CHAPTER - IV

PUBLIC INTEREST LITIGATION IN INDIA

BREAK UP OF THE CHAPTER:

A. INTRODUCTION

B. PUBLIC INTEREST LITIGATION IN INDIA -
   THE EMERGING TRENDS

C. FACTORS RESPONSIBLE FOR THE EMERGENCE OF PUBLIC
   INTEREST LITIGATION IN INDIA:

   i. ROLE OF THE PRESS

   ii. ROLE OF THE STATE

   iii. ROLE OF THE PUBLIC

   iv. ROLE OF SOCIAL OR DEMOCRATIC ORGANIZATIONS

   v. ROLE OF LAWYER'S

   vi. ROLE OF THE JUDICIARY

C. NATURE OF PUBLIC INTEREST LITIGATION IN INDIA:

   i. COLLABORATIVE LITIGATION

   ii. INVESTIGATIVE LITIGATION
D. FEATURES OF PUBLIC INTEREST LITIGATION IN INDIA: 243

i. THE NEW ROLE OF JUDGE IN PUBLIC INTEREST LITIGATION 245

ii. THE PARTIES' RIGHT TO BE HEARD - FROM INDIVIDUALISTIC TO SOCIALISTIC DUE PROCESS 252

E. LIMITATIONS OF PUBLIC INTEREST LITIGATION IN INDIA 255

F. PUBLIC INTEREST LITIGATION - THE DIVERGENCE FROM TRADITIONAL MODEL: 264

i. POSITION IN UNITED STATES 264

ii. POSITION IN INDIA: 267

a. GIVING 'RELIEF' WITHOUT DECLARING 'RIGHTS' 268

b. DECLARING 'RIGHTS' WITHOUT GRANTING 'RELIEF' 276

H. 'CRITICISMS' AGAINST PUBLIC INTEREST LITIGATION AND 'ANSWERS' TO THOSE CRITICISMS 283

I. CONCLUDING OBSERVATIONS 286

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CHAPTER - IV

PUBLIC INTEREST LITIGATION IN INDIA

A. INTRODUCTION

In this chapter of the study, the present researcher firstly, proposes to elucidate the position of Public Interest Litigation in India - the emerging trends. Secondly, the question arises - what are the factors responsible for the emergence of Public Interest in India? Thirdly, what is the nature of Public Interest Litigation? Fourthly, What are the features of Public Interest Litigation? - this part, the present researcher will break into two heads: A. The New Role of the Judge in Public Interest Litigation; Is 'res judicata' applicable to Public Interest Litigation?; B. The Parties' Right to be heard - From Individualistic to Socialistic Due Process. Fifthly, what are the limitations on Public Interest Litigation? Sixthly, the present researcher will examine how Public Interest Litigation is a divergence from the traditional model. Herein this part, there will be comparative analysis of position in United States and India. Since there are some strong criticisms made against this movement, so what are those criticisms and what are the answers to those criticisms. This will be then followed by concluding observations.
B. POSITION IN INDIA - THE EMERGING TRENDS

In India, due to rapid rise in technology, and the past colonial experience, there is pluaristic network of indigenous traditional relationship and attitudes which co-exist with yet another system of 'modern' commercially oriented relationships. The question is how to deal with this pluralism? India is trying to solve this problem of social pluarism and to integrate the traditional and modern, since independence. There has been various attempts to this end, in the area of law in general, and procedure in particular. The emergence of Public Interest Litigation in India is such a dynamic attempt to grapple with this problem.

Since, large number of men, women and children, constituting bulk of Indian population are living in sub-human conditions owing to poverty. Utter grinding poverty has broken their back, and sapped their moral fibre. They are the innocent, ignorant victims of oppression, repression, exploitation, lawlessness, injustices due to in-action and non-action on the part of the officials concerned, and those who can buy justice with money power to silence their protests. To them, in such circumstances, fundamental issue is of 'survival' and 'security' - the two essentials for their very existence. This fundamental issue is reflected in the development of Public Interest Law in India.
Public Interest Law is primarily aiming at the catalysing the growth of Public Interest Litigation as an effective strategy to render remedial justice through judicial process to socially, economically and politically disadvantaged section of Indian society. In such circumstances, it is not only unthinkable but also unreasonable to think of citizen's participation in the governmental decision-making process, as is there in the United States. However, one Hon'ble Judge of the High Court of Gujarat, Ahmedabad, has given his view to the present researcher during the interview session that citizen participation in decision making process of all the social and political institutions should be there in India also.

Earlier, persons with legitimate claims were excluded from seeking redressal of their grievances in the courts due to many reasons. Firstly, there was lack of awareness of their rights and entitlements. Secondly, there was general lack of trust in law due to dramatic increase in lawless violence. There was absence of trust, particularly in lawyer, due to their common 'parasite's' impression. Thirdly, there was fear of repression and oppression meted out by the police and establishment. Fourthly, there was insufficient financial resources to afford legal expenditure. Fifthly, if the issues were politically controversial or unpopular, there were few, if any, lawyers

1. Anonymity of the Judge to be maintained due to official position held be him.
willing to handle the case. And lastly, due to lack of 'standing to sue' or 'exhaustion of alternate remedies' they could not have access to the courts. The proper forum for the issues involved was inaccessible for one reason or the other.

C. FACTORS RESPONSIBLE FOR THE EMERGENCE OF PUBLIC INTEREST LITIGATION IN INDIA

The organic growth of Public Interest Litigation, however, has been provided by the collective efforts of various institutions including People, Press, Professors, Lawyers, Judiciary, and the State. Besides, there are multiple factors existing at each level that have catalysed the growth of Public Interest Litigation in India.

1. ROLE OF THE PRESS

In India, press has played and is still playing a very significant role in giving voice to the victims of injustices to the level of memorial visibility. It has perforated the myth of modern society. The emerging 'investigative journalism' technique has exposed the inequity, oppression, ruthless dehumanization and more subtle violations of human rights of poor and unorganized class in Indian society which were previously hidden under the formal civil, social and political freedoms. The government is either lax or fails to implement the social welfare
legislations. There is oppression, repression and exploitation of unorganized weaker sections of Indian society due to profusion and complexity in laws that in turn gives in wide possibilities for manipulations.

**ii. ROLE OF THE STATE**

Even though, legal institutions in India have endured and flourished, still they are beset by a growing sense of despair. They do arouse high expectations, but are, usually, seen as failing in fulfilling these expectations. Their promises are mere illusions. Lawlessness is on rapid increase. Government officials, being susceptible to pressures, are unable to control it.

The factors responsible for this state of affairs are: general mal-administration in the country; failure of political process to bring social changes in the country to solve people's problems; denial or paucity of alternative 'public forums' to discuss and negotiate the issues affecting the large number of people.

**iii. ROLE OF THE PUBLIC**

Nowadays, citizens are motivated to act collectively to enforce meta-individual interests. The idea behind this collective action is the fact that when one person's rights are
violated, it indirectly affects every one's freedom. Also, the plight of the poor, unorganized, weaker sections of the society, when exposed by the Press, activated certain 'public spirited' individuals to seek judicial redress on their behalf. And especially when judiciary also showed sympathetic and receptive attitude towards their cause, this activity by 'one individual for many in a class' gained further momentum.

The factors responsible for initiation and acceleration of Public Interest litigation at public lever are many. Firstly, there is increasing awareness in the people due to wide-spread information available about the happenings around the world through the modern means of communication. The plight of socially and economically disadvantaged people is exposed by the Press immediately. There is also world-wide human rights movement. Secondly, after the emergency, there is increasing democratic consciousness due to attack on basic rights during the emergency period which lasted for eighteen months. Thirdly, people now have unsatiable desire of 'justice' cutting across the barriers of technical procedural niceties. Fourthly, there is a new middle-class political elite outside party politics.

iv. ROLE OF SOCIAL AND DEMOCRATIC ORGANIZATIONS

Social or democratic organizations have, oflate, gained a growing acceptance by the people and the judiciary as legitimate representatives of the 'interests' of the people. They are
necessary to strengthen the democratic rights of the people. There is mass movements, in various form, succeeding in getting redressal of public grievances at judicial, political, and social legal. For instance, there is Trade Union movement, Dalit movement, Agrarian Reform movement, Civil Liberties movement etc. Since most of these organizations are with lawyers as its members which convinced the people about its legitimacy and strength, thus inspiring people to resort to judicial redress through these organizations straight-away instead of relying on other forms of protest.

v. ROLE OF THE LAWYERS

Even though, the proportion of lawyers involved in Public Interest Litigation is never large, yet their impact on the profession and the society indeed profound. The lawyer's skills are central to a creative use of legislative, administrative, and judicial processes as tools of institutional reform. The new sense of professional responsibility towards society in general and the weaker sections in particular, and interest generated by the Legal Aid Programs - which adopted Public Interest Litigation as a strategy to reach justice to many at one go - are the factors that activated the Lawyers in India to take up Public Interest Litigation cases.
vi. ROLE OF THE JUDICIARY

In a democracy, rule of law assured judicial protection to the citizen. In any democratic system, the citizens have 'access to justice' for the vindication of legal rights - both individual and meta-individual. There has been partial growth of 'judicial power' with the growth of socio-economic interdependence of groups and classes of citizens in modern government. The political changes, amendments, socialist ideals, impact of Directive Principles, and humanitarian values, all together, inspired the judiciary to bring social changes by redressing socio-economic grievances. On judge's part, it is the ultra-costly litigative process which is beyond the reach of the poor that inspired the judges to resort to less formal process. There is emergence of poverty-oriented jurisprudence in India which contributed toward the judicial receptivity to the Public Interest Litigation. The most significant is the liberalization.

2. Chapter VII deals with this aspect. Questions like what was the position of poor prior to the advent of Public Interest Litigation in India?; What is the position of poor in contemporary judicial system? What is poverty syndrome?; How Public Interest Litigation has helped the poor to realise his rights in the court of law?. All these queries will be answered in Chapter VII of the present study.
of doctrine of *locus standi*. Besides, there was also the heart-felt need to re-establish the credibility of Supreme Court which was lost during Emergency Era. And this was achieved by resorting to 'judicial activism' on the part of the judiciary.

