‘CONTINUING MANDAMUS’ – A JUDICIAL INNOVATION TO BRIDGE THE RIGHT-REMEDY GAP

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The sanctity and credibility of the democratic legal system is intrinsically linked to the enforceability of rights, a task typically adjudged to the judiciary. However, the constitutional court’s image as the defender of rights has come into scrutiny due to its incapability of ensuring government compliance, especially in cases requiring enforcement of positive state duties. Socio-economic rights, for instance, propose a major challenge to the judicial and legal system where coercing state action is at times an insurmountable task. The Indian Supreme Court, tip-toeing around the constitutional separation of powers, has devised the novel writ remedy of ‘continuing mandamus’ to prevent the failure of constitutional promises. Instead of passing a final judgment that would end the litigation, it keeps the case pending, entering into a dialogue with the political and administrative wing, prodding to alter government action, or inaction. This paper discusses the Supreme Court’s procedural innovation in the backdrop of the enforcement conundrum. Locating the need for the remedy in constitutional and rights theory, the paper traces judicial trends, and extensively reviews the use of the remedy by the Indian Supreme Court over the years. The authors assess the effectiveness of how the remedy is being administered, identifying reasons for the success of some interventions, vis-à-vis others, trying to locate the shortcomings and roadblocks to the court’s approach.

I. INTRODUCTION

The transformation of the Supreme Court of India into a Supreme Court for Indians,1 has been marked with remarkable strides towards bridging the right-remedy gap, a major cause of concern for constitutional scholars. In the context of Social Action Litigation, Upendra Baxi remarked that the ‘fundamental issue of how the Court should make the state and its agencies fully liable for deprivations or denials of fundamental rights still remains to be

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1 See Upendra Baxi, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India 107, 4 Third World Legal Studies (1985) (This refers to the people and right-centric approach taken by the Supreme Court through its engagement in social action litigation).
authoritatively answered.\textsuperscript{2} The paper traces judicial trends thereafter, arguing that with the phasing out of what Baxi famously identifies as ‘post-emergency judicial populism’,\textsuperscript{3} there have been multifarious attempts by the appellate judiciary to give fuller existential meaning to our rights. After the organic inclusion of a relaxed \textit{locus standi} in public interest cases, and then the trend of significant interim orders with delayed decisions, the court commonly used mandatory orders and other tools.\textsuperscript{4} We then see remedial jurisprudence reach its crescendo in what is now called the ‘continuing mandamus’ – a form of adjudication that enables the SC to ensure and supervise the implementation of its directions.\textsuperscript{5} This is a process by which the constitutional court instead of delivering a conclusive verdict, keeps the litigation ongoing, giving orders from time to time, monitoring compliance through regular hearings. The Government and administrative bodies are asked to submit affidavits with regard to compliance status with justifications for delays and inaction. The court in many ways, as is discussed throughout the paper, becomes the nodal point for change, facilitating and coordinating action to ensure rights-realization. It is a remedy crafted to jettison uncertainties of constitutional adjudication by allowing the court to oversee, intervene periodically and ensure the fulfilment of the particular socio-economic right, to remedy administrative recalcitrance blocking realization of rights. A full-blown manifestation of ‘creeping jurisdiction’,\textsuperscript{6} the court here takes on the administrative role that political science text books would ordinarily have recognised as typical of the executive. We have attempted to contextualise the fashioning of the remedy and critically evaluate its use, functioning, and standing in constitutional jurisprudence.

The first part of this paper delves into the inevitable right-remedy gap in constitutional law, contextualising the jurisprudential premise of the writ remedy, whereby we make a case for constitutional change, and justify expansion of the law of remedies. The second part traces the trajectory of adjudicatory trends that led to the innovation of ‘continuing mandamus’, from prolonged determination with elaborate interim orders to mandatory orders and directions, and then the reporting back of the status of implementation. The third part assesses the nature of the remedy in the context of different areas where it has been widely used, how it has succeeded or failed to fashion change, especially in as much as it has been able to address administrative

\textsuperscript{2} \textit{Id.}, 42.
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\textsuperscript{3} The court’s intervention in social litigation has increased manifold after the Emergency, with PILs gaining momentum, and the Supreme Court’s decisions becoming bolder and seemingly more obtrusive. \textit{See} Upendra Baxi, \textit{Taking suffering seriously: Social action litigation in the Supreme Court of India}, Third World Legal Studies 107 (1985).
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\textsuperscript{5} \textit{Id.}
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\textsuperscript{6} A term coined by Upendra Baxi as he describes the “taking over the direction of administration in a particular arena from the executive.” \textit{See} 29 I.C.J. Rev. 37 1982.
recalcitrance, particularly in areas of environmental protection, food security, investigative independence and police reforms, human rights and other fields. The fourth part analyses to what extent have these attempts failed while tackling the criticism of no effective implementation, despite usurpation of administrative powers. The authors hypothesise that it is the nature of orders that have been responsible for the failure in certain aspects, not the remedy itself. In the last part, we argue that the ultimate issue of implementation, even under such a framework of judicial intervention, can best be resolved not through some procedural or constitutional innovation, rather, through effective use of existing contempt jurisdiction that the courts have been so reluctant to exercise in social litigation. The limitations and the possible apprehensions to such use, we illustrate, could be addressed through expansion of the scope of such jurisdiction and its creative application.

II. THE RIGHT-REMEDY GAP – A BATTLE FOR FRUITIFICATION OF RIGHTS

As per Blackstone’s popular formulation it is “a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded”7 While seemingly a reiteration of a basic premise of law, in practical terms, this may be impossible to uphold, especially when it comes to enforcement of rights against the State. Although there might be consensus on the ideal of vindication of every right in an effective remedy,8 some have acknowledged a right-remedy gap to be inevitable in constitutional law.9

The Indian Supreme Court has, however, made valiant attempts at bridging this unfortunate gap through non-adversarial litigation. Their adjudicatory leadership has often been seen as broadening the scope of remedies to give better effect to the maxim restitution in integrum or restoration to original condition/position.10 Described as a corollary to representative standing, the courts take on an active role in investigation, removing barriers to access to justice.11

8 Walter E. Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harvard Law Review 8 (1972); See Marbury v. Madison, 2 L Ed 60 : 5 US (1 Cr) 137, 163 (1803) (The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right); Akhil R. Amar, Of Sovereignty and Federalism, 96 Yale L. J. 1425, 1427 (1987) (Governments acting unconstitutionally must in some way undo the violation by ensuring that victims are made whole).
9 Id.

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While noting the limitations of American Constitutional Courts to give a sweeping remedial relief (if the plaintiff is unable to show massive and pervasive illegal conduct or if the necessary relief is available only from parties who owe no duty to the plaintiff), Clark Cunningham, through a study of cases in the Indian Supreme Court, observes, how unlike in the US, right and remedy in India had become ‘thoroughly disconnected’. The judiciary had, through practise fashioned adjudication of even ‘remedies without rights’ and ‘rights without remedies’, toying with the traditional understanding of rights and remedies.

The former category of cases, having kick-started the right-remedy disconnect, refers to the practice of issuing interim orders with detailed directions, while delaying the ultimate decision. Remedies were being granted much before a conclusive determination of rights, in contrast to the traditional model of injunctive relief that was limited to preserving status quo pending final decision. The landmark case in this regard is Hussainara Khatoon v. State of Bihar, where although the case remained pending before the Supreme Court for more than 15 years, as many as seven orders were passed, with detailed directions with regard to release of under trial prisoners languishing in jails for want of expeditious disposal of pending cases. The trend started in this case was similarly adopted in public interest cases, with the court meting out sweeping affirmative interim relief addressing a pressing need, pushed the final decision as to factual issues and liability determination to a much later date. However, a closer analysis would show that in most such cases, the relief has been to compensate for grave and shocking effects of the alleged misconduct.

There are then multiple instances where the courts had declared the rights but no remedy was given, constituting the second categorization of ‘rights without remedies’. The court here, despite recognising the rights, refrained from further issuing directions, which could have had a substantial


bearing on budgetary resources of the State, stressing on the prerogative of the executive to determine the manner of use of public resources.19

Some reluctance to exceed, what could be argued to be a conservative limitation of its mandate, and toe-tipping around the doctrine of separation of powers was seen in a few earlier decisions as well. In *U.R. Sharma case*, the court directed the High Court not to require continuing reports from the State to ascertain whether any action was taken on the road, the construction of which had been held to be a part of the right to life under Article 21.20 In *State of H.P. v. Parent of a Student of Medical College*,21 the Supreme Court held that the Division Bench erred in directing the filing of an affidavit within 6 weeks, setting out the action taken by the State to implement the recommendations of the Anti-Ragging Committee constituted by the State at the direction of the court.22

Krishna Mahajan, his work being a manifestation of popular discontent at these judgments, had argued – “If the court actually starts monitoring the implementation of the poor’s right spelt out by it then there is some hope of its credibility and respect for its judges … Why should people come to judges at all if all they are to get only toothless fundamental right…?”23 Other scholars also add to the consensus on enforceability of rights being crucial to the court’s credibility and public perception.24 Even otherwise, remediation of violated rights is grounded as a fundamental tenet of constitutional values, embodied, even in the Indian Constitution as a ‘right to constitutional remedies’ in Article 32. The right to an effective remedy is an obligation placed upon nations under international law as well,25 making judicial action obligatory.

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19 Id., at 24.
22 Id., 5 (The reasoning centred on the recommendation in the report of the Anti-ragging committee that required the Government to initiate legislation against ragging. It could thus be argued that the court was wary of interfering in legislation-making and not per-se inquiring as to steps taken for implementation).
24 S.K. Agarwala, Public Interest Litigation in India: A Critique 36 (1985) (credibility of the court “depends wholly on the conviction that the relief granted by the Court is enforceable” and that if it issues directions which are not enforceable, it does not act “within its judicial role”).
25 See The International Covenant on Civil and Political Rights, 1966 (‘ICCPR’), Art. 2(3); See also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (‘CAT’), Art. 14; The Convention on the Elimination of All Forms of Discrimination against Women, 1979 (‘CEDAW’), Art. 2; The Convention on the Elimination of All Forms of Racial Discrimination, 1965 (‘CERD’), Art. 6; The European Convention on Human Rights, 1950 (ECHR), Art. 13 (‘everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity’); The EU Charter of Fundamental Rights, 2000, Art. 47 (‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article').
The break-down of the strict right-remedy relation in private law favours the oppressed or victimised in cases where the courts are willing to give immediate remediation to sufferers without determination of liability. This liberalization is however disastrous for the rule of law when the court makes peace with recognising rights without any remedies. It has been argued that both aspects of the detachment of rights and remedies form part of constitutional law.\(^{26}\) However, the former gamut of cases, i.e., ‘remedies without rights’ need not be justified based on the detachment of rights and remedies, as the court certainly takes into account the rights of the beneficiaries of its orders, it is only the attribution of fault that is mostly postponed. This should, rather, be seen only as a liberal construct of the traditional interim relief, peculiar of social litigation. As Chayes also points out, the attenuation of the tight linkage between rights and remedy is a distinguishing characteristic of public law litigation, where the dominant form of relief is prospective and affirmative, rather than compensatory.\(^{27}\) The nature of the cases requires non-traditional forms of reliefs, as is evident even from a study of Indian remedial trends.\(^{28}\) Pre-occupation with the right-remedy linkage acts as a barrier to developing any other basis of effective supervision of the court’s remedial discretion.\(^{29}\) The authors argue that the classification of cases that fall into ‘remedies without rights’ involve postponement of fault determination, not abdication thereof. This cannot be used by the higher judiciary to find doctrinal backing for recognizing rights whose fruitification cannot be ensured. Rather than generalizing this as a category of right-remedy attenuation, this should be looked at as expansion of injunctive relief, marking a shift in constitutional adjudication ‘from reparation to reform’.\(^{30}\) ‘Right without remedies’ and ‘remedies without rights’, thus cannot be seen as sides of the same coin, the former being a means of constitutional reform in furtherance of addressing changing nature of threats to constitutional goals, the latter being nothing short of a direct attempt at hollowing constitutional guarantees. To thus say that right-remedy gaps are inevitable is only to acknowledge that “the law of remedies, as a body of doctrine not generalizable across all enforcement

\(^{26}\) Cunningham, *supra* note 11.


\(^{30}\) See John C. Jeffries, *The Right Remedy Gap in Constitutional Law*, 109 Yale L.J. 87 1999-2000, available at http://www.law.virginia.edu/pdf/faculty/hein/jeffries/109yale_lj87_1999.pdf (Last visited on April 28, 2017) (The fighting issue in structural reform cases is not whether a court should enjoin constitutional violations, but how far a court should go in regulating structures and practices that are not unconstitutional. The justification for such regulation is that certain structures and practices, though not in themselves unconstitutional, contribute to an environment of constitutional risk. To the extent that injunctive remedies address antecedent matters that are only strategically and probabilistically related to constitutional violations, they may be said to have gone beyond the underlying rights).
mechanisms, exists." This cannot be extended to justify the inevitability of mere recognition of rights, incapable of enforcement.

A right to constitutional remedy is what legitimises writ courts in the democratic set-up. Even practice of selective escapism is antithetical to constitutional spirit. While executive recalcitrance and governmental reluctance are realities that are difficult to eliminate; for the highest judiciary to bow down to these in the name of selective use of the separation of powers, would defeat the purpose of the system of ‘checks and balances’. The judiciary, post-emergency, had eased into its role, and save a few exceptions here and there, has been instrumental in aiding the development of a whole new dimension of ensuring governmental accountability. We see that the courts have, save exceptions, mostly lived up to the tag of the ‘sentinel of the qui vive’, ensuring the greatest fruitification of the writ remedy in recent times. We look at these developments by tracing the origin and use of the newly fashioned writ of ‘continuing mandamus’, a tool devised to ensure enforcement of directions, a strike at the misfortune of ‘rights without remedies’.

