

‘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 judgement 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.

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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 authoritatively answered.’² The paper traces judicial trends thereafter, arguing that with the phasing out of what Baxi famously identifies as ‘post-emergency judicial populism’,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 *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.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.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 realisation of rights. A full-blown manifestation of ‘creeping jurisdiction’,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

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 Apex Court through its engagement in social action litigation).

² *Id.*, 42.

³ The court’s intervention in social litigation has increased manifold after the Emergency, with PILs gaining momentum, and the Apex Court’s decisions becoming bolder and seemingly more obtrusive. See Upendra Baxi, *Taking suffering seriously: Social action litigation in the Supreme Court of India*, Third World Legal Studies 107 (1985).

⁴ S. Muralidhar, *The Expectations and Challenges of Judicial Enforcement of Social Rights* available at http://www.delhidistrictcourts.nic.in/ejournals/Social_Rights_Jurisprudence.pdf (Last visited on August 21, 2017).

⁵ *Id.*

⁶ A term coined by Upendra Baxi as he describes the “taking over the direction of administration in a particular arena from the executive.” See 29 I.C.J. REV. 37 1982.

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 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

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

⁷ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Vol. 3, 21 (2nd ed., 1832).

⁸ Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harvard Law Review 8 (1972); See *Marbury v. Madison*, 5 U.S. (1 Cranch) 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.*

¹⁰ See WOUTER VANDENHOLE, THE LIMITS OF HUMAN RIGHTS LAW IN HUMAN DEVELOPMENT IN FACING THE LIMITS OF THE LAW 359 (2009).

¹¹ See Clark D. Cunningham, *Public Interest Litigation in the Indian Supreme Court: A Study in Light of the American Experience*, 29 J. INDIAN L. INST. (1987), 505, available at <http://clarkcunningham.org/PDF/PublicInterestLitigationInIndia.pdf> (Last visited on January 18, 2016); *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802, at 815.

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 Apex Court, observes, how unlike in the US, right and remedy in India had become 'thoroughly disconnected'.¹² 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.¹³

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.¹⁴ The landmark case in this regard is *Hussainara Khatoon v. State of Bihar*, where although the case remained pending before the Apex court for more than 15 years, as many as seven orders were passed,¹⁵ with detailed directions with regard to release of under trial prisoners languishing in jails for want of expeditious disposal of pending cases.¹⁶ 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.¹⁷ 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,¹⁸ 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's 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 the case of *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

¹² Clark D. Cunningham, *Public Interest Litigation in the Indian Supreme Court: A Study in Light of the American Experience*, 29 J. INDIAN L. INST. (1987), at 505, available at <http://clarkcunningham.org/PDF/PublicInterestLitigationInIndia.pdf> (Last visited on January 18, 2016).

¹³ *Id.*

¹⁴ *Id.*, 511.

¹⁵ *Hussainara Khatoon & Ors. (III) v. Home Secretary, Bihar, Patna*, AIR 1979 SC 1360; *Hussainara Khatoon (IV) v. Home Secretary, Bihar*, AIR 1979 SC 1369; *Hussainara Khatoon v. Home Secretary, State of Bihar*, AIR 1979 SC 1377; *Hussainara Khatoon v. Home Secretary, State of Bihar*, AIR 1979 SC 1819; *Hussainara Khatoon (VII) v. Home Secretary, State of Bihar*, (1995) 5 SCC 326

¹⁶ See *Hussainara Khatoon (VII) v. Home Secy.*, (1995) 5 SCC 326.

¹⁷ Cunningham, *supra* note 11, 512.

¹⁸ See e.g. *Bombay Pavement Dwellers, P. Nalla Thampy Thera v. Union of India*, AIR 1984 SC 74.

¹⁹ *Id.*, at 24.

²⁰ *State of H.P. v. Umed Ram Sharma*, (1986) 2 SCC 68, ¶¶33-37.

²¹ *State of Himachal Pradesh v. Parent of a Student of Medical College, Shimla*, (1985) 3 SCC 169.

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).

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.

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

²³ See SAMPAT JAIN, PUBLIC INTEREST LITIGATION 342 (2002).

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).

²⁶ Cunningham, *supra* note 11.

²⁷ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

²⁸ See generally SAMPAT JAIN, PUBLIC INTEREST LITIGATION (2002).

²⁹ But see Clark D. Cunningham, *Public Interest Litigation in the Indian Supreme Court: A Study In Light of the American Experience* 505, 29 J. INDIAN L. INST. (1987), available at <http://clarkcunningham.org/PDF/PublicInterestLitigationInIndia.pdf> (Last visited on January 18, 2016).

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

‘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 mechanisms, exists.”³¹ 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*’,³² 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.³³ While an extensive comparative analysis is beyond the scope of this paper, it is worth noticing that similar tools have been adopted by constitutional courts in both, South Africa and Canada, in combatting

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).

³¹ *Id.*, 113.

³² *State of Madras v. V.G. Row, Union of India & State, 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.); *Nilabati Behera v. State of Orissa, AIR 1993 SC 1960*, at 19; *Lavoie v. Nova Scotia (1988) 84 NSR (2d) 393 (NS SC)* at 400, 403 (Pursuant to §24 of the Charter, the court has a duty, where it is just under the circumstances, to grant a remedy if Charter rights have been infringed or denied. The Charter of Rights to be meaningful must be capable of enforcement).

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 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

³⁴ The ‘structural interdict’ in SA and the Charter remedy in Canada, *See* Kent Roach & Geoff Bunlender, *Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable*, 122 S. AFRICAN L.J. 325 (2005), pp. 325-351.

³⁵ S. Muralidhar, *Implementation of Court Orders in the Area of Economic, Social and Cultural Rights: An overview of the Experience of the Indian Judiciary*, 2 INTERNATIONAL ENVIRONMENTAL LAW RESEARCH CENTRE (2002), available at <http://www.ielrc.org/content/w0202.pdf> (Last visited on April 28, 2017).

³⁶ Shivani Verma, *The International Council on Human Rights Policy, Review Meeting Rights and Responsibilities of Human Rights Organisations Geneva*, 15 March 2005.

³⁷ LAWRENCE BAXTER, *ADMINISTRATIVE LAW* 696-8 (1984).

³⁸ For instance, *Premier, Mpumalanga v. Executive Committee, Association of State-Aided Schools, Eastern Transvaal*, 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*; *Shalabi v. Minister of Home Affairs*, CCT35/99 (2000) ZACC 8; *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).

³⁹ DENNIS DAVIS, *SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: THE RECORD AFTER TEN YEARS*, Vol. 2 (Issue 1, 2004).

⁴⁰ 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).

⁴¹ Mitra Ebadolahi, *Using Structural Interdicts and The South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa*, 83 NYU LAW REVIEW 1565, <http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-83-5-Ebadolahi.pdf> (Last visited on April 28, 2017).

⁴² Currie & de Waal, *supra* note 40, at 217–18.

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 Court.⁴⁹ The courts' reluctance to award structural interdicts has been severely criticised,⁵⁰ 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,⁵¹ 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.⁵² Despite the establishment of the validity of such injunctive relief,⁵³ general declarations were preferred, with the faith that governments would

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*, 218.

⁴⁶ 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.

⁴⁷ Minister of Health & Others v. Treatment Action Campaign, (TAC (No 2)) 2002 (5) SA 721 (CC) at 757; *See also* Pretoria City Council v. Walker 1998, (2) SA 363 (CC), at 401.

⁴⁸ 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).

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).

Sibiya v. Director of Public Prosecution, Johannesburg (Sibiya 1), 2005 (5) SA 315 (CC) at 337–38; Makwanyane case, (1995 (3) SA 391 (CC)) (The Constitutional Court had declared the death penalty inconsistent with the interim Constitution and ordered the substitution of lawful punishments for prisoners on death row. A decade later, finding that "the process of the substitution of sentences has taken far too long," the Court issued a structural interdict to exercise supervisory jurisdiction over the sentence-conversion process).

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.

⁵² Van Mulligan v. Saskatchewan Housing Corp., (1982) 23 Sask R 66 (QB); Levesque v. Canada (Attorney General), (1985) 25 DLR (4th) 184 (FCTD); *See also* PETER HOGG, CONSTITUTIONAL LAW OF CANADA 37.269, (3rd ed., 1992); PETER HOGG & PATRICK MONAHAN, LIABILITY OF THE CROWN 36, (3rd ed., 2001); R. J. SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE, (3rd ed., 2000), at 3.1030; KENT ROACH, CONSTITUTIONAL REMEDIES IN CANADA (1994), at 13.90.

