



**PROBLEMS, LIMITATIONS AND
IMPLEMENTATIONAL FAILURES IN
PUBLIC INTEREST
ENVIRONMENTAL LITIGATION
THROUGH AN ANALYSIS OF THE
KANPUR TANNERIES GANGA
POLLUTION CASE**

*By Sanchita Aggarwal
From Jindal Global Law School*

Introduction:

The field of environmental law has seen an influx of litigation, especially public interest litigation, in cases where the government policy or the institutional machinery of Pollution Control Boards has failed to bring redressal. Dereliction becomes a matter of grave public concern – big enough to allow an individual to seek the Courts directions to avoid any further harm to the environment, and ultimately protect human rights. One such case has been that of *MC Mehta v. Union of India*,¹ that is, the Kanpur Tanneries Ganga Pollution case, wherein a citizen in his own capacity looked to prevent tanneries situated in Kanpur from polluting and discharging their trade effluents in Ganga.² The matter was raised after steps were not taken by industries and the concerned lawful authorities to control this act of public nuisance. While the Court was quick to adjudicate protective methods mandating that the tanneries install primary treatment plants (or shut down) and governmental bodies like the Pollution Control Board take active steps to ensure clean environment – it still raises

the question if its enough. The paper through an analysis of the *Kanpur Tanneries Ganga Pollution case* seeks to propose that public interest environmental litigation will be thoroughly constrained till the time effective changes are not made within the law itself since the actions under mere judicial threats and orders are temporary in nature – and do not bring long-term change.³ It will also explore how in absence of clear environmental rights and interests, the judiciary has a lot of flexibility which is not the best practice.

A surface level reading of the judgment may lead us to believe that the effective goal was achieved, however, it is not completely true. It has been more than 30 years since these orders have passed and yet, Ganga's pollution is at an all-time high, arguably because of three reasons. One, public interest environmental litigations (herein after referred to as "PILs") are subjective and limited in their analysis due to multiple factors affecting orders – creating disparity. Two, the government machinery established under law is ineffective, and thus, directions by the judges under this machinery have no long-term consequences. Three, the rights established under the Water Act of 1974⁴ are incomplete – and thus, remedies under that framework of rights have proven to be incomplete.

The paper will shed light on the above-mentioned claims through the use of the *Kanpur Tanneries Ganga Pollution case* at different points, followed by the relevance

¹ *MC Mehta v. Union of India*, (1988) 1 SCC 471.

² *MC Mehta v. Union of India*, (1987) 4 SCC 463.

³ SHYAM DIVAN & ARMIN ROSENCRANZ, *ENVIRONMENTAL LAW AND POLICY IN INDIA* 133 (2nd ed. Oxford University Press 2001).

⁴ Water (Prevention and Control of Pollution) Act, 1974.



and urgency for its correction. Part I of the paper will see how anthropocentrism has breached the Court due to discretionary powers in light of assumed public interest, which may not always overlap with environmental interests. It calls for a determination of what “environmental interest” may be. Part II of the paper underlines how only certain facts are brought forth due to the flexibilities within PILs, which prevents the entire impact on the environment from being assessed. Part III foregrounds how the predominant reason why PILs will be constrained is due to the lack of a framework for them to work under, since they are directorial in nature. Judges are not experts in the field, and the dearth of accountability for regulatory bodies such as Pollution Control Boards, absence of clear rights for the people, and overall lack of an ecocentric approach due to political reasons, leads to failure of environmental goals from being achieved. Part IV and V thus look to find a balanced framework of PILs and laws – to neutralise the incoherence of rights and predictability within environmental jurisprudence, wherein although PILs are not bad, the lack of laws are what makes it problematic. It calls for action by the Parliament to increase accountability in regulations, focus on prevention of damage instead of merely penalising damage, reduce judicial flexibility, and create specific rights and interest-based laws with a balance of anthropocentric and ecocentric approaches – for effective long-term results.

I. The Anthropocentric and Perceived “Public Interest” of Environmental Litigation

PILs bring with them a large amount of discretion and flexibility. There is no specific procedure the judges need to follow.⁵ It is based on what facts come to the court, the judge’s perception on how publicly important the matter is, the political dialogue surrounding the situation, the laws governing the situation, etc. Inevitably, it allows for subjectivity to creep in – and in the case of environmental litigation, it opens scope for the judgement to be based on matters other than the environment’s importance itself.

