The Class Action Paradox: A Comparative Mirror for Reflection On Law and Social Change In India

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The class action paradox lies in the fact that the American model of collective litigation faces strong internal criticism while simultaneously gaining international credence as a paradigm for legal reform. However, India's particular problems require specific legal solutions. In terms of restorative justice, the mechanisms of accountability were challenged by the Bhopal disaster. In terms of redistributive justice, Indians should evaluate the impact of their legal system on the perpetuation of inequalities based on millennia of assignment of social roles, distribution of economic benefits, and recognition of prestige through a caste system. In any event, the debate about legal reform must not be shaped by an idealized perspective of the American model of civil justice. The analysis of the possibilities and limitations of social transformation through legal reform in India must be based on empirical research, the historical experience, and the cultural values of the Indian society. The dilemmas of collective litigation in the U.S. deconstruct the mythical illusion that their legal system is the ideal model for legal reform. Public Interest Litigation, affirmative action, and the mass torts system in India may benefit from a comparative

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perspective, as long as derived from a critical assessment of weaknesses and strengths of American "law in action". The Law and Society Movement suggests that cross-cultural borrowing should be the result of a conscious political decision, instead of the uncritical imitation of a legal scheme due to the influence of a more powerful country. Social change does not come instantaneously, but it is rather the result of long term processes in which legal decision-making has an essential role. To shape the historical landscape and future social perspectives through law and justice is the challenge ahead of India.

I. Introduction

This paper is a summary of reflections on a phenomenon that I call the "class action paradox": the American model of collective litigation faces strong internal criticism while simultaneously gaining international credence as a paradigm for legal reform. While I was writing this paper, the Brazilian congress was discussing a new Class Action Statute.[1] Renowned Brazilian scholars added that Brazil should follow the pattern of American collective litigation. No one raised some of the paradigm's possible negative effects and elusive promises.[2]

Why would an Indian audience be interested in this phenomenon? Like Brazil, India has been attempting to refine its own legislation of restorative and redistributive justice in the past few decades. Of course, India has its own particular problems and they are likely to require specific solutions. Two of these problems are extremely well known worldwide. First, there is the problem of the perpetuation of inequalities based on

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[1] Projeto de Lei n. 5.139/09 (Bill No. 5.139/09).

[2] I have in mind, particularly, a few extremely influential Brazilian Law professors: Ada Pellegrini Grinover, Aluízio Gonçalves de Castro Mendes, Kazuo Watanabe, Direito Processual Coletivo e o Anteprojeto de Código Brasileiro de Processos Coletivos *(Procedural Law Collective and the Draft of the Brazilian Code of Collective Processes)*, São Paulo: Revista dos Tribunais (Journal of the Courts), 2008; Antonio Gidi, Rumo a um código de processo civil coletivo: a codificação das ações coletivas no Brasil *(Towards A Code of Civil Procedure Collective: The Codification Of Collective Action in Brazil)*, Rio de Janeiro: Forense, 2008.

millennia of assignment of social roles, distribution of economic benefits, and recognition of prestige through a caste system. Second, there is the necessity to improve a system of civil justice, whose mechanisms of accountability were challenged by the worst industrial disaster that has ever happened, namely the accident involving the Union Carbide Company at Bhopal in 1984. The particularity of the Indian problems requires India to develop legal solutions that will fit into India's own social context. For this reason, an Indian audience should be interested in the phenomenon of the class action paradox. If India decides to follow the American paradigm, Indians should learn from the American critiques of the model and assess critically its possible negative effects or elusive promises.

Will I suggest what kind of legal reform should refine the Indian system of collective litigation? The answer to this question is clearly a negative one. This paper is a reflection and, therefore, aims to foster future debates on how Indians could think about their own system and eventual improvements. Inasmuch as I do not imagine how Indian scholars could suggest to Brazilians how to reform the Brazilian legal system, I do not intend to make any suggestion whatsoever about which transformation could improve the Indian legal system. The animating idea of this paper is a different one. My main goal is to use the American model of collective litigation as a tool to engage in an academic dialogue with an Indian audience, so that Indians can reflect about how to evaluate and, if necessary, how to refine their own system of collective litigation.

