THE JUDICIARY IN INDIA: A HUNGER AND THIRST FOR JUSTICE

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India's higher judiciary has created and overseen the evolution of public interest litigation in India. This paper presents a strong defence for the public interest litigation model as an instrument for the delivery of fair and equitable justice, resistant to governmental apathy as well as economic and social privilege. The first part of the paper provides an account of the evolution of India's constitutional courts', and particularly the Supreme Court's, role prior to the emergence of public interest litigation. It discusses the nomenclature of 'social action litigation' and characterizes its evolution as unique and indigenous, distinguishable from the practice of public interest law in the United States of America. The obstacles faced by this radical new form of preserving social and economic rights are also examined. The paper then addresses the Supreme Court's approach to increasing access to justice and overcoming these impediments, especially through procedural innovations such as broadened locus standi and non-adversarial, investigative proceedings using court appointed investigative commissions and amicus curiae. Even as it recognizes the possibility of misuse of social action litigation, the paper concludes with a strident defence of judicial activism and of social action litigation as a means for bringing the promise of justice to the ordinary and disempowered.[†]

> 'Blessed are they who hunger and thirst for justice, for they shall have their fill'.
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> —The Eight Beatitudes, The Bible

I. INTRODUCTION

The Indian judiciary, especially at the level of the Supreme Court and the High Courts, has for long been concerned with the concept and practice of justice. What constitutes justice and for whom? How do we truly achieve the laudable constitutional precepts that 'no one is above the law' and that 'all persons are entitled to the equal protection of the law'? How do we cope with the problem that in principle, 'all persons are equal under the law' but in reality, 'some are more equal than others'?[1]

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† Abstract supplied by Editors.

In its infancy, immediately after independence, the Supreme Court of India grappled, not always successfully, with the problem of striking a balance between the much-needed programmes of economic and social reform (for example, land reform and land redistribution) on the one hand and establishing the credibility of the newly-born Indian State in terms of fostering the rule of law and respecting the rights vested under laws that preceded independence and the very Constitution itself , on the other.[2]

During the first couple of decades when, for all practical purposes, India was functioning as a *de facto* one-party political system, the Supreme Court focused on promoting the values of constitutionalism, separation of powers and checks and balances over and in each organ of the State. The Supreme Court and the High Courts were ever-vigilant in their review of executive actions, hence ensuring to the public requisite protection against excesses of authority or abuses of power.[3] They were equally vigilant in their review of legislative actions, both in respect of lawmaking[4] as well as in balancing legitimate parliamentary powers, (necessary for the effective functioning of Parliament) with parliamentary privileges, notably that of punishing for contempt.[5]

In the decades thereafter, the Supreme Court turned its attention towards the frequency with which the Parliament was amending the Constitution using the dominance of a single political party at both the national and state levels to the maximum. The Court elaborated upon the distinction between the constituent and legislative power.[6] Moreover, as the judiciary and the Indian political system matured, the Supreme Court firmly established the primacy of the Constitution through its articulation of the basic structure doctrine, thereby safeguarding those features that are inherent in the Constitution from being altered through the mere exercise of legislative power.[7]

As its confidence, skill and maturity developed from the above achievements, the Supreme Court turned its attention towards the challenge

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1 GEORGE ORWELL, ANIMAL FARM 105 (1965).

2 *See, e.g.,* Shankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458 (upholding the validity of the first amendment to the Constitution that shielded land acquisition laws from legal challenge under Part III of the Constitution.) However, in later judgments starting with State of West Bengal v. Bella Banerjee, AIR 1954 SC 170 the Court ruled that the meaning of 'compensation' in Art. 31(2) meant just equivalent for the property acquired, making meaningful land reform impossible. This in turn led to Parliament's adoption of the undesirable practice of shielding laws from constitutional challenge by placing them in the Ninth Schedule added to the Constitution by Parliament through a constitutional amendment.

3 *See, e.g.*, C. S. Rowjee v. Andhra Pradesh State Road Transport Corporation, AIR 1964 SC 962.

4 Gopalan v. State of Madras, 1950 SCR 88.

5 Keshav Singh v. Speaker, Legislative Assembly, U.P., AIR 1965 All 349.

6 Through a series of cases culminating in I.C.Golak Nath v. State of Punjab, AIR 1967 SC 1643.

7 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225: AIR 1973 SC 1461.

of securing 'justice for all', *i.e.*, for the rich and poor, over-privileged and under-privileged, disadvantaged and vulnerable, exploited and excluded alike. It did so by creating a uniquely Indian breed of public interest litigation, which was given the nomenclature 'social action litigation' ('SAL') by noted jurist, Upendra Baxi.[8] After a thoughtful and balanced assessment of the early years of SAL in India, Professor Baxi concluded that as a result of SAL, the Supreme Court had evolved from being the Supreme Court of India into a Supreme Court for Indians—*all* Indians alike.[9] In this context, this paper traces the origins and evolution of SAL, reviews some of the landmark SAL cases and seeks to identify the systemic reforms achieved through SAL, both within the judicial system and beyond, in virtually all spheres of governance addressed by the Constitution.

