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Poverty and Constitutional Justice: The Indian Experience

by Dr. Jeremy Cooper*

I. INTRODUCTION

In 1933, the British House of Lords affirmed its view that "poverty is a misfortune for which the law cannot take any responsibility at all." 1 In 1986, Justice Bhagwati, Chief Justice of the Indian Supreme Court, described the function of a Supreme Court, in relation to poverty and oppression, in a somewhat different vein:

The judges in India have asked themselves the question: Can judges really escape addressing themselves to substantial questions of social justice? Can they simply say to litigants who came to them for justice and the general public that accords them power, status and respect, that they simply follow the legal text when they are aware that their actions will perpetuate inequality and injustice? Can they restrict their enquiry into law and life within the narrow confines of a narrowly defined rule of law? Does the requirement of constitutionalism not make of greater demands on the judicial function? 2

The history of litigation in the Indian Supreme Court throughout the past decade has demonstrated that the answer to all of the above rhetorical questions has been a clear and unambiguous no, the Judges cannot. Throughout the 1980s, whenever a citizen of India has come to the Indian

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1. WOLFGANG FRIEDMAN, LAW IN A CHANGING SOCIETY 122 (1972).
Supreme Court, seeking relief under the constitution, the court seems consistently to have asked itself the same fundamental question: Will the granting of the relief asked by the plaintiff advance the goal of social justice? If the answer is affirmative, the litigant is granted the relief requested. If the answer is negative, the relief is refused. This Article seeks to describe and explain the background of this phenomenon, and to explore the promises and limitations found in this strategy for poverty lawyers in other jurisdictions.

India has a total area of 3,287,782 square kilometers and a population in excess of 700 million, of whom only 100 million live in cities or towns. Although there are considerable gaps between rich and poor, the vast majority of the Indian population is poor. An enormous variety of races and peoples live within the political boundaries of the state, and despite a large Hindu majority, there are large minorities of other religions, including Moslems, Christians, Sikhs, Buddhists, and Jains. India’s legal system is among the oldest in the world. The Constitution of India, created in 1950, gave its Supreme Court the powers to nullify actions of the Executive and the Legislature, when the action breaches fundamental human rights. These powers are as wide ranging as those afforded in 1787 by the United States Constitution’s Founding Fathers to the United States Supreme Court, a Court described by one international law expert as “the world’s first human rights tribunal.” The traditions of the Indian Supreme Court between 1950 and 1980 were proud, with many strong judgements meted from its chambers. However, the primary focus of their judgements was not poverty or social justice. Indeed, the contrary was more often the case, as was observed by Dwivedi in 1973, when characterizing the Indian Supreme Court of that period as “an arena of legal quibbling for men with long purses.” The legal system had itself been “transplanted from a foreign colonial power based on foreign ideals and values and imposed on a country with vastly different indigenous value systems,

7. H. Seervai, Constitutional Law of India (1987); Sathe, supra note 5.
The court tried to follow the arcane methods of the British House of Lords. It is not surprising therefore that during the period from 1950-80, the Indian Supreme Court was frequently accused of obstructing social reform.

In the 1980s, however, due largely to the collective philosophy of a group of radical judges who formed the majority view of the court at that time, a primary function of the Indian Supreme Court became "the liberation of the poor and oppressed through judicial initiatives" with the overt assistance of "the social activists and public interest litigators." In a decade, the Indian Supreme Court became the last resort for the oppressed and bewildered.

As part of this process, numerous public interest groups mobilized to take advantage of a likely favourable judicial response to protect a whole range of vulnerable, or victimised groups, including prisoners held without trial, bonded labourers, pavement dwellers, litigants without legal aid, women bought and sold as chattels, children forced into jails for homosexual activities, slave labourers paid wages in the form of toxic drugs causing an incurable disease, tortured young prisoners in state jails, and abused inmates of children's homes. The blend of social and judicial activism allowed the Indian Supreme Court finally to break free from its conservative traditions, and what Dhavan has described as "the conflicts between Nehru's political mandate approach and subsequent affirmations of juridical constitutionalism" were at least temporarily resolved in favour of judge led human rights litigation. In the words of Chief Justice Bhagwati:

With a legal architecture designed for a colonial administration and a jurisprudence structured around a free-market economy, the Indian judiciary could not accomplish much in fulfilling the constitutional aspirations of the vast masses of underprivileged people during the first three decades of freedom. During the last five or six years however, social activism has opened up a new dimension of the judicial process, and this new dimension is a direct emanation from the basic objectives and values underlying the Indian Constitution.
The next part of this Article traces the background to the above stated period of judicial activism and assesses its achievements.

