

PUBLIC INTEREST LAW REVISITED*

Jeremy Cooper**

Public Interest Litigation (PIL) is the process whereby organisations or individuals use litigation in the high courts to enforce collective rights or to influence social change.¹ PIL first came into prominence in the 1970s in the United States of America, as a strategic extension of the wider public interest law movement,² and was adapted thereafter in a number of different countries.³ Its most spectacular manifestations can be found in a series of key decisions of

* This article is developed from the text of a public lecture sponsored by the British Council and the Bangladesh Legal Aid and Services Trust (BLAST), delivered at the Press Club in Dhaka on 30th April, 1998.

** Jeremy Cooper, FRSA, MA, Ph.D., Barrister at Law, is Professor and Dean of Law Faculty, Southampton Institute, UK.

¹ See generally Cooper, J. and Dhavan, R. (eds), Public Interest Law, Oxford, 1985; Cunningham, C., "Public Interest Litigation in the Indian Supreme Court: A Study in the Light of American Experience", 29:4 (1987) Journal of the Indian Law Institute, 494-523; Aron, N. Liberty and Justice for All: Public Interest Law in the 1980s and Beyond, Boulder, 1989; Cooper, J., Keyguide to Information Sources in Public Interest Law, London, 1992; Gomez, M., In the Public Interest: Essays on Public Interest Litigation and Participatory Justice, Colombo, 1993.

² For a brief history of PIL in the United States, consult, Aron, supra note 1, at pp. 6-23. See also: Shah, M. and Tanna, B., Public Interest Law Movement in North America and UK, Ahmedabad, 1983.

³ For a contemporary world snapshot of these issues see generally Cappelletti M., "Vindicating the Public Interest Through the Courts: a Comparativist's Contribution", 25 (1976) Buffalo Law Review, 643-690; Sward, E. and Weisbrod, B. "A Public Interest Law: Collective Action in an International Perspective", 3 (1980) Urban Law and Policy, 59-98; Chambers, J. et al. (eds), "Public Interest Law Around the World", 1992 Columbia Human Rights Law Review, (reported by T. Hutchins and J. Klareen). For examples in South Asia, see Peiris, G.L., "Public Interest Litigation in the Indian Subcontinent: Current Dimensions", 40 International and Comparative Law Quarterly, 66-90; Nasir, A., "Public Interest Litigation in India and Pakistan", XII:2 (1993) Journal of Law and Society, 67-77; Hussain, F., "Public Interest Litigation in Pakistan", (1993) PLD Journal, 72-83; Hossain, S., Malik, S., Musa, B. (eds), Public Interest Litigation in South Asia: Rights in Search of Remedies, Dhaka, 1997.

the Supreme Court of India in the period from 1975-90.⁴ PIL emerged in India as a local response to a “need to make judicial process more accessible to the disadvantaged sections of society and to ensure adequate judicial protection to their human rights.”⁵

In recent years, PIL has begun to emerge as a potent new force within the justice system of Bangladesh. Social and political activists have expressed high levels of interest in the potential of this phenomenon to bring about significant change in Bangladesh society.⁶ This article takes a hard look at both the strengths and the limitations of PIL in the Indian Sub Continent. Reflecting upon the wider vision of public interest law,⁷ the author urges legal

⁴ For an exhaustive study of all the key PIL cases in India between 1979-1994 see Ahuja, S., People, Law and Justice: Casebook on Public Interest Litigation, London, 1997. See also Editorial, “Public Interest Litigation: Its Importance and Function in a Modern Developing State: Evolution in the Indian Courts”, 1:V (1983) Bar Association Law Journal 14-20; Sathe, S.P., “Public Participation in Judicial Process With Special Reference to Administrative Law”, 26:1(1984) Journal of the Indian Law Institute, 1-12; Agrawala, S.K., Public Interest Litigation in India: A Critique, Delhi, 1985; Baxi, U., “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India”, in Dhavan, R., Sudershan, R. and Khurshid, S. (eds.), Judges and the Judicial Power, London and Bombay, 1985; Baxi, U., Courage, Craft and Content: The Indian Supreme Court in the Eighties, Bombay, 1985; Marudhar, M., Public Interest Litigation: a Profile, Jaipur, 1986; Cunningham, C., “Public Interest Litigation in the Indian Supreme Court: A Study in the Light of American Experience”, 29:4 (1987) Journal of the Indian Law Institute, 494-523; Cassels, J., “Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?”, 37 (1989) American Journal of Comparative Law, 495-519; Rizvi, S., Public Interest Litigation. Liberty and Justice for All: A Perspective, Delhi, 1991; Cooper, J., “Poverty and Constitutional Justice: the Indian Experience”, 44:2 (1993) Mercer Law Review, 611-635; Meer, S.Y., “Litigating with Fundamental Rights: Rights Litigation and Social Action Litigation in India”, XV (1993) Delhi Law Review, 1993 38-57; Tripathi, S.M., The Human Face of the Supreme Court of India: Public Interest Litigation in the Apex Court, Varanasi, 1993; Dhavan, R., “Law as Struggle: Public Interest Law in India”, 36:2 (1994) Journal of the Indian Law Institute, 302.

⁵ Ahuja supra note 4, at p.xxxv.

⁶ See generally Hossain, Malik and Musa (eds) supra note 3; Hoque, R.Q., “Social Values through Litigation: the Case of Bangladesh”, in Cooper, J. and Trubek, L. (eds), Educating for Justice: Social Values and Legal Education, Aldershot, 1997, pp.218-232; Ahmed, N., Litigating in the Name of the People: Stresses and Strains of the Development of Public Interest Litigation in Bangladesh, Unpublished Ph.D. Dissertation, School of Oriental and African Studies, London, 1998.

⁷ See Infra note 11 and text accompanying.

activists and social action lawyers in Bangladesh to revisit the strategic justification for PIL with Bangladeshi characteristics, and consider whether full blooded public interest law is not a more promising route to holistic lawyering in the pursuit of justice for the poor.

PIL: THE SUCCESSES

There have been many attempts to define the broad purposes of PIL in India. One of the clearest expositions is that of a key figure in its promotion, Chief Justice P. Bhagwati:

Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically backward position should not go unnoticed and unredressed.⁸

There is no doubt that PIL has had a revolutionary impact upon certain aspects of the judicial system in India since the concept was first developed in 1979. The simple axiom applied by the prime architects of PIL in India at that time was well expressed by Justice V.R. Krishna Iyer, as early as 1976, when he said, "procedural prescriptions are handmaidens, not mistresses, of justice."⁹ To this end a series of landmark decisions over the following decade revolutionised *locus standi*, ensuring that it could not be allowed to prevent access to the courtroom where justice demanded.

Taking the constitutional alleviation of poverty and unlawful oppression as its baseline, the Supreme Court discarded the traditional *locus standi* doctrine that the passport to litigation is limited to a 'person aggrieved' and replaced it with the powerful notion that *anybody* could apply to court, on an aggrieved party's behalf, if the aggrieved parties were not themselves in a position to do so through ignorance, poverty or other handicap.¹⁰ This procedure was even made available directly to the highest courts of the land, including the Supreme Court,¹¹ which can initiate its own PIL proceedings

⁸ *People's Union for Democratic Rights (PUDR) and others* AIR 1982 (SC) 1473 at p.1476.