SAL is the product of judicial activism on the part of the judges of the Supreme Court and the High Courts in India. It came into existence as a response to an endemic problem encountered in India, and indeed in many Third World countries, namely, that of the continued existence of a large number of groups and sectors who are subjected to exploitation, injustice, and even violence on a sustained and systemic basis. In this climate of exploitation, conflict and violence, judges were challenged to play a positive role. They could not recuse themselves by invoking the doctrines of self-restraint, strict constructionism, or passive interpretation. The Constitution confers upon judges a very potent power, namely, the power of judicial review. Given the historically prevalent conditions of poverty, squalor, and injustice in India, the judicious and sustained use of this power to further the cause of social justice became an absolute imperative. The judiciary was called upon to play an important role in preventing and remedying abuses and misuses of power and in eliminating exploitation and injustice. It was necessary for this purpose to make procedural innovations that would enable it to meet the challenges posed by such new roles. In doing so, the judiciary, being alive to its social responsibility and accountability to the people of the country, sought to liberate itself from the shackles of western thought-ways. It made innovative use of the power of judicial review to forge new tools, devise new methods and fashion new strategies for the purpose of bringing justice to socially and economically disadvantaged groups. Through creative interpretation, the courts brought about democratization of remedies to an extent that was unimaginable ten or fifteen years earlier. The strategy of SAL, evolved by the Supreme Court has brought justice within the ken and reach of the common man and it has made the judicial process readily accessible to large segments of the population who were hitherto excluded from claiming justice.

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[8] Upendra Baxi, *Taking Suffering Seriously*: *Social Action Litigation in the Supreme Court of India*, 4 Third World Legal Studies 107, 108-11 (1985).

[9] *Id*.

II. A HISTORICAL REVIEW OF SOCIAL ACTION LITIGATION IN INDIA

The history of SAL is the history of the last four decades. It represents a sustained effort on the part of the Indian judiciary to provide access to justice to the deprived and vulnerable sections of Indian society. With a legal architecture designed for a colonial situation and a jurisprudence structured around a free market economy, the Indian State could not accomplish much in fulfilling the constitutional aspirations for the vast poor and the underprivileged segments of society during the first three decades of freedom. As one scholar has characterized it, the Court appeared to act during this period as the 'conscience keeper of the status quo'.[10] But over the course of its evolution, judicial activism has opened up a new dimension of the justice delivery mechanism. It has also given renewed hope to the millions of Indians who seek justice.

The Supreme Court has evolved the strategy of SAL in response to what the late Mauro Cappelletti called the 'massifications phenomenon'.[11] Today, in contemporary society, due to the massification phenomenon, human actions and relationships assume a collective rather than a merely individual character. They refer to groups, categories, and classes of people rather than to one or a few individuals alone. They refer to more than just the basic rights and duties of individuals contained in the eighteenth or ninetieth century declarations of human rights. They refer to meta-individual, social, and collective rights and duties of associations, communities, and class.[12] This is not to say that individual rights no longer have a vital place in our society. Rather, this suggests that these rights are virtually meaningless today unless accompanied by the social and collective rights necessary to make them effective and truly accessible to all. These social and collective rights require active intervention by the State and other public authorities for their realization. Paramount amongst them are the freedom from indigence, ignorance and discrimination, as well as the right to a healthy environment, social security, and protection from massive financial, corporate oppression and exploitation by vested interests. Most importantly, it includes the right to protection against governmental repression and lawlessness. These social and collective rights need protection and enforcement through an effective implementation mechanism devised by the legal process, as well as through effective machinery for monitoring implementation devised through the judicial process.

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[10] Mohammed Ghouse, *Conscience Keepers of Status Quo,* 9(1) INDIAN BAR REV. 4 (1982).

[11] MAURO CAPPELLETTI, TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1978).

[12] WILLIAM F. FELICE, TAKING SUFFERING SERIOUSLY –THE IMPORTANCE OF COLLECTIVE HUMAN RIGHTS (1996).

But such an endeavour immediately raises the problem of whether common law, which has developed and grown in an essentially individualistic society to deal with situations involving private right-duty patterns, can face the challenges thrown up by the emergence of the new social and collective rights. How can an individual-centric system of law, which deals with mechanical, slot machine-type justice arising out of specific transactions between individuals, meet the challenges of the collective claims of groups, especially disadvantaged groups and dispense well-balanced equitable distributive justice? Can twentieth century justice be produced out of a nineteenth century mould? This is the problem which lawyers, judges, and social activists have to resolve.[13] The Supreme Court and High Courts in India have tried to make innovative use of judicial power in an attempt to resolve this problem. It would not be an overstatement to assert that such a response to the problem is quite unique in the history of the development of the law and the judicial process. As a result, it may be worth considering for implementation in other jurisdictions as well. Indeed, the judiciary in neighbouring South Asian countries have already taken note of the SAL experiences in India and in some cases they have adapted and adopted contextually, the relevant aspects of such experiences.[14]

The thrust of SAL is directed against the establishment and vested interests. It is a matter of both pride and satisfaction to note that the Government of India (albeit, not always whole-heartedly) supports the strategy of SAL and that in fact, the Committee for Implementing Legal Aid Schemes (a committee set up by the Government of India for establishing legal aid programmes in the country) was engaged in promoting this strategy.[15] The courts in India have been able to considerably dilute bureaucratic opposition to SAL by emphasizing that SAL is not in the nature of adversarial litigation, but rather, provides a challenge and an opportunity to the Government to make basic human rights meaningful for the disadvantaged sections of the community and to ensure distributive justice to them. It is a collaborative effort directed towards that end. When a court passes an order in an SAL case, it does not do so to invoke confrontation from, or criticism of the executive authority. It does so for the purpose of drawing the attention of the executive to its failure or inaction in eliminating and eradicating oppression/exploitation of the poor and the underprivileged. It also makes the executive focus on its shortcomings in ensuring the rights and benefits, conferred by social legislation and other social and economic reform programmes to the groups named above.