II. BACKGROUND

The background to the development in India of a Supreme Court committed to pro-active litigation designed to achieve social justice on behalf of the poor is to be found in an influential report on the lack of national judicare published by a high level committee in India in 1977.17 A crucial section of this report reads as follows:

In our expensive court system, it is impossible for the lower income groups and the poor to enforce rights. The poor people of a village may be prevented from walking along a public pathway by a feudal chief, immigrant workers may be denied fair wages, women workers as a class may be refused equal wages. Collective wrongs call for class action. The rule of locus standi requires to be broad-based and any organisation or individual must be able to start such legal action.18

This committee, which included two distinguished Indian Supreme Court Judges, Justice Bhagwati and Justice Krishna Iyer, was committed from the outset to a path of reform that was to be based on high-profile litigation, at a time when governments throughout the world were engaged in similar debates on the broadening of access to justice, but few were seeking the path of group litigation as their chosen priority.19 However, this particular path was not entirely new to Indian jurisprudence. It had already been seen as an appropriate priority in the Indian context by the Bhagwati Committee of Gujerat on Legal Aid in 1971, by the Krishna Iyer Committee on Processual Justice to the People in 1973, and the Rajasthan Law Reform Committee in 1975.20 Indeed, the latter committee had gone so far as to proclaim that "public interest litigation can prove to be the glory of our legal and judicial system," and the Krishna Iyer Committee had been happy to expand the concept of public interest litigation to embrace socio-legal research on problems affecting the poor, the initiation of law and judicial reforms, and the auditing of the work of state financed social welfare organisations.21

The recommendations contained in the 1977 report were largely accepted by the Bhagwati Committee for Legal Aid Implementation, set up

17. REPORT ON NATIONAL JURIDICARE (Ministry of Law, Justice and Company Affairs, Govt. of India, 1977); DHAVAN, supra note 8, at 293.
18. DHAVAN, supra note 8, at 293.
19. See ACCESS TO JUSTICE (Mauro Cappelletti & B. Garth eds. 1979-81).
20. DHAVAN, supra note 8, at 293-94.
21. Menon, supra note 11.
in 1980 to give practical effect to the report. By 1982, a leading Indian jurist could already write that today, over a hundred matters being litigated mostly in the Supreme Court and the High Courts relate to problems affecting directly the rights of perhaps a hundred thousand or more people who, in the ordinary course of nature, would never have come before the courts for redressal of their just grievances.28

Few, if any other jurisdictions in the world could claim such a radical transformation in such a short period of time. What was it that occurred in India at this time that brought about this change?

Perhaps the most remarkable aspect of this process was the shift that occurred in this period in the Indian Supreme Court’s perception of its own function with regard to human rights protection. Far from being a merely defensive fortress for the protection of the traditionally accepted “fundamental” human rights, such as equality before the law and personal liberty, the Indian Supreme Court adopted a highly visible role as the initiator of affirmative action to force national and state governments to accept the existence of a whole range of positive rights, hitherto more or less unrecognised outside the canons of international statements of human rights principles.29 In the space of a mere five years, the Indian Supreme Court, in a string of dazzling judgements, asserted inter alia, the fundamental right of Indian citizens to speedy trial, against bondage, to livelihood, against environmental pollution, to human dignity, and to legal aid.30 In their judgements in this period of judicial activism, the Indian Supreme Court Justices deliberately adopted a style of interpretation that they argued “shared the passion of the Constitution for social justice.”29 Their credo was the conviction that “in a developing society

22. Id. at 151.


judicial activism is essential for participative justice . . . . Justices are the constitutional invigilators and reformers (who) bring the rule of law closer to the rule of life."

III. The Strategies

At the heart of the reforms that made possible the outgrowth of judicial activism in the 1980s was a two-pronged assault on traditional conceptions of constitutional court practice. The first strategy has involved rethinking judicial interpretation in the context of constitutional rights and social justice and the second a dynamic approach to civil procedure. Let us examine each of these in turn.

A. Judicial Interpretation, Constitutional Rights, and Social Justice

Throughout the 1980s, the Indian Supreme Court has argued that it has the social responsibility of imaginatively interpreting constitutional rights to reflect social justice, and to operate neither narrowly nor statiscally. Rights are dynamic and should be treated as such. Justice Bhagwati developed this philosophy at the Bangalore Judicial Colloquium where reviewing the development of human rights he said:

Civil and political rights . . . do not exist for the large masses of people in the developing countries who are suffering from poverty, want and destitution . . . . It is only if social and economic rights are ensured to these large masses of people that they will be able to enjoy civil and political rights and become equal participants in the democratic process."

In sharp contrast, the American Professor, Geoffrey Hazard, described the contribution of civil justice to social justice as “diffuse, microcosmic, and dull.” He argues that this more or less meets the expectations of the poor that the legal system is supposed to serve, leaving the true resolution of the question of social justice where it belongs: “on the conscience of the community.” However, Stephen Sedley, a highly experienced public interest advocate practising in England (now a High Court judge), demonstrates that this “dull function” of the justice system is more complex than it may first appear when he writes, “Left-wing critiques of judicial decision making often fail to grasp the complexity of judicial aims and

29. Id.
the divergences that may exist between those aims and the myopic ends of the politicians for whom the judges probably vote.”

Crucially, Sedley’s experience when appearing before the highest judges in the land, in a series of politically and socially embattled cases, lead him to caution that “[t]he judiciary may be reactionary, but it is not the Tory Party in horsehair, and it is eminently capable of biting the hand that feeds it.”

In another article on the same theme, he states that “there is no defensible simple equation of conservative judges, with conservative law-making . . . . The radicalism of modern political conservatism in Britain has in many respects overtaken that of the judiciary.”

This view is energetically supported by another leading commentator on the function of British judges, Professor Simon Lee, author of a seminal text, *Judging Judges.*

However, a contemporary Australian judge of high status, Justice Michael Kirby, argues from another perspective, one drawn more from a sense of the function of a judge, than the politics he or she may embody, when he states, “The sense of frustration about the overly activist court . . . may in the ultimate cause, and even justify, unrest and the very civic disorder which it has traditionally been a function of the judiciary to avoid and replace.”

