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PUBLIC INTEREST LITIGATION IN INDIAN SUPREME COURT : A STUDY IN THE LIGHT OF AMERICAN EXPERIENCE

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I Introduction

ELEVEN YEARS ago Abram Chayes, a distinguished Harvard law professor, wrote a much discussed article¹ where he argued that the fundamental role of American courts was undergoing a vast transformation due to what he called "public law litigation" (PLL). He identifies eight ways in which this new kind of litigation differs radically from traditional private law litigation :

(i) The scope of the lawsuit is not limited by a specific historical event, such as a breach of contract or personal injury, but is consciously shaped by the court and parties.

(ii) The party structure is not limited to individual adversaries but is sprawling and amorphous.

(iii) The fact inquiry is not a simple investigation of past historical events but rather resembles the kind of inquiry into current problems undertaken by legislative bodies.

(iv) Relief is not limited to compensation for a past wrong; instead it is often prospective, flexible and remedial having broad impact on many persons not party to the lawsuit.

(v) The relief is often negotiated² by the parties rather than imposed by the court.

(vi) The judgment does not end the court's involvement but requires a continuing administrative judicial role.

(vii) The judge is not passive but takes an active role in organising and shaping the litigation.

(viii) The subject matter of the lawsuit is not a private dispute but rather a grievance about public policy.²

For the purposes of this article, these eight factors are taken as identifying features of what is more commonly called "public interest litigation" (PIL) in both the United States and India, noting that while PIL typifies the phenomenon described by Chayes, his phrase, PLL may be intended to encompass a wider range of cases. He observed that this new

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kind of litigation is so fundamentally different that some might say it "is recognisable as a lawsuit only because it takes place in a courtroom before an official called a judge."³

When Chayes wrote that article in 1976 he and many others thought that "the trend toward public law litigation seemed to be on the rise and gathering momentum."⁴ Six years later, in 1982, he wrote a follow-up article⁵ reporting instead on the counter-tendencies that had emerged. Scholarly, journalistic and political commentary had become increasingly sceptical of judicial activism as a means of correcting governmental abuses. In case after case the US Supreme Court was rejecting the new "public law" model by limiting litigation to the traditional private law model, especially on issues of standing, class actions and relief.^{5a}

Since 1982 the counter-reaction to PIL has, if anything, become stronger. Not only has the US Supreme Court continued to constrain judicial activism by reliance on norms drawn from traditional private litigation,⁶ but also a number of extra-judicial events have had enormous impact. The surge of PIL which began in the late 1960s was substantially financed by contribution from private foundations; however, by 1980 such funding was dramatically reduced.⁷

Public support of PIL has also undergone a drastic reversal. In 1974, US Congress created a national Legal Services Corporation to fund civil legal aid to the poor. During the tenure of President Carter the leadership of the corporation was made up of former public interest litigators who funded both national and state law reform centres and encouraged PIL by local legal aid offices. But under President Reagan the corporation's budget has been cut and the administrator replaced with people opposed to federal funding of PIL. The result has been a significant decline in such litigation by legal aid programmes.

If the past six years have been a time of restraint and decline for PIL in the United States, obviously just the opposite has been the trend in India over the same period. Indeed Chayes' description of the new "public law" model of litigation describes the current Indian judicial scene far better than the American one.

3. *Ibid.* However, he immediately qualified such a characterisation as "too sensational in tone". *Id.* at 1303.

4. See Abram Chayes, "Foreword: Public Law Litigation and the Burger Court", 96 *Har. L. Rev.* 4 at 5 (1982).

5. *Ibid.*

5a. *Id.* at 3, 8-60.

6. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95; 103 S. Ct. 1660; 75 L. Ed. 675 (1983) (vacating a lower court injunction against the use of life-threatening "chokeholds" because the plaintiff—a victim of such a chokehold—had no standing to seek prospective remedial relief but could only recover compensation for his past injury).

7. K.O' Connor and L. Epstein, "Rebalancing the Scales of Justice: Assessment

This spectacular growth of PIL in India, contrasting so dramatically with the simultaneous tumult and decline in the United States, suggests the value of comparative study. Of course, comparative legal studies must be made with caution and sensitivity to the vast differences in politics, economy and culture between such countries as the United States and India. Yet as former British colonies, both share a common British legal heritage and, unlike the British, both share the institution of a written Constitution which enshrines fundamental rights and entrusts their special protection to courts which have ultimate authority in these areas over the other branches of government.

The value of such a comparative study is made even more compelling by the enormous importance of India among the democracies of the world. It is not merely the world's largest democracy in terms of population; the challenges faced by it and its resulting accomplishments are equally vast. All throughout the world, those who share in the ancient British legal tradition should observe with rapt attention as that tradition is immersed in the fiery crucible of modern Indian society. For as the heat of the crucible burns away the dross and impurities to leave only pure metal, so too the jurisprudence which emerges from India's refining process may well prove a model of the best and most universal concepts of the common law. Indeed the metaphor of the crucible is inadequate because often the strongest and most durable metal is an alloy, a fusing of different elements into a new form. Thus, a comparative study should not merely examine how in India outmoded legal traditions have been stripped away, but also see how qualities which are India's own may have merged with elements of the common law system to form a more just and enduring jurisprudence.

Yet perhaps neither the metaphor of refined metal nor of the alloy is appropriate. Indian PIL might rather be a phoenix: a whole new creature arising out of the ashes of an older order. Chayes' vision of an emerging PLL in the United States may have had this quality of a new creation: indeed the failure of the Supreme Court and other authorities to share this vision may ultimately explain the recent history of American PIL: it had reached the limits to which a reform movement can go before it threatens the fundamental assumptions of the underlying system.

Indian PIL seems to have drawn some inspiration from an article by Cappelletti.⁸ His description of PIL as a necessary rejection of *laissez-faire* notions of traditional jurisprudence in order to address the modern phenomenon, of "massification" in which important rights are not individual but "diffuse and meta-individual" is cited and followed in the influential opinion of Bhagwati J. (as he then was) in the *Judges'*

8. M. Cappelletti, "Vindicating the Public Interest Through the Courts: A Comparative Contribution," in M. Cappelletti and B. Garth (eds.), *Access to Justice*, 101.

Transfer case.⁹ Even more clearly than Chayes, Cappelletti envisioned PIL as a revolutionary transformation. According to him:

[A] turmoil, indeed a real revolution, is in progress, in which even the most sacred ideas and themes of judicial law, such as due process and the right to be heard are being challenged.... Such new concepts as "diffuse rights," "fluid recovery", and the "ideological plaintiff" may admittedly appear dangerous, iconoclastic and confusing. Yet, they reflect the unprecedented complexity of contemporary realities.... [T]hese new concepts represent.....a deeply motivated major trend of universal dimensions.¹⁰

This vision is echoed in the *Judges' Transfer* case where it was observed that, "Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing, and the problems of the poor are coming to the forefront."¹¹

In assessing whether Indian PIL should be seen as a revolutionary or reforming development, the statements in the *Judges' Transfer* case should also be weighed against the opinion of Justice R.S. Pathak (as he then was) in *Bandhua Mukti Morcha*:

I think it appropriate to set down a few considerations which seem to me relevant if public interest litigation is to command broad acceptance. The history of human experience shows that when a revolution in ideas and in action enters the life of a nation, the nascent power so released possesses the potential of throwing the prevailing social order into disarray. In a changing society, wisdom dictates that reform should emerge in the existing polity as an ordered change produced through its institutions. Moreover, the pace of change needs to be handled with care lest the institutions themselves be endangered.¹²

He further observed:

[I]n public interest litigation) the Court enjoys a degree of flexibility unknown to the trial of traditional private law litigation. But I think it necessary to emphasise that whatever the procedure adopted by the Court it must be procedure known to judicial tenets and characteristic of a judicial proceeding.... Legal jurisprudence has in its historical development identified

9. *S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149 at 192.

10. *Supra* note 3 at 564.

11. *Supra* note 9 at 189.

