PART - III
JUDICIAL ACTIVISM AND CRIMINAL LAW

Lack of Judicial Activism in Trail Courts

In spite of the fact that pre-sentence investigation report is of immense value to the court in deciding about the appropriate method of dealing with offenders and continual stress by the higher judiciary on its utility, it is distressing to note that trail courts are yet to realize the real importance of the report. Statistical bear testimony to the fact that the report is called hardly in 1% to 2% cases. Consequently, trail courts are not in position to pass appropriate sentence in a large majority of cases, the sumit court has also highlighted the consequences of wrong type of sentence as dangerous and counterproductive. Therefore, the sentencing of offenders by trial courts in a mechanical manner despite humanizing penological trends, constraints of section 361 of the Code and section 6 of the Act has to be stopped. The Orissa High court has correctly called it as dereliction of duty by courts.

This also leads to the conclusion that social change reflected in the act and psychological thinking for reformation and rehabilitation of corrigible offenders especially young and first offenders is yet to be imbibed by the lower courts in the country, the release on probation of good conduct on selective basis is still taken by the trial courts as leniency of law and favour, and not as an appropriate case-disposition method meant for rehabilitation of offenders through non-institutional treatment method which is more effective and productive in some cases. Consequently, offenders who deserve probation are subjected to deleterious influence of prison life and made to adopt crime as a career whereas incurable offenders whose prolonged imprisonment is essential for the protection of the society and prevention of crime are given the benefit of release on probation of good conduct that too without supervision. This further leads to the inference that advances made in correctional administration of criminal justice through researches of behavioral science are yet to be taken note by the lower judiciary. Thus, social change in this respect is yet to inform the trial courts in India. This further adds to the imperatives of induction of judicial activism in the preliminary training of judicial officers. It is evident from a few following observations of the judges of the Supreme court:

100
Indeed, modern criminal jurisprudence and allied social and psychiatric departments have gone so far ahead of the lagging Indian Courts, cloistered in their outworn ideas, that a national or refresher program for the criminal judiciary ... is an imperative need\(^3\).

Indeed, modern criminal jurisprudence and allied social and psychiatric departments have gone so far ahead of the lagging Indian courts, cloistered in the outworn ideas, that a national or refresher program for the criminal judiciary ... is an imperative need\(^3\).

It is imperative to educate them in the new trends in the penology for sentencing procedure so that they may learn to use penal law a tool for reforming and rehabilitating criminals\(^3\).

It is the prime need of the hour to set up training institutes to educate new judicial recruits even serving judges in the changing trend of judicial thought and new ideas which the new judicial approach has imbibed over the years as a result of new circumstances that have come into existence\(^3\).

The former Chief Justice of India P.N. Bhagwati, during the last phase of his tenure devote at length on judicial reforms especially of absorbing of social change by the judges and translating it into action through judicial activism so that a vast majority of population living below the poverty line can hope to get justice. He advised his critics to reconcile to the new wind of change roaring down the ancient corridors\(^3\).

Justice D.A. Desai, formerly chairman, Law Commission of India, has added new dimensions to judicial activism via-a-vis social change by recommending the induction of grassroots justice in the India judicial system\(^3\). It adds to the compulsions of social change which the judiciary must imbibe so that it can march with time, i.e. justice done must be acceptable. Hence, dynamic dimensions of Justice-widening scope of judicial activism and increasing responsibility of judiciary for absorbing social with the international development of the concept, too. Sociology of criminal justice and reintegration of the offender in the society as it productive member\(^3\). In the Indian context, Justice Desai can set the record straight officers\(^3\). As per the mandate of Article 38 of the constitution social justice shall inform all institutions of national life. Therefore, our justice otherwise large masses of people, who are entitled to justice, are likely to get

\[ 319607 \]

101
it through means which may lead to the overthrow of the whole system. The theory that a police officer is an officer of the law whose job is to enforce the law, bring the guilty to justice, remain staunch also of in an honest, unbiased and accurate manner, is a theory which has utterly failed in practice. Consequently, the number of innocent persons who suffer imprisonment is enormous. This aspect too must activate judicial so that the least possible number of people should suffer at the hands of Justice system and the conspectus of social change is fully taken note of an fully realised through judicious dispensation of Justice.

Probation developed as an alternative to imprisonment especially of short-term, is a method of dealing with offenders found guilty of not very serious offence. It is a suspension of imposition of sentence on the condition of good behaviour which the offender unertakes to observe for a specified period under the supervision of a probation officer. In case of violation of conditions of probation (mainly reapse to crime), the probationer renders himself liable to punishment for the original offence and the quantum of sentence is determined by the concerned court.

Supervision is an integral part of probation. Actually, there is no probation without supervision. This is true about U.S.A. and U.K. from Procedure 1898. But in India, no provision was made for supervision under the said code and the position remained the same under the new as well. The release on probation of good conduct under the Act may be with or without supervision. Since probation is an alternative method of dealing with offenders, some sort of check on the offenders and necessary help and counseling for a specified period for rehabilitation of offenders hamper the rehabilitation and make the community to misunderstand probation as acquittal and lose faith in the institution of justice and ultimately necessitated by the public good and interest of the offender. Unfortunately, judiciary has yet to realize the correct connotation of probation.

The lower judiciary instead of being activated in appropriate direction seems to be inactivated and almost alien to the social change that is to be adopted by it as its guiding principle. Placing of probationers under the supervision of probation officer has not been seriously taken note of the higher judiciary in spite of lauding the role of probation as an effective alternative to imprisonment. While advocating liberal use of
probation, it should have highlighted the importance of supervision and directed the lower courts to follow it in letter and spirit. This further bring forth the importance of understanding the current sentencing principles of correctional non-institutional justice which has now become integral part of our justice system under the act and the code. Social changes has yet to socialise our lower judiciary through judicial activism. Higher judiciary de spite its distinguished and landmark role in certain aspects has yet to move the wheal of correctional justice through probation to its full circle. Let us hope and pray that this cherished goal is really realised.

In the case of Narasimhula v. Public Prosecutor A.P. 24, Supreme Court, speaking through V.K. Iyer, J., has categorically stated that pretrial or the post-convocation state (Bail or Jail) belongs to the bullered area of Criminal Justice system and largely hinges on the hunches of the bench otherwise called judicial discretion. The code is crypts on this topic and the court prefers to be that, be the order custodial or not. And yet the issue is not of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of Bail is deprived when bail is refused, this is too precious a value of our constitutional system recognised under Art. 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially with lively concern for the cost to the individual and the community 25.

It thus seems to have been well said, that any refusal to grant Bail will mean the loss of trust which has been reposed by the individual and the community in the judiciary and will mean the violation of the constitutionally recognised right guaranteed under Art.21. Thus, a note of caution is added that the judiciary should always be pragmatic and when it considers some circumstances for the grant of bail it should include among other factors the period in prison already spent as well as the period of delay if any for hearing, having regard to the suffocating crowd of dockets pressing before the Benches. There is also one more infirmity of legal and judicial system which is responsible for gross denial of justice to the under trial prisoners and that is the notorious delay in disposal of cases. It is a sad reflection on the legal and judicial system that the trial of an accused is delayed. Speedy trial is the essence of criminal justice, though not specifically enumerated as fundamental right but it is implicit in the bread sweep and context of Art. 21 26. The deprivation of liberty is a matter of grave concern and is

103
permissible only when the law authorising it is reasonable, even-handed and geared to the
goals of good of the community and state. A law in order to be reasonable has to stand
the test of one or more of the fundamental rights referred under Art.19 which may be
applicable in a given situation., Ex-hypothesis it must also be liable to be tested with
reference to Art.14. The procedure contemplated by Art.21 must answer the test of
reasonableness in order to be in conformity with Art.14. It must be “right just and fair”
and not arbitrary, fanciful or oppressive 27. One component of air procedure is natural
justice and a basic component of civilized jurisprudence includes right of appeal with
long loss of liberty. Every step that makes the right of appeal fruitful is depilatory and
every action or inaction which stultifies it is unfair and unconstitutional 28. The full text
of these cases reveal that a) Service of the copy of judgement to the prisoner in time to
file an appeal, and

b) provision of free legal service to the prisoner, who is indigent or
otherwise disabled from securing such assistance are the state responsibilities embodied
in Art.21 of the Indian Constitution. Thus, any failure by indifference or vendetta to
withhold the copy thwarts the court process and violates Art.21 of the Indian constitution.
Thus, any failure by indifference or vendetta to withhold the copy thwarts the court
process and violates Art.21 and this paves the way of holding the further imprisonment
illegal. Thus a direction has been issued by the Supreme Court to get the jail manual
undated to include the mandate of providing such copy of judgement and in case any
deviance is being made by the Jailor they should be punished. These obligations are
necessarily implied in the right of appeal conferred by the code read with the
commitment to procedural fairness in Art.2129.

The most important issue of prison discipline and judicial oversight or in
other words the jurisdictional delima were discussed at length by Supreme Court in Sunil
Batra v. Delhi Administration 30. Where the petitioner sought use of the rule of law to
force open the iron gates of Tihar Jail and the prison administrators, resisted judicial
action on the ground that it is forbidden under section 30 and 56 of Prisons Act. (1984)
while the petitioner invoked Art.14,21 and 19 of the Constitution.

The jurisdictional reach and the range of this courts writ to hold prison
caprice and cruelty in constitutional limits is incontestable, but testing intrusion into
administrative discretion is legal anathema, about breaches of constitutional rights or prescribed procedures prisoners have enforceable liberties devalued may be but not demonetized and under our basic scheme prison power must bow before Judge power if fundamental freedoms are in jeopardy. The hand off doctrine, has withered away and it is well settled that when the responsible prison authorities have abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debared nature, then the court must intervene promptly to restore the prima rules of civilized community in accordance with the mandate of the constitution. Thus the fact that a person is in prison does not prevent the use of habes-corpus to protect his other interest and rights or in other words habeas corpus is a method of testing the constitutionality, duration and conditions of imprisonment. To put it precisely, there is no iron curtain drawn between the constitution and the prisoner of this country. In the words of J.Douglas.