In the 1980s the justices of the Indian Supreme Court have not shared the scepticism of Hazard, the cautioning balance of Sedley and Lee, nor the pragmatic restraint of Kirby. Furthermore, they have totally rejected in the Indian context the stronger statements of the academic left contained in the conclusions of such writers as Ewing and Gearty, who having investigated the arguments in favour of creating a legally enforceable Bill of Rights in the United Kingdom, conclude “[w]e consider that the arguments against a judicially enforceable Bill of Rights are overwhelming.”

The Indian judges argue that it is the luxury of the aca-


31. *Id.*


35. *But see P. Singh, Thinking About the Limits of Judicial Vindication of Public Interest,* 3 S.C.C. 1 (1985).

36. This brief quotation does not do justice to the serious and trenchant critique put forward by Ewing and Gearty in their analysis of the dangers of a judge enforced Bill of Rights in the United Kingdom. It is submitted, however, that the arguments contained in their excellent paper, are highly specific to the United Kingdom. K. Ewing & C. Gearty, *Democracy or a Bill of Rights* (1990).
ademic to argue such points, and the duty of the courts to prove them wrong.\textsuperscript{37}

It is clear that the primary function of the Indian Supreme Court in constitutional rights litigation has been to stimulate government and other public bodies to adopt proper practices, under the closer scrutiny of social activist organisations. The results for the parties are ultimately of secondary importance. But a further function of the Indian Supreme Court's work for the poor and oppressed could perhaps be described as the opening of a dialogue on oppression, as an attempt to influence and redefine public opinion.\textsuperscript{38} Bickel has observed that in the United States:

\begin{quote}
virtually all important decisions in the Supreme Court are the beginnings of a conversation between the Court and the people and their representatives. They are never, at the start, conversations between equals. The Court has an edge, because it initiates things with some immediate action, even if limited. But conversations they are, and to say that the Supreme Court lays down the law of the land is to state the ultimate result, following upon a complex series of events, in some cases and in others it is a form of speech only. The effectiveness of the judgement universalised depends on consent and administration.\textsuperscript{39}
\end{quote}

**Interpreting the Constitution**

How then has the Indian Supreme Court set about this dual purpose of regulating public bodies through social activism and opening of further dialogue on the nature of constitutional rights in its judgements?

At the heart of the Indian Supreme Court's judicial activism in the 1980s has been a perception that constitutional interpretation fundamentally differs, almost mystically, from statutory interpretation. Justice Bhagwati expressed this distinction at the Commonwealth Law Conference in Jamaica in 1986, in the following terms:

\begin{quote}
It must be remembered that a constitution is a totally different kind of enactment than an ordinary statute. It is an organic instrument defining and regulating the power structure and power relationship: it embodies the hopes and aspirations of the people; it projects certain basic values and it sets out certain objectives and goals. It cannot therefore be interpreted like any ordinary statute. It must be interpreted creatively and imaginatively with a view to advancing the constitutional values and spelling out and strengthening the basic human rights of the large masses of people in the country, keeping in mind all the time that it is the constitution, the basic law of the land, that we are expounding and that ulti-
\end{quote}

\begin{footnotes}
37. *Id.*
38. *DHAVAN*, supra note 8, at 299.
\end{footnotes}
mately, as one great American judge felicitously said, "the Constitution is what we say it is." 40

Let us look at this approach in practice by reference to some of the key decisions of the Indian Supreme Court in this period. 41 Perhaps the most celebrated decision of the early 1980s was the case of People's Union for Democratic Rights v. Union of India. 42 This case centered on the exposure of illegal employment practices that were being carried out on a grand scale, as the country prepared to host the highly prestigious Asian Games. The practices were first unearthed by social activists, and presented to the Indian Supreme Court by way of an epistolary petition. 43 In order to comply with the exacting international standards necessary to host this prestigious event, the Indian Government had to embark upon a large range of construction projects including the building of fly-overs, stadia, swimming pools, hotels, and the Asian Games Village Complex. 44 The Government duly contracted the work out to a number of agencies, some of whom flaunted the labour laws on such matters as minimum wages and equal wages for men and women, and the prohibition on the employment of children under fourteen. In addition, many of the workers were denied proper living conditions and medical and other facilities to which they were entitled by law. The significant point about the case for our purposes, was that it was brought not against the contractors, who were clearly and flagrantly breaching labour laws, but was brought against the Indian Government for failing to uphold various fundamental human rights of its citizens. This was despite the fact that the contractors were already being prosecuted under various criminal acts, for their wrongdoing. Constitutionally, the Indian Supreme Court could only accept a direct petition of this kind if it could demonstrate a breach of a fundamental right under the Constitution. 45 At this point, the new creativity emerged.

