LAW AND THE POOR: SOME RECENT DEVELOPMENTS IN INDIA

I

The problem of poverty in India is pervasive and endemic. Leaders of the society have always been conscious of this problem and of the need to eradicate poverty. In the colonial days, this was one of the chief reasons for demanding the end of colonialism in India. In the Constituent Assembly several times the national leaders sincerely expressed their determination to eradicate poverty from India.[1] A number of provisions were incorporated in the Constitution to obligate any future government in the country to work incessantly for the eradication of poverty. A number of political, economic and social steps have been adopted since the Independence with a view to ameliorate the condition of the poor. Up to date, seven five year plans have been launched. Industrialization in India has grown by leaps and bounds over the years, though India's economy primarily remains agricultural even now. A host of laws has been enacted with this objective in view, viz., eradication of poverty. But the effective implementation of these laws has been the crux of the problem. Many a time, the law is observed more in breach than in observance. There has always been an acute problem of the poor getting access to justice. The judicial machinery in India, a vestige of the colonial era, is costly and dilatory. The poor people being mostly illiterate and without resources cannot take advantage of whatever remedies the law provides to them for the vindication of their rights.

During the last eight years, the Supreme Court of India has sought to take cognisance of the problem of poverty, and

[1] Jawahar Lal Nehru, the first Prime Minister of India, said about the problem of poverty and social change in the Constituent Assembly:

> "The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over."

through a series of notable decisions, has strived to do three significant things: (1) facilitate access to justice to the poor by demolishing certain traditional common-law procedural obstacles; (2) interpret the constitutional provisions more favourably towards the poor so that some of the inert provisions have become lively; and (3) to compel the administration to enforce the law favouring the poor more effectively.

II

Before proceeding further, it may be worth-while to take note of some of the relevant constitutional provisions having a bearing on the problem of poverty. The makers of the Indian constitution realized that in a poor country like India, political democracy would be meaningless without economic democracy. Accordingly, they incorporated a few provisions with a view to achieve amelioration of socio-economic condition of the poor masses. Thus, the preamble to the Constitution emphasizes that India is a Sovereign Socialist Secular Democratic Republic and that it is being established by the people of India with a view to achieve "justice, social, economic and political", for all citizens. The ideal stated in the preamble is reinforced through the directive principles of state policy. Thus, the state is directed to promote the welfare of the people by securing a social order based on social, economic and political justice.[2] This directive reaffirms what has been declared in the preamble to the Constitution, viz., the function of the Republic is to secure, inter alia, social, economic and political justice. The state is also directed to minimise inequalities in income and eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also among groups residing in different areas or engaged in different vocations.[3] The state is also directed to ensure that all workers — agricultural, industrial or otherwise — get a living wage and a decent standard of life;[4] that the citizens, men and

[2] Art. 38(1). For Directive Principles see Jain, *Indian Constitutional Law*, 737-51 (1987).

[3] Art. 38(2).

[4] Art. 43.

women equally, have the right to an adequate means of livelihood;[5] that the economic system does not result in concentration of wealth and means of production to the common detriment;[6] that the ownership and control of community's material resources are so distributed as to subserve the common good;[7] that the workers are not abused and are not forced by economic necessity to enter avocations unsuited to their age or strength.[8] The state is to provide opportunities and facilities to children to develop in a healthy manner and in conditions of freedom and dignity. The state must protect childhood and youth against exploitation and moral and material abandonment.[9] Education, health, unemployment compensation and other welfare benefits are to be provided by the state within the limits of its economic capacity and development.[10] The state has to make laws and use its administrative machinery for the achievement of the above-mentioned objectives.

Besides, there are a number of fundamental rights guaranteeing equality before law,[11] outlawing discrimination on several specific grounds,[12] guaranteeing protection to life and personal liberty,[13] outlawing forced labour[14] and protecting children against exploitation and in several other ways.[15] These provisions are referred to in some detail below.

The purpose of this paper is not to review what the legislature and the executive have done towards the implementation of the fine sentiments mentioned above, but to highlight what the courts (especially, the Supreme Court) have done towards realising some of the above-mentioned goals and objectives and

[5] Art. 39(a).
[6] Art. 39(c).
[7] Art. 39(b).
[8] Art. 39(e).
[9] Art. 39(f).
[10] Art. 41.
[11] Art 14.
[12] Art. 15. But there can be protective discrimination in favour of weaker sections of the society. See, Jain, note 2, *supra*, 497-503.
[13] Art. 21. Jain, *op.cit.*, 576-600.
[14] Art. 23. Jain, *op.cit.*, 631-5.
[15] Art. 24.

to help the country's poor towards proper implementation of the law meant for their amelioration against powerful vested interests and administrative lethargy. Unfortunately, at times, the administration even creates obstacles in the way of the proper implementation of the beneficent laws. Law on paper is one thing, law on the ground another. Here the courts have sought to help by exposing this dichotomy and even compelling the administration to enforce the laws actively. The courts have adopted two main strategies for this purpose: (i) liberal interpretation of constitutional and statutory provisions favouring the poor; and (ii) promotion of the concept of public interest litigation to make it possible to ventilate the grievances of the poor in the courts. It is interesting to note that some of the constitutional provisions, such as the fundamental rights contained in Arts. 23 and 24, which have virtually remained dormant so far for the last thirty two years, have suddenly become too lively as these have been used by the courts, and given new meaning with a view to ameliorate the condition of the poor. In the Supreme Court, the main architect of these strategies has been Chief Justice Bhagwati, who has just retired from the Supreme Court. Several other Judges have also assisted in this humane process. To name only a few: Justice Krishna Iyer, Chief Justice Pathak and retired Chief Justice Chandrachud.

There are a number of legal aspects of the problem of poverty. It is not possible to cover all these aspects within the confines of one paper and, therefore, reference is made here only to a few aspects of the problem on a selective basis.

III

Judicial Empathy with the Poor

On many occasions the Judges of the Supreme Court have expressed sympathy for the poor during the course of their opinions and have advised the administration to take a sympathetic view towards the poor. At times, the judges have frowned upon the administration for adopting a static legalistic attitude at the cost of humanitarian considerations. Two instances of such a judicial approach may be cited here. One such instance is

Som Prakash v. *Union of India.*[16] The petitioner was employed as a clerk in Burmah Shell and retired at the age of 50 years after qualifying for a pension. The Burmah Shell was then taken over by the Government of India and was converted into a government company. The claim of the petitioner for pension not having been settled by the company, the petitioner brought a writ petition against the company in the Supreme Court under Art. 32. Under the regulations of the company, the petitioner was entitled to a pension of Rs. 165.99 out of which the company wanted to make some deductions leaving a monthly pension of Rs. 40 a month. The petitioner challenged the deductions sought to be made by the company out of his original pension as "illegal and inhuman".

The Supreme Court ruled that the company was not entitled to make any deductions from the petitioner's entitlement to pension. The court (Krishna Iyer J.) made the following impassioned observation:

> Social justice is the conscience of our Constitution, the State is the promoter of economic justice, the founding faith which sustains the constitution and the country is Indian humanity. The public sector is a model employer with a social conscience not an artificial person without soul to be damned or body to be burnt. The stance that, by deductions and discretionary withholdings of payment, a public sector company may reduce an old man's pension to Rs. 40 from Rs. 250 is unjust, even if it be assumed to be legal. Law and justice must be on talking terms and what matters under our constitutional scheme is not merciless law but humane legality. The true strength and stability of our polity is society's credibility in social justice, not perfect legalese; and this case does disclose indifference to this fundamental value.

The Judge wondered whether "the highest principle of our constitutional culture is not empathy with every little individual". At another point, the Judge said caustically that it was "heartless" for a "prosperous undertaking" which pays over-generous salaries to higher officials and liberal scales even to its lesser employees, to destroy the pensionary survival of an erstwhile

[16] A.I.R. 1981 S.C. 212.

employee who had served 28 long and fruitful years of his limited span of life for the profit of his employer".[17]

In *State of Haryana* v. *Darshana Devi*,[18] the husband of the plaintiff had been killed by a state transport bus. He was the family's only bread winner. The High Court allowed the widow of the deceased to file claim before the claims tribunal against the state in *forma pauperis*. The state objected to this and came in appeal to the Supreme Court against the High Court's order. Rebuking the state for appealling to it against the High Court's order, the Supreme Court said:

> . . . . The Haryana Government, instead of acting on social justice and generously settling the claim, fights like a cantankerous litigant even by avoiding adjudication through the device of asking for court fee from the pathetic plaintiffs.

The court emphasized that the government had forgotten that it was obligated under Art. 41 to render assistance, without litigation, in case of disablement and undeserved want.[19]

The Supreme Court has taken occasion to comment adversely on the obstructionist, dilatory, rigid and unhelpful attitude adopted by government agencies in matters of litigation with the people, especially, in matters of paying compensation to those who have suffered by their negligent actions. The court has at times commented adversely and in strong terms on the lack of social consciousness and sense of responsibility displayed by public undertakings towards the very people whom they feign to serve. A bus of a state transport undertaking was involved in an accident in which many passengers lost their limbs. A flimsy plea was put forward by the undertaking to escape its liability for compensation. The accidents tribunal disbelieved the evidence presented by the undertaking and awarded compensation to the victims of the accident. The undertaking appealed to the Supreme Court against the verdict of the tri-

[17] A.I.R. 1981 S.C. at 216.

[18] A.I.R. 1979 S.C. 853.

[19] Art. 41, a directive principle, says: "The State shall within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness, and disablement, and in other cases of undeserved want."

bunal. Commenting adversely on the conduct of the undertaking, Krishna Iyer J., delivering the judgment of the court observed:

> One should have thought that nationalization of road transport would have produced a better sense of social responsibility on the part of the management and the drivers. In fact, one of the major purposes of nationalization of transport is to inject a sense of safety, accountability and operational responsibility which may be absent in the case of private undertakings, whose motivation is profit making regardless of risk of life; but common experience. . . discloses callousness and blunted consciousness on the part of public corporations which acquire a monopoly . . . in plying buses.

K. Iyer J. went on to say further that it is a thousand pities that the state road transport vehicles should become mobile menaces. He impressed on nationalised transport the need to have greater reverence for human life representing, as they do, the value set of the state itself. In the instant case, emphasized the Judge, it would have been more humane and just, if instead of indulging in wasteful litigation, the undertaking had hastened compassionately to settle the claims so that goodwill and public credibility could be improved. It was improper for the undertaking to have tenaciously resisted the claim. He reminded the state that under Art. 41 of the Constitution, it has a paramount duty, apart from liability for tort, to make effective provision for disablement in cases of undeserved want.

The undertaking also contested the amount of compensation awarded by the tribunal. But the court rejected the contention saying that the awards were moderate and Indian life and limb cannot be treated as cheap at least by the state and its undertakings. The undertaking should have sympathised with the victims and generously adjusted the claim within a short time instead of insisting on callous litigation. The judge said that these observations were induced by the hope that nationalised transport service would eventually establish its superiority over the private system and seriously respond to the comforts of, and avoid injury to, the travelling public and pedestrian users of highways.[20]

[20] *Rajasthan State Road Transport Corporation, Jaipur* v *Narain Shankar*, AIR 1980 SC 695.

Equal Pay for Equal Work

The Supreme Court has emphasized in *Randhir Singh*[21] referring to Art. 39(d)[22] that the principle of "equal pay for equal work" is not an abstract doctrine but one of substance. Equal pay for equal work is a constitutional goal set forth by Art. 39(d). Though the principle is not expressly declared by the Constitution to be a fundamental right yet it may be deduced by construing Arts. 14 and 16[23] in the light of Art. 39(d). The word "socialist" in the preamble must at least mean "equal pay for equal work". The petitioner was a driver constable in the Delhi Police Force under the Delhi Administration. His contention was that his scale of pay should at least be the same as that of other drivers in the service of the Delhi Administration. Accepting his plea, the Supreme Court made the following remarks[24]

> Hitherto the equality clauses of the Constitution, as other articles of the Constitution guaranteeing fundamental and other rights, were most often invoked by the privileged classes for their protection and advancement and for a 'fair and satisfactory' distribution of the buttered loaves amongst themselves. Now, thanks to the rising social and political consciousness and the forward looking posture of this court, the underprivileged also are clamouring for their rights and are seeking the intervention of the court with touching faith and confidence in the court.

Thus, where all things are equal, persons holding identical posts may not be treated differently in the matter of their pay merely because they belong to different departments.

This principle may be properly applied to cases of unequal scales of pay based on no classification or irrational classifica-

[21] A.I.R. 1982 S.C. 879.

[22] Art. 39(d), a directive principle, requires the state to direct its policy towards securing that "there is equal pay for equal work for both men and women".

[23] *Supra*, Art. 14, known as the equality clause, says: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". Art. 16 guarantees "equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State." See, Jain, note 2, *supra*, 471-500.

[24] The court decision was delivered by Chinnappa Reddy J.

tion though those drawing the different scales of pay do identical work under the same employer. If, however, officers of the same rank perform dissimilar functions, and the powers, duties and responsibilities of the post held by them vary, then they may have no complaint on account of dissimilar pay merely because the posts are of the same rank and nomenclature. In the instant case, the Supreme Court held that the difference in salary of driver constables in the Police Force and other drivers in the service of the Delhi Administration was irrational as there was no reason to give a lower scale than other drivers as their duties were more, not less, onerous than those of other drivers.[25]

The principle is now firmly established that all relevant considerations being the same, person holding identical posts and discharging similar duties should not be treated differently. The *Randhir Singh* pronouncement has transformed the directive principle contained in Art. 39(d) into a fundamental right by reading it into Art. 14.

A question of practical application of the principle of equal pay for equal work arose in *Dhirendra Chamoli* v. *State of Uttar Pradesh*.[25a] The Central Government employed certain casual workers on daily wage basis and paid them much less than equivalent employees appointed on regular basis although the casual workers were doing the same work. The Supreme Court objected to such a practice and ordered that the casual workers be paid the same salary and allowances as regular workers with effect from the date of their employment. The government had argued that the casual workers had taken up employment knowing fully well that they would be paid only daily wages and therefore they could not now claim more. The court took strong exception to such an argument and observed:

> This argument lies ill in the mouth of the Central Government for it is an all too familiar argument with the exploiting class and a welfare State committed to a socialist pattern of society cannot

[25]The principle of equal pay for equal work has again been reiterated by the Supreme Court in *P.K. Ramachandra Iyer* v. *Union of India*, A.I.R. 1984 S.C. 541, and *P. Savita* v. *Union of India*, A.I.R. 1985 S.C. 1124. In an earlier case, *Kshori Mohanlal Bakshi* v. *Union of India*, A.I.R. 1962 S.C. 1139, the Court had said that the abstract doctrine of equal pay for equal work had nothing to do with Art. 14. Obviously, this rigid view has now undergone a change.

[25a](1986) 1 S.C.C. 637.

> be permitted to advance such an argument. It must be remembered that in this country where there is so much unemployment, the choice for the majority of people is to serve or to take employment on whatever exploitative terms are offered by the employer. The fact that these employees accepted employment with full knowledge that they will be paid only daily wages and they will not get the same salary and conditions of service as other Class IV employees, cannot provide an escape to the Central Government to avoid the mandate of equality enshrined in Art. 14 of the Constitution.

So long as casual workers perform the same duties as regular workers, they must get the same salary and conditions of service.

In another similar case, *Surinder Singh* v. *Engineer-in-Chief, C.P.W.D.*,[26] the Supreme Court again ruled that daily wage workers of CPWD were entitled to the wages equal to regular and permanent employees employed there to do identical work. It was argued on behalf of the Central Government that the doctrine of 'equal pay for equal work' was a mere abstract doctrine and that it was not capable of being enforced in a court of law. The court said: "We are not a little surprised that such an argument should be advanced on behalf of the Central Government 36 years after the passing of the Constitution. The Central Government like all organs of the State is committed to the Directive Principles of State Policy and Article 39 enshrines the principle of equal pay for equal work". The court insisted that the principle of equal pay for equal work was not an abstract doctrine but was a "vital and vigorous doctrine" accepted throughout the world. Finally, the court observed:

> The Central Government, the State Governments and likewise, all public sector undertakings are expected to function like model and enlightened employers and arguments such as those which were advanced before us that the principle of equal pay for equal work is an abstract doctrine which cannot be enforced in a court of law should ill come from the mouths of the State and State Undertakings . . . We also record our regret that many employees are kept in service on a temporary daily wage basis without their

[26] (1986) 1 S.C.C. 639. C.P.W.D. means Central Public Works Department.

> services being regularised. We hope that the government will take appropriate action to regularise the services of all those who have been in continuous employment for more than six months.

The petitioners and all other daily rated employees were awarded the same salary and allowance as paid to regular and permanent employees with effect from the date of employment of each as well as a sum of Rs. 1000 to each petitioner as costs.