### III. THE EVOLUTION OF ‘CONTINUING MANDAMUS’ – ADDRESSING THE TRAGEDY OF SOCIO-ECONOMIC RIGHTS IN REMEDIAL JURISPRUDENCE

The misfortune of ‘rights without remedies’, as analysed in the previous part, has not gone unheeded either by constitutional scholars, nor as we see, by the judiciary, both in India and in other similar democratic set-ups. Given the increasingly problematic limitations of declaratory, one-shot remedies, it became imperative to craft new remedies tailored to be immune to the limitations of the traditional approaches, for better fructification of rights. Given the wide remedial discretion accorded to judges in constitutional set-ups, the expansion of right remedies has been welcomed as a necessity. While an extensive comparative analysis is beyond the scope of this paper, it is worth

31 Id., 113.
32 State of Madras v. V.G. Row, AIR 1952 SC 196 (Characterising the activist role of the court, it is always ‘alert’ of constitutional violations).
33 Fose v. Minister of Safety and Security, (1997) 3 SA 786 (CC), at 19 & 69 (Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.... Particularly in a country where so few have the means to enforce their legal rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.);
noticing that similar tools have been adopted by constitutional courts in both, South Africa and Canada, in combating executive inaction, limitations of separation of powers, and the insufficiency of existing remedies, to effectuate constitutional justice.34

While traditionally, a court order was supposed to be declaratory in nature, identifying a right or violation thereof, in multiple jurisdictions, the concept of ‘mandatory orders’, a step beyond mere declaratory relief, is not a recent development, having been used fairly often to ensure obedience of the positive obligations on the government under the constitution. ‘Declaratory’ and ‘mandatory’ have been described as two facets of an order.35 While declaratory judgments are without consequential directions to state authorities, and are based in a good faith assumption of executive compliance, mandatory orders are premised on the general apathy displayed by the executive to move to action within a reasonable time period, with detailed directions to be followed by the government.36 However, the increasing failure of both mandatory and declaratory reliefs has led courts in multiple jurisdictions to fashion newer remedies including the retention of jurisdiction over a case to ensure compliance. This dialogic-form of adjudication has evolved, as we see, somewhat similarly in these constitutional set-ups, albeit peculiarities rooted in differences in historical and political experiences.

In South Africa for instance, even in the pre-constitutional era, courts could give mandatory orders to the government, although limited as a remedy in administrative law, and these were called ‘mandatory interdicts’.37 The Constitutional Court had made several mandatory orders requiring the provincial Government to perform specific duties in furtherance of realisation of rights concerned.38 It was with the court’s reluctance to monitor compliance

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34 The ‘structural interdict’ in SA and the Charter remedy in Canada, See Kent Roach & Geoff Bundlender, Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable, 122 S. AFRICAN L.J. 325 (2005), pp. 325-351.
38 For instance, Premier v. Assn. of State-Aided Schools, (1999) 2 SA 91 (CC) (mandatory orders requiring a provincial government to resume payments of subsidies to certain schools); August v. Electoral Commission, (1999) 3 SA 1 (CC) (directing the Electoral Commission to make the necessary arrangements to enable prisoners to vote); and Dawood v. Minister of Home Affairs (2000) 3 SA 936 (CC); Shalabi v. Minister of Home Affairs, 2000 ZACC 8;
with such orders that the dilemma of failure by successful litigants to benefit from constitutional litigation emerged, portraying rights as hollow and illusory.39 This brought in the need for the ‘structural interdict’, which required “the violator to rectify the breach of fundamental rights under court supervision”,40 enabling litigants to follow up on declaratory or mandatory orders.41 It has been segregated into five elements,42 starting with a declaration of infringement by the government then mandating compliance with constitutional responsibilities requiring the submission of a comprehensive report to the court, with the action plan for remedying the violation.43 This is followed by judicial evaluation of the report to ensure the effectiveness of the proposed remedial plan, which eventually culminates into a final order after integrating the government plan and any court mandated amendments.44 The failure of the government to adhere to this plan would then amount to contempt of court.45 Through such structured exercise of supervisory jurisdiction, a dynamic dialogue between the court and other branches of the government on the intricacies of implementation may be initiated.46 This mechanism thus permits the courts to refrain from political action, while at the same time, provides for ample administrative flexibility.

First acknowledged as a valid remedy in 1998, the Constitutional Court of South Africa affirmed that a litigant could obtain a court order directing the government body in question to take steps to eliminate the violation and also to report back to the court.47 The remedy has thereafter been used, although, sparingly, by High Courts48 and at times even by the Constitutional

Thomas v. Minister of Home Affairs, (2000) 3 SA 936 (CC) (ordering immigration officials to exercise their discretion in a manner that takes account of the constitutional rights involved).


Iain Currie & Johan de Waal, Remedies in The Bill of Rights Handbook 217 (5th ed., 2005); See also Richard Moultrie, A Structural Interdict as the Appropriate Remedy for the Constitutional Infringement, 7–8 (December, 2006) (unpublished manuscript developed for Legal Resources Centre’s Constitutional Litigation Unit, on file with the New York University Law Review) (describing basic characteristics of structural interdicts).


Currie & de Waal, supra note 40, at 217–18.

Id.

Id., 218.

Marius Pieterse, Coming to Terms with Judicial Enforcement of Socio-economic Rights, 20 SAJHR 383, 414 (2004) (Often, even interested third parties may submit comments on the proposed plan, requiring the government to reply to those comments); Moultrie, supra note 40, 8.


Ebadolahi, supra note 41 (High Courts have used structural interdicts in cases involving both socio-economic rights and even other cases involving ‘public interest’ in a broader sense. For the kinds of cases that have involved such supervision).
The courts’ reluctance to award structural interdicts has been severely criticised, showing popular support for such remedy.

The rights’ struggle in Canada was a little different, given the hurdle of the immunity of the crown from injunctive relief, that had to be overcome. After the enactment of the Canadian Charter of Rights and Freedoms, there was judicial and scholarly support for subjecting the Crown to mandatory relief. Despite the establishment of the validity of such injunctive relief, general declarations were preferred, with the faith that governments would comply in good faith with general declarations of constitutional entitlement. However, soon the limitations of declaratory orders, such as ‘vagueness, inability to monitor compliance an ensuing need for subsequent litigation to ensure compliance’ becoming more and more apparent, and recurrent administrative default, marked a change in trend. With the motto that systematic flaws require systematic remedies, Canadian law of remedies saw massive expansion and innovation. The ‘suspended declaration of invalidity’, a novel remedy by which the court makes space for legislative response, is characterised by the

49 August v. Electoral Commission, (1999) 3 SA 1 (CC) (the Court found the Electoral Commission had violated South African prisoners’ right to vote. Conceding the Court lacked the institutional competence to rectify the constitutional wrong, Judge Sachs directed the Electoral Commission to do so itself, requiring the Commission “to furnish an affidavit setting out the manner in which the order will be complied with” within two weeks).

50 Dennis Davis, *Adjudicating the Socio-economic Rights in the South African Constitution: Towards ‘Deference Lite’?*, 22 SAJHR 301, 304–05 (2006) (By failing to issue structural interdicts, “the Court has, in effect, surrendered its power of sanction of government inertia and, as a direct result, litigants have not obtained the shelter or drugs that even a cursory reading of the Constitutional Court decisions in Grootboom and TAC (No. 2] promised in so clear a fashion). 51 See *Proceedings Against the Crown Act, RSO, 1990, Chapter P.27, §14.*


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court declaring that the law declared to be unconstitutional remain in force temporarily, providing the legislature an opportunity to enact new legislation before the unconstitutional legislation is struck down.\(^{57}\) This was first used to prevent a breakdown of the rule of law which might have followed the declaration invalidating most laws of Manitoba, having been enacted only in English and not French.\(^{58}\) The court retained jurisdiction over the case for several years, issuing follow-up judgments, relating both to the timing and extent of the translation process.\(^{59}\) This allows for the government to adopt more comprehensive reforms, with courts retaining jurisdiction and enforcing declaration of invalidity as the ultimate default remedy.\(^{60}\) A broad understanding of judicial review has lent support to retention of jurisdiction over cases, in pursuit of ‘responsive’ and ‘effective remedies’.\(^{61}\) This involves interpreting separation of powers to mean not that courts may never exercise legislative or administrative functions, but rather that it would be inappropriate ‘to leap into the kind of decisions and functions for which its design and expertise are manifestly unsuited’.\(^{62}\)

In India, the use of similar remedies is not only more frequent, but also broader in its scope of application. While the evolutionary trend here too, started with the coming into prominence of the failure of declaratory and injunctive relief, the adoption of the writ of continuing mandamus into the constitutional framework saw much less friction, and in ways more than one, saw an organic inclusion in Public Interest Litigation.\(^{63}\) The Supreme Court of India has for a long time now been giving mandatory orders to the government, and has not limited its powers of adjudication to mere declaratory remedies.\(^{64}\) Recognised as “the last resort for the oppressed and the bewildered”, it is not hindered by traditional concepts of judicial detachment and objectivity in seeking to compel the State to improve socio-economic conditions.\(^{65}\) Justice Bhagwati went as far as to observe that the court may issue “whatever direction, order or writ may be appropriate in a given case for the enforcement of a fundamental right.”\(^{66}\)

\(^{57}\) Id.; Manitoba Language Rights, In re, (1985) 1 SCR 721.


\(^{61}\) Id.


\(^{64}\) Id.

\(^{65}\) UPEENDRA BAXI, THE INDIAN SUPREME COURT AND POLITICS 373 (1980).

While, as noted in the previous section, this has not precluded the court from at times refraining from ensuring fructification, this has been mostly in cases where the court did not think a comprehensive order to be either economically, politically or otherwise apt. These have not however been in recognition of the limitations to the courts’ powers to accord further remedial relief. Rather, with the growth of PILs, we have seen comprehensive mandatory orders become the norm in writ courts. The courts have, more than often, gone beyond merely declaring the existence or violation of a right, and with a view to effectuate realisation, handed down detailed orders and directives, be it preventive, regulatory or even curative in scope. In the landmark Olga Tellis case, for instance, instead of merely recognising a right, the court ordered substitute accommodation and implementation of a Slum Upgradation programme. Even in the CERC case, in addition to recognising the right of workers to healthcare, it handed down far-reaching mandatory orders requiring regulation of factories, documentation of health status and surveys.

As with declaratory orders, even mandatory orders were not wholly successful in combating the reluctance to enforce socio-economic rights. Despite the hue and cry created over the ‘path breaking’ Olga Tellis judgment, the resettlement never took place, and the government has repeatedly flouted the court’s dictum, carrying out evictions without resettlement. A detailed analysis of mandatory orders and their failure in terms of effective compliance and enforcement in social litigation, however, is beyond the scope of this paper, and thus we proceed on the informed premise that enforcement of socio-economic rights, despite there being court directives, remains an issue in the Indian administrative set-up.

The implementation challenge is partly attributable to the absence of a follow-up mechanism, as a mandatory order signifies the end of litigation. Based thus on the understanding that one-time orders are not always adequate to deal with situations of social deprivation, the court is required to

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67 See also Assam Rifles Multi-Purpose Coop. Society Ltd. v. Union of India, (1987) 2 SCC 638 (SC refused to adjudicate on sensitive issues dominated by political concerns); Vincent Panikurlangara v. Union of India, (1987) 2 SCC 165 (SC recognised that matters may arise which involve a multiplicity of complex interests which cannot be appropriately disposed of in court proceedings).

68 Alva, supra note 63.


70 Consumer Education & Research Centre v. Union of India, (1995) 3 SCC 42.

71 Id., 31.


73 Alva, supra note 63, 211.
issue directions from time-to-time to monitor compliance. This is the essential premise of the writ of continuing mandamus. It is a remedy crafted to jettison uncertainties of constitutional adjudication by allowing the court to oversee, intervene periodically and ensure the fulfilment of the particular socio-economic right, to remedy administrative recalcitrance blocking realisation of rights.

One of the first instances of such practise can be seen in Hussainara Khatoon case, discussed below, where relief was given to the prisoners as orders and directives, without issuing dispositive judgments, in order to retain jurisdiction over the matter. This set the trend for series of cases where immediate, significant interim relief was followed by a long deferral of final adjudication, distinguished from traditional preliminary injunctive relief due to both extent of relief and lack of preliminary finding on probability of success. Furthermore, in the Mukti Morcha case, while assessing the inhumane condition of bonded labourers, the SC after ordering detailed assessments, issued remedial orders asking the State to create a Vigilance Commission, to ensure minimum wages, rehabilitation, etc.

It was only in Vineet Narain v. Union of India, that this was called a ‘continuing mandamus’, issued to ensure effective discharge of public duty by the CBI and other governmental agencies, free from political bias and influence. However, the Supreme Court clearly stated that ‘continuing mandamus’, was a new tool forged because of the peculiar needs of this matter.

What followed was expansive use of the remedy not limited only to supervision of investigative agencies, being used mainly for supervision of implementation of socio-economic rights in the fields of environmental protection, rights read into Article 21, rehabilitation, labour exploitation, etc. We see a trajectory of cases where courts issued directions, supervising enforcement and even requiring periodic progress reports. It has now culminated into a full-blown writ remedy that courts have adopted without reservations in cases that involve systematic impairment of collective rights. What is notable that unlike other writ remedies, a continuing mandamus is a procedural innovation, not a substantive one, i.e., it only allows the court an affective basis to ensure that

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75 Alva, supra note 63.
77 Manoj Mate, Two Paths to Judicial Power: The Basis Structure Doctrine and Public Interest Litigation in Comparative Perspective 196, 12 San Diego Int’l L.J. 175, 222 (2010-2011).
78 Cunningham, supra note 11, 512.
81 Id., ¶21.
the fruits of a judgment can be enjoyed by the right-bearers, and realization is not hindered by administrative and/or political recalcitrance. Tip-toe-ing around the constitutional separation of powers, it is a means devised to ensure that the administration of justice translates into tangible benefits, beyond the law reporters. In the next section, we deal with categories of cases where the writ has been used, and courts have monitored compliance, through continuous orders and directions. While in several areas, effective enforcement still remains illusory, significant strides have been made in some fields, and the paper attempts to trace the reasons for the same. We hypothesise that it is not the failure of the remedy, but, rather, the nature of orders, political co-operation and also public reception, to some extent, that determine the fate of such social litigation.

IV. ANALYSIS OF COURT ORDERS IN CONTINUING MANDAMUS PROCEEDINGS

In this part, we analyse instances of the use of continuing mandamus by the Supreme Court with the aim of deducing the success of the remedy, and reasons for short-comings. We see that court orders and the approach has varied significantly depending upon the nature of the subject matter of the case. We have thus classified the cases into categories depending upon the nature of the right involved, which, as we will see, mostly complements the form and extent of judicial involvement.