In the *Kapur Tanneries Ganga Pollution case*, Justice Singh in his supplemental ruling highlighted wrongdoing, specifically exasperated due to the religious importance of river Ganga to Hindu beliefs – whose holy sanctity needed to be maintained per him. The focus shifted from the environment, foregrounding the anthropocentric approach taken with the discretion under PILs which allows judges to choose what matter becomes important – based on the value *they* prescribe to the river in question, distinct from the value of the river itself.⁶ That is, the abstract of religion is given more importance under this perceived public interest, rather than the environments. There is an inherent importance which becomes associated with the former’s language – which demands no further explanation. In *Vellore Tanneries v. Union of India*,⁷ a case also about a river getting polluted by tanneries, environmental principles like polluters pay, sustainable development, precautionary principle were

⁵ *Supra* note 3.

⁶ Paul Cryer et.al., *Why Ecocentrism is the key pathway to sustainability*, MAHB (Jul. 4, 2017),

<https://mahb.stanford.edu/blog/statement-ecocentrism/>.

⁷ *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647.



used to determine rights, whereas there is a clear absence of application of these in our present-elected case which primarily accentuated Ganga's religious/holy importance along with few abstract discussions of the environment. It casts doubt upon whether "public interest" under its large ambit will be the same as "environmental interest". This approach arguably also allows other rivers or environmental issues to not be considered important in absence of this subjective value. Initially, *Mohd. Salim vs State of Uttarakhand*,⁸ allowed only specific rivers, such as Ganga, to be declared as juristic persons where their pollution was considered as an "extraordinary situation" due to their religious importance.⁹ It brings a duality of sorts, disallowing the environment to be seen with its own inherent value.

Even if we are to set this duality aside for a moment, isolating the ruling in itself to imagine a balance between environmental importance and religious practices, in hope that it leads to some benefits, it is tough to not see the dissonance created which subconsciously gave the latter a preference. Justice Singh detailed the honour of getting to bathe in river Ganga or be cremated by its banks. He emphasised on its purity and went on to quote Nehru's wish of wanting his ashes submerged in the river. These comments were made without sheer consideration of how the ashes themselves are one of the major pollutants of the river.¹⁰ Although after

foregrounding this meritoriously in 1987, the second order in 1988 to the Kanpur Nagar Mahapalika empowered said authority to make sure no bodies are thrown in the Ganga, there is an obvious polarity which exists here. Preventing bodies to be thrown in the river may allow some forms of checks on pollution, but what is inherently pollution by way of ashes and cremation fire is looked at in awe due to ideation of the "holy" by the public— placing personal values over the environment. It promotes flexibilities for human interest over the environment. Such discretion could be harmful and may lead to wavering responsibility. Intergenerational equity (though it may also be weak anthropocentricism)¹¹ will also start to blur since current perceived public interests are limited in nature. Not only are they that of specific groups who are currently in courts or who have representation in courts, but they are also only of the current generation. Further, Muslim and Hindu majority countries have the lowest climate-change adaptive capacity,¹² indicating that climate-change risks in India may only further increase if limited religious public interests start to seep in environmental jurisprudence. To regulate it and bring more accountability within this litigation, there needs to be a primary determination of what "environmental interest" is, through the incorporation of balanced anthropocentric and eco-centric approaches in domestic law.

⁸ *Mohd. Salim vs State of Uttarakhand*, 2017 SCC OnLine Utt 367.

⁹ *Id.*

¹⁰ PTI, *NGT asks govt. to explore alternatives to traditional cremation*, THE HINDU (Feb. 2, 2016, 6:28PM), <https://www.thehindu.com/sci-tech/energy-and-environment/ngt-asks-govt-to-explore-alternatives-to-traditional-cremation/article8184426.ece>.

¹¹ N.M KATSOUKAKOS ET.AL, ENVIRONMENT AND DEVELOPMENT (Stavros G. & Vassilis J. Ed., 2016).

¹² Vegard Skirbekk et.al, *How Religion Influences Our Relationship With the Environment*, STATE OF THE PLANET COLUMBIA UNIVERSITY (Oct. 15, 2020), <https://blogs.ei.columbia.edu/2020/10/15/religion-influences-relationship-environment/>.