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[13] P. N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 Colum. J. Transnat'l L. 561, 568 (1984-1985).

[14] Arun K. Thiruvengadam, *In Pursuit of the Common Illumination of Our House: Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia*, (2008) 2 Indian J. Const. L. 67.

[15] The provision of legal services, including legal aid, is now regulated across the country on a uniform statutory basis by the Legal Services Authorities Act, 1987 (as amended by the Legal Services Authorities (Amendment) Act, 1994).

Largely due to the efforts of the Supreme Court, SAL has been effectively conceptualized and it is now in the process of being institutionalized. SAL has come to be recognized as an effective weapon in the armoury of the law for securing implementation of the constitutional and legal rights of the under-privileged segments of society and for ensuring social justice to them. Though this strategy has often been referred to as public interest litigation, Professor Baxi prefers to call it 'social action litigation' because the expression 'public interest litigation' has acquired a specific meaning in the United States and is connected with a particular kind of development, which is peculiarly American in nature.[16] The SAL model, which has evolved in India, is both homespun and home-grown. It is fundamentally and profoundly different from the public interest litigation model that is prevalent in the United States. SAL is directed towards finding 'turn around' situations in the political economy for the disadvantaged and other vulnerable groups. It is also concerned with other more diffuse and less easily identifiable groups. The focus of SAL is on both the immediate as well as the long-term resolution of the problems of the disadvantaged, in the quest for distributive justice. Moreover, in the SAL model, the disadvantaged are regarded not just as beneficiaries in a one-on-one relationship with the designated lawyer. They are very much a part of the exercise of 'taking suffering seriously', to borrow Professor Baxi's terminology.[17] It is because of this that the term 'social action litigation', rather than public interest litigation, is preferred. The substance of SAL is much wider than that of the public interest litigation that is practiced in the United States.[18] In essence, much of SAL focuses on exposure of the exploitation of disadvantaged groups and the deprivation of their rights and entitlements by vested interests. This is often supported by repression on the part of the agencies of the State and other custodial authorities. SAL also seeks to ensure that the authorities of the State fulfil their obligations in full conformity with the laws under which such State authorities exist and function.

III. SOCIAL ACTION LITIGATION: FROM JUDICIAL CRAFTSMANSHIP TO JUDICIOUS CREATIVITY

One of the main problems that impeded the development of effective use of the law and the justice system in aid of the disadvantaged was that of accessibility of justice. The Constitution, which provides for fundamental rights, confers the right to move the Supreme Court by appropriate proceedings under Art. 32 for their enforcement. Art. 32 empowers the Supreme Court to issue any directions, orders, or writs for the enforcement of such fundamental rights. Art. 226 vests similar powers in the High Courts.

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[16] Baxi, *supra* note 8.

[17] *Id.*

[18] *Id.,*109.

Though these Articles of the Constitution are couched in the widest of terms and anyone can approach the Supreme Court or the High Courts for enforcement of fundamental rights under them, the interpretation which prevailed during the first three decades of the existence of the Supreme Court was such that Art. 32 meant very little to the large bulk of the population of India who remained in awe and isolation of the Court.[19] The Court was, for a long time, used only by those who were wealthy and affluent and who, to borrow Marc Galanter's phrase, were 'repeat players' of the litigation game.[20] The poor were priced out of the judicial system and they had become what one would call 'functional out-laws'. It was impossible for the poor to approach the Court for justice because they lacked the awareness, assertiveness, and access to the machinery required to enforce their constitutional and legal rights.

The Supreme Court found that the main obstacle which deprived the poor and the disadvantaged of effective access to justice was the traditional rule of *locus standi* which insists that only persons who have suffered a specific legal injury, by reason of actual or threatened violation of a legal right or legally-protected interest, can bring an action for judicial redress.[21] It is only the holder of the right who can sue for actual or threatened violation of such right.[22] No other person can file an action to vindicate such right. This rule of standing was obviously evolved to deal with the right-duty pattern, which is to be found in private law litigation.[23] But it effectively barred the door of the Court to large masses of people who, on account of poverty and/or ignorance, were unable to avail of the judicial process. It was felt that even if legal aid offices were established, it would be impossible for them to take advantage of such legal aid programme because most of them lack awareness of their constitutional and legal rights. Moreover, even if they were made aware of their rights, many of them would lack the capacity to assert them.

The Supreme Court, therefore took the view that it was necessary to depart from the traditional rule of *locus standi* and to broaden access to justice by providing that where a legal injury is caused to a person (or to a class of persons) by violation of their constitutional or legal rights and where such person or class of persons is, by reason of any disability, unable to approach the Court for relief, any member of the public or any *bona fide* social action group

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19 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, 947: AIR 1973 SC 1461, 2009 (Dwivedi, J. observed that the Supreme Court operated as an "arena of legal quibbling for men with long purses").

20 Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 (1) Law and Society Review 165 (1974).