It was only in last few years that first perceptible sign of emergence of trend of Public Interest Litigation was discernible in petitions before the Indian Supreme Court and various High Courts covering many issues, such as that of under-trials in jails, the torture of prisoners in jails, the blindings of under-trials in jails, the plight of rickshaw-pullers, pavement-dweller's right to live on pavements, right to human

3. Chapter I of the present study has already dealt with the liberalization of doctrine of 'locus standi'- both in United States and India.


dignity of inmates of Agra Home, trafficking in women, plight of ASIAD labour, issues of bonded labour, and so on. A perusal of these cases goes to show that judiciary was forced to act in these areas because of utter carelessness of the part of governmental machinery which showed a blind eye to these problems of the helpless masses in India. Ex Justice B.J. Diwan says that it is the gross violation of basic human rights which compelled the judiciary to discard its conservative cloak and come to the rescue of the suffering masses.

It was through lawyers, journalists, legal academicians, legal aid projects, fellow prisoners, social organizations, and the 'public spirited' individuals, that these Public Interest Litigation cases were taken up. And the court's jurisdiction was invoked by them, either by writing letters, sending post-cards, telegrams, filing writ-petitions or the court *suo motu*, relying on newspaper articles or letters.

D. NATURE OF PUBLIC INTEREST LITIGATION IN INDIA

The nature, the style, the process of generation, and the substance of Public Interest Litigation confirms to the social, political, legal and economic development of particular legal system. Inspite of geographical differences, it is still possible to lay down certain general characteristics of Public Interest Litigation which is a dominant feature of most of the legal systems in the world today.

The dominant characteristics of Public Interest Litigation are: Firstly, Public Interest Litigation does not arise out of disputes between private parties about private rights. But object of Public Interest Litigation is the enforcement of constitutional or statutory policies. Secondly, in Public Interest Litigation, the party structure is not rigidly bilateral but is amorphous. The plaintiff for 'public interest' acts as a spokesman for the public at the large or a segment of the public. Thirdly, the scope of the lawsuit is shaped primarily by the court and the parties. Fourthly, Public Interest Litigation generally seeks to enjoin future or threaten action, or to modify a course of conduct presently existing or a condition presently continuing. Fifthly, in Public Interest Litigation, the fact of inquiry is not historical and adjudicative but it is predictive, prospective and legislative. Sixthly, in Public Interest Litigation, the judge is not passive but he is a dominating figure in organizing and guiding the case. The most significant
aspect is that, of late, judge has increasingly become the creator and manager of complex forms of 'ongoing' relief, which have widespread effects on persons who are not even before the court, and requires the Judge's continuing involvement in administration and implementation. Seventhly, the thrust behind the growth of 'public interest actions' is provided by an unprecedented liberalisation of the requirement of locus standi. And lastly, Public Interest Litigation engages in research, negotiation in a variety of settings, citizen's education, media relations and so on.

The policy underlying Public Interest Litigation is to give otherwise unrepresented, unorganised and unprotected interests an access to justice. It favours effective citizen's participation in guarding the public against illegal or non-existence of governmental power.

According to Justice V.S. Deshpande, Public Interest Litigation is a strategy to bring about a silent and peaceful revolution in enlarging the socio-economic equality without harming the principle of meritocracy. It's a new trend in constitutional litigation to uphold such egalitarian economic rights of the people even though they may not be either enumerated in the Constitution or may not have been made enforceable in the Constitution.

Prof. Upendra Baxi view Public Interest Litigation as the outcome of 'judicial populism'. He has named it 'Social Action Litigation' instead of Public Interest Litigation because in India it is primarily concerned with combating state repression and the governmental lawlessness. Whereas in United States Public Interest Litigation secures civic participation in governmental decision-making process for which there is no counterpart in India.

Ex C.J. P.N.Bhagwati, of Indian Supreme Court, views Public Interest Litigation as a strategic arm of legal aid movement for it intends to bring justice within the reach of the poor who constitute the low visibility area of humanity.

In view of Justice Krishna Iyer, Public Interest Litigation is a part of the process of 'participative' justice. He observed:

"Our current processual jurisprudence is not of individualistic Anglo-saxon mould. It is broad


based and people-oriented, and envisions access to justice through 'Class actions', 'Public Interest Litigation', and 'Representative proceedings'. Indeed, little Indians in large numbers seeking remedies in courts through collective proceeding, instead of being driven to an expensive plurality of litigants, is an affirmation of participative justice in our democracy."

Whereas, R. Venkataramani has taken an all together different stand. He argues that Public Interest Litigation has two facets. On the one hand, Public Interest Litigation is an elitist attempt to tell the deprived that they are their saviours, that it is they who are throwing open the 'institutions of justice' for their consumption. On the other hand, it is the emergence of a trend and an awakening, but capsuled and constrained by many social factors.

Ex Justice B.J. Diwan says Public Interest Litigation is meant and must be directed towards redressal of grievances of a comparatively large body of people who cannot approach the courts on their own for: a. because of indifference; b. because of

18. Supra note 17.

ignorance of their rights; and secondly, because of lack of knowledge about the availability of redressal machinery. And the greatest enemy against which Public Interest Litigation is to fight is 'bureaucratic functioning' and 'bureaucratic procedures' in India, which sometimes leads to absurd results in the new context. He added further that whole Public Interest Litigation in America started as a protest against bureaucratic functioning.

He says, Governmental agencies for helping the disadvantaged sections of our society may or may not be functioning according to the spirit and the letter of law, and Public Interest Litigation will be the only remedy and the check on these agencies, and to see to it that those who are in real need of the help of these agencies, they get it.

One Hon'ble Judge of Ahmedabad High Court says that it is the 'poverty and the ignorance of law' that lead the judiciary to activate itself to help the downtrodden through the strategy of Public Interest Litigation to realise their basic rights.

Dr. S.C. Jain says that it is possibly due to two factors,

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20. Ex Justice B.J. Diwan, in his interview given to the present researcher on February 14, 1991.
21. During the interview given to the present researcher.
22. Joint Secretary and Legal Adviser to the Government of India, Shashtri Bhawan, Delhi, in his answer to the 'Questionnaire' sent to him by the present researcher.
namely, i. interests of large number of persons involved, and, ii. delay in the Courts in the case of individual petitions which is responsible for the emergence of Public Interest Litigation in India.

Dr. P.C. Juneja says that the main factors responsible for the emergence of Public Interest Litigation in India are 'poverty and ignorance of law on the part of unorganised poor masses, the consciousness and alertness of social workers, social service minded advocates and journalists, and conscientious and ready to help judges. The progressive judges sitting on the bench of the Supreme Court ignored the strictness of procedural technicalities and allowed the 'third party' interventions on behalf of the poor and ignorant, and thus extending the scope of 'locus standi'. Therefore the real mother and also the nurse of Public Interest Litigation in India is 'higher judiciary'.

The theory of Public Interest Litigation has created deep social, political, economic and jural impact on the Indian society, and it is the duty of the legal profession to analyse it critically as to how far the theory would be helpful in strengthening and re-enforcing the rights of the members of the poorer sections of the community as against the state, and furthering the objectives of the Constitution to build an 

\[\text{23} \, \text{Reader, Faculty of Law, Maharshi Dayanand University, Rohtak, in his answer to the 'questionnaire' sent to him by the present researcher.}\]
egalitarian social order where there will be justice: social, economic, and political for all alike, whether rich or poor.

There are two aspects of Public Interest Litigation which constantly come in conflict with each other, viz., the desirability of encouraging individual citizens to participate actively in the enforcement of law, and the undesirability of encouraging the professional litigant and the meddlesome interloper to invoke the jurisdiction of the courts in matters that do not concern him. All developed legal systems have to face this problem of adjusting these two opposing claims. Public Interest Litigation is a struggle between solitary individualism and laissez faire, on the one hand, and social conception of the law, the economy, and the state's role, on the other. Public Interest Litigation represents a marked deviation from the principles longstanding in the law of procedure of most nations, within and without the Common Law countries. The struggle between the maintenance of these traditional rules, concepts and principles, and the growth of Public Interest Litigation reflects the most heated debate of our century.

Traditionally, lawsuit is understood as a vehicle for resolving disputes between private parties about private rights. Abram Chayes opines that:

"The traditional conception of adjudication reflected

the late nineteenth century vision of society, which assumed that the major social and economic arrangements would result from the activities of autonomous individuals. In such a setting, the Court could be seen as an adjunct to private ordering whose primary function was the resolution of disputes about the fair implications of individual interactions."

Further, Chayes gave description of traditional conception of 'adjudication' which is central to the understanding and analysis of legal system:

1. Litigation is bipolar, in other words, two parties or two unitary interests are locked in confrontational, winner-take-all controversy;

2. Litigation is retrospective, directed to the determination of legal consequences of an identified act of past events;

3. Right and remedy are inter-dependent, linked in close, mutually defying logical relationships. In other words, the scope of the relief is derived, more or less, from the substantive violations. And compensatory damages are the usual form of relief;

4. Litigation is a self-contained episode, in other words, it is bounded in time as judicial involvement ends

with the determination of the disputed issues. It is bounded in effect as the impact is confined to the parties before the court;

5. The whole process is party-initiated and party-controlled, in other words, the case is organised, the issues are defined, and facts are developed by the exchanges between the parties. The judge is passive and a neutral umpire of such interactions. He decides the questions of law only if they are put in issue by an appropriate move of a party.

In support of traditional adversary system giving way to the liberalised rules of 'standing' of modern times John Rawl's Theory of Distributive Justice may be advocated. One of the consequences of Rawl's principle of 'equal liberty' is that "each person is to have an equal right to the most extensive total system of equal basic liberties, compatible with a similar system of liberty for all." This is the 'principle of redress'. 'Redress', according to John Rawls, requires that society must give more attention to those with less of the 'contingencies of natural assets or social opportunities.'

Thus, modern societies are witnessing progressive decline of two-party laissez faire concept of justice. This decline was forcefully announced by Roscoe Pound, in United States, as early

26. Supra note25.

There are various reasons for this decline. **Firstly**, modern societies are influenced by the process of 'acculturation'. Therefore, the new social, collective, meta-individual, public and 'diffuse' rights and interests are brought to the forefront. **Secondly**, there is a growing assumption that the legislature in welfare societies embody affirmative regulatory objectives which are to be fostered and encouraged by judicial action. In other words, a 'new property' has emerged and with it a new role.


"Since governments' largess was considered as a gratuity, it was said that the State could withhold or revoke the largess at its pleasure. The position of the government in this respect was considered the same as that of a private giver. The distinction between 'right' and 'privilege' is getting blurred in this area. What were considered as privileges are coming to be recognized as interest in the nature of rights to be protected against arbitrary action. The government largess is gaining recognition as 'new property' requiring legal protection."
of the courts. Thirdly, the complexity of modern societies generates more and more frequently, situations in which single human action or inaction can be beneficial or prejudicial to a large number of people. This results into mass injuries. As for instance, the discharge of waste into a lake or river harms all who want to enjoy clean water; arbitrary or unreasonable rise in Railway or bus-fare affects all who use these public services; and defective or unhealthy packaging may cause damage to all consumers of these goods.