First, I will show how two leading American scholars have described the main challenges of redistributive and restorative justice in India, mainly to address to an Indian audience the same points that were raised by these law professors. I have decided to discuss their ideas because Cass Sunstein and Marc Galanter are widely known academics, they addressed key Indian problems, and their attitudes towards American law were quite antagonistic. In particular, Galanter's description of the U.S. legal system does not correspond to the reality of "law in action" and even to his own analysis elsewhere. This discussion will lead us to points raised by empirical research about the American model of class action. In the second section, I will present two theories from the Law and Society Movement that may cast a light on the potential advantages of collective litigation and on the aspects of social change that foster legal transformation. The section will provide Friedman and Ladinsky's

categories to classify aspects of legal and social change. It will also link Galanter's insight on "why the 'haves' come out ahead" with the importance of social organization and collective litigation. Galanter suggested that class action suits eliminated the advantages of powerful players in civil litigation. Notwithstanding this powerful justification of collective action, the third section will explore the tensions and weaknesses of the U.S. civil justice system. It will analyze the crisis of the American class action. I will expose a list of critical points raised against this model: frivolous litigation, temptation to collude, incapacity to provide full recovery to victims, incapacity to achieve optimal deterrence, difficulty to provide closure and adequate regulatory enforcement, poor representation of class members by class attorneys. On the other hand, collective litigation is still associated with the hope for social transformation. The fourth section examines whether this is a hollow hope or a silent revolution. I will discuss different perspectives on whether adjudication may cause social change, drawing from two American scholars who have used the leading case *Brown v. Board of Education*[3] as the point of departure for their analysis. Debating equality is relevant for our reflection because the deconstruction of the caste system is one of the key Indian problems. *Brown* is also essential to understand the idea of the class action paradox. This landmark decision is a global icon of social transformation through adjudication. *Brown* will bring us back to the animating idea of our reflection and will drive us to think about the challenges ahead of India. In the final section, I will conclude with a few remarks on the importance that Indians take advantage of their own legal experience to reflect about their present circumstances and their future perspectives.

II. A Passage From India: Sunstein On The Anticaste Principle And Galanter On *Bhopal Gas Tragedy*

Reflecting on the equality principle of the American constitution, Cass Sunstein has concluded that it prohibits second-class citizenship.[4] From the idea of equality, he inferred an anticaste principle and affirmed that policies favoring minorities that suffered from past discrimination should not be considered *per se* unconstitutional since they do not turn

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[3] 347 U.S. 483 (1954) (Brown I); 349 U.S. 294 (1955) (Brown II).

[4] Cass R, Sunstein, *The Anticaste Principle, 92* Mich. L. Rev. 2410 (1993).

majorities into second-class citizens.[5]

After considering that the convenience of affirmative action programs should be decided by legislatures, Sunstein summarized the main characteristics of inequality in India in a comparison with the United States. He referred to the conclusions of Clark Cunningham and Madhava Menon's study on the subject. First, unlike the American inequality based on gender and race, the Indian caste system operates without highly visible characteristics.[6] Second, the caste system should be considered to be a social construction, given the fact that symbolic stigma was created to perpetuate previously constructed social disadvantages.[7] Third, India has created "a highly programmatic method for redressing past social discrimination – an experiment in social engineering far beyond anything in American law".[8]

According to Sunstein, any decision on the convenience of affirmative action programs should be based on empirical work and factual analysis due to the fact that the reservations usually provoke disagreement on matters of high principle.[9] The American law professor addressed many questions to Indians and I would like to repeat them for the sake of reflection: Does this kind of close attention to caste background increase

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[5] Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparisons,* 97 MICH. L. REV. 1311 (1998).

[6] *Id. at 1312.*

[7] *Id.*

[8] *Id. at 1313-1316.* As Sunstein puts it, *"Perhaps the most intriguing aspect of the discussion by Cunningham and Menon involves its depiction of a path not taken by the United States. Recall that India maintains a list of 3,500 'backward classes' and that empirical factors, including social discrimination, educational deprivation, and economic status, are used to determine group status. Some groups – the most disadvantaged – have their own independent quotas, generally proportional to population. Other groups also receive a reserve, but one smaller than their population share. Individual entitlements may depend on whether the relevant individuals have been raised in privileged circumstances. Thus there is a careful, elaborate, and quite refined method for determining how government policies will counteract or even dismantle the caste system. India appears, in short, to be engaged in a social experiment that goes well beyond anything in American practice".*