12. *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802 at 838.

certain fundamental principles which form the essential constituents of judicial procedure. They are employed in every judicial proceeding, and constitute the basic infrastructure along whose channels flows the power of the Court in the process of adjudication.^{12a}

Both Justices P.N. Bhagwati and Pathak are deeply committed to PIL. Are their different ways of describing its relationship to the received legal tradition a matter of style or do they reflect a deeper unresolved question that prevades PIL in India, the resolution of which may determine its future fate? In a small way we endeavour to focus discussion on whether and to what extent Indian PIL is a reform or a revolution by studying three procedural innovations: expanded standing, non-adversarial procedures, and the attenuation of rights from remedies. Each innovation fits within Chayes' enumeration of factors indentifying PIL: the altered party structure, the new judicial role and the development of new forms of relief. Discussion of each will highlight differences resulting from the increasingly constrained American practice of PIL, analyse each innovation in terms of reform of the traditional model and then re-evaluate that analysis by looking at the innovation as a possible revolution in judicial procedure and function.

II. The doctrine of standing

The doctrine of *locus standi*—what in the United States is called "standing"—has been a major battleground between the traditional private law model of litigation and PIL. The US Supreme Court has repeatedly relied on standing to reject public interest lawsuits without consideration of the merits.¹³ In contrast the Indian Supreme Court has deliberately liberalised the rules of standing in order to promote PIL. The transformation of standing doctrine in India can be viewed as a striking example of both the refining and alloying processes at work. Not only have the elements of standing doctrine been clarified so that the outmoded and ill-founded can be discarded but, further, the special problems and potentialities of Indian society have been used to shape and strengthen a new jurisprudence.

(1) Representative standing

Viewed as a reform of the traditional model, PIL in India can be seen as an improvement on the American doctrine of standing which has

^{12a} *Id.* at 842.

¹³ See, e.g., *Warth v. Seidun*, 422 U.S. 490 (1975); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Simon v. Eastern Kentucky Welfare Rights Organisation*, 426 U.S. 26 (1976); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 461 (1982).

muddled together two distinct issues, viz., (i) whether the petitioner is sufficiently motivated to present a good case to the court;¹⁴ and (ii) whether there is an injury that requires judicial redress.¹⁵ American law presumes that only someone with a personal stake can meet the first requirement of motivation. The Indian Supreme Court has rejected that presumption by allowing any member of the public to seek judicial redress for a legal wrong caused to a "person or to a determinate class of persons (who)... by reason of poverty, helplessness or disability or socially or economically disadvantaged position" is unable to approach the court directly.¹⁶ This modification of traditional *locus standi* could be termed "representative standing" by assuming that the petitioner is accorded standing as the representative of another person or group of persons.

Representative standing can be seen as a creative expansion of the well-accepted standing exception which allows a third party to file a *habeas corpus* petition on the ground that the injured party—the prisoner—cannot approach the court himself.¹⁷ Indeed, the first public interest case in the Indian Supreme Court, the undertrials lawsuit filed by Kapila Hingorani in 1979,¹⁸ was essentially a *habeas corpus* case complaining of the unlawful detention of 18 prisoners awaiting trial for very long periods which led to the discovery of over 80,000 such prisoners. The judicial creativity came in expanding representative standing to other groups of persons who were not "free" to approach the courts due to socio-economic factors rather than physical restraint.¹⁹

The Indian Supreme Court thus took what seemed to be merely a dismal social problem—lack of access to justice by the poor and oppressed—and used that problem as the springboard for an ingenious answer—to build upon the strong Indian tradition of voluntary social action by empowering volunteer representatives to approach the court on behalf of the poor and oppressed.

One need only compare the paucity of litigation concerning the

14. *Baker v. Carr*, 369 U.S. 186, 204 (1962); accord, e.g., *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Warth, id.* at 498-99; *Sierra Club, id.* at 732.

15. *Chayes, supra* note 4 at 16.

16. *Supra* note 9 at 188.

17. See Rules of Indian Supreme Court, part IV, order XXXV, rule 3.

18. *Hussainara Khatoon v. State of Bihar*, A.I.R. 1979 S.C. 1360. Although the case caption carries the names of several actual prisoners, the petitioner was Hingorani herself.

19. Justice Deshpande has suggested that the *habeas* exception to traditional standing doctrine can "be explained on the theory that the personal liberty of an individual is a matter of public concern." V.S. Deshpande, "Standing and Justiciability", 13 *J.I.L.I.* 153 at 188 (1971). However, it seems clear that the Supreme Court took access to the courts as the justifying principle for the *habeas* exception in adapting it to representative standing. See interview with Chief Justice Bhagwati, 3 *Frontline* 4, 9-10 (January 11-24, 1986). For the view that representative standing should be limited to cases where the injured parties are literally "not free" see, M. Rajagopalan, "Constitutional Issues in

rights of the poor and oppressed prior to the court's approval of representative standing with the surge that has since ensued to obtain vivid empirical evidence of its value in expanding access to justice. Further, these cases effectively refute the traditional assumption that only a petitioner motivated by self-interest will present a case well. Whatever criticisms are levelled against such lawsuits, one does not hear the complaint that these representative petitioners fail to press the claims with as much adversary zeal as if they had a personal stake in the outcome.

Characterising "representative standing" the Supreme Court's expansion of standing in cases where the directly affected persons cannot approach the court themselves suggests that this innovation could be viewed as a modified form of class action. Like the petitioner under representative standing, the class representative in a traditional class action can raise the claims of persons not before the court.²⁰ The difference is that the traditional class representative must himself be a member of the class whose claims he raises, although there are some limited exceptions allowing, for example, an attorney-general to act as a class representative.²¹ Cases categorised as brought under representative standing could thus be re-categorised as class actions with a non-class member representing the class. For example, many of the public interest cases filed by Kapila and Nirmal Hingorani might seem to be modified class actions because they typically file using the name of actual class members in the petition caption, even though they themselves are actually the petitioners.²² And at least one such major case, the *Bombay Pavement Dwellers* case,²³ included both actual class members (pavement and slum dwellers) and public-spirited citizens (two journalists and a civil liberties organisation) among the petitioners.

(2) Citizen standing

Although the doctrine here characterised as "representative standing" was first articulated in the *Judges' Transfer* case, the facts in that case actually seem to have involved a second modification of traditional standing doctrine, regarding the issue of whether the petitioner has been injured. The US Supreme Court has repeatedly denied standing to petitioners who sought to remedy public rather than personal injuries, reflecting a basic

20. Federal Rule of Civil Procedure 23 (U.S.A.), Cf. Rule 8, (Indian) Code of Civil Procedure.

21. See, e.g., the Michigan Consumer Protection Act (U.S.A.).

22. See, e.g., *Hussainara Khatoon*, supra note 18; *Khatri v. State of Bihar*, A.I.R. 1981 S.C. 928 (Bhagalpur blinded prisoners); *Gobindram v. Union of India* (lepers), W.P. 20210 of 1985.

Although Hingoranis often have direct contact with the class members named in the petition after the case is filed, they generally continue to view themselves as the petitioners rather than as advocates having a client relationship with the class members.

assumption that the role of courts is to protect only individual rights. In contrast the *Judges' Transfer* case set down a rule allowing any member of the public with "sufficient interest" to assert "diffuse, collective and meta-individual rights."²⁴ Such standing could be termed "citizen standing" to distinguish it from representative standing. A petitioner under citizen standing sues not as a representative of others but in his own right as a member of the citizenry to whom a public duty is owed.

Supreme Court cases that could be categorised under citizen standing have addressed such issues as the President's power to transfer judges, whether foreigners should be allowed to adopt Indian children,²⁵ the environmental impact of limestone quarrying in the Mussourie Hills,²⁶ and the leak of chlorine gas from a chemical plant.²⁷ None of these cases were brought on behalf of a determinate group of persons who suffer from poverty or social oppression; rather, the petitioners raised claims shared by the public generally. Thus, the justification for development of citizen standing is not to improve access to justice for the poor, but to vindicate rights that are so "diffused" among the public generally that no traditional individual right exists to be enforced.

