

SILICOSIS AND THE STATE: CONFIGURING LABOUR'S INTEREST AS THE PUBLIC INTEREST

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This article presents a close reading of several Public Interest Litigation ('PIL') petitions before the Indian Supreme Court since the 1980s, analysing how the figure of the worker suffering from silicosis, an occupational lung disease, has been constructed in judicial discourse. I trace the shifts in the vocabulary of law which variously constructed informal workers, exposed to dust in the workplace – first, as a community facing forced working conditions; then, as residents suffering air pollution; and finally, as victims of a human rights violation that the state was bound to compensate. This paper builds on and contributes to existing critical scholarship on PIL in India, and demonstrates how the Supreme Court has been subject to varying pressures in its decision-making, issuing a confusing range of orders as a result. I show that these cases represent an important but contested site of claim-making. Through these cases, this article emphasizes that we can discern the outlines of a broader trajectory in India – where state responsibility for informal workers has been negotiated with the identification of informal labour's interests with the public interest. I also suggest that the route these cases have taken might offer us reason to be sceptical

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of the promise of the 'public interest' for informal workers in India.

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Poyha padya re apu jeeve hata kaurine,

Poyha kunin re, tharla kun re?

We earned some money by breaking body and soul,

Who gets the money, who gets nothing?

—Bhilala song¹

The ongoing epidemic of silicosis in India made international news once: when the Supreme Court issued a warrant against the Chief of the Central Pollution Board for contempt of court.² This order came a decade into an ongoing public interest case on the conditions of workers suffering from silicosis, an incurable lung disease caused by the inhalation of free crystalline silica dust, typically contracted from hazardous working conditions. The Court issued the warrant as pollution control authorities had repeatedly failed to appear in court to explain what they had done to prevent the deaths of stone workers from silicosis in Gujarat. This event opens up a series of questions: what led to the Supreme Court's interest in silicosis as a matter of public interest? Why was a central state agency summoned before the Court, instead of a private employing firm or corporation? And, of all state agencies, how was it that the Pollution Board was summoned and not the Labour Department?

This article traces how silicosis came to be framed in this way, in what seems a definitive break from the ideas of responsibility at the heart of workers' compensation legislation and other existing labour law statutes. I follow how silicosis came to be an object of judicial concern in India, and the shifting ways in which the Indian Supreme Court has constructed the worker suffering from silicosis. Whilst there are numerous Indian labour laws that provide for compensation for occupational disease – such as the Factories Act, 1948 ('the Factories Act'), the Employees Compensation Act, 1923 ('the ECA'), and the

¹ Amita Baviskar, 'Contract Killings: Silicosis among Adivasi Migrant Workers' (2008) 43(25) Economic and Political Weekly 8.

² Rina Chandran, 'India's Top Court Issues Rare Warrant in Gujarat Silicosis Deaths Case' *Reuters* (20 May 2016) <<https://www.reuters.com/article/us-india-mining-silicosis-idUSKCN0YBIIT>> accessed 15 September 2020.

Mines Act, 1952 ('the Mines Act') – silicosis came to figure in several public interest cases before the Supreme Court from the 1980s. These cases created a parallel track of compensation, where one set of workers claimed silicosis compensation from the state as an issue of the 'public interest', while others could reasonably be expected to claim compensation from employers under labour law. The vast majority of the Indian workforce – over 90% in most estimates – are classified as 'informally employed', that is, without any social insurance, generally without a contract, and outside the reach of protective labour legislation.³ Advocates for worker welfare were forced to find another way to secure compensation for informal workers. This was attempted in the Public Interest Litigation ('PIL') cases beginning in the 1980s.

This article examines key moments when silicosis became an object of 'public interest' before the Indian Supreme Court. It does so by analysing three different discourses about injury and dust that came to the fore in court cases, each of which cast the worker in a different light. First, in the 1980s, silicosis was framed as a question of forced labour practices, linked to debt bondage and child labour, an issue whose solution required rehabilitation to be funded by both the state and employers. This interpretation remained in vogue until the 1990s, until activists and the Court reframed silicosis as an issue of dust pollution. Here, dust was a 'pollutant' and the affected person was the 'resident', rather than dust being conceptualized as 'workplace hazard' with the affected person as the 'worker'. However, the spectre of court-ordered industrial closures, in response to pollution, led several trade unions to file a petition intervening in a case on water contamination, arguing that the Supreme Court's attitude ignored the question of workers' health. This order has been neglected in existing academic work.⁴ Therefore, the account in this chapter relies on the few English language newspapers and non-governmental organisation ('NGO') reports that followed the case to show how the Supreme Court's compensation order took much initiative on the part of workers' groups to be fulfilled.

³ Santosh Mehrotra, 'Informal Employment Trends in the Indian Economy: Persistent Informality, but Growing Positive Development' (International Labour Organization 2020) Working Paper 254 <https://www.ilo.org/employment/Whatwedo/Publications/working-papers/WCMS_734503/lang--en/index.htm> accessed 25 March 2021. There are numerous and significant critiques of the formal/informal binary – such as arguments that informality has become so pervasive so as to render it conceptually useless, and those who argue that the formal and informal economy are intrinsically connected and not separate. I retain the use of the term in a limited sense here, using informality as shorthand to simply mean activities that operate outside the formal reach of protective labour law.

⁴ Amita Baviskar, Subir Sinha and Kavita Philip, 'Rethinking Indian Environmentalism' in Joanne R Bauer (ed), *Forging Environmentalism: Justice, Livelihood and Contested Environments* (Routledge Books 2015); and Nivedita Menon, 'Environment and the Will to Rule: Supreme Court and Public Interest Litigation in the 1990s' in Mayur Suresh and Siddharth Narrain (eds), *The Shifting Scales of Justice: The Supreme Court in Neo-liberal India* (Orient Blackswan 2014). These are examples of writing on the Indian judiciary's response to 'bourgeois environmentalist' demands made via the PIL.

The final case I consider is the ongoing PIL of *People's Rights and Social Responsibility Centre v Union of India* filed in 2006.⁵ I show that this case cements the shift to human rights language for workers that we witness today. The National Human Rights Commission ('NHRC') became a co-petitioner and issued recommendations that State governments compensate victims and their families. This marked a decisive discursive transformation in the way the law understood silicosis – it refashioned workers suffering from occupationally caused disease as citizens whose basic human rights are violated. However, this case too has marked a return to the worry about pollution with the order of more industrial closures.

An outline of this history tells us several things of significance – first, that the courtroom has been an important site of renegotiation, where workers' advocates have developed an argument for state responsibility for worker welfare. Further, while PIL has been a useful tool for civil society groups to advance their claims, the role and function of PIL has altered with time. As Bhuwania observes, the Indian Supreme Court has become “the self-proclaimed vanguard of the social revolution” and, in this, its priorities have tended to shift.⁶ By attending to the discursive transformations in these cases, I aim to show how the Supreme Court has engaged with the question of informality and dust-related disease over time. Although the broader statutory landscape on occupational health and disease in India informs the Court's interventions, I focus here on discursive shifts in case law.

I conclude by situating these cases within broader changes in India's political economy. The rise of human rights and public interest discourse to advance worker protection has been concomitant with the Supreme Court's own role in dismantling formal labour law protections. PIL has allowed the Court to construct itself as the defender of the vulnerable, rather than defending the rights of workers as a class, and the framing of labour's interest as the public interest might be better understood in this light.

I. 'DANGEROUS OPERATIONS': SILICOSIS AS FORCED LABOUR

A. Background

PIL began to emerge in the Supreme Court's jurisprudence in the late 1970s and acquired many of its key characteristics in the 1980s, where it began to

⁵ (2010) 14 SCC 769 (Supreme Court of India).