Given such circumstances, both the solutions provided by adversary legal system - namely, 'individual standing' solution, and the 'governmental standing' solution have not proven out to be adequate enough to protect the 'public interest'. This is so because the 'individual standing' solution allows the private individual to sue merely to vindicate his own interests. This solution is insufficient either to protect the individual against the mass injuries or to vindicate the 'public interest' because if the individual having a legal cause of action is allowed to sue merely on his behalf then the 'diffuse' interests in most cases will not find adequate protection. Moreover, the individual's personal interest may be too small to encourage him to sue at first instance. For instance, in case of labour getting wages below the fixed minimum or in a consumer case. And even if, occasionally, the individual has 'sufficient interest' to sue,
the wrongdoer would not be sufficiently deterred by this suit from continuing his illegal activity.

Similarly, the 'governmental standing' solution has also proven out to be inadequate. The Attorney-general is usually charged with laxity and passivity in performing his new tasks as a defender of 'collective interest', especially his failure to bring to the notice of the court such cases as involving oppressive practices in prisons, trafficking in women, exploitation of labour class; existence of bonded labour, long detention of undertrials, blindings of undertrials in police custody, etc.

Mauro Cppelletti has highlighted two main reasons for such passivity of Attorney-general:

1. That the Attorney-general is highly dependent upon the political branches of the government. Therefore, he cannot act as an advocate against such abuses which are frequently generated or atleast deliberately tolerated by political and administrative bodies;

2. That the Attorney-general is specialized in only one field, the law. He is, therefore, poorly equipped to handle new, more complex, and highly sophisticated situations, essentially collective in nature. For instance, economic crimes and other illegal activities by rich people and corporations, that are detrimental to a large number of poor people; exploitation of
labour, poor people, food and drug violations.

Besides the above-stated inadequacies in the traditional model of adjudication, Abram Chayes argues further that there are number of political and intellectual needs of traditional adjudication system, viz., firstly, the conception of litigation as a private contest between private parties with only minimal judicial intrusion confirmed the general view of government as stringently limited; secondly, most importantly, the formulation operated to legitimise the increasingly visible political consequences of the actions of a judiciary that was not politically accountable in the usual sense; and finally, the scientific and deductive character of judicial law-making supplied the demand of the legal academics for a body of teachable material.

Due to proven inadequacies of the traditional solutions, the contemporary legal systems started exploring for, and started experimenting with various alternatives. In the process, the contemporary legal system did discover an alternative solution which is more flexible, sophisticated, but is very complex. This


30. Supra note 25, at pp. 1281-88.
solution involves the use of initiatives, and zeal of individuals or organizations by allowing them to act in Court for a general or group interest, even though they may not be directly injured in their own individual rights. And this flexible alternative with which judiciary is presently experimenting is nothing but PUBLIC INTEREST LITIGATION.

The Indian Supreme Court has emphatically stated that Public Interest Litigation is different from adversary litigation in the traditional model. In People’s Union for Democratic Rights v Union of India, the court observed:

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

Thus, Public Interest Litigation is different from traditional model of adversarial litigation. It is non-adversial

31. Supra note 11.
32. Ibid. at p. 1476.
procedure developed by Supreme Court. When viewed from the perspective of traditional model, the non-adversial litigation procedure developed by the Supreme Court are of two different types: i. Collaborative Litigation; and ii. Investigative Litigation.

i. COLLABORATIVE LITIGATION

The first type of non-adversial procedure developed by the Supreme Court is 'Collaborative Litigation'. It is non-adversial because the relationship between the parties is largely one of communication and cooperation, rather than combat. This type is the 'ideal' which the then Chief Justice P.N.Bhagwati hopes for, as is indicated in his frequent exhortations to the government to "welcome Public Interest Litigation because it would provide them an occasion to examine whether the poor and down-trodden are getting their social and economic entitlements." He views Public Interest Litigation as "a collaborative effort on the part of the claimant, the court, and the government or the public official to see that basic human rights become meaningful for the large masses of people".

Therefore, this type of non-adversial litigation procedure

33. Supra note 12, at p. 811.
34. Interview with C.J. P.N.Bhagwati, 3 Frontline 4,9-10(1986) at p. 11.
is termed 'Collaborative litigation'. This is so because collaborative litigation presumes that the parties will voluntarily reach an agreement and take necessary action. Here, the role of the court changes from that of traditional determination and issuance of a decree. Instead, the court takes on three rather different functions:

a. Ombudsman - the court receives citizen's complaints and brings the important ones' to the attention of responsible government officials;

b. Forum - the court provides a setting for clear and calm discussion of public issues, often setting the stage for such conversation by preserving the status quo or providing emergency relief through interim order;

c. Mediator - the court suggest possible compromises and moves the parties towards agreement.

Such collaborative (non-adversarial) litigation works fairly well when the undisputed facts, once brought to light, result in a clear consensus that 'action' is required. For instance, Kannanaikil v State of Bihar, a case of shocking communal violence against a rural harijan community which local police had ignored, and was resolved through a writ petition in the Supreme Court. Herein, the State government did not deny any

of the facts, and was also fully cooperative in providing interim protection and long-term re-location and rehabilitation to the victims of communal violence.

The Forum function of the court was also well illustrated in Sheela Barse v State of Maharashtra, wherein a journalist, Sheela Barse revealed the fact of recurrent custodial violence to women in Bombay Central Jail. Herein, there was a meaningful and constructive debate in court as to the steps necessary to provide protection to women prisoners, and State of Maharashtra, through its advocate, offered full cooperation in laying down the guidelines, and also readily accepted most of the suggestions made by the court.

Then, in a struggle between villagers in Andhra Pradesh and a big contractor over a quarry operation that turned to violence and allegations of police repression, Supreme Court issued stay order on both quarrying and criminal prosecutions, which gave the state government time and impetus to review and ultimately revoke the quarrying licence.

ii. INVESTIGATIVE LITIGATION

The second type of 'non-adversial' procedure developed and described by the Supreme Court is 'investigative litigation'.


Herein, the parties do not collaborate, but the court steps out its' passive role which is typical of adversial litigation, to take an active role in investigating the facts, thus it is called 'investigative litigation'. This second type of procedure is also referred to as 'inquisitorial litigation' because of its analogy to the inquisitorial judicial system which is typical of Continental jurisprudence. But it is humbly submitted that the term 'investigative' is more closer to the spirit of the Court's procedures.

Such 'investigative litigation' is a corollary to the 'representative standing' having the same function of lowering the barriers which traditionally separate the poor from the courts. Ex C.J. P.N.Bhagwati, in Bandhua Mukti Morcha case observed:

"Where one of the parties to a litigation belongs to a poor and deprived section of the community, and does not possess adequate social and material resources, he is bound to be at a disadvantage as against a strong and powerful opponent under the adversary system of justice, because of his difficulty in getting competent legal representation, and more than any thing else, his inability to produce relevant evidence before the Court. Therefore, when a poor comes before the court, particularly for the enforcement of their fundamental rights, it is necessary to depart from the adversial procedure and to evolve a new procedure which will make it possible
for the poor and the weak to bring the necessary material before the court for the purpose of securing enforcement of their fundamental rights."

Ex C.J. P.N. Bhagwati says when a poverty-stricken section of the society is pitted against a rich and powerful who can afford the best of lawyers, naturally the poor is at disadvantageous position, and it is in such situations that Public Interest Litigation comes to the rescue the poor and protect his basic human rights.

In an 'investigative litigation' the primary device used by the court is the appointment of special commissions. These commissions serve one of the three functions. The first function is to propose remedial reliefs and monitor its implementation. Such commissions frequently include non-legal experts, and use methodologies drawn from the physical and social sciences. For instance, in M.C.Mehta v Union of India, popularly called Sri Ram Fertilizer Gas leak case.

The second function for the commission is described in Bandhua Mukti Morcha case as:

"The report of the Commission would furnish prima facie evidence of the facts and data gathered by the Commissioner...Once the report of the commissioner is

38. Supra note 12, at p. 815.
40. AIR 1987 SC 965.
received, copies of it would be supplied to the parties so that either party if it wants to dispute any of the facts or data stated in the Report, may do so by filing an affidavit and the Court then considers the report of the commissioner and the affidavits which may have been filed and proceed to adjudicate upon the issue arising in the writ petition. It would be entirely for the court to consider what weight to attach to the facts and data stated in the report of the commissioners and to what extent to act upon such facts and data."

On the question asked by the present researcher — whether over-extensive reliance on socio-legal commissions of inquiry does not give to the court a partial and biased views of the facts, all the interviewees replied that it may be possible.

41. Supra note 12, at p. 816.

42. Interviews taken by the present researcher of — Ex Justice B.J. Diwan, Judges of the Ahmedabad High Court — anonymity to be maintained due to official position held by them, Mr. M.D. Pancholi, Principal, Sir L.A. Shah Law College, Ahmedabad, Dr. B.M. Shukla, Director, School of Law, Ahmedabad. All of them, however, maintained that the court should be vigilant while relying on the report of the commissions and they should see that persons with best antecedents are appointed as commissioners. Ex C.J.P.N. Bhagwati said that court's vigilance can overcome this fear.
The function of the commission as described in Bandhua Mukti Morcha case can be very effective when parties to case do not challenge the commission's report, because then the prima facie case becomes a set of undisputed facts. But if a party to the case disputes the commission's report, the court's statement in Bandhua Mukti Morcha case does not indicate how factual issues are to be resolved. Generally the court does not resolve the disputed facts. For instance, in Ram Kumar Mishra v State of Bihar when the ferry operator, the respondent challenged the commission's report saying that he had failed to pay his employees minimum wages, the court observed:

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

Sometimes, yet another commission is also created by the court to investigate and report on the disputed facts. However, it is not clear whether or not the second commission's report would have any greater weight in the face of opposition from a

43. See for example, Mukesh Advani v State of M.P., (1985)
3 SCC 162.

44. AIR 1984 SC 537.

45. Ibid., at p. 538.
It is humbly submitted that the court could, perhaps, make more effective use of its commissions of inquiry if it applied its rule more strictly. As for instance court could have insisted that affidavits be confined to such facts as the deponent is able from his own knowledge to prove. Many affidavits filed to challenge the commission's report rely primarily on legal arguments, and statements are not really based on personal knowledge. For instance, in Bandhua Mukti Morcha case, numerous affidavits were filed by the quarry workers claiming that they were bonded labourers. The report of the Commissioner appointed by the Court also confirmed the widespread existence of bonded labour. The state contended that there were no bonded labourers in Haryana. But, it is to be noted, that State's counter-affidavits did not give any 'personal knowledge' that those workers, identified by the petitioners and Commissioners were not bonded labourer. They said that 50% of the workers were not working under the obligation of any advance.