"Convocation of a crime does not render on a non-person whose rights are subject to the whim of the prison administration and therefore, the imposition of any serious punishment within the prison system requires procedural safeguarding.

The whole law crystallized on the subject lays down clearly that disciplinary autonomy of the jail from behind the high walls will not easily break through the sound proof, night proof barrier to awaken the judges writ jurisdiction. Thus the activist legal aid as a pipeline to carry to the court the breaches of prisoners basic right in a radical humanist constituent of the rule of prison law and as has been said already in this paper constitutional rights are superior to prison laws and as sentinels on the qui-vive it will guard freedom behind the bars, tempered, of course, by environment realism but intolerant of torture by executive echelons. The policy of the law and the paramount of the constitution are beyond purchase by authoritarian glibly invoking dangerousness of inmates and peace in prison.

The concept of activist legal aid to indigent prisoner received its full recognition in Khatri V. State of Bihar. When the legal aid was declared to be an essential ingredient of 'reasonable fair and just procedure" for a person accused of an offence and it is implicit in the guarantee of Art.21. The state Government cannot avoid its constitutional obligation to provide free legal services to poor accused by pleading
financial or administrative inability and whatever is necessary for this purpose has to be done by the State. The obligation on the state exists not only when the trial commences but also attaches when the accused is for the first time produced before the magistrate. Again in the case of Kadra Pahadiya v. State of Bihar 34b. it was emphatically laid down that legal aid in criminal cases is a fundamental right implicit in Art. 21 of the constitution. Therefore the direction were given to the session judge to have compliance with this constitutional mandate. Recently with this in 1983 the law relating to legal aid was concretized in Sheela Barse V. State of Maharashtra.

"Legal assistance to a poor or indigent accused who arrested and put in jeopardy of his or personal liberty, is a constitutional imperative mandate not only provided in Art.39-A but also Art.14 and 21 of the constitution. It is a necessary sine qua non of justice and where it is not provided injustice is likely to result and undeniably every act of injustice erodes the foundation of democracy and rule of land.

Part III of the constitution does not part company with the prisoner at the gates and judicial ever sight protects the prisoners shrunken fundamental rights, if flouted, frowned upon or frozen by prison authority... Judges even with a prison setting are the real though restricted, ombudsmen empowered to prescribe and prescribe, humanise and civilize the lifestyle within the carcers.

It is submitted that Art 42 shall be extended to living condition in jails. Further the barbarous method of punishment enshrined in the imperial mint 37, or in the relics of bygone era should be declared to be unconstitutional and violative of Art.21. One such example of it is the use of bear fetter which make a serious indeed on a limited person liberty which a prison is left with. The duty is totally left with the courts, because of the legislative inaction as well as the administrative non compliance to put it squarely interstitial legislation through interpretation in a life process of the law and judges are party to it. In Rakesh v. B.L. vig. (Supdt.) Central Jail, New Delhi, the jurisdictional dilemma and the responsibility of the court has been concretized in the following statements.

"Prison torture is not beyond the reach of the court in its constitutional jurisdiction and on materials placed before it. If there is ground enough it can exercise its exceptional jurisdiction to ensure some minimum of social hygiene in prison when police
and prison torture in escalating courts owe a duty to society not to ignore such dangerous reality.

In Pern Shanker v. Delhi Administration Supreme Court has gone ahead by stating that the preamble set the humane tone and temper of the founding document and highlight justice, equality and the dignity of the individual Art.14 interdicts arbitrary treatment and capricious cruelty, and Art.19 prescribes restrictions on free movement unless in the interest of the general public, while Art.21 is the sanctuary of human values.

In the light of above stated human values handcuffing is prima facie inhuman and, therefore, unreasonable, is over harsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring, to inflict 'irons' is to resort to Zoological strategies repugnant to Art.21. In situations where the handcuffs is necessary, the court imposes a duty upon the escorting authority to record reason for doing so, otherwise, under Art.21 procedure will be unfair and bad in law. However, after the court has given the directions that handcuffs must be off, no escorting authority can overrule judicial direction. This is implicitly in Art.21.

The concept of human dignity was further collaborated by Supreme Court in Sunil Batra v. Delhi Administration by laying down that 'prisons are built with stones of law, and so it behaves the court to insist that, in the eye of law, prisoners are not animals and punish the deviant 'guardians' of the prison system where they go berserk and defile the dignity of human inmates. Prison houses are part of Indian earth and Indian constitution cannot be kept at Bay by jail officials dressed in little, brief authority, when a convict invokes part III. For when a prisoner is traumatized the constitution suffers a shock. The direction were issued by the apex court to the state government to issue appropriate instructions to jail authorities to give the prisoners the treatment which is not likely to degrade or offend dignity and decency but uplift and elevate. The court in order to study the actual condition in prison is now a position to appoint commission and can in case direct the state Government to refer the prisoner suffering from any disease to the treatment of doctor or can ask for the report of competent doctor to determine the cause of any type of disability by which the prisoner is suffering. Keeping a prisoner in the leg-irons has again been stated to be violative art.21 and against human dignity and decency. Thus, the Superintendent of Jail has been asked to explain as to why should he keep

107
prisoner in leg-irons contrary to the law of the hands. Directions were therefore issued to
the Superintendent of Jail to immediately remove leg-iron from the feet of the prisoners,
and in future no convicted or undertrial prisoner shall be kept in leg-irons. The judicial
action was triggered off with telegraphic speed and the Bench directed that the prisoner
be forthwith liberated from solitary confinement and freed from fetters, in terms of the
law laid down by the apex-court. The concept of human dignity was elaborated to the
extent that it is the dear value of our constitution, which cannot be battered away for mere
apprehensions entertained by jail officials. In the case of Francis Corli v. Union Territory
of Delhi, crystal clear approach with respect to human dignity was made in the following
words.

"Right to life includes right to live with human dignity and all that goes
along with it, namely, the bare necessaries of life such as nutrition, clothing and shelter
over the head and facilities for reading, writing and expressing oneself is diverse form,
freely moving about and mixing and communicating with fellow human beings. Inspite
of the fact that this right would depend upon the extent of economic development of the
country, but it must in any view of the matter include the right to the basic necessities of
life and also the right to carry no such functions and activities as constitute the bare
minimum expression of human self. Every act which offends against or impairs human
dignity would constitute deprivation proton to of right to live and it would have to be in
accordance with 'reasonable fair and just procedure' established by law, which stand the
test of other fundamental rights.

Activist role in the form of interstitial law making by the Supreme Court
has been highlighted in the case of Prabha Dutt v. Union of India. Rule 549(4) of the
Manual of Superintendence and Management of Jails, which is applicable to Delhi,
provides that every prisoner under a sentence of death shall be allowed such interview
and other communication with his relatives and friends and legal advisers as the
superintendent thinks reasonable, journalists or newspapermen are not expressly referred
to in clause (4) but that does not mean that they can always and without good reasons be
denied the opportunity to interview a condemned prisoner.
Conclusion

Public opinion is said to be necessary for the creation of law. When the legislature legislates, it is not always necessary that policies framed by it are in accordance with the prevailing conditions in the community but at times it can be in conflict with community of a sizeable section of it. This happens when the legislature passes a law. When the same law comes before the court for interpretation it could not mean giving a simple meaning to the text of the statute but involves a choice among several meaning to the text of the statute but involves a choice among several alternative results which may be possible by filling gaps, left by the legislature consciously or otherwise, here what the judges do is creativity or law-making.

Further, a law made is not only for a given situation in hand but it must satisfy the future contingencies, thus the legislature must speculate with regard to case, which will arise. But a perfect generalization for the legislature too is impossible. Hence, what the legislature do is to lay down a general statement of law, intending that the courts, and other law-making bodies will apply these principles to specific situation according to the need. Thus, every time without specifying there is a conscious and deliberate delegation of this responsibility to the courts.

The Indian Supreme Court is general and with regard to the prison the prisoner is particular has given landmark judgements which were not even contemplated by a prisoner or a prison authority a decade back. All these judgement in which interference of the court in the prison administration for the maintenance of prison's human dignity, providing administration for the maintenance of prison's human dignity, providing of bare necessaries, removal of leg-irons and meeting with the press have been held to be the constitutional obligations on the state as well as providing legal service to indigent prisoners as a constitutional mandate can be said to be the ignition point of the movement of restoration of human rights which is the basis of criminal jurisprudence.
JUDICIAL ACTIVISM AND ENVIRONMENTAL POLLUTION

1. Philosophical Aspect of Environmental Pollution:

Rousseau, the enlightened French Philosopher, maintained in his Discourse on Arts and Sciences that arts and science have brought corruption to mankind. It is true that arts and sciences have brought environmental pollution.

