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# TAKING SUFFERING SERIOUSLY: SOCIAL ACTION LITIGATION IN THE SUPREME COURT OF INDIA

Upendra Baxi\*

## I. Introduction

The Supreme Court of India is at long last becoming, after thirty two years of the Republic, the Supreme Court for Indians. For too long, the apex constitutional court had become “an arena of legal quibbling for men with long purses.”<sup>1</sup> Now, increasingly, the Court is being identified by justices as well as people as the “last resort for the oppressed and the bewildered.”<sup>2</sup> The transition from a traditional captive agency with a low social visibility into a liberated agency with a high socio-political visibility is a remarkable development in the career of the Indian appellate judiciary.<sup>3</sup> A post-emergency phenomenon, the transformation is characterized chiefly by *judicial populism*.<sup>4</sup> The Court is augmenting its support base and moral authority in the nation at a time when other institutions of governance are facing a legitimation crisis.<sup>5</sup> In the process, like all political institutions, the Court promises more than it can deliver and is severely exposed to the *dynamics of disenchantment*.

For the present, and the near future, however, there is little prospect of the Court reverting to its traditional adjudicatory posture where people's causes *appeared* merely as issues, argued arcanelly by lawyers, and decided

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1. Kesavnanda Bharathi v. State of Kerala (1973) 4 S.C.C. 225 at 947 (hereinafter cited as *Kesavnanda*).

2. State of Rajasthan v. Union of India (1977) 3 S.C.C. 634 at 70 (per Justice Goswami).

3. It is customary to think about administrative and regulatory agencies as 'captive.' See, e.g. D.M. Trubek "Public Policy Advocacy: Administrative Government and Representation of Diffuse Interests" in III *Access to Justice* 445 (M. Cappelletti & B. Garth eds. 1979) and the literature there cited. But, barring small causes courts and similar other judicial fora, the notion of 'captive agency' has not been explicitly extended to appellate courts. Even these latter can become 'captive' to certain professional interests, backed by societal dominant groups.

4. See U. BAXI, *THE INDIAN SUPREME COURT AND POLITICS* 121-248 (1980), (hereinafter cited as Baxi, *Politics*).

5. *Id.* at 246-248A.

in the mystery and mystique of the inherited common-law-like judicial process.

People now know that the Court has constitutional power of intervention, which can be invoked to ameliorate their miseries arising from repression, governmental lawlessness and administrative deviance. Undertrial as well as convicted prisoners, women in protective custody, children in juvenile institutions, bonded and migrant labourers, unorganized labourers, untouchables and scheduled tribes, landless agricultural labourers who fall prey to faulty mechanization, women who are bought and sold, slum-dwellers and pavement dwellers, kins of victims of extra judicial executions - these and many more groups now flock to the Supreme Court seeking justice.

They come with *unusual problems*, never before so directly confronted by the Supreme Court. They seek *extraordinary remedies*, transcending the received notions of separation of powers and the inherited distinctions between adjudication and legislation on the one hand and administration and adjudication on the other. They bring, too, *a new kind of lawyering and a novel kind of judging*. They add a poignant twist to the docket explosion<sup>6</sup> which was so far merely a routine product of the Bar committed only to justice according to the fees. They also bring a new kind of dialogue on the judicial role in a traumatically changeful society.<sup>7</sup>

The medium through which all this has happened, and is happening, is social action litigation, a distinctive by-product of the catharsis of the 1975-1976 Emergency. What emerged as an expiatory syndrome is now a catalytic component of a movement for "*juridical democracy*"<sup>8</sup> through innovative uses of judicial power.

Throughout this paper, I use the term "social action litigation" (SAL) in preference to the more requisish term "public interest litigation" (PIL). The label PIL has slipped into Indian juridical diction as effortlessly as all Anglo-American conceptual borrowings readily do. But while labels can be borrowed, history cannot be. The PIL represents for America a distinctive phase of socio-legal development for which there is no counterpart in India; and the salient characteristics of its birth, growth and, possibly, decay are also distinctive to American history.

6. See R. DHAVAN, *THE SUPREME COURT UNDER STRAIN: THE CHALLENGE OF ARREARS* (1977); U. BAXI, *THE CRISIS OF THE INDIAN LEGAL SYSTEM* 58-83 (1982); (hereinafter referred to as Baxi, *Crisis*).

7. See U. Baxi, "On How Not to Judge the Judges. . ." (Mimeo: paper presented at a Seminar on Judicial Process and Social Change, Indian Law Institute and Andhra Pradesh University, (1980); Reddy, *Judicial Process and Social Change* 56 SUP. CT. J. 1 (1981).

8. For an elaboration of the notion of juridical democracy, see, T. LOWI, *THE END OF LIBERALISM* 291-303 (1969).

The PIL efflorescence in the United States owed much to substantial resource investment from the government and private foundations; the PIL work was espoused mainly by specialized public interest law firms.<sup>9</sup> The issues within the sway of PIL in the United States concerned not so much state repression or governmental lawlessness but rather civic participation in governmental decision making.<sup>10</sup> Nor did the PIL groups there focus preeminently on the rural poor.<sup>11</sup> And, typically, PIL sought to represent “interests without groups” such as consumerism or environment.<sup>12</sup> Given the nature of state and federal politics, PIL marched with public advocacy outside courts through well established mechanisms like lobbying.<sup>13</sup> In brief, *the PIL movement* in the United States involved innovative uses of the law, lawyers and courts to secure greater fidelity to the parlous notions of legal liberalism and interest group pluralism in an advanced industrial capitalistic society.<sup>14</sup>

No doubt, Indian social action groups should know the essence of the American PIL experience, and particularly the structural reasons for its failures and successes. PIL activism has instead of generating pressures for structural changes in law and society ended up servicing the much exposed ideology of interest group pluralism and legal liberalism; indeed, public advocacy programmes have tended to “enhance the legitimacy of processes that may not really change.”<sup>15</sup> Similarly, PIL activism is, despite the affluent society, unable to overcome problems of resources, both in terms of person-power and finances.<sup>16</sup> Critiques of PIL activism raise

9. See L.G. Trubek & D.M. Trubek, *Civic Justice Through Civil Justice: New Approach to Public Interest Advocacy in the United States* in ACCESS TO JUSTICE & THE WELFARE STATE 119 (M. Cappelletti ed. 1981).

10. *Id.*

11. See, generally, J. HANDLER, LEGAL SYSTEM AND SOCIAL CHANGE: A THEORY OF LAW REFORM (1979); F.F. PIVEN & R.A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL (1977).

12. See *supra* note 9. Trubek's analysis of 'interests without groups' needs to be extended to the wider setting of the political economy of advanced capitalist societies. See, e.g. C. Offe, *Political Authority and Class Structure: An Analysis of the Late Capitalist Societies*, 2 INT. J. OF SOC. 73 (1972).

13. J.M. BARRY, LOBBYING FOR THE PEOPLE (1977).

14. See Trubek, *supra* note 9; also see the insightful analysis by Handler, *supra* note 11.

15. Trubek, *supra* note 3, at 494.

16. The PIL Movement suffered a grievous setback when the Ford Foundation terminated its grants to the PIL firms in 1979. Until that year the Foundation had provided US \$21 million to these firms. See, for a lively account of the resource - vicissitudes of the PIL movement, D.S. BRODER, CHANGING OF THE GUARD: POWER AND LEADERSHIP IN AMERICA 225 (1980).

The support from the bar is miniscule. In 1977 the Carnegie Endowment awarded \$250,000 to the Council on Public Interest Law, subject to the conditions that the American Bar Association raise a like amount. The award was cancelled because the Association did not raise the corresponding

doubts concerning its overall impact as regards both the modes of decision making and the short and long term results achieved.<sup>17</sup>

No doubt, there have been fruitful innovations in legal doctrine and technique (e.g. liberalization of *locus standi*, growth of techniques of judicial review over administrative action and regulatory agencies and occasional institutionalization of PIL advocacy). No doubt, too, there are certain items on the *programschrift* of reform of administration, adjudication and legislation of concern and interest to social activists in India.<sup>18</sup> But, at the end of the day, the realization seems to be dawning that while all these technical developments ultimately raise "basic issues of power and equality in society," these sorts of developments "have to do with 'justice' in the most impoverished sense of the word" and are "truly marginal."<sup>19</sup>

The Indian social action groups should ponder the emerging perceptions of failure of PIL activism in the United States. If these are valid, the challenge before the American socio-legal community is to rethink the basic assumptions behind public advocacy; and this process is now well under way.<sup>20</sup> In India, perhaps, we can learn from the American PIL failure. But so great is the hold of colonial legal imagination that, in the last analysis, these lessons will be learned only after the attempts at transferring the success stories (in terms of techniques, doctrines and models organization of SAL) have demonstrably failed. In the process, the appreciation of the vital political cultural differences between the two societies will be deferred; and a loose-minded importation of notions opposite to the circumstances of development in the United States will continue to obscure a genuine appreciation of the distinctive social and

amount. See Trubek & Trubek, *supra* note 9, at 127-128.