Under American Federal Rule of Civil Procedure, Rule 56, a party is entitled to a summary judgement on the legal issues without the need of trial if his opponent fails to rebut his prima facie case with affidavits or other hard evidence. There, 46. See for example Bandhua Mukti Morcha case, supra note 12, at p.829; M.C.Mehta case, Supra note 40, at p. 202-3.

47. Part IV, Order XI, Rule 5.
the mere arguments of a party's lawyer, no matter how vigorous, are not sufficient rebuttal without support of evidence that could be admissible at trial.

Therefore, it is humbly submitted that application of a similar approach could enable the Indian Supreme Court also to resolve more factual issues on the basis of commission's reports.

A third function of a Commission is to actually decided factual issues on authority delegated by the Court. An example of this is the appointment of High Court officer, D.S. Rajpurker, in the Bombay Pavement Dwellers case to determine the question whether specific dwellings were obstructing traffic, or were build after the effective date of the court's interim stay on demolition. In this case, Rajpurker's findings were binding on the parties for the purpose of implementing the court's interim order.

F. FEATURES OF PUBLIC INTEREST LITIGATION IN INDIA

Both in United States and India, eight identifying features of Public Interest Litigation distinguishes it from traditional litigation. In other words these eight features are nothing but eight ways in which this new kind of litigation differs so radically from traditional private law litigation.

Public Interest Litigation is so fundamentally different from private law litigation that it is recognizable as a law suit only because it takes place in a court room before a judge.

The said eight identifying or say distinguishing features of Public Interest Litigation are:

i. In Public Interest Litigation, the scope of the law suit is consciously shaped by the court and parties, rather than being limited by a specific past event, such as a breach of contract or personal injury.

ii. The party-structure is sprawling and amorphous, rather than limited to individual adversaries.

iii. The fact-inquiry resembles the kind of inquiry taken into current problems by legislative bodies, rather than a simple investigation of past historical events.

iv. 'Relief' is often propective, flexible, and remedial having broad impact on many persons, rather than limited to compensation for a past wrong given only to party to the law suit.

v. The 'relief' is often negotiated by the parties than imposed by the court.

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

vii. The judge plays an active role in organising and shaping the litigation, and is not passive.

viii. The subject-matter of the law suit is a 'grievance'
about public policy, and is not a private suit.

The new Public Interest Groups of recent times to represent 'diffuse' rights act as 'public spirited' or 'ideological plaintiffs'. This gradual rise and growth of 'ideological plaintiff' is a multi-faceted phenomenon, and one aspect of this phenomenon is the new role of the judge in Public Interest Litigation.

i. THE NEW ROLE OF THE JUDGE IN PUBLIC INTEREST LITIGATION

Traditionally, the role of civil judge was determined by the individualistic character and private content of civil litigation. The court's task was to restore to the aggrieved party the enjoyment of his own rights vis-a-vis his adversary. Consequently, the direct effects of a judicial decision were not reach beyond the sphere of the actual parties in the proceedings.

In the case of Public Interest Litigation, however, the traditional 'individualistic' procedures are clearly inadequate. By definition also it is clear that in Public Interest Litigation the plaintiff does not sue merely for himself but for the 'collectivity' - for a class or sub-class of persons. It is the class and not merely the party that has to be restored to the enjoyment of 'collective right'. As a consequence, both, the

49. Supra note 48, at p. 1302.
duties of the 'public spirited group' or 'ideological plaintiff', and the controlling responsibility of the court become comparatively more intense. On the one hand, the party cannot freely dispose of the collective right in issue. And on the other hand, the judge is responsible for ensuring that the party's procedural behaviour is, and remains, throughout the proceedings, that of a good champion of the public cause.

In United States, Federal Rules of Civil Procedure express, in part, this idea of providing that in both - Class actions and Shareholder's derivative actions, the 'approval' of the court is necessary for the action to be 'dismissed or compromised'.

However, questions remain that - what is adequate representation?; How can it be decided whether or not an 'ideological plaintiff' or 'public spirited person' is honest, prepared, and aggressive, in one word - 'serious' enough to be held as adequate representation of an entire class or sub-class? How can negligence, abuse and blackmail be prevented?

When the present researcher asked this question in her interview, and analysed the answers to the questionnaire sent to various academicians, judges, social activists, advocates, the answer of all was same in essence. They replied that it would be absurd to expect the legislation to provide complete and uniform answers to this problem. They said, given a degree of

50. Federal Rule of Civil Procedure, Rule 23(e), 23.1.
judicial discretion, a degree of judicial wisdom, judges will for themselves tackle these problems. A degree of judicial discretion is desirable and unavoidable, especially at present. Where as in or ordinary litigation, the honesty, preparedness, aggressiveness, the 'seriousness' of the plaintiff is generally assured by the traditional limitations of 'standing' to the person who is directly affected in his own rights. But, in Public Interest Litigation, the judge must measure the plaintiff's seriousness, honesty, and hence his adequacy as representative, by means of various and variable yardsticks. These yardsticks include - from time to time - the past history of a plaintiff, the statutory objectives, the internal organization, the funding sources, etc., of a private social organization, as well as the numerical and geographical size, the local or national character of Public Interest Organization. Thus, adopting a legislative and rigid uniform solution would be like using the axe of the woods-man to perform delicate surgery.

As Prof. Homburger has correctly put it:

"The most distinctive feature of Class litigation...may be that uncommonly active role which the judge must play

51. Ex.C.J. P.N. Bhagwati, Supreme Court of India; Hon'ble Judges of High Court, Ahmedabad, anonymity to be maintained due to official position held by them; Dr.B.M.Shukla, Director, School of Law, Ahmedabad; Mr.M.D.Pancholi, Principal, Sir L.A.Shah Law College, Ahmedabad.
in the control and supervision of the proceedings. The Public Interest in the prosecution of a Class action is far greater than in ordinary civil litigation. It is the court’s function to protect that interest as well as the interests of the absent members of the class. The successful management of a Class action, therefore, requires a procedure that leans more toward court-prosecution than ordinarily is the case in American system."

With respect to Class and Public Interest Litigation, special receivers, committees, and even commissions are set up by the Judges for 'fact investigation' and then to supervise the implementation of their decrees. To ensure compliance with a decree, judges, thus, create their own supervisory institutions, as for instance Commissions in India, rather than simply relying on the usual method of complaints by one of the adversary parties.

Again, as the name suggests, the effects of judicial decisions rendered in Public Interest Litigation must also go beyond the sphere of the parties actually present in the proceedings before the court. The traditional principle is expressed in well-known Latin phrase 'res inter alios judicata alteri non nocet nec prodest' - that resjudicata effects are

52. Homburger, "Private Suits", in, Mauro Cappelletti, ed., "Vindicating the Public Interest", at p. 349.
limited to the actual litigants. This 'res judicata' principle, called the last refuge of individualism in civil litigation, simply cannot prevail if 'diffuse' rights are to be protected by the courts, since the 'ideological plaintiff' in Public Interest Litigation is not suing merely to have his own damage restored, but rather to have the wrongdoer provide indemnification for all the damage he caused to the group, the class, or the society as a whole.

It is to be noted here, Indian Supreme Court in *Forward Construction Company v Prabhat Mandal, Andheri*, observed that principle of 'res judicata' under Section 11 of the Civil Procedure Code, 1908, is applicable to Public Interest Litigation also if and only if it is proved that the previous litigation was also Public Interest Litigation and not by way of a private grievance. It has to be a bonafide litigation in respect of a right which is common with others. The onus of proving the want of bonafides in respect of previous litigation is on the party seeking to avoid the decision.

In the field of diffuse rights, recovery also tends to cover the total damages caused by the defendant rather than merely the damages suffered by the plaintiff. For instance, when a multi-national corporation is polluting the atmosphere, it can hardly be forced to stop its' wrongdoing if it is merely to be sued by individual victims and that too only for the damage

53. AIR 1986 SC 391.
inflicted on one or some of affected persons. Clearly, a blind refusal to indemnify the class injured by the wrong doer, can amount to an *a priori* refusal by the courts to provide for the effective defense of 'diffuse' rights. And this will be an unsympathetic attitude, considering the fact that those rights are becoming more and more important in all advanced societies, and that judicial protection is the most trustworthy and sophisticated safeguard of legal rights ever designed by human civilizations.

There is growing concern about the expansion of judicial power among judges who show attachment to the traditional view of judicial role. For instance, in *United States v Richardson* Justice Powell, in concurring opinion, said that relaxation of 'standing' requirements was directly related to the expansion of judicial power, and that such relaxation would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government.

In an interview with the Hon'ble judge of High Court, Ahmedabad, when present researcher asked the question - that since Doctrine of 'locus standi' has acquired a new dimension after the liberal interpretation placed on Article 21 in *Maneka Gandhi case* in 1978, and with this new interpretation in the background whether judiciary will not be entrenching upon the


55. The present researcher cannot disclose the name of the Judge due to his official position.
field reserved for legislature or executive? To this question the Hon'ble Judge replied that 'locus standi' needs to be more liberalized. He added that approach should be of Lord Denning:

"I must confess that whenever an ordinary citizen comes to the court of appeal and complains that this or that Government Department - or this or that local authority - or this or that trade union - is abusing or misusing its' power - I always like to hear what he has to say."

Regarding the fear over expansion of the judicial power among judges, it is humbly submitted that with the more and more increase of powers of the legislature and the executive there is the necessity of corresponding expansion of judicial power in order to maintain a balanced system. With the growth of modern 'welfare' government and corresponding growth of Public Interest Groups and Classes of Citizens, there is an urgent need of expanding the 'judicial protection'. Right to a citizen to have 'Equal Access to Effective Justice' to vindicate legal rights, whether old or new, whether individual or meta-individual, is basic in any democratic government. It is the duty of the democratic government to see that legal rights, duties and entitlements are judicially enforced. And Public Interest Litigation is a strategy to safeguard legal rights of citizens.

ii. **THE PARTIES' RIGHT TO BE HEARD - FROM INDIVIDUALISTIC TO SOCIALISTIC DUE PROCESS**

Today, not merely question of "traditionalism" and "attachment to the 'old'" is at stake, but also the most important of the problems present in the new era, concerns the parties' right to heard which is most fundamental of all the guarantees of a 'fair' hearing.