The threshold question, then, for citizen standing is whether a sufficient public injury has been alleged to support the claim that the petition has been brought in the public interest. In cases on consumer and environmental issues, the question of public injury is not difficult; however in some cases the alleged public injury is far less tangible. In the *Judges' Transfer* case itself petitioners claimed to be vindicating the public's interest in assuring the freedom of the judiciary from political influence. The court interpreted the potential public injury in such a case as the loss of faith in the rule of law and a concurrent loss of confidence in the democratic institutions of government. It stated:

But if no specific legal injury is caused to a person or to a determinate class or group of persons by the act or omission of the State or any public authority and the injury is caused only to public interest, the question arises as to who can maintain an action for vindicating the rule of law and setting aside the unlawful action of enforcing the performance of the public duty. If no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the state or a public authority to act

24. *Supra* note 9 at 182-94.

25. *Lakshmi Kant Pandey v. Union of India*, A.I.R. 1984 S.C. 469.

26. *Rural Litigation and Entitlement Kendra, Dehra Dun v. State of U.P.*, A.I.R. 1985 S.C. 652.

27. *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 965 (known as *Sri Ram Ferti-*

with impunity beyond the scope of its power or in breach of a public duty owed by it.²⁸

The doctrine of citizen standing thus marks a significant expansion of the court's role, from protector of individual rights to guardian of the rule of law wherever threatened by official lawlessness. The import of this innovation is demonstrated by the recent decision of the Karnataka High Court regarding the bottling of arrack liquor, which led to the short-term resignation of Chief Minister Hegde.²⁹ Although the litigation was begun by parties with traditional standing—unsuccessful applicants for the bottling rights—these parties withdrew their petitions (for reasons not made public). Thus the allegations of nepotism and impropriety would have remained adjudicated had not two persons filed petitions, claiming only an interest as citizens of Karnataka in seeing that public business was conducted lawfully.

(3) Re-evaluating the distinction between representative and citizen standing

Characterisation of public interest cases brought for asserting the rights of discrete groups of poor or oppressed people as representative actions conceptually reconciles much of the Indian Supreme Court's activity with a reformist approach to the traditional model. Unlike citizen standing, which seems to open new horizons of judicial function, representative standing, as a species of class action, appears to be an adjudication of individual rights, albeit that the relief is multiplied across a class of similarly situated persons.

The major problem with the distinction between what is here termed representative and citizen standing is that neither the court (with the exception of the *Judges' Transfer* case) nor the parties make the distinction. Instead, the two originally separate rationales for expanded standing seem to have merged in a single doctrine of public interest standing, as illustrated by the preamble to a recent Supreme Court decision. The court stated:

While public interest litigation is brought before the court not for the purpose of enforcing the right of the one individual against another, as happens in the case of ordinary litigation, it is intended to prosecute and vindicate public interest which demands that violation of constitutional or legal rights of a large number of people, who are poor, ignorant or socially and economically in disadvantaged position, should not go unnoticed, unredressed for that would be destructive of the rule of law.³⁰

28. *Supra* note 9 at 190.

29. *Raju v. State of Karnataka*, K.L.R. 1986 (1) 164. On 31 January 1986 the Supreme Court granted special leave *sub nom Winery and Distillery P. Ltd. v. Raju*, S.L.P. Nos. 2095-96, 2097-98, 2293-94, 2299, 2300, 2364-65, 2366-67 of 1986.

30. *Forward Construction Company v. Prabanat Mandal*, A.I.R. 1986 S.C. 391 at

The theory expressed seems to be, perhaps because redistributive justice is an affirmative value under the Indian Constitution, that a petitioner who sues to benefit one of the weaker sections of society is actually redressing a public injury. In fact, such was precisely the position taken by the petitioner in one of the cases cited in the *Judges' Transfer* case as a prior example of a case brought on behalf of persons unable to approach the court themselves.³¹

Under this re-evaluation what seemed at first to be reformist adaption of the class action device as representative standing may be seen as simply one aspect of the much more revolutionary concept of the citizen law suit. In turn the Indian blending of the concepts of the representative and citizen plaintiff may prompt some creative reassessment of the American sharp demarcation between the class representative, who has standing, and the "ideological plaintiff" who does not. Some commentators on American class action practice suggest that in many cases the attorney for the class, rather than the nominal class representative, initiates and controls the litigation.³² Indeed there is well established American case law that once a court has certified a class action, the attorney for the class has a fiduciary duty to the class as a whole which supersedes his duty to the individual class representative, even though he is also the attorney's client.³³ Thus, an attorney may be duty bound to settle a class action contrary to the wishes of the class representative if he believes the settlement is in the best interests of the class. Is it therefore possible that in American practice the class action attorney may in fact sometimes function as a citizen or "ideological" plaintiff?

There is also a growing trend among some public interest litigators in the United States to use organisational plaintiffs to secure broad injunctive relief benefitting a whole class of persons wider than the organisation's membership as an alternative to the time consuming process of seeking class certification which often diverts the precious resources of both the parties and the court from the merits of the case. A recent article³⁴ suggests the possibility of giving new life to the concept of the ideological plaintiff through recognising that social reform organisations have aspirational and existential interests worthy of legal protection. This suggestion might be bolstered by the example of the fruits of the Indian

31. *Upendra Baxi v. State of U.P.*, (1983) 2 S.C.C. 308, discussed in *supra* note 9 at 188. In a personal interview Baxi described in detail how he took the position before the court that he was appearing as the ordinary citizen bound under article 51-A to respect constitutional rights. For a discussion of this theory and the need for citizen standing generally see Arun Shourie, "On Why the Hon'ble Court Must Hear Us", 4 S.C.C. (Jour.) 1 (1981).

32. See, e.g., Chayes, *supra* note 4 at 45.

33. *Kincade v. General Tire & Rubber Co.*, 635 F. 2d 501 (5th Cir. 1981).

34. William Burham, "Aspirational and Existential Interests of Social Reform Organizations: A New Role For the Ideological Plaintiff", 20 *Harvard Civil Rights Civil Liberties Law Review* 153 (1985).

Supreme Court's bold experiments with the traditional doctrines of standing.

III Non-adversarial litigation

The Indian Supreme Court has emphatically stated that PIL is different from adversary litigation in the traditional model. The court observed:

We wish to point out with all the emphasis at our command that public interest litigation...is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief.³⁵

(1) Collaborative litigation

Viewed from the perspective of the traditional model, it seems, however, that the non-adversarial litigation procedures developed by the Supreme Court are of two different types. The first one of procedure is non-adversarial because the relationship between the parties is largely one of communication and co-operation rather than combat. This type is clearly the ideal which Justice P.N. Bhagwati (as he then was) hopes for as indicated by his frequent exhortations to the government to "welcome public interest litigation because it would provide them an occasion to examine whether the poor and down-trodden are getting their social and economic entitlements".³⁶ He views PIL as "a collaborative effort on the part of the claimant, the court and the Government or the public official to see that basic human rights become meaningful for the large masses of the people."³⁷ This can, therefore, be termed "collaborative litigation."

Because collaborative litigation assumes that the parties will voluntarily reach an agreement and take necessary action, the role of the court apparently changes from the traditional determination and issuance of a decree. Instead the court takes on three rather different functions:

(i) *Ombudsman*—the court receives citizen complaints and brings the most important ones to the attention of responsible government officials.

(ii) *Forum*—the court provides a setting for clear and calm discussion of public issues, often setting the stage for such conversation by preserving the *status quo* or providing emergency relief through interim orders.

35. *People's Union for Democratic Rights v. Union of India*, A.I.R. 1982 S.C. 1473 at 1476.

36. *Bandhua Mukti Morcha*, *supra* note 12 at 311.

37. *Frontline*, *supra* note 19 at 11.

(iii) *Mediator*—the court suggests possible compromises and moves the parties toward agreement.

Such collaborative litigation seems to work fairly well when the undisputed facts, once brought to light, result in a clear consensus that action is required. For example, a case of shocking communal violence against a rural *harijan* community which local police had ignored was resolved through a writ petition in the Supreme Court; the state government did not deny any of the facts and was fully cooperative in providing interim protection and long term re-location and rehabilitation to the victims.³⁸ The forum function was also well illustrated in a case brought by a journalist revealing recurrent custodial violence to women in the Bombay Central Jail. The court's judgment reports that there was a "meaningful and constructive debate in court" as to the steps necessary to provide protection to women prisoners, that the State of Maharashtra, through its advocate, offered full cooperation in laying down the guidelines, and "readily accepted" most of the suggestions made by the court.³⁹ In a third example, struggle between villagers in Andhra Pradesh and a big contractor over a quarry operation that turned to violence and allegations of police repression was resolved following issuance of a Supreme Court stay on both quarrying and criminal prosecutions which gave the state government time and impetus to review and ultimately revoke the quarrying licence.⁴⁰

(2) Investigative litigation.