21 S.P. Gupta v. Union of India, 1981 Supp SCC 87, 204.

22 *Nain Sukh Das* v. *State of Uttar Pradesh*, 1953 SCR 1184.

23 Surya Deva, *Public Interest Litigation in India: A Quest to Achieve the Impossible*, in Public Interest Litigation in Asia 57 (2011).

can bring an application in the High Court or the Supreme Court seeking judicial redress for the injury caused to such person or class of persons.[24]

The Supreme Court also felt that when any member of the public or a social organization espouses the cause of the poor and the downtrodden, he/she should be able to move the Court, even by just writing a letter, because it would not be right or fair to expect a person acting *pro bono publico* to incur expenses from his or her own pocket for the lawyer's fees and prepare a regular writ petition to be filed in court. In such a case, a letter addressed by such person to the court can legitimately be regarded as an 'appropriate proceeding' within the meaning of Art. 32 of the Constitution. The Supreme Court thus evolved what has come to be known as 'epistolary' jurisdiction[25] where the Court can be moved by just addressing a letter on behalf of the disadvantaged class of persons. Through this, the Supreme Court achieved a major breakthrough in bringing justice closer to large masses of the people. The courts, for a long time, remained the preserve of the rich and the powerful, the landed gentry, the business magnate, and the industrial tycoon. They were used mainly to protect the rights of the privileged classes.[26] But, now for the first time, the portals of the Court were thrown open to the poor and the downtrodden, the ignorant and the hitherto subservient. Through SAL, their cases started coming before the courts at the Centre and in the States. The have-nots and the handicapped began to feel, for the first time, that there was an institution to which they could turn for redressal against exploitation and injustice. They could seek protection against both, governmental lawlessness as well as administrative deviance. The Supreme Court became a symbol of hope for the deprived and vulnerable sections of Indian society. It acquired fresh credibility with the people, as the courts began dispensing justice to under-trial prisoners,[27] women in distress,[28] juveniles in jails or otherwise incarcerated,[29] landless peasants,[30] bonded labour,[31] victims of environmental pollution[32] and

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[24] *See, e.g,* People's Union for Democratic Rights v. Union of India, (1982) 3 SCC 235: AIR 1982 SC 1473. *See also* GL Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 International and Comparative Law Quarterly 66 (1991).

[25] The doctrine has its origins in the jurisprudence of the United States Supreme Court in Gideon v. Wainwright, 372 US 335 (1963).

[26] *See, e.g.,* S.P. Gupta v. Union of India, 1981 Supp SC 87, 210 (Explicitly stating that there is a need for opening standing to the disadvantaged where there is legal injury. The direct inference is an acknowledgement that it is unfavourable to continue to limit access to legal remedies).

[27] *See, e.g.,* Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608; Hussainara Khatoon (1) v. Home Secretary, State of Bihar, (1980) 1 SCC 81.

[28] *See for e.g.,* Vishaka v. State of Rajasthan (1997) 6 SCC 241; Bodhisattwa Gautam v. Subhra Chakraborty (1996) 1 SCC 490.

[29] *See e.g.,* Munna v. State of Uttar Pradesh, (1982) 1 SCC 545: AIR 1982 SC 806; Sheela Barse v. Union of India, (1986) 3 SCC 596: AIR 1986 SC 1773.

[30] *Supra* note 24.

[31] Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161: AIR 1984 SC 802.

[32] *See, e.g.,* M.C. Mehta v. Union of India, (2001) 3 SCC 756: AIR 2001 SC 1948; Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647: AIR 1996 SC 2715.

many other disadvantaged groups of people, in a manner unprecedented in the annals of judicial history.

Right from the inception of SAL, one difficulty which became apparent, was the total unsuitability of the adversarial procedure to this new kind of litigation.[33] The adversarial procedure is intended to be based on the rule of fairness. It has evolved an elaborate code of procedure in order to maintain basic equality between the parties and to ensure that one party does not obtain an unfair advantage over the other. But the adversarial procedure can operate fairly and produce just results only if the two contesting parties are evenly matched in strength and resources. This is quite often not the case. Where one of the parties to the litigation belongs to the poor and deprived sections of the community and does not possess adequate social and material resources, she/he is bound to be at a disadvantage in relation to a strong and powerful opponent in an adversarial system of justice. This was not only due to the difficulty in getting competent legal representation but also because of her/his inability to produce relevant evidence before the Court.

The problem of proof, therefore, presented an obvious difficulty in SAL cases. This problem become extremely acute in many cases because often, the authorities or vested interests who were the respondents, denied on affidavit the allegations of exploitation, repression, and denial of rights made against them. Often, the respondents contested the *bona fides* of the social activists who came to the Court. Sometimes, they attributed wild, ulterior motives to such social activists and denounced the source on which the social activists relied, namely, media and investigative reports of social scientists and journalists. Then, how is evidence to be produced before the Court on behalf of the poor in support of their case? It is obvious that the poor and the disadvantaged usually cannot produce material evidence themselves before the Court and often, it is extremely difficult for the public-spirited citizen to gather relevant material and place it before the Court. Similarly, while there may be exceptions, by and large, it would be difficult for most social action groups to collect the necessary materials.