The principle of *audi et alteram partem* is sanctioned by the Constitutions of many countries, including United States and India. It is also guaranteed by modern transitional Bill of Rights such as the European Convention on Human Rights. Indeed, it is a most ancient aphorism of human wisdom that a judgement can not be made before the arguments of both sides are heard. Then, question arises, how can one accept the fact that judgements rendered in Public Interest cases extend their binding effects beyond the sphere of the actual litigants, possibly prejudicing the persons, and sometimes, legions of persons, who were not given an effective opportunity to be heard?

In United States, prior to 1966, the Class actions - analogous to actions now brought under amended Federal Rule of 57. Article 6, para. 1 says, "In the determination of his civil rights and obligations or of any criminal charge against him, every one is entitled to a fair and public hearing within a reasonable time by an impartial tribunal established by law."
Civil Procedure, Rule 23(b)(3) - the absent members of the class were not bound by a judgement for the defendant, but could intervene and share the benefits it the plaintiff prevailed. The Supreme Court's decision in *Eisen v Carlisle & Jacquelin*, foreshadows a return to the 'one-way intervention' system.

At first glance, an opinion such as that rendered by the United States Supreme Court in *Eisen case* would seem perfectly correct, and perhaps even too liberal, since the Court was willing to forego individual notice at least to those members of the class who could not easily be identified.

It is humbly submitted that the fact is, the decision prescribes individual notice only to the members of the class identifiable through 'reasonable efforts', and is limited to Rule 23(b)(3) actions. In *Eisen case*, this would have still left about 4 million members of the class without individual notice. The United States Supreme Court in *Eisen case* does not explicitly address itself to the Constitutional due process aspects of notice in Class actions, but merely to the statutory requirements of Rule 23(c)(2).

When strictly construed, 'due process' would seem to require that adequate notice, which is a necessary ingredient of the right to be heard, be given to all the individual members of the class who are to be affected by the decision. As in *Mullane v Central Hanover Bank & Trust Co.*, United States Supreme Court 58. 417 US 156(1974).

stated, "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

It is humbly submitted that although the procedural device of any Class suit conflicts with the deep rooted principle of Anglo-American jurisprudence that no one shall be bound by a judgement without having had an opportunity to litigate his own claim in his own way. But this individualistic concept of a 'fair' hearing will appear too rigid if measured against its practical consequences. Judicial protection of 'diffuse' rights, frequently involving a large number of persons, is often made impossible for all purposes by a strict adherence to traditional notice and fair hearing requirements. For instance, in Eisen case, even though notice was limited to identifiable persons, it would have costed the 'ideological plaintiff' $225,000, which clearly is an impossible costs of notice which must initially be borne by the plaintiffs with only a possibility of re-imbursement if the plaintiffs prevail in the lawsuit.

Thus, in view of changed circumstances of contemporary societies, the principle of 'right to be heard' should be reconsidered so as to be adapted to the present circumstances. In other words, an individualistic due process should give way to socialistic or collective due process for this is the only way to

60. Supra note59.
61. Supra note 55, at p. 178.
get judicial vindication of new 'diffuse' rights. The right to be heard has to stay with an adaptation that notice requirement may not be insisted on all the members of the class, unnecessarily burdening the ideological party with heavy costs of giving notice to all affected thereby, but notice should be insisted only to be given to ideological plaintiff. So the ideological party, if adequately represented, shall be allowed to act for the entire class, including those members who are not identified, not served with the notice, not 'heard' in strict literal sense of that term.

F. LIMITATIONS ON PUBLIC INTEREST LITIGATION IN INDIA

The new liberal judicial attitude undoubtedly constitutes a new era in the life of the Apex Court in India. Public Interest Litigation is a new device by which public participation in judicial review of administrative action has increased. It is only because of Public Interest Litigation that courts are reaching the poor to deliver them justice at their homes. No doubt, Public Interest Litigation is a revolutionary innovation. The court, therefore, will have to be very careful in scrutinising the claims of Public Interest Litigation so that it does not become resort of psuedo-social activists. Public Interest Litigation requires careful handling so that judicial

process is not misused for political reasons.

In S.P. Gupta v Union of India, Justice P.N. Bhagwati laid down various limitations to be kept in mind while dealing with Public Interest cases before the court. These limitations are:

i. Courts must see that the member of public who approaches the court in such cases is acting bonafide and not for personal gain or private profit or political motivation or other oblique considerations.

ii. Court must not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain political objective.

iii. Court must not overstep the limits of its judicial functions and trespass into areas reserved for the executive and legislature by Constitution.

In State of Himachal Pradesh v Parent of a student. Medical College, Simla a parent wrote a letter to the Chief Justice of the Himachal Pradesh High Court, Simla, regarding ragging of fresh students by senior students in medical college. The letter was treated as writ petition and court directed the


64. 1982 AIR SC 149, at p. 195.


66. AIR 1985 SC 911.
state to pass anti-ragging legislation to curb the evil of ragging. The State government went in appeal to the Supreme Court against the order of the High Court. The Supreme Court held that judiciary cannot compel the State government to initiate legislation with a view to curbing ragging. Court observed that it is entirely a matter for the executive branch of government to decide whether or not to introduce any particular legislation.

In *West Bengal Board of Examination v Jitendra Prasad* High Court of Calcutta observed that the scope and extent of Public Interest Litigation is very limited and to extend the scope of such Public Interest Litigation beyond limit will upset judicial system. In this case, the petitioners alleged that the answer books had not been properly assessed. The single judge treated the letter as Public Interest Litigation. On appeal the Division Bench of the High Court opined that writ petitioner was required to give all particulars and the bases of the allegations in support of prayer. The court said that a mere allegation without any material support will not entitle the writ petitioner to ask for any assistance because otherwise any unsuccessful candidate in any examination may file a writ petition alleging that the answer scripts have not been properly assessed or that grace marks have been given arbitrarily. The court held that it is not that when ever any governmental action involving the members of public or class of persons challenged in the court of

67. AIR 1984 Cal. 52.
law that it will be considered as Public Interest Litigation.

Kailash Meghwal v State of Rajasthan is a case that shows that Public Interest Litigation cannot be used for extraneous purposes. The facts of the case were that Kailash Meghwal was M.L.A. from Ajmer. He challenged through writ petition the decision of the government to shift the office of Public Health Engineering Department circle from Ajmer to Bhilwara, the constituency of the Chief Minister. The main allegation was that the decision of the government to transfer circle office from Ajmer to Bhilwara was politically motivated, against public interest, and was influenced by the Chief Minister Shiv Charan Mathur in order to benefit his constituency at the cost of interests of the people of Ajmer District. The court held that the establishment of P.H.E.D. office or its shifting from one place to another was neither within legislative not judicial domain, and an administrative action simplicitor could not be put in judicial review. The court concluded that in the wider Constitutional interests, political controversies should not be permitted to be agitated under writ jurisdiction of the High Court.

In People's Union for Democratic Rights v Ministry of Home Affairs a voluntary organization filed Public Interest Litigation praying for order or direction of the court by an

68. AIR 1983 Raj 182.
69. AIR 1985 Delhi 268.
appropriate writ for the appointment of a commission of inquiry to investigate into the role of the police and the political interference in the occurrence of riots in November 1984, after the assassination of Smt. Indira Gandhi, the then Prime Minister. The High Court observed that in Public Interest Litigation, the petitioner had no legal or statutory right to compel the government to appoint a commission of enquiry. Moreover, the power of the Government to appoint a commission of enquiry was discretionary and not arbitrary. It was further observed that the courts should not have an attitude that they alone are the protectors of fundamental rights of citizens and a democratically elected government have no such feeling or inclination.

In Krishna Kant v Vice Chancellor, Banaras Hindu University the appointment of a lecturer who did not possess the minimum qualification for the post of lecturer as advertised was challenged by the petitioners. The contention of the petitioner was that had he known that appointment would be made even without insisting on fulfillment of these qualifications, he would have also applied for the post and taken his chance. On the question whether the petitioner not being an applicant had the 'locus standi' to file the petition, the court observed that Public Interest Litigation does not confer unbridled right to indulge in frivolous litigation. The court held that certain minimum conditions must be satisfied before the court lent its

70. AIR 1984 All. 350.
assistance to such litigants asking for relief. For instance:

a. The petitioner should not have personal axe to grind and the petition should not be founded on apparently personal and selfish motives;
b. He should not be inspired by malice or a design to malign others or be actuated with desire for propaganda.

And since, in this case the petition was on behalf of a litigant subjected to personal grievances, the petition was dismissed.

In *Shri Sachidanand Pandey v State of West Bengal*, Court observed,

"There is the need to restraint on the part of Public Interest Litigants when they move the Courts. Public Interest Litigation has now come to stay. But one is led to think that it poses a threat to the courts and public alike. Such cases are now filed without any rhyme or reason. It is, therefore, necessary to lay down clear guidelines, and to outline the correct parameters for entertainment of such petitions. If courts do not restrict the Public Interest Litigations, the traditional litigation will suffer. And the courts of law, instead of dispensing justice, will have to take upon themselves administrative and executive functions."

71. *AIR 1987 SC 1136.*

Court further observed:

"That does not mean that traditional litigation should stay put. They have to be tackled by other effective methods like decentralising the judicial system and entrusting majority of traditional litigation to village courts and Lok Adalats without the usual populist stance and by a complete restructuring of the procedural law which is the villain in delaying disposal of cases....It is only when Courts are apprised of gross violation of Fundamental Rights by a group or a class action or when basic human rights are invaded or when there are complaints of such acts as to shock the judicial conscience that the courts, especially this Court, should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, and the underdog, and the neglected....Doors of the Court are not open to anyone to walk in. It is necessary to have some self-imposed restraint on Public Interest Litigants."

S.N. Jain has given the following warning:

"If carefully and prudently used, the Public Interest Litigation has great potential in correcting the adminis-
trative wrong, but if liberally and indiscriminately used

73. Supra note 71.
in all kinds of cases, it may turn into an engine of destruction."

Cappelletti, describing Public Interest Litigation as a revolutionary transformation, observed:

"[A] turmoil, indeed a real revolution, is in progress, in which even the most sacred ideas and themes of judicial law, such as due process and the right to be heard are being challenged....Such new concepts as 'diffuse rights', 'fluid recovery', and the 'ideological plaintiff' may admittedly appear dangerous, iconoclastic and confusing. Yet, they reflect the unprecedented complexity of contemporary realities....[T]hese new concepts represents....a deeply motivated trend of universal dimensions."