[9] *Id*, at 1314-1315.

or decrease social antagonism? Does the 'ethnification' compromise social cohesion? Does the system create, or is perceived to create, a kind of castes spoils system? Do groups jockey for a position of "most disadvantaged" with harmful consequences for society as a whole? Does this system compromise performance-related goals, and, if so, to what extent? Does this system significantly weaken the Indian economy? Does the Indian approach make sense for India?[10]

Even though Cass Sunstein was not willing to answer questions that should be assessed by Indians through empirical research, he suggested that "an insistence on fair equality of opportunity and minimally decent conditions might well be a far more effective and direct way of dealing with systemic disadvantages than India's extremely complex affirmative action program".[11] Complex litigation may reduce inequality through the adjudication of economic, social, and cultural rights. Courts could guarantee fair equality of opportunity by ordering the executive branch to provide excellent educational resources to each and every student. Courts could also guarantee basic primary goods through the recognition that the right to food is justiciable and that miserable individuals are entitled to receive basic nutrients in case of famine. Taking ESC rights seriously may be a complement or an alternative to controversial affirmative action programs.

Marc Galanter, another leading American scholar, has written extensively on the industrial disaster involving the Union Carbide Company at Bhopal in 1984. In one of his works, *When legal worlds collide: reflections on Bhopal, the good lawyer, and the American law school*, Galanter claimed that the Indian legal system, in terms of providing remedies for mass torts disaster, is weak: tort law in undeveloped; cases take an extremely long time do be decided because there is a relative small number of courts, cases are judged piecemeal, and there are multiple possibilities of appeals; court fees are high; lawyers are courtroom advocates, with rudimentary specialization and no inclination for fact-finding investigation; the lack of discovery in Indian civil procedure turns impossible the factual investigation of complex problems.[12] In contrast, the American legal system

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[10] *Id,* at 1316-1319.

[11] *Id.* at 1319.

[12] Marc Galanter, *When Legal Worlds Collide: Reflections on Bhopal, the Good Lawyer, and the American Law School*, 36 J Legal Educ. 292, 296-297 (1986).

is a strong one[13] and the exchange of legal ideas between the U.S. and India in the aftermath of the mass industrial disaster at Union Carbide established, in Galanter's words, the Bhopal connection. From the standpoint of the United States, Americans should wonder about their responsibility when exporting new risky technologies to countries with weak regulatory apparatus: should mechanisms of accountability be exported as well?[14] If so, would the United States be creating "a double standard under which victims of multinational wrongdoers will be compensated but victims of indigenous wrongdoers will not."[15]

The relevant passage for our reflection, however, is the one in which Marc Galanter described the reaction of Indian authorities in the aftermath of the disaster, by pointing out that judges were imposing higher levels of liability and that politicians were seeking to strength the procedural remedies.[16] Then, Galanter remarked that:

> *"the challenge facing India and her legal system is many-faceted: to secure and administer belated relief for Bhopal victims; to break out of the stultifying patterns that have locked India into a low-accountability system; and to create and adaptive and efficient remedial system compatible with democracy and development".*[17]

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[13] *Id.* at 297-298.ccording to Galanter, *"The American system, very expensive and maddening wasteful in handling repetitive claims, is good at delineating new frontiers of accountability. Substantive law is abundant and subtle; procedure permits ample factual investigation; lawyers cultivate specialized skill in dealing with cases involving complex technology; courts are innovative in dealing with complex cases; an entrepreneurial bar invests in pioneering claims; contingent fees provide ready access to legal services. Although there are delays, cases usually proceed toward final disposition. Drawing on powerful investigatory tools, readily available support facilities, and the vast fund of experience in such cases, a U.S. lawyer of ordinary talents can perform feats that lie beyond the capability of the most skilled and most devoted lawyer in a less well endowed system".*

[14] *Id.* at 299.

[15] *Id.* at 307.

[16] *Id.* at 308.

[17] *Id.* at 310.

One score of years later, it would be important to evaluate if Marc Galanter's analysis was accurate. If so, what has been done in the past twenty five years to improve the Indian civil justice system? And what there is yet to be done? Can class actions succeed in India? Or could they solve some of the problems identified by Galanter?