The Supreme Court has also described as "non-adversarial" a second type of procedure in which the parties do not collaborate but the court steps out of the passive role typical of adversarial litigation to take an active role in investigating the facts. Such "investigative litigation"⁴¹ is a corollary to representative standing, having the same function of lowering the barriers which traditionally separate the poor from the courts., as explained by Justice Bhagwati in *Bandhua Mukti Morcha*. He observed:

Where one of the parties to a litigation belongs to a poor and deprived section of the community and does not possess adequate social and material resources, he is bound to be at a disadvantage

38. *Kannanail v. State of Bihar*, W.P. 8136 of 1983. See G. Paradesi, "Babubigha: An Ideal Public Interest Litigation Case", II *Legal News and Views*, no. 2 at 1 (Indian Social Institute, September 1985) and *Babubigha Scheduled Caste People Show the Way* (Struggle for Justice Series No. 2, forthcoming) (Indian Social Institute, forthcoming).

39. *Sheela Barse v. State of Maharashtra*, A.L.R. 1983 S.C. 378 at 381-82.

40. See R. Robert, *Nulakapetta People's Struggle for Safe Environment* (Struggle for Justice Series No. 1) (1985).

41. In the lecture at the Indian Law Institute the author referred to this second type of procedure as "inquisitorial litigation" by analogy to the inquisitorial judicial system typical of continental jurisprudence. The author later accepted Kapila Hingorani's suggestion to use the term "investigative" as closer to the spirit of the court's procedures.

as against a strong and powerful opponent under the adversary system of justice, because of his difficulty in getting competent legal representation and more than anything else, his inability to produce relevant evidence before the Court. Therefore, when the poor come before the Court particularly for enforcement of their fundamental rights, it is necessary to depart from the adversarial procedure and to evolve a new procedure which will make it possible for the poor and the weak to bring the necessary material before the Court for the purpose of securing enforcement of their fundamental rights.⁴²

The primary device used by the court in investigative litigation is the appointment of special commissions. These commissions seem to serve one of three functions. The first function is to propose remedial relief and monitor its implementation. Such commissions frequently include non-legal experts and use methodologies drawn from the physical and social sciences. A good example would be the appointment of commissions in the *Sri Ram Fertilizer Gas Leak* case.⁴³

A second function for commissions is described in *Bandhua Mukti Morcha* thus:

The report of the commission would furnish prima facie evidence of the facts and data gathered by the commissioner.... Once the report of the commissioner is received, copies of it would be supplied to the parties so that either party if it wants to dispute any of the facts or data stated in the Report, may do so by filing an affidavit and the Court then considers the report of the commissioner and the affidavits which may have been filed and proceed to adjudicate upon the issue arising in the writ petition. It would be entirely for the Court to consider what weight to attach to the facts and data stated in the report of the commissioners and to what extent to act upon such facts and data.⁴⁴

This function can be very effective when the parties do not challenge the commission's report⁴⁵ for then the *prima facie* case becomes a set of undisputed facts. However, the court's statement in *Bandhua Mukti Morcha* does not indicate how factual issues are to be resolved if a party disputes the commission's report. Generally it seems that the court does not resolve the disputed facts. For example in *Ram Kumar Misra v. State of Bihar*⁴⁶ when the respondent ferry operator challenged the

42. *Supra* note 12 at 315.

43. *Supra* note 27.

44. *Supra* note 12 at 316.

45. See, e.g., *Mukesh Advani v. State of Madhya Pradesh*, (1985) 3 S.C.C. 162.

46. A.I.R. 1984 S.C. 537.

report that he had failed to pay his employees minimum wages, the court, observed:

It is not necessary for us...to go into the question whether the facts stated in the report are correct or not, because as we have stated above, the report was called for by us for the purpose of satisfying ourselves that there was a *prima facie* case for respondent...to meet.^{46a}

Sometimes the court creates another commission to investigate and report on the disputed facts,⁴⁷ although it is not clear whether the second commission's report would have any greater weight in the face of opposition from a party.

It is possible that the court could make more effective use of its commissions if it applied more stringently its rule that affidavits be confined to such facts as the deponent is able from his own knowledge to prove.⁴⁸ Many affidavits filed to challenge a commission report seem to rely primarily on legal argument and conclusory statements not based on personal knowledge; perhaps because respondents often file counter-affidavits by senior government officials who are accustomed to relying on policy and reports of others. For example, despite numerous affidavits and sworn statements by quarry workers claiming that they were bonded labourers and the report of the court's commissions that their investigations confirmed the widespread existence of bonded labour, the state in *Bandhua Mukti Morcha* steadfastly contended that there were no bonded labourers in Haryana. Yet the state's counter-affidavits did not seem to evidence any personal knowledge that the workers identified by the petitioners and commissioners were not bonded labourers. Typical was an affidavit from the state's deputy secretary of labour which relied on an annexed set of minutes from a meeting of officials which reported that the Deputy Commissioner of Faridabad "said that 50 per cent of the workers were not working under the obligation of any advance."⁴⁹ Obviously the deponent did not have personal knowledge as to the facts asserted by the commissioner nor is it even apparent what knowledge that commissioner based his statement upon.

Under American civil procedure a party is entitled to a summary judgment on the legal issues without the need of trial if his opponent fails to rebut his *prima facie* case with affidavits or other hard evidence; the mere arguments of a party's lawyer, no matter how vigorous, are not sufficient rebuttal without support of evidence that could be admissible at

46a. *Id.* at 538.

47. See, e.g., *Bandhua Mukti Morcha*, *supra* note 12 at 829; the *Sri Ram Fertilizer* case, *supra* note 27 at 202-3.

48. Part IV, order XI, rule 5.

49. Affidavit of Kamla Chaudhry, Deputy Secretary, Labour and Employment, State of Haryana, dated 10 August 1982.

trial.⁵⁰ Application of a similar approach could enable the Indian Supreme Court to resolve more factual issues on the basis of commission reports.

A third function of a commission is to actually decide factual issues on authority delegated by the court. A good example is the appointment of High Court officer, D.S. Rajpurkar, in the *Bombay Pavement Dwellers* case to determine whether specific dwellings were obstructing traffic or were built after the effective date of the court's interim stay on demolition. Rajpurkar's findings were binding on the parties for the purpose of implementing the court's interim orders.

(3) Re-evaluating non-adversarial litigation

As was the case for the analysis of standing, categorisation of non-adversarial litigation from the viewpoint of traditional litigation may result in a typology that reflects neither Indian thinking nor practice. For example the Supreme Court does not seem to have carefully distinguished between the different functions of commissions. In *Bandhua Mukti Morcha* the second commission led by Patwardhan of the Indian Institute of Technology was directed by the court to conduct its investigations "with a view to putting forward a scheme for improving the living conditions for workers working in the stone quarries".⁵¹ This mandate, combined with the description of the commission as "socio-legal" and its membership of persons without legal training, suggests that it was serving the first function of proposing a remedial scheme. However, the commission was appointed prior to a finding of legal liability upon which a remedial scheme could be built. Thus the court was not able to make full use of the Patwardhan Commission's recommendations. For example, the report assumed that the quarry operators were obliged to provide certain basic housing and health facilities under the Inter-state Migrant Workmen (Regulation of Employment Conditions of Service) Act 1959, and the Contract Labour (Regulation and Abolition) Act 1970. Yet the court in its judgment concluded that the Patwardhan report did not provide enough information to determine whether the provisions of either Act were applicable to any particular quarry.⁵² Therefore, a third commission was appointed to investigate this and other issues further.

The Patwardhan Commission also illustrates the problems raised when a commission uses fact-finding techniques rooted in disciplines other than the law. To determine whether the quarry workers were bonded labourers the commission conducted confidential interviews of a statistical sample of workers and reported the results. The respondents complained vigorously that this procedure violated principles of natural justice since

50. Federal Rule of Civil Procedure, r. 56.

51. *Supra* note 12 at 309.