⁹ *The Mumbai Kamgar Sabha, Bombay vs M/s Abdhulbhai Faizullabhai and others* AIR 1976 (SC) at p.1458.

¹⁰ Per Bhagwati P, in *S.P. Gupta vs Union of India* 1981 (Supp) SCC 87 at p.210.

¹¹ In *Sachidanand Pandey and another v State of West Bengal and Others* AIR 1987 (SC) 1109, the Supreme Court stressed that direct PIL petitioning was acceptable to allow: "the Courts, *especially this Court*, to leave aside procedural shackles whenever there are complaints of such acts as shock the judicial conscience of the Courts, *especially this Court*". (*italics added*).

suo moto.¹² The new position was comprehensively summarised in 1981, by Chief Justice Bhagwati, as follows:

Where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal position or without authority of law, or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, *any member of the public can maintain an application for an appropriate direction, order or writ in the High Court...and in case of any breach of fundamental right of such persons or determinate class of persons, in this (Supreme) Court seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.*¹³ (emphasis added)

Alongside these procedural reforms the Indian PIL courts also developed the concept of the court as a fact-finding agency, moving common law courts closer to the continental model¹⁴ and as an enforcement agency.¹⁵ In a parallel development, there were attempts to set up a national legal aid scheme, although this proved a harder task than envisaged.¹⁶ Literally thousands of petitions have been filed in recent years under PIL protection, and judgements have been meted out or remain pending, covering a very wide range of injustices. These include injustices relating to prisons and state institutions, the police and the armed forces, those specific to children, to women, to bonded labourers, to environmental abuses, to education and to consumer questions. Many of these cases have led to spectacular outcomes.¹⁷

Thus PIL has proved itself to be exciting, cutting edge, high profile litigation activity that is now starting to arouse considerable interest in Bangladesh, thanks in particular to the work of the Bangladesh Environmental Law Association.¹⁸ Recent years have seen increasing numbers of PIL cases

¹² Latin phrase denoting where court may take action on its own initiative where facts requiring legal intervention reach its notice.

¹³ *SP Gupta*, supra note 10, at 210.

¹⁴ See Mahajan, R.K., "Public Interest Litigation: Court's Role as Administrators and Social Dimensions", *All India Reporter Journal*, 1995, 49-54; and more generally Cassels, supra note 4, and Ahuja, supra note 4.

¹⁵ See generally Cassels, supra note 4.

¹⁶ To quote Dhavan "Independent India remains hopelessly unclear about the broad perspectives of its legal aid programme" in "The Unbearable Lightness of India's Legal Aid Programme", in Hossain, Malik and Musa (eds.) supra note 3, at p.153.

¹⁷ For a comprehensive listing of all the major PIL cases in India between 1979-1994, consult Ahuja, supra note 4.

¹⁸ In the landmark case *Dr Mohiuddin Farooque vs Bangladesh and Others*, 17 (1997) BLD (AD) 1, the Appellate Division of the Supreme Court of Bangladesh

filed in the Bangladesh High Court on issues including a challenge to the Government to monitor medicines that might cause harm to children,¹⁹ the protection of slum dwellers from summary eviction,²⁰ the boycotting of parliamentary sessions by political parties,²¹ the need for government to oppose unchecked pollution,²² objecting to the power of doctors to strike,²³ the importation of radio-active milk,²⁴ and the kidnapping and trafficking of Bangladeshi children to be used as camel jockeys in the Arab States.²⁵ Early studies of the phenomenon of PIL in Bangladesh suggest that its manifestation in this country has taken on special 'Bangladeshi characteristics' associated with the particularities of the 'autochthonic'²⁶ Bangladesh Constitution, and the more traditional conservatism of the Bangladesh judiciary.²⁷ One commentator in particular argues that:

The use of PIL in Bangladesh has been dominated by an elite whose main concern continues to be the re-distribution of power in the aftermath of autocratic rule (which) has actually undermined the much-needed focus on social and economic justice for the poor and the deprived.²⁸

Whether or not these trends will harden remains a matter for conjecture, and PIL has a long journey to travel in Bangladesh if it is to achieve anything

decided that as the people are the ultimate holders of power under the Bangladesh Constitution, social and economic justice issues have primacy over special or individual interests. This meant that in cases of public wrong or injury any member of the public can file a writ petition on behalf of the entire public or a particular vulnerable section of society (in this case the several million inhabitants of the district of Tangail, threatened with uprooting from their homes and livelihoods as a result of a proposed Flood Control Plan).

¹⁹ *Syed Borhan Kabir vs Bangladesh and others*, unreported Writ Petition 701/1993.

²⁰ *Royeka Khatun vs Sub-Divisional Engineer and others*, unreported Writ Petition 1789/1993.

²¹ *Anwar Hossain Khan vs Speaker of Bangladesh Sangsad Bhavan and others*, 47 (1995) DLR (HCD) 42

²² *Dr Mohiuddin Farooque vs Bangladesh*, unreported Writ Petition 891/1994.

²³ *Dr Mohiuddin Farooque vs Bangladesh represented by Secretary Ministry of Health and Family Welfare and others*, unreported Writ Petition 1783/1994.

²⁴ *Dr Mohiuddin Farooque vs Bangladesh represented by Secretary Ministry of Commerce and others*, 48 (1996) DLR (HCD) 438.

²⁵ *Issa N. Farooque and others vs Bangladesh represented by Secretary, Foreign Affairs and others*, unreported Writ Petition 278/96.

²⁶ From the Greek, meaning "sprung from that land itself".

²⁷ The most comprehensive study of PIL in Bangladesh to date, is Ahmed, *supra* note 6. See also Hoque, *supra* note 6, and Hossain, Malik and Musa (eds), *supra* note 3.

²⁸ Ahmed, *supra* note 6.

like the impact in the High Courts of its larger neighbour. As PIL in Bangladesh is still in its infancy, uncertain of its future direction or significance, it is a good time to take stock of the real achievements, but also of the limitations of the PIL movement in India, over the past 25 years.

PIL: THE PROBLEMS

In 1990, one observer of the Indian PIL movement wrote as follows:

The Indian legal system, in its current condition, is far from meeting its constitutional obligation of promoting justice. In fact, it actually operates to deny justice to a majority of the Indian population, the rural and the urban poor.²⁹

The problems associated with the Indian PIL history can be grouped under a number of broad headings:

A. Prioritisation

To justify PIL as a system designed to ensure that justice is achieved for the weak and powerless, it is necessary to be able to define a system of criteria for determining firstly what is and what is not a PIL case, and thereafter a priority PIL case. This necessity raises in turn the question: should courts be the gatekeepers of justice in this way? Sangeeta Ahuja has identified this problem as follows:

The courts intended (PIL) to be a mechanism through which the grievances of those unable to participate in political administrative and legal processes could be addressed. In practice, PIL has evolved beyond these parameters..... The huge range of issues raised and the lack of parameters defining 'public interest' or 'public importance' has meant that any usable definition of PIL has to refer back to the cases themselves.³⁰

Notwithstanding the extreme problems associated with the determination of priorities in PIL cases the Supreme Court of India has determined the categories of cases that it will entertain as PIL cases,³¹ and put in place a procedure in the Supreme Court administration (intended to be duplicated in

²⁹ Williams, M., "Increasing Access to Justice: A Search for Alternatives", The Lawyers, January, 1990, at p.4

³⁰ Ahuja, supra note 4. Ahuja has extensively analyzed the definitional problems associated with PIL in India in her Public Interest Litigation in India: A Socio-Legal Study, unpublished Ph.D. thesis, London School of Economics, London, 1996.