III. Social Change And Legal Transformation: Two Lessons From The Law And Society Movement

A classical study on social change and legal transformation may reveal that, perhaps, Marc Galanter was too critical about the Indian legal system. After all, the United States took approximately one century to abandon the fellow-servant rule (that prohibited an employee of recovering damages from an employer in case of an accident unless the employer was directly involved in the injury, what was unlikely to occur). In *Social Change And The Law Of Industrial Accidents*, Lawrence Friedman and Jack Ladinsky explained that "the explosive growth of tort law was directly related to the rapidity of industrial development", but the 19th century's social concern with economic growth resulted in the allocation of all the burdens and costs of industrial accidents over the shoulders of workmen.[18] Over the course of several decades, social perception has changed and the fellow-servant rule had gradually eroded.

In a brilliant passage, Friedman and Ladinsky summarized their understanding on how social change affected the American law of industrial accidents:

> *"in essence, then, workmen's compensation was designed to replace a highly unsatisfactory system with a rational, actuarial one. It should not be viewed as the replacement of a fault-oriented compensation system with one unconcerned with fault. It should not be viewed as a victory of employees over employers. In its initial stages, the fellow-servant rule was not concerned with fault, either, but with establishing a clear-cut, workable, and predictable rule, one which substantively placed much of the risk (if not all) on*

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[18] Lawrence Friedman & Jack Ladinsky, *Social Change And The Law Of Industrial Accidents*, 67 Col. L. Rev. 50, 52 (1967).

> *the worker. Industrial accidents were not seen as a social problem – at most as an economic problem. As value perceptions changed, the rule weakened; it developed exceptions and lost its efficiency. The exceptions and counter-exceptions can be looked at as a series of brief, ad hoc, and unstable compromises between the clashing interests of labor and management. When both sides became convinced that the game was mutually unprofitable, a compensation system became possible. But this system was itself a compromise: an attempt at a new, workable, and predictable mode of handling accident liability which neatly balanced the interests of labor and management".*[19]

Friedman and Ladinsky disregarded the Marxist concept of a class struggle as the explanatory factor for social change (the idea that the fellow-servant rule was a deliberate instrument of oppression and that workmen defeated capitalists).[20] Instead, they focused on three other aspects of social change. First, they looked at the concept of "cultural lag", defined as "the notion that law fails to adjust promptly to the call for change is commonly voiced".[21] Second, they looked at the possibility of cross-cultural borrowing. Third, they observed the role of great men in social change. Since there was intense social dispute over the accountability system for industrial accidents, the concept of cultural lag does not provide a good explanation for the rate of change in this case. Cross-cultural borrowing, on the other hand, is definitely an aspect of social change, since Americans were somewhat inspired by the German and the British compensatory schemes. Nonetheless, Friedman and Ladinsky warned us not to confuse cross-cultural borrowing with influence, by stating that "'influence' carries with it an implication of power or, at least, of cultural dominance".[22] Finally, Friedman and Ladinsky highlighted the importance of great men: "outstanding men may be necessary in general for the

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[19] *Id.* at 71-72.

[20] *Id.* at 53.

[21] *Id.* at 73.

[22] *Id.* at 77.

implementation of social change; someone must take the lead in creating the intellectual basis for a change in perception. Nonetheless, when a certain pattern of demand exists in society, more than one person may be capable of filling that role. Particular individuals are not indispensable. The need is for talent – men with extraordinary ability, perseverance, and personal influence, men who can surmount barriers and accomplish significant results".[23]

Friedman and Ladinsky's study is extremely relevant to our reflection because it explored the perspective that social change and legal transformation depend on collective bargaining and compromising. Moreover, each society will have its own specific rate of change, according to an extremely complex set of multiple factors. Law is not detached from society's history, culture, and context. In addition, their study also provided a quite useful analysis of three aspects of social change: cultural lag; cross-cultural influences; and the role of great men. Observing the "wake up call" that the mass disaster in Bhopal represented for the judiciary and the parliament, which of these three aspects have shaped transformation of the Indian mass torts system in the past twenty five years? Regarding the role of the Supreme Court in advancing fundamental rights through public interest litigation, which of these three aspects were decisive for change? These questions are essential for an analysis of the transformation of the Indian legal system in line with the tradition of the Law and Society Movement.