Urban concentration intensifies the deficiencies of housing, transport capacity, food storage which in turn magnify crowding, noise, rodent to health, and well-being identifiable roles in the ecology and epidemiology and adversely influenced by the effect of urbanisation. Pollution has come to stay as the concomitant hazard of an industrialised society; Introduction of big technology is accentuating the hazard.²

Chief Justice Bhagwati in M.C. Mehta V. Union of India 3, has suggested that the High Powered Authority should be set up by the Government in consultation with central Board for overseeing functioning of the hazardous industries with a view to ensuring that there are no defects in the design, structure or quality of their plant and that proper and adequate measures are strictly followed to mitigate the danger of pollution arising out of such industries. This step is necessary because the problem of danger of health and well being of community on account of chemical and other hazardous industries has become a pressing problem in modern industrial society. The Hon’ble Chief Justice also pointed out that when science and technology are increasingly employed in producing goods and services calculated to improve the quality of life, there is certain element of hazard or risk inherent in the very use of science and technology and it is not possible to totally eliminate such hazard or risk altogether. It is true that there is no method or policy of not having any chemical or other hazardous industries merely because they pose hazard or risk to community. If
such policy were adopted, it would mean the end all progress and development. Such industries even if hazardous are essential for economic development and achievement of well being of the people. It is therefore, necessary to take steps for reducing the element of hazard or risk to community by taking all necessary steps for locating such industries in a manner, which pose least risk of danger to the community and maximising safety requirement in such industries. It is fully agreed that since progress and pollution go together there can be no end of progress and consequently, no escape from pollution. If industry is felt to be necessary evil, the pollution is the surest sufferance. When technology is extending up to the exploitation of nuclear resources, the devices are to ended, it has to be endured with endeavour only to abate or alleviate it and nature. Ecology balance has suffered a great set back. It is true that the public interest plays the prime factor in stopping such polluting industries, but this would rather lead to curtailment of progress. Well-made plan is necessary in this contemporary situation for combating with the problem.

a) International Awareness:

The international world has not noticed any remarkable agitation about a balanced ecology prior to the year 1972.

Scientist has been aware that there exists a vital nexus between environment and life. The main components of environment are soil, water and air. The balance of these components is the pre-requisite for a healthy existence and consequently the preservation of the essential ingredients of life requires a stable ecological balance. It is not denying the fact the said balance is upset by misuse, abuse and depredation of natural resources, putting into jeopardy the human beings. The danger to environment is anathema incurred in the hectic role of industrialisation. l There is no doubt that day by day treasure of nature are being so mercilessly utilised that the human life is being in degrees cut short. This awareness has not alarmed the world at large. The heads of states are now crying
for looking at the environment issues from a global point of view rather than national, because it is the issue which has cut across barrier of religion, language and the frontiers of nations.2.

Thus having become conscious of the worldwide problem of keeping the environment safe from human existence, the United Nations organisation held its conference on Human Environment at Stockholm in June 1972. India was one of the parties to the conference. The general Assembly of the United Nation has passed a Resolution 2977 on December 15, 1972 with eloquent emphasis on the need of active co-operation among the states in the field of human environment and designated June 5 as the world Environment Day1.

The declaration in Stockholm is also considered as Magna-carta of Environment. The conference inter alia declared.

a) Man has the fundamental right to freedom, equality and adequate condition of life in an environment of quality that permits a life of dignity and well being.

b) Man bears a solemn responsibility to protect an improve the environment for present and future generations.

c) Water resources to be safeguarded for the benefit of the present and the future generation through a careful planning or management.

d) The heritage of wildlife and its habitat should be safeguarded.

e) The economic system should be protected and struggle against pollution should be supported.

f) The pollution of the sea be prevented.

Moreover, the recommendation was generally made for the education in the environment. Mobilisation of public opinion in each and every country should be taken in finding out the solution on this serious crisis. Needless to say that the Stockholm Declaration stands as a milestone in the movement for international Environmental Protection. Besides this, several declarations, charters, submimits, and conventions made y the United Nations like Earth Summit in 1992 at Rio de Jenerio and so on in Environmental Pollution.
2. Increasing Awareness in India: -

The Bhopal Gas Leak Disaster created awareness among the public in finding out solution for interest of public in checking such disaster. As a result, the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 was passed.

Prior to that several Acts pertaining to Environmental law were passed in accordance with the International Resolution like Water (Prevention and Control Pollution) Act, 1974. This act provides for penalties, fines and imprisonment for non-compliance with certain provisions of the Act. Moreover, this act extends its sphere for violation committed by companies, certain corporate employees and officials.

The Air (Preventive and Control) Act, 1981 provides for the prevention, control and abatement of Air Pollution. For this provisions were made for the establishment of central and State Board with the view to carrying out the aforesaid purposes. Chapter VI of this Act provides penalties for violation of or non-compliance with the provisions of the Act. Besides Section 20, 21, 22-A, 23, 26 and 31 are noteworthy provisions of Chapter IV dealing with prevention and control of air pollution in the Act.

It has been seen that although Water Act and Air Act are made but a compact and a comprehensive statute is still lacking. The environmental Protection Act, 1986 provides limit of water quality and control of water pollution. Not only that it also provides for checking air pollution. The environment (Protection) Act was the first environmental statute to give the Central Government Authority to issue direct written orders, including orders to close, prohibit or regulate any industry, operation or process or to stop or regulate the supply of electricity, water or any other service.1. Other power granted to the central Government to ensure compliance with the act include the power of entry for examination, testing of equipment and other purposes and the power to take samples of air, water, soil or any other substance from any place for analysis.2.
This Act provides for severe penalties for a person who fails to comply with or contravene any Act. Such person shall be punished for each failure and contravention, or both. The act imposes an additional fine up to Rs.5, 000/- for every day of continuing violation. If a failure or contravention occurs for more than one year after the date of conviction, an offender may be punished with imprisonment for a term, which may extend to seven years.

Besides, the Public Liability Insurance Act, 1991 and National Environment Tribunal act, 1995 are noteworthy in this connection.

The public Liability Insurance Act aims at providing for public liability insurance for the purpose of providing immediate relief to the persons affected by accident occurring while handling any hazardous substance, section 16 of this Act provides for offences committed by Companies and section 17, specifically speaks for offences committed by a department of to provide for strict liability for damages arising out of any accident occurring while handling while handling any hazardous substance and for establishment of a National Environment Tribunal for effective and expeditious disposal of case arising from such accident so as to give relief and compensation for damages to the affected persons and property.


It is worthy to mention in this connection that the Water (Prevention and control of Pollution) cess Act.1977 has been passed to provide for the levy and collection of cess on water consumed by persons carrying on certain industries and by local authorities. The rapid decline of India’s wild animals and birds, one of the most varied in the world has compelled the Parliament to pass the Wild Life
(Protection) Act, 1972 with a view to providing protection to those wild animals and birds which were likely to be extinct, had there been not such an Act. The Indian Act, 1927 is an Act passed to consolidate the land relating to forest and the transit of forest produce. Deforestation causes ecological imbalance and leads to environmental deterioration. Deforestation had been taking place on large scale in the country. Thus, the forest (Conservation) act. 1980 was passed to provide for the conservation of forests.

**Constitutional Provisions:**

Article 253 of the constitution empower Parliament to make laws implementing India’s obligations as well as any decision made at an international conference, association or other body. It states.

“Notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

After the constitution Forty Second (Amendment) Act. 1976 environmental consciousness got momentum at the global level. It tailored certain significant concepts into the fundamental law of the country. The obligation to improve the environment and to safeguard the forest and wildlife has been imposed on the State under Article 48 A. in the part IV of the constitution under the heading Directive Principles of State Policy. Under Article 51-A (g) a fundamental duty has been imposed on every citizen for improving and protecting environment.

There is no doubt that India is also keeping pace with the international arena in checking environmental pollution. By Virtue of which
several acts and Constitutional provisions are implemented pertaining to the same. Awareness on the wholesome environment is also increasing among the masses with the aid of media.

3. Public Interest Litigation for Right to Clean Environments:

Parallel to the generation of these ideas from the provisions of the 42nd Amendment relating to environment, there was a tide of judicial activism extending to new dimensions, the concept, "The right to life" and procedure established by law in Article 21. The judicial enthusiasm went to the extent of finding out the right to clean environment in the right to life in Article 21. But the absence of specific provision in the constitution recognising the fundamental right to environment has been set off by judicial innovation.

The first case where the Supreme Court recognised the right though not directly in Rural Litigation and Entitlement Kendra V. Sate of Uttar Pradesh.¹. In this case the Court after hearing both the sides held inter alia that the threat to ecological balance resulting in the deterioration of the quality of environment was thus apparently treated as involving a threat to right to life. In other words, the right to clean environment was indirectly recognised as an ingredient of right to live.

Initiated by a social activities lawyer, there were a series of cases under the M.C. Mehta V. Union of India where the Supreme Court had to opportunity to examine the potentialities of the concept of right to live on checking violations of environment. Mr. M.C. Mehta is also popularly known as "India’s Mr. Clean"². The first M.C. Mehta’s case 3 is specifically dealing with an activity causing direct threat to life of workers and of the general public in and around factory engaged in the manufacture of hazardous products. The court pointed out that the case raised some seminal questions concerning the true scope and ambit of Articles 21 and 31 of the constitution. In meeting the questions the
court adopted a detached approach of balancing the values of environment with those of development. On the basis of it, the court imposed certain conditions on such type of hazardous industry. The ratio of this case is simple. It states that when Science and Technology are increasingly employed in producing goods and services calculated to improve the quality of life, there is a certain element of hazard or risk inherent in the very use of science and technology and it is not possible to totally eliminate such hazard or risk. It is not possible to adopt a policy of not having any chemical or other hazardous industries merely because they pose hazard or risk to the community. If such a policy were adopted, it would mean the end of all progress and development. The second M.C. Mehat’s case 4 imputes an important question whether the claim for compensation for oleum gas can be made under Article 32? The question was answered by the court in the affirmative way. The court held that if it can accept a letter of complaint for violation of fundamental right of an individual or a class of individuals who cannot approach the court of justice, there is no reason why the application for compensation which has been made for the enforcement of the fundamental right under Article-21 of the person affected by the oleum gas leak should riot be entertained. The court held that the power to issue direction under Article 32 is tantamount to power to issue direction for payment of compensation. In this case also the Supreme Court did not specifically say whether the right to clean environment did come under the right to life under the purview of Article 21. But the trend to the decisions is too obvious to sustain a contrary view or to leave anybody in doubt.