⁵³ Doucet-Boudreau v. Nova Scotia (Minister of Education, 20031 3 SCR 3; *See also* Marchand v. Simcoe Country Board of Education, (1986) 29 DLR (4th) 596 (Ont HC and Marchand v. Simcoe Country Board of

comply in good faith with general declarations of constitutional entitlement.⁵⁴ 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.⁵⁵ With the motto that systematic flaws require systematic remedies, Canadian law of remedies saw massive expansion and innovation.⁵⁶ The ‘suspended declaration of invalidity’, a novel remedy by which the court makes space for legislative response, is characterised by the 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

Education (no. 2) (1987) 44 DLR (4th) 171 (Ont HC) (Injunctive relief granted against local school board demonstrates willingness to use mandatory relief against local authorities).

⁵⁴ See *Mahe v. Alberta*, (1990) 68 DLR (4th) 69 (SCC), at 106; *Eldridge v. British Columbia*, (1997) 151 DLR (4th) 577 (SCC), ¶96; K. Roach, *Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity* 211, 269, 39 UNIVERSITY OF BRITISH COLUMBIA LAW REVIEW (2002).

⁵⁵ Justice Iacobucci’s Dissent in *Little Sisters v. Canada*, (2000) 2 S.C.R. 1120.

⁵⁶ See *Schachter v. Canada*, (1992) 2 S.C.R. 679.

⁵⁷ *Id.*; Reference re Language Rights under the Manitoba Act, (1985) 1 S.C.R. 721.

⁵⁸ Reference re language rights under the Manitoba Act, (1985) 1 SCR 721.

⁵⁹ Reference re language rights under the Manitoba Act, (1985) 1 SCR 721, supp reasons (1985) 2 SCR 347, supp reasons (1990) 3 SCR 1417, supp reasons (1992) 1 SCR 212.

⁶⁰ Sujit Choudhry & Kent Roach, *Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies*, 21 SUPREME COURT LAW REVIEW SECOND SERIES 205 (2003).

⁶¹ *Id.*

⁶² *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, ¶25, per Iacobucci and Arbour JJ (emphasis in original) [*Doucet-Boudreau*], ABOA, Tab 7. 56, 57.

⁶³ Rohan J Alva, *Continuing Mandamus: A Sufficient Protector of Socio-Economic Rights in India* 210, 44 HONG KONG L.J. 207, 230 (2014).

⁶⁴ *Id.*

⁶⁵ UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* 373 (1980).

⁶⁶ *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802, at 813

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.⁶⁷ 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.⁶⁸ 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.⁶⁹ Even in *the CERC case*,⁷⁰ 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.⁷¹

As with declaratory orders, even mandatory orders were not wholly successful in combatting 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.⁷² 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.⁷³ 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 issue directions from time-to-time to monitor compliance.⁷⁴ 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.⁷⁵

One of the first instances of such practise can be seen in *Hussainara Khatoon case*,⁷⁶ discussed below, where relief was given to the prisoners as orders and directives,

⁶⁷ See also *Assam Rifles v. Union of India*, (1987) 2 SCC 638 (SC refused to adjudicate on sensitive issues dominated by political concerns); *Vincent Parikulangara 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.

⁶⁹ *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545.

⁷⁰ *Consumer Education and Research Centre v. UOI*, (1995) 3 SCC 42.

⁷¹ *Id.*, 31.

⁷² See *Olga Tellis, Thirty Years after a landmark Supreme Court verdict, slum dwellers rights' are still ignored*, THE SCROLL, December 21, 2015, available at <https://scroll.in/authors/3404> (Last visited on April 28, 2017); Markandey Katju, *The Peremptory Demolition of Slums is a Violation of the Law*, THE WIRE (Mumbai) December 14, 2015, available at <https://thewire.in/17279/the-peremptory-demolition-of-slums-is-a-violation-of-the-law/> (Last visited on April 30, 2017).

⁷³ Alva, *supra* note 63, 211.

⁷⁴ D. Y. Chandrachud, *Constitutional and Administrative Law in India*, 36 INTERNATIONAL JOURNAL OF LEGAL INFORMATION 335 (2008), available at: <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1142&context=ijli> (Last visited on April 28, 2017).

⁷⁵ Alva, *supra* note 63.

⁷⁶ *Hussainara Khatoon v. State of Bihar*, A.I.R. 1979 S.C. 1360.

without issuing dispositive judgments, in order to retain jurisdiction over the matter.⁷⁷ 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.⁷⁸ 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.⁷⁹

It was only in *Vineet Narain v. UOI*,⁸⁰ 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.⁸¹

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.⁸² 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 the fruits of a judgement can be enjoyed by the right-bearers, and realization is not hindered by administrative and/or political recalcitrance. Tip-toeing 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 shortcomings. 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

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.

⁷⁹ *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161, ¶¶37, 38.

⁸⁰ *Vineet Narain v. Union of India*, (1998) 1 SCC 226.

⁸¹ *Id.*, ¶21.

⁸² *M. C. Mehta v. Union of India*, (2001) 3 SCC 763; *Manohar Lal Sharma v. Principal Secretary 14*, (2014) 2 SCC 532.

The fashioning of the writ, although, in substance, used before, took place in the *Vineet Narain* case,⁸³ 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')⁸⁴ in investigations against government bureaucrats and dignitaries has often been considered as non-committal, if not undependable.⁸⁵ Its transparency in working has often been impugned - in the *Bofors fraud* case,⁸⁶ and even the *Priyadarshani Mattoo* case,⁸⁷ 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.⁸⁸ 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.'⁸⁹ The apex 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. UOI*, ('Jain Hawala case').⁹⁰ Motivated by the need to fill this executive and legislative void, and guided by its duty under the Beijing Principles,⁹¹ 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. Director, CBI*⁹² and *Anukul Chandra*

⁸³ *Vineet Narain v. Union of India*, AIR 1998 SC 889.

⁸⁴ The CBI was established by the Special Police Establishment set up by the Government of India in 1941. Its powers come from the Delhi Special Police Establishment Act (1946) and it's found in the Union List of the 7th Schedule of the Indian Constitution. Its aim is to maintain the law of the land by 'in-depth investigation and successful prosecution.'

⁸⁵ See generally N K SINGH, THE POLITICS OF CRIME AND CORRUPTION: A FORMER CBI OFFICER SPEAKS 105 (1999).

⁸⁶ *Union of India v. Prakash P. Hinduja*, AIR 2003 SC 2612 (Allegation of bribery in the contract entered into between the Government of India and M/s AB Bofors for supply guns, ammunitions, vehicles, etc. The SC overruled the Delhi High Court judgement (*Prakash P. Hinduja v. Union of India*, (2002) 64 DRJ 34) which quashed the FIR filed and asked the CBI to advance with investigations).

⁸⁷ *Santosh Kumar Singh v. State through CBI*, (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 no. 85.

⁸⁹ See *Vineet Narain v. Union of India*, 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").

⁹⁰ *Vineet Narain v. Union of India*, AIR 1998 SC 889.

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 *Vishakha v. State of Rajasthan*, AIR 1997 SC 3011, ¶11.

⁹² *Subramanian Swamy v. Director, CBI*, (2014) 8 SCC 682.

Pradhan v. Union of India,⁹³ 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.⁹⁴

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 mandamus, owing to the similar nature of proceedings as in the *Jain Hawala* case.¹⁰⁴ 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.¹⁰⁵ A similar judgement was also given in *M.C. Mehta v. Union of India*, ('Taj Heritage Corridor Project

⁹³ Anukul Chandra Pradhan v. Union of India, (1996) 6 SCC 354.

⁹⁴ Vineet Narain v. Union of India, AIR 1998 SC 889, ¶12.

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.

⁹⁷ Vineet Narain v. Union of India, AIR 1998 SC 889, ¶15.

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 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.

¹⁰² Vineet Narain v. Union of India, (1996) 2 SCC 199.

¹⁰³ Union of India v. Sushil Kumar Modi, (1998) 8 SCC 661.

¹⁰⁴ *Id.*, ¶10.

¹⁰⁵ *Id.*, ¶4; See also R. v. Metropolitan Police Commissioner, (1968) 1 All ER 763.

case')¹⁰⁶ where the Court intervened to contain the construction activities between the Agra Fort and Taj Mahal thereby diverting River Yamuna,¹⁰⁷ and in pursuance thereof, adopted the procedure of continuing mandamus by monitoring the functioning of the CBI. Even in the Taj Trapezium case¹⁰⁸ 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,¹⁰⁹ and in accordance with the responses, directed the CBI to file an FIR and make further investigation.¹¹⁰

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.¹¹¹ 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.¹¹² It rather observes court monitoring to be a reason why the investigating agencies may not misuse it.¹¹³ The Jain Hawala dictum was, thereafter, frequently used as a precedent by both the Apex Court¹¹⁴ as well as High Courts¹¹⁵ to do complete justice. Although there is a mandatory CBI manual¹¹⁶ 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, *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.¹¹⁷

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.¹¹⁸ 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.¹¹⁹ Nevertheless, a party cannot seek the investigation by an independent agency merely on suspicion or surmises as held by the

¹⁰⁶ M.C Mehta v. Union of India, (2003) 8 SCC 706.