Another quite interesting idea for the reflection on legal change comes from the typology of parties provided by Marc Galanter in his *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*. Galanter distinguished the *one-shotters* (OS), who would eventually appear in court one or other few times (like, for instance, the auto-injury claimant), from the *repeat-players (RP)*, who would have several judicial appearances over time (like, for example, the insurance company). According to him, *repeat-players* have many different advantages over the *one-shotters*: advance intelligent based on their previous experience; expertise and access to specialists; possibility of developing informal relationships with judicial, legislative, and executive

[23] *Id.* at 79.

authorities; a bargaining reputation; the possibility of adopting strategies to play the odds and to minimize loss; possibility of playing for rules through lobbying or developing positive precedents; experience, expertise, and the ability to secure the penetration of favorable rules.[24]

The relevant insight for a reflection on collective litigation comes from the idea that the 'have-nots', almost always one-shotters, should organize themselves to be capable of changing the rules, obtaining better institutional facilities, and an increase in legal services through legal aid, lower litigation costs, and better access to courts.[25] Interest-groups may improve the ability of 'have-nots' to accumulate resources, to develop long-term strategies, to gather information, to bargain, to lobby, and to monitor law enforcement.[26] Collective litigation is, according to Galanter, an essential mechanism to rebalance the power dynamics between repeat-players (RP) and one-shotters (OS): "the class action is a device to raise the stakes for an RP, reducing his strategic position to that of an OS by making the stakes more than he can afford to play the odds on, while moving the claimants into a position in which they enjoy the RP advantages without having to undergo the outlay for organizing".[27]

Reflecting on the Indian scenario, one could wonder whether social action litigation is fostering the organization of interest-groups, improving the socio-economic condition of the 'have-nots', and providing the necessary leverage for the judicial protection of their collective rights. However, one should not have the illusion that the American model of class action would solve all the problems of collective litigation in India. Next, the vices of the U.S. system will be exposed, so that an Indian audience may have a realistic perspective of the limits and possibilities of their model of class action.

IV. Crisis Of The American Model Of Class Action

The U.S. model of class action is based on the premise that lawyers will exercise the role of "private attorney general" and that private attorneys

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[24] Marc Galanter, *Why The 'Haves' Come Out Ahead: Speculations On The Limit Of Legal Change*,, 9 Law & Soc'y Rev. 95, 98-103 (1974).

[25] *Id.* at 135-141.

[26] *Id.* at 141-143.

[27] *Id.* at 143.

will function as public benefactors by enforcing laws and defending social interests through class action suits.[28] Stephen Yeazell crystallized the skepticism toward such concept by raising the following questions: "Is the private-attorney-general theory little more than a thin mask for lawyer's self interest? Is it fair to challenge the concepts operation when lawyers may be served only incidentally? Should political processes control the kinds of litigation a private attorney general can institute?"[29]

A RAND Institute research team conducted an extremely comprehensive empirical research on these and other *Class Action dilemmas*. Their findings exposed the crisis of the American model of class action. First, private class attorneys are driven primarily by their own financial incentives and, eventually, may also be interested in defending public interests.[30] Second, if a class has a large number of members with low value damages, all the actors involved in a collective settlement may have a temptation to accept collusion. Plaintiff lawyers may secure large fee awards through early settlements, by not investing their resources in a long and expensive discovery. Defendant lawyers may be interested in avoiding negative publicity, litigation costs, and the findings that could result from a serious investigation of their client's wrongdoing. Judges may be ill equipped to evaluate the existence of collusion, given the absence of evidence in a premature settlement and the pressure imposed by their workload. By referring to their interviewees and by describing various settlements, the researchers suggested that the temptation to collude is a problem that may affect the objectives of collective litigation in the U.S.[31] Third, private class attorneys may have economic incentives to fill premature class actions, sometimes even based on controversial scientific evidence, to press for settlement in frivolous cases.[32] Fourth, achieving a global settlement in mass torts class actions is an extremely difficult

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[28]Stephen C. Yeazall, *Collective Litigation As Collective Action*, U.. ILL. L. REV. 43, 55 (1989).

[29] *Id.* at 55.