52. *Id.* at 331.

they were not given notice of these interviews or the opportunity to cross-examine the workers. Although the court clearly held that the commission's report could be accepted as evidence, perhaps some lingering doubts raised by the respondents' objections were the reason it did not make a finding that any particular person was a bonded labourer. Moreover the court was careful to note that the findings of the third commissioner, appointed by it to identify bonded labourer workers for release and rehabilitation by the states would in no way be binding on the employers.⁵³

If non-adversarial litigation is re-evaluated outside the conceptual framework of the traditional model, perhaps the "problems" illustrated by *Bandhua Mukti Morcha* take on a new aspect. It may be that the court sees investigative litigation as potential collaborative litigation. Thus, a charge to propose remedial schemes even at the preliminary stages of litigation may be a productive way to move the parties to a mutually agreeable solution without a struggle over the legal and factual issues. Likewise, the court may hope to compensate for a greater informality in fact-finding by appointing as commissioners persons of such expertise and stature that the parties are likely to accept their findings.⁵⁴ The frequent use of senior government officials in collaboration with outside experts of a social activist inclination may give the joint report credence for both petitioners and respondents. Indeed, such commissions may function almost as arbitrators.

Even if the use of commissions does not always lead to a collaborative resolution, they still may offer a viable albeit non-traditional alternative to the burden and limitations of full-blown adjudication. Extensive litigation regarding bonded labourers has shown that proof problems can be intractable given normal judicial procedures. For example, one district judge appointed as a commissioner reported "that when the workman is taken into confidence and is assured of protection he gives out a story of harassment and torture by the quarry contractor but when officially questioned he is afraid of making necessary disclosures."⁵⁵ Thus, the process of confidential interviews used by the commissions in *Bandhua Mukti Morcha* may be the only viable option. The use of commissions in that case may then be seen as a kind of "approximate justice" in which the labourer receives release and rehabilitation on the basis of non-traditional procedures for determining his status but only the state bears the burden; no financial or criminal liability attaches to the private employer as a result of an investigation which denies him the right to participate in the process. Thus the disparity between the procedures used by "socio-legal" commissions and those normally relied upon in adjudication can be explained because the result is something rather different than tradi-

53. *Id.* at 829.

54. See, *id.* at 816.

55. *Supra* note 45 at 982.

tional adjudication, an observation which leads to the last topic, the relationship between rights and remedies.

IV The relationship of right to remedy

A third crucial distinction in Chayes' analysis between the traditional model and PIL is the attenuation between right and remedy in the latter. He described the typical decree in a public interest case as follows:

[R]ight and remedy are pretty thoroughly disconnected. The form of relief does not flow ineluctably from the liability determination, but is fashioned ad hoc. In the process, moreover, right and remedy have been to some extent transmuted. The liability determination is not simply a pronouncement of the legal consequences of past events, but to some extent a prediction of what is likely to be in the future. And relief is not a terminal, compensatory transfer but an effort to devise a program to contain future consequences in a way that accommodates the range of interests involved.⁵⁶

The description, however, must be read together with an important qualifier which appears in Chayes' later article: "To be sure, the purpose of the decree is to rectify a course of conduct that has been found to bridge rights asserted by the plaintiffs."⁵⁷ Thus, he conceded that even under his expansive view of judicial freedom to fashion sweeping and innovative remedies, such remedies must ultimately be based on two findings: (i) that such remedies are required to correct the results of *past* conduct by the defendants; and (ii) that such conduct had violated plaintiff's rights.

Decisions of the US Supreme Court over the past fifteen years show how the need for these two findings has significantly delimited the scope of relief available in PIL. In *Frank L. Rizzo v. Gerald G. Goode*,⁵⁸ the court struck down a decree establishing a formal internal review procedure for citizen complaints made to the Philadelphia police department because the first finding was absent. The court held that the 19 cases of police brutality proved by the plaintiffs did not show a sufficient pattern and practice of official misconduct to justify ordering a department-wide change in procedure. Instead for these cases of misconduct, individual suits for compensation would be sufficient relief. Absence of the second finding was fatal to the decree in *William G. Milliken v. Ronald Bradley*,⁵⁹ which ordered that suburban school districts, mostly white, exchange a percentage of their students with the Detroit school system, mostly black, in order to give Detroit students a racially integrated education. Distinguishing

56. *Supra* note 1 at 1293-94.

57. *Supra* note 4 at 46.

58. 423 U.S. 362 (1976), discussed in *supra* note 1 at 1305-7.

59. 418 U.S. 717 (1974) discussed in *supra* note 4 at 48-9.

earlier cases authorising student exchange among schools of the same educational system, the court pointed out that there was no finding that the suburban school districts had violated the rights of the Detroit students. Even though inter-city student exchange was the only remedy capable of curing the results of racial discrimination in Detroit, the remedy was not available for the lack of an enforceable right against a necessary party for the remedy, the suburban school districts.

Although Chayes recognised in such cases as *Rizzo* and *Milliken* "a serious effort to reimpose the right-remedy linkage as a way of limiting the power of judges,"⁶⁰ he found hope in several other Supreme Court decisions approving broad prospective relief, saying that American courts had gone too far down the path of PIL to be forced back into the rigid limitation of remedy to right. However, the cases he cited seem instead to be exceptions which prove the continued validity of an American rule limiting remedies to rights. In all three cases⁶¹ the US Supreme Court upheld the relief awarded because it was necessary to cure proven systemic and extensive constitutional violations. In all these cases relief was obtained only from parties who had violated the plaintiffs' rights.

Thus under the current American doctrine sweeping remedial relief will be difficult to obtain, (a) if the plaintiff is unable to mount what is often a major evidentiary struggle to show massive and pervasive illegal conduct; or (b) if necessary relief is available only from parties who owe no legal duty to him. Study of public interest cases decided by the Indian Supreme Court, on the other hand, shows such attenuation of relief from proof of past misconduct or clear legal duty to warrant the conclusion that in India, unlike the United States, right and remedy have become "thoroughly disconnected".

(1) Remedies without rights

In Indian PIL, the "disconnection" of remedies from rights began with the practice of issuing major directions through interim orders. Under the traditional Anglo-American model preliminary injunctive relief was originally limited to preserving the *status quo* pending final decision; later courts in the United States developed broader discretion to order affirmative action upon a showing that the plaintiff was likely to succeed on the merits and that the relative balance of harm justified such interim relief. In the first public interest case, *Hussainara*,⁶² litigated before the Indian Supreme Court, the court issued four interim orders within the first four months following the filing of the writ petition. These orders set norms for releasing undertrial prisoners on personal bond.⁶³ ended

60. *Supra*, note 4 at 47.

61. *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267 (1977); *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979); and *Hutto v. Finney*, 437 U.S. 678 (1978).

62. *Supra*, note 18.

the practice of "protective custody" for crime victims and witnesses.⁶⁴ ordered release of all prisoners in the State of Bihar who had been awaiting trial for a longer period than the maximum sentence for which they could be convicted,⁶⁵ directed that free legal aid be given to all indigent accused,⁶⁶ held that a speedy trial was a constitutional right,⁶⁷ imposed an affirmative duty on magistrates to inform undertrial prisoners of their right to bail and legal aid,⁶⁸ and ordered the release of all undertrials in Bihar for whom investigations had been pending for more than six months without an extension being granted by the magistrate.⁶⁹ After this initial surge of judicial activity, *Hussainara* has remained pending before the court for the last seven years without further major decisions or final judgment.

Hussainara thus set a pattern which the Supreme Court has followed in many public interest cases: immediate and significant interim relief prompted by urgent need expressed in the writ petition with a long deferral of final decision as to factual issues and legal liability. In the *Bhagalpur Blinding* case⁷⁰ the court ordered the State of Bihar to provide medical and rehabilitative services to the blinded prisoners when the case was filed in 1980 but has not yet decided whether the state is liable for the blinding and if so, whether the victims are entitled to compensation. All evictions of pavement dwellers and demolition of hutments on public land in Bombay were halted by the Supreme Court for four years following filing of the writ petition in *Olga Tellis*⁷¹ and an extensive implementation and monitoring mechanism created. Most recently in the *Sri Ram Fertilizer Gas Leak* case⁷² the court ordered the plant to be closed, set up a victim compensation scheme, and then ordered the plant reopening subject to extensive directions, all within ten weeks of the gas leak, without first deciding whether it had jurisdiction under article 32 to order relief against a private corporation.