Livelihood Guaranteed

Art. 21 of the Indian Constitution says: "No person shall be deprived of his life or personal liberty except according to procedure established by law". An attempt has been made from time to time to persuade the Supreme Court to interpret the word 'life' in Art. 21 expansively so as to include 'livelihood' therein with a view to extend the guarantee of Art. 21 to 'livelihood' in addition to 'life'. Initially, the response of the Supreme Court to this contention was in the negative. In *In re Sant Ram,*[27] a case prior to *Maneka Gandhi,* the Supreme Court ruled that the right to 'livelihood' does not fall within the expression 'life' in Art. 21. The court said curtly: "The argument that the word "life" in Art. 21 of the Constitution includes "livelihood" has only to be stated to be rejected. The question of livelihood has not in terms been dealt with by Art. 21. . ." The right to livelihood is included in the freedoms enumerated in Art. 19, or even in Art. 16, in a limited sense. But the language of Art. 21 "cannot be pressed into aid of the argument that the word "life" in Art. 21 includes "livelihood" also". This proposition was reiterated by the Supreme Court in several cases in the post-*Maneka* era also. In *A.V. Nachane* v. *Union of India,*[28] the court reiterated the same proposition without much argument. Again, the court adopted the *Sant Ram* view in *Bapi Raju*[29] without any elaboration.

[27] *In re Sant Ram,* AIR 1960 SC 932.

[28] A.I.R. 1982 S.C. 1126.

[29] *B. Bapi Raju* v. *State of Andhra Pradesh,* A.I.R. 1983 S.C. 1073, 1080.

But, recently, in *Olga Tellis* v. *Bombay Municipal Corporation*,[30] the Supreme Court has adopted a different view on this question. This case was brought by slum dwellers to challenge eviction by the Bombay Municipal Corporation.[31] The court has ruled in *Olga Tellis* that the right to life guaranteed by Art. 21 includes the right to livelihood. No person can live without the means of living, that is, the means of livelihood. Thus, the protection of Art. 21 has been extended to 'livelihood' as well. Chandrachud C.J. delivering the judgment of the full bench observed:[32]

> . . . . the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Art. 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood.

Chandrachud C.J. emphasized that "if the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation". Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. Emphasizing upon the close relation between 'life' and livelihood, Chandrachud C.J. stated:[33]

> That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and

[30] A.I.R. 1986 S.C. 180.

[31] For further discussion on this case see *infra*, note 41.

[32] A.I.R. 1986 S.C. at 193.

[33] *Ibid.*, 194.

> you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which propels their desertion of their hearths and homes in the village is the struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live. Only a handful can afford the luxury of living to eat. That they can do, namely, eat, only if they have the means of livelihood."

Chandrachud C.J. then referred to what Douglas J. had said in *Baksey*:[34] "that the right to work is the most precious liberty that man possesses. It is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom." Chandrachud C.J. also quoted with approval the following observation by Field J. in *Munn* v. *Illinois*:[35]

> Life means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed.

The court also invoked directive principles in Arts. 39(a)[36] and 41.[37] Chandrachud C.J. clinched the matter with the observation:

> The principles contained in Arts. 39(a) and 41 must be regarded as equally fundamental in the understanding and interpreting of the meaning and content of fundamental rights.[38] If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to citi-

[34](1954) 347 M.D. 442.

[35](1877) 94 U.S. 113.

[36]*Supra*, note 5.

[37]*Supra*, note 10.

[38]It is not necessary to discuss the status of directive principles. Reference may be made for the purpose to M.P. Jain, *Indian Constitutional Law*, 737-50 (1987). However, according to Art. 37, the directive principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country.

> zens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Art. 21. [39]

It will thus be seen that from the traditional right to life the court has now spelt out a very significant economic right. The full ramifications of this ruling will appear only in course of time. However, in *Olga Tellis* itself the court used its newly developed view to help the slum dwellers in some way as described below.

Slum Dwellers: Protection To

The Supreme Court has recently made an important pronouncement on the impact of Art. 21 on urbanisation. Bombay is a big metropolitan centre. While Delhi is the political centre, Bombay is India's economic centre. Consequently, thousands of people migrate to Bombay from all over India for economic reasons. Due to acute housing shortage, these people squat everywhere. Thousands of people live in Bombay on pavements and in slums. The condition of pavement dwellers is very pitiable. They exist in the midst of filth and squalor as they have no sanitation facilities available to them. The Bombay Municipal Corporation (BMC) sought to remove the pavement dwellers without offering them any alternative accommodation. The BMC's case was that no person has any legal right to encroach on a foot-path, a public street or any place over which the public has a right of way. The pavement dwellers took recourse to Art. 21 to stall their eviction from the pavements,[40] and argued that their eviction would adversely affect their means of livelihood, that under Art. 21, they have a guaranteed right to live and this right cannot be exercised without the means of livelihood. Their plea was that "the right to life is illusory without a right to the protection of the means by which alone life can be lived". And the right to life can only be taken away or abridged by fair and reasonable procedure. Their main

[39] A.I.R. 1985 S.C. at 194.
[40] *Supra*, note 13.

target was the procedure prescribed by the Bombay Municipal Corporation Act to evict pavement dwellers which they characterised as fanciful and arbitrary.

As has been noted above, the Supreme Court ruled in *Olga Tellis* v. *Bombay Municipal Corporation*[41] that the right to life guaranteed by Art. 21 includes the right to livelihood. It means that Art. 21 protects right to livelihood. It leads to the further postulate that right to livelihood can be taken away only by following just and fair procedure established by law.

An important question for the court to decide was whether evicting the pavement-dwellers from their present habitat would lead to deprivation of their livelihood and, consequently, to the deprivation of their life. The court noted that, in the very nature of things, it would be impossible to gather reliable data on this matter in regard to each individual petitioner. So, the court ruled that it was not necessary to establish in each individual case that his eviction from his present habitat would inevitably lead to the deprivation of his means of livelihood. "That is an inference which can be drawn from acceptable data." On this aspect of the matter, the court made the following pithy and meaningful observation which has a great relevance to social litigation of the type before the court:

> Issues of general public importance, which affect the lives of large sections of the society, defy a just determination if their consideration is limited to the evidence pertaining to specific individuals. In the resolution of such issues, there are no symbolic samples which can effectively project a true picture of the grim realities of life. The writ petitions before us undoubtedly involve a question relating to dwelling houses, but, they cannot be equated with a suit for the possession of a house by one private person against another. In case of the latter kind, evidence has to be led to establish the cause of action and justify the claim. In a matter like the one before us, in which the future of half of the city's population is at stake, the court must consult authentic empirical data compiled by agencies, official and non-official. It is by that process that the core of the problem can be reached and a satisfactory solution found.

[41] *Supra*, note 30.

The court went on to emphasize that it would be unrealistic on its part to reject the petitions on the ground that the petitioners had not adduced evidence to show that they would be rendered jobless if evicted from their habitat. "Commonsense, which is a cluster of life's experiences, is often more dependable than the rival facts presented by warring litigants". After referring to various expert studies, the court concluded: "The conclusion, therefore, in terms of the constitutional phraseology is that the eviction of the petitioners will lead to deprivation of their livelihood and consequently to the deprivation of life". There was enough empirical data to justify the conclusion that people live in slums and on pavements because they have small jobs to nurse in the city and there is nowhere else to live. Such people choose a place in the vicinity of their place of work, "the time otherwise taken in commuting and its cost being forbidding for their slender means."[42]

However, even if removal of the pavement squatters would lead to deprivation of 'livelihood', and hence 'life' for purposes of Art. 21, Art. 21 does not place an absolute embargo on the deprivation of life or personal liberty. What Art. 21 insists is that such deprivation has to be according to procedure established by law. The procedure prescribed by law for the deprivation of the right conferred by Art. 21 must be fair, just and reasonable.[43] The court accepted the right of the BMC to remove the pavement dwellers and remove encroachments on foot paths and pavements over which the public has a right of passage or access. Footpaths or pavements are properties intended to serve the convenience of the general public and are not meant for private use. The court thus rejected the contention of the pavement dwellers that their claim to put up constructions on pavements and that of the pedestrians to make use of the pavements for passing or repassing are 'competing claims' and so the former ought to be preferred to the latter. However, it is imperative, because of Art. 21, that the Municipal Commissioner must follow a reasonable procedure while removing them. The Commissioner must give notice and hearing to the encroachers before removing them (except in urgent cases

[42] *Ibid.*

[43] See, *infra*, this paper under 'Criminal Justice'.

which brook no delay where the Commissioner can act without giving notice). Thus, ordinarily, the commissioner must follow natural justice. The relevant statutory provisions under which the Commissioner sought to take action, viz. Ss 312-314 of the Bombay Municipal Act, 1888, *prima facie* prescribe no hearing. S. 314 specifically authorises the Commissioner to act without notice to remove any encroachment from pavements. It was therefore argued that these statutory provisions fell foul of Art. 21. Here the court adopted the technique of reading down a statutory provision to bring it in conformity with Art. 21. The court said that "considered in its proper perspective, s. 314 is in the nature of an enabling provision and not of a compulsive character." S. 314 enables the Commissioner to dispense with notice to affected persons in appropriate cases but not in all cases. S. 314 enables the commissioner to remove encroachments without notice. "It does not command that the Commissioner shall, without notice, cause an encroachment to be removed." The Commissioner has discretion to remove encroachment with or without notice. He must exercise his discretion in a reasonable manner so as to comply with the constitutional mandate. Thus, the court interpreted the statutory provisions so as to bring in natural justice except in exceptional circumstances. The court said on this point: ". . . while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule . . . could be presumed to have been intended." The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. This rule ought to prevail. S. 314 excluded the principles of natural justice by way of exception and not as a general rule. The hearing may be given individually or collectively, depending on the facts of each situation. "A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence." With this gloss, the court held that the statutory provisions in question were not "arbitrary and unreasonable."

Pleading for procedural fairness towards the pavement dwellers even though they were trespassers, the court observed:

> There is no doubt that the petitioners are using pavements and other public properties for an unauthorised purpose. But, their intention or object in doing so is not to commit an offence. . . They manage to find a habitat in places which are mostly filthy or marshy, out of sheer helplessness.
>
> It is not as if they have a free choice to exercise as to whether to commit an encroachment and if so, where. The encroachments committed by these persons are involuntary acts in the sense that those acts are compelled by inevitable circumstances and are not guided by choice."[44]

In the instant case, however, the court ruled that there was no need for the Commissioner to give a hearing to the petitioners as the elaborate court hearing of their case had fulfilled the requirement of hearing in an ample measure. The court now ruled that the Commissioner was justified in removing the encroachments committed by the petitioners on pavements, footpaths etc. But while conceding the right of the Commissioner to evict the pavement dwellers, the court made two suggestions: (1) they should not be evicted until one month after the conclusion of the rainy season; (2) In the meanwhile, steps be taken to offer alternative pitches to those pavement dwellers who were censused in 1976. The court also ruled that the slums which have been in existence for a long time, say for twenty years or more, and which have been improved and developed, would not be removed unless the land on which the slums stand is required for a public purpose, in which case, alternate sites or accommodation must be provided. In 1976, the corporation had made an offer of alternative pitches to pavement dwellers and they were counted then for the purpose. The court therefore said: "The offer of alternative pitches to such pavement dwellers should be made good in the spirit in which it was made though we do not propose to make it a condition precedent to the removal of the encroachments committed by them." Such alternative pitches must not be very far away in terms of

[44] *Ibid.* 201.

distance. As regards other slum dwellers, the court was categorical. Slum dwellers who were censused in 1976 "must be provided with alternate accommodation before they are evicted."

The court exhorted the government to undertake actively programmes for rehabilitation, housing and amelioration of the condition of these unfortunate people. Such programmes "must not remain a dead letter as such schemes and programmes often do", but "more and more of such programmes must be initiated if the theory of equal protection of laws has to take its rightful place in the struggle for equality". "In these matters, the demand is not so much for less government interference as for positive governmental action to provide equal treatment to neglected segments of society. The profound rhetoric of socialism must be translated into practice for the problems which confront the State are problems of human destiny."[45]

It is clear that the court did not accept the argument that the pavement dwellers have a right to encroach or live on the pavements or footpaths. The court did accept the position that they could be evicted, but the court did insist that it should be done only after following a reasonable and fair procedure, i.e. after hearing these persons. The court did suggest rather strongly that the government should actively pursue programmes for the amelioration of the condition of slum dwellers and make good its promise to allot alternative accommodation to these persons.

A parallel case came before the Supreme Court from Madras. In *K. Chandru* v. *State of Tamil Nadu*,[46] the question was regarding the eviction of pavement and slum dwellers from the City of Madras, another Metropolis of India. The petitioners moved the Court for issue of a writ of *mandamus* restraining the Government of Tamil Nadu from evicting the slum dwellers and pavement dwellers in the City of Madras, without providing alternative accommodation to them. They also prayed that the Government should also be made to provide basic amenities like water, drainage and electricity to the slum dwellers. The court noted that 43% of the population of Madras lives in slums, apart

[45] *Ibid*, 203.

[46] A.I.R. 1986 S.C. 204.

from those who live on pavements. After reviewing the various government programmes relating to slum dwellers, the court was satisfied that the Government of Tamil Nadu "has adopted a benevolent and sympathetic policy in regard to slum dwellers. Steps are being taken for the purpose of improving the slums and wherever they cannot be improved, alternate accommodation is provided to the slum dwellers, before they are evicted". The court characterised the government slum improvement programme as "an admirable step which shows a realistic awareness of an urgent social problem". The whole accent of the programme is on the improvement of the slums rather than on clearance. Only such slums as could not be improved were proposed to be removed. Security of tenure was given to those slums which were situated on public lands and which were selected for upgrading. In view of this position, the court refused to issue any writ or direction to the government. The court very much appreciated the thesis contained in a government report that "the slum dwellers are an essential element in city life, who are as necessary as any other section of the population for the life of the city". This report ended with the following motto of slum clearance: "God revealeth in the smile of the poor". The court expressed its confidence that the Government would continue to evince the same dynamic interest in the welfare of the pavement and slum dwellers. However, in view of the rainy season, the court directed that the pavement dwellers must not be evicted before December 31, 1985 and the Government must do its best to provide alternative accommodation to those who were living on pavements before June 30, 1977 – the date on which slum dwellers were counted. As regards other slum dwellers, the government had given an assurance to the court that it was its policy not to evict such of them, as were living in the slums prior to June 30, 1977, without providing alternate accommodation to them. "That assurance will bind the Government" said the court. On the constitutional points, the court reiterated what it had said in the *Bombay* case.[47]

On clearance of slums, an interesting High Court case may be mentioned here. A land owner was trying to develop his plot

[47] *Supra*, note 41.

of land. All around his land, there were hutmet dwellers on public roads. Because of this, the landowner was not getting the optimum return on his investment. He therefore brought an action against the municipal corporation for an injunction seeking direction from the court that the municipal corporation should remove the dwellers and remove encroachment on the public roads as it was duty bound to do so. His contention was that these hutmet dwellers were trespassers on the land of the public roads; these people had no right to remain on this land and the Municipal Corporation was obligated to remove the encroachment. On the other hand, the Corporation contended that it was the policy of the government to help the poor and the Corporation pleaded its inability to remove them. Nevertheless, it submitted that attempts were being made to shift them to some other alternative place and, therefore, it requested that meanwhile no precipitate action be taken. The lower court granted a mandatory injunction directing the corporation to remove the hutment dwellers within two months. But, on appeal, the Gujarat High Court in *Surat Municipal Corporation* v. *Rameshchandra*[48] rejected the petition. In reaching this conclusion, the court took into account various considerations, e.g., egalitarian nature of the Constitution, poverty of the hutmet dwellers, contribution made by them in providing services in the city. It was alleged by the petitioners that the councillors of the municipal Corporation and the members of the State Legislative Assembly were siding with these trespassers. To this the court replied: "For the successful functioning of democracy, those who sit in the position of power and those who are accountable to the people, are duty bound to heed to the urges and aspirations of the people articulated through their chosen representatives. Therefore, if the Corporators and M.L.A's have sided with the hutmet dwellers and have tried to protect their interest, they have not done anything wrong. On the co trary, had they not protected the interests of hutmet dwellers, they would have failed in the discharge of their duties as true representatives of the people." The court pointed out that the Indian Constitution aims at establishment of an egalitarian society based on socialist

[48] A.I.R. 1986 Guj. 50.

principles; that the directive principles envisage a social order based on social, economic and political justice and equality of status and the Five Year Plans seek to improve the socio-economic condition of vast majority of the people of this country. If the term 'life' (in Art. 21) has any meaning, the poor citizens of the country "are surely entitled to have roof over their heads". The court went on to emphasize that "democracy does not mean the rule by few, holding powerful economic resources in their hands" and that the courts should comprehend that "the might and grandeur of this nation lie in the millions of its citizens and not in few elites who may appear to be in or around the centres of power". The courts cannot provide houses to the teeming millions of the country. At the same time, it could also not be expected of the courts that they should take away the right of vast majority of these citizens to exist and worsen their position. The High Court therefore ruled that the plaintiff had no *prima facie* case so as to override the interests of numerous citizens and also that the balance of convenience was not in favour of the plaintiff. On one side (hutmet dwellers), there was the question of life and death, while, on the other side (plaintiff), there was the question of uneconomic user of land. Lives of the poor citizens were much more important than the profit or comforts of few individuals. If the courts are required to choose between the two, the courts are duty bound to protect the lives of the poor individuals. The court also ruled that no order adverse to the hutmet dwellers could be passed in the action as they were not party to the suit and they could not be condemned unheard.