[30] DEBORAH R. HENSLER, NICHOLAS M. PACE, BONITA DOMBEY-MOORE, BETH GIDDENS, JENNIFER GROSS & ERIK MOLLER, CLASS ACTION DILEMMA: PURSUING PUBLIC GOODS FOR PRIVATE GAIN 71-72 (2000).

[31] *Id.* at 79-99.

[32] *Id.* at 106-107.

enterprise, given the dynamics involving individuals who opt-out and those who become new claimants. These largely unpredictable moves affect the delicate balance of global settlements.[33] In addition, there is often the question of future claimants, the challenge being how to reconcile the necessity to protect those individuals who may have a future claim with the defendant's pursuit of closure.[34] Finally, the American model of class action does not offer adequate representation for the absent parties and mass tort victims are often ill informed and lack adequate mechanisms to control their attorney.[35] Stephen Yeazell refers also to the problem of the "kidnapped rider"[36] in which an individual may be treated as a class member even though her own personal interests may conflict with the particular argument advanced by the class action attorney.[37]

Not surprisingly, the RAND Institute researchers concluded that the American system of class action: provides monetary incentives for frivolous litigation; fails to achieve the goal of regulatory enforcement; is ill equipped to prevent collusion; benefits class members whose cases are weaker in detriment of those individuals with stronger claims; exacerbates the judicial challenge of dealing with scientific evidence.[38] This is not to say that collective litigation should be abandoned. Class action suits are definitely a powerful mechanism to prevent industrial wrongdoings and mass disasters.

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[33] *Id.* at 108-114.

[34] *Id.* at 114-117.

[35] *Id.* at 117-118.

[36] Yeazell, *supra* note 28, at 44.

[37] *Id.* at 61. The following example is provided by him: "Sometimes courts treat as members of the same class those benefited and those harmed by the same decree. The most common and wrenching example occurs in prison litigation. A group of prisoners challenges the conditions of solitary confinement. Suit is brought, not only on behalf of those in solitary, but for all prisoners, on the theory that all prisoners are potential victims of the allegedly unlawful practices. Courts routinely certify such actions. Yet releasing prisoners held in solitary confinement into the general prison population may work great hardship on that general population. Treating all prisoners as a single group prevents the litigants from asserting the position that the state should treat the inhabitants of solitary differently but that it should also protect the rest of the prison population from those in solitary. By treating both groups as one, contemporary class action sometimes mask conflict".

[38] HENSLER, *supra* note 31, at 119-123.

Class actions had also a relevant role in the emergence of environmental law and consumer rights, for instance. The American model, however, is not a perfect one. Awareness of its systemic weaknesses is essential to a reflection on whether cross-cultural borrowing would be appropriate.

Another controversial issue in the U.S. mass torts system is the validity of awarding punitive damages when there is a repetition of similar wrongdoings by one single defendant. In a seminal article, Mitchell Polinsky and Steven Shavell illuminated the question and demonstrated that *optimal deterrence* may require the application of punitive damages in some cases. According to them, punitive damages should be imposed only in a context of imperfect enforcement, when the injurer has a chance of escaping liability, and the award should be inversely proportional to the probability of escaping liability, so that the injurer will pay for the total damages caused by him.[39] Their formula provides extremely objective guidelines for awarding punitive damages. Polinsky and Shavell also offer powerful reasons for not applying punitive damages simply to punish corporate wrongdoing: companies should be perceived as inanimate objects; imposing punitive damages to a firm will have little marginal impact, if any, on individual's liability; ultimately, shareholders and consumers will be penalized and will have to internalize the costs of excessive punishment.[40]

Even though punitive damages should target deterrence, juries are inclined to award large amounts of punitive damages to punish corporate wrongdoing. At least, empirical research conducted by Sunstein, Kahneman, and Schkade supports that conclusion: punitive damages award are erratic and jurors often miss the context, defining monetary awards based on aspects that are irrelevant for achieving *optimal deterrence* (such as, for instance, the firm size or its location).[41] Since the jury lacks technical knowledge to assess adequate punitive awards, Sunstein, Kahneman, and Schkade suggested that these decisions should be left for an administrative body composed of experts.[42]

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[39] A. Mitchell Polinsky and Steven Shavell, *Punitive Damages: An Economic Analysis*,, 111 HARV. L. REV., 869, 873-874 (1997).