A. INVESTIGATIVE AGENCIES AND POLICE REFORMS

The fashioning of the writ, although, in substance, used before, took place in the Vineet Narain case, whereby the court retained jurisdiction over the matter, granting a ‘continuing mandamus’. This, as we discuss below, sparked a revolutionary trend of judicial oversight of investigative agencies to guard against political influence and bias, with petitioners now being able to seek court-monitored investigations. This section analyses the need, use and success of the writ in this field, critiquing the methodology that prevents ultimate convictions and possible ways to make it more effective.

1. Significance of Continuing Mandamus in the functioning of CBI

The role of the Central Bureau of Investigation (‘CBI’) in investigations against government bureaucrats and dignitaries has often been
considered as non-committal, if not undependable. Its transparency in working has often been impugned - in the Bofors fraud case, and even the Priyadarshini Mattoo case, amongst others, where either the charge sheet had not been filed or even after its filing, no sensible conclusion was arrived at. During the Janta Party’s rule, the CBI suffered a setback while investigating charges against Indira Gandhi, her son Sanjay Gandhi and their confederates. The independence of CBI was curbed by the Single Directive of 1988 of the Government, making it compulsory to take the consent of the concerned government department before initiating any investigation against ‘decision-making level officers.’ The Supreme Court noting Government’s control as a reason for the CBI’s inertia in the agency’s investigation, quashed the politically motivated directive in Vineet Narain v. Union of India, (Jain Hawala case). Motivated by the need to fill this executive and legislative void, and guided by its duty under the Beijing Principles, the court sought to intervene in the Jain Hawala case and coined the term ‘continuing mandamus’. The alleged inaction of the CBI in cases like Subramanian Swamy v. CBI and Anukul Chandra Pradhan v. Union of India, against influential persons in the government, was heeded, fuelling the court’s pursuit to fashion this new justice delivery mechanism to curb growing corruption in the Indian polity.

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87 Santosh Kumar Singh v. State, (2010) 9 SCC 747 (Santosh Kumar Singh, the alleged murderer of a 25-year-old law student, was acquitted for what the judge called “deliberate inaction” by the investigating team. The accused was the son of a high-ranking officer in the Indian Police Service, the reason for the CBI’s involvement. The 1999 judgment noted that “the influence of the father of the accused has been there”).
88 Singh, supra note 85.
89 See Vineet Narain v. Union of India, (1998) 1 SCC 226 : AIR 1998 SC 889, ¶19 (Decision making level officer includes- “Joint Secretary or equivalent of above in the Central government or such officers as are or have been on deputation to a Public Sector Undertaking; officers of the Reserve Bank of India of the level equivalent to Joint Secretary of above in the Central Government, Executive Directors and above of the SEBI and Chairman & Managing Director and Executive Directors and such of the Bank officers who are one level below the Board of Nationalised Banks”).
91 In the Beijing Statement, the Objectives of the Judicial Organ have been laid down: (a) to ensure that all persons are able to live securely under the Rule of Law, (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and (c) to administer the law impartially among persons and between persons and the State.”; See Vishaka v. State of Rajasthan, (1997) 6 SCC 241 : AIR 1997 SC 3011, ¶11.

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The Jain *Hawala* case was, in ways more than one, a path-breaking decision. The Division Bench extrapolated the ambit of the writ of mandamus by judicial application, and kept the matter *sub judice* to monitor the CBI’s investigation.95 This was consequent of the CBI’s failure to conduct investigations against influential government bureaucrats, who were alleged to be involved in financially supporting terrorist activities, using funds acquired through ‘*hawala*’96 transactions. Perceiving the normative passivity of the CBI, especially when the alleged offender was a powerful person, the court noted the necessity “to take measures to ensure permanency in the remedial effect to prevent reversion to inertia of the agencies in such matters.”97 In accordance with this, the Court not only directed the appointment of a Central Vigilance Commissioner98 and gave the Central Vigilance Commission statutory status to supervise the CBI,99 but also *inter alia*, issued directions on strengthening the investigation procedure and most importantly, monitored them.100 It had also over a period of time, supervised the case and passed numerous orders to ensure effective investigation.101 For instance, the Court asked the authorities to submit a report with reasons if they close a case against anyone, and also not make any kind of settlement without the leave of this Court.102 This procedure of keeping the case pending and regularly monitoring it was, for the first time, termed as ‘continuing mandamus.’ This, as we will see, saw the birth of the now often demanded remedy of court monitored investigations, giving end victims of otherwise incomplete investigations at least a legal entitlement to seek remedial judicial intervention.

Its practicability was further re-iterated in *Union of India v. Sushil Kumar Modi* (‘Bihar Fodder Scam case’)103 where the Court used continuing

95 *Id.*
96 *Hawala* transactions take place by transferring money without actually moving it. An undercover alternative banking method for global money transaction that is primarily based on trust.
98 The Commissioner shall be selected by a committee comprising of the Prime Minister, Home Minister and the Leader of the Opposition, from a panel of outstanding civil servants and others with ‘uncorrupted integrity’.
99 The control over the CBI as per §4 of the Delhi Special Police Establishment Act, vests in the central government. The Court directed that this superintendence should be exercised by the CVC.
100 The Court’s directions included- the selection of the CBI Director (to be the same as Head of the Enforcement Directorate of the Ministry of Finance), a Nodal Agency controlled by the Union Home Secretary with Member (Investigation), Central Board of Direct Taxes, Director General, Revenue Intelligence, Director, Enforcement, and Director, CBI as associates, shall be formed for harmonized action in cases with a politico-bureaucrat-criminal relation and also a panel of established lawyers to be formed to help the CBI in investigation, prosecution and reviewing the cases without convictions.
101 Vineet Narain v. Union of India, 1996 (2) Scale (SP) 42; (1996) 2 SCC 199; 1996 (2) Scale (SP) 84; (1997) 4 SCC 778; 1996 (4) Scale (SP) 3; 1996 (4) Scale (SP) 56; (6) Scale (SP) 24; 1997 (5) Scale 254.
mandamus, owing to the similar nature of proceedings as in the Jain Hawala case. The need for judicial intervention to ensure effective functioning of such agencies had been recognised before. The court thus found support in Lord Denning’s popular acknowledgement of the duty of investigative agencies to enforce the ‘law of the land’ without any interference from the executive, and the need of enforcing the duty using the writ of mandamus. A similar judgement was also given in M.C. Mehta v. Union of India, (‘Taj Heritage Corridor Project case’) where the Court intervened to contain the construction activities between the Agra Fort and Taj Mahal thereby diverting River Yamuna, and in pursuance thereof, adopted the procedure of continuing mandamus by monitoring the functioning of the CBI. Even in the Taj Trapezium case where the Taj Mahal was recognized as a world heritage site, the Supreme Court constituted the Agra Mission Management Board followed by the Taj Trapezium Zone Pollution Authority, to divert the construction work from that area to avert air pollution. After passing regular orders, it enquired from the committee if any damage was foreseeable from the construction work, and in accordance with the responses, directed the CBI to file an FIR and make further investigation.

Plethora of arguments have been made against use of the writ in monitoring investigations and directing the filing of FIRs, on grounds of it being violative of §6A of the Delhi Special Police Establishment Act (‘DSPE’), 1946 that requires the approval of the respective government department before initiating investigation against government officials, and in its absence, the possibility of its misuse to harass such officials. However, the Court has been keen on using the writ to preserve public confidence in the impartial functioning of the investigating agencies. It has countered these arguments apprising §6A to not be an embargo to judicial involvement. It rather observes court monitoring to be a reason why the investigating agencies may not misuse it. The Jain Hawala dictum was, thereafter, frequently used as a precedent by both the Supreme Court as well as High Courts to do complete justice. Although

104 Id., ¶10.
105 Id., ¶4; See also R. v. Metropolitan Police Commr., (1968) 2 QB 118 : (1968) 2 WLR 893 : (1968) 1 All ER 763.
107 Id., ¶3.
110 Id., ¶13.
113 Id.
there is a mandatory CBI manual\footnote{Central Bureau of Investigation, \textit{Crime Manual} (July 5, 2013), available at http://cbi.nic.in/aboutus/manuals/crimemanual.php (Last visited on April 24, 2017).} in relation to its investigative functions like raids, seizure and arrests, it has evidently not been followed considering the inaction of the agency in cases like the Jain Hawala Scam or the 2G scam, \textit{inter alia}. Thus, the court in public interest, using its extraordinary jurisdiction under Article 32, extended the writ of mandamus in an attempt to enforce the duties of the executive.\footnote{See Vineet Narain v. Union of India, (1998) 1 SCC 226 : AIR 1998 SC 889.}

Originally, it was the Court which used to extend the ambit of the writ to check the compliance of its order in spite of the petitioners seeking only further directions.\footnote{Narmada Bai v. State of Gujarat, (2011) 5 SCC 79, State of Karnataka v. Arun Kumar Agarwal, (2000) 1 SCC 210.} Even in Vineet Narain, the Court considering the uncommon nature of the facts and the seeming possibility of no direct remedy issued the writ. However, with time, continuing mandamus has turned into a procedural right, with the petitioners asking the Court to monitor the investigating agencies with regular directions.\footnote{Sushila Devi v. State of Rajasthan, (2014) 1 SCC 269; O.M. Debbara v. Govt. of A.P., 2014 SCC OnLine AP 163.} Nevertheless, a party cannot seek the investigation by an independent agency merely on suspicion or surmises as held by the Supreme Court in \textit{State of Karnataka v. Arun Kumar Agarwal}\footnote{State of Karnataka v. Arun Kumar Agarwal, (2000) 1 SCC 210.} while overruling the High Court\footnote{Arun Kumar Agarwal v. State of Karnataka, 1998 SCC OnLine Kar 124 : (1999) 1 Kar LJ 603.} judgment where the High Court granted a continuing mandamus on the basis of a report by the Comptroller and Auditor General. The Supreme Court, differentiating the facts of this case from that of Vineet Narain, said that crime should be committed and reported for there to be a CBI enquiry monitored by the Court.\footnote{Compare Vineet Narain v. Union of India, (1998) 1 SCC 226 : AIR 1998 SC 889 (evidence was collected by the CBI on a probe started long back) with State of Karnataka v. Arun Kumar Agarwal, (2000) 1 SCC 210 (Here, the crime was neither reported nor was there reasonable suspicion and thus the SC struck down the decision of the HC).} Therefore, according to us, it is in compelling circumstances like lack of interest in conducting the investigation, apparent political interference in the agency’s functioning, unnecessary delays and other such extreme cases, that the Supreme Court may use the writ.

2. Continuing Mandamus: An overarching solution in insulating the CBI?

The moot question which arises is if the writ of continuing mandamus is enough to insulate the investigating agencies from external influences and at the same time expedite the investigating process. There have been doubts about the whole process providing only a false sense of confidence in the investigations to the public. While there is no denying that court monitoring has,
to some extent, helped in fighting against corruption by some commendable investigations conducted by the CBI, the actual realisation of rights remains controvertible. The Court simply ensures that investigation takes place and a charge sheet is filed. However, charge sheets against government servants have been ‘collapsing’ at many times, i.e., no case can be made from the same.123

There is no check on the content of charge sheet. For that matter, even the *amicus curiae* has failed to look into the same, as in the Vineet Narain case, where the charge sheet was filed, before the *amicus curiae* could tell if the investigation was being done in the right manner or not.124 Insofar as the investigation as recorded in the charge sheet is concerned, Justice J. S. Verma shares the view that the charge sheets are ‘half-baked’ and based on corroborative evidence.125 Further, the investigation is so inadequate, that framing charges by the courts becomes impossible.

Recently, in *Manohar Lal Sharma v. Union of India*,126 where allegations were levelled against unknown public officials for allocating coal blocks for external considerations, conspiring with other businessmen and agents, the Court cleared the contextual scope of ‘monitoring’, restricting it to only ensure proper investigation by surveillance, without leading the ‘mode or manner of direction.’127 While this would seem to provide ample flexibility to specialised agencies, countering any ‘capability’ and ‘specialisation’ critiques, it also seemingly limits the scope and nature of the courts’ powers.

The Supreme Court, at various other instances, has clarified the limited extent of its power to monitor after a charge sheet is filed by the investigating agency.128 By delimiting its scope to interfere, it has eschewed from creating any ‘imbalance in the criminal jurisprudence’, addressing scepticism in this regard.129 It needs to abstain from saying anything on merits or otherwise that can prejudice the decision of the court, competent to decide on merits, to ensure a fair trial.130 Thus, it is beyond this Court’s jurisdiction to express any

124 Ashish Khetan, *There is strange cohabitation between different political forces and CBI cases are used for various collateral purposes*, TEHELKA, January 14, 2012, available at http://www.tehelka.com/2012/01/there-is-strange-cohabitation-between-different-political-forces-and-cbi-cases-are-used-for-various-collateral-purposes/ (Last visited on December 16, 2016).
127 Id., ¶43.
130 See supra note 118.
kind of view on the merits of the case considering facilitating fair investigation as its ultimate goal.\footnote{See Jakia Nasim Ahasan v. State of Gujarat, (2011) 12 SCC 302 (The appellant filed a petition asking the Court to direct investigation by an independent agency for her husband’s death. She alleged the death to be caused by an influential person in the Government, thereby tying the hands of the CBI to investigate. However, the Court rejected the plea after scrutinizing this Court’s holdings in Vineet Narain, M.C. Mehta and the Narmada Bai case. It was held that once a charge sheet is filed by the investigating agency, the Court has no further power to monitor.)}

Furthermore, the Court has always adverted to how it was being cautious, and made sure that it did not overstep its powers so as not to set up a precedent which could be misused, keeping in light the principle of ‘presumption of the accused’s innocence’\footnote{Union of India v. Sushil Kumar Modi, (1998) 8 SCC 661, ¶1.}. The purpose is to avert the lower courts from considering such observations in trial, to avoid any impression of arbitrariness, bias and subjectivity against the accused.