³¹ The categories cover any case relating to bonded labour, neglected children, non-payment of minimum wages to workers, collective exploitation of casual labourers or other violation of collective labour laws, certain jail violations, specified complaints against police, specified atrocities against women, torture or other harassment of villagers from backward classes, environmental pollution and destruction, food and drug safety, petitions from riot victims and family pensions.

every Division of the High Court in India) whereby an initial screening of cases takes place, to decide whether the case comes within one of the categories. Although this innovation has improved the process of case selection it has done little to assist the question of prioritisation of cases, once they have passed the initial threshold test. The extreme length of time it takes for a case to get to the Higher Courts is a further restraint on the effectiveness of the system.³²

B. Legal Personnel Requirements

To have impact, PIL requires the training of a cadre of skilled specialist lawyers, with time, commitment and a capacity to work on highly complex, lengthy cases for little or no fee. Often in the process of developing PIL practices lawyers can become hijacked by political opportunists who use their courts, and sometimes their lawyers to fight internal political battles with the issues as a secondary factor.

C. Funding Requirements

PIL undoubtedly needs an effective legal aid system to pay those lawyers who specialise in PIL cases but who are not in a position to run *pro bono* practices. Without such a support system, it is unlikely to make any significant or universalised impact on court practice. Dhavan has described the Indian system in this respect in the following stark terms:

India's legal aid schemes have been inspired by embarrassment rather than by imagination. The embarrassment is as inescapable as the lack of imagination is inexcusable. Securely ensconced in the private market economy of lawyering, the Indian legal system did not — and with notable exceptions, continues not to — provide legal aid and advice in an efficient and capable manner.³³

And the refusal of the Indian Supreme Court specifically to accept the right to legal aid as a constitutional right³⁴ stands in stark contrast to the powerful rhetoric of many of its strongest PIL judgements, for example the case of *Centre of Legal Research and another vs State of Kerala*, in which Chief Justice Bhagwati stated unequivocally:

The State Government undoubtedly has an obligation under ... the Constitution ... to set up a comprehensive legal aid programme in order to ensure that the operation of the legal system promotes justice on the basis of equality.³⁵

The reality is alas very different.

³² See below, *infra* note 38 and text accompanying.

³³ Dhavan, *supra* note 16, at p.153.

³⁴ *Tara Singh vs State of Punjab*, AIR 1951 (SC) 441.

³⁵ WP No 463 1986 (C)

D. Activist Court

The Indian experience demonstrates unequivocally that PIL needs a creative, politically aware, activist court prepared to use law as a tool for constitutional justice to succeed. It is not a helpful tool in the hands of traditionalist judges who see their role as stating, rather than making, law. This is a fragile basis upon which to build a social justice movement, as judges have their own independent views and value this independence:

The misuse of PIL has discredited this form of litigation amongst many in the judiciary, and the dependence upon the support and concern of judges has led to constant resistance to the evolution of PIL³⁶

E. Clogging up the Court System

PIL can rapidly become prisoner of its own success,³⁷ as the scale of applications following high profile 'victories' clogs up the normal processes of the courts, and becomes crippling of the court system, both in time³⁸ and in cost.³⁹ In concluding her monumental and comprehensive study of PIL cases in India between 1979 and 1994, Sangeeta Ahuja made the following observations:

The administration of PIL has prevented it from being used to its full potential. There is no system of co-ordination of cases within and between each court.⁴⁰

F. Enforcement Requirements

PIL needs an extensive network of enforcement systems, otherwise it runs the risk of raising expectations without the power to deliver results:

The PIL guidelines have limited a form of litigation that was evolved as an open-

³⁶ Ahuja, supra note 4, at p. 790.

³⁷ See for example Menski, W.F., "On the Limits of Public Interest Litigation", 1992 Kerala Law Times Journal, 45-47; Menski, W.F., "Bottlenecks of Justice? A Further Note on the Limits of Public Interest Litigation", (1992) Kerala Law Times Journal, 57-60.

³⁸ See Dhavan, R., Litigation Explosion in India, Bombay, 1984. In 1986 (*Kanubhai Brahmhatt*, WP No. 1169) the Supreme Court lamented that "as it is, more than ten years old Civil Appeals and Criminal Appeals are sobbing for attention." Ahuja believes, however, that "fears that the development of PIL would open the floodgates to an unmanageable amount of litigation are not justified. In comparison to the total number of pending cases, PILs are few" in Ahuja, supra note 4, at p.772. Others argue that whilst the number of cases using the epistolary jurisdiction (petition by letter) is relatively small, it has nevertheless served to clog up the court dockets. On this see Jaswal, P., "Public Interest Litigation: Some New Developments in India", mimeo, seminar paper delivered at SOAS, London University, on February 17th, 1992.

³⁹ Baxi, U., The Crisis of the Indian Legal System, New Delhi, 1982.

⁴⁰ Ahuja, supra note 4, at 790.

ended mechanism to resolve injustices and the long wait for the resolution of cases has rendered many judgements academic ... The poor implementations of orders in PIL petitions have often prevented the remedy provided by the courts from becoming a meaningful reality.⁴¹

This requirement places a heavy burden on the court administrators who have to assist in the management of the fact-finding processes and the subsequent monitoring of enforcement machinery. Innovation in this respect has been both significant and substantial. In the former case, PIL courts have increasingly set up commissions of enquiry to carry out preliminary investigations following the acceptance of letter petitions. In the latter case, PIL has evolved new types of remedy, such as interim payments to petitioners, exemplary cost awards, costs awards to the social activist organisations sponsoring petitions. But according to Ahuja:

The most striking feature of compensation awards is their arbitrary nature. The courts have responded to cases with charity, and have avoided the need to decide upon a case by awarding interim compensation. No formal scheme for the compensation of those wronged has been framed.⁴²

Chief Justice Bhagwati himself recognised the vulnerability of the PIL project, if it was not able to guarantee systems to enforce its decisions:

The orders made by the Court are obviously not self-executing. They have to be enforced through State agencies; if the State agencies are not enthusiastic in enforcing the Court orders and do not actively co-operate in that task, the object and purpose of the public interest litigation would remain unfulfilled.⁴³

In an attempt to obviate this danger, the Supreme Court has passed down a number of highly complex enforcement orders requiring sophisticated machinery, funds and goodwill on the part of third parties, in key judgements over the years. Thus, in a case concerning the protection of women in police custody, the Court instructed a woman judicial officer to make regular visits to the police stations in question and to report regularly to the High Court on whether the directives were being obeyed.⁴⁴ In a case involving bonded labour, the Court appointed a state Minister to visit the quarries where the bonded labour networks had existed to ensure its discontinuance.⁴⁵ And in a case involving environmental pollution caused by a gas leak from a chemical plant, the Court appointed a four strong technical team, to retrain staff in the plant, to allocate them to specified safety functions and to monitor the plant regularly

⁴¹ Ibid.