[40] *Id.* at 948-954.

[41] Cass R. Sunstein, Daniel Kahneman, & David Schkade *"Assessing Punitive Damages (With Notes On Cognition And Valuation On Law)",* in BEHAVIORAL LAW AND ECONOMICS 233-242 (Cass R. Sunstein ed. 2001).

[42] *Id.* at 246-249.

Observation of the U.S. legal system "in action" provides essential insights for our reflection. First, rigorous empirical research exposes the hidden weakness, the undelivered promises, and the unknown failures of a legal system that, while "on the books", may be perceived as a perfect one. The Law and Society Movement prescribes empirical evaluation of legal systems, so that observers may have a realistic perspective of their virtues and vices. Thinking about legal reform in Social Action Litigation in India, therefore, should involve researching about the actual limits and possibilities of the current model, instead of adopting an idealized version of the American model as a paradigm for change. Second, eventual lessons from the U.S. legal system should come from a critical observation of the "law in action". Deciding whether to reform mass tort litigation or to adopt punitive damages requires awareness of the crisis of the American class action, the excessive litigations costs of the U.S. system, and the challenges faced by such a model of collective litigation.

Another important debate that divides scholars who are skeptical about the role of courts in social change from those who support the idea that adjudication may foster transformation. Two different perspectives are discussed in the next session.

V. Hope: Hollow Or Revolutionary?

In *The Hollow Hope: Can Courts Bring About Social Change?* a book that has become extremely influential, Gerald Rosenberg argued that adjudication is not capable of provoking social transformation. According to him, even the landmark decision in *Brown v. Board of Education*[43] was not a factor of social change, but simply the consequence of an already inevitable historical process of desegregation in the United States. Rosenberg claimed that economic growth, electoral changes, and international affairs were the actual vectors of transformation. Segregation was inefficient and the business leaders' interests were harmed by the costs, the violence, and the bad reputation associated with racial discrimination.[44] Due to bipartisan politics and the migration of blacks

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[43] 347 U.S. 483 (1954) (Brown I); 349 U.S. 294 (1955) (Brown II).

[44] Gerald N. Rosenberg , The hollow hope: can courts bring about social change?, , 157-160 (2008).

from the south to key electoral states, their vote was decisive in national politics and presidential elections.[45] In the aftermath of the Second World War, the United States emerged as the leader of the liberal world and segregation was extremely harmful for the American reputation in the context of the Cold War.[46] Rosenberg concludes that the pressure for desegregation was not created by the U.S. Supreme Court and the court was just part of the current of history.[47]

The idea that desegregation was inevitable, however, is striking, particularly because Congress and the federal executive power have limited powers to intervene in state affairs and it seems unlikely that states legislatures could have brought social transformation in a racist south. Gerald Rosenberg offers a version of history as an evolutionary process through which society continuously evolves in a positive direction that, as a matter of historical evidence, is completely unreal. His "current of history" thesis misses all the caveats and nuances of a conflicting historical process, in which the U.S. Supreme Court was a strong political player and provided support for black organizations and legitimacy for their movement. His argument is not only mere speculation, but also an exercise of wishful thinking and an idealization of the American society.

A much more realistic evaluation of the transformation caused by *Brown* v. *Board of Education*[48] comes from Stephen Yeazell and his analysis of the impact of this landmark U.S. Supreme Court decision on the role of lawyers, the structure of the legal profession, and the emergence of new fields of law. *Brown* has become an icon of public interest litigation and an inspirational symbol of the transformative force of litigation.[49] This powerful image of attorneys as public benefactors revolutionized the American legal culture and, as an immediate consequence, caused the rearrangement in the structure of bar (new rules regarding standing, advertisement, and litigation costs) that provided strong incentives for public interest litigation.[50] As a

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[45] *Id.* at 160-162.

[46] *Id.* at 162-167.

[47] *Id.* at 169.

[48] 347 U.S. 483 (1954) (Brown I); 349 U.S. 294 (1955) (Brown II).

[49] Stephen Yeazell, *Brown, The Civil Rights Movement, And The Silent Litigation Revolution,*, 57 VAND. L. REV. 1975,1975-6 (2004).