The Fourth M.C. Mehta’s case, 1 presented a fact situation different from other cases. A group of owners of tanneries doing business ordered relocation of tanneries in east on the bank of Ganga were alleged to be polluting the river. The Supreme Court issued directions to the tanneries to set up primary treatment plant within a period of six months. The said court also directed the Central Government, Pollution Control Bard and the District Magistrate to oversee the work. In supporting judgement, Justice K.N. Singh observed that the pollution
of the river Ganga is affecting the life, health, and ecology of the Indao Gaetic plan. He also concluded that the closure of tanneries may bring unemployment, loss of revenue but life, health and ecology have greater importance to the people.

The Supreme Court on 19th December ordered relocation of tyrannies in each Calcutta to new site being built by the State Government. The owners of tanneries were asked to deposit 25 per cent of the land cost by February 28, 1997. All units paying the money have been permitted to operate till they are relocated by April 15, 1997. A division Bench comprising Mr. Justice Kuldip Singh and Mr. Justice S. Sagir Ahmed order the West Bengal Government to give public notices in newspaper for two consecutive days. The bench directed the state to appoint a Commissioner to assess he ecological damage and impose fine on the polluting units. The penalty and environmental damages recovered from the tanneries would be used to form "Environmental Protection fund" which would be utilised to restore the environment in the areas. The fine would be deposited with the Collector and Magistrate. The units, which have installed pollution control device on a later date, would pay fine for the period prior to installation of the devices. This judgement as delivered on the petition filed by M.C. Mehta. He contended that the tanneries were polluting the Hooghly river in the absence of proper of effluent treatment facilities. The court further directed that the workman should not be retrenched but be allowed to work at new site. They should be considered as actively employed. The tanneries opting for closure have to pay six years wages to the retrenched workers.

In the fifth M.C. Mehta's case, the court held on the same fact that a person interested in protecting lives and using water flowing in the river Ganga has the right to move to the Supreme Court. The petition was for the enforcement of statutory duties of municipal authorities and the Board constituted under the Water pollution control law. The court held that the petition was in order and could be allowed as it related to protecting the live of the people.
It is to be noticed that the Supreme Court in Mehta cases as well as in the Rural Litigation Kendra case has not held right to environment as one of the species of right to life within the purview of Article 21 in exercise of power under Article 32. But it gives indirectly the irresistible conclusion that right of life contained in Article 21 is so wide hat it can be taken within its ambit of right to clean and health and environment as well. Public Interest Litigation has emerged as a growing mechanism in the field on environment protection in India.

In the instant case the Supreme Court gave certain directions to the Kanpur Municipal Corporation and other concerned authorities in order to control and prevent the pollution of water in the river Ganga at Kanpur. All those directions will also apply mutates mutants to other Municipal corporation and Municipalities. The Central Government was directed to include the subject at national environment in the textbooks of all educational institutions. There was further direction to make people aware of the importance of cleanliness and hazards of pollution. "Keep City/Village Clean" weeks should also be observed in this connection. Most of the cases arose in the form of PIL were initiated by a public-spirited citizen rather than interests of group of people than to ascertaintable rights of individuals. In India class action against public nuisance can be brought under section 91 of the code of Civil Procedure and section 133 of the code of criminal Procedure. In inquisitive researcher may perhaps be disappointed when he sets out to inquire how far an environmental problem had been directly dealt with under the former provision. The latter provision was also not frequently used for environmental martyrs in early stage. But of late courts found section 133 of the code of Criminal procedure as a useful weapon for the protection of environment.

In Krishna Gopal V. State of Madhya Pradesh, ¹ the provision in section 133 of the Code was effectively made use of. In this case the complaint was against noise and air pollution from a glucose saline manufacturing company. It was installed is residential locality under license granted by appropriate
authorities. A lady resident of the locality complained that her husband, a heart patent, had been disturbed in his sleep every night due to the booming noise produced by the boiler in the factory. The question before the High Court were whether an order of removal of the boiler and factory could be made on a complaint by a single person. The court observed.

It is not the intent of law that the community as a whole or large number of complainants comes forwards to lodge their complaint or protest against the nuisance. That means that the provision of locus standi does not apply when the question arises on the issue of public interest. A mere reading of section 133(1) of the code of Criminal Procedure, 1974 would go to show that the jurisdiction of sub-divisional Magistrate can be invoked on receiving a report of a police officer or other information and on taking such evidence, if any as, he thinks fit and essential. The court was of the view that granting of permission for the installation of boiler in a residential locality and running of the factory was itself blatantly violative of law. The operation resulted in public nuisance and was against the larger interest of the community. The court held that it is not enough if he boiler is removed and ordered that the factory from which the nuisance was caused, has to be closed. The court upheld the original order of the Magistrate for removal of both boiler and the factory. Likewise, in Ajeet Mehta V. State of Rajasthan,1, the Rajasthan High court endorsed the order of the Magistrate under section 133 of the Criminal Procedure code directing the removal of a business enterprises from a residential locality which has become serious health hazard to the residents and the whole atmosphere was polluted on account of dust particles of the folder.

In Madhavi V. Thilakan,2 the Kerala High court held that everyman's home is to be considered as his castle in which one cannot invade it by toxic fumes, or tormenting sounds. This principle expressed through law and culture consistent with nature's ground rules for existence, which has been recognised in section 133(1)(b) of the code of criminal Procedure. The conduct of
any trade or occupation or keeping of any good or merchandise, injurious to health or physical comfort of community could be regarded or probated under section.

The Madhya Pradesh and Kerala High Court had an opposite view relating to the scope of remedies against public nuisance when they had to deal with questions of pollution of water and air.

In Tata Tea Ltd., V. State of Kerala 3 the question arises whether the discharge of effluents to the river by a factory could be prevented by District Magistrate when the permission of discharge was already given by authorities under section 133 of the code. It is open to citizen to directly approach an Executive Magistrate, one is unable to approach directly to Judicial Magistrate under the provision of the aforementioned Water Act. But that would make no difference. Since under the provision of the said Act, it is open to the citizen concerned to approach to the State Board to take measures as are contemplated in the act including filing petition before a Judicial Magistrate. All the remedies which would be provided by an executive Magistrate under section 133 of the Cr.P.C. could certainly be provided by authorities contemplated under the said Act.

There is no reasons to assume that the Executive Magistrate could move more expeditiously than the State Board. On the contrary, the State Board which has considerable expertise and requisite machinery in aid of its functions can certainly be expected to move purposefully and fruitfully in the case of water pollution. In this view, the provisions of the act by implication repealed the provision of section 133 of the code insofar as they relate to the prevention and control of water pollution.

It is to be mentioned that Tata Tea case is an example of lost opportunity for the courts to fully appreciate the point that moving the wheel of pollution control Board is an uphill task and is not an expeditious process.
Moreover, the perceived expertise and equipment of the Board are also questionable. The view in Tata Tea case does not seem to be environment oriented. Under section 133 of the code of criminal procedure the action is not in respect of prosecution of an offence but it relates to the prevention or removal of a public nuisance in exercise of administrative jurisdiction of an Executive Magistrate when the procedure envisaged in Air and Water Acts is turned out to be ineffective. The contention of special measures and self-containment should not be advanced to defeat the predominant purpose behind the action against public nuisance. Moreover, the red tapism of the Board in taking step in public interest, the court should take serious steps on the petition field by the public. But it not denied that the writ jurisdiction of the Supreme court under Article 32 and the High Court under Article 226 has not at any point of time been misused. It is prima facie seen in Rural Litigation and Mr. Mehta's cases. It bears testimony to the fact that the traditional rule of locus standi did not stand in any way in cases where environmental questions were raised and that the Supreme court interfered and gave direction after direction to the Governments for environmental protection measures in the interest of the general public. The High courts, as it has been seen from the provisions in the discussed cases, are not lagging behind. They invoked jurisdiction under Article 226 and made significant contributions to the development of Public Interest litigation through environmental cases, in Rabin Mukherjee v. State of West Bengal, 1. The Calcutta High Court specifically deals with noisy electric and air-horns used in buses and trucks. This writ application was moved by the petitioners for protection of their own rights and also in public interest being aggrieved by the nuisance and noise pollution which are being created by transport operators by indiscriminate installation and use of electric and artificially generated air horns which cause unduly rash, shrill, lead and alarming noise. In the Writ Petition the petitioners prayed for a writ in the nature of Madamus commanding the respondent to enforce the provision of Rule 114 of the Bengal Motor Vehicle Rules 1940 and to enforce the restrictions against the use of
such electric and other loud and shrill horns including air horns by operators and other loud and shrill horns by operators of the transport vehicles. It was further alleged that in such polluted state where the noise level is well beyond the permissible limit, it is no longer disputed that such excessive noise level pose positive danger to the residents of the respective locality. It has been held by the Calcutta High court that it is quite unfortunate that in spite of statutory provision such transport vehicles are allowed to use such type of prohibited horn and no action is taken against the person who has been contravening the provisions of the said rules. The High court directs the state Government to issue notice and/or notification immediately notifying to all transport vehicles about the restriction provided in Rule 114(d) of the Bengal Motor Vehicle Rule 1940 and directing them to use only bulb horn. The breach of such direction would lead to penal actions against such wrongdoer.

Besides, the Calcutta High Court on 24th February, 1997 directed the police to seize the microphone at any meeting if the noise exceeded the maximum level prescribed by West Bengal Pollution Control Board. A Division Bench comprising Justices Mr. Bhagwati Banerjee and Mr. Vidyanand has passed the order.