¹⁰⁷ *Id.*, ¶3.

¹⁰⁸ M.C. Mehta v. Union of India, 1997 2 SCC 353.

¹⁰⁹ M.C Mehta v. Union of India, 2003 Supp (3) SCR 925, ¶6.

¹¹⁰ *Id.*, ¶13.

¹¹¹ Manohar Lal Sharma v. Principal Secretary, (2014) 2 SCC 532; Centre for Public Interest Litigation v. Union of India, (2000) 8 SCC 606.

¹¹² Manohar Lal Sharma v. Principal Secretary, (2014) 2 SCC 532, ¶38.

¹¹³ *Id.*

¹¹⁴ Sushila Devi v. State of Rajasthan, (2014) 1 SCC 269.

¹¹⁵ S. Seshaiyah v. Government of A.P., (2004) 1 ALD 307.

¹¹⁶ Central Bureau of Investigation, *Crime Manual* (July 5, 2013), available at <http://cbi.nic.in/aboutus/manuals/crimemanual.php> (Last visited on April 24, 2017).

¹¹⁷ See Vineet Narain v. Union of India, AIR 1998 SC 889.

¹¹⁸ Narmada Bai v. State of Gujarat, (2011) 5 SCC 79, State of Karnataka v. Arun Kumar Agarwal, (2000) 1 SCC 210.

¹¹⁹ Sushila Devi v. State of Rajasthan, (2014) 1 SCC 269; O.M. Debara v. The Government of Andhra Pradesh, General Administration (SPL.C) Department rep. by Chief Secretary, (2014) 2 SCC 1.

Supreme Court in *Karnataka v. Arun Kumar*¹²⁰ while overruling the High Court¹²¹ judgement 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.¹²² 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. the Principal Secretary*,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

¹²⁰ *Karnataka v. Arun Kumar*, (2000) 1 SCC 210.

¹²¹ *Arun Kumar v. State of Karnataka*, (1999) 1 Kar LJ 603.

¹²² *Compare Vineet Narain v. Union of India*, 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).

¹²³ *See, e.g., Vineet Narain v. Union of India*, AIR 1998 SC 889.

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/2/> (Last visited on December 16, 2016).

¹²⁵ Alope Tikku, *Given CBI past record, SC monitoring not enough*, HINDUSTAN TIMES (Delhi) December 27, 2010, available at <http://www.hindustantimes.com/delhi/given-cbi-past-record-sc-monitoring-not-enough/story-uQWMo0w2kIRR922UPBeOkN.html> (Last visited on December 16, 2016).

¹²⁶ *Manohar Lal Sharma v. the Principal Secretary*, (2014) 2 SCC 532.

¹²⁷ *Id.*, ¶43.

¹²⁸ *Vineet Narain v. Union of India*, AIR 1998 SC 889, ¶8; *Narmada Bai v. State of Gujarat*, (2011) 5 SCC 79, ¶38.

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 kind of view on the merits of the case considering facilitating fair investigation as its ultimate goal.¹³¹

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.’¹³² 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.¹³³ 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 *mala fide* or colourable legislation, or any other undesired influence on fair investigation.¹³⁴ 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.¹³⁵

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.¹³⁶ 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 investigation¹³⁷ 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, combatting

¹²⁹ Arun Jaitley, Minister of Finance, Corporate Affairs and Information & Broadcasting, 28th I.B. Endowment Lecture (23 December, 2015), available at: <http://pibphoto.nic.in/documents/rlink/2015/dec/p2015122301.pdf> (Last visited on December 16, 2016).

¹³⁰ See *supra* note 118.

¹³¹ See *Jakia Nasim Ahesan 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.)

¹³² *Union of India v. Sushil Kumar Modi*, (1998) 8 SCC 661, ¶1.

¹³³ *Narmada Bai v. State of Gujarat*, (2011) 5 SCC 79, ¶38.

¹³⁴ *Manohar Lal Sharma v. Principal Secretary 14*, (2014) 2 SCC 532, ¶29.

¹³⁵ See *Nirmal Kahlon v. State of Punjab*, 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).

¹³⁶ *Vineet Narain v. Union of India*, 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.)

¹³⁷ The Code of Criminal Procedure, 1973, §2(h).

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 the case of *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 judgement 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 trials a ‘waste of public money’ because of the controversial role of the CBI.¹⁴⁴ Even in the *M. C. Mehta case*,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.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.¹⁴⁷ This was after CBI's inexplicable lethargy in interrogating, freezing bank accounts and raiding the

¹³⁸ *Prakash Singh v. Union of India*, (2006) 8 SCC 1.

¹³⁹ Abhinav Gargi, *Nothing has changed since 1997, Vineet Narain says*, THE TIMES OF INDIA (New Delhi) May 10, 2013, available at <http://timesofindia.indiatimes.com/india/Nothing-has-changed-since-1997-judgment-Vineet-Narain-says/articleshow/19978247.cms> (Last visited on December 16, 2016).

¹⁴⁰ (2006) 8 SCC 1.

¹⁴¹ Maja Daruwala, *Ten Years and Waiting: A Decade after 'Prakash Singh' Judgement, police reforms remain undone*, INDIAN EXPRESS, September 22, 2016, available at <http://indianexpress.com/article/opinion/columns/model-police-law-supreme-court-prakash-singh-case-india-police-3043093> (Last visited on December 20, 2016).

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.

¹⁴³ *Reforms in Police Force*, BUSINESS STANDARD (Delhi) November 29, 2016, available at http://www.business-standard.com/article/government-press-release/reforms-in-police-force-116112900976_1.html (Last visited on December 10, 2016).

¹⁴⁴ G. P. Joshi, *The Central Vigilance Commission and the Central Bureau of Investigation: A brief history of some developments*, COMMONWEALTH HUMAN RIGHTS INITIATIVE, September 17, 2010, available at http://humanrightsinitiative.org/old/publications/police/cvc_cbi_some_developments_a_brief_history.pdf (Last visited December 18, 2016); See *Union of India v. Prakash P Hinduja*, (2002) 64 DRJ 34.

¹⁴⁵ *M. C. Mehta v. Union of India*, (2001) 3 SCC 763.

¹⁴⁶ Aditya Dev, *Forest department hurdle in Taj Heritage Corridor*, THE TIMES OF INDIA (Agra) July 11, 2016, available at <http://timesofindia.indiatimes.com/city/agra/Forest-department-hurdle-in-Taj-Heritage-Corridor/articleshow/53159073.cms> (Last visited on December 11, 2016).

¹⁴⁷ *Centre for Public Litigation v. Union of India*, (2011) 1 SCC 560.

houses of the suspects.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.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,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.¹⁵¹ Hence, it is 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

¹⁴⁸ Sankar Sen, *CBI’s Credibility Crisis*, THE TRIBUNE, July 21, 2016, available at <http://www.tribuneindia.com/news/comment/cbi-s-credibility-crisis/268703.html> (Last visited on December 20, 2016).

¹⁴⁹ Press Trust of India, *2G spectrum scam: Former telecom minister A Raja arrested*, THE TIMES OF INDIA, February 2, 2011, available at <http://timesofindia.indiatimes.com/india/2G-spectrum-scam-Former-telecom-minister-A-Raja-arrested/articleshow/7411212.cms> (Last visited on August 6, 2017).

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.

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 Apex 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.

¹⁵² Bosco Dominique, *Don’t amend prevention of corruption Act: India against Corruption to Centre*, THE TIMES OF INDIA (Puducherry) November 22, 2016, available at <http://timesofindia.indiatimes.com/city/puducherry/Dont-amend-prevention-of-corruption-Act-India-Against-Corruption-to-Centre/articleshow/55559489.cms> (Last Visited on December 11, 2016).

¹⁵³ See generally Kaushal Shroff, *The Curious Case of CBI*, BUSINESS STANDARD (Delhi) October 31, 2015, available at http://www.business-standard.com/article/current-affairs/the-curious-case-of-cbi-115103001651_1.html (Last visited on April 25, 2017) (Justice T. S. Thakur and Justice C. Nagappan suggested “CBI probe against CBI” for not filling up vacancies in the agency).

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 Apex Court as ‘Garbage Supervisor’ or ‘Lords of Green Bench’,¹⁵⁵ many have lauded its approach as having pioneered procedural as well as substantive innovations for the realisation of environmental justice.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ Instituting new bodies and implementing court orders through the writ of continuing mandamus has also been characterised as one such innovation,¹⁶⁰ strengthening access to environmental justice.