One more Supreme Court case in this *genre* may be noted here. A large number of street hawkers carried on trade of hawking their wares on the streets of Greater Bombay. Some of the streets were so much flooded with these hawkers that it was impossible for the pedestrians to walk on those streets. The Bombay Municipal Corporation refused to grant licences to the hawkers so that they remained liable to be removed from the streets along with their goods. The Bombay Hawkers' Union filed a writ petition in the Supreme Court claiming that the hawkers had a fundamental right to carry on their trade, business or calling and that the Municipal Corporation was

unlawfully interfering with their rights.[49] In *Bombay Hawkers' Union* v. *Bombay Municipal Corporation,*[50] the court ruled that there was no substance in the contention of the hawkers for the right conferred by Art. 19(1)(g) was subject to Art. 19(6). The statutory provisions under which the Corporation was acting were in the nature of reasonable restrictions in the interests of the general public on the exercise of the right of hawkers to carry on their trade or business. The court (per Chandrachud C.J.) stated in this connection: "No one has any right to do his or her trade or business so as to cause nuisance, annoyance or inconvenience to the other members of the public. Public streets, by their very nomenclature and definition, are meant for the use of the general public. They are not laid to facilitate the carrying on of private trade or business." The court further pointed out that if hawkers were conceded the right claimed by them, they could squat on the centre of busy thoroughfares and thus paralyse all civil life. The hawkers could make it impossible for the pedestrians to walk on footpaths or even on the streets properly so-called.

But this does not mean that the hawkers be completely deprived of the right to carry on trade. Therefore, the Supreme Court laid down certain guidelines for the Municipal Corporation to frame a scheme for regulation of street hawkers. So, the court emphasized that, as far as possible, there should be one hawking zone for every two contiguous municipal wards in Greater Bombay. The non-hawking zones may be fixed by the Municipal Commissioner. In areas other than the non-hawking zones, licences should be granted to the hawkers to do their business on payment of the prescribed fee. But that will be without prejudice to the right of the Commissioner to extend the limits of the non-hawking zones in the interests of public health, sanitation, safety, public convenience and the like. Licences should not be refused to the hawkers in the hawking zones except for good reasons. The discretion not to grant a

[49] Art. 19(1)(g) of the Indian Constitution guarantees to every citizen of India the right to carry on any trade or business. However, this right is subject to Art. 19(6) which provides that reasonable restrictions can be imposed by the state on the right guaranteed by Art. 19(1)(g) in the interests of general public. For judicial exposition of these constitutional provisions see, Jain, *Indian Constitutional Law* 547-62 (1987).

[50] A.I.R. 1985 S.C. 1206.

hawking licence in the hawking zone should be exercised by the commissioner reasonably and in public interest. The court also directed the Commissioner that, in future, before making any alteration in the scheme, he should consult all public interests, including the hawkers and representative associations of the public. Hawkers have the right to do their business subject to reasonable restrictions in the interests of the general public. The general public has a stake in showing how and why the hawking trade should be regulated. The court observed in this context:

> The power conferred upon the Commissioner by S. 313A of the Act[51] to grant licences to hawkers is in the nature of a discretion coupled with a duty. It is therefore essential that the said power should be exercised by consulting all concerned interests and guided by considerations of what is in the interests of the general public.[52]

Pensioners

In *D.S. Nakara* v. *Union of India*,[53] the Supreme Court gave relief to government pensioners.[53a] The government announced a liberalised pension scheme for retired government servants and made it applicable to those who had retired after March 31, 1979 but not to those who retired from service before that date. The court ruled that the scheme was discriminatory vis-a-vis those retiring before the specified date. The Supreme Court invoked Arts. 14, 38(i), 39(e), and (d), 41 and 43(3) and even the word 'socialist' in the preamble to reach this result. According to the court, since the advent of the constitution, the State action must be directed towards attaining the goal of the directive principles so as to set up a welfare state in India. The principal aim of a socialist state is to eliminate in-

[51] S. 313A of the Bombay Municipal Corporation Act, 1888.

[52] A.I.R. 1985 S.C. at 1211.

[53] A.I.R. 1983 S.C. 130. The judgment was delivered by D.A. Desai J.

[53a] The Supreme Court has emphasized in numerous decisions that pension is "a right not a bounty or gratuitous payment." "The payment of pension does not depend upon the discretion of the government but is governed by the relevant rules and anyone entitled to the pension under the rules can claim it as a matter of right". See, *Deoki Nandan Prasad* v. *State of Bihar*, A.I.R. 1971 S.C. 1409; *State of Punjab* v. *Iqbal Singh*, A.I.R. 1976 S.C. 667.

equality in income, status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people and, especially, to provide security from cradle to grave. This, amongst others on the economic side, envisages economic equality and equitable distribution of income. In the old age, socialism aims at providing an economic security to those who have rendered unto society what they were capable of doing when they were fully equipped with their mental and physical prowess. Art. 41 enjoins the state to ensure a reasonably decent standard of life, medical aid, freedom from want, freedom from fear and enjoyable leisure, relieving the boredom and the humility of dependence in old age. Describing the nature of the pension given to a government servant on retirement, the court emphasized on three features thereof: (1) Pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer and it creates a vested right; (2) the pension is not an exgratia payment but it is a payment for the past service rendered; and (3) it is a social welfare measure rendering socio-economic justice to those who in the heyday of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch. The court ruled vis-a-vis Art. 14, that all pensioners form one class for the purpose of revision of pension and the division of pensioners into two classes on the basis of the date of retirement is not based on any discernible rational principle because a difference of two days in the matter of retirement can have a traumatic effect on the pensioner. Such a division is arbitrary and unprincipled as there is no acceptable or persuasive reason in its favour, and hence invalid under Art. 14. The court pointed out that if date of retirement could be accepted as a valid criterion for classification, then, on retirement, each individual government servant would form a class by himself because the date of retirement of each is correlated to his birth date and on attaining a certain age he has to retire. The court applied the liberal formula to all pensioners irrespective of the date of retirement, as distinction among pensioners with reference to a specified date was held to be discriminatory. The Supreme Court judgment is too much interlaced with considerations of socio-economic justice and welfare which the government is endeavouring to set up in India. The court's basic approach

was that the pensioners in their old age should be able to live at a standard equivalent to the pre-retirement level. As the court said graphically: "We owe it to them and ourselves that they live, not merely exist". The court was influenced by the fact that "the old men who retired when emoluments were comparatively low" were now "exposed to vagaries of continuously rising prices" and "the falling value of the rupee consequent upon inflationary inputs".

As a result of the Supreme Court decision in the *Nakara* case,[54] a number of petitions were filed in the Supreme Court claiming to be entitled to the socially beneficent approach of the court. One such group comprised of widows of erstwhile government servants who were not in receipt of family pension. The court considered their case in *Poonamal* v. *Union of India.*[55]

The scheme of family pension came to be conceptualised in 1950. If a government servant dies in harness or soon after retirement, in the traditional Indian family on the death of the only earning member, the widow or the minor children often faced destitution or starvation. The widow was hardly in a position to obtain gainful employment and thus became economically orphaned. As a measure of socio-economic justice, government devised the family pension scheme to give succour to the widow and the minor children. Since 1950, the scheme was liberalised from time to time. The liberalisation was however subject to the condition that the government servant had in his lifetime agreed that he would make a contribution of an amount equal to two months' emoluments or Rs. 5000/= whichever was less out of the death-cum-retirement gratuity. Those government servants who did not accept this condition were denied the benefit of family pension scheme.

There was some liberalisation of the scheme introduced in 1964. But the government servants who died prior to 1964 were not eligible for the benefit of liberalised scheme. Another class of government servants who were left out of the liberalisation scheme was of those who specifically opted out of the family pension scheme of 1964. Thus, since January 1, 1964, there were in force two parallel schemes: (a) pre-liberalisation scheme

[54] *Supra*, note 53.

[55] A.I.R. 1985 S.C. 1196.

operative for those who retired prior to January 1, 1964; (b) or those who did not contribute out of the death-cum-retirement gratuity, roughly styled as non-contributory scheme. The other was contributory scheme.

In September 1977, the Government of India in its onward march for ushering in socio-economic justice in the form of social security further took a bold and imaginative step by which the precondition of contribution was done away with. This was done in recognition of the fact that the family pension was a social security measure.

Thus, since September, 1977, a very anomalous situation came into existence. The widows of those government servants who had not agreed to contribute in accordance with the 1964 scheme were denied the benefit of pension scheme and this disability continued even after the changes introduced in 1977 when the scheme ceased to be contributory. Such widows moved the Supreme Court through writ petitions.

The court stated that pension is a right not a bounty or gratuitous payment. The payment of pension does not depend on government discretion but is governed by relevant rules and any one entitled to the pension under the rules can claim it as a matter of right.[56] On the nature of the family pension, the court said:[57]

> Where the government servant rendered service to compensate which a family pension scheme is devised the widow and the dependent minors would equally be entitled to family pension as a matter of right. In fact we look upon pension not merely as a statutory right but as the fulfilment of a constitutional promise in as much as it partakes the character of public assistance in cases of unemployment, old-age, disablement or similar other cases of undeserved want. Relevant rules merely make effective the constitutional mandate.[58]

The court pointed out that since the family pension scheme had become non-contributory effective from September 22,

[56] Ref. made to: *Deoki Nandan Prasad* v. *State of Bihar*, A.I.R. 1971 S.C. 1409; *State of Punjab* v. *Iqbal Singh*, A.I.R. 1976 S.C. 667; *D.S. Nakara* v. *Union of India*, *supra*, note 53.

[57] The judgment was delivered by D.A. Desai J.

[58] Art. 41.

1977, any attempt at denying its benefit to widows and dependents of government servants who had not taken advantage of the 1964 liberalisation scheme by making or agreeing to make necessary contribution would be denial of equality to persons similarly situated and hence violative of Art. 14. "If widows and dependents of deceased government servants since after September 22, 1977 would be entitled to benefits of family pension scheme without the obligation of making contribution, those widows who were denied the benefits on the ground that the government servants having not agreed to make the contribution could not be differently treated because that would be introducing an invidious classification among those who would be entitled to similar treatment." Accordingly, the government agreed to extend the benefit of the scheme to the widows/dependent children of those government servants who had not agreed to contribute to the scheme before 1977.

Thus, there was a happy ending to an extremely humane problem.

Workers' Right To Be Heard When A Company Is Being Wound Up:

A very significant case of the Supreme Court is *National Textile Workers' Union* v. *P.R. Ramakrishnan.*[59] The question was: Do the workers in a company have a right of being heard when a winding up petition against the company is being heard by the court? Section 439 of the Companies Act, 1956 does not give any right to the workers of a company to present a winding up petition before the court. But the workers have clearly a stake in the company as they would be thrown on the streets if the company is wound up. In this case, three unions of workers made applications before the court on behalf of workers for the purpose of being heard. They did not claim to be impleaded as parties.

Bhagwati J. delivering the majority opinion of the court[60] conceded that when a petition for winding up of a company is

[59] A.I.R. 1983 S.C. 75.

[60] The Court divided 3:2 in this case.

presented to the court, the workers of the company have *locus standi* to appear and be heard to support or oppose winding up before the court makes the winding up order. Even though there is no specific statutory provision for the purpose, the court has accepted workers' entitlement of being heard at such a proceeding. Bhagwati J. noted that capital and labour are two equally important factors of production along with financial institutions, depositors who provide additional finance and the consumers. Now a company is not merely a legal device adopted by the shareholders for carrying on trade or business as proprietors but a socio-economic institution wielding economic power and influencing the life of the people. A company is a social institution having duties and responsibilities towards the community in which it functions.

Bhagwati J. emphasized in his judgment the important role played by the workers in the affairs of a company. He observed:

> . . . . it is not only the shareholders who have supplied capital who are interested in the enterprise which is being run by a company but the workers who supply labour are also equally, if not more, interested because what is produced by the enterprise is the result of labour as well as capital. [61]

Bhagwati J. went on to say that "it would indeed be strange that the workers who have contributed to the building of the enterprise as a centre of economic power should have no right to be heard when it is sought to demolish that centre of economic power."

The court noted that there was a difference between right to present a winding up petition and right to be heard when a petition was already pending. The workers cannot claim the first right but they are entitled to the second. Not only in quasi-judicial but even in purely administrative functions fair play in action must be observed. The court stated:[62]

> The audi alteram partem rule which mandates that no one shall be condemned unheard is one of the basic principles of natural justice and if this rule has been held to be applicable in a quasi-

[61] *Ibid.* at 83.

[62] *Id.* at 85; also see *Bhagwan Swaroop* v. *Mool Chand*, A.I.R. 1983 S.C. 355.

> judicial or even in an administrative proceeding involving adverse civil consequences, it would a fortiori apply in a judicial proceeding such as a petition for winding up of a company. It is difficult to imagine how any system of law which is designed to promote justice through fair play in action can permit the Court to make a winding up order which has the effect of bringing about termination of the services of the workers without giving them an opportunity of being heard against the making of such order. It would be violative of the basic principle of fair procedure . . .

The court held that if the interest of workers has to be taken into account, they must have a say because it is they who know best what is in their interest and they must have an opportunity of placing before the court relevant material bearing upon their interest.

The court further held that if a winding up order was made by the court and the workers felt aggrieved, they also have a right to prefer an appeal against the same. They also have a right of hearing when an application for the appointment of a provisional liquidator was made. The court, however, pointed out that neither the petitioners nor the court was under any obligation to give notice of any such application to the workers. They must apply for hearing. In reaching this result, the court specifically refused to follow the contrary rule laid down in England in *Re Bradford Navigation Company*,[63] saying that the rule was laid down in the *laissez faire* era and therefore "does not commend itself to us". Bhagwati J. asserted: "We have to build our own jurisprudence".

This pronouncement is of great significance as it changes the settled legal position that an employer cannot claim a legal right to be heard at a winding up proceeding. It would be noted that the constitutional mandate of social justice and the directive principle contained in article 43A regarding workers' participation in management was the main plank for the above approach adopted by the majority of the court.[64] The minority view did not accede to the workers' right to be heard in such proceedings.

[63](1869) LR 9 Eq. 80; (1870) 5 Ch. App. 600.

[64]43A provides that the state shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry.

In *Fertilizer Corporation Kamagar Union* v. *Union of India,*[65] the Labour Union of the workers in the Public undertaking challenged the validity of sale of certain old plants and equipment by the corporation. The Union claimed that such a sale deprived them of their right under Art. 19(1)(g).[66] The court rejected the challenge on this ground saying that Art. 19(1)(g) does not protect the right to work in a particular post under a contract of employment. "The right to pursue a calling or to carry on an occupation is not the same thing as the right to work in any particular post under a contract of employment". Art. 19(1)(g) cannot be invoked against loss of a job or retrenchment or removal from service. If workers are retrenched in a factory, they can pursue their rights and remedies under the industrial laws. The closure of an establishment in which a workman is for the time being employed does not by itself infringe his fundamental right under Art. 19(1)(g). "Art. 19(1)(g) confers a broad and general right which is available to all persons to do work of any particular kind and of their choice. It does not confer the right to hold a particular job or to occupy a particular post of one's choice". But, on the general question of *locus standi,* the court upheld the right of the Union to maintain such a petition. On this point, Chandrachud C.J. observed:

> But in an appropriate case, it may become necessary in the changing awareness of legal rights and social obligations to take a broader view of the question of *locus standi* to initiate a proceeding be it under Art. 226 or under Art. 32 of the Constitution. If the public property is dissipated, it would require a strong argument to convince the court that representative segments of the public or at least a section of the public which is directly interested and affected would have no right to complain of the infraction of public duties and obligations."

Chandrachud C.J. went on to say that public enterprises are owned by the people and those who run them are accountable to the people. If the sale of the plant and machinery were found to be "unjust, unfair and *mala fide*", the court was not sure if

[65] A.I.R. 1981 S.C. 344.
[66] *Supra,* note 49.

it would have refused relief to the workers. Krishna Iyer J. in an elaborate judgment specifically conceded *locus standi* to the workers to challenge such a sale. He emphasized that a worker clearly has an interest in the industry. If he brings an action regarding an alleged wrongdoing by the Board of Management, he will have standing to do so under Art. 226. He referred to Art. 43A of the Constitution as conferring, in principle, partnership status to workers in industry.[67] A worker cannot be kept away on technical considerations to seek to remedy wrongs committed in the management of public sector.