What does the Court do in such cases? Would the Court be failing to discharge its constitutional duties if it refused to intervene when the relevant material had not been produced before it by the petitioner? If the Court were to adopt a passive approach and decline to intervene in such cases where relevant material had not been produced by the party seeking its intervention, fundamental rights would remain merely an illusion so far as the poor and disadvantaged groups are concerned. The Supreme Court, therefore, started experimenting with different strategies, which involved departure from the adversarial procedure, without in any way sacrificing the principles of fair play.

[33] *See, e.g.,* Upendra Baxi v. State of Uttar Pradesh, (1986) 4 SCC 106, 117; Vincent Panikurlangara v. Union of India, (1987) 2 SCC 165.

It was found that the problems of the poor and the oppressed were qualitatively different from those which had hitherto occupied the attention of the Court. They needed a different kind of lawyering skills and a different kind of approach. It was necessary to abandon the *laissez-faire* approach in the judicial process and devise new strategies and procedures for articulating, asserting, and establishing the claims and demands of the have-nots. The Supreme Court, therefore, initiated the strategy of appointing 'socio-legal commissions of inquiry'.[34] The Supreme Court started appointing social activists, teachers, researchers, journalists, government officers, and judicial officers as court commissioners to visit particular locations for fact-finding. They were also required to submit quick and detailed reports setting out their findings as well as their suggestions and recommendations. There have been numerous cases where the Supreme Court has adopted this procedure. The following paragraph mentions a few by way of illustration.

In one of the early cases in 1981, there was a complaint by a backward community called *chamars* (who had been traditionally carrying on the vocation of flaying the skin of carcasses of dead animals in the rural areas) that their fundamental right to carry on their vocation was being unreasonably taken away, through the system of auctioning to the highest bidder the right to flay dead animals and to dispose of the skin, horns, and bones. The *chamars* were, for various social and economic reasons, unable to produce any material in support of their case. The Supreme Court, therefore, appointed a socio-legal commission consisting of a professor of law and a journalist to investigate the complaint of the *chamars* and to gather material bearing on the correctness or otherwise of the complaint. The commission submitted a detailed report of its socio-legal investigation and put forward an alternative scheme under which carcass administrators would safeguard the rights of the *chamars*.[35]

In another case concerning the use of bonded labour in the Faridabad stone quarries, the Supreme Court appointed Dr. S Patwardhan, a Professor of Sociology working at the Indian Institute of Technology, to carry out a socio-legal investigation into the conditions of the stone quarry workers. On the basis of his report, the Supreme Court gave various directions in the well-known case of *Bandhua Mukti Morcha* v. *Union of India*[36] ('*Bandhua Mukti Morcha*').

Similarly, in the case of *Upendra Baxi and Lotika Sarkar* v. *State of Uttar Pradesh*, the Supreme Court appointed the District Judge of Agra as commissioner to visit the protective home and to make a detailed report with regard to the conditions in which the girls were living in the home. Consequent to the submission of his report, several directions were given by the Court,

[34] *See, e.g.,* Kamaladevi Chattopadhyay v. State of Punjab, (1985) 1 SCC 41.
[35] Gulshan v. Zila Parishad, 1987 Supp SCC 619.
[36] Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161: AIR 1984 SC 802.

from time to time, which resulted in the improvement of living conditions in the protective home.[37]

The practice of appointing socio-legal commissions of inquiry for the purpose of gathering relevant material, has now been placed on a sound jurisprudential basis as a result of the judgment of the Supreme Court in *Bandhua Mukti Morcha*, which specifically ruled that the Court, under the powers granted to it by Arts. 32 and 226 of the Constitution, can appoint such commissions and specify their mandate and powers.[38]

When the report of the socio-legal investigation is received by the Court, copies of it are supplied to the parties so that either party wanting to dispute the facts or dates stated in the report may do so by filing an affidavit. The Court would then consider the report of the commissioner and the affidavits that have been filed and proceed to adjudicate upon the issues arising in the writ petition. This practice marks a radical departure from the adversarial system of justice, which India inherited from the British.

IV. *UBI JUS IBI REMEDIUM*: FOR EVERY RIGHT THERE MUST BE A REMEDY

Even after these innovations were undertaken by the Supreme Court, the question concerning the kind of relief which the Court could grant still remained unanswered. The Court needed to evolve new remedies for giving relief. The existing remedies were intended to deal with private rights situations and were therefore simply inadequate. The suffering of the disadvantaged could not be relieved by mere issuance of the high prerogative writs, orders granting damages or injunctions. The Supreme Court, therefore, tried to explore new remedies, which would ensure distributive justice to the deprived sections of the community. These remedies were unorthodox and unconventional and they were focussed on enabling the State (and its authorities) to initiate affirmative action. *Bandhua Mukti Morcha* provides a typical example of the development and utilization of new remedies. In that case, the Supreme Court made an order giving various directions for identifying, releasing, and rehabilitating bonded labourers, ensuring payment of the minimum wage, the observance of labour laws, provision of wholesome drinking water and the setting up of dust sucking machines in the stone quarries. The Supreme Court also set up a monitoring agency to continuously monitor implementation of those directions.

[37] Upendra Baxi v. State of Uttar Pradesh, (1983) 2 SCC 308.
[38] Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161: AIR 1984 SC 802.