⁶ Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press 2016) 25.

use the discourse of the ‘people’s will’ in an attempt to secure popular legitimacy after the Emergency years.⁷ The key procedural innovations of PIL were invented in the 1980s – the first and most significant of these was that it loosened rules on legal standing (‘locus standi’), allowing any ‘public-spirited’ person or organization to file a suit on behalf of a general or group interest, even if their own rights had not been injured. In the landmark case of *Bandhua Mukti Morcha v Union of India* (1984), the Court also rejected the need to cross-examine information collected by its amicus curiae, arguing that the standards of an adversarial trial could not apply to PILs. It pronounced orders of a policy nature, including ordering stone crushing units to spray water and install vacuuming equipment to prevent dust exposure.⁸ This marks an early and significant intervention that the Supreme Court made via PIL on dust-related illnesses, coming in the context of a case on bonded labour. It also is an early example of an enduring trend in PIL – cases are frequently initiated ‘suo motu’, and often the remedies ordered are more akin to court-monitored public policy projects.

B. The Case

The first significant case dealing with silicosis came four years earlier in *Workmen of Slate-Pencil Industry v State of MP* (1980), also probably the first PIL engaging with health before the Indian Supreme Court.⁹ It concerned the working conditions of slate pencil manufacturers in the district of Mandsaur, in Madhya Pradesh. The case was prompted by local investigative reporting, sparking national front-page coverage of shocking conditions of work. Newspapers reported that entire villages were losing a generation of male workers to silicosis.¹⁰ The media focused on the scale of death, debt bondage and the horrors of child labour. They reported that 2,000 workers had died of silicosis in the last decade, and that the illness was so severe that doctors said nearly all child workers had developed the disease and would die of it soon.¹¹ According to Saiyed and others, “no [other] single occupation has been the focus of so much public and Government concern in India.”¹²

⁷ For a full critical appraisal of this history, see Bhuwania (n 6).

⁸ Chintan Chandrachud, ‘Structural Injunctions and Public Interest Litigation in India’ in Po Jen Yap (ed), *Constitutional Remedies in Asia* (Routledge Books 2019).

⁹ Writ Petition (Civil) 5143 of 1980 (Supreme Court of India).

¹⁰ S Dhara, ‘Shop-Floor Safety in India: Report of Public Interest Action’ (1990) 25(47) *Economic and Political Weekly* 195.

¹¹ Amiya Rao, ‘Silicosis Deaths of Slate Workers’ (1980) 15(44) *Economic and Political Weekly* 1883.

¹² HN Saiyed and others, ‘Silicosis in Slate Pencil Workers: I. An Environmental and Medical Study’ (1985) 8(2) *American Journal of Industrial Medicine* 127, 128.

This led lawyers and trade unionists to act publicly and move the Supreme Court with a writ petition. They applied for the judicial enforcement of fundamental rights under the powers of the Supreme Court. The writ said:

The workmen may have no right to be employed by the manufacturers but once they are employed, they have the right to work under just and humane conditions and cannot be forced by economic necessity to work under conditions hazardous to their lives in violation of their fundamental rights under Article 19(1) (g) of the Constitution.¹³

This construction of Article 19(1)(g) by the petitioner is worth considering. The constitutional proviso is framed merely as a ‘negative’ right, guaranteeing the freedom of every individual to practice any lawful profession or trade. In this era, several fundamental rights against coercion were expanded to encompass ‘positive rights’ to social and economic justice, marking the beginning of more creative interpretations of the Constitution to advance the cause of labour.¹⁴

The second argument articulated in the writ petition was that the government failed in its responsibility to enforce the Factories Act, which safeguarded the health and safety of workers and prohibited child labour. This vocabulary of claim-making is also worth considering in greater depth. Rao wrote, “So powerful are these manufacturers that the government has not once enforced the Factory Act though it is fairly well known that the employers have been violating every one of the minimum requirements regarding health, safety and general welfare of the workers.”¹⁵ While this argument could have been used to elaborate the ‘horizontal’ of fundamental rights – that is, holding fundamental rights as equally binding on private actors as in individual-state relations – the logic employed was ultimately to different ends. Fundamental rights were not called upon to regulate private employers, but rather to argue that “the state has abdicated these powers and has endangered the lives of the workers by allowing the manufacturers to continue their operations without any safety measures.”¹⁶ The responsible actor in this framing is the state, and the state that is called upon to provide relief. Here, we can see how the language of constitutionalism begins to be used to articulate labour rights as ineluctably ‘human’ rights that are the state’s responsibility to defend, rather than as solely

¹³ Rao (n 11) 1883.

¹⁴ Gautam Bhatia, ‘The Freedom to Work: PUDR vs. Union of India and the Meaning of “Forced Labour” under the Indian Constitution’ (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3094640>.

¹⁵ Rao (n 11) 1883.

¹⁶ Rao (n 11).

private rights flowing from the contract of employment to be enforced directly against employers by workers themselves.

While the case was being heard, the State government of Madhya Pradesh passed the M.P. Slate Pencil Karmkar Kalyan Nidhi Adhiniyam in 1982, constituting a ‘Welfare Board’ to provide relief to disabled workers.¹⁷ This was not atypical for the time. Beginning in the 1980s, informal workers in a range of sectors and States were waging struggles for a Welfare Board that would connect them to welfare and social security without having to prove a relation to a specific employer.¹⁸ This Welfare Board levied a tax on slate pencil manufacturers, creating a group insurance scheme and several other cash welfare benefits for workers.¹⁹ Four years later, in 1984, the Supreme Court directed dust prevention technology to be installed, the government to deal with the compensation cases that had been filed, and the Chief Inspector of Factories to submit a report on the safety precautions.²⁰ Subsequently, the Madhya Pradesh State government ordered slate pencil manufacturing to be included as a ‘dangerous operation’ within the scope of the Factories Act of the State. It also ordered that, women and children must be barred from stone cutting and carving work.²¹

C. The Aftermath

Two years on, Singh’s investigative report claimed that little progress on these measures had occurred, arguing that it was a “classic example of the fate of public interest litigation”.²² Factory owners slashed production immediately in response to the welfare tax, even as they continued to refuse to pay it, despite the commencement of prosecution. Cheap dust prevention technology had been installed that marginally increased a worker’s lifespan, but that did not prevent the development of silicosis.²³ There has been little reporting on the issue since, apart from public health journals that have repeatedly found poor working conditions and high rates of exposure affecting non-workers who

¹⁷ Welfare Boards are usually tripartite institutions, collecting contributions from employers in an industry, workers, and the State government. They allow for informal workers in specific sectors to access a range of specialised social security schemes.

¹⁸ Rina Agarwala, *Informal Labor, Formal Politics, and Dignified Discontent in India* (Cambridge University Press 2013).

¹⁹ The M.P. State Pencil Karmkar Kalyan Nidhi Rules, 1983 (published vide Notification No. 4755-16-13, dated 17-9-1984, M.P. Rajpatra, Part 4 (Ga), dated 8-3-1985) <<http://www.bareactslive.com/MP/MP736.HTM>>.

²⁰ NK Singh, ‘Silicosis Cases: Death Continues to Stalk Slate-Pencil Industry Workers in Madhya Pradesh’ (*India Today*, 30 September 1986) <<https://www.indiatoday.in/magazine/nation/story/19860930-silicosis-cases-death-continues-to-stalk-slate-pencil-industry-workers-in-madhya-pradesh-801263-1986-09-30>> accessed 21 March 2020.

²¹ *ibid.*

²² *ibid.*

²³ *ibid.*

live around processing zones as well as labourers themselves.²⁴ There is some evidence that the Welfare Board continues to be operational, and patients and their dependents remain eligible for benefits upon producing proof of employment and a certified diagnosis.²⁵ On the other hand, there are reports of widespread deaths in the area and little alternative employment. Public interest in the fate of slate pencil workers has died down in the last 40 years.²⁶

The use of PIL to advance labour rights already seemed to be limited in its real-world effects. Progressive court judgements did not seem to translate to either material change or creation of a justiciable right. This case also demonstrates how the problem of silicosis came to be framed in the courtroom through discourses that the Supreme Court was attuned to – forced labour and child labour were two key areas of interest to the Court in its early PIL jurisprudence.²⁷ This case also prefigured a pattern that would become prominent in later cases – the disappearance of private employers from direct accountability under labour law for workplace health and safety.