Such bifurcation of immediate relief from an ultimate determination of rights is not itself a radical change from the practice of providing preliminary injunctive relief in traditional litigation, although the extent of the relief and the lack of a preliminary finding of probability of success on the merits are distinguishing features. Moreover, even if in *Hussainara*, *Bhagalpur Blinding*, *Olga Tellis*, and *Sri Ram Fertilizer*, the court deferred determination of rights, the sweeping affirmative relief ordered in these cases was tailored to remedy the serious and wide-ranging effects of alleged misconduct or culpable inaction.

64. *Id.* at 1367.

65. *Hussainara v. State of Bihar*, A.I.R. 1979 S.C. 1369.

66. *Ibid.*

67. *Ibid.*

68. *Hussainara v. State of Bihar*, A.I.R. 1979 S.C. 1377.

69. *Ibid.*

70. *Khatri v. State of Bihar*, *supra* note 22.

71. *Supra* note 23. The court did permit some evictions under certain limited exceptions.

The divergence from the traditional model becomes more marked however in cases where the Supreme Court has issued directions which go well beyond the relief necessary to remedy the injuries alleged in the petition; indeed sometimes the relief seems to include everything except the original relief sought. For example, the *Barse* case began as a journalist's letter complaining of custodial violence to five women confined in the Bombay city jail. Yet in the final judgment disposing of the petition the Supreme Court said:

It is not necessary for the purpose of this writ petition to go into the various allegations in regard to the ill-treatment meted out to the women prisoners in the police lock up... because we do not propose to investigate into the correctness of these allegations which have been disputed on behalf of the State of Maharashtra.⁷³

Instead of determining the factual validity of the petition and remedying whatever legal injuries were disclosed by the facts, the court used *Barse* to issue guidelines applicable to the entire State of Maharashtra requiring that the state, (i) work with the district legal aid committees to assure that all undertrial prisoners receive free legal aid; (ii) distribute pamphlets to prisoners on their right to bail; (iii) inform each prisoner's designated friend or relative of the arrest; and (iv) use only women police officers to guard and interrogate female suspects. Although the court had before it a commission report based on a social workers' visit to the Bombay jail, the court's directions seemed primarily based on its own sense of what undertrial prisoners generally need and on the state's willingness to agree to the suggested guidelines, rather than on either the allegations in the petition or the findings of its commissioner. *Barse* is thus almost a mirror opposite of the U.S. Supreme Court's decision in *Rizzo* where a small number of complaints of police brutality, not even proven, resulted in system-wide reform *instead of* individual compensation.

Barse is typical of what Baxi has called "creeping jurisdiction... (which) consists in taking over the direction of administration in a particular arena from the executive."⁷⁴ The Supreme Court has particularly been active in expanding the scope of its review in cases involving prisoners and bonded labourers, two social problems demonstrably ignored by the executive. The court's jurisdiction thus "creeps" from the claims raised by the original petition to the larger social problems revealed by its activist inquiry. For example in one bonded labour case, *Mukesh Advani v. State of Madhya Pradesh*,⁷⁵ the court found that the bonded labourers who were

73. *Supra* note 39 at 379.

74. Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India", *The Review* (International Commission of Jurists) 37 at 42 (December 1982).

the subject of the petition had been released by the time the court's commission made its investigation. However, the commission's report pointed out a total absence of implementation of labour laws in the flagstone quarries investigated, in particular the minimum wage laws. The state broadly admitted the findings of the commission but said in defence that the Central Government had failed to prescribe minimum wages for piece work in flagstone quarries. The court then directed the Central Government to issue wage notifications for flagstone quarry workers, a direction with nation-wide impact. Once again a broad remedy was issued and no individual relief was given to the persons who were the subject of the original petition.

Perhaps the most striking example of the separation of remedy from rights is found in the *Foreign Adoption* case,⁷⁶ which began with a letter from an advocate asking that private agencies be barred from routing Indian children abroad for adoption. The letter was based on a magazine article claiming that some Indian children sent abroad for adoption ended up as beggars or prostitutes for lack of proper foster care. The court did not appoint a commission or make any other effort to determine whether these allegations were true. Instead it immediately issued notice to the Union of India and the two major national child welfare agencies to "assist the court in laying down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents and if so, the procedure to be followed for that purpose, with the object of ensuring the welfare of the child."⁷⁷ After allowing the intervention of a number of private adoption agencies and consideration of a welter of various studies and policy statements on adoption, the court issued extraordinarily detailed procedures to govern the foreign adoption of Indian children, including such details as the maximum permissible daily rate for child care by an agency while adoption proceedings are pending.

It is difficult to distinguish the court's actions in the *Foreign Adoption* case from typical legislative activity.⁷⁸ Rather than adjudicating on a set of specific facts applying pre-existing positive law, the court solicited the views of experts and interested parties, reviewed legislation and policies adopted by other jurisdictions, studied sociological materials, and then issued comprehensive guidelines carrying the force of law. In the process it resolved such controversial and sensitive policy issues as whether foreigners should be allowed to adopt Indian children at all, and if so under what limited circumstances. The difficulty of these policy questions is evidenced by the inability of the Indian Parliament to enact adoption legis-

76. *Supra* note 25.

77. *Id.* at 471.

78. The author is indebted to P.M. Bakshi for drawing the author's attention to what he terms the court's "creative legislation" in both *Barse* and the *Foreign Adoption*

lation despite two separate attempts.⁷⁹ The court went well beyond the relief requested in the petition, which was limited to barring private agencies from arranging foreign adoptions. The case could be explained as an exercise of rule-making power by the court, given the central role played by courts in the adoption process and the absence of specific legislative guidance.⁸⁰ However the judgment itself contains no statement indicating that the court viewed its activities in that case as any different from other PIL.

(2) Rights without remedies

The attenuation of remedies from rights seems to find its corollary in a recent trend of cases where rights are declared but no remedy is available. In the *Bombay Pavement Dwellers* case the Supreme Court found that the inability of low-wage workers in Bombay to obtain legal housing within a reasonable distance of their jobs "will lead to deprivation of their livelihood and consequently to the deprivation of life."⁸¹ Yet the only remedy provided by the court for the deprivation of the article 21 right to life caused by eviction from the only available housing in Bombay pavements and slums encroaching on public land, is a prior warning before the eviction. Despite the petitioners' pleas that the state be ordered to undertake a massive low-income housing programme in Bombay, the court limited itself to the unenforceable suggestion that such programmes "be pursued earnestly" and "implemented without delay" without making the provision of legal and affordable housing a pre-condition to the clearance of Bombay's pavements and slums.⁸²

79. The court reported that an Adoption of Children Bill was introduced in both 1972 and 1980. The 1972 Bill failed primarily because of Muslim opposition; however, the court noted that even though the 1980 Bill specifically exempted Muslims it "has unfortunately not yet been enacted into law." *Id.* at 472.

80. As the court explained, due to the absence of any statute providing specifically for foreign adoption, prospective foster parents are forced to apply to the Indian courts for appointment as guardians under the Guardians and Wards Act, 1890. *Id.* at 480. Because the Act only states that the judge should be satisfied that guardianship is for the welfare of the child, several High Courts had adopted guidelines for the district courts in their state for such proceedings. *Id.* at 481-82.

81. *Olga Tellis, supra* note 23 at 200.