Despite having given constitutional protection to environmental rights,¹⁶¹ non-implementation of orders has been one of the main issues hindering relief in environmental cases.¹⁶² Enforcement agencies have repeatedly failed to enforce court orders.¹⁶³ In an

¹⁵⁴ See *Nirmal Singh Kahlon v. State of Punjab*, AIR 2009 SC 984.

¹⁵⁵ S.S. Prakash and P.V.N. Sarma, *Environment Protection vis-a-vis Judicial Activism* 56, 2 SUPREME COURT JOURNAL (1998).

¹⁵⁶ Shyami Fernando Puvimanasinghe, *An Analysis of the Environmental Dimension of Public Nuisance, with particular reference to role in India and Sri Lanka*, 9 SRI LANKA JOURNAL OF INTERNATIONAL LAW 143-171(1997); Ayesha Dias, *Judicial Activism in Development and Enforcement of environmental Law: Some Comparative Insights from The Indian Experience*, 6 J. ENVIRONMENTAL LAW (1994); See G. L. Perris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 (1) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 66 (1991); See also M.R. Anderson, *Individual Rights to Environmental Protection in India*, HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 1 (1998).

¹⁵⁷ *Subhash Kumar v. State of Bihar*, (1991) 1 SCC 598; *Shantistar Builders v. Narayan Khimalal Totame*, AIR 1990 SC 630; Organization for Economic Co-operation and Development [OECD], *Environmental Compliance and Enforcement in India: Rapid Assessment* (December 5, 2006), available at <https://www.oecd.org/env/outreach/37838061.pdf> (Last visited on April 25, 2017).

¹⁵⁸ See Geetanjoy Sahu, *Implication of Indian Supreme Courts Innovation for Environmental Jurisprudence*, 4/1 LAW, ENVIRONMENTAL AND DEVELOPMENT JOURNAL (2008), available at <http://www.lead-journal.org/content/08001.pdf> (Last visited on April 25, 2017).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*; Gitanjali Nain Gill, *Human Rights and the Environment in India: Access through Public Interest Litigation*, ENV L REV 14 (2012) 200-218.

¹⁶¹ See *Rural Litigation*, AIR 1985 SC 652; *MC Mehta v. UOI*, AIR 1987 SC 965.

¹⁶² Rajesh Rangarajan, *A Review of Implementation Gaps in the Enforcement of Environmental Regulation in India*, Institute for Financial Management and Research, Centre for Development Finance, Environmental Policy: Citizens, Institutions & Implementation, Working Paper (July 2009) available at

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 Apex Court has sought to initiate court monitored proceedings to ensure compliance in environmental cases. In *Vellore Citizen's Welfare Forum v. Union of India*,¹⁶⁴ 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 the case of Indian Council for *Enviro-Legal Action v. Union of India*,¹⁶⁵ 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.¹⁶⁶ It had ordered the constitution of a 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

http://environmentportal.in/files/Working%20paper_env%20enf%20gaps_final.pdf (Last visited on August 8, 2017).

¹⁶³ 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 *Ryland v. Fletcher*. 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 and Others*, AIR 1996 SC 2231. See also Nandini Dasgupta, *Tall Blunders*, Doten To Earth, September 30, 1998, 22.

¹⁶⁴ *Vellore Citizen's Welfare Forum v. Union of India*, (1996) 5 SCC 647.

¹⁶⁵ *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212.

¹⁶⁶ *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212.

¹⁶⁷ *Indian Council for Enviro-Legal Action v. Union of India*, (2000) 2 SCC 293.

¹⁶⁸ (1996) 3 SCC 212; *Indian Council for Enviro-Legal Action v. Union of India*, AIR 1999 SC 1502;

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.

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 hazardous waste management,¹⁷⁷ and even entrusted with overseeing time-bound implementation of the court's directions.¹⁷⁸ Importers who made illegal imports of such waste were directed to be placed on record,¹⁷⁹ failing which a government inquiry was directed.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.¹⁸¹ It directed recycling or destruction of waste, depending upon its hazardous nature under supervision of the monitoring committee.¹⁸² If the reports showed non-compliance, contempt proceedings were initiated *suo moto* 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.¹⁸³

Another case pertaining to waste management was *Almitra H. Patel v. Union of India*,¹⁸⁴ where the Supreme Court used continuing mandamus to oversee the system of

¹⁷⁰ *Indian Council for Enviro-Legal Action v. Union of India*, (2011) 12 SCC 739; *Indian Council for Enviro-Legal Action v. Union of India*, (2011) 12 SCC 764;

¹⁷¹ *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212.

¹⁷² *Indian Council for Enviro-Legal Action v. Union of India & Others*, (2011) 12 SCC 764, ¶133.

¹⁷³ See (1996) 3 SCC 212; *Indian Council for Enviro-Legal Action v. Union of India*, (2011) 12 SCC 768; *Indian Council for Enviro-Legal Action v. Union of India*, (2011) 12 SCC 752; *Indian Council for Enviro-Legal Action v. Union of India*, (2011) 12 SCC 764; *Indian Council for Enviro-Legal Action v. Union of India*, (2011) 12 SCC 766.

¹⁷⁴ See GITANJALI NAIN GILL, ENVIRONMENTAL JUSTICE IN INDIA: THE NATIONAL GREEN TRIBUNAL 213-216 (2012).

¹⁷⁵ *Research Foundation for Science, Technology and Natural Resource Policy v. Union of India*, (2012) 7 SCC 764.

¹⁷⁶ *Id.*

¹⁷⁷ *Research Foundation for Science v. Union of India*, (1999) 1 SCC 224.

¹⁷⁸ *Research Foundation for Science v. Union of India*, (2005) 10 SCC 510, ¶53.

¹⁷⁹ *Research Foundation for Science v. Union of India*, (2000) 9 SCC 41, ¶42.

¹⁸⁰ *Research Foundation for Science v. Union of India*, (2005) 13 SCC 658.

¹⁸¹ *Research Foundation for Science v. Union of India*, (2005) 10 SCC 510.

¹⁸² *Research Foundation for Science v. Union of India*, (2005) 13 SCC 671; *Research Foundation for Science v. Union of India*, (2005) 13 SCC 186.

¹⁸³ *Research Foundation for Science v. Union of India*, (2012) 7 SCC 769 ¶45.

¹⁸⁴ *Almitra H. Patel v. Union of India*, (2000) 2 SCC 166.

solid waste management in cities across India. The court instituted a committee to examine aspects of solid waste management in Class I cities,¹⁸⁵ requiring authorities from the different cities to file responses to its recommendations,¹⁸⁶ failing which even penalties were imposed.¹⁸⁷ Even the Central Pollution Board was directed to submit a report regarding implementation of the committee's recommendations.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.¹⁸⁹ Explanations were regularly sought for all instances of non-compliance.¹⁹⁰ Improvements were noticed due to implementation of suggestions even during the continuation of litigation.¹⁹¹

During the pendency of litigation, the court's attention was brought to non-implementation of its orders in *B.L. Wadhera v. Union of India*,¹⁹² regarding issues such as composts and land-fills, to which there was no satisfactory explanation.¹⁹³ 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.¹⁹⁴ In furtherance of this, they issued appropriate directions for proper and scientific waste-management.¹⁹⁵ 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.¹⁹⁶ 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. Chief Secretary, State of U.P.*,¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ 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 *Godavaran* case, as discussed below, being pending for decades, no similar apprehension has been noted.

a) *The Delhi Pollution case*

¹⁸⁵ Almitra H. Patel v. Union of India, (1998) 2 SCC 416

¹⁸⁶ *Id.*

¹⁸⁷ Almitra H. Patel v. Union of India, (2000) 3 SCC 575.

¹⁸⁸ *Id.*

¹⁸⁹ Almitra H. Patel v. Union of India, (2000) 8 SCC 19, ¶5.

¹⁹⁰ Almitra H. Patel v. Union of India, (2004) 13 SCC 536.

¹⁹¹ Almitra H. Patel v. Union of India, (2004) 13 SCC 538.

¹⁹² B.L. Wadhera v. Union of India, (1996) 2 SCC 594.

¹⁹³ Almitra H. Patel v. Union of India, (2000) 2 SCC 679, ¶6.

¹⁹⁴ *Id.* ¶15, 21.

¹⁹⁵ *Id.* ¶15, 21.

¹⁹⁶ Almitra H. Patel v. Union of India, (2000) 8 SCC 19, ¶2.

¹⁹⁷ D.K. Joshi v. Chief Secretary, State of U.P., (1999) 9 SCC 578.

¹⁹⁸ *Id.*

¹⁹⁹ D.K. Joshi v. Chief Secy., State of U.P., (1999) 9 SCC 578, ¶2.