In *Hussainara Khatoon* v. *State of Bihar* (Bihar pre-trial detention case),[39] the Supreme Court directed that the State Government should prepare an annual census of under-trial prisoners on October 31 each year and submit it to the High Court. Thereupon, the High Court would give directions for early disposal of cases where the under-trial prisoners had been under detention for unreasonably long periods of time. In *Khatri* v. *State of Bihar* (Bihar blinding case)[40] the Supreme Court directed that under-trials who had been blinded should be given vocational training in an institution for the blind and should be paid adequate compensation. Likewise, in *Peoples' Union for Democratic Rights* v. *Union of India* ('ASIAD Workers case'),[41] the Supreme Court set up a monitoring agency of social activists. In another case brought before the Court by Sheela Barse, a journalist[42] the Supreme Court directed that there should be a separate lock-up for women, where women police constables would be in charge and in addition, a notice should be put up in each police lock-up informing the arrested persons of their rights. The Supreme Court also ordered that a judicial officer should periodically inspect the police lock-ups. There are also cases where the Supreme Court has directed remedy by way of affirmative action.[43]

V. FROM DIRECTIVES AND ORDERS TO COMPLIANCE

The question further arises as to how the directives and orders made by the Court in SAL cases can be enforced. The orders made by the Court are obviously not self-executing. They have to be enforced through State agencies and if the State agencies are not enthusiastic in enforcing the court orders, the object and purpose of SAL would remain largely unfulfilled. The consequence of the failure of State machinery to secure the enforcement of court orders in SAL cases would not only result in the denial of effective justice to the disadvantaged groups but would also have a demoralizing effect on further attempts at litigation. It would make people lose faith in the capacity of the Court to deliver justice through SAL. The success or failure of the strategy of SAL would necessarily depend on the extent to which it is able to provide actual relief to the vulnerable sections of the community. It is, therefore, absolutely essential to the success of the strategy of SAL that a method be found for securing enforcement of court orders in such litigation. There are two different methods that have been adopted to ensure that the orders made by the Court in SAL cases are carried out. These are dealt with below.

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39 Hussainara Khatoon (3) v. State of Bihar, (1980) 1 SCC 93: AIR 1979 SC 1360.
40 Khatri (3) v. State of Bihar, (1981) 1 SCC 635.
41 People's Union for Democratic Rights v. Union of India, (1982) 3 SCC 235: AIR 1982 SC 1473.
42 Sheela Barse v. Union of India, (1988) 4 SCC 226.
43 *See, e.g.,* Municipal Council, Ratlam v. Vardhichan, (1980) 4 SCC 162: AIR 1980 SC 1622.

Public-spirited individuals or the social action group, which initiated the SAL and secured the order of the Court, should not remain content merely with the court order. They should also take the necessary follow-up actions and maintain constant pressure on State authorities or agencies to enforce and implement it. If it is found that the court order is not being implemented effectively, they must immediately bring it to the notice of the Court so that the Court can call upon the State authorities or agencies to render an explanation as to why it has not been carried out. If there is wilful or contumacious disregard of the court order, the Court can punish the concerned officers of the State for contempt of court. The Supreme Court has not so far used its contempt jurisdiction[44] in SAL cases. But if particular orders made in a SAL case are not carried out, the obligation of drawing the attention of the Court to such failure of implementation should be on the individual or social action group. If the Supreme Court has to use its powers to punish the concerned for contempt in appropriate and exceptional cases, it should not hesitate to do so. The Supreme Court has also started appointing monitoring agencies for the purpose of ensuring implementation of the orders made by it in SAL cases. This is another example of innovative use of judicial power by the Supreme Court.

The Supreme Court in *Sheila Barse* v. *Union of India*,[45] gave various directions regarding police lock-ups for women and directed that a lady judicial officer should visit the police lock-ups periodically and report to the High Court as to whether the directions of the Supreme Court were being carried out or not. This was also seen in *Bandhua Mukti Morcha*[46] where the Supreme Court issued approximately twenty-one directions, several of which have already been referred to above. With a view to ensuring implementation of these directions, the Supreme Court appointed Laxmi Dhar Misra, a Joint Secretary, in the Ministry of Labour, to visit the Faridabad stone quarries after a period of about two or three months. This was done to ascertain whether the directions given by the Court had been implemented and to make a report for the Supreme Court with regard to the implementation of those directions. Misra carried out the assignment as a monitoring agent and submitted a report for the Court's consideration. The Supreme Court in *Neeraja Chaudhary's case*[47] and in another case coming from the State of Madhya Pradesh[48] also directed that representatives of social action groups operating within the area should be appointed as members of the Vigilance Committees constituted under the Bonded Labour System (Abolition) Act, 1976.[49] The same strategy was also followed in

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[44] This is a constitutional power under Arts. 129 and Art.142. §§ 4 and 15 of the Contempt of Courts Act, 1971 provide for the substantive provisions with respect to the contempt of court.

[45] Sheela Barse v. Union of India, (1988) 4 SCC 226.

[46] Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161: AIR 1984 SC 802.

[47] Neeraja Chaudhary v. State of Madhya Pradesh, (1984) 3 SCC 243: AIR 1984 SC 1099.

[48] Mukesh Advani v. State of Madhya Pradesh, (1985) 3 SCC 162: AIR 1985 SC 1363.