WAGES – Fixation of

Art. 19(1)(g) guarantees to every citizen of India the right to carry on any profession, trade or business.[68] Under Art. 19(6) reasonable restrictions can be imposed on this right in the interests of the general public. Usually, a piece of labour law can be challenged by an industrialist under these constitutional provisions on the ground that the law in question imposes an unreasonable restriction on his right to carry on trade and commerce.[69] In assessing the reasonableness of the restriction, the court has to draw a balance between the mutual rights of labour and management and, usually, in doing so, the court has tilted towards the side of the labour. For example, there is the question of fixation of wages. It is obvious that there is a close connection between the right to carry on trade and wages payable to the workmen in a trade or industry as too high wages may adversely affect the economic viability of the industry concerned but too low wages may amount to exploitation of human labour. A balance has to be struck between the two conflicting values. The Supreme Court has been called upon to do so in several cases. The court has held that the technique of appointing a wage board consisting equally of the representatives of the employers and employees with a few neutral members and a neutral chairman for fixing wages in an industry according to

[67] For Art. 43A see *supra*, note 64.

[68] *Supra*, note 49.

[69] For a discussion on Art. 19(1)(g), see, Jain, *Indian Constitutional Law*, 547 *et. seq.* (1987).

the factors laid down in the law and according to natural justice, would not amount to an unreasonable restriction on trade and commerce.[70]

Minimum Wages

Then, there has been the question of payment of minimum wages to the labour. Can an industry be made to pay minimum wages irrespective of its capacity to pay without infringing Art. 19(1)(g)? To answer this question, the Supreme Court went into the question of wages in some detail in the *Express Newspapers* case.[71] According to the court, wages are usually classified into 'living wage', 'fair wage' and 'minimum wage'. A 'minimum wage' provides for bare sustenance of life just sufficient to cover the bare physical needs of a worker and his family and preserve his efficiency as a worker, and such a wage must be paid to a worker irrespective of the industry's capacity to pay.[71] A 'living wage', on the other hand, is higher than the 'minimum wage' as it provides a 'frugal measure' of comfort and other amenities, e.g. education and health in addition to what 'minimum wage' provides for. A 'fair wage' is a mean between 'minimum' and 'living' wages. The court has ruled that Art. 19(1)(g) and 19(6) demand, that in fixing 'living' or 'fair' wages, industry's capacity to pay is an essential ingredient. If 'living' or 'fair' wages are fixed without taking into consideration industry's capacity to pay it would amount to an unreasonable restraint on the right to carry on trade. But, it is not worth having an industry if it cannot pay even 'minimum' wages. On this point, the court said:[73]

> It is quite likely that in under-developed countries, where unemployment prevails on a very large scale, unorganised labour may be available on starvation wages, but the employment of labour on starvation wages cannot be encouraged or favoured in

[70] *Express Newspapers* v. *Union of India*, A.I.R. 1958 S.C. 578.

[71] *Ibid.*

[72] Also, *P.T.I.* v. *Union of India*, A.I.R. 1974 S.C. 1044; *U. Unichoyi* v. *State of Kerala*, A.I.R. 1962 S.C. 12.

[73] *Crown Aluminium Works* v. *Their Workmen*, A.I.R. 1958 S.C. 30, 34.

> modern democratic welfare state. If an employer cannot maintain his enterprise without cutting down the wages of his employees below even a bare subsistence or minimum wage, he would have no right to conduct his enterprise on such terms."

The Supreme Court however pointed to Art. 43 as the ideal to which the social welfare state in India has to approximate in an attempt to ameliorate the living conditions of the workers. Art. 43 envisages the fixing of living wage for all workers in course of time.[74]

In *Bijay Cotton Mills* v. *State of Ajmer*,[75] the Minimum Wages Act, 1948, was challenged on the ground that it put unreasonable restrictions on employers (who could not carry on their trade without paying minimum wages), the employees (who could not work on terms mutually agreed upon between them and their employers), and that the procedure to fix minimum wages was arbitrary as it left everything to the unfettered discretion of the government. The Supreme Court held the Act valid. Securing of minimum wages to labourers is in public interest for it is necessary to ensure not only bare physical subsistence but also health and decency to labourers. It is necessary to curb the freedom of contract to prevent the exploitation of labour. The court said:

> "The employers cannot be heard to complain if they are compelled to pay minimum wages to their labourers even though the labourers on account of their poverty and helplessness are willing to work on lesser wages, and that if individual employers might find it difficult to carry on business on the basis of minimum wages fixed under the Act that cannot be the reason for striking down the law itself as unreasonable."

Though the powers enjoyed by the government under the Act[76] are wide, yet there are sufficient procedural safeguards, *viz.*, the government is to take into consideration, before fix-

[74] A.I.R. 1955 S.C. 33. Also, *Edward Mills Co. v. State of Ajmer*, A.I.R. 1955 S.C. 25.

[75] A.I.R. 1955 S.C. 33.

[76] The government has power to fix minimum wages payable to employees employed in any of the employments specified in the schedule; the government may add any employment to the schedule.

ing the minimum wages, advice of the committee or representations of the people on minimum wages;[77] each committee or advisory body is to consist of an equal number of representatives of employers and employees with a few independent persons who could take a fair and impartial view of the matter; there is a Central Advisory Board to advice the Central and State Governments in the matter of fixing and revision of minimum wages and to act as a co-ordinating agency for different advisory bodies. There is no provision for review of the government decision, but that would not make the Act unreasonable as it has adequate safeguards against hasty or capricious decision by the government.

Gratuity

Can the law impose on the industry an obligation to pay gratuity consistent with Art. 19(1)(g)?[78] The Supreme Court has replied in the affirmative. Gratuity, the court has ruled, is a retirement benefit which may be awarded when an employee resigns from service voluntarily after completion of 15 years' service. Gratuity is a reward for good, efficient and faithful service rendered for a considerable period. But there could be no justification for awarding gratuity when an employee resigns after only three years' service except under exceptional circumstances. Therefore, a legal provision providing for gratuity in such a case would amount to an unreasonable restriction under Art. 19(6).[79] On the other hand,[80] a provision made for labour welfare providing for annual paid leave or one month's notice for dismissal have been held to be reasonable. Also, a statutory provision putting an obligation on industrial undertakings to pay the statutory minimum bonus to the employees

[77]The concerned government can appoint a committee to hold enquiries to advise it in the matter of fixing minimum wages; in the alternative, by notification in the official gazette, it may publish its proposals for the information of persons likely to be affected thereby. After considering the advice of the committee or the representations on the proposals as the case may be, the government fixes the minimum wages in respect to any scheduled employment.

[78]*Supra*, note 49.

[79]*Express Newspapers, supra*, note 70.

[80]*M.G. Beedi Works* v. *Union of India*, A.I.R. 1974 S.C. 1832.

even when an undertaking sustains loss has been held to be reasonable and in public interest, as this is in implementation of the directive principles contained in Arts. 39 and 43.[81] What is sanctioned by directive principles cannot be regarded as unreasonable or contrary to public interest in the context of Art. 19.[82]

Dismissal benefits

The scale of compensation payable to the employees by the employers who close their undertakings, prescribed by the Industrial Disputes Act,[83] has been held to be not unreasonable, because it is based on social justice.[84]

Restriction on closure of an undertaking

A provision in the Industrial Disputes Act required an employer intending to close down his industrial undertaking to give a three months' notice to the government of its intended closure. The government could refuse to permit closure if it was satisfied that the reasons for the intended closure of the undertaking were "not adequate and sufficient" or that "such closure is prejudicial to the public interest." If an employer closed down the undertaking without observing this procedure, he could be punished with imprisonment up to 6 months, or fine up to 5000 rupees, or with both. The closure would be illegal and the workmen would be entitled to all the benefits under any law as if no notice had been given to them. In *Excel Wear* v. *India*,[85] the Supreme Court declared this provision to be unconstitutional. Commenting on the above provision, the court

[81] *Supra*, notes 4-9.

[82] *Jalan Trading Co.* v. *D.M. Aney*, A.I.R. 1979 S.C. 233. For directive principles see *supra*, notes 2-10.

[83] S. 25F stipulates that when an undertaking is closed for reasons beyond the control of the employer, the workmen will be compensated on the basis of 15 days' average pay for every completed year of continuous service.

[84] *Hathisingh Mfg. Co. Ltd.* v. *Union of India*, A.I.R. 1960 S.C. 923; *Excel Wear*, *infra*, note 85.

[85] A.I.R. 1979 S.C. 25.

said that the reasons given by the employer for closure of the undertaking might be correct yet permission could still be refused if the government thought them to be "not adequate and sufficient". The authority can refuse permission to close down "whimsically and capriciously". No reasons need be given in the government order granting or refusing the permission. The government was not enjoined to pass the order within the 90 days' period of notice. No provision was made for review of the order, or for appeal from the government order to any higher tribunal. The right to close down a business is "an integral part" of the right to carry it on.[86] The court rejected the contention that "an employer has no right to close down a business once he starts it." The right to close is itself a fundamental right embedded in the right to carry on any business guaranteed under Art. 19(1)(g). But as no right is absolute in scope, this right could also be restricted, regulated or controlled by law in the interest of the general public. The restrictions imposed on this right by the impugned provision in question were held to be unreasonable. The court also rejected the contention of the employers that the right to close down business was at par with the right not to start a business at all. The court said that while no one can be compelled to start a business, it is different from closing down a business. The two rights cannot be equated.

Replying to the argument that the word "socialist" existing in the Preamble to the Constitution and, therefore, the tests for "reasonableness" have to be evolved accordingly, the court said that after the addition of the word 'socialist' the court might lean more and more in favour of nationalisation and state ownership. The court cautioned that one must take a pragmatic approach rather than a doctrinaire approach to the problem of socialism. The court raised the following question:

> But so long as the private ownership of an industry is recognised and governs an overwhelmingly large proportion of our economic structure, is it possible to say that principles of socialism and social justice can be pushed to such an extreme so as to ignore completely or to a very large extent the interests of another section of the public namely the private owners of the under-

[86] Ref. *Hathisingh Mfg. Co. Ltd.* v. *India, supra,* note 84.

> takings? Most of the industries are owned by limited companies in which a number of shareholders both big and small, holds the shares. There are creditors and depositors and various other persons connected with or having dealings with the undertaking. Does socialism go to the extent of not looking to the interests of all such persons?"

The court pointed out that in private sector, there are owners managing the business and the owner runs the business for return not only for purposes of meeting his livelihood or expenses but also for the purpose of the growth of the national economy by formation of more and more capital. The court asked: "Does it stand to reason that by such rigorous provisions like those contained in the impugned sections all these interests should be completely or substantially ignored? The questions posed are suggestive of the answers".

The court accepted the proposition that public interest and social justice do require the protection of labour. But it could not be done at the cost of the interests of so many persons interested and connected with the management; the employer cannot be compelled to run the undertaking and suffer loss after loss every year, or run the undertaking even at the risk of his person and property. Already the law provided for compensation to the workers in case of closure.

In this case, the court endeavoured to strike a balance between the conflicting interests of employer and employee. To protect employment of the workers, the law had gone to an extreme limit. The court felt that the law unfairly and unreasonably tilted the balance in favour of the employees ignoring the employers and so the court held the law bad under Art. 19(1)(g) read with Art. 19(6).

Forced Labour

Articles 23 and 24, though fundamental rights, lay dormant for almost thirty two years and were hardly ever invoked by the litigants. Since 1982, Arts. 23 and 24 have become potent instruments in the hands of the Supreme Court to ameliorate the pitiable condition of the poor in the country.

According to Art. 23(1), traffic in human beings, *begar* and other similar forms of forced labour are prohibited and any con-

travention of this provision shall be an offence punishable in accordance with law.

The term *begar* means compulsory work without payment. The practice was widely prevalent in the erstwhile princely States in India before the advent of the Constitution. It was a great evil and has, therefore, been abolished through Art. 23(1).[87] Withholding of pay of a government employee as a punishment has been held to be invalid in view of Art. 23 which prohibits *begar*. "To ask a man to work and then not to pay him any salary or wages savours of *begar*. It is a fundamental right of a citizen of India not to be compelled to work without wages."[88] A village custom requiring every householder to offer a day's free labour to village headman infringes Art. 23(1).[89] The expression 'traffic in human beings', commonly known as slavery implies the buying and selling of human beings as if they are chattels, and such a practice is abolished. Traffic in women for immoral purposes is also covered by this expression.[90] The words 'other similar forms of forced labour' in Art. 23(1) are to be interpreted *ejusdem generis*. The kind of 'forced labour' contemplated by the Article has to be something in the nature of either traffic in human beings or *begar*.[91]

A significant feature of Art. 23 is that it protects the individual not only against the state but also against other private citizens.

The Supreme Court has given an expansive significance to the term 'forced labour' used in Art. 23 in a series of cases beginning with the *Asiad* case in 1982.[92] The court has insisted that Art. 23 is intended to abolish every form of *forced* labour even if it has origin in a contract. Art. 23 strikes at forced

[87] VII *Constituent Assembly Debates*, 803-13. See, Commissioner of Scheduled Castes and Scheduled Tribes, *First Rep.*, 22-27 (1952).

[88] *Suraj* v. *State of Madhya Pradesh*, A.I.R. 1960 M.P. 303.

[89] *R.K. Tangkhul* v. *R.S. Khullakpa*, A.I.R. 1961 Man. 1.

[90] *Raj Babadur* v. *Legal Remembrancer, Govt. of West Bengal*, A.I.R. 1953 Cal. 522; *Shama Bai* v. *State of Uttar Pradesh*, A.I.R. 1959 All. 57.

[91] Conscription for police or military service does not fall under either traffic in human beings or *begar*. *Dulal Samanta* v. *Dist. Magistrate, Howrah*, A.I.R. 1958 Cal. 365.

[92] *People's Union for Democratic Rights* v. *India*, A.I.R. 1982 S.C. 1473. see *infra*, note 143, for facts.

labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values.

It was argued in the *Asiad* case that Art. 23 should be interpreted as prohibiting not every form of forced labour but only such form thereof as was similar to *begar*, meaning labour or service which a person was forced to render without receiving any remuneration at all. The court rejected this narrow view of Art. 23. Bhagwati J. said while countering such a view:

> It is difficult to imagine that the Constitution makers should have intended to strike only at certain forms of forced labour leaving it open to the socially or economically powerful sections of the community to exploit the poor and weaker sections by resorting to other forms of forced labour.

So, the court insisted that every form of forced labour, *begar* or otherwise, is within the inhibition of Art. 23, and it makes no difference whether the person who is forced to give his labour or service to another is remunerated or not. Even if remuneration is paid, labour supplied by a person would be hit by Art. 23 if it is forced labour, that is, labour supplied not willingly but as a result of force or compulsion. Even if a person has contracted with another to perform service and there is consideration for such service, "he cannot be forced, by compulsion of law or otherwise, to continue to perform such service, as that would be forced labour."

Giving a very expansive interpretation to Art. 23, the Supreme Court has ruled that even payment of wages less than the minimum wages would amount to forced labour. Bhagwati J. has argued that ordinarily no one would willingly supply his labour for less than the minimum wages. He would do so only under the force of some compulsion. Under Art. 23, 'forced labour' is prohibited, i.e. labour or service which a person is forced to provide. 'Force', Bhagwati J. has emphasized, which would make labour or service 'forced labour' may arise in several ways. It may be physical force compelling a person to provide labour or service to another, or it may be force exerted through a legal provision, such as, a provision for imprisonment or fine for failure to provide labour or service, or it may even be "compulsion arising from hunger and poverty, want and destitution". Any factor depriving a person of a choice of alternatives

and compelling him to adopt one particular course of action may properly be regarded as force and if labour or service is compelled as a result of such 'force', it would amount to 'forced labour'. As Bhagwati J. has said:

> Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly 'forced labour'.

There is no reason, emphasized Bhagwati J., as to why the word 'forced' in Art. 23 should be read in a narrow and restricted manner so as to be confined only to "physical or legal force". According to Bhagwati J. in the *Asiad* case:[93]

> The word 'force' must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage.

Therefore, a complaint that minimum wage[94] is not being paid to the workmen by government contractors, in effect and substance, amounts to a complaint against violation of the fundamental right of the workmen under Art. 23, for providing labour for less than the minimum wage clearly falls within the scope and ambit of the words 'forced labour' in Art. 23. Such a person can come to the court for enforcement of his fundamental right under Art. 23 and ask the court to direct payment of

[93] *Ibid.*, at 1491.

[94] *Supra*, notes 71-77.

the minimum wage to him so that the labour or service provided by him ceases to be 'forced labour' and the breach of Art. 23 is remedied.