In the *Delhi Vehicular Pollution Case*,²⁰⁰ M.C. Mehta's public interest litigation filed in 1985 concerning air pollution in Delhi and the surrounding region saw no action being taken till 1990, until a series of directions were passed as continuing mandamus.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.²⁰² It has ordered periodic vehicle emission checks, with the power of cancellation of registration certificates of faulty vehicles.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 1997.²⁰⁴ There were detailed directions on the use of unleaded fuel in phases, to start in Delhi and encompassing the whole nation by 2001,²⁰⁵ mandating conversion into compressed natural gas of all government vehicles,²⁰⁶ and even directing establishment of a body to oversee implementation of the court's orders,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,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,²⁰⁹ and emission norms were laid down with strict standards.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 to curtail local vehicular pollution.²¹¹ 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.²¹² Given the fragmented federal structure and involvement of multiple authorities and ministries that lacked co-ordination,

²⁰⁰M. C. Mehta v. Union of India, AIR 2002 SC 1696..

²⁰¹ Gitanjali Nain Gill, *Human Rights and the Environment in India: Access through Public Interest Litigation*, *Environmental Law Review* 14.3 (2012): 200-218, 211, available at <http://journals.sagepub.com/doi/pdf/10.1350/enr.2012.14.3.158> (Last visited on August 8, 2017).

²⁰² Order dated 23 March 2001, unreported, see <http://journals.sagepub.com/doi/pdf/10.1350/enr.2012.14.3.158>

²⁰³ M.C. Mehta vs. Union of India, 1991 2 SCALE 741.

²⁰⁴ *Id.*

²⁰⁵ Orders dated 12 August 1994, 21 October 1994 and 14 February 1996.

²⁰⁶ Order dated 28 March 1995.

²⁰⁷ Order dated 27 April 1997.

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.

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.

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.

²¹¹ Gitanjali Nain Gill, *Human Rights and the Environment in India: Access through Public Interest Litigation*, *Environmental Law Review* 14.3 (2012): 200-218, 211.

²¹² *Id.*, 212.

there was a confusing hierarchy, conflicting interests and bureaucratic indifference.²¹³ All actors were subject to extremely high cost of compliance, with massive investments that needed to be made to follow the court's orders.²¹⁴ These costs were seen as being higher than any projected cost of defiance,²¹⁵ 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.²¹⁶ The court's continuous prodding has been recognised as having been significant.²¹⁷ A marked improvement in Delhi's air quality has been noted.²¹⁸

b) *The Omnibus Forests Case – The Godavaran Case*

One of the most drawn-out and longest standing *continuing mandamus* issued is in the case of *T. N. Godavaram v. Union of India*, often recognised as having started the second wave of environmental litigation, after a host of pollution related cases.²¹⁹ 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.²²⁰ For almost two decades, the Supreme Court passed numerous orders, taking over supervision and control of the day-to-day governance of Indian forests.²²¹ It has covered issues ranging from logging,²²² deforestation and mining,²²³ impacts of clearing forest²²⁴ to even endangered species.²²⁵ The constitutional permissibility of such vast assumption of powers has been seen with suspicion,²²⁶ with the court going beyond mere interpretation of the law, becoming a policy-

²¹³ *Id.*, 212; A. Agarwal et al., *The State of India's Environment: Part 1 – The Citizen Fifth Report* (1999) Centre for Science and Environment, 192.

²¹⁴ Special Correspondent, *Euro-III emission norms recommended by 2005*, THE HINDU (September 26, 2002) <http://hindu.com/2002/09/26/stories/2002092604460900.htm>.

²¹⁵ Centre for Environmental Law (1999) 'WWF – India, Strengthening Environmental Legislation in India', 216.

²¹⁶ Gitanjali Nain Gill, *Human Rights and the Environment in India: Access through Public Interest Litigation*, *Environmental Law Review* 14.3 (2012): 200-218, 214, available at <http://journals.sagepub.com/doi/pdf/10.1350/enlr.2012.14.3.158> (Last visited on August 8, 2017).

²¹⁷ ENERGY AND RESOURCES INSTITUTE REPORT, *Looking Back to Change Track: Strengthening Transition Economies* 19 (2006).

²¹⁸ WORLD BANK, *For a Breath of Fresh Air - Ten Years of Progress and Challenges in Urban Air Quality Management in India*, June, 2005, available at <http://documents.worldbank.org/curated/en/951561468051260427/pdf/350470PAPER0IN0Breath0of0fresh0air.pdf> (Last visited on August 30, 2017).

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 Surendranath C., Aug. 31, 2002.

²²¹ Armin Rosencranz & SharachchandraLélé, *Supreme Court and India's Forest*, Vol.43 No. 5, *Economic and Political Weekly* (2008) 11-14, available at: <http://www.environmentportal.in/files/epw1.pdf> (Last visited on August 20, 2016).

²²² *T. N. Godavaram v. Union of India*, (1996) 9 SCC 982.

²²³ *T. N. Godavaram Thirumulpad v. Union of India*, (2008) 2 SCC 222, ¶19; *T. N. Godavaram Thirumulpad v. Union of India*, [2011] INSC 597.

²²⁴ *T. N. Godavaram Thirumulpad v. Union of India*, [2010] INSC 1058, ¶66.

²²⁵ *T. N. Godavaram Thirumulpad v. Union of India*, [2012] INSC 114.

²²⁶ Armin Rosencranz, Edward Boenig & Brinda Dutta, *The Godavarman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests*, 37 ELR 1003.

maker and an administrator.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.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.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.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 States respectively.²³¹ 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.²³² It relied heavily on the CEC to assist in assessment of granting forest clearance permits and recommending measures for restoration of degraded areas.²³³ Its 2005 order focussed on compensatory afforestation, with the CEC making recommendations to the scheme submitted by the MoEF.²³⁴ 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.²³⁵ Subsequently, even State Governments and Union territories constituted State CAMPA to facilitate activities for environmental preservation.²³⁶ One of the last orders dismissing interlocutory applications

²²⁷ Down to Earth, Deep in the Woods, Jan. 15, 2003, 1; Gitanjali Nain Gill, *Human Rights and the Environment in India: Access through Public Interest Litigation*, ENV L REV 14, 200-218 (2012).

²²⁸ Astha Pandey, *T. N. Godavaraman Thirumulpad v. Union of India & Others: A Case Study*, Global Journal of Human-Social Science: B Geography, Geo-Sciences, Environmental Science & Disaster Management Vol.15 (4) (2015); RITWICK DUTTA & BHUPENDER YADAV, SUPREME COURT ON FOREST CONSERVATION (2005); Armin Rosencranz, Edward Boenig & Brinda Dutta, *The Godavarman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests*, 37 ELR 1003.

²²⁹ T.N. Godavaraman Thirumulpad v. UOI, (1997) 2 SCC 267.

²³⁰ *Id.*

²³¹ T.N. Godavaraman Thirumulpad v. UOI, (1997) 2 SCC 267; See Astha Pandey, *T. N. Godavaraman Thirumulpad v. Union of India & Others: A Case Study*, Global Journal of Human-Social Science: B Geography, Geo-Sciences, Environmental Science & Disaster Management Vol.15 (4) (2015).

²³² Operating for more than a decade, since its 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*, 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.).

²³⁴ T.N. Godavaraman Thirumulpad v. Union of India, AIR 2005 SC 4256 (2006) 1 SCC 1.

²³⁵ *Id.*

²³⁶ T.N. Godavarman Thirumulpad v. Union of India (2014) 6 SCC 150, ¶24.

was in 2014,²³⁷ 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.²³⁸ Noting the insufficiency and shortfall of the government notification on environmental clearances, it directed the regulator to have as many state branches as possible,²³⁹ to carry out an independent appraisal and approval of projects for environmental clearances and monitor the implementation of the conditions laid down thereunder.²⁴⁰ High Courts have placed greater responsibilities in terms of forests and environmental cases, placing reliance of the *Godavarman* case.²⁴¹

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,²⁴² the continuing mandamus in forests still continues. However, even though the case is open, it is not under active hearing.²⁴³

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.²⁴⁴ 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.²⁴⁵

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

²³⁷ T.N. Godavarman Thirumulpad v. Union of India, (2014) 6 SCC 150.

²³⁸ T.N. Godavarman Thirumulpad v. Union of India, 2014 (1) SCALE 161, ¶5.

²³⁹ *Id.*, ¶8.

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

²⁴¹ Silver Cloud Estates, Upper Gudalur v. Principla Chief Conservator of Forests, 1999 SCC OnLine Mad 151; Gram Panchayat v. Union of India, 2012 SCC OnLine Bom 851.