[49] In these situations whenever any case of bonded labour was brought to the notice of the District Administration by a representative of a social action group, the District Administration was required to proceed to inquire into it in the presence of a representative of the social action

the *ASIAD Workers' case*[50] where the Supreme Court, after clearly laying down the law on the subject, appointed three social activists as ombudsmen for the purpose of ensuring that labour laws were being observed by the state administration. The SAL strategy is still in the course of evolution but it holds out great promise for the future. This is so because by adopting it the Court has tried to secure obedience to the orders made by it.

These are some of the methodologies that have been evolved for the purpose of securing implementation of the directions given by the Court in SAL cases. But it should be stressed that the judiciary in India is still experimenting with new techniques and in the years to come, there is little doubt that it will creatively develop new methods and strategies for perfecting this powerful tool.

VI. A WHOLE GREATER THAN THE SUM OF ITS PARTS

Over a period of a decade and a half, the Supreme Court, later followed by several High Courts as well, has through a series of SAL judgments (several of which have been detailed above) drastically altered the jurisprudential landscape of the country. It has forged new concepts and procedures relevant to the cultural, economic, and social conditions in post-colonial India. At a procedural level, SAL has given a new dimension to the traditional rules of court procedure. At a substantive level, the courts have held up to intense scrutiny key areas of government action and inaction. This explosion of judicial activism (termed in India as *social action litigation*) has triggered constitutional, legislative, and judicial reforms in a couple of South Asian countries, notably Bangladesh, Pakistan, and Sri Lanka.

The most significant elements of innovation in the SAL approach:

- *Relaxation of the doctrine of standing.* Traditionally, a petitioner only had the standing to move the court if she/he had suffered some actual or threatened violation of legal rights or interests. The Supreme Court jettisoned this doctrine, throwing its portals open to all Indians. It permitted NGOs, social action groups and individuals to bring action on behalf of others, whose fundamental rights under the Constitution were violated or threatened.

group who is a member of the Vigilance Committee. Further, rehabilitation was required be provided to the released bonded labourers in consultation with and in the presence of such representative of the concerned social action group.

[50] People's Union for Democratic Rights v. Union of India, (1982) 3 SCC 235: AIR 1982 SC 1473.

- Reforms of procedural laws in order to simplify them and make them less burdensome (financially and otherwise) by creating '*epistolary jurisdiction*',[51] under which actions can be initiated simply by addressing a letter to a judge thereby dispensing with the need to draw up a formal writ petition.[52] It was deemed unfair that a petitioner should have to incur the expenses of drafting a formal petition. Court fees are also waived.[53]

- *Departing substantially from the adversarial mode of judicial proceedings*. The objective here is an attempt to level the playing field especially in terms of burden of proof (through the creative use of rebuttable presumptions) and proactive ascertainment of facts by the Court (through court-appointed commissions of inquiry, as elaborated further below) without in any way prejudicing the right of either party to due process of law.

- *Strengthening the investigative reach* of the courts through court-appointed Commissions of Socio-Legal Inquiry comprising of lawyers, academics, social workers, district judges, and others to inquire into allegations raised in the petition, undertake fact-finding and report to the Court. Such reports were treated as *prima facie* evidence.

- Encouraging a new breed of lawyering through schemes to ensure legal representation for unrepresented or underrepresented groups, as well as through *use of amicus curiae* (and amicus briefs).

- *Conscious retention of jurisdiction over the matter*, as long as is necessary in the interest of dispensing justice. Such retention of jurisdiction makes it possible to keep the matter *sub judice* as long as it is necessary and also enables the court to issue a succession of court orders and directions until the time is appropriate for the court to deliver an effective final judgment.

- *Protecting and realizing the right to effective remedies*. Both the Constitution and the International Covenant on Civil and Political Rights[54] (which India has ratified) make the right to effective remedies itself a fundamental human right. In SAL cases, the Supreme Court has fashioned a range of new remedies that are proactive as well as reactive. Moreover, it has also tried wherever possible to provide the range of

[51] Sunil Batra (2) v. Delhi Administration, (1980) 3 SCC 488; Upendra Baxi v. State of Uttar Pradesh, (1983) 2 SCC 308; Veena Sethi v. State of Bihar, (1982) 2 SCC 583.

[52] Supreme Court Rules, 1966, Or. XXXV read with Or. XLVII R1.

[53] Supreme Court Rules, 1966, Order XXXV, Rule 2. *See*, P.P. Rao, Public Interest Litigations: Practice, Procedure and Precautions -Some Perceptions 31 Indian Bar Rev. 34 (2004).

[54] International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Art. 2(3)(a).

available constitutional, civil, and criminal remedies using a 'one-stop approach', thereby saving the petitioners from going through multiple processes of court proceedings.

- *Monitoring compliance* with Court orders and directives through court-appointed monitoring agencies and Commissions, as described above.

Two further points merit notice when considering the above eight elements. First, each of the above eight elements of SAL (and further elements that may get evolved in the future) represents a distinct and severable aspect of judicial reform, which may be assessed, adapted, and adopted on its own, as appropriate in widely-varying contexts of different countries. Second, it is important to mention that these elements are interrelated and interdependent, and together form the composite that is SAL. The components cumulatively achieve more than each of them (for example enhanced legal representation) can separately achieve in terms of enhancing access to justice.

Through these innovations, SAL has not only changed the judicial landscape, but has also promoted the rule of law, the reign of constitutionalism and the supremacy of the Constitution. In this sense, so far as SAL is concerned, the whole is indeed greater than the sum of its parts.

