and wildlife and other matters of public importance.' The Guidelines provide that all letter-petitions received in the PIL Cell will first be screened in the Cell and only such petitions as are covered by the above mentioned categories will be placed before a Judge to be nominated by the Chief Justice of India for directions after which the case will be listed before the Bench concerned. If a letter-petition is to be lodged, the orders to that effect should be passed by Registrar (Judicial) (or any Registrar nominated by the Chief Justice of India), instead of Additional Registrar, or any junior officer. To begin with only one Judge may be assigned this work and number increased to two or three later depending on the workload. Submission Notes be put up before a Judge, nominated for such periods, as may be decided by the Chief Justice of India from time to time. If on scrutiny of a letter petition, it is found that the same is not covered under the PIL guidelines and no public interest is involved, then the same may be lodged only after the approval from the Registrar nominated by the Chief Justice of India. It may be worthwhile to require an affidavit to be filed in support of the statement contained in the petition whenever it is not too onerous a requirement. The matter that can be dealt with by the High Court or any other authority may be sent to them without any comment whatsoever instead of all such matters being heard judicially in the court only [31].

These guidelines attempt to allow public interest litigation only in genuine cases so that justice could be brought to the doorsteps of the poor and marginalised people of the country. In spite of these guidelines, there are chances of abuse of the right to bring public interest/social interest cases. A person, pretending to be public-spirited person may bring a case simply to cause harassment to defendants, or to pressurise them to agree to something or for fun. They can be practiced by group of individuals also. In these situations, the cause to bring a case is not genuine, rather to achieve any sinister objective. The authors are of the opinion that if this is the case, the objective for which public PIL has been justified will be defeated. It will also waste the precious time of the courts. In view of this, it will be appropriate for the court, where the sham petition has been filed, to thoroughly investigate the allegation(s) and to ask the petitioner to establish a *prima facie* case by producing sufficient evidence before the court. If he fails to do so and the case appears to be an attempt any of the above-mentioned situations, the petitioner should be subjected to necessary action, which the court deems fit, including ordering to prosecute such person.

Another argument, which is generally taken against PIL, is that they will cast impediment to regular cases. This situation might occur when the numbers of such cases are large enough to impede regular cases. It is argued in order to rebut this argument that PIL are necessary because they impart justice to a large number of poor and marginalised people. Even the present suffers are not many, but if the case is applicable a relatively larger similar cases around the country. The litigation might be considered, on this ground, to be public interest litigation.

#### *Conclusion:*

The above discussions accentuate the fact that for conservation of the biodiversity, which is crucial for survival of the human kind, is *sine qua non*. And without proper but easy access to justice in environmental degradation matters, which are responsible for the sufferance of the people and loss of biodiversity - because for

the survival of the biodiversity, congenial environment and its processes are fundamental - right to access to information, right to participate in environmental decision-making become superfluous and ineffectual. It is for this reason, amalgamated with bringing justice to poor and marginal sufferers, that apex judiciary, especially constitutional courts, in some countries devised a means by relaxing the requirement of *locus standi* to entertain representative suits in environmental pollution cases, where relatively large number of people suffered who did not have resources to access to justice. It could be possible by making simple letter to the Chief Justice of the High Court or The Supreme Court, as the case may be. Judicial activism went a step further even to consider cases, where only few individuals suffered but similar situations existed in other areas. The concerns expressed on public interest/social interest litigations are genuine but not serious. They cannot cast serious impacts if the courts are cautious in registering such cases. It is notable that the Indian Supreme Court has issued guidelines in order to obliterate sham applications for instituting PIL motivated to achieve sinister objectives. In view of the India practice, the authors offer the following suggestions: 1. All states must relax the requirement of *locus standi* in order to provide environmental justice to poor and marginal people. 2. Relaxation of the locus should be only in genuine cases. 3. The Apex courts, Supreme Court, Federal Court, Court of Appeal and High Courts, as the case may be, in all countries should develop guidelines to screen out sham cases. 4. It will be appropriate if a person or group of persons prove to have tried to institute public interest litigation for achieving any sinister purpose must be prosecuted. 5. It will be appropriate that states make appropriate legislations so that law could be known to all and implemented by the courts. 6. Public interest litigations should be supported by social action groups and individual environmental activists. It will be better if every state creates a fund and extends legal aid by state supported legal aid clinics. 6. The Australian practice of the Law Clearing Houses should be followed by other countries. 7. Courts should develop an appropriate cost jurisprudence on the Canadian practice.

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