82. *Id.* at 204. The court's direction that pavement and slum dwellers who hold 1976 census identify cards be provided alternative pitches cannot be explained as a vindication of the right to livelihood established in the judgment. Rather this direction simply enforces a voluntary promise made by the state government; indeed the court's failure to explain why the state must be bound in the future by its voluntary past policy statement suggests that this direction is a remedy without a corresponding right. Had alternate pitches been based on the fundamental right to livelihood, the court would have had to explain why persons resident in Bombay in 1976 had an enforceable right while more recently arrived persons did not. Further, according to the state's own affidavit, 33 per cent of the hutment dwellers resident in Bombay in 1976 did not receive census cards (*Id.* at 188); petitioners claimed the percentage was much higher. Also the court would have had to address the petitioner's apparently undisputed contention that the alternate

Perhaps the unarticulated reason for the lack of an effective remedy in the *Bombay Pavement Dwellers* case can be found in the court's earlier judgment in *P. Nalla Thampy Thera v. Union of India*.⁸³ The petitioner had filed a seemingly comprehensive list of grievances about the operation of the railways including the number of unmanned crossings, accidents caused by human error, inadequate funds for improvements and improper utilisation of existing assets and facilities, inefficient administration at different levels, prevalent indiscipline, crimes against train passengers, equipment in need of replacement and bridges to be repaired.⁸⁴ The court apparently agreed with the petitioner that his fundamental rights to move freely throughout India, to carry on any occupation, under articles 19 and 21, imposed on the government "the obligation... to improve the established means of communication in this country."⁸⁵ The judgment contains an extensive discussion of the history of Indian railways, the results of three special commissions which studied its operation in post-Independence India and the steps taken by the government to improve the system. The court then concluded with a long list of needed improvements but declined to issue any directions, observing:

Giving directions in a matter like this where availability of resources has a material bearing, policy regarding priorities is involved, expertise is very much in issue, is not prudent and we do not, therefore, propose to issue directions. We however, do hope and believe that early steps shall be taken to implement in a phased manner the improvements referred to... in our decision.⁸⁶

Thus the court in *Thera* may have expressly stated the reasons why no affirmative remedy to provide housing under article 21 was ordered in the *Bombay Pavement Dwellers* case: such relief would have substantially affected the overall budgetary resources of the State of Maharashtra, placed the housing needs of Bombay pavement and slum dwellers above other social needs that might have to be unmet given limit available funds, and would have interfered with the state's claimed expertise in planning the future development of Bombay. Yet directions have been issued in many public interest cases even though availability of resources, policy priorities, and expertise have been very much involved. For example, in *Rural Litigation and Entitlement Kendra*,⁸⁷ the Supreme Court considered, balanced and resolved weighty competing policies, priorities, and issues

pitches to be provided are so distant from public transportation as to make them effectively inaccessible to employment in Bombay.

83. A.I.R. 1984 S.C. 74.

84. *Id.* at 74-75.

85. *Id.* at 79.

86. *Id.* at 80.

of resources—including, the need for development, environmental conservation, preserving jobs, and protecting substantial business investments—in deciding to close a number of limestone quarries in the Mussoorie Hills and to allow others to continue operating under detailed conditions. In rendering this judgment the court reviewed the highly technical reports of various geological experts and gave varying weight to the expert opinions. The generalised explanation in *Thera* for not issuing directions fails to distinguish adequately a case like *Rural Litigation*.

Perhaps some guidance can be found in two recent Supreme Court decisions in which the court found that the Himachal Pradesh High Court had exceeded the limits of judicial power in ordering relief in PIL. In the first case, *State of Himachal Pradesh v. A Parent of a Student of Medical College, Shimla (The Ragging case)*,⁸⁸ the High Court had appointed a commission to investigate the petitioner's complaint of harassment ("ragging") of fresh medical students by older students. One of the commission's recommendations was that the state government should introduce legislation to make ragging a criminal offence, modelled on similar Acts in other states. The High Court, in effect, directed the state to implement that recommendation. The Supreme Court reversed that direction, stating:

It is entirely a matter for the executive branch of the Government to decide whether or not to introduce any particular legislation.... [T]he Court certainly cannot mandate the executive or any members of the legislature to initiate legislation, howsoever necessary or desirable the Court may consider it to be.... If the executive is not carrying out any duty laid upon it by the Constitution or the law, the Court, can certainly require the executive to carry out such duty and this is precisely what the Court does when it entertains public interest litigation.... But at the same time the Court cannot usurp the functions assigned to the executive and the legislature under the Constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law making activities of the executive and the legislature.⁸⁹

In the second case, *State of Himachal Pradesh v. U.R. Sharma*⁹⁰ the Supreme Court agreed with the High Court that the petitioners, had established a fundamental right. It observed :

[T]he persons who have applied to the High Court..... are

88. A.I.R. 1985 S.C. 910.

89. *Id.* at 913-14.

persons affected by the absence of usable road because they are poor Harijan residents of the area, their access by communication, indeed to life outside is obstructed and/or prevented by the absence of road.... For residents of hilly areas, access to road is access to life itself. We accept the proposition that there should be road for communication in reasonable conditions in view of our Constitutional imperatives and denial of that right would be denial of the life as understood in its richness and fullness by the ambit of the Constitution. To the residents of the hilly areas as far as feasible and possible society has constitutional obligation to provide roads for communication.⁹¹

This right was implicated in the specific facts of the case because the executive had failed to complete in a timely manner a planned road to the petitioner's village. The Supreme Court approved of the High Court's actions to the extent that the High Court brought about "an urgency in executive lethargy"⁹² by encouraging the expenditure of already appropriated funds on further construction. However, the Supreme Court interpreted a direction that the superintending engineer apply to the state for the necessary additional funds to complete the road to the village and that the state "favourably consider the demand for additional funds" as merely a suggestion which the state could follow or not at its own discretion. The Supreme Court then discussed at length the importance of judicial deference to the doctrine of separation of powers and emphasized that remedial action in PIL "must be (done) with caution and within limits."⁹³ To underline its point, the Supreme Court directed the High Court not to require continuing reports from the state to determine whether further action had been taken on the road.⁹⁴

It is surprising to an American reader that the same court could take such an expansive interpretation of the constitutional right to life as set forth in *U.R. Sharma*, yet at the same time takes such a cautious view of judicial powers to enforce that right. Yet this seeming paradox may be a logical outcome of the attenuation of rights from remedy. Whereas the U.S. Supreme Court, when confronted with a remedial scheme that seems to invade the province of the executive, asks whether such a remedy is justified by a finding of grave violation of constitutional rights, the Indian counterpart seems willing to declare the right but delimit the remedy for reasons not at all dependent on the extent and nature of the right at issue.

91. *Id.* at 186.

92. *Id.* at 192.

93. *Id.* at 191.

94. *Id.* at 192.

(3) Re-evaluating the relationship of right to remedy

The Indian Supreme Court's innovations in the area of remedies, more so than its new approach to standing and non-adversarial litigation, have provoked comment and debate. On the one hand, the development of remedies without rights through "creeping jurisdiction" draw criticism almost from the beginning of PIL. In January 1982 the Law Commission of India issued a nation-wide questionnaire⁹⁵ which asked whether the Supreme Court had begun to act as third legislative chamber or was acting in matters which should be left to the sole competence of the executive. Later, in the same year, Justice Tulzapurkar expressed in a well-publicised speech his concern about "disturbing trends" emerging from PIL stating his belief that the court cannot "in the name of alleviating the grave public injury... arrogate to itself the role of an administrator or an overseer looking after the management and day to day working of all non-functioning or malfunctioning public bodies or institutions."⁹⁶

By the end of 1983, according to Justice Pathak's opinion in *Bandhua Mukti Morcha*, a "welter of agitated controversy"⁹⁷ surrounded the issue of PIL. Although he recognised that PIL requires that "the relationship between right and remedy...(be) freed from the rigid intimacy which constitutes a fundamental feature of private law litigation,"⁹⁸ he went on with words of caution seemingly applicable to some of the court's more expansive remedial schemes: According to him:

[T]here is always the possibility, in public interest litigation, of succumbing to the temptation of crossing into territory which properly pertains to the Legislature or the Executive Government. For in most cases the jurisdiction of the Court is invoked when a default occurs in executive administration, and sometimes where a void in community life remains unfilled by legislative action...

In the process of correcting executive error or removing legislative omission the Court can so easily find itself involved in policy making of a quality and to a degree characteristic of political authority, and indeed run the risk of being mistaken for one.⁹⁹

The issue of remedies without rights has also attracted scholarly attention. The court's *Asiad* decision¹⁰⁰ was criticised for taking over

95. 1 S.C.C. (Jour.) 27 (1982). The Law Commission never issued a report on the answers received to these questions.