²⁴² RITWICK DUTTA, SUPREME COURT ON FOREST CONSERVATION xiii (3rd ed. 2011).

²⁴³ P. K. Manohar & Praveen Bhargav, *The architect of an omnibus forest-protection case*, THE HINDU, July 5, 2016, available at <http://www.thehindu.com/opinion/open-page/The-architect-of-an-omnibus-forest-protection-case/article14470903.ece> (Last visited on August 30, 2017).

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.*

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,²⁴⁶ could 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.²⁴⁷ 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.²⁴⁸ 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.²⁴⁹ 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.²⁵⁰ 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 *Bangladesh–Farooque v. Government of Bangladesh*,²⁵¹ 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,²⁵² issuing directions to multiple authorities concerned and requiring them to submit regular progress reports.²⁵³ Even in Philippines, the globally famous judgment in the Manila bay case,²⁵⁴ borrowing from the Indian Supreme Court's jurisprudence, kept the case open to

²⁴⁶ Gitanjali Nain Gill; *A Green Tribunal for India*, J ENVIRONMENTAL LAW 22 (3): 461-474 (2010).

²⁴⁷ Shubhankar Dam & Vivek Tewary, *Polluting Environment, Polluting Constitution: Is a 'Polluted' Constitution Worse than a Polluted Environment?*, 17 J. ENVTL. L. 383, 389 (2005).

²⁴⁸ ERIN DALY & JAMES MAY, CONSTITUTIONAL ENVIRONMENTAL RIGHTS AND LIABILITIES 84 (2012).

²⁴⁹ See Urvashi Narain & Ruth Greenspan Bell, *Who Changed Delhi's Air? - The Roles of the Court and the Executive in Environmental Policymaking*, RFF DP 05-48 (December 2005), available at <http://ageconsearch.umn.edu/bitstream/10466/1/dp050048.pdf> (Last visited on August 30, 2017).

²⁵⁰ M. C. Mehta v. Union of India, AIR 2002 SC 1696.

²⁵¹ Bangladesh–Farooque v. Government of Bangladesh, WP 891 of 1994 (2007.07.15).

²⁵² *Id.*, 27..

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.)

²⁵⁴ Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay, G.R. Nos. 17194748 (S.C. Dec. 18, 2008), available at <http://sc.judiciary.gov.ph/jurisprudence/2008/december2008/171947-48.htm> (Last visited on August 30, 2017).

ensure compliance with its orders,²⁵⁵ supervising the restoration plan, issuing additional orders and requiring government agencies to complete specific tasks within prescribed deadlines.²⁵⁶

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.²⁵⁷ 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 curie* 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.²⁵⁸ In the *Bichri* case also, the court looked at representation from multiple states and NGOs in the central body constituted.²⁵⁹ Even the CEC, consisting of three federal government officers, and two NGO representatives,²⁶⁰ is one such hybrid regulatory bodies created by higher court edict seen as examples of the institutional forms.²⁶¹

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.²⁶² By appointing

²⁵⁵ See Presbitero J. Velasco, Jr., *Manila Bay: A Daunting Challenge in Environmental Rehabilitation and Protection*, 11 OR. REV. INT'L L. 441 (2009).

²⁵⁶ See DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS* 168-169 (2011).

²⁵⁷ ERIN DALY & JAMES MAY, *CONSTITUTIONAL ENVIRONMENTAL RIGHTS AND LIABILITIES* 84 (2012).

²⁵⁸ Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, *THE AMERICAN JOURNAL OF COMPARATIVE LAW* 37.3, 495-519 (1989).. (But several *ex parte* orders show that there was no effective participation. *M.C. Mehta v. UOI* (1987) 4 SCC 463; AIR 1988 SC 1037; (1997) 2 SCC 411).

²⁵⁹ *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212.

²⁶⁰ RITWICK DUTTA & BHPENDER YADAV, *SUPREME COURT ON FOREST CONSERVATION* 11-12 (2nd edn., 2007).

²⁶¹ K. Sivaramakrishnan, *Environment, Law, and Democracy in India*, 70 *THE JOURNAL OF ASIAN STUDIES*, No. 4, 905-928, 911 (November, 2011).

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

amicus curie to assist the court with the litigation, even without the plaintiff's involvement has helped overcome this problem.²⁶³ 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.

The courts' interventions in environmental concerns in India have led to Indian law being 'infused with procedural environmental rights'.²⁶⁴ 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,²⁶⁵ 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, with no access to necessities like clean water.²⁶⁶

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 Godavaran case for instance, Harish Salve was appointed as the *amicus curie*. Even after the petitioner died in 2016, the case continues. Even before, he was not actively involved.

²⁶⁴ Karen Hulme, *International Environmental Law and Human Rights* in ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 291 (Scott Sheeran & Sir Nigel Rodley, 2013).

²⁶⁵ *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161.

²⁶⁶ *Id.*, ¶5-6.

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.²⁶⁷ 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.²⁶⁸ What ultimately makes this judgement 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.²⁶⁹ 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.²⁷⁰ 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.²⁷¹ 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.²⁷² Their findings revealed ineffective implementation and showed that even though some steps had been taken by the Government, the majority of the directives remained unimplemented.²⁷³ 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.²⁷⁴ 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."²⁷⁵ Without making any specific orders upon the inaction, the Court only called upon the Government to attend to the needs of the workmen,²⁷⁶ and directed the State to ensure that the labourers identified by reports

²⁶⁷ *Id.*, ¶73.

²⁶⁸ *Id.*

²⁶⁹ *Id.*, ¶74-75.

²⁷⁰ *Id.*, ¶105.

²⁷¹ *Id.*, ¶115-116.

²⁷² *Bandhua Mukti Morcha v. Union of India and Others*, (1991) 4 SCC 174, ¶3.

²⁷³ *See Id.*, ¶7-10.

²⁷⁴ *Id.*

²⁷⁵ *Id.*, ¶13.

²⁷⁶ *Id.*, ¶14

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.²⁷⁷ 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 Apex Court suggested that the State Government may consider cancelling the leases of the defaulting employers.²⁷⁸

In stark contrast to the decades of supervision still leading to flouting of directions, the *Salal Hydro Project* case,²⁷⁹ 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.²⁸⁰ Dealing with similar plight of non-implementation of rehabilitation schemes for released bonded labourers, the Court in *Neerja Chaudhary*²⁸¹ directed intense surveys in bonded labour prone areas, supervision over officers and release and rehabilitation of bonded labourers.²⁸²

Judicial intervention in labour welfare was relatively successful even in the *Rickshaw Puller's* case,²⁸³ 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.²⁸⁴ The Court issuing a continuing mandamus, directed the petitions to be listed before the Division Bench,²⁸⁵ and a Special Leave Petition against the order was dismissed by the Supreme Court.²⁸⁶ The task force, and the various authorities worked towards introducing several new policies that were debated in court.²⁸⁷ Finer considerations such as the scope and identification requirements for the scheme for licenses and registration of rickshaws,²⁸⁸ of the practicalities relating to separate lanes for non-motorised vehicles,²⁸⁹ and objections to plans permitting cycle rickshaws in particular areas,²⁹⁰ 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

²⁷⁷ *Id.*, ¶17.

²⁷⁸ *Bandhua Mukti Morcha v. Union of India and others*, (2000) 10 SCC 104.

²⁷⁹ *Salal Hydro-Electric Project v. State of Jammu and Kashmir and Others*, (1983) 3 SCC (L&S) 289.

²⁸⁰ *Salal Hydro-Electric Project v. State of Jammu and Kashmir and Others*, (1984) 3 SCC 538.

²⁸¹ *Neeraja Chaudhary v. State of MP*, AIR 1984 SC 1009.

²⁸² *Id.*, See also *Bachpan Bachao Andolan, Status of Rehabilitation of Rescued Bonded Labourers - Analysis of Data with Bachpan Bachao Andolan*, (2015), available at <http://bba.org.in/sites/default/files/Rehab-of-Bonded-Child-Labour.pdf> (Last visited on August 21, 2017).

²⁸³ *Manushi Sangathan, Delhi v. Government of Delhi*, 168 (2010) DLT 168.

²⁸⁴ *Id.*, ¶74.

²⁸⁵ *Id.*

²⁸⁶ *MCD v. Manushi Sangathan*, (2012) 12 SCC 483.

²⁸⁷ *Id.*

²⁸⁸ *Manushi Sangathan, Delhi v. Govt. of Delhi and Others.*, 2012 SCC OnLine Del 6097.

²⁸⁹ *Manushi Sangathan v. Govt. of Delhi*, 2013 SCC OnLine Del 2162.

²⁹⁰ *Manushi Sangathan v. P.K. Panda*, 2014 SCC OnLine Del 1836.

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.²⁹¹ This humungous 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,²⁹² 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.