II. Bourgeois Environmentalism

The facts which are brought to the court also play a factor in determining the scope of the environmental duty judged. Due to the vast nature of the Gangetic plains, the Court requested the focus of the PIL to be limited, and ultimately Kanpur and its tanneries were pinned down.¹³ However, it is important to note that Kanpur being one of the biggest cities with a booming industry also has sugar, detergent, chemical, textile, automobile industries which are in violation of permitted pollution levels.¹⁴ Statistically, about 70% of the industrial pollution in Ganga is by big sugar, paper, distillery industries,¹⁵ but they have been mysteriously erased from all equations when questioning industrial authenticity. It is observed that most (80%) stakeholders when it comes to these tanneries are Dalit workers and Muslim owners, who became the bearers of the burden alone.¹⁶ The judicial decisions, thus, have large politic-socio-economic bias when it comes to these minorities who become ‘easy’ targets when you consider the caste and religious hierarchy prevalent in India. Our previously discussed entry of limited perceived public interest coupled with this problem of PILs allowing only half facts to be explored becomes a greater problem in terms of liability. Amita Baviskar calls it a form of “bourgeois

environmentalism” where only certain interests are put forward without consideration of the working class, especially through PILs.¹⁷ The result is that upon unequal division of liability, not only is there injustice to certain sections of society, but also the environmental issue goes unscathed. The impact is limited to the parties before the Court.¹⁸ Without proper checks and regulations for all, the larger industries continue to flout regulations. Similar incidents have been seen throughout environmental jurisprudence under this mechanism where in *the Taj Trapezium case*, only small-scale industries were targeted even though it was proved that Mathura Refinery (a bigger industry) had the maximum pollution.¹⁹ In *the CNG case*, the Court mandated for rickshaws to switch to CNG while simultaneously refusing to regulate private vehicles.²⁰ This has also routinely been noticed in forest protection cases when the tussle might be with Adivasis. Those with lower socio-political economy will not always be able to reach the Court to fight back, and through such PILs a system of incomplete rights has been created – which is ultimately not beneficial for the environment

¹³ Shareen Joshi, *Ganga pollution cases: Impact on infant mortality*, IGC (Feb. 26, 2016), <https://www.theigc.org/blog/ganga-pollution-cases-impact-on-infant-mortality/>.

¹⁴ Jacob Koshy, *Nowhere to hide: how Kanpur’s tanneries are struggling to stay afloat*, THE HINDU (Sept 1, 2018, 5:01 PM), <https://www.thehindu.com/news/national/other-states/nowhere-to-hide/article24835411.ece>.

¹⁵ Ganga Action, *Industrial Waste Management*, <https://www.gangaaction.org/actions/issues/industrial-waste-management/>.

¹⁶ Abdul Alim Jafri, *After 14 months closure, 248 tanneries in Kanpur shut down again*, NEWS CLICK

(Feb. 29 2020), <https://www.newsclick.in/After-14-Months-Closure-248-Tanneries-Kanpur-Shut-Down-Again>.

¹⁷ Amita Baviskar, *The Politics of the City*, INDIA SEMINAR, <https://www.india-seminar.com/2002/516/516%20amita%20baviskar.htm>.

¹⁸ *Supra* note 3.

¹⁹ M C Mehta v Union of India, AIR 1997 SC 734.

²⁰ Yogini Oke, *Why judiciary steps in to solve India’s air pollution crisis every time & why it’s not enough*, THE PRINT (Nov 5 2019, 11:33AM), <https://theprint.in/opinion/judiciary-steps-in-to-solve-india-air-pollution-crisis-its-not-enough/315807/>.



either since the entire impact is not being assessed.²¹

III. Limitations of PILs due to improper State Machinery

The looming umbrella over all these problems, however, is the constraint under which the PILs must work. The role of the judiciary is to give directions to the authorities to do what they were supposed to do. It is more directional in nature. When clear rights do not exist under the law, the discretions and the contradictions tend to increase. The framework under which the *Kanpur tanneries Ganga Pollution case* was adjudicated was the Water (Prevention and Control of Pollution) Act, 1974 (herein after referred to as “the Act”). It establishes a body called the Pollution Control Board to regulate all actions affecting the environment, both on the State and Central level. The same were also enjoined in the case. Heavy duty was placed to follow the Act and for these bodies to ensure that there is no dereliction in the future. However, understanding the scope of the Acts makes us realise that no matter what directions the ruling may give underneath it, the effective result cannot change unless there is a broader institutional change.