⁴² Ahuja, *supra* note 5, at p.790.

⁴³ Bhagwati, P.N., "Judicial Activism and Public Interest Litigation", 23 (1985) *Columbia Journal of Transnational Law*, at pp.576-7.

⁴⁴ *Sheela Barse vs State of Maharashtra*, 1983 AIR (SC) 382.

⁴⁵ *Bandhu Murkti Morcha vs Union of India*, 1984 AIR (SC) 802.

with both planned and surprise visits.⁴⁶ Despite these strong and imaginative orders, research into the effectiveness of their enforcement is sparse. The Supreme Court has itself recognised that unless and until the attitudes of public administrators change significantly, the vigilance and dedication of social activists on the ground will remain of greater importance than any Supreme Court eloquence in protecting the poor.⁴⁷ One PIL activist, has put the issue quite bluntly in the following way:

For the downtrodden of the world, we secure their rights by law, exactly as though they had the same privileged background as we, and then, outside the courtroom we leave them to their separate ways. Ours is not, however, the universe, which they inhabit. Their grim, hostile world, which recedes while we are present, returns with a vengeance. This is why our legal victories turn out to be both pyrrhic and dangerous to the poor. There is a real danger if legal activists continue to interfere haphazardly, on a short term, case-wise basis with the lives of the downtrodden. It is time we learn that it is not enough to expose the innumerable and appalling social evils through the courts and the media. We must link up with social activists who alone can provide them with ground support.⁴⁸

G. Implications for the Law-making Process and the Separation of Powers

PIL, in the Indian form, inevitably raises criticism from some circles that it transforms courts into a form of superlegislature, replacing the rightful function of parliament. The Court has itself referred to the danger of taking on a policy role "to a degree characteristic of political authority (and) running the risk of being mistaken for one."⁴⁹ Also it presupposes that a Supreme Court *should* be the final arbiter, begging the question: is the Supreme Court's decision right because it is final, or final because it is right? A further criticism of an activist Supreme Court is that it may also usurp the discretionary and administrative functions of the Executive which should retain the ultimate decisions on how to prioritise government action. The criticism has been put trenchantly as follows:

India being a welfare state, legislation already exists on most matters... If the Court starts enforcing all such legislation under the spurious pleas that non-enforcement is violative of Article 21,⁵⁰ perhaps no state activity can be spared from the purview of the Supreme Court as a PIL matter. Its logical extension

⁴⁶ *Mehta vs India*, (1986) 2 SCC 176.

⁴⁷ *Sheela Barse vs State of Maharashtra*, supra note 44.

⁴⁸ Dr Vasudha Dhagamwar, quoted in "Public Interest Litigation: Courting Justice or Trouble?", *Sunday Observer*, 30 October, 1983.

⁴⁹ Per Pathak J, in *Banduha Mukti Morcha*, (1983) 3 SCC 161, AIR 1984 (SC) 802.

⁵⁰ Article 21 states as follows:

Protection of Life and Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

could mean the taking over of the total administration of the country from the Executive by the Court.⁵¹

H. Possibilities of Abuse

PIL can be used by political groups for their own ends, outside the constitutional purposes of PIL. This may not necessarily be a negative use of PIL. The accountability of government, the protection of consumers, of the environment or the integrity of the public examination processes are all issues of civic concern that are properly justiciable through the processes of PIL. It does, nevertheless, once again beg the question: for whom are the specialised processes and procedures of PIL primarily intended, the 'poor and helpless', or the public at large? The importance of this question is brought more sharply into focus when we note that PIL courts have also been used by ego seekers, by those seeking political advantage and those seeking to damage commercial rivals. In the Indian context we can note the case of an advocate who used a PIL petition to ask the court to direct the local telephone company to prioritise the allocation of telephones to lawyers because of the alleged importance of the legal profession to the general public;⁵² the use of a PIL petition in West Bengal seeking to ban the Koran, on the basis that it inflamed communal violence, and religious fanaticism;⁵³ numerous attempts to use PIL to influence urban planning on behalf of private interests;⁵⁴ and the persistent use of PIL petitions, "as another tool in the personal or political battles of those wishing to gain political power, or propagate their perspective."⁵⁵

THE ALTERNATIVE WAY FORWARD: PUBLIC INTEREST LAW

Delivering the keynote address at a National Seminar on Unorganised Rural Labour, in new Delhi in January 1994, Justice Bhagwati observed as follows:

We must always remember that social action litigation is a necessary and valuable ally in the cause of the poor, but it cannot be a substitute for organisation of the poor, development of community self-reliance and establishment of effective organisational structures through which the poor can

⁵¹ Agrawala, K. "Public Interest Litigation in India", 20:1 (1986), Journal of Indian Law Institute, 37.

⁵² *M. Balagovindam, vs Union of India and another*, OP No. 6965 of 1982-I, Kerala (unreported).

⁵³ *Chandanmai Chopra and another vs State of West Bengal*, Matter No. 297 of 1985, Calcutta (unreported).

⁵⁴ See generally Ahuja, supra note 4, chapter 8.

⁵⁵ Ahuja, supra note 4, at p. 577. Ahuja cites the case of *Maharishi Avadhesh vs State of Uttar Pradesh*, WP No 10804 of 1989, Allahabad, in which the petitioner sought (inter alia) the dismissal of the Prime Minister for his role in securing the release of a politician's daughter from the hands of terrorists.

combat exploitation and injustice, protect, and defend their interests and secure their rights and entitlements.⁵⁶

The spirit of these words, namely the belief that PIL alone (described here as social action litigation)⁵⁷ is an insufficient strategy for effective legal intervention on behalf of poor and destitute people, inform the second part of this article in which I explore the concept of public interest law, as compared to PIL, in the context of legal activism in Bangladesh. The core of my argument will be that the use of public interest law (hereinafter referred to as PILaw) as the basis for strategic advance provides an altogether more radical, versatile and holistic basis on which to mount a lawyer-based campaign to address impoverishment, exploitation and destitution via legal processes. Whilst PIL focuses upon efforts to provide legal representation in the courts to interests that historically have been unrepresented in the legal process, PILaw involves the use of a wide and diverse range of strategies to widen the access of the general populace to the sources of power and the decision making processes that affect their daily lives, specifically using the processes of the law to achieve this end.⁵⁸ By developing strategic lawyering campaigns, law reform activity through lobbying and advocacy programmes and above all by a radical re-interpretation of the function of legal education, under the umbrella of PILaw, legal activists have a far richer seam of opportunities at their disposal, to assist them in countering injustice. The three themes I will explore in order to develop this theory (although there are many more)⁵⁹ are as follows:

1. PIL as Strategic Work
2. PILaw as Training in Community Advocacy and Lobbying Skills
3. PILaw as Rethinking Legal Education

1. PIL as Strategic Work

⁵⁶ Agrawala, *supra* note 50.