[50] *Id.* at 1985-2000.

result, diverse interest groups were organized, formed working teams of specialized attorneys, and were decisive in forging new rights. Public interest attorneys took advantage of the transformative opportunities created by *Brown* and, through litigation, shaped legal fields as diverse as environmental law and consumer's rights.[51] As Yeazell points out, Congressional debates have recently discussed the possible negative effects of this market-oriented instrument of collective action.[52]

These critiques bring our attention back to the class action paradox: on one hand, *Brown*, as an icon of social transformation through adjudication and as a symbol of the transformative power of the class action attorney, provides an idealized version of the American model of class action to the globe; on the other hand, rigorous empirical research exposes the decline of this system of collective action in the United States, due to excessive transaction costs, growth of frivolous litigation, and the failure to achieve optimal deterrence and effective law enforcement. What should one learn from this paradox? What kind of reflection does the simultaneous crisis and globalization of the American class action bring? The next section will offer a few inconclusive remarks about it.

VI. A Few Inconclusive Remarks

The Indian model of class action is under intense academic scrutiny. In a recent piece, Marc Galanter, for instance, has criticized the lower courts and the Lok Adalats and has advocated a radical reform of the tort system. According to Galanter, the current Indian legislation induces victims of wrongdoings to bypass the system, by seeking for alternative ways of recovering damages, even if they will ultimately get half the amount they deserved.[53]

Social action litigation has also been object of scholarly critiques. Ashok H. Desai and S. Muralidhar, for example, have enumerated the problems of the Indian model of public interest litigation: the Supreme Court has obliterated the separation of powers, by deciding matters of

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[51] *Id.* at 1997.

[52] *Id.* at 2002.

[53] Marc Galanter, *Fifty Years On*, in Supreme, but not infallible, 57-64 (B. N. Kirpal et al eds, 2000).

public policy that should have been left to the legislatures;[54] given the informality of epistolary jurisdiction, there are various difficulties in delineating the relevant legal issues, collecting evidence, and providing opportunities for parties to intervene in the judicial process;[55] since some of these cases involve complex questions of policy analysis, finance, and development, judges may not manage to exercise adequate control of the effectiveness of their decisions;[56] Public interest litigation is frequently misused to address private matters.[57] Mamta Rao offers also his own list of limitations and dilemmas of PIL.[58] These authors, nonetheless, acknowledge the importance of social action litigation as an instrument of social justice.[59] Others are vehemently opposed to it.[60]

The class action paradox illuminates such debate in various ways. First, it deconstructs the mythical illusion that the U.S. legal system is the ideal model for legal reform and that the American class action should be a paradigm for legal and social change to the entire globe. Second, it demonstrates that cross-cultural borrowing should be the result of a conscious political decision, instead of the uncritical imitation of a legal scheme due to the influence of a more powerful country. Third, it highlights the fact that legal reforms should be based on historical experience and, as such, rigorous empirical research should indicate problems, limitations, and possibilities for legal and social change. Fourth, social change does not come instantaneously, but it is rather the result of long term processes in which legal decision-making has an essential role.

These are not new ideas. In 1985, Upendra Baxi stated that Indians should learn from the failure of American PIL, appreciate their cultural differences, and refrain from importing their model as an expression

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[54] Ashok H. Desai and S. Muralidhar, *Public Interest Litigation: Potential And Problems*, in SUPREME, BUT NOT INFALLIBLE, 176-179 (B. N. Kirpal et al eds 2000)

[55] *Id.* at 179-180.

[56] *Id.* at 180-182.

[57] *Id.* at 182-183.

[58] MAMTA RAO, PUBLIC INTEREST LITIGATION LEGAL AID & LOK ADALATS, 217-250 (2004).

[59] Desai, *supra* note 55, at 184. Rao, *supra* note 59, at 248.

[60] Shubankar Dam and Vivek Tewary, *Polluting Environment, Polluting*

of colonial legal imagination.[61] In Baxi's own words, *"while labels can be borrowed, history cannot be"*.[62] While this paper does not suggest directions for law and social change in India, it offers a comparative mirror for reflection. To shape the historical landscape and future social perspectives through law and justice is the challenge ahead for India.

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[61] Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation In The Supreme Court Of India*, THIRD WORLD LEGAL STUD., 107. 110 (1985).

[62] *Id.* at 108.