This rule, however, is not absolute. Any aggrieved party, even after the disposal of the case, can approach the Court asking for further directions.\footnote{Narmada Bai v. State of Gujarat, (2011) 5 SCC 79, ¶38.} Now, while the jurisdiction of the Courts as under Articles 226 and 32 is not used to meddle with the progress of the trial or any other investigation later, it can empower the court to duly look into matters involving \textit{mala fide} or colourable legislation, or any other undesired influence on fair investigation.\footnote{Manohar Lal Sharma v. Union of India, (2014) 2 SCC 532, ¶29.} Thus, if anything holds back or impedes the investigation because of extraneous influences, one may approach the Court even after the charge sheet is filed.\footnote{See Nirmal Singh Kahlon v. State of Punjab, (2009) 1 SCC 441 : AIR 2009 SC 984 (the offence of fraud was committed in a organized manner in the selection process of the Panchayat Secretaries, the Supreme Court upheld the direction given by the High Court to the CBI even after the charge sheet was filed).}

While there may be inclination towards inquisitorial proceedings while using this doctrine, it does not dilute a fair trial. The Court does not thwart any principles of jurisprudence like the presumption of innocence unless found guilty while scrutinizing the charge sheet without expressing a view on the merits. The question of bias does not arise if the Court questions just to ensure proper procedure was followed, what all was and should be done.\footnote{Vineet Narain v. Union of India, (1998) 1 SCC 226 : AIR 1998 SC 889 (The then Solicitor General requested ‘in-camera’ proceedings to state certain material facts. The Court allowed the same to the extent necessary while noting the importance of its secrecy, in the interest of justice. Therefore, the Court to be satisfied with the content of the charge sheet may monitor to the requisite scale.).} It is however because of this cautious approach of the Courts to ensure a fair trial that the writ fails to be of benefit. It is argued that the Court should though not comment as to prejudice but should examine the content of the charge sheet...
considering *quod est necessarium est licitum*. The Code of Criminal Procedure, 1973, defines investigation\(^{137}\) including the procedure requisite for collection of evidence. Thus, while monitoring the investigation, it becomes the duty of the Court to see to it that influential persons do not botch up the investigation in any manner. The writ court should thus, exercising its powers, extend its jurisdiction to look into cases even post filing of charge sheet where necessary, to give effect to the ultimate objective of ensuring unbiased, meaningful investigations, combating political corruption. Needless to mention, any such intervention should be cautiously done, without prejudice to the presumption of innocence.

3. Functionality and Practicality of the writ in CBI Cases

While the writ may have been effectual at some instances, there is no guarantee of the CBI being insulated from political interference. For instance, the orders and directions passed by the SC in the *Jain Hawala* case and in *Prakash Singh v. Union of India*\(^{138}\) remain unimplemented till date. The Vineet Narain of the *Hawala* case, who is an anti-corruption activist grieves, “Despite SC monitoring, the case was never properly probed. I saw how CBI and government’s top law officers played a dubious role to ensure the probe was botched up.”\(^{139}\) There were no convictions because of lack of conclusive evidence in the charge sheets. As for the *Prakash Singh case*\(^{140}\), a decade has passed since the judgment but still the police reforms remain unexecuted in most states.\(^{141}\) The Court in this case had passed seven binding directions for all the states to follow and monitored the same till 2008 after which it set up a monitoring committee.\(^{142}\) A decade has passed and still nearly 16 states are to fully implement the directives.\(^{143}\) The judge in the *Bofors case* called such

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\(^{140}\) (2006) 8 SCC 1.


\(^{142}\) The directives were given to ensure functional accountability and responsibility of the police. They included forming a State Security Commission to avert extraneous influence in selection process, to give them a minimum tenure, to set up a Police Establishment Board to decide issues related to their services, to establish a Police Complaints Authority to look into complaints against police personnel, to have a National Security Commission for appointment of Chiefs of Central Police Organisations, etc.

trials a ‘waste of public money’ because of the controversial role of the CBI.\textsuperscript{144} Even in the M. C. Mehta case,\textsuperscript{145} the Supreme Court had, after continuous monitoring, ordered to replace heritage corridor project with forested greenbelt. However, it only took place after nearly 8 years and that too when the same was directed by the Minister of Culture.\textsuperscript{146} That it was nonetheless done, despite the delay is also a huge feat.

Unlawful influence is inevitable in such political matters. Even in the recent 2G Spectrum scam, the SC ordered court monitoring over the functions of the CBI.\textsuperscript{147} This was after CBI’s inexplicable lethargy in interrogating, freezing bank accounts and raiding the houses of the suspects.\textsuperscript{148} The CBI along with the ED was required to submit a report to the Court. All efforts in vain, it was only after the SC admonished the Government that the suspect was jailed.\textsuperscript{149}

The fact that the Court consciously retains jurisdiction of the case and monitors the investigation agency neither safeguards the agencies from being affected by high level government servants and politicians, nor ensures an honest investigation. The CBI generally circumvents a fair investigation, such as when it dropped charges against Satish Sharma,\textsuperscript{150} or when the Samajwadi Party supported the ruling party thereby getting the CBI to submit its report against Mulayam Singh to the government instead of the court.\textsuperscript{151} Hence, it is


\textsuperscript{145} M.C. Mehta v. Union of India, (2001) 3 SCC 763.


\textsuperscript{147} Centre for Public Interest Litigation v. Union of India, (2011) 1 SCC 560.


\textsuperscript{150} Captain Satish Sharma is a senior Congress leader against whom CBI had instituted cases pertaining to alleged irregularities in allotment of petrol pumps and gas agencies during his tenure as Petroleum Minister between 1993 and 1996. The cases were later closed.

\textsuperscript{151} The Supreme Court had directed the CBI in March 2007 to probe his assets. When Mulayam Singh’s party was not part of the ruling coalition at the Centre, the CBI wanted to submit its report to the Court and requested the Supreme Court in October 2007 to modify the earlier order of producing it to the central government. But in a complete turnaround from its earlier stance, it later sought the Supreme Court’s approval to submit the findings of its inquiry to the government and not to the Court. This happened after the Samajwadi Party lent support to the government during the Confidence Motion in the Lok Sabha on 22 July, 2008.
clear from the above examples that the CBI, just like the police forces in our country, is open to be influenced by high level politicians and government servants, and there is hardly anything that the Court can do in this matter simply by ‘monitoring’ the case. Moreover, political parties at the Centre are always reluctant to strengthen the functioning of the CBI. Even recently, the Prevention of Corruption (‘PC’) Bill, 2013, has been proposed by the Modi government requiring the CBI to take sanction of the government before investigating as under the DSPE.152

Keeping in mind social welfare and common good, a more pragmatic and realistic approach adopted by the Courts, may help to tackle the issue in a more effective manner. Continuing mandamus in investigations has not proved to be a concrete solution to all evils. Factors such as the mettle of the CBI officers, the nature of the cases and the persons involved and the guidelines and directions given by the Court are all determining factors in the successful implementation of the writ. However, to reduce the risk of political interference, a factor which may detriment the effect of the writ, there should be thorough enquiry of the CBI’s functioning itself, i.e., a CBI like probe against the CBI,153 by some notable individuals of unimpeachable integrity or a Joint Parliamentary Committee. Moreover, the CBI in these kinds of cases should be made more accountable to, if not the Court, then at least the amicus curiae or any committee like the CVC as in the Hawala case. Since this jurisdiction is yet evolving, blunders like filing of the charge sheet without corroborating with the amicus curiae should be taken care of. The Courts need to form monitoring committees, comprising of people more specialized and able to figure out the constraints in the investigation, and such committees should be made directly accountable to the Court.

The High Courts within their territorial jurisdiction and the SC have vested powers to order an investigation by the CBI.154 The Courts should rightfully use their discretion to get a case investigated by the CBI and monitor the same if needed. Thus, continuing mandamus along with political disassociation of the CBI and the new police reforms (functional accountability with limited political control and the internal check system), should be a more productive approach.


B. CONTINUING MANDAMUS IN ENVIRONMENTAL LITIGATION

Judicial innovation has been the hallmark of the Indian environmental litigation. While critics have referred to the Supreme Court as ‘Garbage Supervisor’ or ‘Lords of Green Bench’, many have lauded its approach as having pioneered procedural as well as substantive innovations for the realisation of environmental justice. Indian courts have been seen as leading the way in enforcement of environmental laws through PILs, having their legal basis in the constitutional right to a healthy environment. Procedural innovations include admitting petitions on behalf of pollution victims and inanimate objects, making spot visits, appointing expert committees and amicus curiae, and other means that aid in expanding the scope and effectiveness of environmental litigation. On the other hand, court decisions formulating, defining or rejecting policies and governance structures for environmental protection, determining how its directions should be implemented, etc., form part of the substantive judicial innovations. Instituting new bodies and implementing court orders through the writ of continuing mandamus has also been characterised as one such innovation, strengthening access to environmental justice.

Despite having given constitutional protection to environmental rights, non-implementation of orders has been one of the main issues hindering relief in environmental cases. Enforcement agencies have repeatedly

159 Id.

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failed to enforce court orders. In an attempt to address recalcitrance and indifference to environment and human problems, despite recognition of rights violations and court mandates, the writ of continuing mandamus saw application in environmental law.

1. Use of Continuing Mandamus in Environmental Protection

There have been several instances where the Supreme Court has sought to initiate court monitored proceedings to ensure compliance in environmental cases. In Vellore Citizens’ Welfare Forum v. Union of India, dealing with a writ petition against tanneries in the Tamil Nadu polluting ground water with untreated effluents, the Supreme Court directed the Central Government to create an authority to deal with the above matter and directed the Madras High Court to set up a Green Bench to deal with the case, and to monitor the functioning of the committee and the tanneries in Tamil Nadu. Thus, the continuous monitoring was an acceptable practice in environmental cases, even before it was called ‘continuing mandamus’.

A popular use of the writ was in Indian Council for Enviro-Legal Action v. Union of India, or the Bichhri case, concerning an action to prohibit pollution caused by several chemical industrial plants operated by respondents in Bichhri village, Rajasthan, without permits. The court, after almost 6 years of litigation and lack of compliance of its directions, through its order in 1996, conclusively laid down the respondents’ liability for causing pollution, with directions for remediation, instructing agencies to enforce the law and reporting to the court for further clarifications. It had ordered the constitution of a


The Court directions in the Ganga river pollution case have also not been implemented. The tanneries continue to operate even though strict action has been ordered by the Court against the polluted industries both in the case of the Kanpur and Calcutta tanneries. See Praveen Singh, ‘Bridging the Ganga Action Plan: Monitoring Failure at Kanpur’, 41(7) Economic and Political Weekly 590 (2006); In the Oleum Gas Leak case, the Court has evolved the doctrine of absolute liability, clarifying the principle of strict liability which was developed in Rylands v. Fletcher, (1868) LR 3 HL 330. It has also developed the principle of claiming compensation under the writ jurisdiction by evolving the public remedy. But ultimately, the victims of gas leak have been left to the ordinary relief of filing suits for damages.; Similarly, in the Delhi industrial relocation case, the Court while giving directions to close down industries or to locate outside Delhi has made it clear that the workers should get whatever compensation they deserve according to law and industries must be relocated from Delhi. The direction of the Court, however, has not been implemented by the government on the ground of non-availability of land to shift the industries and also workers’ right to compensation appeal has not been given due attention in the subsequent Court hearings. M.C. Mehta v. Union of India, (1996) 4 SCC 750 : AIR 1996 SC 2231. See also Nandini Dagsupta, Tall Blunders, Doten To Earth, September 30, 1998, 22.


national authority and subsequent orders even required equi-proportionate representation from different states, as well as from the non-governmental organizations.167 States were asked to submit management plans for pollution control to both, the Central Government and the courts.168 The SC however delegated further proceedings to various high courts, and was to reconvene to ensure that directions were complied with.169 Its orders stressed on taking into account reports by experts, and most steps were directed to be taken in accordance with such expert opinion.170 This case is different from most others discussed in as much as the case was ongoing mostly because the respondents kept filing interlocutory applications to escape liability imposed by the 1996 judgment,171 on one ground or the other. Both review and curative petitions were filed and dismissed. Stressing on the need for finality of judgment and to discourage constant filing of applications to avoid compliance, the court even imposed a fine on the respondent industries vide its 2011 order.172 Compensation was aggressively pursued with attachment of property and even interest payments for delay.173 While ultimately termed successful, the delay in implementation and the economic strength of corporations who are able to hold-out for longer has been criticized.174

Another case in this regard is the Research Foundation for Science, Technology and Natural Resource Policy v. Union of India,175 challenging the authority of MoEF permitting import of toxic wastes from industrialised countries, despite it being hazardous to environment and life. The petitioner drew attention of the court to the non-conformity of MoEF with international obligations as well as provisions of the Hazardous Wastes (Management and Handling) Rules, 1989.176 The court asked for affidavits to show the extent of implementation of provisions, and then appointed a High-Powered Committee of experts to submit reports and recommendations on various aspects of

169 This involved regular follow-up and consulting the status of applications in the HC’s during dismissal of many interlocutory applications. See e.g. Indian Council for Enviro-Legal Action v. Union of India, (2007) 15 SCC 633.
176 Id.
hazardous waste management,\textsuperscript{177} and even entrusted with overseeing time-bound implementation of the court’s directions.\textsuperscript{178} Importers who made illegal imports of such waste were directed to be placed on record,\textsuperscript{179} failing which a government inquiry was directed.\textsuperscript{180} After considering reports of committees and experts, and international standards, directions were given to Central and State Pollution Control Boards, and recommendations were made for legislation to address transboundary movement of hazardous wastes, with provisions for punishing illegal trafficking.\textsuperscript{181} It directed recycling or destruction of waste, depending upon its hazardous nature under supervision of the monitoring committee.\textsuperscript{182} If the reports showed non-compliance, contempt proceedings were initiated \textit{suo motu} by the Court. Finally disposing off the writ petition in 2012, the court reasserted its various interim orders, directing the government to bring its rules in conformity with international conventions and ban imports of hazardous wastes as identified under the Basel Convention.\textsuperscript{183}

Another case pertaining to waste management was Almitra H. Patel v. Union of India,\textsuperscript{184} where the Supreme Court used continuing mandamus to oversee the system of solid waste management in cities across India. The court instituted a committee to examine aspects of solid waste management in Class I cities,\textsuperscript{185} requiring authorities from the different cities to file responses to its recommendations,\textsuperscript{186} failing which even penalties were imposed.\textsuperscript{187} Even the Central Pollution Board was directed to submit a report regarding implementation of the committee’s recommendations.\textsuperscript{188}

Bangalore authorities’ reports indicated the success of a door-to-door waste collection scheme, following which, the court asked even other cities to implement similar schemes.\textsuperscript{189} Explanations were regularly sought for all

\textsuperscript{186} Id.
\textsuperscript{188} Id.
instances of non-compliance. Improvements were noticed due to implementation of suggestions even during the continuation of litigation.