⁵⁷ Baxi, U., "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India", in Baxi, U. (ed), *Law and Poverty*, Bombay, 1988, at p.89, argues most forcefully that the appropriate description of PIL in India is SAL (social action law), being grounded in a drive for social change, allowing the problems of the dispossessed poor to be resolved in the legal forum of the High Court. "By changing the terminology, Baxi sought to avoid the extension of this litigation, originally evolved for the disadvantaged and deprived, into a more general legal tool for all public interest issues." See, Ahuja, *supra* note 4, at p. 7.

⁵⁸ Cooper, *supra* note 1, at p. 10.

⁵⁹ For example the use of private litigation as a source of public interest law: see Tur, R. "Litigation and the Consumer Interest: The Class Action and Beyond", 2:2 (1982) *Legal Studies*, at p. 135 on the development of representative quasi-governmental agency action; the development of regulatory bodies for specific services and utilities; and the development of techniques of informal justice.

One of the most intriguing aspects of PILaw is the often ambiguous approach its exponents adopt towards PIL as a whole. In contrast to the public interest litigator, whose primary reason for taking a case must be to win the case, for the public interest lawyer, litigation is a means to an end, never an end in itself. Thus, its purpose may even be to lose rather than to win a case.⁶⁰ "It is clear that litigation can be effective in producing leverage even when one does not prevail in court."⁶¹ A case may be taken in order to expose the inadequacies of the law, to cause delay⁶² or, in the words of Justice Bhagwati, "to call attention to the pathology of public and dominant group power."⁶³ Similarly it has been argued that even successful outcomes of litigation need not be seen as an end in themselves, but rather as "bargaining endowments in the struggle to improve the lot of the oppressed."⁶⁴

A judicial victory is itself neither necessary nor sufficient for bringing about the change in behaviour toward which the public interest litigation is directed.⁶⁵

This is sometimes described as, the strategic use of litigation to achieve a political solution.⁶⁶ Alternatively PIL may be adopted for its indirect influence on policy-making, with a number of possible outcomes, for example using its deterrence function, its publicity and fact-finding function as a catalyst to legislative action, or simply using the courts as a legitimation of community values,⁶⁷ or a forum for publicising the widespread existence of a particular injustice, especially when such exposure also reveals the inability of the court system to cope with the desires of the victims to obtain redress, through litigation.

One example of the use of the courts for the latter strategy is the mass filing of same-fact cases, to draw attention to a particular localised problem. For example, a few years back, a prominent neighbourhood law centre in the United Kingdom, working with immigrant communities in a poor quarter of

⁶⁰ See Handler, J., Social Movements and the Legal System: A Theory of Law Reform and Social Change, New York, 1978.

⁶¹ Olson, S., "The Political Evolution of Interest Group Litigation", in Gambitta, R., May, M., and Foster, J., Governing Through Courts, California, 1981, at p. 239.

⁶² See Denvir, J., "Towards a Political Theory of Public Interest Representation", 54 (1976) North Carolina Law Review, 1133.

⁶³ Bhagwati, supra note 43, at p. 573.

⁶⁴ Singh, P., "Judicial Socialism and Promises of Liberation: Myth and Truth", 28 (1986) Journal of the Indian Law Institute, 336.

⁶⁵ Weisbrod, B., Handler, J., and Komesar, N., Public Interest Law: An Economic and Institutional Analysis, Berkeley, 1978.

⁶⁶ See Gambitta, R., "Litigation, Judicial Deference and Policy Changes", in Gambitta, et al, supra note 61.

⁶⁷ See Denvir, supra note 62; Selznick, P., "Social Advocacy in the Legal Profession in the USA", (1974) Juridical Review, 113.

London adopted a tactical case-filing procedure to bring attention to a local injustice. They were aware of a number of attempted or actual instances of illegal eviction of tenants by private landlords, based upon spurious claims of rent arrears. In many cases the rent was in arrears but had been deliberately withheld by tenants in order to pressurise their landlord to carry out essential repairs on the properties that were their legal responsibility. Although a tenant's legal right to due process prior to eviction, including proper notice periods, and the right to counterclaim for damages and injunctions related to disrepair, were well entrenched in the law textbooks, the case workers were well aware that the level of knowledge about these rights and procedures amongst the judiciary and staff of the local housing court was woefully low. Exploiting this general level of ignorance, a number of landlords were taking the law into their own hands, and carrying out illegal evictions, confident that the courts were not equipped to deal effectively or decisively with the legal rights of the evicted tenants. Faced with this dilemma, the law centre worked with local tenants organisations to plan a flood of case-filings, whereby a very large number of aggrieved tenants would file simultaneous suits claiming compensation and protection, in the certain knowledge that this campaign would effectively bring the work of the local courts to a standstill, which it duly did. The local and national media were briefed to report the chaos, and as a consequence not only did the spate of illegal evictions dry up in that area of the city but new procedures were also introduced across the country to expedite the processing of such cases, together with higher levels of compensation and the criminalisation of illegal eviction. Thus, a solid victory was achieved, with a substantive reform of both law, and procedure, without the hearing of a single case. This provides a textbook example of PILaw having a greater range of influence than PIL.

2. PILaw as Training in Community Advocacy and Lobbying Skills

One of the key components of a public interest law strategy is for public interest lawyers to use their legal training skills and knowledge, to empower communities to protect themselves and to fight for their rights within the framework of law and legal process. In many instances, communities with specific common concerns, for example poor housing, a polluted environment, entrenched corruption in the local administration, abusive policing, illegal money lending can benefit in the long run far more from training in self-organisation, and the skills of lobbying and self-advocacy, than from legal representation on their behalf. Public interest lawyers can concentrate their efforts on advising communities how to create a community group organisation, dealing with such issues as constitutions, contracts, dealing with third parties, free speech issues, standing orders, revenue collection, problem

solving, negotiation, the law of meetings, the conduct of business, the use of lobbying, petition collection, principles of good governance and participation in decision-making, or the running of accounts. In addition to this public interest lawyers can provide essential support through community legal education programmes, including publicity, journalism, street law programmes, school law programmes and so forth. Similarly, public interest lawyers can provide training programmes to specific groups of people on generic issues, such as disability or gender awareness.⁶⁸

Another PILaw strategy that can be used to good effect is the use of direct lobbying, in an attempt to influence law reform. In these circumstances, to have a strong research base to proposed law reforms is an essential component, a strategy is already being developed in this context in both BLAST (Bangladesh Legal Aid and Services Trust) and WLC (the Women's Law Centre). The National Law School of India (NLSIU) in Bangalore, has made an imaginative contribution to the training of law reform lobbyists through the national Law Reform Competition, organised across India. In this competition, teams of law students from different law colleges work with local communities on an issue of local injustice, preparing a law reform brief, which is then judged competitively on its content and presentation by a panel of judges and lawyers at an annual national event. The experience gained, and prestige associated with this programme, provides a high incentive for the best young lawyers to engage in law reform research and advocacy from the earliest stages of their legal training.

3. PILaw as Rethinking Legal Education

Adrienne Stone has written:

The charge has often been levelled at law schools that they serve as training grounds for the elite, producing lawyers who go on to earn enormous salaries serving large commercial interests rather than using their skills to deliver justice to the poor or in the name of a social or political cause. Most dramatically, sociological research has shown that students who enter law school with a commitment to a career working in the public interest tend not to do so.⁶⁹

⁶⁸ The provision of such training programmes is to form the cornerstone of the work of the new Women's Law Centre, to be located in Dhaka University Faculty of Law. The Centre has an ambitious set of proposals to develop back up research and training programmes on a host of women's issues, and could become a major example of PILaw activity in Bangladesh in the coming years.