96. Speech delivered by V.D. Tulzapurkar, Justice, Supreme Court of India, at Pune on 29 October 1982, reprinted as "Judiciary: Attacks and Survivals", *A.J.R. (Jour.)* 9 at 14 (1982).

97. *Supra* note 12 at 338.

98. *Id.* at 341.

99. *Id.* at 347.

enforcement of the Minimum Wages Act for the Asian Games construction projects without first requiring the proof that the statutory administrative enforcement authority had failed.¹⁰¹ S.K. Agrawala devoted one of his three K.M. Munshi Lectures to critiquing the court's practice of issuing extensive directions, with particular attention to *Bandhua Mukti Morcha*. Noting the court's expressed intent in that case to develop "a scheme for improving the living conditions for the workers working in stone quarries" he stated, "In my humble submission, it does not fall within the jurisdiction of the Court to attempt to frame any scheme of this nature, even if it be with the assistance of the government(s) concerned."¹⁰² Even Baxi, perhaps the leading scholarly exponent judicial activism, has observed that successful social action litigation

calls not just for vision and commitment of a high order on the part of justices; it also requires careful attention to the lowly details of how facts about the violations of rights are proved. Without this, no jurisprudence of liability of the state for constitutional violations can survive for long.¹⁰³

On the other hand, the issue of rights without remedies has also begun to attract attention. A recent column by Krishan Mahajan, legal correspondent for *The Hindustan Times*, who also served as a commissioner in several public interest cases, well summarises concern shared by many involved in PIL:

Public interest litigation... is already at a crossroads in the Supreme Court, concerning the implementation of the highest court's orders.... If the court actually starts monitoring the implementation of the poor's right spelt out by it then there is some hope of its credibility and respect for its judges. Otherwise it will be part of the prevailing Indian State where Parliament passes laws for the poor, Ministers laud the vote catching experiment of lok adalats and the condition of the poor worsens....

[But even while one part of the Court takes forward steps on implementation] it seems another part is heading in the direction of saying that even where people have admittedly fundamental rights the court cannot effectively deliver these to the poor. Of the latter, the best example is the pavement dwellers decision in *Olga Tellis*.... The latest is the decision... in the case of *Himachal Pradesh v. Umed Ram Sharma* by which fundamental rights and directive principles have been

101. S.B. Talekar, "Rise of New Equity Jurisprudence : A Critique of the *Asiad Labour Case*", 16 *Journal of Constitutional & Parliamentary Studies* 321 at 323 (1982).

102. S.K. Agrawala, *Public Interest Litigation in India*, 1 *Currents* 33 (III 1985).

made subject to the priorities and expenditure as determined by the executive or the legislature....[W]hy should people come to (judges) at all if they are to get only toothless fundamental rights from them...?¹⁰⁴

Constructive discussion of the phenomena of both "remedies without rights" and "rights without remedies" might be advanced by recognising that both may be two sides of the same coin, jointly resulting from the court's experimentation with a new function... The traditional model leads us to characterise cases into two categories: (i) those where there is a right and hence a remedy; (ii) those where there is no right and no remedy. S.K. Agrawala operates from within the traditional model in his critique of Indian PIL when he states that the credibility of the court "depends wholly on the conviction that the relief granted by the Court is enforceable"¹⁰⁵ and that if the court issues directions which are not capable of enforcement it does not act "within its judicial role".^{106a} But if we step outside the traditional model perhaps all the cases discussed in this section—whether categorised above as "remedy without right" or "right without remedy"—can be classified together. All would be then seen as cases in which the court tells the government what in its opinion, the government *ought* to do. If the court feels that the social injustice presented by a particular case creates a powerful imperative for concrete action, and feels sufficiently confident that the executive will share that sense of the imperative, then it will venture to issue specific remedial relief. If it does not feel that a case presents such an imperative, or doubts its ability to persuade the executive, it may limit itself to a declaration of rights bolstered by argument and rhetoric.

The attenuation of rights and remedies may thus be a sign that the court is evolving a role quite different from adjudication. Perhaps this is Baxi's point when he argues that both Indian jurists and judges should accept the fact that the Indian courts play a political role in which the line between legislation and adjudication is blurred.¹⁰⁶ If in this role the court is sometimes able to do more than a court in the traditional model, sometimes it may also be able to do less than we expect from that in the traditional model. Singh's description of the court's power in PIL is at first a bit startling. He observed:

All that the court is able to do in this type of jurisdiction is to

104. *The Hindustan Times*, 10 March 1986. A number of persons who were interviewed by the author expressed concern that the Supreme Court had resorted to making speeches instead of delivering judgments and that it was in danger of being viewed as having no more credibility than the other branches of government for failing to deliver on its promises.

105. *Supra* note 102 at 34.

105a. *Id.* at 36.

106. Upendra Baxi, "On How Not to Judge the Judges : Notes Towards Evaluation

express its anguish... and endeavour to prevent recurrence of similar episodes.... The courts simply remind and alert the executive and legislature of their failings and lapses and give them an opportunity to right the wrong.¹⁰⁷

Yet Singh's description is strikingly close to the court's most recent statement about PIL in the *U.R. Sharma* case where it observed:

The High Court has served its high purpose of drawing attention to a public need and indicated a feasible course of action. No further need be done....¹⁰⁸

Re-evaluating the relationship between rights and remedies in the Indian context also stimulates possible new perspectives on the realities of public interest practice in the United States. Denvir has argued persuasively that the belief that PIL is ineffective has the flaw of not recognising the important secondary uses of litigation which operate independent of actual adjudication of rights.¹⁰⁹

His list of such secondary uses—deterrence of lawlessness, publicity, fact-finding, creation of new forums, catalyst for legislative action and even constructive delay—all find some parallel in Indian cases which attenuate rights from remedies. Further, American PIL like most American litigation, often ends in settlement rather than final judgment. The author knows from his own litigation experience that the remedy obtained in settlement may go well beyond the corresponding right asserted in the complaint, *albeit* at the price of forfeiting other rights asserted. Thus the Indian judges may be doing themselves what public interest litigants in America do outside the courtroom in seeking to achieve ends of social justice through the legal system.

V Conclusion

Two themes emerge from the study of all three procedural innovations developed by the Supreme Court in Indian PIL. First, the strategy for giving the poor and oppressed meaningful access to justice is not, as in the United States, to provide funds so that they may participate in the traditional system on an equal economic footing. Instead the strategy is to change the system. Thus volunteer social activists are allowed standing, a simple letter can be accepted as a writ petition, the court itself will shoulder much of the burden of establishing the facts through commissions, and whenever possible the case will move swiftly to the issue of

107. "Thinking About the Limits of Judicial Vindication of Public Interest", 3 *S.C.C. (Jour.)* 1 at 6-7 (1985).

108. *Supra* note 90 at 192.

109. John Denvir, "Towards a Political Theory of Public Interest Litigation", 54 *N. Carolina L. Rev.* 1133 (1976).

remedy, bypassing the time-consuming and costly process of determining liability for past acts. As explained by Justice Pathak in *Bandhua-Mukti Morcha* the goal is the "creation of a system which promises legal relief without cumbersome formality and heavy expenditure."¹¹⁰

The second theme is a continuing judicial willingness to depart from fundamental principles of the traditional Anglo-American legal system—that plaintiffs must have a personal stake, that judges, are passive arbiters of facts produced by the parties, that remedies must be derived from rights—when confronted with social injustice. As proclaimed Justice Bhagwati in the *Judges Transfer* case: "The Court would therefore unhesitatingly and without the slightest qualms of conscience case aside the technical rules of procedure in the exercise of its dispensing power."¹¹¹

The substantial accomplishments of Indian PIL in its few short years of existence surely prove that it is a development worthy of the most serious consideration by jurists, lawyers and judges from all societies, and particularly from the United States where the parallel and contrasts are so striking. At stake is nothing less than the role of courts in a democracy. Whether reform alone will be sufficient to make the courts effective instruments of social justice, and if not, whether a more revolutionary approach is possible without destroying the fundamental sources of judicial power is still a question to be answered. What is possible now is a full, considered and penetrating public discussion of the larger implications of PIL in India and the world.