II. ‘A THICK LAYER OF DUST’: SILICOSIS AS ENVIRONMENTAL HAZARD

A. Background

Though the workers in Mandsaur receded from the public eye, the issue of dust-related illnesses did not disappear from the courts – it merely went through another configuration. The question of worker health was framed by the discourse of environmentalism this time. In *State of Uttaranchal v Balwant Singh Chauhal*, the Supreme Court provided its own account of the evolving history of PIL, which it saw as having three phases.²⁸ In Phase I, the Court was primarily concerned with protecting the fundamental rights of the poor

²⁴ LJ Bhagia, ‘Non-Occupational Exposure to Silica Dust in Vicinity of Slate Pencil Industry, India’ (2008) 151(1) *Environmental Monitoring and Assessment* 477; MH Fulekar and MM Alam Khan, ‘Occupational Exposure to Dust in Slate Pencil Manufacture’ (1995) 39(1) *The Annals of Occupational Hygiene* 107.

²⁵ Counterview, ‘Gujarat Govt “Solution” for Workers Suffering from Deadly Silicosis: Go in for Alternative Job Sources’ (*Counterview*, 25 June 2014) <<https://www.counterview.net/2014/06/gujarat-govt-solution-for-workers.html>> accessed 1 April 2020.

²⁶ One newspaper article in 2009 alleged that slate pencils are no longer in use anywhere, and the real purpose of the industry is to act as a cover for opium production and distribution. See Padma Shastri, ‘A Breathtaking Waste’ (*Hindustan Times*, 1 June 2009) <<https://www.hindustantimes.com/india/a-breathtaking-waste/story-MNnZwOzE6uFNaiObIRNHRN.html>> accessed 17 September 2020.

²⁷ Modhurima Dasgupta, ‘Public Interest Litigation for Labour: How the Indian Supreme Court Protects the Rights of India’s Most Disadvantaged Workers’ (2008) 16(2) *Contemporary South Asia* 159.

²⁸ (2010) 3 SCC 402 (Supreme Court of India).

and marginalized who were unable to approach the Court; in Phase II, it dealt with cases related to protection and conservation of the environment and cultural heritage; and in Phase III, it focused on what it calls ‘governance’ issues, from corruption to public transparency.²⁹ The classic cases of ‘Phase II’ of PIL, that focused on environmental issues, were largely filed by one lawyer, MC Mehta, from 1984–85. The Supreme Court continues to hear some of these cases in what is called ‘continuing mandamus,’ and new orders are still issued.³⁰ Bhatia remarks of one such drawn-out environmental case, “[e]very once in a while, the Supreme Court Registry unfreezes [PIL] from its cryostat, dusts it down and posts it for hearing.”³¹

B. The Two Cases

The issue of occupational health figured prominently in two petitions of this period. The first I consider here is the *Writ Petition (Civil) 4677 of 1985*.³² The case began with a plea for the Court to intervene in the problem of pollution in Delhi, initially focusing on stone-crushing units in the southern part of the city, Lal Kuan, which emitted heavy dust pollution. MC Mehta claimed “more than 2,000 tons of dust was being emitted” from the units; a worker later recalled, “when mining and crushing activities were still going on, everything in Lal Kuan was covered by a thick layer of dust. Sometimes it was even hard to breathe.”³³ The Supreme Court responded to the complaint that the stone quarries were causing dust pollution by mandating the closure of 300 stone-crushing units in the Lal Kuan area.³⁴ This caused a complete eviction of quarry workers from this area. In *MC Mehta v Union of India*, this was followed by the Supreme Court order that all hazardous industries ought to be relocated and moved out of urban city limits.³⁵ In this understanding, stone quarry workers were not workers at risk, but a ‘risk community’ whose health was in danger from industrial pollution spread by the quarries. In practice, the industries merely moved to another State.

²⁹ Bhatia argues that there is now a fourth phase of PIL – where the Supreme Court increasingly attempts to curtail individual freedoms and/or achieve political goals through the use of PIL. See Gautam Bhatia, ‘The Lawyers’ Collective Order and the Rise of the Fourth-Phase PIL’ (*Indian Constitutional Law and Philosophy*, 6 May 2019) <<https://indconlawphil.wordpress.com/2019/05/08/the-lawyers-collective-order-and-the-rise-of-fourth-phase-pil/>>.

³⁰ Menon (n 4).

³¹ Gautam Bhatia, ‘Natural Justice at the Bar of the Supreme Court’ (*Indian Constitutional Law and Philosophy*, 5 November 2019) <<https://indconlawphil.wordpress.com/2019/11/05/natural-justice-at-the-bar-of-the-supreme-court/>>.

³² *MC Mehta vs Union of India* (Writ Petition (Civil) 4677 of 1985) (Supreme Court of India).

³³ SA Azad, ‘PRASAR’s Fight for Rights of Delhi’s Silicosis Sufferers: Grassroot Organization Improves Lives of Former Stone-Crushers’ (2007) Case Study No 9 Artisanal and Small-Scale Mining in Asia-Pacific 7; Baviskar, Sinha and Philip (n 4) 197.

³⁴ Pratik Kanjilal, ‘Closure of Stone Crushers Leaves Labour High and Dry’ (*Down to Earth*, 30 June 1992) <<https://www.downtoearth.org.in/news/closure-of-stone-crushers-leaves-labour-high-and-dry-29868>> accessed 10 May 2020.

³⁵ (1996) 4 SCC 351 (Supreme Court of India).

The shift in judicial discourse that Talib tracks here is one from a relationship where ‘workers’ are owed specific responsibilities, as a result of bondage or hazardous working conditions, to one where workers are construed as ‘citizens’ living amidst hazardous pollutants.³⁶ Ramanathan argues that some of this is attributable to the Bhopal Gas Tragedy of 1984, after which the legal concept of industrial risk expanded to include communities living in proximity to industry and at risk of exposure to industrial toxins.³⁷ It was partly in line with this thinking on risk that the Court ordered hazardous factories to relocate, and partly due to the desire to decongest and beautify the capital city for its middle-class denizens. As a result, industrial relocation meant urban exile – the workers who inevitably had to travel alongside industry were outside the scope of the Court’s imagination.

As the Delhi Janwadi Adhikar Manch documented the impact of the orders on working-class people, a federation of trade unions and human rights groups banded together to attempt representing their concerns to the Court.³⁸ Baviskar and others report that when trade unions attempted to be heard in Court:

the judges brushed them aside, merely remarking that the court would protect workers’ interests and did not need the intercession of the unions. This verbal assurance was not recorded as a part of court proceedings, and thus trade unions were later unable to appeal the judgment, since they had not been recognized as affected parties.³⁹

Unions and workers’ organizations attempted to problematize the discourse that framed these industries as illegal and polluting, highlighting that it would affect the livelihoods of thousands, when air pollution control could just as easily target vehicular pollution and the consumerist practices of the wealthy

³⁶ Mohammad Talib, *Writing Labour: Stone Quarry Workers in Delhi* (Oxford University Press 2010).

³⁷ Usha Ramanathan, ‘Communities at Risk: Industrial Risk in Indian Law’ (2004) 39(41) *Economic and Political Weekly* 4521. This was a lethal gas leak that occurred in a Union Carbide pesticide plant, and one of the world’s worst industrial disasters. It had a significant impact on the development of health and safety law in India, and has been extensively studied by socio-legal scholars. See Sheila Jasanoff (ed), *Learning from Disaster: Risk Management after Bhopal* (University of Pennsylvania Press 1994); Marc Galanter, ‘When Legal Worlds Collide: Reflections on Bhopal, the Good Lawyer, and the American Law School’ (1986) 36 *Journal of Legal Education* 292; Veena Das, ‘Suffering, Legitimacy and Healing: The Bhopal Case’, *Critical Events: An Anthropological Perspective on Contemporary India* (Oxford University Press 1995).