The Pollution Control Board further complained that there had been violation of the permissible noise level at Esplanade East where the Government offices are situated. The Division Bench has directed that normally no permission should be given to hold meeting at such public thoroughfares. If permission to hold meeting at such thoroughfares is allowed in an exceptional case, then police should inform the Pollution Control Board about it, so that the Board official may come to check the noise level at such meeting.

Noise pollution is detrimental to the health of people psychologically and behaviorally. The world health Organisation is of the opinion that it causes lowered efficiency and increased errors. It is estimated in
1961 that noise causes the American Industry a loss of about 2 million dollars a day in the form of compensation, lost hours and diminished efficiency.1

Thus, it has been seen that environmental pollution is very serious concern in the matter of public. It is for the interest of public. Courts must take seriously regarding this aspect and should entertain the petitions on the same without any restriction.

4) Shrimp Culture Farming Along Coastal Line – Goopy. Aqua Farms v. Union of India.2

This writ petition has been filed by means of Public Interest Litigation (PIL) and the petitioners claimed that they were not parties to the earlier PIL proceedings before the Supreme Court in the case of S. Jagannath v. Union of India 3. In Jagannath case, very wide publicity was given and individual notices to all aqua farms were issued. Persons affected were directed to appear in the court to place their case. Public notices were also issued in a large number of newspapers all over the India in English and also in local languages informing the aqua farms about the pending of the litigation and the date of next hearing. Various investigations into facts relating to Shrimp Culture Farming all over India were carried out and reports obtained from NEERI, Central Board for Prevention and Control of Water Pollution.

The Supreme Court held that Shrimp Cultrue is restricted for the prevention of Water Pollution. Moreover, in the Jagannath case itself, the notice is given in several leading daily circulating Newspapers for the appearance of the affected persons in the Jagannath case who are making Shrimp Culture. Thus, the petitioners claiming not to be affected by the judgement of Jagannath's case would simply loose the efficacy of the judgement rendered by the Supreme Court and the aqua farms will be able to carry on their business merrily notwithstanding the direction to the contrary given in that judgement. The Supreme Court rejected the
1961 that noise causes the American Industry a loss of about 2 million dollars a day in the form of compensation, lost hours and diminished efficiency. 1

Thus, it has been seen that environmental pollution is very serious concern in the matter of public. It is for the interest of public. Courts must take seriously regarding this aspect and should entertain the petitions on the same without any restriction.

4) Shrimp Culture Farming Along Costal Line – Goopy. Aqua Farms v. Union of India. 2

This writ petition has been filed by means of Public Interest Litigation (PIL) and the petitioners claimed that they were not parties to the earlier PIL proceedings before the Supreme Court in the case of S. Jagannath V. Union of India 3. In Jagannath case, very wide publicity was given and individual notices to all aqua farms were issued. Persons affected were directed to appear in the court to place their case. Public notices were also issued in a large number of newspapers all over the India in English and also in local languages informing the acquaforms about the pending of the litigation and the date of next hearing. Various investigations into facts relating to Shrimp Culture Farming all over India were carried out and reports obtained from NEERI, Central Board for Prevention and Control of Water Pollution.

The Supreme Court held that Shrimp Cultrue is restricted for the prevention of Water Pollution. Moreover, in the Jagannath case itself, the notice is given in several leading daily circulating Newspapers for the appearance of the affected persons in the Jagannath case who are making Shrimp Culture. Thus, the petitioners claiming not to be affected by the judgement of Jagannath's case would simply loose the efficacy of the judgement rendered by the Supreme Court and the aqua farms will be able to carry on their business merrily notwithstanding the direction to the contrary given in that judgement. The Supreme Court rejected the
contentions of the writ petitioners. Thus, the petition in the present case was rejected.

5) Some other cases relating to environment:
A). M.C. Mehta v. Union of India,

A Public Interest Litigation was filed for shifting/relocation/closure of hazardous/noxious/heavy/lare industries from Delhi, and secondly, for utilisation of land available as a result thereof for compensation/relief to women in terms of directions given by the Supreme Court in orders dated 10-5-1996 and 8-71996. It has been held in the aforesaid orders on the abovementioned dates that the order regarding land was both for relocating industries, as well as those which decide to close down and not to relocate the industries. There location of the industries would not be allowed unless and until fresh procedure for setting up a new industry, conform with the Master Plan, seek fresh permission to set up the industry from the Government and the pollution Control Board/Committee and obtain fresh electric and water connections. Moreover, the package of compensation proposed for the workmen employed in the industries which are not relocating and are closing down is inadequate and needs to be enhanced. The workmen who have not been provided residential accommodation by the employees be permitted to continue to occupy the same till accommodation is provided/made available at the relocating site. Such workmen employed with the industries which are not relocating should also be permitted to stay for a reasonable time. In M.C. Mehta v. Union of India, regarding land use along with the order dated 8-71996 regarding relocation of 168 industries, same principle as aforesaid has been laid down. This principle has been followed subsequently, i.e., in the present case also. The main objective of this Public Interest petition is to relocate the hazardous polluted industries from the crowded city, Delhi and secondly, for giving sufficient compensation to workmen who are employed in those industries which are not willing for relocation. Thus, on the one hand
protection of environment is made and on the other hand the right to livelihood is
not being deprived.

B) M.C. Mehta v. Kamal Nath,² :

It has been held by the Supreme Court that the notion that the public
has a right to expect certain lands and natural areas to retain their natural
characteristics is finding its way into the law of the land. The ancient Roman
Empire developed a legal theory known as the 'Doctrine of the Public Trust.' The
Public Trust Doctrine primarily rests on the principle that certain resources like
air, sea, waters and forests have such a great importance to the people as whole
that it would be wholly unjustified to make them a subject of private ownership.
The said resources being a gift of nature and they should be made freely available
to everyone irrespective of the status in life. The doctrine enjoins upon the
Government to protect the resources for the enjoyment of the general public rather
than to permit their use for private ownership or commercial purposes. Though the
public trust doctrine under the English Common Law extended only to certain
traditional uses such as navigation, commerce and fishing, the American Courts in
recent cases expanded the concept of the public trust doctrine. The observation of
the Supreme Court of California in Monolatu case clearly shows the judicial
concern in protecting all ecologically important lands for example fresh water,
wetlands or riparian forests. The observation therein to the effect that the
protection of ecological values is among the purpose of public trust, may give rise
to an argument that the ecology and the environment protection is a relevant factor
to determine which lands, waters or airs are protected by the public trust doctrine.
The Courts in United States are finally beginning to adopt this reasoning and are
expanding the public trust to encompass new types of lands and waters. There is
no reason why the public trust doctrine should not be expanded to include all
ecosystems operating in our natural resources. The Indian legal system is based on
English Common law which includes the public trust doctrine as part of its jurisprudence. The State as a trustee is under legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership. Thus, the public trust doctrine is a part of the law of the land.

C) M.C. Meha v. Union of India,¹:

This case relates to control of traffic which is a matter of paramount public interest.

In another case of M.C. Mehta v. Union of India,² the Supreme Court held that the existing provisions of the Motor Vehicles Act (59 of 1988) alone are sufficient to clothe the members of the police force and the transport authorities with ample powers to control and regulate the traffic in an appropriate manner so that no vehicle being used in public place poses any danger to the public in any form. The requirement of maintaining the motor vehicles in the manner prescribed and its use of roadworthy in a manner which does not endanger public, has to be ensured by the authorities. The Supreme Court expected that the concerned authorities would mobilize the needed support by delegation of these powers to other authorities, officers and if needed, to responsible members of the public so that the resource crunch or inadequacy of infrastructure is not an impediment in enforcement of law. The entire scope of the mater and particularly the control and regulation of traffic is a matter of paramount safety and therefore, is evidently within the ambit of Article 21 of the Constitution.

D) M.C. Mehta v. Union of India,³:

In this case directions were given by the Supreme Court to prevent Vehicular Pollution for the protection of environment in the interest of public.

This is a pro bono public petition. The Supreme Court has held that in the contemporary society environmental protection appears to have taken a back
seat. The Supreme Court felt unhappy while finding that no firm steps have been taken in protecting the environment by controlling the vehicular pollution which directly puts impact on the right to life under Article 21 of the Indian Constitution. Law casts an obligation on the State to improve the public health and protect and improve the environment. The directions issued by this Court were aimed at making the State to effectively discharge their obligations. In this regard the Delhi Administration and the Union of India have pleaded among other factors that lack of man, power is the reason to deal with the growing menace of chaotic traffic and decline in the environmental quality. The Supreme Court shows its desire to appoint Court Officers to assist the administration with a view to ensuring compliance of the directions issued by this Court. Article 142 of the Constitution provides inherent power to the Supreme Court to do complete justice. Article 144 of the Constitution provides that all authorities, Civil and Judicial, in the territory of India shall act in aid of the Supreme Court. The Supreme Court also directed the Ministers of Petroleum to submit their contention relating to the steps taken by them for supply of lead free petrol and the use of Catalytic Converter on the new as well as existing vehicle so as to use lead free petrol throughout the country.

A committee had been constituted by the Environment Pollution (Prevention and Control) Authority for Delhi. The Supreme Court directed that Committee to submit report about the action taken by the Committee for controlling vehicular pollution and the connected matter with suggestion for mitigating such vehicular pollution.