Specialised public advocacy groups, too, have staggering problems of financial viability. It has been estimated that "the direct costs to *one* company participating in a *single* regulatory hearing can often exceed \$500,000" whereas the "entire budget for the proposed consumer advocacy agency, including all administrative costs, research programmes and the like was \$500,000" In the circumstances, PIL activity is unlikely to achieve "genuine resource equalisation." See Trubek, *supra* note 3, at 477-78.

The resource-problems in themselves highlight the need for a thorough-going structural revision of the American legal system; PIL failures may reinforce the need for such changes but cannot provide these.

17. See *supra* notes 3 and 9.

18. E.g. the rights of access to information and sources of information; overdelegation of legislative power; quest for refined mechanisms other than court-systems of ensuring accountability. See Lowi, *supra* note 8; J.H. ELY, *DEMOCRACY AND DISTRUST* (1980). For the Indian situation, see Baxi, *Crisis*, *supra* note 6, at 41-57.

19. See *supra* note 9, at 119.

20. See *supra* notes 3, 9, 11.

historical forces shaping, generally, the role of adjudication in India. I propose to use the notion SAL, rather than PIL, to avoid these pitfalls.

## II. *Sal*: Some Contributory Influences

### A. *Judicial Populism*

A striking feature of SAL is that it is primarily judge-led and even judge-induced. And it is in turn related to juristic and judicial activism on the High Bench.<sup>21</sup> Many Justices have, on and off the bench, advocated active assertion of judicial power to ameliorate the miseries of the masses. Although the active, almost explosive, assertion of judicial power in the aid of the dispossessed and the deprived began in the aftermath of the emergency, judicial populism had become pronounced even before the emergency, particularly in the great decisions in *Golak Nath*<sup>22</sup> and *Kesavnanda Bharati*.<sup>23</sup> In these decisions, familiar to every student of constitutional politics of India, justices who wished Parliament to have unbridled power to amend the Constitution invariably sought to justify it in the name of, and for the sake of, the "teeming millions" of impoverished Indians.<sup>24</sup> They sought to mold constitutional interpretation and doctrine in unmistakable and emotionally surcharged people-oriented ways. Populist rhetoric is writ large in many judicial opinions, on both sides, in these landmark decisions. The following excerpts, one from Justice Dwivedi and the other from Justice (now Chief Justice) Chandrachud in *Kesavnanda* suffice to offer us a glimpse of the emergent judicial populism in the early seventies:

The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people. It should generally be so construed as that they can understand and appreciate it. The more they understand it the more they love it and the more they prize it.<sup>25</sup>

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21. Baxi, *Politics*, *supra* note 4; K.K. MATHEW ON DEMOCRACY, EQUALITY AND FREEDOM (1978).

22. *Golak Nath v. State of Punjab*, 1967 A.I.R. (S.C.) 1643.

23. *Supra* note 1.

24. For examples of populist stances see U. BAXI, POLITICS ON THE NATURE OF CONSTITUENT POWER IN THE INDIAN CONSTITUTION 127-51; Baxi, *Some Reflection*: . . . in TRENDS & ISSUES 122 (R. Dhavan & A. Jacob ed. 1977); R. DHAVAN, THE SUPREME COURT & PARLIAMENTARY SOVEREIGNTY (1979). The debate over the reaches of the amending power has preeminently been concerned with the 'right' to property (with the conspicuous exception of *Raj Narain v. Indira Nehru Gandhi*, 1975 1 Supp. S.C.C. 1) The 'right' now stands deleted. But the socialist content of the Preamble and the Directive Principles of the State Policy have provided, and will continue to do so, fruitful *topic* for populist judicial reasoning.

25. *Kesavnanda* at 947 (para 1947).

And further:

The Court is not chosen by the people and is not responsible to them in the sense in which the House of the People is. However, it will win for itself a permanent place in the hearts of the people and augment its moral authority if it can shift the focus of judicial review from the numerical concept of minority protection to the humanitarian concept of the protection of the weaker section of the people.<sup>26</sup>

It is really the poor, starved and mindless millions who need the Court's protection for securing to themselves the enjoyment of human rights. In the absence of an explicit mandate, the Court should abstain from striking down a constitutional amendment which makes an endeavour to wipe out every tear from every eye.<sup>27</sup>

In much the same vein Justice Chandrachud was moved to say (with reference to constitutional precedents):

But these landmarks in the development of the law cannot be permitted to be transformed into weapons for defeating the hopes and aspirations of our teeming millions,—half-clad, half-starved, half-educated. These hopes and aspirations representing the will of the people can only become articulate through the voice of their elected representatives. If they fail the people, the nation must face death and destruction. Then, neither the Court nor the Constitution will save the country.<sup>28</sup>

The elevation of Justice Krishna Iyer to the High Bench in 1974 reinforced the tendency towards judicial populism. He unremittingly insisted that the law is meant for the people and not the people for the law, and as a neo-Marxist, he meant by "people" mostly the proletariat and not the properteriat.<sup>29</sup> He used every conceivable occasion, on and off the Bench, to further the cause of the "toiling masses" and the "weaker sections of the society."<sup>30</sup> He also indefatigably demonstrated and critiqued the colonial and alienating nature of legal processes and institutions and crusaded for a radical reorientation of the Bench and Bar towards the urgent tasks of development and justice for the Indian masses.<sup>31</sup> Justice

26. *Id.* at 948-949 (para 1952).

27. *Id.* at 949 (para 1953).

28. *Kesavnanda* at 968; See also pp. 991, 1005.

29. Baxi, *Politics supra* note 4, at 170-172, 233-245; Baxi, *Crisis, supra* note 6, at 209, 243. See also K.M. Sharma, "The Judicial Universe of Mr. Justice Krishna Iyer," IV S.C.C. (Journal) 38 (1981).

30. E.g., V.R. KRISHNA IYER, *LAW AND THE PEOPLE: A COLLECTION OF ESSAYS* (1972); V. IYER, *LAW FREEDOM & CHANGE* (1975); V. IYER, *COME HALF HIDDEN ASPECTS OF SOCIAL JUSTICE* (1980).

31. Baxi, *Politics supra* note 4, at 121-177.

Krishna Iyer enhanced the sensitivity of judges and lawyers to exploitation and suffering in a way no other justice of the Supreme Court had ever done.

### B. *Emergency Populism*

During the 1975-76 emergency, legal aid to the people was one of the key points of the twenty-point programme launched by Indira Gandhi, to which Justices Krishna Iyer and Bhagwati, themselves deeply committed to the spread of the legal aid movement,<sup>32</sup> readily responded. They led a nationwide movement for the promotion of legal services. They organised legal aid camps in distant villages; they mobilized many a High Court justice to do *padayatras* (long marches) through villages to solve people's grievances. They, through "camps" and *lokadalats* (people's courts), sought to provide deprofessionalized justice. They also in their extra-curial utterances, called for a total restructuring of the legal system, and in particular of the administration of justice.<sup>33</sup> In a sense, their movement constituted a juridical counterpart of the 1971 *Garibi Hatao* (eliminate poverty) campaign, as well as of the Twenty-Point Programme. Although they stopped short of overtly legitimating the emergency regime, they remain vulnerable to the charge of acting as legitimators of the regime. Be that as it may, many Supreme Court and High Court justices did systematically become people-prone in a manner conducive to the growth of judicial populism.

In the immediate aftermath of the Emergency, populist rhetoric and stances decided many a vital issue of constitutional polity.<sup>34</sup> Judicial populism was partly an aspect of post-Emergency catharsis. Partly, it was an attempt to refurbish the image of the Court tarnished by a few emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power.<sup>35</sup> Partly, too, the Court was responding, like all other dominant agencies of governance, to the post-Emergency euphoria at the return of liberal democracy.

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32. See the Krishna Iyer Committee's report, *Processual Justice to the People* (1975); and its critique in Baxi, *Legal Assistance to the Poor*, 27 *ECON. POL. WEEKLY* 1005 (1975).