In the same spirit in Judge's Transfer case it was observed, "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 forefront."

In India, whether Public Interest Litigation is to be seen

74. S.N.Jain, Standing and Public Interest Litigation.


76. S.P.Gupta v Union of India, AIR 1982 SC 149.
as a revolutionary development or reforming? To know the answer to this question the statement in the Judge's Transfer case are also to be weighted against the opinion of Justice R.S. Pathak, as he then was, in Bandhua Mukti Morcha case, wherein he opined:

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

Justice R.S. Pathak further observed:

"[I]n Public Interest Litigation the court enjoys a degree of flexibility unknown to the trial of traditional private law litigation. But I think it necessary to emphasise that whatever the procedure adopted by the court, it must be procedure known to judicial tenets and characteristic of a judicial proceedings....Legal jurisprudence has in its

77. Supra note 12, at p. 838.
historical development identified certain fundamental principles which form the essential constituents of judicial procedure. They are employed in every judicial proceedings, and constitute the basic infrastructure along whose channels flows the power of the Court in the process of adjudication."

G. PUBLIC INTEREST LITIGATION - DIVERGENCE FROM TRADITIONAL MODEL

i. POSITION IN UNITED STATES

In Public Interest case, the 'right' and 'remedy' are totally irrelated. The 'form of relief' is designed ad hoc. It does not flow from the determination of liability. The determination of liability is not simply a pronouncement of legal consequences of past events. But it is, to some extent, a prediction of what is likely to be in future. In Public Interest Litigation 'relief' is not terminal, compensatory transfer, but it is an effort to devise a program to contain future consequences in a way that accommodates the range of interests involved. The purpose of the decree is to rectify a course of conduct that has been found to bridge rights asserted by the

78. Supra note 12 at p. 842.

79. Supra note 48, pp. 1293-94.
plaintiff. Thus, even if one takes most liberal view of judicial freedom to design sweeping and innovative remedies, such remedies must ultimately be based on two findings:

i. that such remedies are required to correct the results of past conduct by the defendant; and

ii. that such conduct had violated plaintiff's rights.

Over past eighteen years, the decisions of the United States Supreme Court show how the need for above-stated two findings has significantly delimited the scope of relief available in Public Interest cases.

Frank L. Rizzo v Gerald G. Goode, is a textbook example of Public Law litigation. It was brought as a class action under the Civil Rights Act of 1871 by a number of individuals and a broad coalition of community organization. Evidence was taken as to over 40 incidents of alleged police brutality - 19 of which, the court was willing to accept - rose to the level of deprivation of Constitutional rights. The Supreme Court struck down the Decree establishing a formal internal review procedure for citizen complaints made to the Philadelphia Police Department because the first finding was absent. The Court held that the 19 cases of police brutality proved by the plaintiff did not show a sufficient pattern and practice of official misconduct to justify a department-wide change in


procedure. Instead, for these cases of misconduct, individual suits for compensation would be sufficient relief.

In *William G. Milliken v. Roanld Bradley* absence of the second findings was fatal to the Decree which ordered that sub-urban school Districts, mostly white, exchange a percentage of their students with the Detroit School System, mostly black, in order to give Detroit students a racially integrated education.

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

Albeit, in such cases as *Rizzo* and *Milliken* a serious effort was made to reimpose the right-remedy bondage as a way of limiting the power of judges, but in several other Supreme Court decisions approved broad proprospective of showing that American Court's are going too far down the path of Public Interest Litigation to be forced back into rigid limitation of linking remedy to right. However, it is argued that such cases seem,

82. Supra note 48, at pp. 1305-7.
instead, to be exceptions which prove the continued validity of an American rule limiting remedies to rights. In all these cases, viz., Milliken v Bradley, Dayton Board of Education v Brinkman, and Hutto v Finney, the United States Supreme Court, perhaps upheld the relief awarded because it was necessary to cure proven systematic and extensive Constitutional violations. Infact, in all these cases relief was obtained only from parties who had violated plaintiff's rights.

Thus, under American, present day doctrine, if the plaintiff is not able to show a pervasive illegal conduct, which is proved by major evidentiary struggle, or if the case is such that relief is to be obtained only from parties who owe no legal duty towards him, then sweeping remedial relief will be very difficult to obtain.

ii. POSITION IN INDIA

On the other hand, a study of Public Interest cases decided by the Supreme Court of India shows such disconnection of 'relief' from the proof of fast wrongful conduct or clear legal duty to lead to conclusion that in India, unlike in United States, 'right' and 'relief' have become thoroughly separate and disconnected.

86. 437 US 678(1978).
a. GIVING 'RELIEF' WITHOUT DECLARING 'RIGHTS'

Under traditional Anglo-American model, originally preliminary injunctive relief was limited to preserving the status quo pending final decision. Later, the United States courts developed broader discretion to order affirmative action when plaintiff showed that he was likely to succeed on the merits and that the resultant harm justified interim relief.

In India, in Public Interest Litigation case, the dissociation of 'reliefs' from the 'rights' began with the practice of issuing directions through interim orders. The first Public Interest Litigation case before the Indian Supreme Court, was Hussainara Khatoon v. State of Bihar wherein the court gave as many as four interim orders within the first four months following the filing of writ petition. These orders - i. set norms for release of undertrial prisoners on personal bond; ii. ended the practice of 'protective custody' for crime victims and witnesses; iii. ordered release of all prisoners in the State of Bihar who had been awaiting trial for a longer period than the maximum sentence for which they could be convicted; iv. directed that free legal aid be given to all indigent accused; v. held that a speedy trial was a Constitutional

87. Supra note 4., at p. 1360.
88. Ibid.
89. Ibid., at p. 1367.
90. Ibid., at p. 1369.
91. Ibid.
right; vi. imposed an affirmative duty on Magistrates to inform under-trial prisoners of their right to bail and legal aid; and vii. ordered the release of all undertrials in State of Bihar for whom investigations had been pending for more than six months without any extension being granted by the Magistrate. But after this initial stage of judicial activity, Hussainara case has remained pending before the Court for last ten years without final judgement.

Thus, a pattern is set by the Indian Supreme Court in Hussainara case which has been followed in many later coming Public Interest cases. And the said pattern is: immediate and significant interim relief prompted by urgent need expressed in the writ petition. Albeit the final decision with respect to factual issues and legal liability may take long time.

In Khatri v State of Bihar, the Court ordered the State of Bihar to provide medical and rehabilitative services to the blinded prisoners at the time when the case was filed in 1980. But whether the State is liable for the blinding, and if yes, whether the victims are entitled to compensation, remains undecided till now.

92. Supra note 4.
93. Ibid, at p. 1377.
94. Ibid.
In *Olga Tellis v Bomabav Municipality Corporation*, when writ petition was filed, all evictions of pavement dwellers and demolition of hutments on public land in Bombay were stayed by the Supreme Court for four years, and also an extensive implementation and monitoring mechanism was created.

Recently, in *M.C. Mehta v Union of India*, within ten weeks of gas leakage, without first deciding whether it had jurisdiction under Article 32 to order 'relief' against a private corporation, the Court ordered - i. the plant to be closed; ii. set up a victim compensation scheme; and then iii. ordered the plant re-opening subject to extensive directions issued by the Court.

It is humbly submitted that such ordering of 'immediate relief' without determining the 'rights' is not in itself a radical change from the practice of providing 'preliminary injunctive relief' in traditional litigation, even though the extent of relief, and the lack of preliminary finding of probability of success on merits of the case, are of course distinguishing features of Public Interest cases. Moreover, even if in *Hussainara case*, *Bhagalpur Blindings case*, *Olga Tellis case*, and *Sri Ram Fertilizer Gas Leak case* the Court did not

96. AIR 1986 SC 180.

97. AIR 1987 SC 965. Popularly known as *Sri Ram Fertilizer Gas Leak case*. 
first determine the rights, the fact is that in all these cases, sweeping affirmative relief was ordered to compensate for the most serious, nerve-shocking, and wide-ranging effects of the alleged misconduct or inaction.

There are also few Public Interest cases wherein the Supreme Court has issued directions which go well beyond the relief necessary to remedy the harm done to the victims. Infact, sometimes the relief includes everything except the original relief asked for in the writ petition. This activist behaviour of the apex court in India shows divergence from the traditional model more markedly.

For instance, in Sheela Barse v State of Maharashtra a journalist, Sheela Barse herself, wrote a letter complaining of custodial violence to five women who were confined in the Bombay Central jail. Yet, while disposing of the petition, the Supreme Court in its final judgement said:

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

98. AIR 1983 SC 378.
99. Ibid., at p. 379.
Then, instead of determining the factual validity of the petition and remedying whatever legal injuries were disclosed by the facts of the case, the Court issued guidelines applicable to the entire State of Maharashtra. These guidelines required the State to:

i. work for the District Legal Aid Committees to assure that all under-trial prisoners receive free Legal Aid;

ii. distribute pamphlets to prisoners on their right to bail;

iii. inform each prisoner's designated friend or relative of the arrest; and

iv. use only women police officers to guard and interrogate female suspects.

In Sheela Barse case the point to be noted is that even though Court did have before it the report of the Commission based on social worker's visit to Bombay jail, the court's directions were primarily based on its own sense of what undertrial prisoners generally need, and also on the State's willingness to accept the guidelines suggested by the Court.

Therefore, the Court's decision in Sheela Barse case is in contrast to Rizzo case of United States Supreme Court where a small number of complaints of police brutality which were not even proven resulted in system-wide reform instead of individual compensation. Sheela Barse case is a typical example of, in the words of Upendra Baxi, "creeping jurisdiction ...(which) consists in taking over the direction of administration in a particular
arena from the executive.

The Indian Supreme Court took up another two social problems which were demonstrably ignored by the executive, viz., 'prisoners' and 'bonded labourers'. In cases concerning prisoners and bonded labourers the Supreme Court expanded the scope of its review, thus resulting in court's jurisdiction creeping from the prayer's raised by the original petition to the larger social problems that are revealed by its highly activist inquiry.

As for instance in Mukesh Advani v State of Madhya Pradesh, the Court found that the bonded labourers petition had been released by the time the commission appointed by the Court made its investigation. However, report of the Commission brought to light the fact that labour laws in the Flagstone queries under investigation were totally flouted, in particular the Minimum Wages law. The State replied in defense that the Central Government had not prescribed minimum wages for piece work in Flagstone quarries. Accordingly, the Court directed the Central Government to issue wage notifications for the Flagstone quarry workers. This direction of the Court had nation-wide impact.