Article 23 of the Indian Constitution enacts the fundamental right prohibiting "traffic in human beings and forced labour." 46 A narrow, "statutory interpretation" of this section would not conclude that the facts as presented in this particular case revealed such a breach. The Indian Supreme Court thought otherwise. It argued that:

42. 1982 A.I.R. 1473 (S.C.).
43. Id. at 1476.
44. Id. at 1479.
45. Id. at 1476, 1479.
46. India Const. art. 23.
in a country like India, where there is so much poverty and unemployment and there is no equality of bargaining power, a contract of service may appear on the face of it voluntary, but it may in reality be involuntary. Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children, or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigor of his poverty, he would have no choice but to accept any work, that comes his way, even if the remuneration offered to him is less than the minimum wage . . . the labour (thus) provided to him would be "forced labour." 47

The Indian Supreme Court further justified this decision by reference to what it considered the "broader purposes of the Constitution," which were defined as "ushering in a new socio-economic order." 48 In these circumstances, the Court argued, that the word "force" must be construed to include not only physical or legal force, but also force arising from the compulsion of economic circumstances which leaves no choice of alternatives to a person in want. 49

The Indian Supreme Court's interpretation of Article 21 of the Indian Constitution provides further insight into this new activity in judicial interpretation. Article 21 of the Indian Constitution enacts a further fundamental right that "no person shall be deprived of his life or personal liberty except by procedure established by law." 50 The Indian Supreme Court formed the view, in the course of its deliberations in the early 1980s, that the state was dragging its heels in providing access to justice. In the words of Justice Bhagwati, "large masses of the people were leading a life of destitution . . . on account of a lack of awareness, assertiveness and availability of machinery, and were priced out of the legal system and thus denied access to justice." 51 In a leading case, M. M. Hoskot v. State of Maharasta 1978, 52 the Indian Supreme Court held it to be in breach of Article 21 to try a criminal case, imperilling the life or personal liberty of an individual, without giving him proper and adequate legal representation. 53 Furthermore, if a magistrate did not inform the accused of this right, the conviction could be set aside. 54 In another case involving Article 21, the Indian Supreme Court decided that "life" does not mean

47. P.N. BHAGWATI, OBSERVE LABOUR LAWS: AN HISTORIC JUDGMENT OF SUPREME COURT OF INDIA 28-29 (1982).
48. Id. at 5-6.
49. Id. at 29.
50. INDIA CONST. art. 21.
51. Bhagwati, supra note 40, at 65.
53. Id. at 1554.
54. Id. at 1556.
merely physical existence, but also includes "the use of every limb or faculty through which life is enjoyed." Implicit in this right was the right to "live with basic human dignity and all that goes along with it, including the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the base minimum expression of the human self." Thus, the Court elevated this right to the status of a fundamental right. In another Article 21 case, the Court concluded that the "right to life" also included the "right to a livelihood." In another case, Article 21 was said to include the right to be "free from exploitation," and

at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity.

B. A Dynamic Approach to Civil Procedure

The relationship between civil procedure and substantive law has always given rise to controversy of interpretation. In 19th and turn of the century jurisprudence, the function of procedure was by and large perceived as neutral, and mechanical, giving rise to such anodyne definitions as that of Jeremy Bentham—"procedure is the course taken for the execution of the laws," and Collins M.R. "the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress." Later proceduralists have been more willing to assert the dynamic function of civil procedure in promoting or thwarting access to justice. Cappelletti, for example, has described civil procedure as "like a mirror, in which the great issues of liberty and justice, the great themes of the relationship between individuals, groups, and states, are faithfully re-

55. Bhagwati, supra note 40, at 65.
61. Per Collins M.R. in Re Coles and Ravenshear 1907 1 K.B. at 4.
The justices of the Indian Supreme Court grasped the dynamic potential of civil procedure to transform the workings and even the basic function of a constitutional court with fortitude, and in several outstanding judgements in the early 1980s made a series of overarching decisions regarding procedure that laid the groundwork for future poverty litigation.

In a major statement of the Indian Supreme Court's philosophy with regard to its encouragement of public interest litigation on behalf of the poor and the oppressed, Bhagwati, in a 1982 judgement, summarised the necessary reforms as threefold: (1) *locus standi* should be made available to anybody who can show a bona fide observation of a legal injury or wrong done to any person or group, if that person or group cannot themselves approach a court by reason of poverty, disability, or a socially or economically disadvantaged position; (2) the defendant in a private action can be the state, for failing to protect the constitutional rights of the injured citizen, even though the immediate technical defendant is a private individual or body, such as a private employer; and (3) whatever the status of the parties to the action, the remedy must be appropriate to the social problem involved, and if no enforceable remedy exists, a new one must be invented.

Let us examine each of these three components of the Indian Supreme Court philosophy, as articulated by Bhagwati, in turn, beginning with the momentous changes in *locus standi*, and the collation of evidence thereafter.**

*locus standi*

At the heart of the procedural reforms enacted by the Indian Supreme Court in this period was a revolutionary approach to *locus standi*. The approach was in essence more of a revolution in interpretation than in substance, for the traditional common law rider that *locus standi* can only be granted to those with "sufficient interest" in the outcome of the proceedings was retained. The interpretation of what amounts to "sufficient interest" was revolutionary. In a landmark case in 1981, Bhagwati delivered the following judgement for the court:

> Today a vast revolution is taking place in the judicial process; the theatre of law is fast changing and the problems of the poor are coming to the forefront. The Court has to innovate new methods and devise new strategies for the purpose of providing access to justice to the large

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masses of people who are denied their basic human rights . . . . The only way in which this can be done is by entertaining writ petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered [injuries] . . . . We hope and trust that the High Courts of the country will also adopt this pro-active, goal-oriented approach.64

The Provision: Epistolary Jurisdiction. The implications contained in this judgement for the future jurisprudence of civil procedure go far beyond the confines of India. Proceduralists throughout the world, should undergo a uniform catching of breath, if they grasp the full implications of this radical approach to the limits of locus standi. Speaking to the Administrative Law Bar Association in London in 1990, Sir Konrad Schiemann, Justice of the English High Court remarked that “neither (England) nor any other (country) has . . . . a legal system under which anyone could obtain a ruling from a court on any subject upon which he or she desired a ruling.”65 But by 1981, India had already opened the doors to such a possibility. What this remarkable judgement meant in practice was as follows:

Where a legal wrong or a legal injury is caused [or threatened] to a person or to a determinate class of persons . . . . and such person[s] . . . . [are] by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in [the Supreme Court] under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class.66

What clearly emerges from this statement is the breaking down of the procedural barrier of locus standi coupled with the reservation of a fast stream, direct access to the Indian Supreme Court provision for cases involving “fundamental rights” as defined in Part III of the Indian Constitution.67

66. See supra note 63.
This provision is particularly radical because of the further ruling that a person acting pro bono publico can initiate proceedings in the public interest simply by writing a letter (described as the epistolary jurisdiction). A judge may issue public interest proceedings by his own motion, suo moto.68 The court justified this procedure as "a major breakthrough . . . in bringing justice closer to the large masses of people."69 It was noted that the Court

for a long time had remained the preserve of the rich and the well-to-do, and had been used only for the purpose of protecting the rights of the privileged classes. As a result of this innovative use of judicial power . . . the portals of the court [were] thrown open to the poor, the ignorant and the illiterate.70

The epistolary jurisdiction is more important for its symbolic reaching out to the common man, and to its confirmation that access to justice is upheld as a fundamental right by the Indian Supreme Court itself, than for its extensive practical use. In the first four years of its availability, little more than seventy cases are recorded as having availed of its potential.71 The epistolary jurisdiction has been particularly welcomed and used by investigative journalists who have written articles about social injustices they have uncovered, which when issues of fundamental rights have been involved have subsequently been translated by social action groups into direct writs to the Indian Supreme Court.72 One of the first uses of this jurisdiction was by a Supreme Court advocate, who filed a writ in 1980, based on a series of journalistic articles in a national daily, The Indian Express, exposing certain nefarious practices in Bihar, involving pre-trial prisoners.73 In the same year, two professors of law wrote a letter to the same newspaper, exposing barbaric conditions in a protective home for women, which the Indian Supreme Court translated into a writ petition under Article 21 of the Indian Constitution.74 Following this, a law student and a social worker adopted a similar strategy to expose barbarism in a women’s home in Delhi, and three journalists exposed and filed a writ concerning a market in which women were bought and sold as chattels. Other social activist groups, lawyers, social workers, and academics have used the same jurisdiction to similar effect.75

70. Id. at 571-72.
71. JASWAL, supra note 68.
73. Baxi, supra note 13, at 39.
74. Cassels, supra note 58, at 495; Baxi, supra note 13, at 39.
Whilst the epistolary jurisdiction allows individuals not directly involved in an injustice to petition the court without incurring the expense of pursuing the litigation, it alone would be of little value without some subsidiary provision regarding the collection of evidence and financing of the case thereafter. The Indian Supreme Court developed a strategy to cover this difficulty. The Court’s strategy has been the appointment of socio-legal commissions of enquiry to visit the sites of alleged injustice and to collect all necessary evidence, at the court’s own expense. Such commissions of enquiry may employ social activists, teachers, researchers, journalists, or government and judicial officers. The commission’s brief is to deliver “a quick but detailed report setting out their findings as well as their suggestions and recommendations.” Any evidence thus collected is regarded as prima facie evidence, and is submitted to all interested parties inviting affidavit response. The case will then be adjudicated on the basis of all the “evidence” thus accumulated.

Abuse of Process. Dangers of possible abuse of the liberal locus standi provisions are also dealt with in the judgement when the court stated that applicants must be acting bona fide. If it appears that applicants are acting “for personal gain or private profit or out of political motivation or other oblique consideration,” the court can reject the application. Herein lies the abuse of process provision that in practice is rarely used in India. A wider range of possible abuses of the open system of access to the jurisdiction of courts, afforded by ultra liberal standing rules, has been canvassed by Schiemann. Schiemann focuses on the negative impact that open access might have upon a cautious administrator who, fearful of litigation from an unknown quarter, might “concentrate less on the quality of his decision, and more on making it ‘judge proof.’” Schiemann notes also the problems of paying for the expanded litigation that open access will encourage, and the risk that flamboyant publicists and pressure groups might convert the courts into some form of debating platform, despite the certain knowledge that they will lose their case. Despite raising the disadvantages, however, Schiemann largely answers these criticisms when he muses that

76. Bhagwati, supra note 16, at 574.
77. Id.
78. Id.
79. Id. at 575.
80. Tripathi, supra note 67.
81. Id.
82. Id.
83. Schiemann, supra note 65, at 342.
84. Id. at 348.
85. Id.
the undesirability of putting certain actions beyond legal challenge by anyone is self evident. The politically, financially or socially strong can oppress the weak, safe in the knowledge that the courts cannot interfere. This is undesirable not only because oppression is undesirable, but also because if the law is openly flouted without redress in the courts the law is brought into contempt as being a dream without substance.\(^8\)

If this is the conclusion of a judge operating in the relative affluence of English "social injustice," it seems safe to say that in a country operating on a scale of poverty and related economic problems such as India, the abuse of process provisions that are necessary in more affluent jurisdictions seem to be of little relevance or application.