⁶⁹ Stone, A., "Women, Law School and Student Commitment to the Public Interest", in Cooper and Trubek, *supra* note 6, at p.56. See also Kennedy, D., "Legal Education and the Reproduction of Hierarchy", 32 (1982) *Journal of Legal Education*, 592.

Stephen Leleiko offers an explanation for this failing, and a solution:

The struggle faced by law students who come to law school, committed to the belief that law is a caring, humanistic profession, only to discover that its primary concern is with cool rational analytical thinking, can be significantly resolved within the clinical environment, which allows students the opportunity to explore ways of merging more closely with their professional responsibility to the rule of law, with their affective responses to client needs and their desires to respond to those needs.⁷⁰

Clinical legal education,⁷¹ is the creation within the law school of a clinical environment in which:

Students act in the role of lawyers under faculty supervision, and through reflection upon their experience, begin the process of learning both the necessary skills and the principles of professional responsibility critical to becoming effective advocates.⁷²

Clinical teaching is not yet a part of the vocabulary of law teaching on the Indian sub-continent:

Out of nearly five thousand law teachers spread over 400 and odd law colleges and other law teaching institutions in India, not even a fraction are involved in any clinical teaching or related programme.⁷³

⁷⁰ Leleiko, S., "Love, Professional Responsibility, the Rule of Law and Clinical Legal Education", 29 (1980) Cleveland St Louis Review, 631.

⁷¹ For a comprehensive overview and analysis clinical legal education with a focus on the Indian sub-continent, see Menon, M. (ed), Clinical Legal Education, Lucknow, 1998.

⁷² Kotkin, M., "The Law School Clinic: A Training Ground for Public Interest Lawyers", in Cooper and Trubek, supra note 6, at p. 136.

⁷³ See Menon, supra note 71. The National Law School of India University (NLSIU) based in Bangalore is an honourable exception to this rule, with a very substantial range of clinical programmes, forming a core of its LL.B. programme. Outside Bangalore, however, the picture is grim, Menon comments, supra note 71, at p. 16

With the abolition of the apprenticeship system in 1964, every law graduate (in India) even without any practical training whatsoever was automatically made eligible for enrollment as an Advocate. The floodgate was thus opened and competence and professionalism given a go-by in one stroke of thoughtless action. As if to make amends for the resulting calamity, the Bar Council of India exercising its powers of maintenance of standards of legal education under the Advocates Act, directed the universities and colleges teaching law to impart practical training as part of legal education. Universities which had neither the resources nor the experience to undertake the job ignored the recommendations and, on repeated advice, introduced some half-hearted measures like moot courts, court visits etc. Even these activities were treated as optional programmes and outside the required

It could, however, be developed in legal education programmes in the sub-continent without too much adjustment to curriculum, given the will and the vision to do so. Not only can it enrich the student understanding of substantive law in action and legal process, it can also be used to define the inter-personal elements of lawyering,⁷⁴ and to use the immense resources of the law school setting — physical, intellectual, inter-personal, international — to allow students to engage in a wider intellectual, philosophical and political enquiry as to the role and function of the legal system.⁷⁵

The clinical environment may take many forms. For example, it can involve working with live clients on individual cases, it can focus on simulated cases, or it can involve the creative usage of law and in particular the unique forum of the law school, with its formidable blend of talent, energy, idealism and academic skill, to stimulate and create new ways of using law to help achieve social justice in the public interest. This might be through initiatives centred on classroom teaching (stressing interdisciplinary materials, critical discussion, integration of doctrine with practical experience); initiatives centred on transformative practice (combining classroom teaching, active participation in a clinical setting, and inter-action with practising lawyers from the community); or initiatives centred on policy formation (concentrating upon opportunities for shared perspectives, among representatives from politics, community groups, legal educators, and public and private entities).⁷⁶

What each form has in common is its belief that by engaging students with the direct impact of law upon real people and exposing them to its destructiveness, and its creative capacity to assist individuals or communities, from the earliest stages of their law studies, their willingness and ability to become public interest lawyers, in the fullest sense of the term, is likely to be

curriculum, with the result most students graduated without having any training or professional skills.

At the time of writing the Bar Council of India is once more seeking to impose clinical training on India's law schools, but whether they will succeed in another matter. In Bangladesh, with the exception of the embryonic Clinical Education course offered as part of the LL.B. programme at the University of Dhaka, there is little clinical legal education at present.

⁷⁴ Menkel-Meadow, C., "The Legacy of Clinical Legal Education: Theories about Lawyering", 29 (1980) Cleveland State Law Review, 555.

⁷⁵ Bellow, G., "On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as a Methodology", in Clinical Education for the Law Student: Legal Education in a Service Setting, Meilen Press, 1973.

⁷⁶ These categorizations are taken from Erlanger, H. and Lessard, G., "Mobilizing Law Schools in Response to Poverty: a Report on Experiments in Progress", 43 (1993) Journal of Legal Education, 199.

enhanced. Bangladesh law schools with their captive audience of young, highly intelligent, well-motivated law students, many of whom come from areas where poverty and disempowerment dominate, have a unique opportunity to develop a clinical environment in which they can experiment with clinical strategies designed to inspire, motivate and enrich the capacity of lawyers to work in the community thereafter on public interest issues. The development in the coming years of a Women's Law Centre at the University of Dhaka provides a great opportunity to seize the initiative in the context of an area of law that lends itself well to public interest strategies. The NLSIU in Bangalore has already taken the lead in this respect, setting up both a Centre for Women and Law (CWL) and a Centre for Child and the Law (CCI). The CWL undertakes various programmes working with women's organisations on legal literacy for women, social auditing of welfare legislation affecting women, involving law students at every level of the programme; the CCL organises workshops designed to sensitise government and non-government functionaries to issues of child rights, and holds seminars and training programmes among college and school students on child rights.⁷⁷ Law students are also involved in these projects, and are encouraged to develop their own initiatives on child rights, as part of their undergraduate studies. For example, in 1997-8, two students worked with a group of 14 street children in Bangalore city, using their legal background, interviewing, research and inter-personal skills both to produce a substantial report on the causes of the street children phenomenon, and also to assist many of the children in entering a rehabilitation scheme, to help them off the streets.

The examples of the value of clinical programmes to be found in the NLSIU in Bangalore are compelling and inspirational but they are by no means unique. I set out below three examples of the infinite variety of approaches that can be used in law schools to achieve this osmosis of legal education and creative radical practice. They could be expanded indefinitely.

The first example is drawn from a project based within the clinical law programme at the Brooklyn Law School in New York City.⁷⁸ This project has been running since 1994, and was developed as a critical and creative response to the negative experiences of law students working in the law School's Federal Litigation Program (FLP). The FLP had been in existence for about 12 years, as an option within the Law School curriculum. Under the FLP, student representation, under faculty supervision, was offered to indigenous litigants

⁷⁷ See generally 1998 Bulletin, National Law School of India University, Nagarbhavi, Bangalore.