Thus, once again, just as in Sheela Barse case, Court gave

101. (1985) 3 SCC 162. (Bonded labour case).
a broad 'relief', and not individual relief to the workers.

Another striking example of separation of 'relief' from the 'rights' is the case of Lakshmi Kant Pandey v Union of India. In this case, an advocate wrote a letter - based on an article in a magazine complaining that some Indian children were being sent abroad for adoption who ended up as beggers or prostitutes for lack of proper foster care - thus praying for the ban on private agencies from taking Indian children abroad for the purpose of adoption. To determine the veracity of the allegations the court did not appoint Commission or make any other effort for the purpose. Rather, the Court, immediately, acted to issue notice to the Union of India and the two major national child welfare agencies to "assist the court in laying down principles and norms which should be followed in determining whether a child be allowed to be adopted by foreign parents, and if so, what procedure should be followed for that purpose, with the object of 'ensuring welfare of the child'". The court also considered various studies and policy statements on adoption, and allowed the intervention of a number of private adoption agencies before issuing extra-ordinary details as to the maximum permissible daily rate for child care by an agency while adoption proceedings are pending.

102. AIR 1984 SC 469. Popularly known as Foreign Adoption case.
103. Ibid., at p. 471.
It is humbly submitted that in both the cases, Sheela Barse and Foreign Adoption case the action of the Court cannot be distinguished from a typical legislative activity. It invited the views of experts and interested parties, reviewed legislation and policies adopted by other jurisdictions, studied sociological materials relevant for the facts of the case, and then went on to give comprehensive guidelines carrying the force of law — a typical legislative activity. It is to be noted that court did not adjudicate on a set of facts put before the court and then applying positive law as it existed on the statute book, as traditionally court used to do. Also, in the process, court resolved certain controversial and sensitive policy issues as — whether foreigners should be allowed to adopt Indian children at all, and if year, under what limited circumstances? These questions relating to policy are such difficult questions that even Indian Parliament could not enact adoption legislation inspite of its two separate attempts. So Court attempted what Parliament could not do. The fact is that an Adoption of Children Bill was introduced twice in Parliament, one in 1972 and then in 1980. The 1972 Bill failed primarily because of Mus'im opposition. And even though, the 1980 Bill specifically exempted Muslims, still it has not yet been enacted into law.

Thus, in Foreign Adoption case, the Court went far beyond the 'relief' requested for in the petition, which was limited to

104. Supra note 102, at p. 472.
only banning the private agencies from adopting Indian children by foreign parents. Seeing the central role played by the Court in foreign adoption process, and the absence of any specific legislative guidance, this case is a clear demonstration of court's exercise of rule-making power.

The Court justifying its highly activist ruling said that it was due to the absence of any statute providing specifically for foreign adoption that prospective foster parents are forced to apply to the Indian courts for appointment as guardians under the Guardianship and Wards Act, 1890. Court further said that it is because the Act only states that the judge should be satisfied that guardianship is for the welfare of the child, several High Courts had adopted guidelines for the District Courts in their State for such proceedings. However, nowhere in the judgement there is any statement or indication pointing to the fact that the court viewed its activities in this case as in any way different from other Public Interest Litigation cases.

b. DECLARING 'RIGHTS' WITHOUT GRANTING 'RELIEF'

Of late, a new trend is discernible in a few cases where rights are declared but no relief is given, thereby again there is dissociation of relief from the rights.

105. Supra note 102, at p. 480.

106. Ibid., at pp. 481-82.
In *Olga Tellis v Bombay Municipal Corporation* the Supreme Court noted that the inability of law-wage workers in Bombay to obtain legal housing within a reasonable distance of their jobs will lead to deprivation of their livelihood, consequently to the deprivation of life. Yet, the only relief provided by the Court for the violation of Article 21, right to life, caused by the eviction from the only available housing in Bombay pavements and slums encroaching on public land, is a 'prior warning before the eviction'. And when the petitioners prayed for a direction to be issued to the State to undertake a massive low-income housing programme in Bombay pavement, the Court merely gave the suggestion that such programs 'be persuaded earnestly' and 'implemented without delay', without making any provision of legal and affordable housing a pre-condition to the removing of Bombay's pavement and slum dwellers.

It is humbly submitted that as was as court's direction - that pavement and slum dwellers who hold 1976 census identify cards be provided alternative pitches - is concerned, it cannot be taken as a vindication of the right to livelihood, established in the judgement. This direction simply enforces a voluntary promise made by the State government. Indeed, the court's failure

107. AIR 1986 SC 180. Popularly known as *Bombay Pavement Dweller's case*.

108. Ibid., at p. 200.

109. Ibid., at p. 204.
to explain why the State must be bound in future by its voluntary past policy statement, suggests that this direction is a 'relief' without a corresponding 'right'. Had it been the case that the 'alternate piches were given' based on the fundamental right to livelihood, the Court would have had to explain as to why persons residing in Bombay since 1976 had an enforceable right, while those persons arrived recently did not have such a right. Further, it is to be noted, that according to state's own affidavit 30% of the dwellers in hutments, residing in Bombay slums since 1976 did not receive census cards. What about that? Also, another point which Court did not note was the undisputed fact that 'pitches to be provided' were at so much distance from public transportation that it was practically so difficult for the petitioners to reach the place of employment in a city like Bombay. This point Court ought to have taken cognizance of.

In an earlier judgement of the Court in P. Nalla Thampy v Union of India where in the plaintiff filed a list of grievances about the operation of railways which included the number of un-manned crossings, accidents caused by human error, inadequate funds for the improvements and improper utilisation of existing assets and facilities, inefficient administration at different levels, prevalent indiscipline, crimes against passengers, equipments in need of replacement and bridges to be

110.Supra note 107, at p. 188.

111.AIR 1984 SC 74.
repaired. The Court recognized the petitioner's right to move freely throughout India, to carry on any occupation, under Articles 19 and 21, and also imposed on the government an obligation to improve the established means of communication in this country. Three Special Commissions appointed by the Court made a study of operation of Indian railways in post-Independence era and proposed what steps to be taken for the improvement of the system. Therefore, in its' judgement the Court gave an extensive discussion of the history of Indian railways. The Court prescribed a long list of improvements which are needed, but declined to issue any directions. The Court observed:

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

Thus, the Court in this case abstained from giving any

112. Supra note. 111, at pp. 74-75.

113. Ibid., at p. 79.

114. Ibid., at p. 80.
directions whatsoever and perhaps this is the reason that later in Bombay Pavement Dwellers case also the court did not give any effective remedy. Another reason for not giving any affirmative remedy in Bombay Pavement Dwellers case can be that such relief would have affected the overall budgetary resources of State of Maharashtra substantially. If the housing needs of Bombay pavement and slum dwellers would have been placed over and above other social needs, then perhaps that might not have to been possible for the State to meet, given the limited available funds for the purpose. It would have interfered with the State’s planning in the future development of Bombay.

Yet, despite the fact that availability of resources, policy priorities and expertise was very much involved, in very many Public Interest cases, directions have been issued by the Court. For instance, in Rural Litigation and Entitlement Kendra, Dehradun v State of U.P., the Supreme Court balanced competing policies, priorities and issues of resources, which included the need for development, environmental conservation, preserving the jobs, and protecting of substantial business investments, before deciding for the closure of a number of limestone quarries in Mussoorie Hills, and to allow other to continue operating subject to detailed conditions prescribed by the Court. While deciding this case, the Court considered the report of various 115. AIR 1985 SC 652.
geological experts and gave different weightage to various expert opinions.

In *State of Himachal Pradesh v A Parent of a Student of Medical College, Shimla*, the High Court has appointed a commission to investigate the petitioner's complaint of harassment - 'ragging' - of fresh medical students by older students. Now, one of the recommendations of the Commission was that the State Government should introduce a legislation making 'ragging' a criminal offense. The High Court also directed the State to implement this recommendation. The Supreme Court, however, reversed the said direction and observed:

"It is entirely for the executive branch of the Government to decide whether or not to introduce any particular legislation....The Court certainly cannot mandate the executive or any members of the legislature to initiate legislation, howsoever necessary or desirable the Court may consider it to be....If the executive is not carrying out any duty laid upon it by the Constitution or the law, the Court, can certainly require the executive to carry out such duty and this is precisely what the Court does when it entertains Public Interest Litigation....But at the same time the Court cannot usurp the functions assigned to the executive and the legislature under the Constitution and it cannot even

indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law making activities of the executive and the legislature."  

Thus, in the above observation of the Supreme Court, it is clear even the Supreme Court found that Himachal Pradesh High Court had exceeded the limits of judicial power in ordering relief in Public Interest Litigation.  

Then, in *State of Himachal Pradesh v U.R. Sharma*, the executive had failed to complete in a timely manner a planned road to the plaintiff's village. The Supreme Court agreeing with the High Court that the Plaintiffs had established a fundamental right to life, observed:

"The persons who have applied to the High Court...are persons affected by the absence of usable road because they are poor Harijan residents of the area, their access by communication, indeed to life outside is obstructed and/or prevented by the absence of road....For residents of hilly areas, access to road is access to life itself. We accept the proposition that there should be road for communication in reasonable conditions in view of our Constitution imperatives and denial of that right would be denial of the life as understood in its richness and

117. Supra note 116, at pp. 913-14.

118. AIR 1986 SC 847.
fulness by the ambit of the Constitution. To the residents of the hilly areas as far as feasible and possible society has constitutional obligation to provide roads for communication.”

In this case the Supreme Court emphasised that remedial action in Public Interest Litigation must be done with caution and within limits.

H. *CRITICISMS MADE AGAINST PUBLIC INTEREST LITIGATION AND 'ANSWERS' TO THOSE CRITICISMS*

Perhaps because of an impressive successful growth of Public Interest Litigation movement in last two decades, it has also received it’s share of criticism. Many critics blame Public Interest Litigation and Public Interest Lawyers for problems of the legal system. In other words, Public Interest Lawyers are blamed for the delay, and inefficiency and various other problems inherent in the legal institutions. The obvious answer to this is that even if Public Interest Lawyers decide to pursue other vocations, such problems as delay in Courts and administrative agencies would not go away. On the contrary, Public Interest Lawyers would oppose other parties’ delaying

119. *Supra note* 118., at p. 186.
tactics because they operate within such tight budgets and thus cannot afford the costs of protracted litigation.