**Sufficient Interest**

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 . . . any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong . . . . What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not possible for the Court to lay down any hard and fast rule.\(^7\)

It is perhaps in the interpretation of this section of the judgement that the most far-reaching and radical practices have occurred. No universal agreement exists as to the definition of the term “public interest” despite a tremendous amount of scholarship devoted to the subject.\(^8\) What emerges from the Indian case-law is that if the Indian Supreme Court considers that litigation in any particular matter is “in the public interest,” the court will grant de facto locus standi to the applicant on the basis of a perceived “sufficient interest.” The terms “sufficient interest” and “in the public interest” are effectively merged into one and the same. This is going further than any equivalent court has dared to do elsewhere. Prior to this advance, the concept of sufficient interest had already been given a more liberal hue in a common law setting by Lord Denning, in a 1976 Court of Appeal case in England, *R. v. Greater London Council, ex parte Blackburn.*\(^\text{88}\) The Indian Supreme Court have always seen this brilliant, but maverick, English judge as an inspiration, and a man in their own mould. In this case, Mr. Blackburn, a ratepayer, had successfully applied to the court for an order to enforce the council’s statutory duty to

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\(^{86}\) *Id.* at 343.

\(^{87}\) S.P. Gupta v. President of India, 1982 A.I.R. 149, 190, 192 (S.C.) (emphasis added).

\(^{88}\) J. COOPER, KEYGUIDE TO INFORMATION SOURCES IN PUBLIC INTEREST LAW (1991).

\(^{89}\) 3 All E.R. 184 (1976).
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prohibit the exhibition of pornographic films in the London area, a duty which the council had previously refused to exercise. In granting locus standi to Mr. Blackburn, and thereafter the right to enforce the statutory duty, Lord Denning wrote the following:

I regard it as a matter of high constitutional principle that, if there is good ground for supposing that a government department or a public authority is transgressing the law or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects [sic], then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, [then] the courts in their discretion can grant whatever remedy is appropriate.

This liberal approach to the concept of standing was broadly adopted by the British House of Lords in a landmark case in 1981, I.R.C. v. The National Federation of Self-Employed & Small Businesses Ltd. By a curious coincidence, this case was being heard at almost the same time as the Indian Supreme Court was laying down its judgement on the issue of standing and sufficient interest. In the case before the House of Lords, the court had to decide whether a group representing self-employed people had sufficient interest in a decision by the Inland Revenue to grant an "amnesty" to another group of notorious tax defaulters, to be granted locus standi to challenge the decision of the Inland Revenue. The House of Lords decided that the group did have sufficient interest. Lord Diplock concluded that

it would . . . be a grave lacuna in our system of public law if a pressure group, like the federation or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

A leading administrative law academic and appeal court judge, Lord Justice Woolf, reflected upon the significance of this judgment in the following terms:

Since the decision of the House of Lords . . . I know of no case where the court has come to a conclusion that there is a breach of the law being committed by a public body which requires rectifying but because the

90. Id. at 186.
91. Id. at 192.
93. Id. at 96.
94. Id. at 107.
person making the application has insufficient standing, leave should not be granted.96

Subsequent case law in England has, however, cast doubt upon the wisdom of Lord Justice Woolf's unfettered optimism.96

Locus Standi and Justiciability

[T]he Court [has] to bear in mind that there is a vital distinction between locus standi and justiciability and it is not every default on the part of the State or a public authority that is justiciable. The Court must take care to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved to the Executive and the Legislature by the Constitution.97

The State As Defendant

Trubek has argued that constitutional rights, rooted in a liberal understanding of society, do less to improve the welfare of the disadvantaged than to entrench the existing maldistribution of wealth and power.98 This view is sustained and developed by Katz in his study of 100 years of the history of the poverty law programmes in Chicago.99 Katz reaches the disturbing conclusion that the most aggressive and creative of the poverty lawyers have proved to be less successful at eliminating poverty than reorganising the poor into a formal category.100 These observations illustrate the danger contained in the second of Bhagwati's philosophical/procedural axioms. Nevertheless, it remains pivotal to the entire system.

In Singh's analysis of the effectiveness of judicial activism as a means of employing rule of law rhetoric as a weapon against both poverty and lawlessness, he has observed that the primary function of such activity, in India, is "to raise the standards of governmental accountability towards . . . human values and not necessarily the widening of the adjudication pro-

96. I am grateful to my colleague Bill Bowring for bringing to my attention a spate of recent cases in the English Court of Appeal, which have drawn back from further developing the open access of locus standi, intimated by Lord Justice Woolf in this quotation, in particular the cases of R. v. Secretary of State for the Environment, ex parte The Rose Theatre Trust Co., 1990 1 All E.R. at 754.
99. JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION (1982).
100. Id.
cess to the mass of the people." Herein lies the justification for rights based strategies, that may be the subject of more sceptical scrutiny in the highly developed, and more mechanically administered welfare states operating in more affluent countries than India. Cassels has observed, in this context, that "litigative strategies can never substantially redistribute wealth or power, nor penetrate and affect the economic and cultural conditions which define the reality of Indian life." The fact that these strategies do nevertheless frequently expose the lawlessness of public bodies does serve a useful political function, particularly when that public body is the government.