33. For example, both Justices Krishna Iyer and Bhagwati called for thoroughgoing judicial reforms, minimizing reliance on foreign models of adjudication, including the system of *Stare decisis*. They advocated return to swadeshi jurisprudence including justice by popular tribunals.

34. Baxi, *Politics*, *supra* note 4, at 121-177.

35. See Baxi, *Politics*, *supra* note 4, at 79-120. Also see M. Ghose, *Constitutional Law* in 12 *ANN. SUR. IND. L.* 240, 264-74 (1976); H.M. SEERVAI, *THE EMERGENCY, FUTURE SAFEGUARDS AND THE HABEAS CORPUS CASE* (1978).



### C. *The SAGS-Press Nexus*

One such institution was the press, which for the first time since Independence strove consistently to expose governmental lawlessness and social tyranny through investigative journalism of a high order. Like judges, editors and correspondents realized that some of the “excesses” of the emergency were not different in kind, but only in degree, from the everyday excesses of State power on the hapless citizens.<sup>36</sup> The press, too, felt the need for public atonement; simultaneously, many journalists realized that they owed their freedom of the press ultimately to the people.<sup>37</sup> People’s problems began to matter.<sup>38</sup> The press, for example, highlighted atrocities on untouchables and advasis, the sub-human plight of prisoners, the cruel extra judicial executions through the so-called “encounters” involving use of the police as a counter-insurgency force, the excesses of protective custody of women and children and numerous related instances of violation of fundamental human rights of the people.

This print media transformation enabled activist social action groups (SAGS) to elevate what were regarded as petty instances of injustice and tyranny at the local level into national issues, calling attention to the pathology of public and dominant group power. SAGS found thus a new ally in their struggle for social development and change. The SAGS-press nexus provided a fertile setting (as we shall note later) for the birth and growth of the SAL.

At the same time, the press became a medium of evaluation of how the dominant institutions of the government “collaborated” against the people.<sup>39</sup> The role of judges and courts was integral to this agonized

36. See the balanced account of the vicissitudes of the press during the Emergency, D.R. MANEKAR & KAMALA MANEKAR, *DECLINE AND FALL OF INDIRA GANDHI: 19 MONTHS OF EMERGENCY* 88-122 (1977).

37. This was, in my opinion, a lasting gain for the free press in India. The Sixth General Elections witnessed the emergence of the consciousness on the part of many a professional, hard-boiled journalist that the so-called “illiterate dumb” masses of India, and not the decadent leaders and patrons of the ‘free press,’ held the power to ensure continuance of political freedom in India.

38. The expose of the Emergency excesses, highlighted in the day to day proceedings of the Shah Commission and other State level enquiries, created almost an altogether new sensitivity among journalists and correspondents. For the first time, excesses of power against the common people began to be considered newsworthy. People’s sufferings did not constitute headline, front-page news in the Pre-Emergency India. The censorship during the Emergency also prepared ground for this new sensibility. In the absence of newsworthy stories of political goings-on, national newspapers carried on the *front page* stories about the bonded labourers and other related aspects of social tyranny. For an overall account of the conditions which fostered the growth of new sensibility in the print media see ARUN SHOURIE, *THE INSTITUTIONS UNDER THE JANATA RULE* (1980); A. SHOURIE, *SYMPTOMS OF FASCISM* (1978).

39. See D. SELBOURNE, *AN EYE TO INDIA* (1979); Shourie, *supra* note 38.

reappraisal. And the Court, and some justices, became exposed to merciless professional critiques of the Court's emergency performance.<sup>40</sup> In this environment, an Open Letter to the Chief Justice of India written by four anguished law teachers, chastizing the Court for its reversal of conviction of two police persons for raping a tribal girl in the police station led to a nationwide mobilization of women's organizations and groups. Unexpectedly, it culminated in an unprecedented march by women's organizations to the Supreme Court of India demanding a review of the decision, which it ultimately declined.<sup>41</sup>

All this enhanced the visibility of the Court and generated new types of claims for accountability for wielding of judicial power. And this deepened the tendency towards judicial populism. Justices of the Supreme Court, notably Justices Krishna Iyer and Bhagwati, began converting much of constitutional litigation into SAL, through a variety of techniques of juristic activism.<sup>42</sup> The Court began to expand the frontiers of fundamental rights and of natural justice. In the process, they rewrote many parts of the Constitution. The right to life and personal liberty under procedure established by law in Article 21 was now converted *de facto* and *de jure* into a due process clause contrary to the intendment of the makers of the Constitution.<sup>43</sup> This expanding right was soon to encompass within itself the right to bail, the right to speedy trial, the right to dignified treatment in custodial institutions, the right to privacy, and the right to legal services to the poor.<sup>44</sup> Prisons and places of detention, theaters of torture and terror, received high priority attention, especially at the hands of Justice Krishna Iyer who developed, on the whole, a new normative regime of rights and status of prisoners and detainees.<sup>45</sup> The insistence that the states behave in good faith and with utmost reasonableness in

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40. The judiciary became, too, an object of the politics of hate in the immediate aftermath of the Sixth General Elections; see Baxi, *Politics*, *supra* note 4, at 88-98.

41. See, for the text of the Open Letter, 1 S.C.C. (Journal) 17 (1979). The review bench declined representation by women's organizations, so irked were some justices at what they thought to be pressure tactics of the protest march. The Bar too was indignant both at the Open Letter and the protest. But Chief Justice Chandrachud not merely publicly welcomed such calls for judicial accountability through the "Open Letter" but he also received the women's delegation urbanely and even assured them a timely review, which in the event took nearly two years.

42. Juristic activism involves enunciation of new ideas and techniques perhaps not even urged at the Bar, which are in no way necessary to the instant decision but relevant, and in some cases decisively so, for the future growth of the law. See Baxi, *Introduction to K.K. MATHEW, DEMOCRACY, EQUALITY AND FREEDOM* xxviii (1978).

43. Baxi, *Politics*, *supra* note 4, at 151-66.

44. *Id.* at 233-245; Baxi, *Crisis*, *supra* note 6, at 244-95.

45. *Ibid.*

dealing with citizens and persons grew apace. Principles of administrative law met with urgent, painstaking and thorough revisions.<sup>46</sup> The doctrinal innovations in their exuberance and normative impact provided further impetus to SAL.

### III. Dramatis Personae of Sal

Some justices of the Supreme Court were thus the prime actors in SAL. Regardless of the argumentative strategies at the Bar, and often regardless of the immediate frameworks of the writ proceeding, they blazed new trails in constitutional interpretation.<sup>47</sup> By 1979 it was clear to the discerning members of the Bar and to social activists that the Court was indeed in search of a new kind of constitutional litigation.

And the first dramatic opportunity was provided by Supreme Court advocate, Ms. Kapila Hingorani, who filed a writ based on a series of articles in a national daily, *The Indian Express*, exposing the plight of Bihar undertrial prisoners, most of whom had served long pre-trial detention, indeed to a point that they had, as it were, sentences to their credit.<sup>48</sup> In 1980, two professors of law wrote a letter to the editor of the *Indian Express* describing the barbaric conditions of detention in the *Agra Protective Home for Women the basis for a Writ Petition under Article 21*.<sup>49</sup> This was followed by a similar petition for Delhi Women's Home, by a third year law student in Delhi Law Faculty and a social worker.<sup>50</sup> A law teacher on a social science research fellowship successfully brought to completion the trial of four young tribals, who grew up in a sub-jail awaiting trial.<sup>51</sup> Three journalists after an expose of a thriving market in which women were bought and sold as chattels, filed a writ demanding prohibition of this practice and immediate relief for their victims through programmes of compensation and rehabilitation.<sup>52</sup> In the same year, a legal correspondent of *The Statesman* brought to the notice of the Court

46. U. Baxi, *Developments in Administrative Law* in PUBLIC LAW IN INDIA (A.G. NOORANI ED. 1982) and the literature there cited; U. BAXI, *Introduction* to I.P. MASSEY'S ADMINISTRATIVE LAW (1980); Baxi, *Politics*, *supra* note 4, at 151-66; Jain, Justice, Bhagwati and Indian Administrative Law, THE BANARAS LAW JOURNAL (1980).

47. See *supra* notes 42 and 46.

48. Hussainara Khatoon v. State of Bihar (six interim decisions so far) discussed in U. Baxi, *The Supreme Court Under Trial: Undertrials and the Supreme Court*, S.C.C. (Journal) (1980).