⁷⁸ For a fuller account of this project see Kotkin, M., "The Violence Against Women Act Project: Teaching a New Generation of Public Interest Lawyers", 4 (1996) Journal of Law and Policy, 435.

fighting discrimination in the local federal courts. Student representation served a dual purpose of providing a free service to those without funds to buy it, and providing students with valuable hands-on training and experience of pre-trial litigation, during the course of their studies. Superficially, this was an excellent vehicle to encourage public interest litigation practice amongst students, once graduated. The faculty leaders of the FLP came to realise however that in many ways, working on the programme was counter-productive to achieving this end, frequently generating cynicism and despondency amongst the student participants, as to the ability of the law to provide any useful assistance in these cases:

Many of (the students) come away from this experience with a host of negative messages about law and litigation The law is rigid and ill-suited to eliminating racism and sexism from the workplace. Regardless of the merits of their claims, clients rarely obtain the public vindication that they seek. Moreover, the program does not teach or offer experience in skills that in fact occupy much of the time of public interest lawyers: public education and outreach efforts, case development and planning, and analysis of legal theories for precedent setting claims.⁷⁹

Concerned that they may well be producing young lawyers disillusioned and cynical about the ability of the law and lawyers to effect social change, before even graduating from law school, the staff developed an alternative approach, switching the attention of the programmes from public interest litigation, to public interest law. The results of the shift in emphasis are striking.

The new project, known as the VAWA Project⁸⁰ involves students taking a holistic approach to a new piece of legislation, analysing its origins, its goals, its implementation problems, and its effectiveness, on a sustained basis, through the year of study. The legislation in question, the *Violence Against Women Act*, was a highly significant and symbolic landmark in the battle against male violence, introduced in 1994, after a long campaign. The Act “stands for the proposition that a violent act by a man against a woman is not just a private act, subject to traditional criminal and tort remedies, but an act that implicates our public perception of civic freedom.”⁸¹ It effectively seeks to establish a new civil right for women, and as such is a hugely important piece of legislation. The project leaders wanted the students to be involved in the whole process of constructing this new right, not simply representing clients who came to them, as reactive litigators, but rather as public interest lawyers, using all their skills to work with an inert piece of legislation to try to ensure its effectiveness. To this end, the students working in the project embarked

⁷⁹ Kotkin, *supra* note 72, at p.133.

⁸⁰ The full title is The Violence against Women Act Project.

⁸¹ Kotkin, *supra* note 72, at p. 130.

upon a rolling programme of activities associated with the Act, that enabled them by the end of the year to have acquired an intense understanding of its history, its content, its impact, both positive and negative, and its accessibility. This analysis, is now being used both to inform their own perceptions of the complex processes that link law to social change, and also to inform others as to its potential and where necessary its defects. In this way, the students acquire a deeper appreciation of public interest law in the context of a single theme.

The strategies used in this process have been various. Students working in teams of four, began by preparing research memoranda on key issues that would arise in future litigation, based upon a detailed study of its history, and of parallel legislation. They then moved on to a phase of outreach work, designed partly to educate the public of its contents ('public' to include not only potential victims of violence, but also the public at large), and partly to identify potential plaintiffs, that could help develop the workings of the Act in practice, and establish its parameters. In this phase different groups experimented with different approaches, some working on the preparation and distribution of information packages for the general public, others working with women's shelters, rape crisis centres, and women's groups, others giving public presentations on the issues at a host of different venues. In the final stages of their year, the students began preparing for possible test cases, and perhaps more significantly worked on a detailed analysis of the reasons why cases were not being taken — fear, ignorance, financial problems, resignation, procedural barriers — and prepared lobbying briefs for various organisations setting out their concerns. The Project will be repeated each year, and it is anticipated that its contribution both to the cause of fighting violence against women and to the creation of a generation of public interest lawyers could be immense. In the words of the project leader:

The goal (of the Project) is to empower students: to encourage them and give them a sense of optimism and confidence as they contemplate careers in public interest law Students did not seem deterred by their initial apprehension or the difficulties of a public interest practice, but rather were optimistic that they could now put such concerns aside and look positively at how their work benefits the overall system.⁸²

The second example is based in the Faculty of Law at the University of Colombo in Sri Lanka. The Faculty is one of only three providers of legal education in Sri Lanka,⁸³ and as such is able to command a high quality of

⁸² Ibid., at p.139 and p.141.

⁸³ The other two are the Sri Lanka Law College, a practical law college that trains students for the bar examination and the Open University, which operates a part-time educational programme in law, combining home study and occasional group discussion classes.

student admission. In addition to offering a series of conventional law topics as part of the undergraduate degree programmes, the Faculty offers the possibility of extra-curricular, direct engagement in socio-legal work, some of which has led to remarkable outcomes both for the students and the community at large, and all of which is a clear manifestation of the wider concept of PILaw.⁸⁴ One example of such a project involved a group of students working on a study of the Veddas, an indigenous group in Sri Lanka.⁸⁵ The students had become aware that a number of Vedda families faced resettlement, as a result of a decision to dam the river Mahaweli, to create an electric power plant. They were aware that the decision would have dramatic consequences not only on the lives of the families in question but also on the identity of the Veddas in general, as their indigenous self-identity was under threat as a result of victimisation, discrimination and a process of intermingling with other ethnic groups in Sri Lanka. Students chose to help support the group in their campaign either not to be moved, or for appropriate compensation, using a full range of legal and forensic skills in the process.

From the outset, conscious of the legal protections offered under international law to indigenous groups, the students realised their first task was to answer the question: How to identify a Vedda? This they did through painstaking anthropological, and ethnographic research, finally isolating a group of traditional hunters with distinguishing physical characteristics, living in rock shelters and remote villages in jungle areas who fitted the pure description of a traditional Vedda. Having defined what a Vedda was, the students went on to address a series of legal issues raised by the electric power plant project and the 1500 acres of land that had been offered to the Veddas, by way of compensation. The understanding of Vedda history and customs they had gained in their preliminary study helped them to use their legal knowledge to argue that the project interfered with the traditional use of land and the proposed resettlement compensation was both inadequate and inappropriate. Relying upon Fundamental Rights contained in the Sri Lankan Constitution and upon international laws demanding special protection for indigenous people, the students built up a formidable argument against the proposed scheme, invoking in the Veddas' defence string of international instruments including the Kari Oca Declaration and Indigenous Peoples Earth Charter, the ILO Convention 169 and the Draft UN Declaration on the Rights of Indigenous Peoples. By referring to anthropological and ethnographic studies on the Vedda communities, by using various social science techniques

⁸⁴ For a fuller account of these activities see Schukoske, J., "Facing Realities: Socio-Legal Study in Sri Lanka", in Cooper and Louise, *supra* note 6, at p. 194.

⁸⁵ See Fernando, M., The Veddas of Sri Lanka: a Socio-Legal Study, Colombo, 1993.

to document tension between Vedda ways, language oppression and the majority way of life, and by researching instruments of international law and preparing lengthy briefs to government making an alternative case, the students achieved something that a PIL case-law based approach could not have achieved. The ultimate impact of their arguments remains a matter of conjecture, but its initial impact was real and impressive, and for the students themselves, this experience of the creative potential using legal research skills in so original and powerful a way was an object lesson in the workings of PILaw.