Galanter has described disputes requiring access to a forum such as the Indian Supreme Court, namely one that is "external to the original social setting of the dispute, at a location at which some specialised learning or expertise will be brought to bear," as a manifestation of a legal centralist model of justice dispensation, and not, in Galanter's view, a model that is in any way essential to the achievement of justice in a given society. What is important in the Indian context is the fact that the legal centralist model functions symbolically and politically, as the embodiment of human rights aspiration, through the mouths of a genuine political elite, the justices of the Indian Supreme Court, and as such can perform the function of the watchdog of governmental accountability referred to above. The history of the Indian Supreme Court has demonstrated unequivocally that it is a political institution.

The separation, both cultural and physical of this powerful political institution from the mass of those whom it seeks to serve, is significant in that "[t]o the foreign observer, one of the most striking aspects of the Indian legal system is the extent to which formal legal arrangements exist in almost metaphysical isolation from social reality." In practical terms, the political and the symbolic function of the court's decisions have exercised a far greater influence on Indian society than the formal decision between the parties. The willingness of the court to concentrate its energies in the field of social justice has opened the door to facilitate what the

102. Cassels, supra note 58, at 515.
104. Id.
105. Dhavan, supra note 8, at 296; Baxi, supra note 5, at 147; George Gadbois, The Supreme Court of India as a Political Institution, in Judges and the Judicial Power 250, 250-51 (Rajeev Dhavan et al. eds. 1985).
106. Cassels, supra note 58, at 515.
Trubeks have described as a people’s “aspiration for . . . civic justice.” They argue that

when the state seeks to protect interests without groups, it confronts problems very different from those encountered when it seeks to protect the more traditional interests of organised sectors of society. Effective protection of any interest means much more than giving formal guarantees of rights. These rights must be translated into tangible benefits, and this can only occur in the day-to-day operation of government and private entities regulated by government.108

This perspective clearly raises serious questions as to what precisely is to be understood by the concept of facilitation. Do the judges create the concept of civic justice in people’s minds, or do they merely give a formal expression to pre-existent notions? The debate goes far beyond the confines of this Article, and indeed can be said to be the central debate underpinning much political and legal/constitutional discussion that is currently taking place in central and eastern Europe. For our purposes, the function of the epistolary jurisdiction is primarily to permit the people to define for themselves what they perceive as civil injustice, and for the court to exercise its discretion, tempered by practical constraints, in the prioritisation of its treatment of such decisions, as manifest in the petitions that come before it. Set out below are some examples of the operation of this axiom in practice in the Indian context.

In a country in which direct action is constantly on the agenda as the most likely alternative to legal process, and as a means to achieve a solution to a social or political problem, the symbolic function of the Supreme Court in replacing, and thereby diverting the threat of direct action cannot be over-emphasised. One writer suggested in the 1980s in this context that the legalisation of politics threatens to divert, manage, and contain the demands of social activists for a more humane social order.109 Thus, the Indian Supreme Court allows for a process of “continued and effective participation in the ongoing stream of governmental decisions”110 in a


108. Id. at 120 (footnote omitted).


110. Trubek & Trubek, supra note 107, at 121.
way that no other organ of the state can achieve. For Indian social activists, it is the best thing available.

**Appropriate Remedies**

Whatever the strength and originality of the new procedures developed by the Indian Supreme Court in the 1980s to allow greater access for the poor to its chamber, there would have been little point in allowing such access without also evolving new remedies for giving relief. As Bhagwati himself pointed out: “The suffering of the disadvantaged could not be relieved by mere issuance of prerogative writs of certiorari, prohibition or mandamus, or by making orders granting damages or injunctive relief, where such suffering was the result of continuous repression and denial of rights.”

The process of developing appropriate remedies involves two aspects. The first aspect is the principle of flexibility, whereby a specific remedy is developed to meet the facts of the injustice uncovered by the court. One case dealt with the discovery of a large scale, illegal debt bondage network, akin to the most primitive form of slavery. The remedy of the courts was to make an order giving various directions for identifying, releasing, and rehabilitating labourers held in debt bondage, and for ensuring thereafter that all labour laws would be observed, that they would all receive a minimum wage, wholesome drinking water, medical assistance, and appropriate schooling facilities for their children, along with legal awareness training.

In another series of cases involving the scandal of people being held pre-trial for longer periods than the maximum possible sentence for their alleged offence, the Supreme Court directed the Bihar state government to prepare an annual census of the prisoners on trial in their state, and to submit it annually to the High Court, which would declare for the early disposal of all cases in which prisoners were being held for an unreasonably long period. In a third case, again in the state of Bihar, in which prisoners under trial had been blinded by the police, the Court ordered that these prisoners should be given vocational training in an institute for the blind, and paid compensation for the rest of their lives. In a fourth case, involving the abuse by male police officers of women in custody, the Court directed that there should be a separate lock-up for women, super-

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113. *Id.* at 828.
vised by women police officers, and that a written notice should be placed in each lock-up informing the arrested person of their rights.116

The second aspect in the development of effective remedies relates to enforcement. The remedy may be tailor-made to match the problem, but unenforceable and therefore worthless. In the words of Bhagwati:

The orders made by the Court are obviously not self-executing. They have to be enforced through State agencies; if the State agencies are not enthusiastic in enforcing the Court orders and do not actively cooperate in that task, the object and purpose of the public interest litigation would remain unfulfilled.117