49. Dr. Upendra Baxi v. State of Uttar Pradesh, 3 S.C.A.L.E. 1136 (1981).

50. Uhinnamma Sivas v. State (Delhi Administration), W.P. 2526 of 1982; initiated by Ms. Nandita Haksar, who later also assisted the Court by surveying the conditions in the Home as a Member of the Committee headed by the District Judge, Delhi.

51. Kadra Pahadiya v. State of Bihar, W.P. 5943 of 1980; see also V. DHAGAMWAR, THE PAHADIYA FILE: A CRY IN WILDERNESS MAINSTREAM (1981).

52. Ms. Gomi Cappor, Aswini Sarin and Arun Shourie v. State of M.P., W.P. 2229 of 1981.

the inhumane conditions of detention of "Naxalite" prisoners in the Madras Jail, challenging in the process the entire edifice of the Prisons Act, 1892.<sup>53</sup> The special legal Correspondent of the *Hindustan Times* also brought to the Court a social activist's report on forced importation of seventy-five young children for homosexual relations in Kanpur Jail.<sup>54</sup> In early 1982, social workers of the Gandhi Peace Foundation, assisted by the author, filed writ proceedings against the state of Madhya Pradesh for allowing *bonded labour* to be paid wages of disability: that is, wages in kind of Kesari Dal, a toxic substance causing incurable lathyrism among the bonded labourers.<sup>55</sup> A newly formed association of law teachers had brought writ proceedings against the same state for inhuman torture of young prisoners in Chattarpur Jail.<sup>56</sup>

This random listing illustrates the new brand of socio-legal entrepreneurs, who approach the Court pro bono publico on their own, without much support from the Bar (and often at its chagrin) and with their social commitment as their only asset. In addition, there are a handful of lawyers and lawyer-led SAGS who have also contributed to SAL.<sup>57</sup> Among the lawyer-led SAGS are three principal groups: the Citizens for Democracy (CFD),<sup>58</sup> the People's Union of Civil Liberties<sup>59</sup> and the People's Union for Democratic Rights.<sup>60</sup>

53. Ghanashyam Pardesi v. State of Tamil Nadu, W.P. 2261/80; 9347/81 & 4252/81.

54. \_\_\_\_\_ v. State of Uttar Pradesh, W.P. 1981 (initiated by Krishen Mahajan).

55. Jyoti Prakash v. State of Madhya Pradesh (May, 1982).

56. Association for Social Action & Legal Thought (ASSALT) v. The State of Madhya Pradesh W.P. 8332 of 1981.

57. Among the lawyers who have individually initiated SAL at the Supreme Court are; Ms. Kapila Hingorani, who brought the undertrial as well as the Bhagalapur blindings cases; Ms. Indira Jaising, who is steadfastly insisting on the fundamental right of people in Bombay to live on pavements; and Mr. Vimal Dave of the Supreme Court Legal Aid Association. Younger members of the Bar seem to have responded more enthusiastically to SAL. Mr. Kapil Sibal, notably, helps Court No. 2 almost as an institutionalized *amicus*.

58. The CFD is led by Tarkunde, a Senior Advocate, Supreme Court, and a retired High Court Judge of the Bombay High Court. A veteran fighter for public causes, Tarkunde's ideology is shaped by the radical humanism of M.N. Roy (whose message he is struggling to make relevant to contemporary India) and the laterday thought of Jayprakash Narayan. Tarkunde was in the forefront of the exposure of the torture of Naxalites in Andhra Pradesh and Punjab, and in the crusade against the constitutional changes during the Emergency. The CFD has intervened in many cases, including notably the Bihar undertrial cases.

59. The PUCL is a body having wide enrollment from cross section of intelligentsia throughout the country. Its members are intellectual activists, most of whom have been shocked into social action by the trauma of the Emergency. Its leadership includes many leading lawyers, journalists and opposition leaders. The PUCL has investigated many cases of atrocities and corruption. It has chapters throughout India and has potential for emerging as a significant shaper of public opinion and as a pressure group.

60. The PUDR is a breakway group of the PUCL, attracting a more radical social activist membership. It is led by Gobinda Mukhoty, a senior advocate of the Supreme Court. A small group

Of about seventy-five SAL writs filed between 1980-1982 a preponderant number were filed by social activists rather than by individual lawyers or lawyer groups.<sup>61</sup> And this was made possible by a rather unique development. Much of SAL in this period arose out of letters written by individuals to Justice P.N. Bhagwati in his twin capacities as the Justice of the Supreme Court and the Chairperson of the National Committee for the Implementation of the Legal Aid Scheme. The letters usually relied on newspaper and periodicals investigative reportage. More often than not, the Justice brought them on the board of the Court, converting these letters into writ petitions. Justice Bhagwati has gone so far as to invite members of the public and especially public spirited citizens to bring to his notice violations of basic human rights, as embodied in the Constitution, for suitable judicial action.

In *habeas corpus* petitions, the Court usually acts on letters written by or on behalf of the detenu. But Justice Bhagwati has generalized this technique, so radically that it could be justly said that he made a momentous social invention - namely, the *epistolary jurisdiction*. After experimenting with it for some time, he was able, too, to fully legitimate the epistolary jurisdiction by imaginatively extending the law of *locus*

of dedicated workers, it is noticeably more active than the PUCL or the CFD. It has produced a large number of reports investigating the conditions of landless and bonded labourers, police and jail atrocities and treatment of political dissenters, including Naxalites. Among the notable SAL brought by the PUDR are: bonded labour cases from Punjab and Haryana and treatment of migrant and contract labourers in the construction of the prestigious Asian Games stadia in New Delhi.

61. The number of 75 SAL cases is based on a rough count; a more detailed census is on the way with the help of an enthusiastic group of final year law students at Delhi (Ms. Nandita Haksar, Messrs. Arun Tyagi, Ananta Barua and Shashibhusan Upadhyaya). The category SAL needs careful operationalization. Some senior leaders of the Supreme Court Bar, when approached, maintained that they too have been initiators of "public interest litigation." They have mentioned, among others, the following important cases: *Azad Rickshaw Pullers v. Punjab*, 1 S.C.R. 366 (1981); *Fertilizer Corp. Kamgar Union, Sindri v. Union of India*, 2 S.C.R. 52 (1981); *Municipal Council Ratlam v. Vardichand*, 1 S.C.R. 47 (1981); *R.K. Gargy v. Union of India*, A.I.R. S.C. 2138 (1981); *A.K. Roy v. Union of India*, 3 S.C.A.L.E. 1601 (1981); and *I.M. Chagalav. Union of India*, S.C.A.L.E. 1959 (1981). Each one of these cases raised very basic questions; and in most, the justices resorted to both judicial and juristic activism strategies. Also public spirited lawyers either *initiated* these matters or participated substantially in these. The present count includes some of these matters, as well as some cases conducted by the Supreme Court Legal Aid Committee, headed by Justice D.A. Desai. The magnitude of the SAL will be high on a liberal operationalization of that notion; all the more so, if we were to further include all cases involving corruption in high places in our listing as well. And if one simply went by the criteria of weighty social interests at stake, almost every fifth matter on the board of the Court will have to qualify as SAL. My preference at this stage of investigation is to confine SAL to mean: (i) Court-recourse against repression, terror and torture; (ii) activation of judicial power against dominant group exploitation of the specially vulnerable strata of society; and (iii) assertion of new rights, either *sui generis* or in aid of (i) and (ii) above.

*standi* in constitutional litigation in the High Court Judge's Case.<sup>62</sup> The judge-led and judge-induced nature of SAL renders it strikingly distinctive.

#### IV. The Social Substance of Sal

Thus not merely in the style and process of generation of the SAL is the contemporary Indian experience unique. The substance of the SAL in India is also distinctive to its contemporary condition. In essence, much of SAL focuses on *exposure of repression by the agencies of the state, notably the police, prison and other custodial authorities. Close to this category are the cases which seek to ensure that authorities of the state fulfill the obligations of law under which they exist and function. In other words, much of SAL is concerned with combating repression and governmental lawlessness.* Only, so far, in rare instances does the SAL concern assertion of new constitutional rights.<sup>63</sup> The other distinctive feature of SAL proceedings is that all of them are Article 32 petitions; that is, they are writ proceedings for the enforcement of the *fundamental rights*. The Supreme Court is empowered, and some would say rather obligated, to duly consider them.<sup>64</sup>

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62. Among the many justifications provided by Justice Bhagwati, the following are important from the present perspectives. First, the rules of law will be "substantially impaired" if "no one can have standing to maintain an action for judicial redress in case of public wrong or, public injury." It is "absolutely essential that the rule of law must wean people away from the lawless street and win them for the court of law." If breach of public duties was "allowed" to go unredressed by courts on the ground of standing, it would "promote disrespect for rule of law." It will also lead to corruption and encourage inefficiency. It might also create possibilities of the "political machinery" itself becoming "a participant in the misuse or abuse of power." Finally, the newly emergent social and economic rights require new kind of enforcement. I.M. Chaglav. P. Shiv Shankar, 4 S.C.A.L.E. 1975, 1991-92 (1981).