During the pendency of litigation, the court’s attention was brought to non-implementation of its orders in B.L. Wadehra v. Union of India, regarding issues such as composts and land-fills, to which there was no satisfactory explanation. While addressing suggestions of issuing directions to MCD and NDMC to handle solid waste generated, it noted that it was not competent to direct how municipal authorities should carry out their functions, but only see to it that they must discharge their statutory duties and obligations. In furtherance of this, they issued appropriate directions for proper and scientific waste-management. Even when corporation sought to justify privatisation of cleaning staff, the court noted that this would be within the ambit of the Government, and not the court’s decision making powers. While this to some extent shows the court’s consciousness of micro-management of executive action being beyond the ambit of its powers, it has seldom kept acted with such consciousness.

The approach of the court was a little different in D.K. Joshi v. State of U.P., where authorities in Agra had been extremely lackadaisical and slow in enforcing the various directions given by the court to ensure better living of the citizens in Agra. Despite noting that status reports submitted by state authorities were not satisfactory, the court held that since the case had been pending for 6 years, and there had been adequate monitoring, retaining the matter would not be appropriate. Rather, it issued directions to the State and directed the appointment of a special monitoring body to look into effective functioning of the responsible public authorities. This is in stark contrast to most other cases of a similar nature where court has rigorously followed through, and despite the cases, such as the Godavarman case, as discussed below, being pending for decades, no similar apprehension has been noted.

a. The Delhi Pollution case

In the Delhi Vehicular Pollution Case, M.C. Mehta’s public interest litigation filed in 1985 concerning air pollution in Delhi and the surround-

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194 Id ¶15, 21.
195 Id ¶15, 21.
198 Id.
ing region saw no action being taken till 1990, until a series of directions were passed as continuing mandamus.\textsuperscript{201} The court justified monitoring of the case to ensure compliance with Article 21, making authorities realise their obligations under statutory provisions and to prevent frustration of legislative intent.\textsuperscript{202} It has ordered periodic vehicle emission checks, with the power of cancellation of registration certificates of faulty vehicles.\textsuperscript{203} It directed the Ministry of Environment to establish an expert Committee to review technological, legal and administrative solutions to curb pollution, to which around 30 reports were submitted between 1991 and 1997.\textsuperscript{204} There were detailed directions on the use of unleaded fuel in phases, to start in Delhi and encompassing the whole nation by 2001,\textsuperscript{205} mandating conversion into compressed natural gas of all government vehicles,\textsuperscript{206} and even directing establishment of a body to oversee implementation of the court’s orders,\textsuperscript{207} among many others. One of the most significant orders was passed in July 1998, with details of systematic phasing out of old vehicles, ban on certain types of fuel and replacement with greener alternatives,\textsuperscript{208} all to be carried out within strict deadlines by authorities, who were also required to bring to public notice the directions issued by the court from time-to-time. Repeated reports and information had to be submitted before the court,\textsuperscript{209} and emission norms were laid down with strict standards.\textsuperscript{210}

Despite criticisms, political backlash and implementation hazards, the intervention was to some extent, successful, and sparked similar attempt throughout the nation with multiple High Courts monitoring action plans


\textsuperscript{203} M.C. Mehta v. Union of India, (1991) 2 SCC 137.

\textsuperscript{204} \textit{Id}.


\textsuperscript{206} Order dated 28 March 1995.

\textsuperscript{207} Order dated 28 March 1995.

\textsuperscript{208} It included the phasing out of all commercial vehicles and taxis which were more than 15 years old as of October 1998; a ban on the supply of 2T oils at petrol stations by December 1998; the increase of public transport to 10,000 buses by April 2001, the stoppage of leaded petrol within NCT Delhi by September 1998; replacement of all pre-1990 auto rickshaws and taxis to new vehicles on clean fuel by 31 March 2000; no eight-year-old buses to ply except on CNG or other clean fuel by 1 April 2000; entire city bus fleet (DTC and private) be steadily converted to single fuel mode on CNG by 31 March 2001.

\textsuperscript{209} For instance, the Court asked for the information about the number of diesel and petrol driven vehicles registered in NCR Delhi in three years: 1997, 1998 and 1999. The matter was adjourned to 29 April 1999.

\textsuperscript{210} On 29 April 1999, the Supreme Court imposed emission norms for vehicles registered in NCR Delhi. All private vehicles registered after 1 June 1999 were to conform to Bharat I norms and those registered after 1 April 2000 to conform to Bharat II norms. Restrictions were imposed on the monthly registration of diesel driven vehicles. Also, diesel taxis were prohibited in NCR Delhi unless they conformed to Euro II norms with immediate effect.
to curtail local vehicular pollution. However, despite its path-breaking role, there were several limitations to the court’s approach that hindered full realisation of the objectives and attracted unfavourable responses. Its failure to push the executive to develop a composite plan to tackle the problem of air pollution has been pointed out as being a major flaw. Given the fragmented federal structure and involvement of multiple authorities and ministries that lacked co-ordination, there was a confusing hierarchy, conflicting interests and bureaucratic indifference. All actors were subject to extremely high cost of compliance, with massive investments that needed to be made to follow the court’s orders. These costs were seen as being higher than any projected cost of defiance, making enforcement and even threat of penalties less effective. However, the perseverance of the judiciary, NGOs and public-spirited citizens such as the petitioner, both in and out of court along with the minimal, at least at later stages, support of the Government led to improvement in air quality in Delhi. The court’s continuous prodding has been recognised as having been significant. A marked improvement in Delhi’s air quality has been noted.

b. The Omnibus Forests Case – The Godavarman Case

One of the most drawn-out and longest standing continuing mandamus issued is in T.N. Godavarman Thirumulpad v. Union of India, often recognised as having started the second wave of environmental litigation, after a host of pollution related cases. Started in 1996, the case is yet to be finally decided. Here, a writ petition to protect the Nilgiris forest land from deforestation by illegal timber felling was expanded by the court, asserting jurisdiction over all matters pertaining to diversion of forests for non-forest use, into an undertaking to reform the entire country’s forest policy.

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212 Id., 212.
219 Ritwick Dutta & Bhupender Yadav, SUPREME COURT ON FOREST CONSERVATION xi (2005).
220 Writ Petition No. 202 of 1995, T.N. Godavarman Thirumulpad v. Union of India, Supreme Court of India; Down to Earth, Interview Between T.N. Godavarman Thirumulpad and
decades, the Supreme Court passed numerous orders, taking over supervision and control of the day-to-day governance of Indian forests.\textsuperscript{221} It has covered issues ranging from logging,\textsuperscript{222} deforestation and mining,\textsuperscript{223} impacts of clearing forest\textsuperscript{224} to even endangered species.\textsuperscript{225} The constitutional permissibility of such vast assumption of powers has been seen with suspicion,\textsuperscript{226} with the court going beyond mere interpretation of the law, becoming a policy-maker and an administrator.\textsuperscript{227} Executive inaction, the deteriorating state of India's forest cover and the blatant flouting of legislations seemed to prompt the court to embark on what was to become a massive undertaking, with the Supreme Court becoming the court of first instance for forest matters for decades to come. All matters relating to the Act and Indian forests were heard by the court as interlocutory applications in the case, and we attempt to give an overview of some of the significant orders to illustrate their extent and nature. Reference can be made to authors who have analysed the orders of the court in some detail.\textsuperscript{228}

In its first order in 1996, the court defined the previously ambiguous scope of the Forest Conservation Act, 1980 and the meaning of ‘forest’ by its dictionary meaning, broader than the restrictive interpretation given by multiple states.\textsuperscript{229} The 1996 order also imposed a nation-wide ban on tree felling, non-forest activities such as mining and saw mills, except with the approval of the Central Government.\textsuperscript{230} States were instructed to put in place multiple expert committees, submit reports within prescribed deadlines, with differing guidelines for States of Jammu & Kashmir, Himachal Pradesh and Hilly Areas of Uttar Pradesh & West Bengal, Tamil Nadu and the North-Eastern


\textsuperscript{224} Noida Memorial Complex Near Okhla Bird Sanctuary, In re, (2011) 1 SCC 744 : 2010 INSC 1058, ¶66.


\textsuperscript{226} Armin Rosencranz, Edward Boenig & Brinda Dutta, \textit{The Godavarman Case: The Indian Supreme Court’s Breach of Constitutional Boundaries in Managing India’s Forests}, 37 ELR 1003.


\textsuperscript{230} Id.
States respectively. Most of its orders were in furtherance of implementation of various environmental statutes and dealt with the functioning of bodies like Ministry of Environment and Forests. It directed formation of a quasi-executive body, the Central Empowered Committee (‘CEC’), that would exclusively report to the court, keep a check on implementation of, and redress grievances due to non-compliance with, any of the orders of the court. It relied heavily on the CEC to assist in assessment of granting forest clearance permits and recommending measures for restoration of degraded areas. Its 2005 order focused on compensatory afforestation, with the CEC making recommendations to the scheme submitted by the MoEF. The court also laid down how funds collected were to be utilised and constituted the Compensatory Afforestation Fund Management and Planning Authority (‘CAMPA’) for managing the funds collected for compensatory afforestation and laid down its working and constitution. Subsequently, even State Governments and Union territories constituted State CAMPA to facilitate activities for environmental preservation.

One of the last orders dismissing interlocutory applications was in 2014 concerning the appointment of a national regulatory authority by the Central Government, required under the EPA, that would be responsible for appraising projects, enforcing environmental conditions for approvals and imposing penalties on polluters. Noting the insufficiency and shortfall of the government notification on environmental clearances, it directed the regulator to have as many state branches as possible, to carry out an independent appraisal and approval of projects for environmental clearances and monitor the implementation of the conditions laid down thereunder. High Courts have placed greater responsibilities in terms of forests and environmental cases, placing reliance of the Godavarman case.


232 Operating for more than a decade, since it constitution by a SC order on 9 May 2002, followed by notification under the Environment (Protection) Act, 1986; it has gained near-institutional status, having operated for more than a decade. After expiry of its statutory term of 5 years, the court through its orders in Samaj Parivartana Samudaya v. State of Karnataka, (2013) 8 SCC 154, continued the CEC. See Shyam Divan, Public Interest Litigation, THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 647 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds.).

233 Shyam Divan, Public Interest Litigation, THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 647 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds.).


235 Id.


239 Id., ¶8.

240 Id., ¶7; See also M. Sakthivel, Case Comment: T.N. Godavarman Thirumulpad v. Union of India, MANU/SC/0028/2014.

The writ petition has not been dismissed. Even though establishment of the National Green Tribunal in 2010 has seen some success contrary to what was envisaged, the continuing mandamus in forests still continues. However, even though the case is open, it is not under active hearing.

The court’s orders have been under a lot of attack – the lack of judicial foresight having wrecked the timber industry; the failure of its working plans and illegal felling of timber coupled with the proliferation of a black market; constant interference with the functioning of the MoEF, entrusted with the responsibility for managing forests and wildlife; constitution of new entities leading to a confusion in co-ordination and the micro-management leading to legislative and executive contentment in deferring to the SC’s forest management rather than building their own capacity as well as leading to disruption of livelihoods of forest dwellers and dependants. However, at the same time, critics note the lack of alternatives, given the apathy of the government and the inaction of the executive despite there being legislation, NGOs and activists often prefer judicial direction of forest policy management over corrupt and inefficient bureaucrats.

What is criticised and perhaps not even constitutionally justified is the extent of the court’s intervention, not the fact of intervention. In such a case where dealing with environmental is concerned, monitoring of implementation becomes pertinent for there to be effective justice. When despite legislation there is inaction, mere court restatement will seldom lead to change, presenting us with the same conundrum of ‘rights without remedies’. However, this need for effective judicial remedy is to mete out justice in the case before the court. A petition against flouting of laws in a district being made the basis for the court to turn into the court of first instance, the administrator and policy-maker for all such disputes nation-wide is and could never have been envisaged by the constitutional framework. Courts have neither the capacity and the time, nor the expertise to deal with such issues. The change in the tenor of orders from 1996 and 2000’s to 2010, 2012 and 2014 perhaps has been in recognition of its constitutional and functional constraints. From micro-management of policy decisions to mandating the Central Government to appoint a regulator can be seen as a drastic change in the modus operandi. The institution of the Green Tribunal in 2010, which is now credited as having effectively addressed concerns of transparency and expertise in environmental disputes, could

242 Ritwick Dutta, Supreme Court on Forest Conservation xiii (3rd ed. 2011).
244 See e.g. Armin Rosencranz, Edward Boenig, & Brinda Dutt, The Godavarman case: The Indian Supreme Court’s breach of constitutional boundaries in managing India’s forests, Environmental Law Reporter News and Analysis 37.1 (2007) 10032.
245 Id.
246 Gitanjali Nain Gill; A Green Tribunal for India, J ENVIRONMENTAL LAW 22 (3): 461-474 (2010).
also be one of the reasons for the change and the inactivity in the continuing mandamus.

2. In Furtherance of Environmental Constitutionalism – Effective Remedy, Defective Implementation

The success, albeit limited, of the writ in environmental matters reinforces the need for such a judicial remedy to counter executive recalcitrance. While seemingly unproductive for the Court to do what the government is already obligated to do, areas like environmental concerns require such duplication as such substitution of statutory commands with judicial orders calls for contempt of court action and penalties in cases of disobedience. Contravention of a legislative mandate that invites judicial review requires the petitioner to discharge the burden of proof, while non-compliance with a court order shifts the burden on the government to justify its nonfeasance, removing any presumption in its favour. Even from the perspective of say polluters, unlike action taken by governmental authorities, the threat of non-compliance with court orders attracting contempt orders cannot as easily be kept at bay with political influence and corrupt practices. But, we see that court intervention can push authorities to comply. Single time orders like conventional adversarial litigation would have served little purpose in most cases discussed here. In a PIL filed for pollution in Delhi, the court went into overhauling standards on a national level, and micro-managing as much as the implementation of phases of reform; instituting funds for all state and union territories in writ case when the original allegation was of violation of forest laws in a particular district. This could be construed to be overstepping even the most liberal and expansive standards of limitations to judicial excesses.