My third example is drawn from the work of the Centre for Social Justice, based in the Seton Hall Law School, in downtown Newark, New Jersey, USA. Seton Hall Law School has a long tradition of clinical law programmes of the classical model, with students and staff offering a free advice and assistance programme to indigent members of the local community on specified topics, as an optional part of the law school curriculum. It had always been seen as a useful and worthy project but it was of limited impact and for many students and faculty a source of frustration, as it did not permit them to get deeper into issues of social justice that they felt to be hovering just beneath the surface of the cases in which they could offer little more than superficial assistance. In 1990, a decision was made by a highly motivated group of public interest lawyers in and around the law school, that this was an inadequate provision, as a consequence of which the Centre for Social Justice was established. One of the Centre's founders, Bernard Freamon, describes the centre's mission in the following terms:

Rather than continuing to function under the routine service and skills training model we had perfected so well for our students, we determined that we would ... establish a place in the law school that would continue to teach skills but would also be a centre for learning about justice; a centre where students would focus on professional goals designed to bring about justice in the everyday lives of their clients while simultaneously reflecting upon the implication of their actions for their careers in the profession.⁸⁶

Needing a 'big issue' to test out this strategy, and to engage students in learning about justice in its deepest sense, the project leaders looked to the housing issue as one of the biggest problems facing the poor and, in particular, the poor black and Hispanic populations of the state of New Jersey. Post-war urban housing development in New Jersey had been dominated by the concept of 'exclusionary zoning', whereby town authorities would construct, more or less openly, a series of measures designed to ensure that black people remained segregated in the poorest and most undesirable housing. Matters

⁸⁶ Freamon, B. "Action Research for Justice in Newark, New Jersey", in Cooper and Trubek, *supra* note 6, at p.171.

came to a head when this 'exclusionary' zoning was challenged in the New Jersey Supreme Court, by way of a series of PIL cases, in the late 60s/early 70s.⁸⁷ In landmark rulings the New Jersey Supreme Court declared 'exclusionary zoning' schemes to be unlawful and in breach of the New Jersey Constitution and ordered every municipality in the state to exercise its constitutional duty to provide a realistic opportunity for the construction of a fair share of low and moderate income housing to meet local and regional needs. These decisions were heralded as a classic example of the impact of high profile PIL and of its power to contribute incisively to notions of distributive justice. "As a consequence of the rulings, between 1975 and 1985, housing advocates and various housing developers filed over 100 lawsuits against 60 suburban towns in New Jersey, alleging unconstitutional exclusionary zoning."⁸⁸

Law students and staff working in the Centre for Social Justice saw things differently. They knew all about the famous rulings and studied them at length as a classic legal text of their time. But there was also deep disquiet on the street, that the rulings represented rhetoric and nothing else and that in reality nothing had changed, after almost 20 years. Working with community activists, a huge research project was initiated within the Centre by a team of academics, housing agency workers, and law students, to get to the bottom of the issue. After almost five years of work analysing data collected from a huge variety of sources relating to the race, ethnicity, income, age, gender, former residence and family size of occupants of poor quality public housing, the Centre came up with the damning conclusion: the housing programmes in New Jersey were just as segregated, if not more so, than they had been prior to the Supreme Court decision as of the late 60s/early 70s. For the students working on this project, the experience was a liberating revelation about the limits of law and also the power of legal skills to produce and sift evidence and thereby reshape conventional beliefs and thinking on issues, especially when such thinking had the support of the highest courts of the land. The next phase of the project was to consider bringing litigation directly against the state for fostering and encouraging discrimination on the basis of race or ethnic origin and to embark upon wider theoretical study of the nature and limitation of litigation in the arena dominated by attitude and prejudice. As a parallel project, the Centre has been using its legal expertise, working to create housing opportunities for poor and moderate income clients where none

⁸⁷ Collectively identified as the Mt. Laurel cases, as follows: *Southern Burlington County N.A.A.C.P vs Township of Mount Laurel*, 67 N.J. 151 (1975) and 92 N.J. 158 (1983); *Hills Development Co. vs Township of Bernards in Somerset County*, 103 N.J. 1 (1986).

⁸⁸ Freamon, *supra* note 86, at p.175.

existed before. Students work with developers and non-profit community organisations on contract analysis, review of architectural site plans, organisation of finance/task relief advice, preparation of mortgages, drafting of deeds and other legal memoranda, thereby empowering poor communities themselves to fight for better housing systems within the state, notwithstanding the deep-rooted prejudice uncovered in the wider research project.

In addition to redefining the function of clinical legal education to expand into social action lawyering, as exemplified in the above three case studies, PILaw can also use the teaching of professional ethics and disciplinary codes to challenge students' assumptions about the 'inalienable duty to the client' whatever the social consequences of the case. Another PILaw technique is to encourage students to experience the integration between legal theory and theories of justice with live case studies. Goldsmith has convincingly argued that key texts of socio-legal scholars⁸⁹ and legal philosophers should be integrated into clinical law teaching in law school, as tools to underpin the clinical practice, the interaction analysed within the classroom. He argues that it is only through such fusion of scholarship and practice that law students can learn to appreciate the full complexity of the lawyer's social role, including responsibility to clients, others and oneself through empirical and conceptual understanding of what lawyering in society involves.⁹⁰ This process can also involve the discouragement of *generic law teaching*, i.e., seeing 'clients' as a homogenous group (like doctors see 'patients'), to be replaced by extensive, interdisciplinary discussion on cause of poverty, disempowerment and oppression.⁹¹ The imaginative redesign of law school curriculum to engage in the real issues of the day is the way forward in the realisation of this strategy.

CONCLUSION

⁸⁹ He cites as particular examples of such texts Black, D., Sociological Justice, Oxford, 1994, Merry, S.E., Getting Justice and Getting Even: Legal Consciousness Amongst Working Class Americans, Chicago, 1990, and Unger, R., Social Theory: Its Situation and Its Task, Cambridge, 1988.

⁹⁰ Goldsmith, A., "An Unruly Conjunction? Social Thought and Legal Action in Clinical Legal Education", 43 (1993) Journal of Legal Education, 415. For an example of such integration in practice in a law school see Goldfarb, P., "Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory", 43 (1992) Hastings Law Journal, 717.

⁹¹ For the most evolved statement of this approach see Lopez, G., "Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Education", 91 (1989) Western Virginia Law Review, 305. See also Trubek, L., "Embedded Practices: Lawyers, Clients and Social Change", 31:2 (1996) Harvard Civil Rights-Civil Liberties Law Review, 415.

This article has set out to encourage thought and reflection on future strategy within the law reform and activist community in Bangladesh at a time when doors are slowly sliding open to allow the entry of radical law practice onto the centre stage of social change in the next phase of the country's development. Whilst acknowledging that the achievements of PIL in India and in other common law jurisdictions over the past 25 years have been remarkable and dramatic, I stress the counter-argument that PIL is fraught with problems, contradictions and limitations, and should not be seen as a panacea. The wider concept, public interest law, I put forward as an altogether more promising, holistic, alternative framework for the comprehensive, strategic use of law to achieve social change and empowerment for the poor, marginalised and dispossessed.