IV. Problems and Remedies in Utilisation of the Legal Device of Representative Suits: Conclusions.

I have shown in my thesis the effective use of this device of class action in the U.S which shares the same legal heritage which we do. I have also pointed out the utility of this device and considering the risks, precautions to be taken in its utilisation. We have seen various categories of representative suits in India. Their use is limited and not many cases are found in the areas other than religious rights or rights of people belonging to particular castes or communities and its limited use for public rights like village pathways, fisheries, ghats, wells etc. by showing special damage.

To quote from the Bhagwati Committee Report:

A sample of the main cases in this area (of representative suits) has shown that most of the suits in this area have been used in the matter of religious rights, caste rights and in respect of the group interests of the privileged. This rule has not been used by the poorer sections of the community in order to fight for their rights. The sample of High-Court cases looked at from 1882 show a considerably clear pattern so far as that is concerned.

I have also shown with the help of Bhopal case study the potential of this device in our legal
system for access to justice by the masses. The intention of the legislature and also the approach of the judiciary in the cases that came before it seems to be liberal.

It is now I turn to the final questions of what are the reasons or problems which result in limited use of such a device in India and also remedies for the same. It should be kept in mind that our task in this respect is going to be more difficult as representative suits have to be filed and tried in lower courts and the quality of judicial process at the lower Courts in India needs to be improved a lot generally.

Firstly, the problem relates to the need of overall social and legal reform oriented towards social, political and economic justice in our country. Representative suits should also be made part of our legal aid movement.

I would like to point out 4 dimensions of this problem which Harvard Law Professor Arthur Taylor Von Mehren gives. He says the quality of judicial process in any given society depends on 4 interrelated elements:

1. the position, sociologically considered of law and of the legal profession in the given
society,
(2) the approaches and habits of thought that are exhibited and encouraged by the Courts in their work,
(3) the quality of legal education and the kind of man and mind it produces
(4) the opportunities, both in terms of service and of economic reward, open to members of the legal profession. We need to keep these elements of judicial process given by Arthur Taylor in mind when we talk about legal reform, particularly because his observations are in the comparative Indian and American judicial process context.

Sathe S.P. points out the following reasons for poor access to justice and law in India:
(1) Ignorance of law
(2) Poverty
(3) Absence of legal services
(4) Malfunctioning of the system of justice and
(5) Lack of public participation in the system of justice.

He suggests following main remedies:
(1) Effective legal aid movement aimed at legal mobilisation meaning creating greater awareness of the law and mobilising oppressed groups towards
the use of law for the vindication of their grievances.

(2) Socially committed Bar

(3) Setting up of an autonomous corporation for funding the legal aid effort with the support of the Government and other Public Trusts.\(^3\)

It is observed by Justice Bhagwati Committee:

The reason for low importance of representative suits is partly due to the fact that the poor sections of people are eclipsed by the fact that there are so many delays in the Indian legal system that a civil suit is not really a very effective remedy. Be that as it may in respect of the final outcome of a case, interim equitable remedies can still be effective. The main problem in respect of the group rights approach has been the simple lack of legal mobilization amongst the poor and depressed classes. They possess neither the resources nor the skills nor the institutional support or the knowhow to put together an effective litigation strategy. The pathology of the use of Order 1, Rule 8 brings us back to the problem of legal mobilisation and institutional viability.\(^3\)A

Secondly, and this is specifically in respect of this device. We have seen that PIL has been carved out of our Constitution by very creative and innovative lawyering, social thinking and above
all judicial interpretation. All these are equally necessary for making representative suits effective, particularly when we do not have a lot of precedent to look for other than American class action suits. In the U.S. judges have played a tremendously active role in making class actions effective. The judges responsible for dealing with litigation arising out of disasters such as Buffalo Creek in West Virginia, Three mile island in Pennsylvania, MCM Grand Hotel Fire in Las Vegas, Nevada, the Hyatt Skywalk Litigation in Kansas City, the Beverly Hills Supper Club Fire, Southgate Kentucky, Agent Orange Litigation, Bendectin Litigation, the "shoot down" of Korean Airlines Flight, 1007 were not given at the outset a concrete formula for the claims of liability and damage, and yet in each case the system was able to deal with the problems forced upon it.

Again, if we are convinced about the utility of this legal device we must make every effort to make best utilisation of the same. Lack of precedences can be overcome by innovation and creativity. Lord Denning has said:

"What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument
does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.  

J. Bhagwati in his Law as Instrument of Change observes in respect of social action litigation:

"This is the only way in which we shall be able to bring about revolution through law. We have a long way to go. We have to wipe the tears from the eyes of the starving millions of our country. We have to redeem the pledge we gave then when we enacted our Constitution. This pledge has to be redeemed through the process of law—law which is not static but dynamic law which does not stand still but moves on-law which draws its substance from the past and yet looks out into the future, law which is ready to march forward in the services of the weaker sections of the community: law of which J. Cardozo said: "The inn that shelters for the night is not the journey's end — law like a traveller must be ready for tomorrow".

Thirdly, a number of lessons can also be learnt from the American class actions and civil procedure. Provisions and their use like pretrial conference and discovery, investigation and research with the use of paralegals, law clerks by the
Judges, reliance on written arguments, division of labour, specialisation and collaboration amongst the lawyers, continuing education, permission to advertise, finance to the litigation and contingency fees or some such incentive to the lawyers, use of experts in other fields, punitive damages in appropriate cases, appointment of lead counsels are also other specific measures which would give a boost to the use of representative suits. Initiative is needed from the legislature as well for these purposes.  