E) A.P. Pollution Control Board v. Prof. M.V. Nayudu and others,

The principles laid down in the above-mentioned case are as follows:

The 'Uncertainty' of Scientific Proof and its changing frontiers from time to time has led to great changes in environmental concepts. A basic shift in the approach to environmental protection occurred initially between 1972 to 1982. Earlier the concept was based on the assimilative capacity rules as revealed in
Principle 6 of the Stockholm Declaration of the U.N. Conference on Human Environment, 1972. The said principle assumed that science could provide policy makers with the information and means necessary to avoid encroaching upon the capacity of the environment to assimilate impacts and it presumed that relevant impacts and if presumed that relevant technical expertise would be available when environmental harm was predicted and there would be sufficient time to act in order to avoid such harm. But in the 11th Principle of the U.N. General Assembly Resolution on Word Charter for Nature, 1982 the emphasis shifted, to the 'Precautionary Principle', and this was reiterated in the Rio Conference of 1992. The principle of precautionary measure involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. Environmental protection should not only aim at protecting health, property and economic interest but also to protect the environment for its own safe. Precautionary duties must not only be triggered by the suspicion of concrete danger but also by (justified) concern or risk potential.

Another important principle was laid down that if in Environmental matter any complex issue arises then Court can refer Scientific and Technical aspects for investigation and opinion to expert bodies such as appellate authority under the National Environmental Appellate Authority Act, 1997.

Closure of Industries: M.C. Mehta v. Union of India and others.¹

Public interest litigation was made under Articles 32 and 21 of the Constitution of India. The Court directed closure of 168 industries in M.C. Mehta v. Union of India.² The main concern in this case is the directions (a) to (f) issued which are as follows:

(a) The Workmen shall have continuity of employment at the new town and place where the industry is shifted. The terms and conditions of their employment shall not be altered to their detriment.
(b) The period between the closure of the Industry in Delhi and its re-start at the place of relocation shall be treated as active employment and the workmen shall be paid their full wages with continuity of service.

(c) All those workmen who agree to shift with the Industry shall be given one year's wages as shifting bonus to help them settle at the new location.

(d) The workmen employed in the industries which fail to relocate and the workmen who are not willing to shift along with the relocated industries, shall be deemed to have been retrenched w.e.f. 30-11-1996 provided they have been in continuous Service (as defined in Section 25-B of the Industrial Disputes Act, 1947) for not less than one year in the industries concerned before the said date. They shall be paid compensation in terms of Section 25-F(6) of the Industrial Disputes Act, 1947. This additional compensation.

(e) The 'shifting bonus' and the Compensation payable to the workmen in terms of this judgement shall be paid by the management before 31-12-1996.

(f) The gratuity amount payable to any workmen shall be paid in addition. The Supreme Court had given the workmen an option for "not joining" and not for "joining". Hence those exercising such option would be deemed to have been retrenched w.e.f. 30-11-1996 rather than from the date of the exercising of such option. Neither the workmens attempt to seek review of the Supreme Court's order dated 31-12-1996 nor the workmens letter dated 6-1-1997 opting to shift subject to the result of such review proceedings amounted to an option not to join at the proposed place of relocation. Hence all the workmen except those who exercised or would exercise an option not to join were directed to be allowed to rejoin at the proposed place of relocation. Workmen not rejoining or refusing to rejoin were directed to be deemed to have been retrenched w.e.f. 30-11-1996 and to be paid only one years (not six years') wages plus Section 25-F(6) compensation.
Indian scientists and technologists. But the consequence of the blasts has turned to be more political than scientific and far more geopolitical than regional. This nuclear test in Pokhran can be pictures in both useful way and harmful way.

6) **A critical review on the closure of 168 industrial units in Delhi**:

The Supreme Courts Order dated July 8, 1996 closed down 168 factories categorized as 'H' (noxious and hazardous) as identified in the Delhi Master Plan with effect from November 30, 1996. The Supreme Court's order directing relocation of industries, special damage compensation and wages to the affected workers had been flouted by the factory owners out of job.

Public interest is not against the concept of judicial activism but it is felt that requirement is more for the effective judiciary than the activist Judges. Now a days, judiciary is more and more receptive to the causes of social justice. But, sometimes judiciary ends their activism with passing of pious orders attracting newspaper headlines. Many of their orders are not implemented at all. It is necessary to expose the human tragedy caused by the Judicial activism relating to the 168 closed industries in Delhi. The environmental concern was merely ostensible reason for the closure, in fact, the real impetus came from the politics of real estate and the growing push to re-structure urban spaces for the elite.

Judicial activism should not deprive the poor people from their basic rights. Their mouth should not be ajar by dirty politics. If this trend of dirty politics prevail over the judicial activism suppressing the sordid condition of the poor, then such judicial activism for the interest of public should not be welcomed.

Indian scientist and technologists. But the consequence of the blasts has turned to be more political than scientific and far more geopolitical than regional. This nuclear test in Pokharn can be picturised in both useful way and harmful way.
Judicial Activism And Labor/Industrial Law

THE ASIAD CASE:

People's Union of democratic Right V. Union of India (Popularly known as the Asiad Case) (A.I.R. 1982 S.C. 1473) is an epoch-making judgement of the Supreme Court of India, which has not made a significant contribution to labour law, but has displayed the creative attitude of judges to protect the interest of the weaker section of the society. Further, the court has given a new dimension to several areas, such as locus standi, public interest litigation, enforcement of labour laws, minimum wages and employment of children.

The case arose out of the denial of minimum wages to workmen engaged in the construction work of various projects connected with the Asian Games held in New Delhi in 1982 and non-observance of the Minimum Wages Act, 1948, Equal Remuneration Act, 1976. Employment of Children Act. 1938, Contract Labour (Regulation and abolition) act, 1970 and the Inter-State Migrant Workmen (Regulation of Employment and condition of Service) Act, 1979 and also Arts.23 and 24 of the constitution.

This name was brought to the notice of the court, not by the aggrieved workers but by a letter written to Justice Bhagwati, Judge of the Supreme Court, by the People's Union of democratic Rights, an organisation formed for the protection of human rights. The letter was based on a report made by a team of three social scientists who had been commissioned and inquire into the conditions under which workmen engaged in various Asiad projects were working. The court after personal investigation and study decided to treat that letter as a writ petition and issued notices to the Union of India, Delhi Administration and Delhi Development Authority. The petitioner pointed out that the workers did not get the minimum wages prescribed under the Minimum Wages Act.1948. The petitioner
also alleged violation of various other labour laws, such as Employment of Children Act, Equal Remuneration Act, Contract Labour Act. Etc.

The court was directly called upon to decide the following main issues. Whether a person, who has not suffered a legal injury of his legally protected right can file a writ petition in case of breach of any fundamental right under Art.32 seeking judicial redress for the public wrong?

Whether a writ petition under Art.32 is maintainable for mere violation of labour laws and not for breach of any fundamental right?

What is true scope and meaning of expression "traffic in human beings, begar and other similar forms of forced labour" in Art.23?

Whether there was violation of several labour laws?

The Supreme Court through bhagwati. J. answered all these question in the affirmative.

For the purpose of analysis, the court's decision may be considered under the following headings.

Locus Standi

Public Interest Litigation

The issue of locus standi has arisen in a number of cases before the Supreme Court. It has been examined in detail in S.P. Gupta V. Union of India (Popularly Known as the Transfer of Judges Case) (A.I.R. 1982, S.C. 149). In this case, Bhagwati, J. Formulated the principle of public interest litigations thus:

Where a legal wrong or a legal injury is caused to a person or to determine class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden in threatened and such person or determinate class of person is by reason of poverty, helplessness or disability of social or economically disadvantaged position,
unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction or writ or order.

Bhagwati, J. Characterized this matter as public interest litigation and stated that: "Public Interest litigation is strategic of the legal aid movement and is intended to bring justice within the reach of the poor masses who constitute low visibility area of humanity. It is totally different kind of litigation from the ordinary, traditional litigation which is essential of an adversary character, where there is a dispute between two litigation parties."

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 Stat or 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... 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."

In such a situation, the court would cast 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. The people, by reason of their poverty, ignorance, illiteracy and socio-economic disability, were unable to approach the court for judicial redress. So, it was decided that under the liberalised rule of standing the petitioners had the locus standi to maintain the writ petition espousing the cause of the workmen. The petition had been brought out of a sense of public service and was clearly maintainable.

As observed by Bhagwati, J. in the transfer of Judges Case (A.I.R. 1982, S.C. 149)
It is only by liberalising the rule of locus standi that it is possible to police the corridors of power and prevent violations of law.

Krishna Iyer J.in Fertilizer Corporation Kamgar Union V. Union of India (A.I.R. 1981 S.C. 344) also stated that.

In simple terms locus standi must be liberalised to meet the challenge of time.

This liberalised rule of locus standi has been reflected in various Supreme Court decisions including the Ratlam Muncipality Case (A.I.r. 1980 S.C. 1622); K.R. Shenoy V. Udipi Municipality (A.I.R. 1974 S.C. 2177); Bandhua Muki Morcha V. Union of India (A.I.R. 1984, S.C. 802), and Ram Kumar Mishra V. State of Bihar (A.I.R. 1984 S.C. 537).

II. MAINTENANCE OF THE WRIT PETITION UNDER ART. 32

As regards the maintainability of the writ petition, the Court accepted that the writ petition of the petitioner under Art.32 could not be maintained unless there was a violation of fundamental right. Consequently, it examined whether there was any violation of fundamental right in this case, and observed.

The complaint of violation of Art. 24 based on the averment that the children below the age of 14 years are employed in the construction work of Asiad projects is clearly a complaint of violation of a fundamental rights and benefits conferred on the workmen employed by a contractor under the provision of the Contract Labour (Regulation and Abolition) Act, 1970 and the Inter-State Migrant Workmen (Regulation of Employment and conditions of service) Act, 1979 are clearly intended to ensure basic human dignity to the workmen and if the workmen are deprived of any of the rights and benefits, that would be clearly a violation of Art.21 by the Union of India. Delhi Administration and Delhi Development Authority, which as principle employers are made statutorily responsible for securing such rights and benefits to the workmen.
III. PROHIBITION OF TRAFFIC IN HUMAN BEINGS AND FORCED LABOUR

As regard the true scope and meaning of traffic in human beings and other form of forced labour, the court pointed out that Art. 23 was designed to protect the individual not only against the State but also against similar forms of forced labour practiced by anyone else. Elaborating the point, Bhagwati J. observed.