63. The petition moved by Ms. Indira Jaising asserts the existence of a constitutional fundamental right under Article 21 previously un contemplated by anyone--namely, the right of pavement dwellers in the city of Greater Bombay to dwell on pavements so long as they do not constitute obstruction to pedestrian and vehicular traffic *on the roads*. It also argues that the State is under corresponding duty to provide them with appropriate house-sites as close as possible to their workplaces. Incidentally, the argument that state does not have vacant land and therefore cannot perform this duty is not to be taken seriously in this case since just in early 1982 the deposed Chief Minister of Maharashtra (A.R. Antulay, who is also a Bar-at-Law) invited four justices of the High Court and in the full glare of television cameras at his residence was seen to hand over to judges scrolls of agreement conveying housing sites. The many applicants for the housing scheme include aside from High Court justices, Chief Justice Chandrachud, Justice P.N. Bhagwati, Justice V.D. Tulzapurkur and Justice D.A. Desai. So the State has enough land as of date to give away for good causes. Pavement dwellers have an equal, if not greater, moral right to housing (while they manage to exist) as justices upon their superannuation. And that is in any case what Justice Chandrachud has said, in general terms, in *Kesavnanda* (see text accompanying note 28; the 'teeming millions' passage).

64. See U. Baxi, *Laches and the Right to Constitutional Remedies: Quis custodiet Ipsos Custodes?* in CONSTITUTIONAL DEVELOPMENTS SINCE INDEPENDENCE 559 (1975).

Both these features lend a special complexity to the SAL in India. On the one hand, they impart high visibility and exalted status to the cause; on the other hand, they present some specific problems for the Court, since all the complaints of governmental repression and lawlessness raise disputed questions of fact which the Court does not as a matter of practice normally handle and which cannot be wholly satisfactorily dealt with by affidavit evidence. We revert to these problems later. For the moment, it would suffice to emphasize this distinct profile of the SAL in India. SAL thus compels judges and lawyers increasingly to take human suffering seriously.<sup>65</sup>

### V. Old Structures, New Concerns

The Court's handling of SAL is at the present in an experimental phase. Much of the future of the SAL ultimately depends on the organizational learning capacity of the Court in dealing with novel and complex problems. And this capacity is affected by existing judicial thought-ways and styles of decision-making.

The most crucial general factor affecting, for weal or woe, the career of SAL is the fluctuating bench-structure. The bench which admits the writ petition is not necessarily the same, unless there is a constitution bench of five justices, as the one hearing it. Even if the presiding judge remains common, his companion justices may differ, often from one hearing to the next. The presiding judge, as well as the SAL petitioner (whether in person or through counsel) thus have to bear additional burdens of persuasion, more so because not all justices are as yet equally attracted by or committed to the SAL.<sup>66</sup> The difficulties are reinforced when the presiding judge is unsympathetic to SAL, or even if moderately sympathetic, he is daunted by the problems of evidence and of shaping new types of reliefs.

Epistolary jurisdiction as developed by Justice Bhagwati was partly addressed to this problem. Once a letter received by him was treated by him as a writ petition, he ensured that it came on his board. His Court No. 2 has, through this process, the largest number of SAL matters. While this result is welcome to many a SAL petitioner, it carries its own costs. First, it indirectly deprives the Chief Justice of India of his undoubtedly important role in docket management and allocation of work

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65. We here modify Professor Dworkin's felicitous title *Taking Rights Seriously* (1977). Perhaps, in a context like India's one may not take rights seriously if one is unable to take suffering seriously.

66. See *infra* 77. Also, U. Baxi, article cited *supra* note 48, at 49-51.

to his companion justices. This has clearly, its own implications on *inter se* relationship among justices, including perhaps the growth of factionalism on the Court.<sup>67</sup> Second, many justices are deprived by this result of epistolary jurisdiction of the much needed exposure to SAL; in the process, the learning capacity of the Court as an institution is constricted. Third, the existing overload on Court No. 2 is accentuated, causing problems of priority in handling. If high priority is accorded to SAL at the cost of other matters, irate leaders of the Bar (as is happening) are bound to seek to discredit SAL.<sup>68</sup> If such priority is not accorded, SAL matters continue to drag on, like others. And this (as is already happening) begins to raise serious questions concerning the impact of judicial intervention for such causes.<sup>69</sup>

On the other hand, most SAL matters do require, in their early phases, careful judicial handling. SAL is distinctive in that it does not raise the problems of validity of a law on the ground that it violates fundamental rights. The heart of the SAL proceedings is rather that gross violation of fundamental rights has actually occurred in the exercise of state powers, either by commission (repression) or omission (lawless disregard of statutorily or constitutionally imposed duties). The facts relied upon initially by the SAL petitioner, in most cases, are as stated in the press. And the SAL petitioner is himself often not the victim of repression or lawlessness, but a public citizen.

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67. The erosion of the Court as an institution did not begin with the 1973 "supersession of judges," but it did accelerate thereafter. During the tenure of Chief Justices Ray and Beg the Court virtually ceased to be an institution and became instead an assembly of individual justices (see Baxi, *supra* note 42, at x-xi). The intense post-Emergency political criticism of Justices Chandrachud and Bhagwati created on the Court a perception that Justices who did not participate in the Emergency decisions had a 'clean' record as against the *emergencywalas*; and some justices began to act and react as such. This created considerable pressure on the '*emergency was*' (improperly so called) to recant and reform; and to demonstrate that they were as good, and even better, libertarians than their colleagues. The conscious policy by the Janata Government to elevate those High Court justices to the Supreme Court who had demonstrated 'political courage' during the Emergency reinforced the stereotypes. Now, people, including Justices, have begun talking about 'Janata Judges' as distinct from the *emergencywalas*. For a general account, see Baxi, *Politics*, *supra* note 4. The tensions were getting resolved to tolerable proportions by 1980. But the public disclosure in March 1980 of a letter written by Justice Bhagwati to Mrs. Indira Gandhi marked the beginnings of an overt conflict between Chief Justice Chandrachud and Justice P.N. Bhagwati. The letter, apart from its sycophantic overtones, contained references to the management of the judicial administration which were readily construed by all and sundry as pointed criticism of the Chief Justice. The Bar was quick to exploit this tension and make it grow. A full account of the processes outlined here must await later analysis. But it is necessary to note that to some extent the birth and growth of the social action litigation on the high bench has been somewhat affected by the malevolent forces seeking to antagonize two of India's most talented and gifted justices.

68. See *infra* section vii of this paper.

69. *Id.*



Invariably, therefore, the Court has to satisfy itself about the factual foundations of the proceedings; and this requires constancy of the Bench. Justice Bhagwati's initiative in retaining many SAL matters with him seems to proceed on the appreciation of this requirement. On the other hand, it imprints the SAL with the insignia of an individual justice, whereas what is needed in days to come is a collective imprimatur of the Court for the new litigation. The future of SAL depends, in great measure, on a satisfactory resolution of this dilemma.

Like the technique of epistolary jurisdiction for its initiation, SAL also requires "creeping" jurisdiction for its progress. Not a single leading SAL matter has yet resulted in a final verdict; the fundamental issue of how the Court should make the state and its agencies fully liable for deprivations or denials of fundamental rights still remains to be authoritatively answered. It is the task of the SAL entrepreneurs to ensure that these issues are ultimately reached with desired results. But, in the meantime, the Court rules through interim directions and orders. Bit by bit, it seeks improvement in the public administration making it more responsive than before to the constitutional ethic and law.

This kind of creeping jurisdiction typically consists in taking over the direction of administration in a particular arena from the executive. For example, the blinded undertrials receive medical examination at New Delhi and the expenses of their stay and those of their relatives are borne by the state under interim orders of the Court; conditions in Agra and Delhi Protective Homes for Women begin to steadily improve, again through a series of interim administrative orders. Fresh directions are issued by the Court to the state of Bihar, from time to time, to ensure that undertrials at least serve less time in pre-trial detention and not in any event more than the time which they would have served had they been tried and convicted. These and many other examples show that the Court is undertaking those very administrative decisions which the state should have taken in the first place.<sup>70</sup> In the meantime, the ultimate constitutional issues patiently await their turn.