Fourthly, we may even think of assigning such suits to special divisions of Civil Courts so that certain Judges can acquire legal and administrative capability in respect of these suits over a period of time. It should be borne in mind that the 1976 amendment gives power to the court to direct filing (converting) and conducting a suit as a representative suit. The courts can periodically take an inspection of the cases filed to see if there are types of cases which fit in the criterion of "similar interest" if not in respect of all the issues at least in respect of some issues as has been done in the U.S. The courts can create sub-classes. The courts may have to use their inherent powers for this purpose.
Lastly, while dealing with the topic of Public Interest Litigation, I have already pointed out that in fact representative suits and PIL are the two sides of the same coin as far as their aims and effects are concerned. The problem seems to be that our law students, the Bar, the Bench and even the legal scholars have not somehow given much thought to the utilisation of the legal device of representative suits as another means for access to justice. In my research, I have not come across any article forget about a book devoted to representative suits in India. With everyone now realising the importance of PIL this concept is gaining reference by some jurists. The first need therefore is to create awareness amongst our people, social activists and of course with our law students, the Bar and the Bench about the legal device of representative suits. I hope my thesis will serve as beginning of this effort.
Foot Notes on Problems and Remedies in Utilisation of the legal Device of Representative Suits: conclusions.


(1A) For this purpose, see Rajiv Dhavan's report in Supra foot-note 1, which deals with this overall problem with special emphasis on legal aid and Public Interest Litigation.


(3A) Supra foot note 1.

(4) Prof. Cappalli's Article Supra.

(5) Upendra Baxi: Inconvenient Forum and Convenient

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Catastrophe: The Bhopal Case, Memorandum of individual plaintiffs in opposition to Union Carbide Corporations's Motion to dismiss prepared by members of the Plaintiffs' Executive Committee: (1986), The Indian Law Institute, New Delhi.

Also see S.P. Sathe "Legal Activism, Social Action and Government Lawlessness" Cochin University Law Review at p. 380, where the author stresses the need for a bar committed to legal activism through social change.


(7) P.N. Bhagwati, Law as an Instrument of Social Change.

(8) See generally the affidavit filed by Prof. Marc Galanter in Union Carbide case supra 634 F.Supp 842 (S.D.N.Y.) 1986.

(9) See discussion of American class action suits Supra.

(10) See for instance, Report prepared by Rajiv
Dhavan for legal Aid Supra, Ch.IV. PIL: Traditional Methods and some problems. Also "PIL and Legal Aid" Bhagwati Committee's report on National Judicature (1977), page 61, J.Krishna Iyer in AIR 1981 SC 298 at 317.
Appendix

(1) Sample form of Application u/o 1, R.8, C.P.C.

Civil Suit No. of

In the Court of the Civil Judge at

A,B,C,D,E,F, .... Plaintiffs/Applicants

V/s.

G,H,I,J,K,L. .... Defendants/Opponents

Herein the respectful application of the Plaintiffs/Applicants:

1. The Plaintiffs are the residents of the Public Street, namely _________ in the town of_________ within the District of _________ and there are about 1,000 people residing on the said street.

2. That the defendants have on _______ encroached on a portion of the above mentioned public street
and have obstructed the free passage of the plaintiffs and other residents of the locality through the above public street.

3. That the Plaintiff therefore intend to file the suit for declaration of Public Pathway, for removal of obstruction by the defendants and for restraining the defendants from interfering with the Plaintiffs right of public way through the above mentioned public street as a representative suit of all the persons residing in the locality for foundation of their common right.

In the circumstances, the Plaintiffs pray that your Honour may be pleased to grant the Plaintiffs the necessary permission to sue the Defendants on behalf of and/or for the benefit of all the persons of the locality as per the details of the accompanying plaint.

Place:

Date:

Sd.

Plaintiffs.
VERIFICATION

We the Plaintiffs abovenamed do hereby solemnly verify that the contents of the application are true and correct as per our own knowledge, belief, information and the legal advice given to us and which we believe to be true and correct.

Place:

Sd.

Date:

Plaintiffs.

(2) Federal Rule 23 of the United States Federal

(a) Prerequisites to a Class Action.
One or more members of a class may sue or be sued
as representative parties on behalf of all only
if
(1) the class is so numerous that joinder of all
members is impracticable,
(2) there are questions of law or fact common to
the class, (3) the claims or defenses of the
representative parties are typical of the claims
or defenses of the class, and (4) the representative
parties will fairly and adequately protect the
interests of the class.

(b) Class Actions Maintainable.
An action may be maintained as a class action if
the prerequisites of subdivision (a) are satisfied,
and in addition:
(1) The prosecution of separate actions by or
against individual members of the class would
create a risk of
(A) inconsistent or varying adjudications with
respect to individual members of the class which
would establish incompatible standards of conduct
for the party opposing the class, or
(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(C) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to
be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgement; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgement, whether favourable or not, will include all; (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgement in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favourable to the class,
shall include and describe those whom the court finds to be members of the class. The Judgement in an action maintained as a class action under subdivision (b)(3), whether or not favourable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions.
In the conduct of actions to which this rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;
(2) requiring, for the protection of the members of the class or otherwise for fair conduct of the action, that notice be given in such manner as
the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgement, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;
(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;
(5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or compromise.
class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.