In PILs, the right and the remedy go hand-in hand.²² The Act unfortunately does not mention the right to clean environment or right to drinking water and is more regulatory in nature. This leads to remedies being envisaged by way of emphasis on the

regulatory bodies to take control of pollution and diffuse situations, instead of a pre-existent rights which accounts for people’s use of the river bodies and sustenance-dependence on river bodies. It delves into regulation of private individuals, which can often be influenced by corruption and allow damage to take place, only later leading to remedial rights in Courts. It fails to give environmental rights in and of itself. Although precautionary principle, which looks to prevent damage altogether even without scientific proof, has found its way through common law jurisprudence, and is specified in the Rio Declaration,²³ a domestic codification of it is lacking.

Not only is lack of a clear right a problem, but the constitution of the regulatory body, that is, the State Pollution Control Board itself raises multiple questions. Under Section 4 of the Act, a Chairman needs to be appointed who has “*special knowledge or practical experience in respect of matters relating to the environmental protection*”.²⁴ However, under current affairs, there is massive politicisation when it comes to appointments. Geetanjoy Sahu highlights how people of expertise or of unbiased backgrounds are hardly appointed.²⁵ Most State Board Chairpersons are members or retired members of the party which governs the State in question. When it comes to Kanpur, the current Uttar Pradesh Pollution Control Board Chairman is JPS Rathore, a former BJP vice president²⁶ – the party the Chief

²¹ Anuj Bhuwania, *The Case that Felled a City: Examining the Politics of Indian Public Interest Litigation through One Case*, SOUTH ASIA MULTIDISCIPLINARY ACAD. J. (2018).

²² *Supra* note 3.

²³ Rio Declaration on Environment and Development, Principle 15, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992).

²⁴ Water (Prevention and Control of Pollution) Act, §4 (1974).

²⁵ Geetanjoy Sahu, *Environmental Regulatory Authorities in India: An Assessment of State Pollution Control Boards*, MUMBAI TISS (2013).

²⁶ Ishan Kukreti, *UPPCB chairman appointed in violation of NGT orders, claims activist*, DOWN TO EARTH (March 18 2020),



Minister of Uttar Pradesh, Yogi Adityanath, is from. The Government is in contempt of the *Rajendra Singh v. State of Uttarakhand*²⁷ NGT order applicable for the State of Uttar Pradesh and the *Techi Tagi Tara v Rajendra Singh*²⁸ Supreme Court order which confirmed and clarified that they cannot appoint the Chairperson of the Board for political gratification. The State government under the abovementioned orders had to set regulations to be followed for such appointments but it was found by an RTI that Uttar Pradesh did not frame rules until January 2020, whereas Rathore was assigned way back in March 2019.²⁹ To further prove the atrocity that is this appointment, Rathore doesn't have a degree in Environmental Science/Engineering – a necessity under the NGT order.³⁰ One must ask themselves if PILs can do much in the face of such incomplete remedial machinery.

The Pollution Board which is directed to ensure that the tanneries are under the pollution-limits lack qualified experts and accountability. Even after the authorities being injuncted in 1988 to ensure and regulate that the tanneries do not pollute, in 1990, it was again the Supreme Court who found out that tanneries are still erring compliances.³¹ Furthermore, with politization of the Board, the policies are

likely to be influenced as well. The Court orders which sought to shut the tanneries on failure to have treatment plants to avoid pollution of the river Ganga have now been imagined differently. It has been observed that more than 200 tanneries were closed in November 2019, close to Kumbh by Chief Minister Adityanath to “ensure that pilgrims have a cleaner dip”.³² Tanneries here were not shut or their treatment plants had never been looked into with the reason of necessity of clean water, clean drinking water, clean environment, but they were shut for symbolic reasons. This is even after the district administration requested the government to allow tanneries to function since no evidence of pollution by the tanneries was found at the time.³³ It begs the question if the internal matters of the pollution control boards allowed for this happen – making the need of a framework of accountability even higher.

Currently, most of the money (more than ₹20,000 crores) under funds set up for cleaning Ganga go unused.³⁴ Accountability for government actions needs to be brought in within the law too to ensure quicker action. Any accountability which could have been established for the agencies under Ganga Action Plan was neglected by the Courts in their ruling, even though their role was mentioned in the reports by the Uttar Pradesh

<https://www.downtoearth.org.in/news/governance/up-pcb-chairman-appointed-in-violation-of-ngt-orders-claims-activist-69813>

²⁷ *Rajendra Singh v. State of Uttarakhand*, 2016 SCC OnLine NGT 456.