Non-observance of the Equal Remuneration Act, 1976[95] by government contractors has been held to raise questions under Art. 14.[96]

The government cannot ignore violation of equality by its own contractors. If any contractor is committing a breach of the Act and thus denying equality before law to the workmen, the government is under an obligation to ensure that the contractor observes the Act and does not breach the equality clause.

Most of the fundamental rights operate as limitations on the power of the state and impose negative obligations on the state not to encroach on individual liberty and the rights are only enforceable against the state. But fundamental rights, such as, Arts. 17, 23 and 24, are enforceable against the whole world.

Bhagwati J. has emphasized in *Asiad* that whenever any fundamental right which is enforceable against private individuals, such as, Art. 17 or 23 or 24, is being violated, the state is constitutionally obligated to take necessary steps for the purpose of interdicting such violation and ensuring that the fundamental right is observed by the private individual who is transgressing the same. The person whose fundamental right is violated can always approach the court for enforcement of his fundamental right. But that does not absolve the state from its constitutional obligation to see that the fundamental right of such person is not violated, "particularly when he belongs to the weaker section of humanity and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him." Thus the court ordered the concerned authorities – Central Government and the Delhi Development Authority –

[95] The Act has been enacted in pursuance of Act. 39, *supra*, notes 5-9. The Act provides for payment of equal remuneration to men and women workers for the same work or work of a similar nature and for the prevention of discrimination on grounds of sex. The Act also ensures that there will be no discrimination against recruitment of women and provides for the setting up of advisory committees to promote employment opportunities for women. Provision is made for appointment of officers for hearing and deciding complaints regarding contravention of the provisions of the Act. Inspectors are to be appointed for the purpose of investigating whether the provisions of the Act are being complied with by employers.

[96] *Supra*, note 11.

responsible for the construction of various *Asiad* projects to ensure that workers got minimum wages and other labour welfare measures were not flouted to the detriment of workers. The authorities were required to ensure the observance of various labour laws, e.g., the Contract Labour Act, the Minimum Wages Act, the Equal Remuneration Act, the Employment of Children Act and the Inter-State Migrant Workmen Act.

In *Sanjit Roy* v. *Rajasthan,*[97] payment by the State of wages lower than the minimum wages to persons employed on famine relief work was held invalid under Art. 23. Because of famine conditions in the countryside, the Public Works Department of the State of Rajasthan started a road building project as a famine relief measure and a large number of workers was employed on this project. As it transpired, the State was paying to these workers less than the minimum wage fixed for unskilled workers in the State. The State claimed that this was authorised by the Rajasthan Famine Relief Works Employees (Exemption from Labour Laws) Act, 1964. Thus, the State argued that because of the Exemption Act, the Minimum Wages Act was not applicable to employees engaged on a famine relief work. Bhagwati J. referred to his earlier ruling in the *Asiad* case and reiterated the proposition that every person providing labour or service to another is entitled at least to the minimum wage and, if less than minimum wage is paid to him, Art. 23 is infringed. Bhagwati J. insisted that Art. 23 "is intended to eradicate the pernicious practice of 'forced labour' and to wipe it out altogether from the national scene". Therefore, the Exemption Act which warranted payment of less than minimum wages on famine relief work was held to be unconstitutional.

It was argued by the State that if it were required to observe labour laws while providing relief to persons affected by drought and famine, its potential to provide employment to affected persons would be reduced and it would not be able to render help to maximum number of sufferers. The court rejected the contention saying though the plea of the State might seem 'plausible' but it was 'unsustainable'. Bhagwati J. argued that though the State undertakes famine relief work to provide relief to suffering people, nonetheless, the work done by them

[97] A.I.R. 1983 S.C. 328.

enures for the benefit of the State representing the society. When the affected persons provide labour or service for carrying out such work there is no reason why the State should pay anything less than the minimum wage to such persons. The state is not giving dole or bounty to the affected persons; the work done by them is not worthless or useless to the society as to do so would be sheer waste of human labour and resources which could be usefully diverted to fruitful and productive channels leading to community welfare and creation of national wealth or asset. Therefore, if persons are employed in doing useful work, there can be no justification for the state not to pay them minimum wage. Bhagwati J. observed on this point as follows:

> The State cannot be permitted to take advantage of the helpless condition of the affected persons and extract labour or service from them on payment of less than the minimum wage. No work of utility and value can be allowed to be constructed on the blood and sweat of persons who are reduced to a state of helplessness on account of drought and scarcity conditions. The State cannot under the guise of helping these affected persons extract work of utility and value from them without paying them the minimum wage. Whenever any labour or service is taken by the State from any person, whether he be affected by drought and scarcity conditions or not, the State must pay, at the least, minimum wage to such person on pain of violation of Article 23 and the Exemption Act in so far as it excludes the applicability of the Minimum Wages Act 1948 to workmen employed on famine relief work and permits payment of less than the minimum wage to such workmen, must be held to be invalid as offending the provisions of Article 23.

The court therefore directed the State to pay to these workers the minimum wage and also to pay them the difference between the minimum wage and the actual wage paid for the past service.

In *Robit Vasavada* v. *Gen. Man., IFFCO,*[98] the pitiable conditions of contract labour working in a fertiliser factory run by a cooperative society were brought to the notice of the Gujarat High Court. These workers had to handle urea manually with-

[98] A.I.R. 1984 Guj. 102.

out adequate safeguards; they were not free to leave the premises as they desired; their health was in jeopardy and that proper wages were not being paid to them. The High Court characterised this form of labour as forced labour prohibited by Art. 23. The court pointed out that economic compulsions may persuade workmen to work under conditions different from those envisaged in the labour laws and the mere fact that they are working, not under any apparent physical restraint, does not render the work voluntary. The court said that when due to economic compulsions, workmen are forced to work under inhuman or sub-human conditions, without the safeguards, facilities and amenities secured to them under the law being made available to them, irrespective of wages paid to them and their apparent consent, the labour employed will be forced labour contrary to Art. 23. The court thus gave necessary directions to the Labour Commissioner to take steps to remedy the situation and to enforce the provisions of the Contract Labour (Regulation and Abolition) Act, 1970.

The Kerala High Court has declared[99] that the prisoners are entitled to payment of reasonable wages for the work taken from them. The right not to be exploited in contravention of Art. 23(1) is a right guaranteed to a citizen and there is no reason why a prisoner should lose his right to receive wages for his labour. The court directed the state to pay Rs. 8 per day as wages to prisoners for their work instead of the prevailing rate of Rs. 1.60 per day.

In *Labourers Working on Salal Hydro-Project* v. *Jammu & Kahsmir,*[100] the Supreme Court found that the workmen employed on the project were being denied the rights and benefits ensured to the workmen under various labour laws. For example, the provisions of the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979,[101] were not being implemented at all and violations of the Minimum Wages Act and the Contract Labour Act were also taking

[99] *In the matter of: Prison Reforms Enhancement of Wages of Prisoners,* A.I.R. 1983 Ker. 261.

[100] A.I.R. 1984 S.C. 177. Also see, *infra,* note 147.

[101] The Act has been enacted to protect the workmen from one State working in another State from exploitation.

place. The court directed the Central Government to ensure that the contractors at the project implemented the various labour laws. The court directed: "The Central Government will at once proceed to identify 'inter-state migrant workmen' from amongst the workmen employed in the project work and adopt necessary measures for ensuring to them the benefits and advantages provided under the Inter-State Migrant Workmen Act." The court also directed the Central Government to file an affidavit within one month setting out the steps taken by it to implement the Act at the project site. Similarly, in *Ram Kumar* v. *Bihar,*[102] the court directed the state to pay minimum wages to the employees at the ferries at Bhagalpur and Sultanganj which fell under the purview of the Act.

Bonded Labour

A serious socio-economic problem in India has been that of bonded labour. Under the bonded system, one person is bonded to provide labour to another for years and years until a debt is supposed to be wiped out. The system is designed to enable a few socially and economically powerful persons to exploit the weaker sections of the people. This is a relic of the feudal hierarchical society. Bonded labour is unconstitutional under Art. 23,[103] as it can be regarded as a form of forced labour. To give effect to Art. 23, Parliament has enacted the Bonded Labour System (Abolition) Act, 1976. This Act strikes at the system of bonded labour.[104] In spite of the constitutional and legal provisions abolishing bonded labour, the implementation of the law has been very tardy at the administrative level as all kinds of vested interests make themselves felt in this area. There are many difficult problems involved in eradicating such labour, *e.g.*, problem of identifying bonded labour, problem of rehabilitation after release from the bondage etc. Even when beneficent laws are passed by the legislature in the interest of the poor, there remains administrative resistance and inertia in im-

[102] A.I.R. 1984 S.C. 537.

[103] *Supra*, note 14.

[104] The Act abolished bonded labour system with a view to preventing the economic and physical exploitation of the weaker sections of the people.

plementing such laws. The courts have recently shown a welcome tendency to prod the administration towards implementing such laws and acting in a supervisory capacity over the administration.[105] The slow implementation of the law banning bonded labour has given rise to several judicial pronouncements by way of public interest litigation. In *Bandhua Mukti Morcha* v. *Union of India*,[106] Bhagwati J. has characterised the process of identification and release of bonded labourers "as a process of discovery and transformation of non-beings into human beings." He has emphasized that this is a "constitutional imperative" that "the bonded labourers must be identified and released from the shackles of bondage so that they can assimilate themselves in the main-stream of civilised human society and realise the dignity, beauty and worth of human existence."

In *Bandhua Mukti Morcha*,[107] Bhagwati J. has condemned the system of bonded labour very strongly in the following words:

> This system under which one person can be bonded to provide labour to another for years and years until an alleged debt is supposed to be wiped out which never seems to happen during the lifetime of the bonded labourer, is totally incompatible with the new egalitarian socio-economic order which we have promised to build and it is not only an affront to basic human dignity but also constitutes gross and revolting violation of constitutional values.[108]

Linking Arts. 23 and 21[109] in the context of the bonded labour, Bhagwati J. has observed: "It is the fundamental right of every one in this country, assured under the interpretation given to Art. 21 . . . to live with human dignity, free from exploitation." Where legislation has already been enacted investing the right of the workmen to live with human dignity, with concrete reality and content, "the state can certainly be obligated to

[105] *Infra*, note 143 *et seq.*

[106] A.I.R. 1985 S.C. 802, 806.

[107] A.I.R. 1984 S.C. 802.

[108] *Ibid.*, 805.

[109] *Supra*, notes 21 & 23.

ensure observance of such legislation for inaction on the part of the state in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Art. 21."[110]

In the instant case, it was established that a large number of labourers were working in stone quarries in the State of Haryana under inhuman and pathetic conditions; no medical aid was provided to them, no safety rules were observed and they lived in sketchy torn huts without roofs and that the State authorities were not properly enforcing the relevant laws. The Supreme Court ordered release of these persons from bondage. The court also emphasized upon the importance of rehabilitation of the released bonded labourers otherwise their condition would be much worse than before. In the instant case, the court directed the State Government "to draw up a scheme or programme for a better and more meaningful rehabilitation of the freed labourers". The court also took cognisance of certain complaints of the workmen at stone quarries, e.g. non-provision of pure drinking water, non-provision of conservancy facilities, absence of medical facilities etc. The court gave due directions to remove these complaints and provide the necessary facilities to the workmen.

On the question of identifying bonded labour, the court has said in *Neeraja Chowdhury* v. *Madhya Pradesh*:[111]

> Whenever it is found that any workman is forced to provide labour for no remuneration or nominal remuneration, the presumption would be that he is a bonded labourer unless the employer or the state government is in a position to prove otherwise by rebutting such presumption.[112]

The question of rehabilitation of bonded labour after release from bondage is crucial. For, otherwise, these labourers will again relapse in bondage if not properly rehabilitated. Official apathy towards rehabilitation of labourers released from their bondage was visibly demonstrated in *Neeraja Chow-*

[110] A.I.R. 1984 S.C. at 812.
[111] A.I.R. 1984 S.C. 1099.
[112] *Ibid.*, at 1103.

dhury, 135 bonded labourers who had been working in stone quarries and were released from their bondage in pursuance of the order of the Supreme Court in *Bandhua Mukti Morcha* were not properly rehabilitated and their sad plight after release from bondage was brought to the notice of the Supreme Court by Neeraja *Chowdhury*, the civil rights correspondent of the *Statesman*, a daily newspaper. The petitioner urged that it was the obligation of the state government to ensure rehabilitation of the bonded labour under the Bonded Labour System (Abolition) Act, 1976 and the government's failure to provide such rehabilitation assistance would amount to violation of the labourers' fundamental right under Art. 21. After hearing arguments, the court directed the state government to provide rehabilitation assistance to these people within a month with the following observation:

> Poverty and destitution are almost perennial features of Indian rural life for large numbers of unfortunate, ill-starred humans in this country and it would be nothing short of cruelty and heartlessness to identify and release bonded labourers, to throw them at the mercy of the existing social and economic system which denies to them even the basic necessities of life such as food, shelter and clothing . . . It is therefore imperative that neither the Government nor the Court should be content with merely securing identification and release of bonded labourers but every effort must be made by them to see that the freed bonded labourers are properly and suitably rehabilitated after identification and release."

A.N. Sen J., in a separate concurring judgment, emphasized that freedom from bondage without effective rehabilitation was of no consequence as it would frustrate the entire purpose of the Act and the vice of the bonded labour system would continue to perpetuate its evil existence.

The court directed the state government to make a vigorous effort to identify and rehabilitate the bonded labourers. If not rehabilitated, they would soon relapse into the state of bondage. Accordingly, the court said: "It is the plainest requirement of Arts. 21 and 23 of the Constitution that bonded labourers must be identified and released and on release, they must be suitably rehabilitated." The court emphasized that any failure on the part of the government in implementing the provisions

of the Bonded Labour System (Abolition) Act would be the clearest violation of Art. 21 apart from Art. 23.

The court pointed out that the Act in question has been passed pursuant to the directive principles of state policy with a view to ensuring basic human dignity to the bonded labourers. In the instant case, the court directed the state government to provide rehabilitative assistance to 135 freed bonded labourers within one month. The state government was asked to file affidavits stating how the court's directions were implemented. The court also made a number of practical suggestions for improving the implementation of the law. The court advocated use of social action groups which work at grass roots level to identify bonded labourers, as there prevails a concealed practice of bonded labour.

Children

Another critical human and economic problem is that of child labour. Poor parents seek to augment their meagre income through employment of their children. It is also of financial advantage to employers. A total prohibition on any form of child labour may not be socially feasible in the prevailing socio-economic environment.[113] Art. 24 in the Indian Constitution, therefore, puts only a partial restriction on child labour.

Art. 24 prohibits the employment of a child below the age of fourteen years to work in any factory or mine or in any other hazardous employment. The Supreme Court has emphasized in *Asiad*[114] that Art. 24 embodies a fundamental right "which is plainly and indubitably enforceable against every one." By reason of its compulsive mandate, no one can employ a child below the age of 14 years in a hazardous employment like construction work. The contractors are thus under a constitutional mandate not to employ any child below 14 years on construction work. It is also the duty of the Union Government, Delhi Administration and the DDA to ensure that the contrac-

[113] In May, 1984, Parliament discussed the question of totally banning child labour. The consensus was that this was not feasible although it was necessary to ensure that working conditions for children are improved and facilities for their education, nutrition and health care ought to be provided.

[114] *Supra*, note 92.

tors to whom they entrust the construction work also obey this constitutional obligation. In the words of Bhagwati J.: "The Union of India, the Delhi Administration and the Delhi Development Authority cannot fold their hands in despair and become silent spectators of the breach of a constitutional prohibition being committed by their own contractors."[115]

The court reiterated this ruling in *Labourers Working on Salal Hydro-Project* v. *Jammu and Kashmir*:[116] Construction work being hazardous employment, children below 14 cannot be employed in this work because of constitutional prohibition contained in Art. 24. The court directed the Central Government to enforce this prohibition. The court also suggested that the Central Government should persuade the workmen to send their children to a nearby school and provide for free education there. The government ought to provide for schooling for children of workmen near the project site. On the problem of child labour generally, the court had this to say:

> We are aware that the problem of child labour is a difficult problem . . . The possibility of augmenting their meagre earnings through employment of children is very often the reason why parents do not send their children to schools and there are large drop-outs from the schools. This is an economic problem and it cannot be solved merely by legislation. So long as there is poverty and destitution in this country, it will be difficult to eradicate child labour. But even so an attempt has to be made to reduce, if not eliminate the incidence of child labour.[117]

The court emphasized that a child should receive proper education with a view to equipping himself to become a useful member of the society and to play a constructive role in the socio-economic development of the country. The court was fully conscious of the fact that in the prevailing socio-economic development of the country, prohibition of child labour altogether would not be acceptable to large masses of people.