³⁸ Aditya Nigam, ‘Whose Delhi is it Anyway? The Struggle against a Black Judgement’ (1997) 3 *Revolutionary Democracy* <<https://www.revolutionarydemocracy.org/rdv3n1/delhi.htm>> accessed 8 July 2020.

³⁹ Baviskar, Sinha and Philip (n 4) 199.

instead.⁴⁰ This framing pitted workers' jobs against the environment. The Manch later conceded that pollution certainly was an important issue, but its primary victims were workers themselves.⁴¹ Nigam wrote:

[...] as the Delhi Janwadi Adhikar Manch has been arguing, the way the government and the courts are proceeding, it is clear that the intention *is not to fight pollution*. The intention is merely to 'get it out of my way'; it is a classic 'not in my backyard' attitude. Simply relocating industries means relocating pollution from the backyard of Delhi's elite to wherever human life can be found to be cheaper. Did it occur to the honourable court ever, to ask if whether the pollution that is choking the city is also affecting the workers employed in the concerned units? If the answer be yes, then how, may one ask of the enlightened judges, will they ever be free of the effects of pollution?⁴²

These pleas had little effect on a Court that had made up its mind – urban pollution was the 'public interest' that had to prevail over the lives of the informally employed working-class.⁴³ Subsequently, in a 1999 order, the Supreme Court mandated the further relocation of 77,000 'non-conforming' and 'polluting' industries in Delhi. The literature extensively remarks on the mass closure of industries in this era as a moment in the neoliberal turn of the Indian Supreme Court, where PIL became a tool mobilized to articulate the 'public interest' as a fundamentally bourgeois conception of 'development'.⁴⁴ Baviskar describes the environmental PILs of this era as initiatives that constituted a 'public' that excludes the city's poorer sections.⁴⁵ That was certainly the effect of this order. Relocation is not a solution for workers, who are either rendered unemployed or relocate and continue working in hazardous conditions.

However, in 1996, the very same year as the first closures and relocations of factories in Delhi, the Court issued a contrasting order in a different MC

⁴⁰ Delhi Janwadi Adhikar Manch, 'The Order That Felled a City' (1997) 32(26) Economic and Political Weekly 1524; Sanjeev K Routray, 'Two Kinds of Activism: Reflections on Citizenship in Globalizing Delhi' (eSocialSciences, 2013) <<https://EconPapers.repec.org/RePEc:ess:wpaper:id:463>>.

⁴¹ Menon (n 4); Gautam Navlakha, 'Urban Pollution: Driving Workers to Desperation' (2000) 35(51) Economic and Political Weekly 4469.

⁴² Aditya Nigam, 'Industrial Closures in Delhi' (2001) 7 Revolutionary Democracy <<https://www.revolutionarydemocracy.org/rdv7n2/industclos.htm>> accessed 2 March 2020.

⁴³ Baviskar, Sinha and Philip (n 4).

⁴⁴ Mayur Suresh and Siddharth Narrain (eds), *The Shifting Scales of Justice: The Supreme Court in Neo-liberal India* (Orient Blackswan 2014), which deals with this at length.

⁴⁵ Amita Baviskar, 'Cows, Cars and Cycle-Rickshaws: Bourgeois Environmentalism and the Battle for Delhi's Streets' in Amita Baviskar and Raka Ray (eds), *Elite and Everyman: The Cultural Politics of the Indian Middle Classes* (Routledge Books 2011) 392.

Mehta petition. This PIL, *Writ Petition Civil 3727 of 1985*, was initially filed on the issue of water pollution in the Ganges, but the malleable and ever-shifting nature of PIL cases allowed trade unions to effectively intervene in this petition when they had been unable to in the other one.⁴⁶ A grassroots science centre had found cases of silicosis among workers in a quartz powder factory. Based on this, trade unions in West Bengal, alongside the labour support group Nagarik Manch, wrote an appeal to the Supreme Court. They argued that:

[e]nvironmental pollution outside the unit and occupational diseases inside the unit are perhaps two sides of the same coin. Whereas, the Supreme Court has already most justly and effectively passed a series of momentous verdicts regarding the “external” environmental pollution, we are keenly awaiting its verdicts and directives regarding the “internal” occupational hazards and diseases...⁴⁷

This strategy – to use a moment of judicial activism on pollution to establish employer responsibility to workers – appeared to pay off. The Court employed its ‘epistolary jurisdiction’, where it took notice of letters written to it, to widen the scope of the environmental pollution case.⁴⁸ The use of this tactic by unions was deliberate, as a direct contestation of the Court’s use of closure orders that disproportionately affected workers. In some ways, this case represents a reversal of the general trend that Sellers traces, where modern environmentalism has grown out of the study of workplace hazard.⁴⁹ In India, in the 1990s, occupational health inserted itself and grew out of concern for the effects of pollution on health.

A year after receiving the letter, the Supreme Court ordered the West Bengal Pollution Control Board to contact Nagarik Manch and locate workers suffering from occupational illnesses in West Bengal.⁵⁰ The Pollution Board confirmed that “a number of workers have died due to environmental pollution [...] and some labourers are still suffering from occupational diseases.”⁵¹ It is here that we start to see a clear intermingling of two related issues in the state’s discourse – of dust pollution affecting residents and occupational disease affecting workers – where both are alternately seen as the cause of death

⁴⁶ *MC Mehta v Union of India* (1987) 4 SCC 463 (Supreme Court of India).

⁴⁷ Niranjan Dutta, ‘The Inside Story: A Calcutta NGO Adds a New Dimension to the Ganga Pollution Case’ (1995) 22 Sunday 88.

⁴⁸ Hans Dembowski, *Taking the State to Court: Public Interest Litigation and the Public Sphere in Metropolitan India* (Oxford University Press 2001).

⁴⁹ Christopher Sellers, *Hazards of the Job: From Industrial Disease to Environmental Health Science* (University of North Carolina Press 1997).

⁵⁰ Mukul, ‘Polluting Industries, Environment and Workers’ Health: A Case for Intervention’ (1997) 32(35) Economic and Political Weekly L37, L–38.

⁵¹ *ibid.*

from inhaling hazardous dust. The report also stated that workers feared losing their jobs if they complained about physical disability: “till date, there is not a single instance of compensation received by any worker through the normal course.”⁵²

In 1996, the Supreme Court ordered the West Bengal government to provide “all possible help” to the workmen in the quartz powder factory and also ordered the industry to respond in court.⁵³ The factory owners denied that the workers had silicosis, introducing evidence from a doctor of their own that stated that two victims were in good respiratory health.⁵⁴ However, the Labour Commissioner discovered that 16 deceased workers were found to have worked at the quartz factory, and several workers currently employed in the factory were also found to have silicosis.⁵⁵ The Supreme Court ordered the Labour Commissioner to assess compensation due.⁵⁶ Here, the Workers’ Compensation Act became a bone of contention, as it provided no method of calculating compensation for occupational diseases. Mukul writes that Nagarik Manch attempted to devise a calculus of compensation, with reference to the average age of the worker, their dependents, yearly income, and inflation. They arrived at ₹3,00,000 per worker. The Government of West Bengal contested this, arguing that compensation should be capped at ₹50,000 rupees instead. The Supreme Court eventually ordered that factory owners ought to pay ₹1,00,000 to each worker, with an interest rate of 12% per annum if the amount was left unpaid.⁵⁷

C. The Aftermath

Despite the low sum, this was a landmark judgment for labour rights in India – it was the first time that the Court had extended the ‘polluter pays’ principle to include workers suffering from occupational diseases, and the first time that compensation had been paid to workers in the informal sector, who were not on company payroll.⁵⁸ But, for years after the order, there was no indication that the owners *would* pay. A Labour Commissioner stated in an interview: “It is necessary to consider whether it is possible to implement such judgments. The employer’s capacity to pay should be taken care of. In the

⁵² Dutta (n 47).