VII. CONCLUSION

It needs to be recognized that there will inevitably be opposition from affected quarters to the strategy of SAL. Such criticism may be blatant or subtler.[55] They may come from expected quarters or unexpected ones including from within the judiciary itself. An example of this may be seen in the judgement of a two-judge bench of the Supreme Court speaking through Katju, J. while setting aside a High Court judgement (which had directed the State to regularize the plaintiff gardener as a truck driver since he had been working in that capacity for the past 10 years).[56] The two-judge bench then went on to make gratuitous comments on the role of the judiciary and on the supposed limitations of public interest litigation in India. These were questions not arising for determination in that case.

As long as forty years ago, the Supreme Court rightly prescribed that, "*Obiter observations and discussion of problems not directly involved in any proceeding should be avoided by courts in dealing with all matters brought*

[55] *See* Balakrishnan Rajagopal, *Pro-Human Rights but Anti-poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective*, 18 (3) Human Rights Rev. 157 (2007).

[56] Divional Manager, Aravali Golf Club v. Chander Hass, (2008) 1 SCC 683. *See also*, Rajindar Sachar, *Judicial Power - No Tinkering Please,* 199 Asian Centre for Human Rights (ACHR) Weekly Review 1 (2007).

before them, but this requirement becomes almost compulsive when the Court is dealing with constitutional matters."[57] Blithely ignoring this sound directive, the two-judge bench went on to pronounce upon the supposed limitations of public interest litigation. Even worse, the two-judge bench went on to criticize two judgements delivered by a three-judge bench (in *'Jagadambika Pal's case* of 1998 [58], and the *Jharkhand Assembly case* of 2005[59]) calling those judgments 'glaring examples of deviations from the clearly provided constitutional scheme of separation of powers'.[60]

This strain of criticism of judicial activism as articulated in judgement of Katju, J., as such is untenable. Courts have been consistent in granting relief in SAL cases relating to labour, to victims of custodial violence, and to victims of the excesses committed by the executive. Since previously the targets of the Court's orders were comparatively junior officials, and certainly not prominent politicians, the issue of judicial activism was not raised by the executive. The present charge of alleged interference by the courts has only now begun to emerge, as those who wield political and economic power are beginning to be threatened by the impact of SAL.[61] In this context, Justice Sachar maintains that:

> "It will thus be amply clear that the judiciary (barring some rare escapades) as mentioned in the two-judge judgment is aware of its precise role in the constitutional set up. So when seemingly interested people, mostly politicians, accuse it of overstepping its constitutional limits, the anger is borne more out of frustration at their own partisan actions being challenged before the judiciary rather than the usurpation of power and jurisdiction by the courts."[62]

In this context it is important to note that the Indian judiciary has previously dealt with the issue of judicial constraint and public interest litigation. As with any innovation, there is a prospect of capture and abuse. But, so far as SAL is concerned, this has been recognized and addressed through development of procedures (constantly in the process of further refinement) to screen SAL petitions when they are filed. A recent judgement of the Supreme Court states that frivolous petitions shall be dismissed with costs in order to dissuade

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57 *Id*.

58 Jagdambika Pal v. Union of India, (1999) 9 SCC 95.

59 Jharkhand Party v. State of Jharkhand, (2005) 2 BLJR 1559.

60 Sachar, *supra* note 63. For partial criticism of the judgment, *see*, Justice M. Rama Jois, *Crossing the Lakshman Rekha*, The Indian Express (Kolkata) December 17, 2007.

61 Prashant Bhushan, *Supreme Court and PIL: Changing Perspectives under Liberalisation* 39 EPW 194 (2004).

62 *Id*.

persons from misusing the procedure established for SAL cases.[63] Dealing with two inter-connected appeals questioning a Bombay High Court decision, Justice Pasayat opined that the time had come to weed out petitions "which though titled as public interest litigations are in essence something else."[64] Recalling several decisions of the Supreme Court, the bench condemned in the harshest of words the trend of filing petitions under the garb of public interest litigation for service related matters. This case underscores the complexities involved in making decisions concerning the legitimacy of SAL petitions. While it may be true as a general rule that service-related matters ought not to be filed as SAL petitions, there is a need to make exceptions where there are allegations of blatant abuse of power or discretion, in whatever form, including dismissals, transfers or other forms of victimization of 'whistle-blowers'.

An important issue relating to the enterprise of democratising justice through SAL concerns its sustainability. This issue implicates the multiple tasks of sustaining the champions of change, of sustaining and increasing the inclusiveness of the broad-based popular constituencies who support and claim ownership of SAL, and the herculean task of strengthening of the capacities needed for effective application of the SAL approach among judges, lawyers, and court personnel.[65]

However, as long as the thirst for justice remains yet to be fully-slaked, and as long as the hunger for justice remains yet to be fully-appeased, SAL will continue to hold its unique attraction, not only in the pursuit of justice for the privileged and affluent few but, more importantly, in the pursuit of justice for all.

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[63] Kushum Lata v. Union of India, (2006) 6 SCC 180. *See* Madhav Khosla, *Finally Awakening to Frivolous PIL Petitions in India,* 12 JUD. REV. 191 (2007).

[64] *Id*.

[65] For a well-balanced appraisal of SAL in India, *see* S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002) and Ashok H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems* in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 159 (2000).