Reading Arts. 15(3), 24 and cls. (e) and (f) of Art. 39, the Supreme Court has emphasized in *Lakshmi Kant* v. *India*[118]

[115] A.I.R. 1982 S.C. 1484.
[116] A.I.R. 1984 S.C. 177.
[117] *Ibid.*, 183.
[118] A.I.R. 1984 S.C. 469.

upon the great importance of child welfare in the country. According to the court, the welfare of the entire community depends on the health and welfare of its children. In this case, another serious problem concerning children was ventilated in the Supreme Court. A large number of Indian children are being adopted by foreigners. There were complaints of malpractices indulged in by social organisations and voluntary agencies engaged in the task of offering children in adoption to foreigners. There were complaints that these children were maltreated in foreign lands after adoption. Unfortunately, India has no law to regulate such adoptions. A Bill was introduced for the purpose in Parliament sometime back but it could not be enacted because of opposition from some groups of people.

Pointing to Arts. 15(3), 24 and 39(e) and (f), the court said: "The constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interests and welfare of children in the country." Accordingly, the court took the opportunity to lay down guidelines for adoption of Indian children by foreign parents as there was no statutory enactment for the purpose. The court emphasized that the primary purpose of giving the child in adoption must be his own welfare, and, therefore, great care must be exercised in permitting the child to be given in adoption to foreign parents.[119]

Criminal Justice and the Poor

Since 1978, the Supreme Court has been endeavouring to humanise and liberalise administration of criminal justice. This new trend in judicial approach has been beneficial to the poor accused persons in several ways. This subject deserves a separate paper in its own right and cannot be fully discussed here. However, one or two salient aspects of the new trend can be mentioned here.

The new trend starts with the reincarnation of Art. 21 of the Indian Constitution in 1978. Art. 21 merely says: "No person shall be deprived of his life or personal liberty except according to procedure established by law." Till 1978, the

[119] Also see: *In re: Dr. Giovanni Marco Muzzu*, A.I.R. 1983 Bom. 242; *In re: Rasiklal Chhaganlal Mehta*, A.I.R. 1982 Guj. 193.

Supreme Court had been taking a static, mechanical view of Art. 21. In *Gopalan,*[120] in 1950, the Court refused to read due process of law or natural justice or reasonableness in Art. 21 and insisted that the expression 'law' in that provision merely signified a statutory law and, thus, to deprive a person of his life or liberty what was necessary was merely to lay down some procedure in a statute. Its reasonableness or otherwise could not be adjudged by the court. In 1978, the court gave up this sterile approach in the momentous decision of *Maneka Gandhi.*[121] The court now ruled, in the words of Bhagwati J., that the 'procedure' in Art. 21 "must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Art. 21 would not be satisfied".

This new judicial approach makes Art. 21 more or less synonymous with the procedural due process in the U.S.A. The new judicial approach has manifested itself in several propositions laid down by the court in relation to administration of criminal justice. One significant proposition is that no procedure can be 'reasonable, fair or just' unless it "ensures a speedy trial for determination of the guilt of such person" and that speedy trial is "an integral and essential part of the fundamental right to life and liberty enshirned in Art. 21."[122] This leads to another proposition that long pre-trial confinement of an individual in prison jeopardises his individual liberty." On this basis, the court has ordered release of hundreds of persons (most of them poor people) who had been languishing in prisons for long without trial. In one case,[123] the court has said:

> It is a crying shame upon our adjudicatory system which keeps men in jail for years on end without a trial.

[120] *A.K. Gopalan* v. *State of Madras,* A.I.R. 1950 S.C. 27. See, Jain, *Indian Constitutional Law,* 577-80 (1987).

[121] *Maneka Gandhi* v. *Union of India,* A.I.R. 1978 S.C. 597; Jain, *op.cit.,* 582-4.

[122] *State of Maharashtra* v. *Champalal,* A.I.R. 1981 S.C. 1675.

[123] *Kedra Pahadiya* v. *State of Bihar,* A.I.R. 1981 S.C. 939; A.I.R. 1982 S.C. 1167.

Colossal injustice being perpetrated on persons kept in prison for long without trial was revealed in *Hussainara.*[124] When the case brought to the notice of the Supreme Court the fact that thousands of undertrials were rotting in Bihar prisons without trial, the court felt outraged. There were cases in which such imprisonment had exceeded the maximum imprisonment which could be awarded under the law for the offences with which they were charged. Bhagwati J. in a blistering attack on the system of administration of criminal justice observed as regards the hapless condition of these poor prisoners:

> Law has become for them an instrument of injustice and they are helpless and despairing victims of the legal and judicial system . . . It is a crying shame on the judicial system which permits incarceration of men and women for such long periods of time without trial . . .

Bhagwati J. observed that the neglect of these person by every one connected with their imprisonment reduced them to "forgotten specimens of humanity" and turned them into mere "ticket numbers" and that their poverty was their crime.

One of the reasons for thousands of accused persons languishing in jails for long awaiting their trial, the court has concluded, is the irrational law regarding bail which insists on financial security from the accused and their sureties. Thus, the poor and indigent persons cannot be released on bail as they are unable to provide financial security and, consequently, they have to remain in prison awaiting their trial. Very often the amount of bail is set at an unrealistic excessive figure and the poor are unable to satisfy the police or the magistrate about their solvency as regards the amount of bail. If the bail is set with sureties, it is almost impossible for the poor to find persons sufficiently solvent to stand as sureties. Thus, the system of criminal justice becomes oppressive and heavily weighted against the poor and they find themselves helplessly in a position of inequality with the non-poor. The result of the irrational law is that even per-

[124] *Hussainara Khatoon v. State of Bihar*, A.I.R. 1979 S.C. 1360, 1379. Also see, *infra*, note 154.

sons accused of bailable offences are unable to secure bail. The court has characterised the system as 'antiquated' and has made the constructive suggestion that legal provisions for bail be changed so that there is no longer need for bail being based merely on financial sureties but that other factors should also be taken into account so that the poor can get their release from the prison pending their trial. Pending reform of the law, the court has laid down that even under the law as it exists, if the trial court feels satisfied that an accused has his roots in the community and that he is not likely to abscond, it can safely release him on his personal bond without sureties. The Supreme Court has laid down guidelines to enable the lower courts to determine whether the accused has his roots in the community which would deter him from fleeing from justice.[125] The Court has emphasized in this connection: ". . . the issue is one of liberty, justice, public safety and burden on the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitive judicial process."[126]

A proposition which may prove to be very beneficial to the poor accused persons laid down by the Supreme Court is that free legal aid be provided by the state to poor prisoners facing a prison sentence. This is a big step forward in humanising the administration of criminal justice. The court has emphasized that the lawyer's services constitute an ingredient of fair procedure to a prisoner who is seeking his liberation through the court's procedure. Thus, the state should provide free legal aid to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service.[127]

The court has reiterated this theme again and again. For example, in *Hussainara,*[128] the court has said: "It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he

[125] *Hussainara Khatoon* v. *State of Bihar,* A.I.R. 1979 S.C. 1360; *Moti Ram* v. *State of Madhya Pradesh,* A.I.R. 1978 S.C. 1594.

[126] *Babu Singh* v. *State of Uttar Pradesh,* A.I.R. 1978 S.C. 527, 529. Also, *Natio Jiria* v. *State of Gujarat,* (1984) Cri. L.J. 936.

[127] *M.H. Hoskot* v. *State of Maharashtra,* A.I.R. 1978 S.C. 1548.

[128] *Hussainara Khatoon* v. *State of Bihar,* A.I.R. 1979 S.C. 1369, 1373.

should have legal services available to him." Free legal service to the poor and the needy is an essential element of any "reasonable, fair and just procedure". The court has exhorted the Central and state governments to introduce a comprehensive legal service programme in the country. In support of this suggestion, the court has also invoked Art. 39A, a directive principle, which provides for free legal aid,[129] and has interpreted Art. 21 in the light of Art. 39A. Art. 39A puts stress upon legal justice. Put simply, the directive requires the state to provide free legal aid to deserving people so that justice is not denied to anyone merely because of economic disability. The court has emphasized that legal assistance to a poor or indigent accused who is arrested and put in jeopardy of his life or personal liberty is a constitutional imperative mandated not only by Art. 39A but also by Arts. 14 and 21. In the absence of legal assistance, injustice may result. Every act of injustice corrodes the foundations of democracy.[130] In *Hussainara,*[131] Bhagwati J. has said:

> Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable, fair and just'."

In *Khatri,*[132] the court has emphasized that the state governments cannot avoid their constitutional obligation to provide free legal service to the poor accused by pleading financial or administrative inability.

Further, the court has insisted that the obligation to provide free legal service to a poor accused arises not only when the trial begins but also when he is for the first time produced before the magistrate because it is at the stage that the accused gets his first

[129] Art. 39A obligates the state to secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and the state shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

[130] *Sheela Barse* v. *State of Maharashtra,* A.I.R. 1983 S.C. 378.

[131] *Hussainara Khatoon* v. *State of Bihar,* A.I.R. 1979 S.C. at 1373.

[132] *Khatri* v. *State of Bihar,* A.I.R. 1981 S.C. 928.

opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody and, therefore, the accused needs competent legal advice and representation at that stage. The accused can also claim free legal aid after he has been sentenced by a court, but is entitled to appeal against the verdict. The court has further emphasized that it is the legal obligation of the magistrate or judge before whom the accused is produced to inform him that if he is unable to engage a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. The court has taken the view that the right to free legal services would be illusory for an indigent accused unless the trial judge informed him of such right. Since more than 70% of the people in the rural areas are illiterate and even more than that percentage of people are unaware of the rights conferred on them by law, it is essential to promote legal literacy as part of the programme of legal aid. It would be a mockery of legal aid if it were to be left to the poor ignorant and illiterate accused to ask for free legal services. "Legal aid would become a paper promise and it would fail in its purpose". The trial judge is therefore obligated to inform the accused that if he is unable to engage a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the state.[133] The court has directed all state governments to make provision for grant of free legal service to the poor accused persons. However, the court has subjected the provision for legal aid to the following rider:[134]

> The only qualification would be that the offence charged against that accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that in the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the state.

[133] Bhagwati J. in *Khatri* v. *Bihar, ibid.* at 931.

[134] *Ibid.* Also, *Sheela Barse* v. *State of Maharashtra*, A.I.R. 1983 S.C. 379.

The interesting case of *Ranjan Dwivedi*[135] may be noted here. The court has reiterated in this case that when the accused is unable to engage a counsel owing to poverty or similar circumstances, the trial would be vitiated, unless the state offers free legal aid for his defence to engage a lawyer to whose engagement he does not object. The Supreme Court has referred approvingly to the U.S. case, *Gideon* v. *Wainright*[135] in this connection. The real bone of contention in the instant case was that under the rules of the Delhi High Court only a daily fee of Rs. 24/- per day was payable to a lawyer appearing as *amicus curiae*. Ranjan argued that for such a paltry fee, no lawyer of standing would find it possible to appear. The prosecution was being conducted by senior lawyers and, therefore, Ranjan argued that as a matter of processual fair play the State should provide him with a counsel on the basis of equal opportunity. The Supreme Court quantified the fees payable at Rs. 500/- per day to the senior counsel and Rs. 350/- per day for junior counsel for representing the petitioner.

IV

Remedial Aspects: Public Interest Litigation

A right without a remedy does not have much substance. Whatever substantive rights may be conferred on the poor by the Constitution or by law, these rights cannot help the poor much as they are not able to enforce them through court action because being poor and illiterate they lack the resources to undertake the dilatory and costly court action. A signal achievement of the judiciary is to correct this inherent flaw in judicial procedure by developing the mechanism of public interest litigation. For this purpose, the Supreme Court has given an extensive interpretation to Arts. 32 and 226 of the Constitution.

Article 32 confers power on the Supreme Court to enforce Fundamental Rights. Art. 32(1) guarantees the right to move the Supreme Court, by appropriate proceedings, for the

[135] *Ranjan Dwivedi* v. *Union of India*, A.I.R. 1983 S.C. 624.

[135a] (1963) 9 Law Ed. 2nd 799.

enforcement of the Fundamental Rights enumerated in the Constitution. For this purpose, Art. 32(2) empowers the Court to issue appropriate directions or orders or writs including writs in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto*, and *certiorari*. Art. 32 is a fundamental right itself. Article 32 provides a guranteed, quick and summary remedy for enforcing the Fundamental Rights because a person can go straight to the Supreme Court without having to undergo the dilatory process of proceeding from the lower to the higher court as he has to do in other ordinary litigation. The Supreme Court has thus been constituted into the protector and guarantor of the Fundamental Rights. Under Article 32, the court enjoys a broad discretion in the matter of framing the writs to suit the exigencies of the particular case and it would not throw out the application of the petitioner simply on the ground that the proper writ or direction has not been prayed for.[136] The Court's power is not confined to issuing writs only: it can make any order including even a declaratory order, or give any direction, as may appear to it to be necessary to give proper relief to the petitioner.[137] The Court would not refuse to entertain an Article 32 petition merely on the ground that it involves the determination of disputed questions of fact.

Underlying the significance of Art. 32, the Supreme Court has characterised the jurisdiction conferred on it by Art. 32 as "an important and integral part of the basic structure of the Constitution" because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated. "A right without a remedy is a legal conundrum of a most grotesque kind." Art. 32 confers one of the 'highly cherished rights'.[138]

Once the Supreme Court is satisfied that the petitioner's Fundamental Right has been infringed, it is not only its right but also its duty to afford relief to the petitioner, and he need not establish either that he has no other adequate remedy, or that he has exhausted all remedies provided by law, but has not

[136] *Chiranjit Lal* v. *India*, A.I.R. 1951 S.C. 41.

[137] *Kochunni* v. *Madras*, A.I.R. 1959 S.C. 725, 733.

[138] *The Fertilizer Corporation* case, A.I.R. 1981 S.C. 344.

obtained proper redress. When the petitioner establishes infringement of his Fundamental Right, the Court has no discretion but to issue an appropriate writ in his favour.[139]

No action lies in the Court under Art. 32 unless there is an infringement of a Fundamental Right.[140] Art. 32 cannot be invoked simply to determine the validity of a legislative measure or an administrative action unless it affects petitioner's fundamental right. As the Supreme Court has emphasized: "The violation of a fundamental right is the *sine qua non* of the exercise of the right conferred by Art. 32."[141] On the other hand, there is Art. 226 which is broader in scope than Art. 32. Under Art. 226, a High Court is empowered to issue a writ, order or direction for the enforcement of any fundamental right or "for any other purpose". The words "for any other purpose" found in Art. 226 (but not in Art. 32) enable a High Court to take cognisance of any matter even if no fundamental right is involved.

Ordinarily the principle followed for filing petitions under Arts. 32 and 226 is that a person whose legal right is unduly affected can move the court for the enforcement of his right. This rule of standing created the problem that although there may be laws to protect and safeguard the interests of the poor, they cannot take advantage of these laws, being ignorant of their rights and lacking resources to undertake litigation to enforce their rights. The Supreme Court has sought to minimise this difficulty by pioneering the development of the procedure of public interest litigation.[142] This means that where legal rights of the poor, ignorant, socially and economically disadvantaged persons are sought to be vindicated through a court action, the court will permit concerned persons or voluntary organisations to agitate such matters before the court. A non-

[139] *Daryao* v. *Uttar Pradesh*, A.I.R. 1961 S.C. 1457; *Kochunni* v. *Madras*, *ibid.*; *Kharak Singh* v. *Uttar Pradesh*, A.I.R. 1963 S.C. 1295. Also see, *supra*, 208-9.

[140] *Andhra Industrial Works* v. *Chief Controller of Imports*, A.I.R. 1974 S.C. 1539.

[141] *The Fertilizer Corp.* case, *supra*, note 65.

[142] On Public Interest Litigation, see: M.P.Jain, Public Interest Litigation, [1984] M.L.J. cvi–cxxxii; P.N. Bhagwati, Judicial Activism and Public Interest Litigation, (1985) 23 *Col. Jl. of Transnational Law*, 561; S.K. Agrawala, *Public Interest Litigation in India: A critique* (1985).

political, non-profit and voluntary organisation consisting of public spirited citizens interested in espousing the cause of ventilating legitimate public grievance can be permitted to take the case of the poor who could not themselves seek redress through the labyrinth of costly and protracted legal and judicial process. The reason which has moved the Supreme Court of India to relax the traditional strict *locus standi* rule in favour of the weak and poor is the realisation that if this is r 16 mitted, rights of the poor will ever remain unredressed as such persons are least equipped to themselves bring their grievances before the courts and such a situation is destructive of rule of law. Chief Justice Bhagwati, who has just retired from the Supreme Court, has played a crucial role in the development of this concept while Justice Pathak (presently the Chief Justice), Justices Desai and Sen have also contributed to this development.