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70. Of course, even these directions are also not readily obeyed. Often, they require reiteration by the Court and a veiled threat of contempt proceedings by the SAL petitioner. But contempt jurisdiction is, more or less, in disuse in the Supreme Court; also, as full scale strategy to implement judicial directions, it may, if resorted to, well prove diversionary and overstrain the already severely strained resources of the SAL petitioner. The Court also prefers in SAL matters to nudge the executive, gently now, sternly on other occasions, into postures of compliance. See, *Dr. Upendra Baxi v. State of Uttar Pradesh*, 3 S.C.A.L.E. 1136 (1981); *Khatri v. State of Bihar*, 3 S.C.A.L.E. 26 (1981).

Doing something about these questions is comparatively far more difficult than compelling the state to do this or that under the creeping jurisdiction. It is difficult because it involves viable momentous normative innovations in the lawyer's law.<sup>71</sup> Some of these have already been attained: for example, expansion of *locus standi*,<sup>72</sup> whittling down of the range of documents for which government may claim privilege,<sup>73</sup> devising of newer ways of fact finding in the SAL type proceeding<sup>74</sup> and devising of prospective inhibitions for potential recurrence of rights-violations in the same arena.<sup>75</sup> All this is noteworthy only so long as the underlying constitutional issues of citizen's rights against the state for violation of fundamental rights are faced and resolved.

These issues in the final analysis relate to exposing the State to liability for wide-ranging compensatory arrangements for violations of fundamental rights of the people. The Court has, already, rightly rejected the facetious argument of the Attorney General of India in the Bihar blindings case that when police torture prisoners they do so outside the authority of the law and, therefore, the state may not even at threshold be considered liable for the manifest unlawful actions of its agents.<sup>76</sup> Well begun is indeed half done.

And yet the challenge of devising appropriate compensatory arrangements for such violations is very daunting. How do we compensate young persons manacled for long years in pre-trial detention for their enforced loss of childhood and all deprivation of sociability? How do we compensate the blinded undertrials? Or the ones who have been inhumanly tortured? What does a court do, under fundamental rights jurisdiction, when it finds young persons thrown into jail for no other reason than to facilitate homosexual assaults by their warders? Or when it finds that inmates of protective homes for women are first allowed to go insane

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71. The types of innovations required in combating governmental lawlessness and repression require a high degree of collective and sustained judicial activism. The task confronts justices with monumental demands on judicial craftpersonship and creativity. It also makes similar demands on the SAL bar, both in terms of strategies of argumentation and of debt manipulation of indigenous and comparative law materials.

72. See *supra* note 62.

73. See the notable analysis of executive privilege in the opinions of Justice Bhagwati, Desai and Tulzapurkur in the *High Court Judges Case*, cited *supra* note 62.

74. See section vi of this paper, *infra*.

75. See note 70 *supra*.

76. *Khatri v. State of Uttar Pradesh*, 2 S.C.A.L.E. 536 (1981). Justice Bhagwati held that to accept this argument would be to "make a mockery of Article 21 and reduce it to nullity, a mere rope of sand. . . ."

and in the wake of the Court's inquisition are put out on roads?<sup>77</sup> Or where the woman who was bought and sold vanishes from Delhi even before the hearing of the writ petition has fully commenced? What relief may the Court provide in situations of extra-judicial executions? Creeping jurisdiction is an apposite strategy for gradualist institutional renovation; it furnishes no answers to the questions raised by the victims of repression and lawlessness, past, present or future. Inability to forge onerous patterns of liability for the state for gross violations of rights may well deprive the SAL of its future.

### VI. Evidentiary Problems in Sal

Accomplishing such a jurisprudential feat calls not just for the 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 state liability for constitutional violations can survive for long. "We accept the principle of compensation for rights-violation" the State will say then, but it will immediately add: "prove it!"

The problems of proof are the most severe in cases of State repression and there seems emergent a common pattern of argumentation by State counsel which make these problems more acute. First, State counsel deny on affidavit any or all allegations of torture or terror. Second, they contest if not the standing, the *bona fides* or the degree of reliable information of the social activists who come to the Court. Often wildest ulterior motives are attributed to them.<sup>78</sup> Third, they decry the sources on which the SAL petitioners rely: mostly media and social science investigative reportage. Fourth, they raise all kinds of claims under the law of evidence and procedure to prevent the disclosure of documents relevant to the determination of violation of fundamental rights. Fifth, even when disclosed, there is always the possibility of impugning their evidentiary value. This is made possible by the device of multiple investigations; the State sets up many panels, one after another, and often consents, in addition,

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77. *Baxi v. State of Uttar Pradesh*, *supra* note 70.

78. In *Baxi v. State of Uttar Pradesh*, *supra* note 70, despite strong strictures, the allegations have not ceased. They still continue to be made on affidavit drawn by state counsel. Professor Lotika Sarkar and I, as petitioners, were irritated and thought of doing something about this. But on mature reflection, we decided that it was not more than a cheap tactic by state counsel to worry us and divert our limited energies to a knowingly false statement on oath. We instead stated in our reply that in India the SAL petitioners are under a duty to face character-assassination in the public interest!

to the investigation by the Central Bureau of Investigation.<sup>79</sup> When despite all this, the State is likely to lose the proceedings in favour of the SAL petitioners, it proceeds to give concessions and undertakings, thereby avoiding a decision on the merits.<sup>80</sup>

And the Court, too, interested more in the inhibition of future illegalities is ready to develop a jurisprudence of the SAL *ex-concessionis*. The Court rightly refuses to view the SAL proceedings as adversarial in nature; it likes to foster such collaboration between the SAL litigant and the State as would result in sound institutional arrangements avoiding recurrent injustice; and thus avoiding a long term SAL-type confrontation between the public-spirited citizen and the State. This technique offers a neat way out of the burdens of proof on questions of fact; therein probably lies its appeal to the judges.

At the same time, the Court is experimenting with several different strategies to overcome the problem of disputed facts, without having to take evidence itself. First, Justice Bhagwati has initiated the idea of socio-legal commissions of enquiry. The Court asks social activists, teachers and researchers to visit particular locations for fact finding and to submit a quick, but complete, report, which may also contain suggestions and proposals. So far the device of commissions has been invoked at least thrice.<sup>81</sup> The commissions are, under the Court's orders, to be financed

79. In *Association of Social Action and Legal Thought (ASSALT) v. State of Madhya Pradesh* the counter affidavit of the State showed that there were three enquiries containing the allegation by undertrials that they were rendered impotent by continuous application of electric shocks on penis. These were young persons, some of them just married, arrested under anti-dacoity operations. We had affidavits made by some of them in our hands. When we asked for disclosure of these documents, and the state furnished a massive 300 page affidavit, the sheer bulk of it moved the presiding judge to ask us to apologize to the police for proceeding on a report in the national weekly! The analysis submitted by us on these reports shows that there was no real enquiry even once in the matter! We now await the Court's verdict on this. In *Khatri, supra* note 76, just after the Court ordered the disclosure of various enquiries made by the state into the blindings episode, the State announced that it has now given consent for a Central Bureau of Investigation enquiry!

80. For example, in *Baxi v. State of Uttar Pradesh, supra* note 70, after a year's protracted litigation, the State has itself shown willingness to amend its rules and prescribe new schemes for rehabilitation, thus, in effect, avoiding a decision on merits of the writ petition. In the Bhagalpur blindings case, too, a similar strategy has been followed.

81. In *Hira Lalv. Zilla Parishad (W.P. 1869/80-81)* the Court asked Kishen Mahajan and myself to conduct a socio-legal investigation on a complaint by chamars that their fundamental right to trade profession and business was being unreasonably taken away from them (through the system of auctioning to the highest bidder the right in caracass utilization). We submitted a report, based on seven days' intensive fieldwork in some sampled villages in Sarsaul block in Kanpur District. We also devised alternate schemes of caracas utilization, after exhaustive discussions with many concerned scientists and developmental administrators. See Upendra Baxi and Kishen Mahajan "The Chamars and the Supreme Court" (1981: mimeo). This first experiment seems to have encouraged Courts and

by the State. Second, the Court has in a number of cases of torture or ill-treatment called upon medical specialists to submit<sup>82</sup> comprehensive reports appropriately at State cost. Third, the Court has used on one or two occasions the services of its own officials<sup>83</sup> or those of the High Court.<sup>84</sup> In some cases, it has asked the district judge not merely to ascertain facts<sup>85</sup> but also to monitor the implementation of the various directions given by the Court.<sup>86</sup>

These modes of fact finding are somewhat novel and will raise, as the many SAL matters proceed to completion, rather difficult issues of evidence and procedure. But the Court is experimenting with new methods to go beyond the notoriously eclectic affidavit evidence.