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,²⁹³ ensuring professional medical care²⁹⁴ and access to necessary facilities like latrines,²⁹⁵ in addition to schemes for vocational training and rehabilitation.²⁹⁶ 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 (II) v. State of Uttar Pradesh*,²⁹⁷ had to deal with the state government, without informing the Court, having relocated the home into a place unfit for habitation.²⁹⁸ While the Court considered this to be a challenge to its authority,²⁹⁹ it also observed that despite repeated directives, the home had not formulated a rehabilitation scheme.³⁰⁰ 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.³⁰¹

Even in *Upendra Baxi (Dr) v. State of Uttar Pradesh (III)*,³⁰² 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.³⁰³ 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.³⁰⁴ There was no visible movement in the legal status of the

²⁹¹ *Id.*

²⁹² See e.g. V. Venkatesan, *Licence to live*, 27 FRONTLINE, (5) (2010), available at <http://www.frontline.in/static/html/fl2705/stories/20100312270509900.htm> (Last visited on August 5, 2017).

²⁹³ *Upendra Baxi v. State of UP*, (1983) 2 SCC 308, ¶18-18.

²⁹⁴ *Id.*, ¶20-26.

²⁹⁵ *Id.*, ¶27.

²⁹⁶ *Id.*, ¶28.

²⁹⁷ *Court in Upendra Baxi (II) v. State of Uttar Pradesh*, (1986) 4 SCC 106.

²⁹⁸ *Id.*, ¶2.

²⁹⁹ *Id.*

³⁰⁰ *Id.*, ¶8.

³⁰¹ *Upendra Baxi v. State of U.P.*, (1998) 9 SCC 388.

³⁰² (1998) 8 SCC 622.

³⁰³ *Id.*, ¶1.

³⁰⁴ Kumar Regmi, *Trafficking into Prostitution in India and the Indian Judiciary*, 1 INTERCULTURAL HUM. RTS. L. REV. 373 (2006).

inmates.³⁰⁵ 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 apex 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 apex 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.³⁰⁶ 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.³⁰⁷ 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."³⁰⁸

On the withdrawal of the original petitioner, the Supreme Court directed the Supreme Court Legal Aid Committee to prosecute the petition.³⁰⁹ 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.³¹⁰

In *Hussainara Khatoon*,³¹¹ 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.³¹² Drawing inspiration from the US prison reform cases such as *Gates v. Collier*,³¹³ where courts took an active participatory role, issuing several directions, the Indian SC also took on an activist approach.³¹⁴

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.³¹⁵ The judgment was delivered in four stages,³¹⁶ with directions to various State and Central Governments, dealing with matters ranging from payment under employment guarantee

³⁰⁵ RAJESWARI SUNDER RAJAN, *THE SCANDAL OF THE STATE: WOMEN, LAW, AND CITIZENSHIP IN POSTCOLONIAL INDIA* 256 (2003).

³⁰⁶ *Sheela Barse v. Union of India*, 1986 SCALE (2) 230.

³⁰⁷ *Id.*

³⁰⁸ *Sheela Barse*, Criminal Miscellaneous Petition No. 3128 of 1988, ¶6.

³⁰⁹ *Sheela Barse v. Union of India* (II), AIR 1988 SC 1531, ¶17.

³¹⁰ 1995 SCC (5) 654, ¶6-7.

³¹¹ *Hussainara Khatoon v. Home Secretary, State of Bihar*, (1980) 1 SCC 98.

³¹² *See e.g., Id.*, ¶1, ¶10.

³¹³ *Gates v. Collier*, 349 F Supp 881.

³¹⁴ *Hussainara Khatoon v. Home Secretary, State of Bihar*, (1980) 1 SCC 98, ¶10.

³¹⁵ *Swaraj Abhiyan v. Union of India*, (2016) 7 SCC 498.

³¹⁶ *Swaraj Abhiyan* (I), Judgment dated 18-1-2016; *Swaraj Abhiyan* (II), Judgment dated 13-5-2016; *Swaraj Abhiyan* (III), Judgment dated 13-5-2016; *Swaraj Abhiyan* (IV), Judgment dated 13-5-2016.

schemes, restructuring and waiver of loans, etc., requiring the authorities to report back to the court.³¹⁷ 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.³¹⁸

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.³¹⁹ 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 *PUCL v. Union of India* had undertaken this herculean task of, after recognising right to food as a part of Article 21, to oversee its effective realisation.³²⁰ 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.³²¹ 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.³²² 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.³²³

Recognising that prevention of starvation and hunger is one of the Government's primary responsibilities,³²⁴ 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.³²⁵ Existing schemes and policies were turned into legal rights, and minimum allocation of food grains and supplemental nutrients set out in detail.³²⁶

The systematic oversight of compliance was aided by appointment of commissioners who were to monitor the implementation of interim orders with the help of

³¹⁷ *Id.*

³¹⁸ Livelaw News Network, *SC Summons Chief Secretaries of Drought-Hit States*, March 23, 2017, available on <http://www.livelaw.in/sc-summons-chief-secretaries-nine-drought-hit-states/> (Last visited on August 21, 2017); The Wire, *Supreme Court Pulls Up Ten States For Non-Implementation of Drought Relief Measures*, March 23, 2017, available at <https://thewire.in/118496/supreme-court-pulls-ten-states-non-implementation-drought-relief-measures/> (Last visited on August 21, 2017).

³¹⁹ *PUCL v. Union of India*, 2007 (12) SCC 135; *Shanti Star Builders vs. Narayan Totame*, 1990(1) SCC 520; *Murli S. Deora v. Union of India*, AIR 2002 SC 40.

³²⁰ Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 Mich. J. Int'l L. 691, 718 (2010).

³²¹ SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 297 (Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, 2017).

³²² Right to Food Campaign, *Supreme Court Orders on the Right to Food - A Tool for Action*, 6 (August 2008) available at http://www.sccommissioners.org/CourtOrders/tool_for_action.pdf (Last visited on August 21, 2017).

³²³ *Id.*, 7.

³²⁴ Supreme Court Order dated 20th August, 2001.

³²⁵ A repository of the court's orders can be found at Right to Food Campaign, *Supreme Court Orders*, available at <http://www.righttofoodcampaign.in/legal-action/supreme-court-orders> (Last visited on August 21, 2017).

³²⁶ For a detailed description of court orders, see - Right to Food Campaign, *Supreme Court Orders on the Right to Food - A Tool for Action*, 6 (August 2008) available at http://www.sccommissioners.org/CourtOrders/tool_for_action.pdf (Last visited on August 21, 2017).

assistants and nodal officers appointed by the State Governments.³²⁷ They were empowered to inquire into any violations and demand redressal, and required to submit reports to the courts regularly, containing detailed recommendations, functioning of various schemes and status of implementation of orders.³²⁸ Unlike court officers though, their work was to be directly funded by the Government of India.³²⁹ Chief Secretaries of states were to be held responsible for persistent default in compliance,³³⁰ and Gram Sabhas were empowered to conduct audits of schemes and help in their implementation with all related information made available to them.³³¹ Court orders were directed to be widely publicised through the radio, television and permanent displays.³³² 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.³³³

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.³³⁴ States were also asked to respond to observations and recommendations in the reports.³³⁵ 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.³³⁶

The case has been called the most spectacular case of a court protecting the ‘right to food.’³³⁷ 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

³²⁷ *Id.* (Also on 29th October 2002, 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 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.)

³²⁸ On 8th May 2002; Supreme Court Order dated 29th October, 2002; order dated 9th May 2005.

³²⁹ Order dated 29th October 2002: “Adequate funds shall be made available to the Commissioner’s by the Union of India to enable them to perform [their] functions.”

³³⁰ Supreme Court Order dated 29th October 2002.

³³¹ Supreme Court Order dated 8th May 2002.

³³² Supreme Court Order dated 29th October 2002; orders dated 28th November, 2001 and 8th May, 2002; *See also* Supreme Court Order dated 2nd May, 2003.

³³³ Right to Food Campaign, *Supreme Court Orders on the Right to Food - A Tool for Action*, 12-13 (August 2008) available at http://www.sccommissioners.org/CourtOrders/tool_for_action.pdf (Last visited on August 21, 2017).

³³⁴ *People’s Union of Civil Liberties v. Union of India*, (2013) 2 SCC 682.

³³⁵ *PUCI (PDS Matters) v. Union of India*, (2013) 2 SCC 663.

³³⁶ SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 302 (Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi 2017).

³³⁷ General Assembly, *Interim report of the Special Rapporteur on the right to food*, A/68/288 (August 8, 2013)

have considerably shaped court orders.³³⁸ 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.³³⁹ 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.³⁴⁰ 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 2013.³⁴¹ While debates over its sufficiency and effectiveness continue,³⁴² 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. 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.³⁴³ 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

³³⁸ See Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICH. J. INT'L L. 691, 719-723 (2010).