The first most important case in which the question of making justice accessible to the poor was debated and discussed at length by the court, and foundations for public interest litigation for redressal of the grievances of the poor were laid, is *People's Union for Democratic Rights* v. *Union of India,* also known as the *Asiad* case.[143]

The factual context of the *Asiad* case was as follows: Delhi, the capital of India, was going to host the Asian games. To this end, a number of buildings, stadia, roads were being constructed. Contracts for these various constructions were awarded to private contractors by the Central Government, the Delhi Government and the Delhi Development Authority, a statutory body. The contractors employed labour to fulfil their contractual obligations. It transpired that the contractors were not fully observing the labour laws in respect of these workmen. The People's Union for Democratic Rights, a voluntary non-political organisation, formed for the purpose of protecting democratic rights, in a letter to Justice Bhagwati of the Supreme Court complained of violation of several labour laws by the contractors. The letter was based on a report prepared by a team of three social scientists who had been commissioned to investigate and inquire into the conditions under which the workmen

[143] A.I.R. 1982 S.C. 1473.

engaged in the various Asiad Projects were working. A bench of the Supreme Court[144] treating the letter as a writ petition under Art. 32 started a hearing into the complaint. The Central Government, Delhi Government and the Delhi Development Authority were made the respondents.

The very first objection raised against the maintainability of the writ petition was regarding the *locus standi* of the petitioners. The complaint was with regard to the violation of the labour laws designed for the welfare of the workmen and, therefore, from the strictly traditional point of view, only the workmen themselves, whose legal rights were being violated, could approach the court for redress. From this point of view, it was argued that the Union in question had no *locus standi* to agitate the matter on behalf of the workmen.

Bhagwati J. rejecting this contention pointed out that this narrow view of standing, which was a legacy of the Anglo-Saxon system of jurisprudence, is no longer valid. "A new dimension has been given to the doctrine of *locus standi* which has revolutioned the whole concept of access to justice." To adhere to the traditional view of standing will be to close the doors of justice to the poor, deprived and illiterate sections of the community. Bhagwati J. said that in modern times, it is necessary to evolve a 'new strategy' by relaxing the traditional rule so that justice may become easily available to the lowly and the lost, and the judicial system is transformed into an instrument of socio-economic change. On this point, Bhagwati J. made the following remarks:

> This court has taken the view that, having regard to the peculiar socio-economic conditions prevailing in the country where there is considerable poverty, illiteracy and ignorance obstructing and impeding accessibility to the judicial process, it would result in closing the doors of justice to the poor and deprived sections of the community if the traditional rule of standing . . . that only a person wronged can sue for judicial redress were to be blindly adhered to and followed and it is therefore necessary to evolve a new strategy by relaxing this traditional rule of standing in order

[144] The Bench consisted of Bhagwati and Baharul Islam JJ. The court judgment was delivered by Bhagwati J.

that justice may become easily available to the lowly and the lost.

Accordingly, Bhagwati J. enunciated the following principle:

> . . . . that where a person or class of persons to whom legal injury is caused or legal wrong is done is by reason of poverty, disability or socially or economically disadvantaged position not able to approach the court for judicial redress, any member of the public acting *bona fide* and not out of any extraneous motivation may move the Court for judicial redress of the legal injury or wrong suffered by such person or class of persons and the judicial process may be set in motion by any public spirited individual or institution even by addressing a letter to the court.

In such a situation the court would cast aside all technical rules of procedure and entertain the letter as a writ petition and take action on it.

In the instant case, the rights of the poor had been violated and basic human dignity denied to them. These people by reason for their poverty, ignorance, illiteracy and socio-economic disability, were unable to approach the court for judicial redress. So, the court ruled that the petitioners would, under the liberalised rule of standing, have *locus standi* to maintain the writ petition espousing the cause of the workmen. The petitioner was an organisation dedicated to the protection and enforcement of Fundamental Rights and making directive principles of the State Policy enforceable and justiciable. The Union had undoubtedly brought the petition out of a sense of public service and it was thus clearly maintainable.

Bhagwati J. characterised the matter as 'public interest litigation'. He explained the purpose and philosophy of the concept of public interest litigation in the following words:

> We wish to point out with all the emphasis at our command that public interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties.

Bhagwati J. went on to emphasize that public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation. Public interest litigation is intended "to promote and vindicate public interest which demands that violations of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed." "That would be destructive of the Rule of Law which forms one of the essential elements of public interest in any democratic form of government. Rule of Law does not envisage merely legal protection for the fortunate few. It does not also mean protection of the vested interest to maintain the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the Rule of Law is meant for them also, though to-day it exists only on paper and not in reality."

The rich can approach the courts to protect their interests with a formidable army of distinguished lawyers. But what about the poor? People forget that "civil and political rights, priceless and invaluable as they are for freedom and democracy simply do not exist for the vast masses of our people." Large groups of people are living a sub-human existence, in conditions of abject poverty. To ensure their human rights it is necessary to restructure the social and economic order. There is a close relationship between civil and political rights and economic, social and cultural rights. Although this task belongs to the executive and the legislature but that would not be enough. It is only through multi-dimensional strategies including public interest litigation that the social and economic programmes can be made effective. Thus, Bhagwati J. underlined the great utility of public interest litigation in the following words:

> "Public interest litigation . . . is essentially a cooperative or collaborative effort on the part of the petitioner, the State of public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them."

Bhagwati J. then went on to say that the public authority against which such a litigation is brought should be as much interested in ensuring basic human rights, constitutional as well as legal, to socially and economically disadvantaged position, as the petitioner bringing the public interest litigation before the court. The concerned public authority should, in fact, welcome it as it provides an opportunity to right a wrong or to redress an injustice done to the poor and weaker sections of the community with whose welfare the State is and must be primarily concerned.

Meeting the argument that public interest litigation would further add to the work of the already over-loaded courts, Bhagwati J. emphasized that the courts are not meant only for the rich but they exist also for the poor and the handicapped, downtrodden and have-nots. The fact that large arrears are pending in the courts cannot be any reason for denying access to the poor and weaker sections of the community. The judicial system is to become an effective instrument of social justice by enforcing the basic human rights of the poor. Such a change can come about through public interest litigation. It is through such a method that the problems of the poor can be brought to the forefront and it holds out great possibilities for the future. Bhagwati J. striking hard at the argument that the new judicial approach would clutter the court and create arrears, has called it as "perverse", "elitist" and "status quoist". Bhagwati J. has emphasized that "social justice was the signature tune of our Constitution", that the courts were not only meant for "the rich and well to do, the landlord and the gentry, the business magnate and the industrial tycoon or the sugar barons and the alcohol kings", and that no state has the right to tell its citizens that because a large number of cases of the rich are pending in our courts we will not help the poor to come to the courts for seeking justice until the staggering load of cases of people who can afford rich lawyers is disposed off. "It is the rich only who have so far had the golden key to unlock the doors of justice".

The Court expressed high hopes that through "the public interest litigation" "the problems of the poor" can now come to the forefront so that "the entire theatre of law" may change. Such litigation "holds out great possibilities for the future".

Having disposed of the question of *locus standi* in favour of the petitioner union, there was another ticklish question to be

considered in connection with the maintenance of the petition. Under Art. 32, a petition could only be moved in the Supreme Court for the enforcement of fundamental rights, most of which operate as limitations on the power of the state and impose negative obligations on the state not to encroach on individual liberty and the rights are only enforceable against the state. But, in the instant case, the workmen were employed by private contractors and not directly by any government or its agency. Could a petition under Art. 32 lie against the government when workmen whose rights were in question were employees of the contractors and not of the government and, thus, the cause of action, if any, of the workmen arose against the contractors and not the government? The court rejected this preliminary objection against the maintenance of the petition. Bhagwati J. argued that the work of construction of the Asiad projects had been entrusted to the contractors by the Government of India, Delhi Administration and the Delhi Development Authority (DDA). Accordingly, these authorities cannot escape their obligation for observance of the various labour laws by the contractors. The governments and the DDA were the "principal employers". Under such labour laws, as the Contract Labour (Regulation and Abolition) Act 1970 or the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979, if the required amenity is not provided by the contractors to the workmen employed, the obligation to provide such amenity rests upon the principal employer. Therefore, if in the construction work of the Asiad Projects, the contractors do not carry out the obligations imposed upon them by laws, the Government of India, the Delhi Administration and the Delhi Development Authority as principal employers would be liable and these obligations would be enforceable against them. As regards employment of child labour, it amounts to an infringement of a constitutional provision, Art. 24, which embodies a fundamental right which is plainly and indubitably enforceable against every one and by reason of its compulsive mandate, no one can employ a child below the age of 14 years in a hazardous employment. It is therefore the duty of the government to ensure that the constitutional obligation is observed by the contractors to whom they have entrusted the work of constructing the various projects. The government and the DDA "cannot fold their hands in despair and become silent

spectators of the breach of a constitutional prohibition being committed by their own contractors."[145] So also with regard to the observance of the Equal Remuneration Act 1976 (ERA) which only embodies the principle of Art. 14 of the Constitution. The government and the DDA "cannot avoid their obligation to ensure that these provisions are complied with by the contractors. If at any time, the government or the DDA finds that the provisions of the ERA are not being enforced and thus the principle of equality enshrined in Art. 14 is being violated by its own contractors, "it cannot ignore such violation and sit quiet by adopting a non-interfering attitude and taking shelter under the excuse that the violation is being committed by the contractors and not by it". The government or the DDA, as the case may be, is under an obligation to ensure that the contractors observe the ERA and do not infringe the Equality clause of the Constitution. Also, the government and the DDA must ensure that the minimum wage is paid to the workmen by the contractors to whom they have assigned the construction work. The contractors are, of course, liable to pay minimum wage but the government and the DDA are also equally responsible to ensure that the minimum wage is paid to the workmen by their contractors. Bhagwati J. thus observed:[146]

> It is obvious, therefore, that the Union of India, the Delhi Administration and the Delhi Development Authority cannot escape their obligation to the workmen to ensure observance of these labour laws by the contractors and if these labour laws are not complied with by the contractors, the workmen would clearly have a cause of action against the Union of India, the Delhi Administration and the Delhi Development Authority.

Since the *Asiad* case, there have been a number of cases in which the pitiable conditions of the labour have been exposed in the Supreme Court by social workers or voluntary organisations and redress obtained for the suffering workmen. In *Labourers Working on Salal Hydro-Project* v. *State of Jammu &*

[145] *Ibid.*, 1484.
[146] *Ibid.*, 1484.

Kashmir,[147] the court gave relief to such workers. The matter came before the court in the following circumstances: The *Indian Express* in its issue dated August 26, 1982, carried a news item that a large number of migrant workmen from different States were working on the Salal Hydro Electric Project in the State of Jammu & Kashmir but being carried out by the Government of India in difficult conditions. These persons were denied the benefits of various labour laws and were being exploited by the contractors to whom different portions of work were entrusted by the Central Government. The People's Union for Democratic Rights, which had sponsored the *Asiad* case, thereupon addressed a letter to Justice D.A. Desai of the Supreme Court enclosing a copy of the news report and requesting him to treat the letter as a writ petition so that justice could be done to these poor labourers. The letter was palced before a bench of the court and hearing started treating the letter as a writ petition under Art. 32. Notices were issued to the concerned governments, the Labour Commissioner of Jammu and Kashmir, and various other officials of the Central and State Governments as respondents. The court also directed the Labour Commissioner of the State of Jammu and Kashmir to visit the site of the project and study the condition of the labour engaged on the project. Pursuant to the court order, the commissioner visited the site of the project and made two reports to the court — one interim and one final. These reports disclosed *prima facie* that there were certain violations of Labour Laws by the government and the contractors. The writ petition was argued before the court on the basis of the reports made by the Labour Commissioner and the affidavit made by the Deputy Secretary in the Ministry of Labour, Government of India. The court ruled that as the project was being carried on by the Central Government, it was the appropriate government in relation to the project. The court found that the provisions of the Inter-State Migrant Workmen Act were not being enforced and the Supreme Court therefore directed the Central Government to take immediate steps for enforcement of the provisions of this Act in regard to interstate migrant workmen employed on

[147] *Supra*, note 100.

the project. The court directed the Central Government to file an affidavit within one month setting out the steps taken by it for securing the implementation of the Act. The court also found that the provisions of the Minimum Wages Act and the Contract Labour Act were being infringed in relation to the workmen employed on the project; Contractors fall within the purview of the Contract Labour Act. The Act makes provisions for providing certain facilities by way of health and welfare of the workmen. The court gave necessary directions to the Central Government for ensuring enforcement of these laws. The court also directed the government to tighten up the inspection machinery. The court also prohibited the employment of child labour on construction work which is a 'hazardous employment' under Art. 24 and suggested that the government provide schooling facilities for these children near the project site. The court directed the Central government to promptly carry out these directions and make a report to the court within two months setting out the steps taken by it for carrying out these directions and how far they had been implemented. The court observed: "It is only if the officers of the National Hydro Electric Power Corporation and the Central Government are sensitive to the misery and suffering of workmen arising from their deprivation and exploitation that they will be able to secure observance of the labour laws and to improve the life conditions of the workmen employed in such construction projects".

Another similar matter disposed of by the Supreme Court on the 20th January, 1983 is *Sanjit Roy* v. *State of Rajasthan.*[148] The judgment of the court in this case was written by Bhagwati J. The petitioner in this case was the Director of a social action group called Social Work and Research Centre which was a registered body engaged actively in the work of upliftment of the Scheduled Castes and Scheduled Tribes. The peition was filed by the petitioner to remedy gross violations of the Minimum Wages Act, 1948[149] by the Public Works Department of the State of Rajasthan. The department had undertaken a road project as a part of famine relief work undertaken

[148] A.I.R. 1983 S.C. 328. See, *supra*, note 97.

[149] *Supra*, note 75.

to provide relief to persons affected by drought and scarcity conditions in the villages. The department employed a large number of workers on this project. These workmen were being paid less than the minimum wages fixed by the State Government itself. The Government justified its action by referring to the State Famine Relief Act which exempted famine relief work from the scope of the Minimum Wages Act. The court however held the State Act invalid on the ground that it violated Art. 23 of the Constitution.[150] Art. 23 bars "forced labour" and the court gave a broad significance to this term by including within it any labour provided by a person for less than the minimum wages. The court insisted that even on a famine relief project, minimum wages must be paid. "No work of utility and value can be allowed to be constructed on the blood and sweat of persons who are reduced to a state of helplessness on account of drought and scarcity condition".

Again, in *D.S. Nakara* v. *India*,[151] the Supreme Court displayed the same liberality of approach in the matter of *locus standi* to agitate a matter of public interest. The Government of India announced a liberal pension scheme for its retired employees but made it applicable to those who retired before a specified date. These people desired to challenge the scheme under Art. 14 — the denial of equality. The case was brought in the Supreme Court through an Art. 32 petition by a society.

The society was registered under the Societies Registration Act, as a non-political, non-profit and voluntary organisation. Its members consisted of public spirited citizens who had taken up the cause of ventilating legitimate public problems. The society received a large number of representations from old pensioners who were individually unable to undertake the journey through "labyrinths of legal judicial process, costly and protracted." The society consistent with its objective espoused the cause of these petitioners. Referring to *S.P. Gupta* v. *India*,[152] the Court ruled

[150] *Supra*, note 14.

[151] A.I.R. 1983 S.C. 130.

[152] A.I.R. 1982 S.C. 149. This case may be regarded as the precursor of public interest litigation in India. Several petitions were filed by lawyers practising in several High Courts raising significant questions concerning the status of additional judges of the High Court and the transfer of a judge from one High Court to another. The

that "any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or for violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision." As the society was seeking to enforce rights that may be available to a large number of old, infirm retirees, its *locus standi* was unquestionable.

In *Neeraj Chowdhary* v. *State of Madhya Pradesh*,[153] the petitioner was the civil rights correspondent of the *Statesman*, a daily newspaper. 135 bonded labourers had been released from stone quarries under an order of the court passed under the Act of 1976. But, after their release, no steps were taken by the state government for their rehabilitation. The petitioner prayed the court that the state government be directed to ensure rehabilitation of these freed bonded labourers.

The famous *Hussainara Khatoon* case which had such a deep impact on the administration of criminal justice in India, and where the Supreme Court was able to lay down some ameliorative guidelines with respect to the poor accused languishing in prisons, came before the court as a matter of public interest litigation. The matter arose in the following factual context. A retired Inspector-General of Police and a member of the National Police Commission published two articles in the *Indian Express*, an English daily, describing the plight of undertrials in Bihar Jails, some of whom had been awaiting their trial for as long as ten years. A lawyer, Mrs. Kapila Hingorani felt so outraged by the revelations made in these articles that she moved a petition for writ of *habeas corpus* in the Supreme Court based on these articles on behalf of the undertrials. The matter was heard by a bench led by Justice Bhagwati and the matter was placed before the court several times.[154]

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questions had a deep relation with the principle of independence of the judiciary. The Supreme Court held the petitions maintainable as the lawyers have a vital interest in the independence of the judiciary. If by any illegal state action, the independence of the judiciary is impaired, the lawyers would certainly be interested in challenging the constitutionality or legality of such action.