"Art. 23 strike at forced labour in whatever form it may manifest itself, because it is violative of human dignity and it contrary to basic human rights.

"Art 23 Striked at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values".

When a person provides labour or service to another for a remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words.

"Forced labour", under Art.23, observed Bhagwati, J. Such a person would be entitled to come to the court for enforcement of his fundamental right under art.23, by asking the Court to direct payment of 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.

The court gave directions to the Central Government and the Delhi Development Authority to take appropriate action against the contractors for not having paid minimum wages to the workers.

The court observed that although many of the fundamental rights enshrined in Part III operated as limitations on the power of the State, there were certain fundamental rights conferred by the constitution, which were enforceable against the whole world and they are to be found, inter alia, in Art.17,23 and 24. Whenever a fundamental right in Art.17, 23 or 24, which is available against private individuals is violated, it is the constitutional obligation of the state to take necessary steps for the purpose of stopping such violation and ensuring observance of the fundamental rights by the private individual who is
transgressing such rights. Of course, the person, whose fundamental right is violated, can always approach the court for its enforcement, but this cannot absolve the State from its constitutional obligation to see that there is no violation of the fundamental rights of such person particularly when he belongs to the weaker sections of the community and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him.

**IV. VIOLATION OF LABOUR LAW:**

As regard the issue whether there was violation of labour laws, the court pointed out that admittedly there were certain violations committed by the contractors but added that for these violations, prosecutions were latched against them and no violation of any of the labour laws was allowed to go unpunished. The union of India also conceded that Re.1 per worker per day was deducted by the Jmadars for the wages payable to the workers with the result that the worker did not get the minimum wages of Rs. 9.25 per day, but stated that the proceedings had been taken for the purpose of recovering the amount of shortfall in the minimum wages from the contractors. In view of this, the court pointed out that whenever any construction work is being carried out either departmentally or through contractors, the Government or any Governmental authority including a public sector corporation which is carrying out such work, observed and they should not wait for any complaint to be received from the workmen in regard to non-observance of any such provision before proceeding to take action against the erring officers or contractors. Instead, they should institute an effective system of periodic inspections coupled with occasional surprise checks by the higher officers in order to ensure the there are no violations of the provisions of labour laws and the workmen are not denied the rights and benefits to which they are entitled under such provision, and if any such violations are found, immediate action should be taken against defaulting officers or contractors.

The decision in Asiad case, as regards the payment of minimum wages and protection of fundamental rights under Art.23 and 24 was reinforced by the

In this case a public interest petition was filed by a social action group, called Social worker and Research Center, a registered society, actively engaged in the upliftment of schedule casts and scheduled tribes. The petitioner claimed that gross violations of the provisions of minimum wages Act, 1948 had been taking place, which called for judicial intervention. In a famine relief work, to provide relief to persons affected by drought and scarcity conditions, the State government had engaged a large number of workers for construction of a road, including women belonging to schedule Cases. It was complained that they were paid Rs.7 per day. Bhagwati J. observed that the word "Forced Labour" must mean such labour as was given by force and "force" would include not merely the physical or legal force but also force arising from the compulsion or economic circumstances which leaves no choice or alternatives to a person in want and compels him to provide labour or service even through the remuneration received for it is less than the minimum wages.

The court held that secs. 1 and 3 of the Rajasthan Famine Relief Works Employees (Exemption from labour Laws) Act, 1964, insofar as they excluded the applicability of the Minimum Wages Act to workmen employed in famine relief work were violative of Art. 23. It was contended in defence of these provisions that the state effort to help the affected persons in famine would be handicapped if it were bound by the labour laws. The above provisions merely freed the State from such obligation in order to enable it to carry on the work of providing famine relief to maximum number of people. This argument was rejected by Bhagwati J. The learned Judge observed that the remuneration of the work done was not dole or bounty given by the State to famine victims. The State could not be permitted to take advantage of the helpless condition of the affected persons and exact labour or service from them on payment of less than the minimum wages. Pathak J. in his concurring judgement stated that the provision of
paying less than the minimum wages to famine relief workers was discriminatory and violated Art.14. The court ordered the payment of wages according to the rates prescribed under the Minimum Wages Act.

Casual Labor and “Equal Pay For Equal Work”

For ages those belonging to lower echelons of the society in India have suffered discrimination and unequal treatment in various form both at the hands of the rules and the society. The history of India before its Independence in replete with large-scale exploitation of the illiterate masses. The Government of the day sanctioned exploitative practices. The rules connived with the richer class and shut their eyes to the system of bonded labour, usurpation of land of the poor and other evil practices, the victims suffered heavily on the social and economic front. That is why the farmers of the constitution mandated that the state would direct its policy towards securing, inter alia, equal pay for equal state would direct its policy towards securing inter alia, equal pay for equal work for both men and women.

Paradoxically, the socialist state of India, in disregard of the constitutional policy, has largely carried on the legacy of the past and denied to a vast number of daily wage employees equal pay for equal work. The Government’s attitude is reflected in its counsel’s successful argument in Kishori Mohanlal Bakshi V. Union of India that “equal pay for equal work” was an abstract doctrine and had nothing to do with Article 14. The trend thus set by the Supreme Court in 1961 was reversed only after two decades (in 1982) by a forward-looking court in Randhir Singh v. Union of India declaring the doctrine as one of substance. Its spokesman, Justice Chinnappa Reddy, gave it content by declaring that it is not “mere demagogic slogan” but a “constitutional goal” capable of being achieved through constitutional remedies and enforcement of constitutional rights. He hailed “the raising social and political consciousness and the expectations aroused as a consequence” among the underprivileged who are now seeking the court’s intervention to protect and promote their rights.
The judge interpreted the directive principle of equal pay for equal work for both men and women as “equal pay for equal work for everyone and as between the sexes” and read it into the fundamental rights guaranteed by article 14 securing equality before the law and by Article 16 equality of opportunity in matters of public employment. In his view, the equality provision and the term “socialist” in the preamble will be meaningful to the vast majority of the people only if equal work draws equal pay; otherwise it will lead to unrest imperiling peace and harmony of the society.8. In this context the judge said:

The principle of equal pay for equal work is deducible from (Articles 14 to 16) and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification through those drawing the different scales of pay do identical work under the same employer.

Consequently the respondent was directed to fix the scale of pay of driver constables (the petitioner being one of them) of the Delhi Police Force at least on par with that of drivers of the Railway Protection Force both doing identical work under the same employer.10

The Randhir Singh Verdict, though cautiously restricted to “identical work under the same employer”, is an excellent example of judicial creativity and has tremendous potential to bring justice to numerous employees who are the real but neglected lot at the base of nation building.

A critic greeted the actual decision in the case but doubted was its ratio decidendi could easily of disparities in wage structure in various sectors of public employment 11. But given the political will and administrative concern, the principle with its limited scope should pose no problem in its effective implementation. As the critic himself said: “Perhaps at present the court is content on providing equality of wages within each government, bank, insurance company, university, etc. 12. The principle being unambiguous, the word “Perhaps” is superfluous.
Another critic mounted a scathing attack on the judgement. He charged the court with a lack of serious thinking about the disastrous consequences of its ruling and was convinced that it would open a floodgate of litigation that the central and State Governments would go in liquidation if parties in pay scales of their employees and those of public undertakings were enforced. In his view, the goal could be achieved through a gradual and slow process of change of the nation as a whole, not by a decree of the court. The criticism is both baseless and opposed to reason. The ruling has not resulted into explosion of litigation; the governments are not doomed, and the public exchequers are not emptied. The decision, having restricted application, and its economics have been thoroughly misunderstood. Its countrywide implementation, even at every level of public employment would not cost the treasury even a fraction of wasteful expenditure the governments and public undertakings knowingly incur. Moreover, there is a complete failure on the part of the critic to appreciate the developmental role of a modern welfare state constitutionally mandate to modernise a traditional society, from which the judiciary as one of its wings cannot be isolated. The Supreme court has played an activist role as the apex court of this country since Maneka Gandhi V. Union of India 14 in providing relief in a variety of situations to the poor and the oppressed, in arousing people’s consciousness about their rights and duties, and in reminding slumbering sentinels of the nation of their assigned tasks. Otherwise, the critic would not have excluded the judiciary from participating in the development role assigned to the state.

The Randhir Singh decision was affirmed and expanded within two years by a constitution bench of the Supreme Court in D.S. Nakara V. Union of India15 giving relief to pensioners. Justice Desai representing the court, explained the objective of a socialist state thus.

The principle aim of a socialist state is to eliminate inequality in income and status and standard of life. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from
cradle to grave. This amongst other on economic side envisaged equitable
distribution of income. This is a blend of marxism & Gandhism leaning heavily
towards Gandhian Socialism.\textsuperscript{16}
The Judge added:
The less equipped person shall be assured a decent minimum standard of life and
exploitation in any form shall be eschewed. There will be equitable distribution of
national cake and the worst off shall be treated in such a manner as to push them
up the ladder\textsuperscript{17}.

Within a period of about two years of its affirmation and expansion in D.S.
Nakara, the Randhir Singh ruling was followed by the Supreme Court in several
cases, for example, Ramachandra Iyer V. Union of India\textsuperscript{18} and P. Savita v. Union
of India. In the former, the irrational and arbitrary differential treatment in the
matter of pay scale accorded to some professors by the Indian Council of
Agricultural Research was struck down and the revised pay scale granted. Similar,
the latter saved the equality doctrine from being flouted by authorities under the
cover of artificial division of senior draughts men in the Ministry of Defence
Production resulting in unequal scales of pay for the same work.