However, it is this manner of administering a continuing mandamus that is problematic, not the remedy itself. This is evident from its successful adoption by courts even in foreign jurisdictions in environmental cases, albeit limited to concerns presented before it. The Bangladesh court in Mohiuddin Farooque v. Govt. of Bangladesh, where petitioners sought appropriate relief for control of pollution from industries around Bangladesh, the court declared that the writ would be treated as a continuing mandamus, issuing directions to multiple authorities concerned and requiring them to submit regular progress

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248 Erin Daly & James May, Constitutional Environmental Rights and Liabilities 84 (2012).
252 Id., 27.
Environmental law particularly requires co-ordination between multiple actors, agencies, states, and even the public. Studying comparative environmental constitutionalism, it has been observed that despite acknowledging the limitations on its powers and resources, courts worldwide have engaged, realising that facilitating dialogue with both the public and private sectors, it can play a pivotal role in securing environmental rights. The continuing mandamus is one such mechanism of dialogue facilitation that allows the courts to be in constant touch with the multifarious actors. While most attempts by Indian courts have been lauded, it has perhaps lacked in facilitating this much-needed dialogue between the public and private fronts, falling short of the aim of judicial engagement. Appointment of amicus curiae and expert committees that accept reports from NGOs etc.; directions ensuring public awareness of court orders, constant consultation with experts and asking governments to formulate plans under supervision of court appointed committees, often of a representative character etc., are steps in furtherance of this. However, there is still a long way to go. Representation of private sectors, commercial operators and environmental activists in these committees, of public feedback, etc., might help counter a lot of backlash the courts face. We have seen such initiatives in say, the Ganges River pollution case where the court published notices in newspapers inviting industries and municipalities to enter appearance in the litigation. In the Bichhri case also, the court looked at representation from multiple states and NGOs in the central body constituted. Even the CEC, consisting of

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253 Id. (Among others, the Director General, Directorate of Environment, was directed to ensure that the polluting industrial units and factories had to adopt adequate and sufficient measures to control pollution within one year from the date of receipt of the judgment and report compliance to this court within six weeks thereafter. The secretary, Minister of industries, was directed to ensure that no new industrial units and factories were set up in Bangladesh without first arranging adequate and sufficient measures to control pollution.)


257 Erin Daly & James May, Constitutional Environmental Rights and Liabilities 84 (2012).


three federal government officers, and two NGO representatives, is one such hybrid regulatory bodies created by higher court edict seen as examples of the institutional forms.

Analysis of these cases shows that the courts have, through orders, succeeded in involving municipal corporations, state and national agencies, the government departments and made them work in tandem with private offenders to alleviate the problem at hand. This is particularly witnessed in the waste management cases, with cohesive orders, whose compliance was regularly checked upon. Requiring municipal corporations to formulate plans based on models successful in other cities, like in the Almitra case, is evidence of such national co-ordination, essential for effective redressal of such systematic issues. Furthermore, popular support for actions will increase incidence of compliance, enticing even political actors to encash fruits of such dialogue.

Another major hurdle to environmental litigation has been abandoned litigation, the plaintiffs not having enough incentive, resources or due to other reasons not being able to pursue the matter, at times even after a favourable judgment. By appointing amicus curiae to assist the court with the litigation, even without the plaintiff’s involvement has helped overcome this problem. This too, we have seen invites its own set of problems when the court takes too much onto its plate. But, the non-involvement of the plaintiff is hardly justifiable as grounds for exceeding the scope of the original petition and related issues. The court’s approach in D.K. Basu sought to justify dismissal on grounds of failure of its own monitoring initiatives. If directions were not enforced under its supervision, expecting compliance post dismissal by a committee, given the hurdles seen in other cases seems nothing short of judicial abandonment. The apparent fallacy with its reasoning brings to the fore the constitutional absurdity of violations without effective redressal and mandates judicial intervention and supervision, such that the rights struggle sees edification.

260 Ritwick Dutta & Bhupender Yadav, Supreme Court on Forest Conservation 11-12 (2nd edn., 2007).
262 The history of environmental litigation, constitutional and otherwise, is littered with examples of abandoned litigation. Indeed, one commentator contends that the Oposa litigation was never fulfilled because the original plaintiffs did not pursue the matter after the Philippine Supreme Court’s remand: “The Supreme Court did not order the cancellation of the TLAs, but ordered the case to be remanded for trial. Because the petitioners did not pursue the case after it was remanded, no TLA was cancelled.” Dante B. Gatmaytan. The Illusion of Intergenerational Equity: Oposa v. Factoran as Pyrrhic Victory, Georgetown International Environmental Law Review 15.3 (2003): 457, 459.
263 In the Godavarman case for instance, Harish Salve was appointed as the amicus curiae. Even after the petitioner died in 2016, the case continues. Even before, he was not actively involved.
The courts’ interventions in environmental concerns in India have led to Indian law being ‘infused with procedural environmental rights’. Continuing mandamus is easily characterised as one such remedial innovation, that has helped overcome many obstacles that environmental litigation usually faces. If limited to the writ as popularly envisaged, even by the court itself, it has helped with co-ordination among actors and incentivising and prodding action. However, using it as an excuse to indulge in micro-management and exercising powers beyond even the legitimate expanses of the remedy have attracted backlash, and rightly so.

C. OBSTACLES TO CONTINUING MANDAMUS IN CASES CONCERNING FUNDAMENTAL FREEDOMS

Another lot of cases where the Judiciary has popularly used the continuing mandamus is cases that deal with fundamental freedoms, and particularly the right to life, and all its concomitant entitlements. As is discussed in this section, this has yielded varying degrees of success, with, again, the major road block being Government inaction. However, more so than in other areas, these involve issues that grab the public eye and we see that active involvement of the populace and the administration can make judicial intervention yield non-conventional positive results.

1. Labour Welfare

In a series of cases dealing with implementation of labour laws, the court has had to adopt the means of monitoring implementation, even before the formulation of the remedy in *Vineet Narain*. This could primarily be due to the nature of corrective action needed, which is mostly in terms of rehabilitative measures or implementation of welfare legislation, that requires an efficient state machinery as well as significant use of funds. Added to this is often the escapist approach of private contractors and employers who optimally exploit the lack lustre nature of the administrative machinery to bypass labour laws. While ensuring realisation of labour rights is a humungous task, the Court has attempted in several instances to undertake a tedious process of overseeing fruitification of statutory rights, with mixed results.

*Bandhua Mukti Morcha v. Union of India*, marked the SC’s initial efforts to oversee the implementation of its orders. This landmark constitutional case that concerned the plight of labourers, dealt with gross violations of fundamental rights, bonded labour and inhumane working and living conditions.  

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conditions, with no access to necessities like clean water.\textsuperscript{267} The court had intervened by issuing wide-ranging remedial orders, encompassing twenty one directives to the State Government, among other things, to constitute a Vigilance Committees in order to implement the Bonded Labour System (Abolition) Act, 1976, in accordance with the court’s guidelines; to work in coordination with District Magistrates for identification and release of bonded labourers; to draw up a scheme for their rehabilitation within the prescribed time period and implement the same; take steps to ensure payment of minimum wages within six weeks; and various other directions to ensure safety standards and better working and living conditions.\textsuperscript{268} A notable direction made, arguably to incentivise implementation of the laws was that, if the Government failed to ensure performance of statutory obligations by the employers within the prescribed time periods, the Government would itself have to carry them out.\textsuperscript{269} What ultimately makes this judgment a beginning point of discussion for ensuring implementation of court orders and also continuing mandamus is the appointment of Joint Secretary in the Ministry of Labour as a Commissioner who was entrusted with detailed duties to ensure compliance with court directives and report back to the court.\textsuperscript{270} This was one of the first instances of such court appointments that would, as discussed below, become a characteristic feature in cases under court supervision.

One of the objections put forth before the case, questioned the court’s powers to appoint an inquiry commission that was to report to the Court to exercise jurisdiction under Art. 32 of the Constitution.\textsuperscript{271} While the court notably affirmed that, given the wide contours of powers vested in it under Article 32 and in larger interests of administration of justice and further for enforcement of fundamental rights, such powers are implicit in its discretionary powers.\textsuperscript{272} However, this dealt exclusively with fact-finding and to aid the court in delivering its judgment. Nevertheless, no similar observation was made as to post-decisional appointments of commissioners and seeking reports for implementation. This could arguably be gauged as being also within the contours of Article 32 for the protection of constitutional safeguards though no discussion along these lines ensued.

The next two decades saw two interventions by the court. A couple of years after the delivery of the judgment, contempt petitions were filed alleging non-implementation of directives, which led the court to appoint multiple commissioners and even a Committee to conduct inquiries and report to the court.\textsuperscript{273} Their findings revealed ineffective implementation and showed

\textsuperscript{267} Id., ¶5-6.
\textsuperscript{268} Id., ¶73.
\textsuperscript{269} Id.
\textsuperscript{270} Id., ¶74-75.
\textsuperscript{271} Id., ¶105.
\textsuperscript{272} Id., ¶115-116.
that even though some steps had been taken by the Government, the majority of the directives remained unimplemented.\textsuperscript{274} The Court went on to discuss the multiple ways in which the Government could have taken steps, for instance, by locating a police station or outpost nearby, a doctor could be appointed and if say the workers were fewer in number, a visiting doctor could be hired.\textsuperscript{275} Noting however its inherent institutional and administrative limitations to monitor and regulate such schemes, the responsibility to take such action was said to vest upon the Government. Ultimately, the court hoped that “if a direction is issued to the Chief Secretary of the State to regulate these aspects the reposing of trust by this Court would not turn out to be misplaced.”\textsuperscript{276} Without making any specific orders upon the inaction, the Court only called upon the Government to attend to the needs of the workmen,\textsuperscript{277} and directed the State to ensure that the labourers identified by reports continued to work with the improved conditions of service, as mentioned, and those wanting to return were released from bondage and rehabilitated under the Centre’s scheme.\textsuperscript{278} Again, after eight to nine years, violations of labour welfare statutes as well as the court’s directives in the earlier two judgments were noted, especially in terms of payment of minimum wages, and the Supreme Court suggested that the State Government may consider cancelling the leases of the defaulting employers.\textsuperscript{279}

In stark contrast to the decades of supervision still leading to flouting of directions, the Salal Hydro-Electric Project case,\textsuperscript{280} where the court’s directions were also aimed at implementation of labour regulations, albeit in a State project, led to tangible success. In only a year, the court noted positive results, and affirmative action having been taken by the State, such as directives being issued to contractors, and Engineers-in-Charge of the projects, and instructions to the Manager of the National Hydro-Electric Power Corporation to ensure compliance, submitting to the court updates on the status of implementation of the labour laws.\textsuperscript{281} Dealing with similar plight of non-implementation of rehabilitation schemes for released bonded labourers, the Court in Neeraja Chaudhary\textsuperscript{282} directed intense surveys in bonded labour prone areas, supervision over officers and release and rehabilitation of bonded labourers.\textsuperscript{283}

\textsuperscript{274} See Id., ¶7-10.
\textsuperscript{275} Id.
\textsuperscript{276} Id., ¶13.
\textsuperscript{277} Id., ¶14
\textsuperscript{278} Id., ¶17.
Judicial intervention in labour welfare was relatively successful even in the *Rickshaw Puller* case, where the Delhi High Court declared several governmental mandates such as the arbitrary cap on the number of rickshaws plying in the city to be violative of Articles 14 and 21. Noting the matter to be a fit case for issuing a continuing mandamus, the court sought to supervise and ensure compliance with its directions. It formulated a special task force, to explore all issues pertaining to road traffic in Delhi, particularly addressing concerns of congestion, pollution and equitable access to all classes of vehicles. The constitution of the task force was specified, with budgetary allocations for the same to be made by the Government, and was given a mandate of reviewing all existing policies and regulatory measures, make recommendations and formulate plans. The Court issuing a continuing mandamus, directed the petitions to be listed before the Division Bench, and a Special Leave Petition against the order was dismissed by the Supreme Court. The task force, and the various authorities worked towards introducing several new policies that were debated in court. Finer considerations such as the scope and identification requirements for the scheme for licences and registration of rickshaws, of the practicalities relating to separate lanes for non-motorised vehicles, and objections to plans permitting cycle rickshaws in particular areas were dealt with at length. The court’s attention while dealing with various proposals was drawn to the issue of traffic management in particular areas, such as Chandni Chowk, and intervention materialised into the construction of a multi-level parking facility, and the court later went on to the extent of regulating permission to the organising committee to access the Parade ground used for parking for *Ram Leela* celebrations. This humongous task that started out as a petition for labour welfare went on to regulate significant portions of the road traffic in Delhi and saw the court dealing with and facilitating coordination amongst various developmental and municipal authorities, including the MCD, the DDA, the Delhi Municipal Corporation and even the Delhi Police. Even though the success has not been materially measured, the positive light in which the court’s role is discussed, and the fact that subsequent orders seldom referred to non-compliance by authorities, unlike in other cases, may be traced back to the comparative specificity of orders, the flexibility given to authorities to work out their own plans, or to the cooperation of the authorities concerned.

285 *Id.*, ¶74.
286 *Id*.
288 *Id*.
289 Manushi Sangathan v. Govt. of Delhi, 2012 SCC OnLine Del 6097.
290 Manushi Sangathan v. Govt. of Delhi, 2013 SCC OnLine Del 2162.
292 *Id*.
2. Violations of the Right to Life

The trilogy of the *Upendra Baxi* cases is a striking example of the failure of the judicial institution to ensure implementation of its orders, and a fitting precursor to the evolution of the continuing mandamus. The court was looking into violations of the right to live with dignity enshrined in Article 21, due to despicable conditions of protective home in Agra. The Supreme Court’s intervention was aimed at curbing the unregulated release of residents, ensuring professional medical care and access to necessary facilities like latrines, in addition to schemes for vocational training and rehabilitation. Despite the court’s supervision over implementation of its directions, and a judicial officer being given the responsibility of inspecting the protective home and inform the Court of developments; the Court in *Upendra Baxi (2)* v. *State of U.P.*, had to deal with the state government, without informing the Court, having relocated the home into a place unfit for habitation. While the Court considered this to be a challenge to its authority, it also observed that despite repeated directives, the home had not formulated a rehabilitation scheme. After having supervised the matter for multiple years, the court thought it best to vest the responsibility to the NHRC, directing reports to be sent instead to the NHRC, giving it the powers to issue directions.