⁵³ Aditi Roy Ghatak, ‘Chinchurgheria Silicosis Victims Win Compensation Case’ <[http://nagarikmancha.org/images/1210-Reports Chinchurgheria%20Silicosis%20Victims%20Win%20Compensation%20Case.pdf](http://nagarikmancha.org/images/1210-Reports%20Chinchurgheria%20Silicosis%20Victims%20Win%20Compensation%20Case.pdf)> accessed 24 July 2020.

⁵⁴ *ibid.*

⁵⁵ Mukul (n 50); Ghatak (n 53).

⁵⁶ Mukul (n 50) L–39.

⁵⁷ Mukul (n 50).

⁵⁸ On the ‘polluter pays’ principle, see Lovleen Bhullar, ‘The Polluter Pays Principle: Scope and Limits of Court Decisions’ in Shibani Ghosh (ed), *Indian Environmental Law: Key Concepts and Principles* (Orient Blackswan 2019).

informal sector, it is difficult to pay 1,00,000 rupees in one go.”⁵⁹ The Labour Secretary bluntly said: “it is better to work for twenty years and die afterwards from occupational diseases, than to die of hunger due to the closure of a factory in the name of pollution and hazards.”⁶⁰

Clearly, paying the compensation sum was not worth the profit margin the production process earned the factory owners.⁶¹ As soon as compensation was ordered, they were keen to sell the enterprise and handed all assets to the Labour Commissioner. The owner’s legal counsel claimed that there was simply no money to pay compensation with. Nagarik Manch was forced to conduct investigations on its own to ascertain what their personal assets might be.⁶² The petitioners presented in court that one identified owner had several personal and industrial properties that ought to be attached and sold to pay compensation. As a result of this pressure and consolidated activity, the first instalment of compensation was paid in 2001 – 10 years after the first death of a worker from silicosis in the quartz factory.⁶³

The contradictory outcomes on occupational health in the two different MC Mehta petitions in the same year allow us to make some important observations about the role of PIL in driving social change. PIL was at a time a device that could be mobilized by different actors in the Supreme Court, but this appeared to often be at the discretion of the individual judge, and it was unable to successfully secure its stated ends without a great deal of civil society engagement. In that sense, it was perhaps a ‘dangerous operation’ of its own – a gamble that might or might not pay off. It was as likely to run counter to workers’ rights as to recognize them.

Arguably, these transforming ideas of what the ‘public interest’ is track alongside broader changes in India’s political economy. Many scholars point out that in the era following 1998, the Supreme Court repeatedly upheld economic liberalization, privatization, and the displacement of the poor in the name of ‘development’ while ignoring economic redistribution.⁶⁴ But this history can sometimes be harder to delineate in individual cases, even if the broader trajectory is true. As this article demonstrates, the Supreme Court in

⁵⁹ Mukul (n 50) 41.

⁶⁰ Ghatak (n 53) 8.

⁶¹ Ghatak (n 53).

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ Amita Baviskar, ‘Public Interest and Private Compromises: The Politics of Environmental Negotiation in Delhi, India’ in Julia Eckert and others (eds), *Law against the State: Ethnographic Forays into Law’s Transformations* (Cambridge University Press 2012); Upendra Baxi, ‘Access to Justice in a Globalized Economy’ (2006) 6 *Combat Law* 57; Gautam Bhan, *In the Public’s Interest: Evictions, Citizenship and Inequality in Contemporary Delhi* (Orient Blackswan 2016); Prashant Bhushan, ‘Supreme Court and PIL: Changing Perspectives under Liberalisation’ (2004) 39(18) *Economic and Political Weekly* 1770.

that period seems to have found itself responding to a range of pressures in its policy-making activity – from the desire to bolster its progressive credentials to delivering on ‘development’.

In the second *MC Mehta* petition, which awarded some compensation to the quartz factory workers, it is equally possible to discern some of the structural limitations in utilizing judicial activism to enforce labour rights. The Court did attempt to hold employers liable, but the structure of the industry rendered this extremely difficult in practice – employers were more willing to wind up operations than pay compensation. I suggest that ‘informality’ is key to understanding this. Small workshops operate outside the scope of the Factories Act and are often at one end of a long value chain. The fragmented nature of informal production, small profit margins of owners, and the vulnerability of workers in sub-contracted work renders the application of labour laws originally designed to regulate large industrial establishments very difficult.⁶⁵ This order demonstrates the ‘contingency’ of the human rights approach that was to follow in the 2000s. Employer liability was the path not taken, but not necessarily for want of trying.⁶⁶

III. ‘THE MISSING EMPLOYER’: SILICOSIS AS A HUMAN RIGHTS VIOLATION

A. Background

In 2003, the stone quarry workers of Lal Kuan featured prominently for the second time in an expansive PIL before the Supreme Court that is ongoing to this day. This time, however, they figured as victims of a human rights violation and not as victims of pollution; and this time, the Supreme Court would find that the state was responsible for compensating them, and not their employers.

Aid workers in Lal Kuan in the 1990s discovered a high rate of tuberculosis among the quarrying community and, through conversations with medical

⁶⁵ Aditya Sarkar, *Trouble at the Mill: Factory Law and the Emergence of the Labour Question in Late Nineteenth-Century Bombay* (Oxford University Press 2018); Prabhu P. Mohapatra, ‘Regulated Informality: Legal Constructions of Labour Relations in Colonial India 1814-1926’ in Jan Lucassen and Sabyasachi Bhattacharya (eds), *Workers in the Informal Sector: Studies in Labour History 1800-2000* (Macmillan India Limited 2005).

⁶⁶ I borrow the term ‘contingency’ here from John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Harvard University Press 2004). By this, I mean that there were several options experimented with before state compensation was arrived at.

experts, began to suspect that the epidemic was instead one of silicosis.⁶⁷ They formed an organization, the People's Rights and Social Research Centre ('PRASAR'), to work for the stone quarriers of Lal Kuan. Many had symptoms of silicosis from past work in the mechanical stone crushing units that had now closed as a result of the Supreme Court order shuttering the industry. Several workers had relocated to a neighbouring State to continue crushing stone; others continued manual stone crushing.⁶⁸ Most were migrant workers, living and labouring in anonymity:

They are being used as another raw material in all this process of the product making for Country's growth, development and prosperity. It is worth mentioning here that these crushers had been shifted here after the Supreme Court's judgment with the intention to save the environment of Country's Capital. Nowhere does the judgment mention the safety and health of the workers. Which environment we are supposed to be saving at the cost of these people?⁶⁹

B. The Case

While recognizing that it was the Supreme Court's order in a PIL that relocated industries and caused the spread of disease, PRASAR decided to use PIL in order to claim compensation for workers. They attempted to lodge petitions with the government on these issues, but when this made little headway, they "followed the example of the activists in the mid-1980s and brought their case to the Indian Supreme Court" in 2006.⁷⁰ Initiating *People's Rights and Social Research Centre (PRASAR) v Union of India*,⁷¹ alongside other NGOs and legal aid groups, their first demand was that the National Human Rights Commission ('NHRC') should ensure that the Ministry of Labour compensates those affected by silicosis. This marked a discernible shift from 1996 in the locus of claim-making – from demanding compensation from employers to demanding compensation from the state. This was not a surprising strategy, seeing that many enterprises responsible were the same ones closed by the Supreme Court in 1992 – it was now impossible to demand compensation from them. Other relocated quarries operated on short-term licences, with workers

⁶⁷ SA Azad, 'Silicosis amongst the Quarry Workers of Lal Kuan' (2006) 12 *Revolutionary Democracy* <<https://revolutionarydemocracy.org/rdv12n1/silicosis.htm>> accessed 21 June 2020. Silica-exposed workers are at high risk of contracting tuberculosis, and the symptoms frequently present as those of tuberculosis or other lung diseases.

⁶⁸ Gopal Krishna, 'Succumbing to Stone-Cutting' (*India Together*, 2004) <<http://www.indiatogether.org/articles/stonecuts-health/print>> accessed 1 March 2020.