²⁸ *Techi Tagi Tara v Rajendra Singh*, 2017 SCC OnLine SC 1165.

²⁹ *Supra* note 26.

³⁰ *Id.*

³¹ Kelly D. Alley, *Urban Institutions At The Crossroads: Judicial Activism And Pollution Prevention In Kanpur*, URBAN ANTHROPOLOGY AND STUDIES OF CULTURAL SYSTEMS AND

WORLD ECONOMIC DEVELOPMENT Vol. 25, No. 4 (WINTER, 1996) at 361, 362.

³² Vivian Fernandes, *Kanpur's Tanneries Are Collateral Damage in UP's Polarised Electoral Battle*, THE WIRE (April 30 2019), <https://thewire.in/politics/kanpurs-tanneries-are-collateral-damage-in-ups-polarised-electoral-battle>.

³³ *Id.*

³⁴ Aishwarya S. Iyer, *Little Hope for Ganga Clean-Up? Only 1/10th of Funds Spent So Far*, THE QUINT (May 25, 12:59PM), <https://www.thequint.com/news/india/pm-narendra-modi-namami-gange>.



State Pollution Control Board.³⁵ This is the downside of a flexible judiciary mechanism working in the absence of law, which allows considerations being left out. A collective understanding of the law, facts, and mechanisms by experts is the only way to avoid dissonance in our current frameworks – an expertise which members of the judiciary lack.

IV. Flexibilities within Environmental Judicial Orders

There is also a constant struggle in analysing PILs because although it does lead to an outcome which is immediately beneficial for the environment, there is also an ever-changing attitude in its governance principles.³⁶ In the *Kanpur Tanneries case*, the Court emphasised on how ecology is more important than issues of unemployment and loss. In the *Calcutta Tanneries case*³⁷ the right to a pollution-free environment did not negate the right to wages and continued employment. We have also previously discussed how the *Vellore Tanneries case*³⁸ used environmental principles in its determination, while our case at hand did not. All are steps in the right direction in varying degrees, but their contradictory stances on the same matter creates an incoherence in predictability and rights.³⁹

The critiques are not to say that PILs are totally ineffectual. They allow enforcement

of statutory obligations, for the entry of constitutional rights and most importantly broader environmental principles within the Indian jurisprudence.⁴⁰ The flexibility accorded has its obvious negatives, but it also permits the judges and the citizens to take action for the benefit of the environment through broader arguments.⁴¹ The case at hand used the language of “public nuisance” to determine the larger duty owed to the public, even if it is at a cost to industries/private entities. It also brought the start of regulatory action. Without this judicial activism and the constant orders demanding implementation even for years after the initial orders, most tanneries would have continued to pollute and exist without treatment plants. A lot of tanneries set up primary treatment plants after the judgement due to the fear of being shut otherwise, which is a great start. However, this paper tries to prove that PILs needs to be looked as only a step in the process, and not the end of environmental rights and obligations.

V. Need for Change

A stronger, more encompassing law needs to be made by the Parliament. Environmental litigation should not be the primary control mechanism. The judiciary’s role is to ensure fulfilment of rights, but the law itself needs to be made stronger so that rights can be found underneath it and not left for the judiciary to assume. A method of accountability needs to

³⁵ *Supra* note 31.

³⁶ Lavanya Rajamani, *Precautionary Principle, in INDIAN ENVIRONMENTAL LAW: KEY CONCEPTS AND PRINCIPLES* (Shibani Ghosh ed. 2019).

³⁷ *M.C. Mehta v. Union of India*, 1997 (2) SCC 411.

³⁸ *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647.

³⁹ Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access,*

Participation, Equity, Effectiveness and Sustainability, JOURNAL OF ENV LAW.19, no. 3 (2007).

⁴⁰ *Supra* note 3.