### VII. Sal as an Aspect of Judicial Statepersonship

The growth of SAL in the Supreme Court bears out amply what I felt concerning the newly emerging role of the Supreme Court in the dying hours of 1979. I said then:

“The politics of the Court - be it the “purest politics” of constitutional adjudication or the hurly burly politics of power-sharing at times, power-grabbing at others, represents the best hope for the millions of Indians for a new constitutional dawn.”<sup>87</sup>

All in all, SAL symbolizes the politics of liberation: the ruled and

SAL parties, as well as the state, to further efforts of a similar nature. There is a commission looking into the conditions of migrant bonded labourers in Faridabad brick-klin industries; and a team of officials appointed by the Court to investigate the alleged violations of labour welfare laws for migrant and contract labour, in the construction of the Asia stadia and related facilities like the multitude of flyovers now “beautifying” New Delhi.

82. In *Baxiv. U.P.*, *supra* note 70, the Court appointed a panel of physicians and psychiatrists for the inmates of the Homes. In *Khatriv* extensive investigations were ordered to ascertain the precise agent and scope of blindings by the top ranking eye specialists in India.

83. In *Khatriv. Bihar* two batches of separate petitions reached two different benches. The first presided over by the Chief Justice asked the Registrar of the Supreme Court to conduct the investigations in Jhagalpur jail; in the second, Justice Bhagwati expanded the registrar's mandate somewhat further, while stating that a socio-legal commission would have been a more preferable device.

84. E.G. Justice O. Chinnappa Reddy directed in *Olga Tellis v. State of Maharashtra* the Bombay High Court to appoint an official to hear and investigate the findings of the Municipal Commissioner that pavement dwellers were constituting an obstruction to traffic on the road. No demolition order can be made without this procedure being fulfilled.

85. Kanpur undertrial ‘rape’ cases, *supra* note 54. The Court here asked the District Judge (also an ex-officio Chairperson of the legal aid board) to investigate and report.

86. The District Judge, Agra, has been performing this role for about a year in *Baxi v. Uttar Pradesh*, *supra* note 70. Further proceedings embodying the Court's appreciation of the several reports made by him are yet to be reported.

87. *Baxi, Politics, supra* note 4, at 248-A.

misruled have added to the might of the adult franchise the quiet dignity of constitutionalism in their struggle against the myriad excesses of power. And the Supreme Court is thereby slowly marshalling a new kind of social legitimation, which neither the legislature, nor the executive nor political parties can contest without appearing to justify injustice and tyranny.

By the same token, the new litigation does not disturb the pattern of institutional comity between the Supreme Court and the supreme executive. Rather, it appears to lend a new kind of intensity to the model of judicial statepersonship which has since Independence steadily enhanced political accommodation and constitutional compromise in certain vital arenas. Even as the new litigation raises great expectations about the Court's role and power, the constitutional compromises in the 1980-82 period create new sources of anxiety.

The Supreme Court has (during 1981) sustained the powers of the President (i.e. the Prime Minister) to issue ordinances even on the eve of Parliament sessions.<sup>88</sup> They have ruled that the satisfaction of the President as regards declaration of continuance of emergencies cannot be judicially reviewed.<sup>89</sup> The Court has upheld the National Security Act, a laterday MISA, in spite of the fact that it violates the 1979 amendments to Article 22, which have not yet been brought into force; what is more, it has also ruled that no mandamus lies to the President to bring into force such an amendment.<sup>90</sup> The Court has also repelled the challenge to the Bearer Bonds Act which massively legalized black money, crucial among other things, to the survival of all political parties in India.<sup>91</sup>

But these constitutional compromises have occurred within the framework of retention of legislative, constituent and judicial powers by the Court. Chief Justice Chandrachud and his brethren have now unalterably laid down that judicial review is an aspect of the doctrine of the basic structure and invalidated an emergency amendment designed to oust judicial review of constitutional amendments.<sup>92</sup> And the Court has gone so far as to say that each and every amendment to the Constitution since its inception has to run the gauntlet of the basic structure.<sup>93</sup>

Simultaneously, the Supreme Court has cold stored two basic challenges to its supremacy. A year has gone by, without any action at all,

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88. See *A.K. Roy v. Union*, *supra* note 61.

89. *Minerva Mills v. Union of India*, A.I.R. S.C. 1789 (1980). *Waman Rho v. Union of India* 3 S.C.C. 587 (1980).

90. See *supra* note 61.

91. *R.K. Garg v. Union of India*, *supra* note 61.

92. See *supra* note 89.

93. *Id.*

on the Presidential Reference on the extent of judicial power.<sup>94</sup> And the review petition moved by the Indira Gandhi government in 1980 calling for reconsideration of the basic structure doctrine has also become a magnificent bit of judicial arrears.<sup>95</sup>

The executive is left with its well-worn conventional weapons system: the power to appoint judges of the Supreme Court and the High Court, and the power to transfer them from one High Court to another.<sup>96</sup> The Supreme Court did not substantially modify these powers in its controversial decision in the *High Court Judges* case.<sup>97</sup> The impact of this decision on the future of the Indian judiciary appears dismal when one speculates on the sources of judicial recruitment.<sup>98</sup> Members of the Bar say that they now see even less reason to be persuaded to accept judgeships, so that in the future, senior district judges will become High Court and even Supreme Court justices.<sup>99</sup> But regardless of this decision, very few members of the Bar were willing to accept a Supreme Court judgeship and, increasingly, ex-district judges comprise the High Courts. Nothing save persistent preference for obscene levels of conspicuous consumption, in the last analysis, disables senior lawyers from accepting judgeships; and the prospect of maintenance of these levels, and even its augmentation, will result in high clustering of mediocrity on the Bench.

The *Judges* case furnished considerable political excitement and was designed, in the last analysis, to deprive Indira Gandhi of some of the fruits of her 1980 victory at the hustings. Judges had their own reasons for refusing to play ball: they were worried about the growth of dynastic and incestuous relations between some members of the Bar and the Bench. The Supreme Court was naturally concerned to project an image of incorruptibility of the Indian appellate judiciary. An adverse image in the minds of people would have identified appellate courts as no better than

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94. Arising out of a remarkable assertion of judicial power in the Insurance Corporation bonus case.

95. No one seems seriously interested in pressing it just yet. Also, a proper consideration would require a full court; and the Court is always working with many vacancies. Technically, there is no reason why thirteen justices cannot sit and review a decision given by a similar bench. But then this is not at all a 'technical' matter.

96. These powers it had always had. And short of elective judiciary, there is really no alternative to executive preeminence in judicial appointments in a society like India.

97. The scope of modification consists in the assertion that the opinion of the Chief Justice of India has no 'primacy' over the Chief Justice of High Courts, or Governors, when their opinions differ on a particular proposal.

98. See U. Baxi, Appointment of the Chief Justice and Justices of the Supreme Court of India! How long shall we Evade Real Questions? (1981: mimeo).

99. *Id.*

other dominant institutions of the State. By upholding the power of transfer of the High Court justices, with maximum consultative safeguards, the Court has made difficult, if not impossible, hostile political propaganda. This is a probable gain, though I persevere with the view that the power of transfer should never have been thus conceded.<sup>100</sup>

Perhaps, only Supreme Court justices know the dynamics of the will to judicial power. They perhaps think it inconceivable that any amount of Court-packing will produce a situation overruling *Kesavnanda* because no future group of judges would like to abandon their constituent power.