⁶⁹ SA Azad and Ashish Mittal, 'The Stone Quarrying Industry around Delhi — Impact on Workers and the Environment' (2006) *People's Rights and Social Resource Centre* 14.

⁷⁰ Azad (n 33).

⁷¹ Writ Petition (Civil) 110 of 2006 (Supreme Court of India).

brought in on contract and excluded from official payrolls, complicating the question of establishing workmen's compensation further.⁷²

After NGOs continued to lobby the NHRC on the question of silicosis, it became a co-petitioner in the case. The Supreme Court directed the NHRC to facilitate compensation "through the concerned authorities" to families of deceased workers.⁷³ The Court also made the Central Pollution Board a party in the case. This demonstrates that despite the decisive turn to human rights in this case, the question of dust in the workplace continued to be construed as a pollution issue. In a review of these cases, the NHRC stated that its position was:

Once the worker or other person is afflicted by silicosis, it becomes a constitutional obligation on the part of the Government to take appropriate measures for providing the necessary health care and rehabilitating the victims. The welfare of workers, especially those in the unorganized sector, should be given priority.⁷⁴

The NHRC here clearly articulates an understanding that posits the welfare of labour as a human rights issue. This is a marked contrast to the language of 'bonded labour' or of 'pollution'. Here, the language of rights is used to demand direct relief from the state. This is a profound shift from the logic of demanding compensation from private employers. In doing so, it also puts forth an expansive vision of state responsibility for silicosis on human rights grounds.

A significant complaint the Court received in this case was on the documented deaths of 238 migrant workers from Madhya Pradesh, who died of silicosis that they contracted from labouring in quartz factories in Gujarat.⁷⁵ This raised complex issues of which State authority was responsible for providing compensation. As far as compensation was concerned, the NHRC's approach was to demand monetary relief (in the form of *ex gratia* payment) from the State of migration and social security from the State of origin. The NHRC argued that the State of Gujarat had failed to discharge their constitutional obligations to workers, as individuals with the 'right to life' and health. It also

⁷² PRASAR, 'The Silicosis Struggle Marches On' (2015) 21 *Revolutionary Democracy* <<https://www.revolutionarydemocracy.org/rdv21n2/silicosis.htm>> accessed 2 February 2020.

⁷³ National Human Rights Commission, *NHRC Interventions on Silicosis* (2016) <https://nhrc.nic.in/sites/default/files/NHRC_Interventions_on_Silicosis_27122016.pdf> accessed 1 June 2020.

⁷⁴ *ibid* 10.

⁷⁵ Neha Dixit, 'Digging Their Own Grave, One Breath at a Time' (*The Wire*, 8 October 2015) <<https://thewire.in/labour/digging-ones-own-grave-one-breath-at-a-time>> accessed 4 March 2020.

said, echoing the Supreme Court's own position on PIL: "The strict principles of evidence as are applicable to criminal trials are not applicable in the case of human rights violations when the life of poor labourer [sic] is at stake and his health is in jeopardy."⁷⁶

There was no response from the States for four years, and no payment was made. The Gujarat government claimed that the Employees' State Insurance Corporation ('ESIC') ought to bear responsibility instead, as the workers 'should' have been insured. Nidhi and Gupta wrote that this was "a classic example of state governments being insensitive to realities."⁷⁷ In 2016, the Supreme Court appeared to lose patience. It ordered that the dispute as to determining responsibility ought not to delay things further. In the interests of the kin of those who had died and their 'orphan children', the Gujarat government would have to pay compensation immediately. If ESIC were later held responsible, they could reimburse the State government.⁷⁸ At this stage, after repeated non-appearances by the Chief of the Central Pollution Control Board, the court issued a warrant to secure his presence.⁷⁹

This demonstrates how the problem of silicosis and workplace hazard was configured in judicial discourse. State governments were required to provide immediate relief in the form of 'compensation', while pollution control authorities were tasked with inspecting workplaces, implementing pollution control regulations, and shuttering 'non-compliant' industries. In this way, employers were only conceived of as responsible in their capacity as 'polluting agents', but the state was responsible for the sustaining the lives of communities affected by workplace disease. This understanding marks a noteworthy change from earlier Supreme Court decisions on occupational health. For example, in *Consumer Education & Research Centre v Union of India*,⁸⁰ a PIL case filed on health hazards faced by workers exposed to asbestos, the Court ordered that liquidated damages must be paid to workers by the factories that had employed them, even if the claimant had ceased to work there. *PRASAR*, in this respect, saw a new reasoning come to the fore.

At the next hearing, the government of Madhya Pradesh claimed that it had acted to provide benefits to 334 victims of silicosis in two of its districts, but

⁷⁶ Supreme Court order dated 4 May, 2016 in *PRASAR* (n 71).

⁷⁷ Amulya Nidhi and Ashish Gupta, 'Silicosis Victims and the Importance of the Supreme Court Judgment' (*The Wire*, 17 May 2016) <<https://thewire.in/rights/silicosis-victims-and-the-importance-of-the-supreme-court-judgment>> accessed 1 March 2020.

⁷⁸ Ashish Gupta, Amulya Nidhi and Shamarukh Dhara, 'Why it was Important to Win the Silicosis Case in Supreme Court' (2017) 52 (2) *Economic and Political Weekly*.

⁷⁹ Chandran (n 2).

⁸⁰ (1995) 3 SCC 42 (Supreme Court of India). The Court here does make a mention of awarding compensation as a remedy on the grounds of a 'deprivation of personal liberty', but this reasoning is not reflected in its final order.

the NHRC and NGOs on the ground argued that these were forgeries, and in fact no steps had been taken. Two workers' collectives, the Khedut Mazdoor Chetna Sangathan and the Silicosis Peedit Sangh, submitted counter-affidavits from affected workers who claimed that they had received no government support. The Supreme Court then ordered the District Legal Services Authority to ensure that benefits were made available. The Court also ordered the State to submit reports on their actions at the next set of hearings, saying: "we make it clear that we are not concerned with any policy framework of the State. The report is on the benefits which have actually been made available to the victims."⁸¹ In this way, the Court found itself playing two roles at the same time – ordering the pollution regulators to control for dust prevention, and tasking State authorities to take 'immediate' action to compensate those suffering. It explicitly took the position of safeguarding the interests of identified victims who had failed to receive state compensation, rather than taking an interest in prevention or how the state would compensate and provide for future victims.

Importantly, the compensation paid to workers was *ex gratia* – a payment made out of a moral rather than a legal obligation. *Ex gratia* payments have a long and chequered history in postcolonial India. In the aftermath of the Bhopal Gas Tragedy, the Indian government negotiated a paltry settlement with Union Carbide, and provided *ex gratia* payments to those affected by the disaster. It continues to pay these to the thousands of people and their dependents who have now developed cancer, renal failure, and other health issues.⁸² *Ex gratia* payments are also frequently disbursed to people displaced after a disaster, such as a flood or a cyclone, and sometimes to the dependents of farmers who died by suicide due to debt or drought.⁸³ *Ex gratia* payments have no legal force, nor can they be called on as precedent. As Partha Chatterjee argues, the state cannot render such claims justiciable as it does not have the means to deliver them to everyone, but at the same time, the state recognises that people can and do make claims of it for welfare which it must accommodate.⁸⁴ As Veena Das argues, this can be understood as an attempt by the Court to "maintain and signal legitimacy in the face of massive human suffering."⁸⁵

⁸¹ *ibid.*

⁸² --, 'Centre Runs out of Compensation Funds for Bhopal Gas Victims' (*The Wire*, 9 October 2019) <<https://thewire.in/rights/bhopal-gas-tragedy-victims-compensation>> accessed 9 April 2021.