153 *Supra*, note 111.

154 *Hussainara Khatoon* (I), [1980] 1 SCC 81; *Hussainara* II, (1980) 1 SCC 91; *Hussainara* III, *ibid.* 93; *Hussainara* IV, *ibid.* 98; *Hussainara* V, *ibid.* 108; *Hussainara* VI, *ibid.* 115. For details see, Baxi, The Supreme Court Under Trial: Undertrials and the Supreme Court, [1980] 1 SCC 35 (Jl.), see, *supra*, notes 124-23.

The most significant judicial pronouncement on the question of public interest litigation is *Bandhua Mukti Morcha* v. *Union of India*.[155] By the time the case arose, there had been a lot of criticism of the new trend, and the Supreme Court as a whole, and Bhagwati J., in particular, took an opportunity to answer the criticism. In this case, the Supreme Court entertained a petition on behalf of an organisation dedicated to the cause of release of bonded labour.[156] The petition was opposed by the State government. Bhagwati J., speaking on behalf of the court, rebuked the state government for adopting such a stance and raising a preliminary objection to stall an inquiry by the court into the matter. He characterised the state attitude as 'incomprehensible' and observed:

> We should have thought that if any citizen brings before the court a complaint that a large number of peasants or workers are bonded serfs or are being subjected to exploitation by a few mine lessees or contractors or employers or are being denied the benefits of social welfare laws, the State Government, which is, under our constitutional scheme, charged with the mission of bringing about a new socio-economic order where there will be social and economic justice for every one and equality of status and opportunity for all, would welcome an inquiry by the court, so that if it is found that there are in fact bonded labourers such a situation can be set right by the State Government.

The court then went on to explain the nature of public interest litigation. The court emphasized that "public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our constitution."[157] The court explained the philosophy underlying public interest litigation as follows:

[155] A.I.R. 1984 S.C. 802.

[156] On bonded labour see, *supra*, notes 103-12.

[157] *Ibid*., at 811.

> . . . . where a person or class of persons to whom legal injury is caused by reason of violation of a fundamental right is unable to approach the court for judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting *bona fide* can move the court for relief under Article 32 and a fortiorari, also under Article 226, so that the fundamental rights may become meaningful not only for the rich and the well to do who have the means to approach the court but also for the large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resources unable to seek judicial redress. [158]

Bhagwati J. pointed out that, in the words of Art. 32(1), there is no limitation that the fundamental right sought to be enforced must belong to the person moving the court. Nor does Art. 32(1) say that the Supreme Court should be moved only by a particular kind of proceeding. "It is clear on the plain language of clause (1) of Art. 32 that whenever there is a violation of a fundamental right, any one can move the Supreme Court for enforcement of such fundamental right." When there is violation of a fundamental right of a person or a class of persons who cannot have resort to the court because of poverty or disability or socially or economically disadvantaged position, the court must allow any member of the public acting *bona fide* to espouse the cause of such person or persons and move the court for judicial enforcement of the fundamental right of such person or class of persons. The court also emphasized that mere "verbal and formalistic canons of construction" must not be applied to interpreting Art. 32. Its interpretation must receive illumination from the trinity of provisions "which permeate and energise the entire Constitution", viz., the preamble, the fundamental rights and the directive principles.

The Supreme Court has even taken cognisance of letters from individuals complaining of the infraction of fundamental rights and has treated such letters as writ petitions.[159] Explain-

[158] *Ibid.*, 813.

[159] *Sunil Batra* II. Also, *Prem Shankar Shukla* v. *Delhi Administration*, *supra*; *The Asiad Workers'* case, *supra*; *Veena Sethi* v. *State of Bihar*, A.I.R. 1983 S.C. 339; *Neeraja Chaudhury* v. *State of Madhya Pradesh*, A.I.R. 1984 S.C. 1099.

ing the reason for such a procedure, Bhagwati J. has said in *Bandhua Mukti Morcha* that when a member of the public acting *bona fide* moves the court for enforcement of a fundamental right on behalf of a person or class of persons who on account of poverty or disability or socially or economically disadvantaged position cannot approach the court for relief, such member of the public may move the court even by just writing a letter, because it would not be right or fair to expect a person acting *pro bono publico* to incur expenses out of his own pocket to approach a lawyer and prepare a regular writ petition for being filed in the court for enforcement of the fundamental right of the poor. In such a case, a letter addressed by him can legitimately be regarded as an "appropriate" proceeding. Thus, in *Lakshmi Kant Pandey* v. *India*,[160] the case was initiated on the basis of a letter by an advocate complaining of malpractices indulged in by social organisations in the matter of offering Indian children in adoption to foreign parents. He based his letter on press reports on this issue. This letter was treated as a writ petition and the Supreme Court issued notice to the Union of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to appear and assist the court in laying down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents, and if so, the procedure to be followed for the purpose, with the object of ensuring the welfare of the child. These bodies filed written submissions before the court along with supporting materials. A Swedish Organisation also participated in the hearing. Several other Indian organisations concerned with the welfare of the children were also allowed to intervene. As the questions arising in the writ petition were of national importance, the Court thought it desirable to have assistance from whatever legitimate source it might come. There were also oral arguments addressed to the court which explored every facet of the problem, involving not only legal but sociological considerations. The Bench consisted of Bhagwati, Pathak and A.N. Sen JJ., the judgment of the court being delivered by Bhagwati J.

[160] *Supra*, note 118.

In *Ram Kumar Misra* v. *State of Assam,*[161] Misra, president of the free legal aid committee, Bhagalpur, complaiend to the Supreme Court that the workmen employed at the two ferries at Bhagalpur and Sultanganj were not being paid minimum wages. The letter was treated as a writ petition and the court issued notice to the State of Bihar. The court also directed the district magistrate, Bhagalpur, and the petitioner jointly to carry out an inquiry into the various averments made in the writ petition and submit a report. Copies of the report were supplied to the advocates appearing on behalf of the parties. After a hearing, the court decided that the ferry workers were entitled to the minimum wage as fixed under the law and directed the State to pay arrears to the workmen concerned. The court also directed payment of Rs. 2000 to the petitioner by way of costs as he had come to the court for the purpose of vindicating the rights of the poor workmen.

Public interest litigation should not however be used by a petitioner to grind a personal axe. He should not be inspired by malice or a design to malign others or be actuated by selfish or personal motives or by political or oblique considerations. He should be acting *bona fide* and with a view to vindicate the cause of justice. The Supreme Court has cautioned that public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be careful to see that under the guise of redressing a public grievance it does not encroach upon the sphere reserved by the Constitution to the executive and the legislature.[162]

A complicated question in public interest litigation has been to collect evidence in support of the public cause espoused in the petition. It will be too much to place this responsibility on the person or the body bringing the matter to the notice of the court. The poor whose cause is being espoused are themselves not in a position to produce evidence before the court. If the court were to adopt the traditional procedure in this respect, that of examining such evidence only as is produced before the court by the parties concerned, then much of the efficacy of

[161] *Supra,* note 102.

[162] *State of Himachal Pradesh* v. *Student's Parent, Medical College, Shimla,* A.I.R. 1985, S.C. 910.

the new procedural technique would be lost and the grievances of the poor would remain unredressed. Therefore, the court adopted an activist approach on the question of evidence itself.

In *Bandhua Mukti Morcha*, the court has explained the *modus operandi* to collect evidence in support of a petition filed under Art. 32 as a matter of public interest litigation. When a writ petition was moved on behalf of some workmen that they were being held in bondage, the court appointed two persons as commissioners to make report on the petitioners' condition. Objection was taken to such a procedure. It was argued that the report of the commissioners would have no evidentiary value since what was stated therein was based only on *ex parte* evidence which had not been tested by cross-examination. The court held the argument not well-founded and rejected it, as it was based upon a total misconception of the true nature of a proceeding under Art. 32. The court clarified that, procedurally, under Art. 32, it is not bound to follow the ordinary adversary procedure; it may adopt such procedure as may be effective for the enforcement of the fundamental rights. Art. 32(1) does not say by what proceedings the Supreme Court may be moved for the enforcement of the fundamental rights. The only limitation is that the proceedings must be 'appropriate' for the enforcement of a fundamental right. "The Constitution-makers deliberately did not lay down any particular form of proceeding for enforcement of a fundamental right nor did they stipulate that such proceeding should conform to any rigid pattern or straight jacket formula."[163] The reason being that they realised that the people were poor and illiterate and insistence on any rigid formula would be self-defeating. Art. 32(2) confers power on the court in its widest terms. "It is not confined to issuing the high prerogative writs, but "it is much wider and includes within its matrix power to issue any directions, orders or writs which may be appropriate for enforcement of the fundamental right in question."[164] The Constitution is silent as to the procedure to be followed by the court in exercising its power under Art. 32(2) because the Constitution-makers were anxious not to allow any procedural technicalities

[163] A.I.R. 1981 S.C. 814.
[164] *Ibid.*

to stand in the way of enforcement of fundamental rights and they never intended to fetter the court's discretion to evolve a procedure appropriate in the circumstances of a given case to enable it to exercise its power to enforce a fundamental right. Whatever procedure is necessary to fulfil that purpose is permissible to the court. It is not at all obligatory for the court to follow adversarial procedure. No such restriction ought to be imposed on the court. In such a system, a poor person is always at a disadvantage against a rich person. When the poor come to the court for enforcement of their fundamental rights, it is necessary to depart from the adversarial procedure and evolve a new procedure so as to enable such people to bring the necessary material before the court so as to secure enforcement of their rights. In the words of Bhagwati J.:[165]

> We have therefore to abandon the *laissez faire* approach in the judicial process particularly where it involves a question of enforcement of fundamental rights and forge new tools, devise new methods and adopt new strategies for purpose of making fundamental rights meaningful for the large masses of people . . . [I]f we want the fundamental rights to become a real sentinel, on the qui vive, we must free ourselves from the shackles of outdated and outmoded assumptions and bring to bear on the subject fresh outlook and original unconventional thinking.

The poor cannot produce relevant material before the court in support of their case. Even when a case is brought on their behalf by a citizen acting *pro bono publico*, it would be almost impossible for him to gather the relevant material and place it before the court. If the court adopts a passive attitude and declines to intervene in the absence of relevant materials, "the fundamental rights would remain merely a teasing illusion so far as the poor and disadvantaged sections of the community are concerned."[166] That is why the court can appoint a commissioner to gather facts and data in regard to a complaint of breach of a fundamental right made on behalf of the weaker sections of the society. The commissioner's report furnishes *prima facie* evi-

[165] A.I.R. 1981 S.C. at 815-6.
[166] *Ibid.*, 816.

dence of the facts and data. The court appoints as commissioners such persons as would carry out the assignment objectively and impartially without any predilection or prejudice. Any party can dispute the facts or data stated in the commissioner's report. It is entirely for the court to consider what weight ought to be attached to the facts mentioned in the report.

The High Courts can also follow a similar procedure in exercise of their jurisdiction under Art. 226 as the Supreme Court follows in relation to Art. 32,[167] for, Art. 226 is also a constitutional jurisdiction and, in fact, Art. 226 is much wider in scope than Art. 32.[168] A High Court can even take up a matter *suo motu* under Art. 226.

There are two more problems concerning public interest litigation. One, the kind of social problems which are raised before the court through such litigation do not admit of the issue of a simple writ enjoining the administration from doing something. The existing remedies meant to enforce private rights are not adequate to cope with social problems. The courts in India have therefore resorted to issuing guidelines to the administration involving affirmative action on its part. Such action is to be taken on the part of the administrative agencies. This leads to another problem: how to ensure that the guidelines laid down by the court have been acted upon? This means that some monitoring system is absolutely essential otherwise the whole exercise may come to naught by administrative inaction. To ensure compliance by the administration of the court directions, at times, the court imposes an obligation on the administration to file an affidavit after sometime testifying to the action taken by it. The court also appoints at times some official or some other agency to monitor administrative action and report to the court from time to time.

The above cases prove conclusively the great utility of the technique of public interest litigation. If the Supreme Court had insisted on the traditional rule of standing, these cases would never have come before it and the condition of the poor and hapless people would never have been ventilated and the

[167] *Bandhua Mukti Morcha, supra; State of West Bengal* v. *Sampat Lal,* (1985) 1 SCC 31.

[168] *Supra,* notes 136-42.

administration obligated to take suitable ameliorative steps to improve their condition. Public interest litigation has come to stay in India as a mechanism to agitate such public issues before the courts as can be brought within the legal and constitutional mould.[169]

V

Concluding Remarks

Is law merely imperative or mandatory as Austin emphasized? Is law a mere formalistic, unbending, coercive code of conduct for the people? This view of law may have been true by and large in a *laissez faire* society. But, in the modern welfare society, law has to mould itself to keep in accord with the accepted social objectives. Law cannot be a mere instrument to maintain social order but must also be ameliorative to remove pain and suffering in the society.

[169]There have been quite a few other public interest litigation cases in India. A few of them may be mentioned here. In *R.L. & E. Kendra, Dehradun* v. *Uttar Pradesh*, AIR 1985 SC 652, the Supreme Court ordered closure of certain lime-stone quarries as their working was disturbing ecological balance. As regards this case, the court said: ". . . this is the first case of its kind in the country involving issues relating to environment and ecological balance . . . It brings into sharp focus the conflict between development and conservation and services to emphasize the need for reconciling the two in the larger interest of the country." In *Chaitanya Kumar* v. *State of Karnataka*, A.I.R. 1986 SC 825, a contract awarded by the state to a few persons was set aside. The court said: ". . . the Court cannot close its eyes and persuade itself to uphold publicly mischievous executive actions which have been so exposed. When arbitrariness and perversion are writ large and brought out clearly, the court cannot shirk its duty and refuse its writ. Advancement of the public interest and avoidance of the public mischief are the paramount considerations. As always the court is concerned with the balancing of interests. . ."

In *State of Himachal Pradesh* v. *Umed Ram Sharma*, A.I.R. 1986 SC 847, the court issued some directions regarding construction of a hilly road. The court read Arts. 21, 19(1)(d) and 38(2) and observed: ". . . there should be roads for communication in reasonable conditions in view of our constitutional imperatives and denial of that right would be denial of the life as understood in its richness and fullness by the ambit of the Constitution. To the residents of the hilly areas as far as feasible and possible society has constitutional obligation to provide roads for communication". Also see, *Sheela Barse* v. *Union of India*, A.I.R. 1986 S.C. 1774 (directing the enforcement of the Children Act, 1960 without delay); *Dr. P. Nella Thamby* v. *Union of India*, A.I.R. 1984 S.C. 74 (seeking improvement in railway services); *Upendra Baxi* v. *State of Uttar Pradesh*, [1986] 4 SCC 106, (giving directions to the State government seeking improvement of the living conditions in the government protective home at Agra).

Do the judges make law? How should a judge interpret and apply the law? The Judges while interpreting and applying law must keep the objectives cherished by the society in view and seek to mould the law to promote those objectives and not take a rigid view of the law, in the Austinian tradition, even at the cost and negation of the social objectives cherished by the community at large. Law faces a dilemma in a modern developing society. Law cannot be static; it cannot support the *status quo;* it has to deliver distributive justice[170] to disadvantaged groups of people in the society. If these functions of law are accepted in a developing democratic society, then the task of shaping law cannot be left solely to the legislature or the executive. The courts have also to show activism and dynamism and play their legimate role and participate in this process of shaping the law and to ensure that the social legislation is properly implemented. As Bhagwati C.J. has recently observed:

> . . . . When judges are granting relief they are not acting as a parallel government. They are merely enforcing the constitutional and legal rights of the underprivileged and obligating the Government to carry out its obligations under the law. The poor cannot be allowed to be cheated out of their rights simply because those who should act do not act, act partially, or fail to monitor what they are doing. Moreover, judges do not cease to be accountable because they are not elected. Their accountability remains. It is not electoral accountability but value accountability, and that must guide their decision-making process.[171]

Fortunately, as is evidenced by the above discussion, the judges in India have listened to the call of the social conscience and avowedly sought to transform law and court procedures to alleviate the misery and suffering of the poor as best as they possibly can. They have been able to rise above a mere formalistic view of law. They now accept the thesis that law is an instrumentality to implement social policies. The judges of the Sup-

[170] On the concept of distributive justice see, Mathew, Fundamental Rights and Distributive Justice in K.K. Mathew, *Democracy, Equality and Freedom*, 52.

[171] P.N. Bhagwati, Judicial Activism and Public Interest Litigation, [1985] 23 *Col. Jl. of Transnational Law*, 561, 576.

reme Court are ready to interpret the law and the Constitution to broaden the horizons of socio-economic justice in the country and to lend a helping hand in establishing a welfare state. The effort of the Supreme Court has been to sensitize the judicial process in the country to the needs of the poor and the underdog.

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