⁴¹ Lovleen Bhullar, *The Judiciary and the Right to Environment in India: Past, Present and Future, in INDIAN ENVIRONMENTAL LAW: KEY CONCEPTS AND PRINCIPLES* (Shibani Ghosh ed. 2019).



be imagined even for the regulatory bodies under the law. Without such a framework of accountability, mere direction-based power is not a long-term solution since orders will be flouted and there are no checks in place. Even until 1995, MC Mehta had to request the Courts to investigate non-compliances by the Pollution Control Board to monitor the tanneries.⁴² After pronouncement of the final judgements, even today, tanneries are not pollution-free. PILs will be therefore be limited in their scope since it needs to depend on these bodies established under law. The current duties under which the bodies work is incomplete or politized. PILs are definitely advantageous when it comes to immediate and urgent remedies but ultimately, the law is what will determine the duty. The current manner in which environmental law has been allowed to exist in India is that instead of the Court being the last resort for implementation of rights, it is being sought after for creation of rights, for continued investigation, for regulation. It has substituted the role of executive,⁴³ and, the separation of powers imagined under the Constitution is being merged here. There is no clear demarcation of rights for the environment. Back in the 1990s, the Court supposedly met every Friday for the Ganga Pollution cases in order to keep check on the regulatory bodies. A large amount of discretion is thus being given to the Court, someone who is also not an expert in the field. A law-based regulation will not only help lessen the activist-reliance on the Courts, but with it the flexibility and the value-based biases which may creep in.

Conclusion

Having seen how the procedure established under law is incomplete and indifferent, there needs to be a revisitation of environmental jurisprudence in India to create a larger framework for PILs and right-based laws. Examples of such rights can be a right to pollution-free water, right to drinking water, right to clean environment, and even codification of principles like the precautionary principle and intergenerational equity. Public interest litigation cannot be a stand-alone mechanism. Accountability, court procedures, regulation of pollution, expert analysis, prevention of damage, fund-mechanisms, broader rights, litigation-remedies—all need to be considered together in an integrated policy-related manner for proper sustainable development.⁴⁴ The *Kanpur Tanneries Ganga Pollution case* showed us that religion can often be considered as a perceived public interest above environmental interests when determination and discretionary powers are given entirely to judges in the absence of guiding law. Flexibility with respect to facts admitted and the weightage given to each fact during litigation also leads to disparity and incoherence, affecting the assessment of the impact on the environment. State Pollution Control Boards under the Water Act of 1974 tend to be corrupt, lack proper regulation and fail to be unbiased, regular, and of an expert opinion, whilst simultaneously flouting directional orders under PILs, making the remedy often unsuccessful. While Courts are a good way of ensuring rights, for a long-term and more coherent change, a balance needs to be made between both the environment in its own value and intergenerational equity to respect rights of future generations. Flaws in

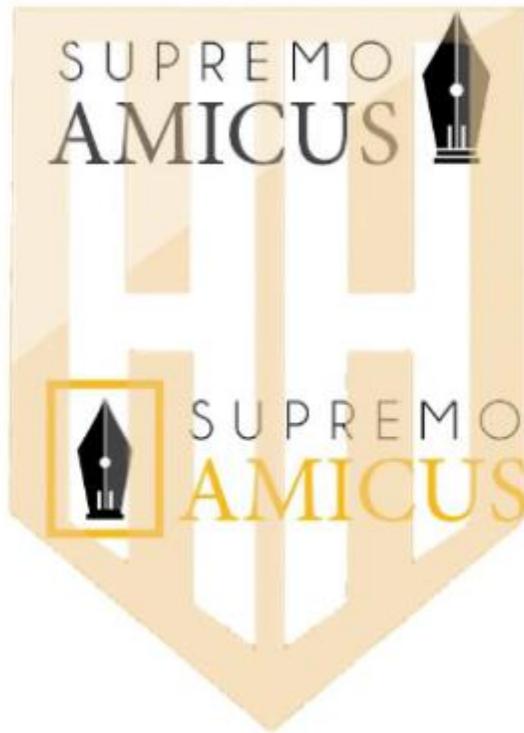
⁴² *Supra* note 31.

⁴³ *Supra* note 39.

⁴⁴ Rio Declaration on Environment and Development, Principle 4, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992).



the current system can often limit impacts to the duration of the litigation, under pressure of the orders, and that needs to be changed.⁴⁵ There is a requirement for “environmental” interest to be determined to create proper rights. Continuously changing flexibilities under PILs need to be curtailed to allow for rights of the people and the environment to be given priority. Until then, PILs will be limited.



⁴⁵ *Supra* note 39.