⁸³ --, 'Uttarakhand Flood: PM Modi Announces Rs 2 Lakh Ex-Gratia for Kin of Deceased' (*Business Today*, 8 February 2021) <<https://www.businesstoday.in/current/economy-politics/uttarakhand-flood-pm-modi-announces-rs-2-lakh-ex-gratia-for-kin-of-deceased/story/430560.html>> accessed 4 May 2021; TNM Staff, 'Andhra Govt to Pay Ex-Gratia of Rs 7 Lakh to Farmers Who Killed Themselves: Jagan' (*The News Minute*, 11 July 2019) <<https://www.thenewsminute.com/article/andhra-govt-pay-ex-gratia-rs-7-lakh-farmers-who-killed-themselves-jagan-105228>> accessed 4 May 2021.

⁸⁴ Partha Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (Columbia University Press 2004).

⁸⁵ Das (n 37).

This is the terrain upon which the state, civil society actors, and those seeking relief negotiate with one another.

The NHRC stated in a submission to the Parliament:

The most disturbing feature of this problem is that in all cases, it is the poor labourer working in the unorganized sector who is the victim. The authorities have been evading the issue to provide assistance to the affected persons [sic]. This is a highly erroneous view as it contradicts the very spirit of human rights [...] ⁸⁶

Following this order in *PRASAR*, State Human Rights Commissions were able to persuade their governments to set aside money for *ex gratia* compensation for those suffering from silicosis. ⁸⁷

Yet, the most recent order passed in this case, in March 2019, marked a puzzling return to the language of environmentalism. This order framed dust in a similar vein to the pollution petitions: the petitioners and the Central Pollution Control Board seemed to agree that action had to be taken to close ‘polluting units.’ The Court ordered all functioning and non-functioning polluting units to be closed, as they had “led to serious health problems among the inhabitants of these areas,” and that the respondent State governments “who allowed such units to operate should be made to pay adequate compensation to the victims.” ⁸⁸

C. Aftermath

Here, we find ourselves at the end of a rather strange journey – a petition that began as a result of Supreme Court-ordered industrial closures ended in the ordering of more industrial closures across the country. The *PRASAR* case has brought together the Supreme Court’s strategies for dealing with occupational illness – ordering industrial closures to prevent pollution and ordering compensation and welfare benefits to be paid to individual identified victims. These cases are marked by circuitous forms of reasoning, welding together two of the most significant discourses of the twentieth century – environmentalism and human rights. They are part of a broader movement, where informal workers in India have increasingly made the state the target of their demands

⁸⁶ Rajasthan State Human Rights Commission, ‘Special Report on Silicosis’ (*Rajasthan State Human Rights Commission* 2014) 18 <https://rshrc.rajasthan.gov.in/includes/Special_Report_Silicosis.pdf> accessed 7 March 2020.

⁸⁷ *ibid.*

⁸⁸ Supreme Court order dated 5 March 2009, in *PRASAR* (n 71).

and used human rights vocabulary to make these claims. Informal workers have used their relation to the state, as citizens and voters, to mobilize for sectoral welfare benefits, social security benefits, and recognition. These have often taken the form of demanding the formation of Welfare Boards (for construction and *beedi* workers nationally, as well as *hamal/mathadi* workers in Maharashtra).⁸⁹

A vast range of PILs have been filed on labour issues in India.⁹⁰ The Indian Supreme Court has also regularly used its power to expand the scope of the case to far beyond the initial issue before it. As we saw, a case can start with the condition of those suffering from silicosis in Delhi and quickly morph to considering silicosis everywhere. But these cases, sometimes progressive in their outcomes, were concomitant with a broader dismantling of formal labour law protections.⁹¹ Singh, after a review of anti-labour judgments made by the Supreme Court from 1990-2008, concluded despairingly, saying “The judiciary has abandoned the working class.”⁹² The Supreme Court issued a series of decisions hollowing out labour law protections, at first without parliamentary changes to the law. It held there was no obligation on employers to hire contract workers on a permanent basis in *SAIL v National Union Waterfront Workers*. It went on to argue that treating casual workers as workers with the right to permanent employment was to treat “unequals as equals” in *State of Karnataka v Umadevi (3)*⁹³ It then held that there is no fundamental right to strike.⁹⁴ The judicial interpretation of labour law in this period was broadly in favour of employers, with the effect of allowing them to access “a set of workers who can be terminated at will.”⁹⁵ Some commentators link this jurisprudence of the Supreme Court to the liberalization policies of 1991, arguing that they paved the way for the acceleration of globalization by weakening

⁸⁹ Agarwala (n 18); Supriya Routh, ‘Do Human Rights Work for Informal Workers?’ in Diamond Ashiagbor (ed), *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (Hart Publishing 2019); Kalpana Karunakaran, ‘Defending Informal Workers’ Welfare Rights: Trade Union Struggles in Tamil Nadu’ (2019) 10 *Global Labour Journal* 209.

⁹⁰ Ramapriya Gopalakrishnan, ‘Enforcing Labour Rights through Human Rights Norms: The Approach of the Supreme Court of India’ in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010). Similar cases have been filed in High Courts as well. See Sujata Patel, ‘Contract Labour and Public Interest Litigation’ (1983) 18 *Economic and Political Weekly* 2151.

⁹¹ Supriya Routh, ‘The Judiciary and (Labour) Law in the Development Discourse in India’ (2011) 44 *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 237.

⁹² Singh (n 20) 33.

⁹³ (2001) 7 SCC 1 (Supreme Court of India); (2006) 4 SCC 1 (Supreme Court of India).

⁹⁴ *TK Rangarajan v Govt of TN*, (2003) 6 SCC 581 (Supreme Court of India).

⁹⁵ Deb Kusum Das, Homagni Choudhury and Jaivir Singh, ‘Contract Labour (Regulation and Abolition) Act 1970 and Labour Market Flexibility: An Exploratory Assessment of Contract Labour Use in India’s Formal Manufacturing’ (2015) Working Paper 300 Indian Council for Research on International Economic Relations 15 <http://icrier.org/pdf/Working_Paper_300.pdf>.

protective labour legislation.⁹⁶ Baxi would even call the Supreme Court's jurisprudence in this time as a form of 'structural adjustment'.⁹⁷

Arguably, PIL to defend labour rights has been utilised as a 'counter movement' in the Polanyian sense – to blunt the effect of the dismantling of protective labour law and to secure judiciary's legitimacy.⁹⁸ The use of PIL by informal workers began in what Agarwala calls the 'second wave of legal empowerment' in India, which focused on human rights violations that workers face, and was continued in the 'third wave', where workers have appealed for welfare from the state, rather than the implementation of labour laws.⁹⁹ This general trend towards demanding state responsibility has been developed partly through the courts, using the vocabulary of human rights and constitutional guarantees. For informal workers affected by silicosis, the new locus of responsibility for compensation is the state, and the new claimant is the 'citizen' as a victim of a human rights violation. This reconfiguring of responsibility is part of a more general development within labour law. Scholars are increasingly arguing that the normative core of labour rights are in fact human rights, as worker rights ultimately are rooted in advancing dignity and freedoms.¹⁰⁰

In some respects, the use of individual rights is a strategy uniquely suited to informal workers who are often unable to prove an employment relationship in court, and who face significant obstacles to workplace organising. Yadav found, in a survey of quarry workers in Bijolia, Rajasthan that nearly a third of workers did not know who employed them, and none held a written

⁹⁶ Bhushan (n 64); Gayatri Singh, 'Judiciary Jettisons Working Class' (2008) 24 *Combat Law*; Prakash Karat, 'Supreme Court in Liberalized Times' (*Countercurrents*, 9 August 2003) <<https://countercurrents.org/hr-karat090803.htm>> accessed 1 April 2020; Gopalakrishnan (n 90).

⁹⁷ Baxi (n 64).

⁹⁸ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2nd edn, Beacon Press 2001).

⁹⁹ Rina Agarwala, 'Using Legal Empowerment for Labour Rights in India' (2019) 55(3) *The Journal of Development Studies* 401.