The main device adopted by the Court to try to ensure enforcement of their orders has been the creation of special monitoring agencies, who report back to the court on the effectiveness of the ordered enforcement procedure. Thus in the case concerning the protection of women in policy custody, the Court instructed a woman judicial officer to make regular visits to the police stations in question and to report to the High Court on whether the directives were being obeyed.118 In the case involving bonded labourers, the Supreme Court appointed the Joint-Secretary in the Ministry of Labour to visit the quarries where the bonded labour network had existed, after three months, with a similar purpose.119 In a case involving environmental pollution caused by a gas leak from a chemical plant, an even more stringent monitoring system was set up by the Court.120

On the basis of recommendations of four separate court-appointed technical teams the court ordered specific technical, safety and training improvements. It required the allocation of trained staff to defined safety functions. To monitor the plant the court set up an independent committee to visit the plant every two weeks, and also ordered the government inspector to make surprise visits once a week . . . [It] "suggested" that the government establish an Ecological Sciences Resource Group to assist the court . . . . [It] required the company and its managers to deposit security to guarantee compensation to any who might be injured as a result of the enterprise’s activity.121

The remedies are thus an imaginative and bold step down the road of constitutional court activism and enforcement of rights. Their effectiveness is challenged by some, and is in any event piecemeal, and under-

121. Cassels, supra note 58, at 506.
The Indian Supreme Court has accepted that unless and until the attitudes of public administrators change significantly, the vigilance and dedication of social activists on the ground will remain of greater importance than any Supreme Court eloquence in protecting the poor. They have not yet proved Hazard wrong.

IV. CONCLUSION

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, they are false hopes. Liberty lies in the hearts of men and women; where it dies there is no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.

The words of Judge Learned Hand ring as true today as they did when he first uttered them in 1953. And they are just as true in India, as they are anywhere else. In particular, it would be misleading to assume that the “Indian Experiment” in public interest litigation has been an unmitigated success. Some quarters are especially critical: “The Indian legal system, in its current condition, is far from meeting its constitutional obligation of promoting justice. In fact, it actually operates to deny justice to a majority of the Indian population, the rural and the urban poor.”

“Public Interest Litigation is failing in India in more ways than one.” Specifically, the number of cases using the epistolary jurisdiction has been relatively small, and has served to clog up the court dockets. The time taken to bring public interest cases to the Supreme Court is inordinate, and has been heavily criticized. The leading exponents of public interest judicial activism, Justices Bhagwati and Krishna Iyer, are no longer in the court, and their replacements are more cautious and conservative; epistolary litigants are normally allocated a legal aid lawyer, not the lawyer of their choice; and litigants are not able to select the judge that might be more sympathetic to their cause. Nevertheless, these cautionary statements remain cautionary, not debilitating. These

122. Id. at 517.
126. Williams, supra note 10, at 4.
127. Dhavan, supra note 15.
128. Jaswal, supra note 68.
130. JASWAL, supra note 68.
statements certainly do not undermine the tremendous achievements of the Indian Supreme Court over the past decade in demonstrating the potential possessed by any constitutional court to bring about significant improvements in the general level of social justice at any one time, nor do they undermine the continuing symbolic function of the Supreme Court, to lead the way as champions of simple concepts of justice.

Extrapolation of policy for one country from the experiences of another is never a wise philosophy, particularly when the social, political, and economic differences are as great as they are between India and the Western countries in which constitutional courts make at least a pretence of asserting fundamental human rights through the process of judicial decision making. Nevertheless, some of the clear conclusions that emerge from the recent Indian experience are of such universality that they bear discussion and debate in fora far far wider than the Indian sub-continent. First, it is clear that the same words in constitutions can be interpreted in widely differing ways, according to the desire of the judges to make them work in a particular way. Second, procedural restraints on access to the courts are by and large, judge-made, and the potential to open up access rests in large part with the same judges. Wherever debates on *locus standi* take place, at least in the common law world, the terms of reference are remarkably similar. The judges take it upon themselves to decide whether a particular party should, or should not, be heard. Third, if judges have the personal, social, or political will to do so, they have enormous scope to expand the type of remedies they wish to see operating in their courts, and the types of evidence that they wish brought before them. Fourth, as history comes full circle, and critics, echoing contemporary debates in the United States, intimate that public interest litigation in India is not today what it was three years ago, the words of John Curran in 1790, are as true today as they were when uttered in those fomenting years of revolutionary politics some 200 years ago: “The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime, and the punishment of his guilt.”

It has been shown in the course of this Article that to use its public interest function effectively, a court must not only be fearless in stating its objectives, but set out a reform agenda designed to achieve those objectives. This agenda will involve a willingness to see and use the creative potential of civil procedure as a tool for reform rather than a techni-

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131. It is significant however that in the past twelve months, activists in Bangladesh and in Pakistan are starting to group together with a view to encouraging their own Supreme Courts to adopt a similar stance to that of India.

132. John Philpot Curran, from his speech on The Right of Election of Lord Mayor of Dublin, made on 10th July, 1790, in the City of Dublin, Ireland.
cal barrier to justice. It will require bold and imaginative initiatives to create enforcement mechanisms and procedures appropriate to the problem in hand. It will require the appointment of the right judges, bearing in mind that in developing countries "judges will frequently be among the very few highly educated citizens available for leadership." Above all, it will involve a conscious and overt acceptance by constitutional court justices, wherever they may sit, that theirs is the power to make law, and this is a power that they should not squander negatively. In the words of one of the British House of Lords judges, Lord Reid: "There was a time when it was thought almost indecent to suggest that Judges make law—they only declare it . . . . But we do not believe in fairy tales any more."

133. Kirby, supra note 34, at 71.