In this context, the steady growth of the SAL appears to me as a master strategy. Give the executive not even a pretense of complaint on the distribution of political power in the constitutional scheme; treat the power of amendment of the Constitution as coordinate power. Having accomplished this much, go Concorde-speed in undoing injustices and unmasking tyrannies. The powers of the President are intact, but surely the Police Commissioner must be held fully accountable under the Constitution. The executive may refuse to bring into force laws duly enacted by Parliament; but the district bureaucrat must be brought to book for commission and omission. Leave to politicians their opium-dreams of omnipotence of their power and influence, but bit by bit prevent them from single-minded excesses of power. The respondents in the SAL matters are always political small fries; so the big ones may not complain. But the results of the SAL irritate the Big Men. No matter how irate (as was Jagannath Mishra, the Chief Minister of Bihar, on the Supreme Court's swift probe in the Bihar blindings), they cannot so easily manipulate public opinion in their favour as can the Court. And the print media opinionators just love the Court (barring the trauma of the *Judges* case) because the Court is now newsworthy, to say the very least. As regards repression and lawlessness, the Supreme Court since 1980 has become the third chamber of Parliament and is close to acquiring, more effectively, the attributes of the House of the People. The SAL fits in beautifully with the well-conducted orchestration of concord and discord with the Executive.

And the Court has now SAGS with it, and also ORPs (organizations of the rural poor) and PORPS (Participatory organizations of the rural poor).<sup>101</sup> The SAL gives to the Court the socio-political space it needs,

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100. See Baxi, *Politics*, *supra* note 4, at 198-209.

101. See U. Baxi, "Legal Mobilization of the Rural Poor" paper presented March 1982 to ESCAP Seminar on Law & Participation (*mimeo*) for details elaboration of this typology.



on the eve of the closure of the post-Emergency era. And it adds to the space already available to the SAGS, ORPs and PORPs.

The SLS movement may be viewed as relatively minor exercises in class-transcendence, subject to all the frailties of such struggles. Backslidings are bound to occur. But it is doubtful that the evolution of the Court as a people-oriented institution can be arrested substantially. Of course, nothing is irreversible, at least in legal history. But it would require considerable mobilization of regressive forces to return the Court to its club-house cloisterings.

In fact, the SAL movement is well under way to institutionalization. Hopeful signs for the growth of SAL-type professional competence abound.<sup>102</sup> The national legal aid movement is rapidly acquiring SAL orientation. And more and more High Court justices are becoming SAL-prone.<sup>103</sup>

The surest sign of a modicum of success of the SAL movement is provided by the changing attitude of the Supreme Court Bar towards it. In 1979, when the Court expressed a hope that the Bar Association intervene in the Bihar undertrial cases, there was just no stirring of response. When two law professors filed the Agra Women's Home petition, there was a certain amount of amused interest on the part of the senior leaders of the Bar. When the SAL dockets explosion began, there was anguished protest. A leading State counsel expressed his exasperation in the open Court at the day-long proceedings of SAL based on the media investigative reportage; his trenchantly expressed protest was met by Justice Bhagwati with a sharp admonition: "Hold your tongue." In the course of the Agra proceedings, senior lawyers were openly heard to say that if the Supreme Court thus wants to do social justice, it had better meet on the weekends.<sup>104</sup>

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102. The National Committee on the Implementation of Legal Aid Schemes is shortly establishing an autonomous public interest litigation cell. Several groups of lawyers, mostly young, have started small centres of PIL in some High Courts. The Consumer Education and Research Centre, Ahmedabad, is now moving into concerns wider than consumerism and is heavily using court process in all its campaigns. Equally active are organisations like the Free Legal Aid Scheme, Rajpipla; Legal Support for the Poor Programmes organized all over India, by Harivallabh Parekh; the Free Legal Aid Clinic at Jamshedpur; the Public Interest Litigation Services, Cochin.

103. Of course, the activism in SAL historically arose first in some High Courts, although the caste-view of judiciary in India has so far forbidden explicit recognition of this fact. The Gujarat High Court, notably through Justice (now Chief Justice) M.P. Thakkar, has been a pioneer in this direction.

104. This kind of attitude arose as Senior lawyers found that the docket of Court No. 2 had decreasing scope for priority to their matters.

The Bar's reaction has moved from indifference to indignation at what it regards as freak litigation. At the present moment, two utterly different types of responses seem to be emerging. One is a frankly antagonistic and hostile response. A Senior Advocate, as a member of Rajya Sabha, moved two motions pertaining to the "public interest" litigation in the Supreme Court. The first at the end of 1981 urged the Government to prescribe certain guidelines for this kind of litigation; this suggestion was promptly discounted by the then Law Minister, Shiv Shankar. In late April, 1982, the same member made highly derogatory references to SAL. He saw in it nothing less than a foreign conspiracy to destabilize the Indian government through the activation of the Supreme Court.<sup>105</sup>

On the other hand, some senior lawyers have now begun to say that they have always been pursuing SAL. They cite a number of examples where public interest was involved: the National Security Ordinance and Act, the Bearer Bonds Act, and other such matters.<sup>106</sup> Even Mr. H.M. Seervai could not resist the temptation despite his contemptuous attitudes towards Justices Krishna Iyer<sup>107</sup> and Bhagwati<sup>108</sup> to assert that the Bombay Bar's initiative in challenging non-appointment of additional High Court justices and their transfers was a shining example of the Bar's deep commitment to the new litigation.

Undoubtedly, an empirical study of the changeful and conflicting attitudes of the Bar to the new litigation is necessary. But available materials suggest a degree of agonizing within the Bar and a slow emergence of a new concern. The SAL movement does pose alternate modes of lawyering for the Indian people.

105. The matter was thus raised by Shri Murli Bhandari, a Senior Advocate and some time an office bearer of the Supreme Court Bar Association.

106. They also point out that they have undertaken such litigation at their own initiative and cost (of professional time).

107. See SEERVAI, *CONSTITUTIONAL LAW OF INDIA 2026-29* (2d ed. 1979); See U. Baxi, *On How Not to Judge the Judges*, (a paper presented to a Seminar on *Judicial Process and Social Change*) (Andhra University, Waltair and the Indian Law Institute, Delhi, 1980: mimeo).

108. Mr. Seervai's public denouncements after Mr. Justice P.N. Bhagwati's opinion in the Judges case reveal his deep seated hostility to Justice Bhagwati. He asserts now that one could not have expected any *other* pronouncement from the Justice, since he was the author of the letter to Mrs. Indira Gandhi. Mr. Seervai overlooks the fact that Justice Bhagwati has refused consistently with his earlier opinion, to allow the transfer of High Court Justices. Mr. Seervai does not also realize that the best course for him would have been to file a protest at the nomination of Justice Bhagwati as a presiding Judge, had Mr. Seervai *honestly* held doubts concerning the judge's integrity. To attack a judge, after arguing a case for over two months, because he failed to hold in favour of counsel, favours of nothing short of blackmail.

The response of the administration to SAL has also been mixed. The top bureaucrats seem to resent the mini-takeover of administration through creeping jurisdiction. Their resentment is shown in indifferent compliance with the Court's interim directions in many proceedings. But in some cases over a period of time, the tenacity of SAL petitioners and of the Bench has overborne their resistance.<sup>109</sup>

### VIII. Conclusion

This impressionistic account of the SAL movement in the last two years does indicate that small, *ad hoc* beginnings have been made. These have received such nationwide attention as to generate emulation as well as hostility. Many avoidable deficiencies characterize the SAL work.<sup>110</sup> There is considerable introspection among the social activists on the role and limits of the Court's intervention. We still lack an assessment of what is really happening although it is perhaps too early to think of exploring the impact of the SAL. And there persists the need for developing critical thought on the mainsprings and meanderings of SAL.

Projections of the future of the SAL can, at the present moment, be only subjective.<sup>111</sup> But to me the future of SAL looks bright. The future of law in India is partly, but vitally, linked to the future of social action litigation because, through it great and unending injustices and tyranny begin to hurt the national conscience and prod at least one major institution of governance to take people's miseries seriously.

For these who take people's sufferings seriously, there is no rejoicing; even revolutions provide transient occasions of celebration. The SAL is at best an "establishment revolution;"<sup>112</sup> still, it nourishes hope in an otherwise darkening landscape of Indian law and jurisprudence.

109. See *supra* notes 70 and 80.

110. Those include multiple petitions in relation to the same subject matter by different persons, inadequate prior research, variable levels of commitment and competence and, inability to deal with hardened lawyers, mostly state counsel.

111. The National Legal Aid Committee had the services of Dr. Rajeev Dhavan for a report on 'public interest law' in India. Despite my close association with the SAL movement, and despite every research effort, this report (like all government reports) is not available to ordinary mortals. One also fears about its availability upon publication, since most government reports are unpriced and therefore not on sale. See Baxi, *Crisis supra* note 6, at 41-57 on the 'colonial' profile of administration through secrecy.

112. I borrow here my friend Rajeev Dhavan's favourite phrase.