¹⁰⁰ Some scholars who have written on this subject include: Guy Davidov and Brian Langille, *The Idea of Labour Law* (Oxford University Press 2011); Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press 2011); Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) *European Labour Law Journal* 151; Simon Deakin, 'Social Rights in a Globalizing Economy' in Phillip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press 2005); Christopher McCrudden, 'Labour Law as Human Rights Law: A Critique of the Use of Dignity by Freedland and Kountouris' in Alan Bogg and others (eds), *The Autonomy of Labour Law* (Hart Publishing 2015); Judy Fudge, 'Constitutionalizing Labour Rights in Europe' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011); Tonia Novitz and Colin Fenwick, 'The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010).

contract of work.¹⁰¹ With the extremely high proportion of informal labour in India, labour laws that depend on the existence of an employer-employee relationship are under-utilized.¹⁰² For example, not a single compensation case was filed by a mine worker in Rajasthan between 2003 and 2013 under the ECA.¹⁰³ Further, most Indian labour laws, including the Mines Act and the Factories Act, exempt small-scale enterprises from registration, which further excludes informal workers from their scope.¹⁰⁴ As informal workers are dispersed across thousands of working spaces (including their homes) and often work embedded within complex subcontracting arrangements, they face particular obstacles to unionizing and making demands of their employers. In India, thousands of informal workers have begun to organize, but they are making demands from the state for welfare instead.¹⁰⁵ The cases we have reviewed here show us the possibility of leveraging individual rights, and the legal process to make concrete gains for informal workers.

But perhaps the route these cases have taken might also offer us reasons to be sceptical of the promise of the public interest for workers in India. PILs have done little to enhance the collective bargaining power of workers as a whole and have failed to meaningfully grant legal protection to informal workers. The silicosis cases are one example of how informal workers have sought to use the courtroom to assert their rights as fundamental ones, but they also demonstrate the limits of such an approach. The state has stepped in to bolster its legitimacy with workers and with capital by providing welfare, but it neither accepts the legal responsibility to always do so and nor does it invoke employer responsibility in labour law. This is the sense in which silicosis compensation has been provisioned by the state – always *ex gratia*. The Indian informal worker is thus not in a mutual relationship of rights with the state, but a population to whom benefits and services are provided.¹⁰⁶

The use of PIL in these cases also led to wildly different outcomes based on whose interests the Court sought to defend. As Douzinas wrote, a rights claim “is the beginning rather than the end of a dispute about the meaning of

¹⁰¹ Anumeha Yadav, ‘Bijolia’s Harvest of Stone: Conditions of Work among Quarrying Labour in Rajasthan’ (2018), Working Paper 13 Centre for Sustainable Employment, Azim Premji University.

¹⁰² Agarwala (n 18) Appendix II.

¹⁰³ Pekham Basu, ‘Mining in Rajasthan—A Quagmire for Policy, Practice and People’ (2020) 50(8) *British Journal of Social Work* 2466.

¹⁰⁴ Shelley Marshall, Kate Taylor and Samantha Balaton-Chrimes, ‘Rajasthan Stone Quarries: Promoting Human Rights Due Diligence and Access to Redress in Complex Supply Chains’ (2016) *Non-Judicial Redress Mechanisms Report Series 11 Corporate Accountability Research*.

¹⁰⁵ Agarwala (n 18).

¹⁰⁶ Partha Chatterjee, *Lineages of Political Society: Studies in Postcolonial Democracy* (Columbia University Press, 2008).

a right or its relative standing vis-à-vis conflicting rights.”¹⁰⁷ Since rights are prescriptions about what ought to happen, one set of rights frequently has to be traded against another. In the case of *MC Mehta v Union of India* (1996), was the right of residents to live in a pollution-free environment more important than the right to livelihood of workers in polluting industries?¹⁰⁸ Was a worker’s right to be gainfully employed more important than their right to a safe workplace?

In these determinations, the key task that confronts the judiciary is to recognize and delineate both corporate and state responsibilities to labour and the environment. Yet, despite the existence of protective labour law statutes in India, this was not attempted.¹⁰⁹ The fickle understanding of the disease in these cases led to the outcome in *PRASAR*, where advocacy for workers affected by silicosis unable to claim compensation as a result of Supreme Court-ordered industrial closures has now resulted in the Court ordering more closures. The erasure of the worker, who is afforded little room to represent themselves, in PIL proceedings is worrying. This is the case in almost all instances related to the urban and working poor.¹¹⁰ Even sympathetic scholars cannot help but note that PIL has the overtones of an elite project, and its critics charge it with being a ‘mobilization from the top’ reminiscent of colonial law.¹¹¹ PIL has allowed the Court to construct itself as the defender of the vulnerable, but it is unable to transform socio-economic conditions that would allow workers to demand accountability from those who profit from their labour.

IV. CONCLUSION

This article has documented how the emergence of Public Interest Litigation in the 1980s offered an opportunity for Indian workers and their advocates to attempt a new route to obtain compensation for occupational disease and ill-health. I traced the shifting discourses by which silicosis was constructed as a ‘public interest’ issue before the Supreme Court of India. In the first case, workers suffering from silicosis were seen as citizens working in forced conditions that impinged on their freedoms; in the second, the identity of workers

¹⁰⁷ Costas Douzinas, ‘Human Rights for Martians’ (*Critical Legal Thinking*, 3 May 2016) <[¹⁰⁸ *MC Mehta* \(n 32\).](https://criticallegalthinking.com/2016/05/03/human-rights-for-martians/#:~:text=1n%20most%20cases%2C%20a%20human,considerations%20unavoidably%20enter%20legal%20argumentation.> accessed 11 June 2020.</p>
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¹⁰⁹ Talib (n 36).

¹¹⁰ Bhan (n 64); Bhuwania (n 6).

¹¹¹ Modhurima Dasgupta, ‘Public Interest Litigation for Labour: How the Indian Supreme Court Protects the Rights of India’s Most Disadvantaged Workers’ (2008) 16(2) *Contemporary South Asia* 159; Radha D’Souza, ‘The “Third World” and Socio-Legal Studies: Neo-Liberalism and Lessons from India’s Legal Innovations’ (2005) 14(4) *Social & Legal Studies* 487.

was merged with that of residents, understood to be victims of ‘pollution’ rather than workplace hazard; and in the final case, workers were constructed as victims of a human rights violation. This last understanding placed the responsibility of compensation on the state, as moral and not a legal obligation.

The development of state responsibility has been influential in the shape that silicosis compensation has taken in India since. In 2013, the Rajasthan State government set aside a ‘compensation fund’ to allow workers with silicosis and their dependents to access benefits – also on *ex gratia* basis.¹¹² This system of compensating workers based on a government approved diagnosis is ongoing.¹¹³ The understanding that the state is responsible for the condition of those suffering from silicosis marks a significant shift from the traditional emphasis in tort and workers’ compensation law on employer liability.

This account of PILs on silicosis has described how workers suffering from silicosis repeatedly figured as victims and not as plaintiffs; as people unable to prove that they had suffered legal harm, but whose suffering could simply not be ignored by the legal process.¹¹⁴ There needs to be greater attention paid to the political economy undergirding this shift, as well as to the sustained dialogue on what these transformations signify. Silicosis compensation has, at the end of this story, been constructed as a moral obligation as opposed to a labour law violation. This dissolves the contract between labour, capital, and the state in labour law by exempting employers from legal liability for workplace safety of informal workers. These cases serve as an example of a new negotiation on the boundaries of responsibility of worker health, and the turn to human rights in such cases may prefigure similar developments elsewhere. It remains to be seen whether the strategy of state accountability for silicosis can do more for workers than its alternative.

¹¹² Such schemes that fund welfare benefits through a publicly-levied ‘cess’ on responsible industries are common across several industries in India. See Kamala Sankaran, ‘Realising Employer Liability for Informal Workers: Lessons from India’ in Martha Chen and François Carré (ed.) *The Informal Economy Revisited: Examining the Past, Envisioning the Future* (Routledge Books 2020).

¹¹³ Rajasthan State Human Rights Commission (n 86).

¹¹⁴ Das (n 37); Bhuwania (n 6).