Even in *Upendra Baxi v. State of U.P.* almost two decades after the first judgment, the Court was still attempting to ensure the regulation of the release of residents and remediation of the shortcomings of the home. It has been noted that despite serious abuses and omissions in the functioning of the protective home, the court, albeit monitored the case for several years, it never implemented a concrete decision to punish the responsible persons. There was no visible movement in the legal status of the inmates. The abject failure is not just institutional, but can also be traced to an inherent unwillingness even in the court’s part to ensure accountability. While the lines between holding the Government actors accountable and interfering with policy are blurred, the

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295 *Id.*, ¶20-26.
296 *Id.*, ¶27.
297 *Id.*, ¶28.
299 *Id.*, ¶2.
300 *Id*.
301 *Id.*, ¶8.
303 *Id.*, ¶1.
Supreme Court has seldom remained shy of walking on edges or even entirely crossing over.

In a PIL concerning violations of constitutional and statutory rights of children in custodial restraints in various parts of the country, the Supreme Court gave numerous directions to different State Governments, prison authorities, State Legal Aid Board, and made several recommendations to the legislature to formulate a central legislation.\(^{307}\) The directions went to the extent of requiring judicial officers to visit the police lock-ups periodically and report to the High Court as to whether directions of the Supreme Court were being carried out.\(^{308}\) Justifying its monitoring, the Court noted:

> “Indeed as the relief is positive and implies affirmative-action the decision are not “one-shot” determinations but have on-going implications. Remedy is both imposed, negotiated or quasi-negotiated. Therefore, what corresponds to the stage of final disposal in an ordinary litigation is only a stage in the proceedings.”\(^{309}\)

On the withdrawal of the original petitioner, the Supreme Court directed the Supreme Court Legal Aid Committee to prosecute the petition.\(^{310}\) After almost a decade, the responsibility of monitoring the cases was given to the High Courts, who were to be assisted by the High Court Legal Aid and Advice Board, empowering them to even pass appropriate orders.\(^{311}\)

In Hussainara Khatoon,\(^{312}\) the court dealt with the plight of under trial prisoners who were behind bars for years awaiting trial, sometimes longer than the maximum punishment for the offences they were charged with, or at times without any charge at all. The Court directed the State Government as well as the High Court to furnish relevant records, data and statistics on both under trial prisoners and on the administrative set-up of the lower judiciary.\(^{313}\) Drawing inspiration from the US prison reform cases such as Gates v. Collier,\(^{314}\) where courts took an active participatory role, issuing several directions, the Indian SC also took on an activist approach.\(^{315}\)

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308 Id.
313 See e.g., Id., ¶1, ¶10.
3. Food Security and Draught Relief

In a writ petition filed in the backdrop of a declaration of draught in districts of nine States, several prayers for draught relief and alleviation were pleaded before the court, with the states as respondents. The directions of the Supreme Court was directed towards enforcement of various schemes and policies and in particular, the Disaster Management Act, 2005, as well as the National Food Security Act, 2013, for the implementation of whose provisions no mechanism had been set up or rules and regulations formulated. The judgment was delivered in four stages, with directions to various State and Central Governments, dealing with matters ranging from payment under employment guarantee schemes, restructuring and waiver of loans, etc., requiring the authorities to report back to the court. However, these directions saw little success, as even in March 2017, the court berated the Chief Secretaries of States for not following mandates of the court as well as the Act.

However, having started way back in 2001, PUCL’s Right to Food case has been not only one of the most complicated litigations, but has also seen a comparatively responsive administration, with judicial supervision making an actual difference.

D. RIGHT TO FOOD – THE SUCCESS STORY OF COURT MONITORING

Most socio-economic rights’ struggles in the Indian polity revolve around recognition of some form of legal entitlement to the non-enforceable tenets enshrined in Part IV of the Indian Constitution. The activist judiciary has often done this by reading into fundamental rights, particularly Article 21, and many socio-economic rights. A legal entitlement though is a battle only half-won, effective enforcement is what defines the actual success of the movement or struggle. The Supreme Court in People’s Union for Civil Liberties v. Union of India had undertaken this herculean task of, after recognising right to

318 Id.
food as a part of Article 21, to oversee its effective realisation. Standing out from most similar struggles, the device of continuing mandamus used in the PUCL case, coupled with cooperation from civil society, led to tangible success of the drawn-out litigation. In 2001, the PIL filed by PUCL brought to the fore the issue of starvation death in various parts of the country while food stocks reached unprecedented levels. The massive litigation has been expanded to cover a wide range of related issues including implementation of schemes, urban destitution, the right to work, starvation deaths, maternity entitlements and even broader issues of transparency and accountability.

Recognising that prevention of starvation and hunger is one of the Government’s primary responsibilities, the court, to ensure fulfilment of the obligation, gave numerous orders over the course of more than a decade, and monitored compliance by various authorities and agencies. Existing schemes and policies were turned into legal rights, and minimum allocation of food grains and supplemental nutrients set out in detail.

The systematic oversight of compliance was aided by appointment of commissioners who were to monitor the implementation of interim orders with the help of assistants and nodal officers appointed by the State Governments. They were empowered to inquire into any violations and demand redressal, and required to submit reports to the courts regularly, contain-


324 Id., 7.

325 Supreme Court Order dated 20th August, 2001 [People's Union for Civil Liberties v. Union of India, WP (C) No. 196 of 2001, order dated 20-8-2001 (SC)].


328 Id. (Also on 29th October 2002 [People’s Union for Civil Liberties v. Union of India, (2011) 12 SCC 675], the Supreme Court directed the state governments to appoint “assistants to the Commissioner’s”. The mandate of the assistants is simply to “render such assistance to the Commissioner’s as the Commissioner’s may require”. In addition, each state government is to appoint a “Nodal Officer” for the purpose of “ensuring the due implementation” of food-related schemes. The nodal officers are expected to “provide to the Commissioner’s full access to relevant records and provide relevant information”. The Commissioners have also nominated their own “Advisor” in each state. The order of 8th May 2002 [People’s Union for Civil Liberties v. Union of India, (2011) 12 SCC 673] allows the Commissioners “to take the assistance of individuals and reliable organisations”, adding that all officials are directed to fully cooperate with such persons/organizations. The Advisors essentially serve as a bridge between the Commissioner’s, the State Government, and various citizens’ groups.)
ing detailed recommendations, functioning of various schemes and status of implementation of orders. Unlike court officers though, their work was to be directly funded by the Government of India. Chief Secretaries of states were to be held responsible for persistent default in compliance, and Gram Sabhas were empowered to conduct audits of schemes and help in their implementation with all related information made available to them. Court orders were directed to be widely publicised through the radio, television and permanent displays. Although, not free from shortfalls, even the work of the court appointed commissioners has been successful to a huge extent, having been key in co-ordinating even policy schemes with and ensuring accountability of Central and State Governments, with states even actively soliciting their intervention and advice on specific policy issues.

The court also appointed a High-Powered Committee that submitted multiple reports dealing with the lacunas of the system and recommendations on reforms, visiting states and reviewing the local conditions of the distribution public system. States were also asked to respond to observations and recommendations in the reports. Thus, the court set up a parallel network of officers who would work in tandem with the court and governments, channelising all efforts and initiatives towards reaching the ultimate goal of ensuring food security. This coupled with the effective monitoring of compliance and clarity, specificity and practicality of the court orders has helped avoid the high rhetoric and low impact of many ill-fated social litigation.

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330 Order dated 29th October 2002 [People’s Union for Civil Liberties v. Union of India, (2011) 12 SCC 675]: “Adequate funds shall be made available to the Commissioner’s by the Union of India to enable them to perform [their] functions.”

331 Supreme Court Order dated 29th October 2002 [People’s Union for Civil Liberties v. Union of India, (2011) 12 SCC 675].

332 Supreme Court Order dated 8th May 2002 [People’s Union for Civil Liberties v. Union of India, (2011) 12 SCC 673].


335 People’s Union for Civil Liberties v. Union of India, (2013) 2 SCC 682.

336 People’s Union for Civil Liberties (PDS Matters) v. Union of India, (2013) 2 SCC 663.


July - September, 2017
The case has been called the most spectacular case of a court protecting the ‘right to food.’ Active litigation saw the right to food struggle take on the shape of a massive national movement that remains an active initiative. It is an informal network of organizations and individuals, with its origins in the 2001 petition, and has played a pivotal role in seeing advocating a right to food, acting as petitioners and activists, and having filed numerous interlocutory applications with detailed, concrete and quantifiable requests that have considerably shaped court orders. The Campaign has helped in publicising the initiative, maintaining an online repository of court orders, carrying out public meetings, etc. to mobilize collective action and empowering people at grassroots level, while also interacting directly with government officials and agencies. The campaign, the commissioners and the court functioned like a well-oiled machine, working tirelessly to make the now justiciable right to food an effective and realisable entitlement.

The increased media attention to the issue of food security during the pendency of the litigation has been identified as reflecting a broader shift in public opinion in India, and the court’s approach in the PUCL case has been recognised as serving an important dialogic function, facilitating compliance. As discussed later, public opinion plays a key role in incentivising government action, especially in such cases that involve long-term policy decisions.

The issue was soon adopted by the Government. The National Food Security Ordinance was passed in 2013, followed by introduction of the Food Security Bill which was enacted as the National Food Security Act in September 2013. While debates over its sufficiency and effectiveness continue, it is at least a huge leap in addressing the issue of food security. While this is seen as a largely successful judicial project, it is in the minority. We have seen however that the tool of continuing mandamus is capable of effective utilisation.

V. ULTIMATE COMPLIANCE – IS THE WRIT EFFECTIVE?

In this part, we thus assess the effectiveness of the writ remedy assessing what an ideal model of such a judicial engagement could look like.

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340 Id., 723-726.
The authors opine that the use of the sturdy jurisprudence on the court’s powers to punish for its contempt is a practicable solution to add to the sanctity of court orders by making the threat of sanction on non-compliance by public officers more credible. We also see how the nature of judicial intervention in such cases are substantially different from the regular brand of adversarial litigation, visualizing the process as a grand societal dialogue that nudges at ineffective functioning and lack of coordination to bring about tangible social change.

A. CONTEMPT AS THE LAST RESORT

The scrutiny of the writ and its application in the abovementioned catena of cases makes it discernible that continuing mandamus cannot act as a stand-alone remedy in the existing mechanism of administration of justice, considering the limited progressive outcome. The remedy, as discussed, is used only in cases with exceptional circumstances where relentless executive recalcitrance is acting as an impediment in dispensing justice. A follow-up of orders becomes mandatory in accordance with the court’s constitutional and moral duties to preserve the Rule of Law. Despite the conventional belief of interdependency between the three government organs, lack of mutual respect and no deference to check the same, especially between the judiciary and the executive, has led to flouting of court orders by executive bodies.344 Bearing in mind the principle of separation of powers and the court’s chary approach in micro-managing the cases, it is argued that the courts in cases of extraordinary circumstances should use the tool of Contempt to prevent further dereliction and create a fear in the minds of the officials to avert them from transgressing their duties. We, by doing so, would manifest that the ineffectiveness is not a structural flaw in the remedy but in its execution, because of the Court’s cautious approach to use contempt.

Article 142 of the Indian Constitution read along with Article 129 confers power on the Supreme Court to not only compel obedience of its orders but also punish for contempt of its authority. Contempt under the Indian jurisdiction has been categorised into two types, civil and criminal contempt.345 Civil contempt primarily refers to the non-compliance of court orders whereas criminal contempt refers concerns the obstruction of administration of justice either by criticising the judges or the court process publicly or scandalizing the court in any other manner.346 The discussion in the parts before makes it apparent that civil contempt of court is significant in the current analysis, especially in light of the court orders being flouted by the government officials. Thus, in this part of the paper, we will be first discussing the importance of contempt as a tool of deterrence to prevent non-compliance of orders, followed by an

346 The Contempt of Courts Act, 1971, §2(b) & §2(c).
analysis of the Court’s existing attitude towards using contempt against the
government officials as compared to how it should ideally be.

The concept of contempt was developed by the kings as a measure
to ensure compliance of orders.\textsuperscript{347} One of the essentials to hold one liable for
contempt is that the disobedience should be wilful and deliberate.\textsuperscript{348} However,
the courts seldom resort to contempt for enforcement of orders due to the dif-

culty in proving wilful contempt by government officials.\textsuperscript{349} It is argued that
indisposed approach of the court has made the government officials indifferent
towards court orders. While the purpose of civil contempt is to be coercive in
nature,\textsuperscript{350} it is important to understand that force and not morality is the de-

finitive deterrent from omission of compliance of orders.\textsuperscript{351} Besides, punishing
in this regard cannot be considered as inconsistent with the intention of the
provision.\textsuperscript{352} It is the duty of the judiciary to ensure that the executive and the
legislature act according to the law which also includes upholding the authority
of the court by following its orders.\textsuperscript{353}

While the number of contempt petitions has been multiplying in-
definitely, the courts have been reluctant to hold government servants guilty.
Revision of orders, extension of deadlines and in some instances, threaten-
ing with punishments has been the approach of the Court without actually de-
termining duties and forcing those individuals to look into the same.\textsuperscript{354} For
instance, even in \textit{D.K. Basu v. State of W.B.}\textsuperscript{355}, the SC warned the officials of
contempt in case of failure to comply with the orders, years passed by without
the Court taking/being able to charge anyone with contempt. The courts are au-

thorized to hold officials guilty for non-compliance of their orders.\textsuperscript{356} However,
even at instances where they choose to do the same, it becomes difficult to prove
\textit{mala fide} intention due to pretexts like red-tapism, delay in getting sanctions,
\textit{inter alia}. It thus becomes impossible for the Court to distinguish the genuine
cases, and it thus ends up revising the orders without any punitive measures.
This conventional approach followed by the Courts has indirectly confused the
officials of the impunity they enjoy and led to alarming disregard of the court
orders. Similar overlooking of orders is also seen by the States. For instance,
in the Prakash Singh case\textsuperscript{357} where the Court used continuing mandamus to

ac.in/bitstream/10603/3570/10/10_chapter%202.pdf (Last visited on August 21, 2017).
\textsuperscript{349} Subrata Roy Sahara v. Union of India, (2014) 8 SCC 470.
\textsuperscript{350} Keegan v. de Burca, 1973 IR 223 at 227.
\textsuperscript{351} \textit{Veena Tomapi, Textbook on Jurisprudence} 76 (2011).
\textsuperscript{352} Flood v. Lawlor, (2002) 3 IR 67.
\textsuperscript{354} \textit{SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK} 293 (Malcolm
Langford, César Rodríguez-Garavito & Julieta Rossi, 2017).
\textsuperscript{355} (1997) 1 SCC 416.
\textsuperscript{356} \textit{The Contempt of Courts Act, 1971}, §12.
redevelop police reforms, the Supreme Court expressing its helplessness declined the contempt petition, because of non-obedience of orders from most of the states.\textsuperscript{358} While the Courts have tried to intimidate the officers with penal actions at several occasions,\textsuperscript{359} its inability in determining the liability of the individual(s) and hold them responsible has abetted in the breakdown of the constitutional machinery.