There are also other serious criticisms mounted against Public Interest Litigation movement which can be put in following points:

i. Public Interest Litigation misuses and overburdens the Court by asking them to resolve questions that belong more appropriately to the executive or the legislature;

ii. Public Interest Lawyers do not really represent the 'Public Interest'; and

iii. Law is not the best way to undertake social change.

It is humbly submitted that since some Public Interest Litigation cases do bring the courts into areas where they must engage in a degree of policy planning in order to fashion effective relief. Therefore, Public Interest Lawyers are accused of asking the courts to resolve questions they belong more properly to legislature or the executive. But these cases, all begin with controversies, that courts have to determine at the first instance, are appropriate for their consideration as involving claimed violations of Constitutional rights or statutory mandates. And once the court has determined that a legal wrong has in fact occurred, they must do whatever they find necessary to frame a satisfactory remedy.

For instance, in Whatt v Stickney, a Federal District Court.

Judge in Alabama found that inhuman conditions in Alabama State Mental Institutions violated the Constitutional rights of the patients in those institutions. In order to put an end to these Constitutional violations, and to give appropriate relief, the judge had to take testimony from psychiatrists, psychologists and social workers. Ultimately, he issued a detailed order laying minimum standards for the institutions.

Accordingly, when Public Interest Lawyers show gross abuses of prisoner's basic Constitutional rights and their human dignity, that no other agency of Government showed it's willingness to correct, the Court must not sit tight handed but come out to the rescue of the suffering poor masses.

Albeit, in some cases, considerations of such issues involve the courts in matters of governmental policy, still such involvement does not imply an inappropriate invasion of the political sphere. On the contrary, a critical role of the court is to assure that the basic legal rights of citizens are honoured even if those citizens lack the power to protect their rights in the political process. It is the duty of the courts to guard the betrayal or adminition of the basic rights of minorities at the hands of majority. Public Interest Lawyers provide the much needed legal representation to bring these claims to the court's attention, and to prosecute them with effectiveness and energy.

In recent years, Public Interest lawyers and social organizations have even asked the courts to consider new kinds of problems, and the new approaches to their solution when there is
a partial failure on the part of the executive or legislative government institutions to do their jobs in a satisfactory and legal way. But when the courts take the charge on these questions and address specific charges that other government branches have behaved contrary to statutory or constitutional demands, they are doing what courts are supposed to do. If courts decline to hear such claims, that would mean that courts are shirking their constitutional responsibilities. And if courts closed themselves to new kinds of evidence and declined to frame new kinds of relief that would help them best to resolve these matters, then they would not be effective adjudicators.

Besides serving their clients, it is the duty of Public Interest Lawyers to approach the poor persons through representative groups and through attempting to achieve changes in legal rules and in the behaviour of judges and governmental agencies. Public Interest Lawyer has to assume various roles as that of litigator, negotiator, policy researcher, public relations man and community organizer man.

I. CONCLUDING OBSERVATIONS

Emergence of Public Interest Litigation is a necessary rejection of laissez faire notions of traditional jurisprudence in order to cope up with new important rights which are 'diffuse' and meta-individual.

After analysing the trend, it appears that the strategy of
giving the poor and oppressed meaningful 'access to justice' is not, as it is United States, to provide funds so that they may participate in the traditional system on an equal footing. Rather, strategy of Public Interest Litigation is to change the system itself. Therefore, social activists who come voluntarily before the courts or simply write a letter espousing the cause of the poor, their petition or letter, whatever the case may be, can be accepted as writ petition, and the court itself shoulders much of the burden of establishing the facts through appointment of commissions of inquiry, and whenever practicable, the case will result in grant of relief, bypassing the time-consuming and expensive adversary litigation based on determination of liability for past acts. The goal of Public Interest Litigation is the creation of a system which will promise legal relief without back-breaking formality and costly procedure.

Whenever confronted with social injustice, there is continuing judicial willingness to side-track the fundamental principles of traditional Anglo-American legal system which requires - that plaintiffs must have personal stake at issue, that judges are the passive arbiters of facts produced by the opposing parties to the dispute, that 'relief' must germinate from 'right'.

The categorisation of non-adversarial litigation into two types gets blurred in practice. For instance, the Supreme Court has not clearly distinguished between the different functions of the commissions. In Bandhau Mukti Morcha case the
second commission, which was led by Patwardhan of Indian Institute of Technology, was directed by the court to conduct its investigations "with a view to putting forward a scheme for improving the living conditions for workers working in the stone queries." This direction, issued by the Court combined with its members without legal training, and the description of the Commission as 'socio-legal', suggests that commission in this case was serving the first function, i.e., of proposing a remedial scheme. However, the commission was appointed before a finding of legal liability upon which remedial scheme could be built. Thus, the court was not able to make full use of recommendations of Patwardhan Commission. For instance, the report presumed that the quarry operators were obliged to provide certain basic housing facilities under the Inter-State-Migrant-Workmen (Regulation and Abolition) Act, 1970. Yet, in its judgement, the court concluded that the Patwardhan report did not provide enough information to enable the court to determine whether the provisions of either Act were applicable to any particular quarry. So the Court appointed a third commission to investigate this issue, and also other issues, further.

Another problem brought to light by Patwardhan Commission is - when Commission uses fact-finding techniques rooted in areas other than the law. Now to determine the question - whether the ------------------------------------------

122. Supra note 12, at p. 809.
123. Ibid. at p. 831.
quarry workers were bonded labourers - the Commission conducted confidential interviews of statistical sample of workers and reported the results also. The respondents all the time strongly complained that this procedure was violative of 'principles of natural justice' as they were not given notice of these interviews.

It is humbly submitted that such commissions can indeed function almost as arbitrators. And even if the use of commissions does not always lead to a collaborative solution, still commission can offer, albeit non-traditional, viable alternative to the burdensome-traditional adjudication-with all its limitations.

In past, extensive litigation regarding bonded labourers has shown that given the normal judicial procedure the 'proof problems' can be intractable. For instance, in Mukesh Advani v State of M.P., one District Judge appointed as a Commissioner reported, "when the workman is taken into confidence, and is assured of protection, he gives ut a story of harassment and torture by the quarry contractor, but when officially questioned, he is afraid of making necessary disclosures".

Thus, only viable option can be process of confidential interviews as used by the Commission in Bandhua Mukti Morcha case. Then the use of Commissions in that case may be seen as a

124.(1985) 3 SCC 162.
125.Ibid.
kind of 'approximate justice' in which the labourer receives release and rehabilitation on the basis of non-traditional procedures after determining his status, and state bears the burden. No financial or criminal liability attaches to the private employer as a result of an investigation which denies him the right to participate in the process. Thus, the disparity between the procedures used by 'socio-legal' commissions and those normally relied upon in adjudication, can be explained because the result is different than traditional adjudication.

It is humbly submitted that Justice Powell's concern about the expansion of the judicial power, however, neglects the fact that such expansion is but one facet of a general expansion of governmental power in modern times - of all branches of government. The ever-increasing power of the legislative and executive branches justify and, indeed, necessitates a corresponding broadening of the judicial power in order to maintain a balanced system. The growth of the modern welfare government and the parallel growth of socio-economic interdependence of groups and classes of citizens call for a corresponding growth of the task of 'judicial protection'. A democratic government is one in which citizens can have access to justice to vindicate legal rights - both old and new, individual and meta-individual. The democratic government is one in which societal, including governmental, legal duties can be judicially enforced. Judicial protection is what assures the 'rule of law', and also democratic government is one in which
people have a sense of participation. Of course, judges can
themselves become bureaucrats, insulated from society. However,
the very fact that they are daily called to adjudicate the
concrete cases and controversies, is a powerful antidote against
that danger. And Public Interest Litigations no less litigation —
no less case and controversy — than traditional two-party system.
Thus Public Interest Litigation is the only safeguard of legal
rights ever designed.

Regarding the applicability of principle of audi et
alteram partem — the right to be heard, it is humbly submitted
that in view of the changed circumstances, the principle must be
reconsidered. However, reconsideration here does not mean
abandonment, but rather reconsideration means 'adaptation' in
view of changed circumstances. The old principles of merely
individualistic procedural fairness must be transformed in order
to be adapted to the new meta-individual rights. In other words,
an individualistic vision of procedural due process should give
way to, or be integrated with, a social or collective concept of
due process because this is the only possible way to assure
judicial vindication of the new rights. Hence, the right to be heard
must be preserved, and guaranteed — not necessarily to all
the individual members of the class, because it is beset with
practical difficulties of burdening the ideological plaintiff
with heavy costs of giving notice to all the members of the
class, but notice requirement may be confined to the 'ideological
plaintiff' only. And when ideological plaintiff is adequately
represented, shall be allowed to act for the entire class inclusive of those who are not given 'notice', or say not 'heard' in strict sense of the term. The fact is that these members of the class will certainly have better fortune if representative litigation is allowed, than if it is not, because as a rule, they would simply be unable to go to court individually. Indeed, now the only litigation procedure capable of protecting the interests of class members is Public Interest Litigation, and if it is rejected by the use of 'due process' concept, it is sad and bad.

Today, under American doctrine, plaintiff has to prove a pervasive illegal conduct which is often based on heavy evidentiary struggle, or when relief is to be obtained from parties who owe no legal duty towards plaintiff, then it is very difficult to obtain remedial relief.

On the other hand, India Supreme Court's trend discernible in late cases shows such disconnection of 'relief' from the proof of past misconduct or clear legal duty to lead to conclusion that in India, unlike in United States, 'right' and 'relief' have become thoroughly disconnected. Court would order immediate relief without preliminary finding of probability of success on merits is itself a distinguishing feature of Public Interest cases. Seeing the seriousness, shocking, wide-ranging effects of alleged misconduct or inaction, Court has ordered sweeping affirmative relief. So much so, that sometimes the directions issued by the Court go much beyond the relief
necessary to be given seeing the injury caused. Many a times relief contains everything but the original relief asked by the plaintiff. This trend of the apex Court in India is demonstrably a divergence from the traditional model.

The innovative trend of the Indian Supreme Court in giving 'relief' is even more striking than its new approach to doctrine of 'locus standi' and 'non-adversial litigation'. Sameway, innovative is the trend of the Court in declaring the 'rights' without giving effective 'relief'. Both these aspects - 'giving relief with out declaring rights' and 'declaring rights without giving any meaningful relief' - are perhaps the result of court's experimentation of its new function. If the court feels that the social injustice demonstrated in a particular case creates a powerful imperative for immediate, concrete action, and understands that the executive will also share that sense of imperative in removing the glaring injustice, then it will issue specific remedial 'relief' discarding technical, out-dated, traditional, procedural formalities.