³³⁹ *Id.*, 723-726.

³⁴⁰ SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 307-310 (Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi 2017).

³⁴¹ National Food Security Act, 2013.

³⁴² See e.g. Ajinkya Tanksale, & J. K. Jha. *Implementing national food security act in India: Issues and challenges*, BRITISH FOOD JOURNAL 117, no. 4, 1315-1335 (2015).

³⁴³ Prakash Singh v. Union of India, (2009) 17 SCC 329.

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.³⁴⁴ 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.³⁴⁵ 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 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.³⁴⁶ One of the essentials to hold one liable for contempt is that the disobedience should be wilful and deliberate.³⁴⁷ However, the courts seldom resort to contempt for enforcement of orders due to the difficulty in proving wilful contempt by government officials.³⁴⁸ 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,³⁴⁹ it is important to understand that force and not morality is the definitive deterrent from omission of compliance of orders.³⁵⁰ Besides, punishing in this regard cannot be considered as inconsistent with the intention of the provision.³⁵¹ 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.³⁵²

While the number of contempt petitions has been multiplying indefinitely, the courts have been reluctant to hold government servants guilty. Revision of orders, extension of deadlines and in some instances, threatening with punishments has been the approach of the Court without actually determining duties and forcing those individuals to look into the same.³⁵³ For instance, even in the case of *D. K. Basu v. State of West Bengal*, 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 authorized to hold officials guilty for non-compliance of their orders.³⁵⁴ However, even at instances where they choose to do the same, it becomes difficult to prove *mala fide* intention due to pretexts like red-tapism, delay in getting sanctions, *inter alia*. It thus becomes impossible for the

³⁴⁴ The Contempt of Courts Act, 1971, §2(a).

³⁴⁵ The Contempt of Courts Act, 1971, §2(b) & §2(c).

³⁴⁶ Shodhganga, *Concept and Genesis of Contempt Law*, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/3570/10/10_chapter%202.pdf (Last visited on August 21, 2017).

³⁴⁷ *Manish Gupta v. Gurudas Roy*, AIR 1995 SC 1359.

³⁴⁸ *Subrata Roy v. Union of India*, (2014) 8 SCC 470.

³⁴⁹ *Keegan v. de Burca*, [1973] I.R. 223 at 227.

³⁵⁰ VEENA TOMAPI, TEXTBOOK ON JURISPRUDENCE 76 (2011).

³⁵¹ *Flood v. Lawlor*, (2002) 3 IR 67.

³⁵² *In Re: Vinay Chandra Mishra*, (1995) 2 SCC 584.

³⁵³ SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 293 (Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, 2017).

³⁵⁴ The Contempt of Courts Act, 1971, §12.

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 confided 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 case³⁵⁵ where the Court used continuing mandamus to redevelop police reforms, the Supreme Court expressing its helplessness declined the contempt petition, because of non-obedience of orders from most of the states.³⁵⁶ While the Courts have tried to intimidate the officers with penal actions at several occasions,³⁵⁷ 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 *bona fide* reason cannot be punishable.³⁵⁸ 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 of resources, no proper technical knowledge, *inter alia*. The Courts have abashed at individuals asking them to approach the Court in advance for any confusion or clarifications.³⁵⁹ Contemnors have been asked to file appeals and get stay orders for any foreseeable delay in executing the order.³⁶⁰ 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.”³⁶¹ Even in the current Cauvery water dispute case, sceptics deliberated the jeopardy of the fundamental structure of our democracy.³⁶²

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.³⁶³ He suggested of forming a Special Cell to only see the compliance of court orders.³⁶⁴ Some officers may think that the Court is needlessly interfering in their duties and therefore be impervious to their directions. Therefore, it is imperative for the Court to *suo moto* 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.

³⁵⁵ Prakash Singh v. Union of India, (2009) 17 SCC 329.

³⁵⁶ Tarun Upadhyay, *Police bill not similar to AFSPA*, HINDUSTAN TIMES (New Delhi) February 28, 2013.

³⁵⁷ Abhinav Gargi, *Nothing has Changed since 1997 judgment, Vineet Narain says*, THE TIMES OF INDIA (May 10, 2013) available at <http://timesofindia.indiatimes.com/india/Nothing-has-changed-since-1997-judgment-Vineet-Narain-says/articleshow/19978247.cms> (Last visited on June 6, 2017).

³⁵⁸ Indian Oil Corporation v. Sheo Shankar Mishra, (1995) 2 PLJR 875.

³⁵⁹ S. K. Samsudin v. Ravikant, 1997 Cri LJ 1603; K.A. Ansari v. Indian Airlines Ltd., (2009) 2 SCC 164.

³⁶⁰ Balaji Krishna Tej v. Inspector of Schools, (1990) 70 Cut LT 402.

³⁶¹ *Olmstead v. United States*, 277 U.S. 438 (1928).

³⁶² See Special Reporter, *Cauvery row: Supreme Court to Continue Hearing Water Dispute Case Today*, INDIAN EXPRESS (NEW DELHI) July 26, 2017.

³⁶³ A. P. Abbu Gounder v. D.K.Goel, Contempt Petition no. 1858 of 2012, ¶12.

³⁶⁴ *Id.*, ¶22.

In *E.T. Sunup v. Canss Employees Association*,³⁶⁵ 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.³⁶⁶ 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.³⁶⁷ 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 non-compliance is common where issues do not receive media coverage.³⁶⁸ Publicising decisions, especially in monitoring programmes, have demonstrable effects on compliance with orders.³⁶⁹ 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.³⁷⁰ The ‘elite bias’ and lack of focus on ‘blind spots’ of social and developmental failures, Dreze and Sen argue plague Indian media.³⁷¹ 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

³⁶⁵ *E. T. Sunup v. Canss Employees Association*, (2004) 8 SCC 683.

³⁶⁶ 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).

³⁶⁷ See *Anil Ratan Sarkar v. HIRAK GHOSH*, (2002) 4 SCC 21.

³⁶⁸ Jeffrey K. Staton, *Judicial Power and Strategic Communication in Mexico*, Cambridge University Press (2010).

³⁶⁹ See Varun Gauri, Jeffrey K. Staton, & Jorge Vargas Cullell, *public strategy for compliance monitoring*, The World Bank Policy Research Working Paper 6523 (2013).

³⁷⁰ *Id.*

³⁷¹ JEAN DREZE & AMARTYA SEN, AN UNCERTAIN GLORY (2013); See Jean Dreze & Amartya Sen, *Inequalities and the Media*, August 2, 2013, available at <http://www.thehoot.org/media-watch/media-practice/inequalities-and-the-media-6940> (Last visited on August 21, 2013).

compliance.³⁷² Despite routine media coverage of starvation deaths in Orissa, there was no significant effect.³⁷³ 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.³⁷⁴ 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.³⁷⁵

Another key variable in the success of such cases is the support and cooperation of several other players, the executive branch and the civil society organisations in ensuring compliance with court orders.³⁷⁶ Allying itself with key interest groups and garnering popular support while addressing popular causes can thus play a vital role in influencing compliance.³⁷⁷ NGOs and other civil groups can act as watch dogs, ensuring that non-implementation leads to legal action.³⁷⁸ 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 *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 nationwide 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 *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.³⁷⁹ 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

³⁷² See Varun Gauri, Jeffrey K. Staton, & Jorge Vargas Cullell, *public strategy for compliance monitoring*, The World Bank Policy Research Working Paper 6523 (2013) as cited in SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 309 (Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, 2017).

³⁷³ Dan Banik, *India's Freedom from Famine: Case of Kalahandi*, Contemporary South Asia 7(3), 265-281 (1998).

³⁷⁴ SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 310 (Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, 2017).

³⁷⁵ *Id.*

³⁷⁶ C. Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, TEXAS LAW REVIEW 89(7), 1669-1698, 1692 (2011).

³⁷⁷ COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 1-37 (V. Gauri & D. Brinks 2008); Staton (2010).

³⁷⁸ See C.R. EPP, THE RIGHTS REVOLUTION: LAWUERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); J. Spriggs, *Explaining Federal Beaucratic Compliance with Supreme Court Opinions*, Political Research Quarterly, 50(3), 569-593, 567 (1997).

³⁷⁹ Armin Rosencranz & Sharachchandra Lélé, *Supreme Court and India's forests*, ECONOMIC AND POLITICAL WEEKLY, 11-14 (February, 2008).

court gets all the different actors, stakeholders and even the public to be a part of this dialogue. *First*, it creates pressure on the public-opinion sensitive governments to move from the state of inertia, and *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 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 judgement, 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.