Non-compliance of court orders due to a \textit{bona fide} reason cannot be punishable.\textsuperscript{360} The government officials may try to use this to their advantage and cite reasons like clarification in order required, keep it pending because of some budgetary reason, lack or resources, no proper technical knowledge, \textit{inter alia}. The Courts have abashed at individuals asking them to approach the Court in advance for any confusion or clarifications.\textsuperscript{361} Contemnors have been asked to file appeals and get stay orders for any foreseeable delay in executing the order.\textsuperscript{362} In such cases, where ascertaining specific liability is not an issue, the courts need to become more stringent and punish for contempt.

The fundamental issue arises when the order is directed towards a State(s). The vagueness of such orders and no fixed responsibilities has made it impossible for the courts to identify relevant officials. Rationalizing this, Justice Louis said, “If the Government becomes a law breaker, it breeds contempt for the law; it invites every man to become a law unto himself it invites anarchy.”\textsuperscript{363} Even in the current Cauvery water dispute case, sceptics deliberated the jeopardy of the fundamental structure of our democracy.\textsuperscript{364}

This antagonistic behaviour of the government to court orders has pressed the courts to be more solicitous with contempt petitions. Justice N. Kirubakaran had rightfully noted that a “step by step procedure for dealing with the court matters and compliance of court orders in time” is required.\textsuperscript{365} He suggested of forming a Special Cell to only see the compliance of court orders.\textsuperscript{366} Some officers may think that the Court is needlessly interfering in

\textsuperscript{358} Tarun Upadhyay, \textit{Police bill not similar to AFSPA}, \textit{Hindustan times} (New Delhi) February 28, 2013.


\textsuperscript{364} See Special Reporter, \textit{Cauvery row: Supreme Court to Continue Hearing Water Dispute Case Today}, \textit{Indian Express (New Delhi)} July 26, 2017.


\textsuperscript{366} Id., ¶22.
their duties and therefore be impervious to their directions. Therefore, it is imperative for the Court to *suo motu* or through Commissions, fixed personal responsibilities on specific officials.

Time and again, the court orders have been become subjects of rebuke without any successful results. The officials do not fear contempt because of the reluctance shown by the Courts in using contempt against government servants and the difficulty in determining the liability because of no specification of duties.

In *E.T. Sunup v. CANSS Employees Assn.*, the Court noted, “it has become a tendency with the government officer to somehow or the other circumvent the orders of Court and try to take recourse to one justification or other.” Thus, the courts should realize the importance of fixing duties and of a hierarchical set-up which may acts as a deterrent on to officers absconding from their duties. Evasion of contempt petitions because of the inability of the Court to actually penalise someone has set up a bad precedent before the officials giving them impunity. Thus, the courts should not accept excuses like ignorance, official delays, etc. If there is *prima facie* lethargy or absence of motivation, the same should be used to hold them liable. In case of severe delays, the court can form Commissions or appoint Court Commissioners to look after the reason of delays. If there are precedents set up punishing the indolent and corrupt officials, the fear of the same would compel them to work effectively. Hence, the writ of continuing mandamus along with the aid of the doctrine of contempt of court can help achieve socio-economic justice, if enforced effectively.

**B. THE INITIATION OF A SOCIAL DIALOGUE – INCENTIVISING CHANGE**

In a political society, especially a democracy, there exists a strong correlation between public opinion and government action or inaction. Empirical research has shown that transparency facilitates compliance, while

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368 The First Law Commission constituted after coming into force of the Constitution observed, “It is now increasingly necessary to abandon the lingering fiction of a legally indivisible state, and a federal conception of the crown, and to substitute for it the Principle of legal liability where the state, either directly or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character. The proper test is not an impractical distinction between government and nongovernmental function but the nature and form of the activities in question.” Law Commission of India, Liability of the State in Tort, Report No.1, (May 1956), available at http://lawcommissionofindia.nic.in/1-50/report1.pdf (Last visited on August 22, 2017).

non-compliance is common where issues do not receive media coverage.\textsuperscript{370} Publicising decisions, especially in monitoring programmes, have demonstrable effects on compliance with orders.\textsuperscript{371} The courts in these Social Action Litigation cases, especially the PUCL case and the environmental cases, have directed authorities to publicise its orders and increase public awareness.\textsuperscript{372} The ‘elite bias’ and lack of focus on ‘blind spots’ of social and developmental failures, Dreze and Sen argue plague Indian media.\textsuperscript{373} The public apathy is not a generational flaw, as popular rebukes would point out, but a result of systematic elimination of information from the public fora, be it a non-independent media or even an over-enthusiastic censor board. The court’s attempts at creation of legal entitlements, engaging the whole social community and requiring publicisation of results is not just a cry for better PR, rather, it has been shown to increase transparency and create pressures on public actors, increasing transparency and awareness. However, awareness generation and monitoring share a symbiotic relation. Greater visibility is not in itself sufficient to ensure compliance. It requires other supporting conditions to be met, such as the credibility of the court’s commitment to monitor and publicise compliance, whether the public officials ascribed value to their reputation, if the responsiveness of bureaucrats to pressures, and the significance that the public attaches to executive compliance.\textsuperscript{374} Despite routine media coverage of starvation deaths in Orissa, there was no significant effect.\textsuperscript{375} This has been traced to how the courts in Orissa, unlike the SC in the PUCL case, never adopted any robust compliance monitoring strategy, which, coupled with lack of political will, prevented any significant policy change.\textsuperscript{376} Contrasting the failure of the SC’s approach in earlier cases and the success of the PUCL litigation, in addition to external factors, the robust monitoring and institutional mechanism of supervision as well as engagement with key allies in civil society through the right to food campaign have been seen to be determinative of its success.\textsuperscript{377}

Another key variable in the success of such cases is the support and cooperation of several other players, the executive branch and the civil

\textsuperscript{372} Id.
\textsuperscript{375} Dan Banik, \textit{India’s Freedom from Famine: Case of Kalahandi}, Contemporary South Asia 7(3), 265-281 (1998).
\textsuperscript{376} \textit{Social Rights Judgments and the Politics of Compliance: Making It Stick} 310 (Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, 2017).
\textsuperscript{377} Id.
society organisations in ensuring compliance with court orders.\textsuperscript{378} Allying itself with key interest groups and garnering popular support while addressing popular causes can thus play a vital role in influencing compliance.\textsuperscript{379} NGOs and other civil groups can act as watch dogs, ensuring that non-implementation leads to legal action.\textsuperscript{380} In most environmental matters, as discussed above, the court acted through a combination of Monitoring Committees, spot visits by officers and central and state pollution control boards. Appointment of \textit{amicus curiae} to aid in its proceedings without active involvement of the petitioner ensured that the proceedings could continue. While most court-formed committees were seen to have NGO representation, the courts should ideally try to encourage more participation from environmental pressure groups and organisations. Similarly, in the PUCL case also, the institutionalised framework of commissioners was aided by the parallel right to food campaign, which amassed nation-wide support and brought the court’s attention to instances of non-compliance. These cases are in stark contrast with the failure and criticism in other cases where the court orders have been more isolative in nature, and failed to adequately engage all stakeholders. This is seen in the court’s approach in \textit{Godavarman}, especially prior to its 2014 orders, which were in complete ignorance of rights of traditional forest dwellers, and in disregard of the importance of engaging the local community in forest conservation.\textsuperscript{381} We can now see that this contrast exists due to the nature of court’s intervention, and its failure to engage and incentivise actors. Where however, proceedings have turned into a continuing mandamus, and the court has adopted coordinated means of civil cooperation, roped in all stakeholders, with precise orders that reflect pragmatic concerns of the government, it has seen reasonable success.

The continuing mandamus enables the court in cases where a declaratory judgment or even a mandatory order will make little change in isolation, to initiate a purposive dialogue in public society. Acting more like a mediator than an adjudicator, the court gets all the different actors, stakeholders and even the public to be a part of this dialogue. \textit{First}, it creates pressure on the public-opinion sensitive governments to move from the state of inertia, and \textit{second}, aids even inter-cooperation among governmental departments and agencies to reach more effective solutions. The power of contempt as a credible threat addresses administrative reluctance. The necessity for a tool like continuing mandamus becomes unambiguously clear when one tries to assess a hypothetical parallel – if say, in the Research Foundation case, instead of the court’s

\textsuperscript{378} C. Rodríguez-Garavito, \textit{Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America}, \textit{Texas Law Review} 89(7), 1669-1698, 1692 (2011).


\textsuperscript{381} Armin Rosencranz & Sharachchandra Lélé, \textit{Supreme Court and India’s forests}, \textit{Economic and Political Weekly}, 11-14 (February, 2008).
continues monitoring of dumping, destruction and import of hazardous waste, there was only one declaratory judgment; or if in the PUCL case, if the court restricted itself to recognising the violation of Article 21 and instructing the government to effectively implement food and employment related schemes. If despite court monitoring, progress was slow, then in its absence, there would be no threat in case of non-compliance. To start a separate set of compliance proceedings requires a lot of effort, will and resources on part of the petitioners, who in most of these cases, in the absence of activist and organizational agendas would have no voice. The procedural innovation in one way shoulders the burden taken upon by such agencies and aids social mobilization, by making the whole process participative, engaging even a reluctant government. While contempt always remains a key option, attribution of fault for policy lapses or ineffective planning is almost impossible. Political actors need motivation, often beyond obligatory responsibilities to comply. Judicial engagement, despite the treacherous constitutional waters it may be said to navigate through, becomes essential to prod action. This at times is the only effective redressal of rights violations that arise from the presence or absence of political motivation and the practical impossibility of coordination due to the presence of a highly fragmented and isolated administrative set-up. However, effective, but limited use of the court’s contempt powers is necessary when abdication of duty is evident, to ensure that it remains a credible threat.

VI. CONCLUSION

The manifestation of the right-remedy gap has been seen in the form of entitlements on paper with no functional means of enforcement, with even the mightiest guar of the constitutional rights being helpless. Especially when alleviation of impending injustice requires a change in societal machinery, an unresponsive State seldom can be incentivised to take affirmative action. We have seen how the Apex judiciary has grasped at straws to remedy this tragedy of rights, and has culled out the writ remedy of continuing mandamus. Dealing with a lackadaisical administrative set-up in social action litigation cannot, especially when remediation involves budgetary expenditure, be done via mere court orders. These are more often than not flouted or blatantly ignored. The model of continuing mandamus facilitates a process of constant judicial nudging and prodding, to overcome inaction. Instead of the case ending with a singular judgment, the case being kept open gives a follow-up mechanism to effect implementation.

Not strictly adhering to our common parameters of the court’s role, we have seen that it has been used with caution, and a study of the sample space of Supreme Court cases compliments this. It is only when one-shot remedies are most obviously seen as futile and where some blatant injustice needs to be remedied on a larger scale, that cases are made into a continuing mandamus.
While this has also not always yielded success, and repeated orders have fallen on deaf years, we have seen that at least limited, and in some cases even drastic change has been facilitated. An analysis aimed at assessing the reasons for varied success stories led us to conclude that the problem mostly emanates not from the structure or form of the remedy in itself. Rather, fault in most cases can be attributed to the nature of judicial orders themselves, which may be either too vague, or detached from practical considerations and an insight into the mechanics of administrative functioning. On the other hand, we see that specificity of directions, an understanding of how the state machinery functions, and an involvement of interested parties and stakeholders in the process throws up better results.

An alteration in the nature of directions and orders needs to be buttressed by making the threat of contempt proceedings more credible. While it becomes impossible at times to trace the source of inaction, especially when there is overlap with alteration in policy considerations, the system of accountability ought to be developed whenever practicable and possible. This will become imperative especially in cases where flouting directives is more due to recalcitrant inaction than the use of budgetary coffers with greater political underpinnings.

The whole process can be visualised as a broader social dialogue, where all key actors, the state, interest-groups, stake-holders and the citizenry are involved, with the judiciary acting as a facilitator. A niche sub-class of the breed of social action litigation, this brand of judicial involvement has the potential to move even what might have been seen as lost causes of non-fruitification of rights. While the judiciary should jump in with caution, and only as an extreme measure, fruitful involvement will necessitate closer attention to the nature of such involvement and an understanding of the practical modalities involved.

In another sense, the fashioning of the writ remedy to address enforcement of entitlements can in itself be seen as the creation of a fresh entitlement to redress such unenforceability. Lending credence to the judiciary’s position as the ultimate defender of our rights, it puts in place a structural set-up that seeks to compensate for some inherent flaws in the separation theory that impedes a robust system of checks and balances. The trade-off between a conservative Blackstonian notion of minimal judicial role and remedying the right-remedy gap draws legitimacy in a post-modern democratic set-up, especially in light of the broader goal of strengthening our constitutional mandate and giving teeth to constitutional rights.