It is evident that the exposition of constitutional law in Randhir Singh
added a new dimension to service jurisprudence. It, however, gave rise to some
whispering dissent in that the doctrine was extended beyond permissible limits. In
fact, the verdict went unheeded, it made no dent into the steel frame of
bureaucracy and had no impact on political managers of the state.

Within one year of P. Savita, the Supreme court was aging confronted in
Surinder Singh v. Chief, C.P.W.D\textsuperscript{21}. With the usual argument of laissez faire state
on "an all too familiar argument with the exploiting class\textsuperscript{22}, that the doctrine of
equal pay for equal work was a mere abstract doctrine incapable of being enforced
in a court of law. Justice Reddy of Randhir Singh fame, representing the court was
“not a little surprised than such an argument should be advanced on behalf of
Central Government 36 years after the passing of the constitution and 11 (in fact 10) years after the Forty-second Amendment proclaiming India as socialist republic\(^{23}\), Actually, this was a sarcasm; the judge was unhappy over the callousness of the government and, citing Randhir Singh, reminded the government that like all organs of the state it was constitutionally committed to the directive principle, one of which enshrined the principle of equal pay for equal work. He added that Governments and public sected undertaking "are expected to function like model and unlighted employers\(^ {24}\), and arguments such as the one advanced in the case "showed ill-come from (their) mouths\(^ {25}\).

An interesting situation came up in Surinder Singh, whereas the beneficiaries of Randhir Singh, Ramchandra Iyer and P. Savita were permanent and better off employees and those of D.S. Nakara pensioners the claimants of relief in Surinder Singh were poor dialy-wage worker employed for several years by the Central Republic Works Department (C.P.W.D.). They demanded parity in their wages (salary and allowances) with those of regular and permanent employees of the department on the basis of doing identical work. Justice Reddy quickly granted the relief in view of his Randhir Singh decision affirmed in D.S. Nakara and he further relied upon the following directions issued by Chief Justice Bhagawati and Justice Sen. in another recent case, namely, Nehru Yuvak Kendras\(^ {26}\).

It must be remembered that in this country where there is so much unemployment, the choice for the majority of people is to starve 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 Article 14.... It makes no difference whether they are appointed in sanctioned posts or not. So long as
they are performing the same duties, they must receive the same salary and conditions of service as class IV employees.

The Government was thus frankly and rightly told by the justices of the court that an exploitative agreement entered into between poor daily rated workers under the pressure of circumstances, which are not of their own creation, and the government of a socialist state, running a foul of the basic rights of employees, would stand amended so as to accord equal treatment to them.

Thus, have fallen under the shooting range of Randhir Singh ruling extensive administrate activities of the governments and their offshoots. So, cruel and incredible are these that they squeeze millions of workers by deliberately subjecting them to a kind of bondage of low-paid daily employment which they have to accept by force of circumstances. The authorities would no longer be able to justify their discriminatory treatment of persons under their employment by applying too mechanically the doctrine of classification laid down under Article 14 to the daily wage earners.

The decision in Surinder Singh is, however, applicable to casual employees of the Center only as the Randhir Singh ruling is restricted to “identical work under the same employer,” May be in some future case the Supreme Court widens the scope of its decision by saying “identical work under the state generally”.

One may qualify Surinder Singh itself as unique ruling in the applied Randhir Singh principle in an altogether different setting. But it hardly matters so long as the judicial process so initiated remains a continuum. Surinder Singh may then be taken as a milestone. It appears the justice of Randhir Singh and DS. Nakara might have contemplated a situation such as the present one when Justice Reddy made a reference to the underprivileged in the former and Justice Desai to the worst off in the latter and both of them (Justice Desai more explicitly) laid emphasis on economic equality in a socialist state, even though the facts did not present as alarming a situation as in the present case.
An added attraction of Surinder Singh is the following observation of Justice Reddy.

We hope that the Government will take appropriate action to regularise the service of all those who have been in continuous employment for more than six months. This was not a direction but a judicial advice to the government to fulfill its constitutional obligation. This might have become a direction from a giving court had the counsel. This might have become a direction from a giving court had the counsel for petitioner raised the issue that the non regularization of series of casual employees who had worked for a specified period of time itself violated the doctrine of equality as expounded in Randhir Singh. He could have alternatively agitated the point scored in the present case. May be he thought it wise to take a safer course at this stage and leave the demand for regularization of their services under the Government to a future case; or be abstained from choosing a harder directed payment of on par emoluments but not regularisation of services in the absence of sanctioned post. Happily, the apex court is now seized on the plea of non-regularisation of services of casual laborers beyond a certain period as a violation of the equality doctrine and one may hope that the underprivileged and the worst off would get their due.

The judicial justice done in Surinder Singh aroused hopes in not only about 19,000 casual labourers of the C.P.W.D, but several lakhs of such workers employed in various departments of the Central Government. The decision did not, however, click with the officialdom and their counsel. They felt that it would subject the exchequer to heavy burden, and that unequal should not have been treated as equals. Their view was that the class held a distinct legal status, some distinguishing features being the nature of employment, the source and method of recruitment, accountability and responsibility and subjection to service rules. Such a case, according to them, was a case of permissible classification and hence differential wages were justified. An insensitive executive machinery, despite its
constitutional obligation to act in aid of the Supreme Court\textsuperscript{36}, however, failed to act. Nothing short of a political action in the form of strike by workers' union, paralyzing the civic life in various ways, could force the government to respect and implement the verdict\textsuperscript{37}. The executive should have realised that the national loss is social and economic terms through such political actions is often much more than what the nation would spend on giving legitimate dues to the needy and deserving, and that, apart from legal requirement, in showing reverence to court, which it expects and claims from the citizenry, it would maintain democracy. How to cast off the court's dependence on the executive for enforcing its judgments and orders deserves serious consideration by legal scholars.

How is that the post-verdict thinking in official circles about the classification being reasonable and hence unequal wages justified did not strike the Government counsel during debates in the court? How is it that he did not confront the court with such an important point (certainly stronger than the one raised) and, on the contrary, harped on the discarded old theory that "equal pay for equal work" was an abstract principle incapable of being enforced by courts? Perhaps he fell short of material to make out an acceptable distinction or he was so sure of the Halloweens of the argument that he did not deliberately advance it. On its face, the plea of permissible classification in the present setting may look sound and attractive, but in its deeper analysis it would stand exposed as, even through the basis of classification could be intelligible, it would have no rational nexus with the objectives of classification, namely, efficiency and desired output of work. The plea would also braked own on the touchstone of social justice which demand, in the larger interest of equality, parity in wage structure for doing identical work. Though it is highly unethical and wholly contrary to constitutional philosophy of soci-economic justice to employ workers on daily wages for long year\textsuperscript{38}, for argument sake let us say that persons working on a day-to-day basis may prove even more efficient and more work-oriented that permanent ones in
order to sustain themselves in job, and would feel physchologically content if at least accorded an equal treatment along with their regular employed brethren.

In determining questions of parity in wages, the right test has been pointed out by a government officer turned research scholar, "is there difference in the nature of work? If not, then the parity in wages is the only answer." Indeed, the true focus has got to be functional and the decisive test the nature of the activity. In this view, it would be difficult to sustain any official justification of the classification and hence of differential wages.

**Casual Labor and “Equal Pay For Equal Work”**

For ages those belonging to lower echelons of the society in India have suffered discrimination and unequal treatment in various form both at the hands of the rules and the society. The history of India before its Independence in replete with large-scale exploitation of the illiterate masses. The Government of the day sanctioned exploitative practices. The rules connived with the richer class and shut their eyes to the system of bonded labour, usurpation of land of the poor and other evil practices, the victims suffered heavily on the social and economic front. That is why the farmers of the constitution mandated that the state would direct its policy towards securing, inter alia, equal pay for equal state would direct its policy towards securing inter alia, equal pay for equal work for both men and women.

Paradoxically, the socialist state of India, in disregard of the constitutional policy, has largely carried on the legacy of the past and denied to a vast number of daily wage employees equal pay for equal work. The Government’s attitude is reflected in its counsel’s successful argument in Kishori Mohanlal Bakshi V. Union of India that “equal pay for equal work” was an abstract doctrine and had nothing to do with Article 14. The trend thus set by the Supreme Court in 1961 was reversed only after two decades (in 1982) by a forward-looking court in Randhir Singh v. Union of India declaring the doctrine as one of substance. Its spokesman, Justice Chinnappa Reddy, gave it content by declaring that it is not “mere demagogic slogan” but a “constitutional goal” capable of being achieved.
through constitutional remedies and enforcement of constitutional rights. He hailed “the raising social and political consciousness and the expectations aroused as a consequence” among the underprivileged who are now seeking the court’s intervention to protect and promote their rights.

The judge interpreted the directive principle of equal pay for equal work for both men and women as “equal pay for equal work for everyone and as between the sexes” and read it into the fundamental rights guaranteed by article 14 securing equality before the law and by Article 16 equality of opportunity in matters of public employment. In his view, the equality provision and the term “socialist” in the preamble will be meaningful to the vast majority of the people only if equal work draws equal pay; otherwise it will lead to unrest imperiling peace and harmony of the society.8. In this context the judge said:

The principle of equal pay for equal work is deducible from (Articles 14 to 16) and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification through those drawing the different scales of pay do identical work under the same employer.

Consequently the respondent was directed to fix the scale of pay of driver constables (the petitioner being one of them) of the Delhi Police Force at least on par with that of drivers of the Railway Protection Force both doing identical work under the same employer.10

The Randhir Singh Verdict, though cautiously restricted to “identical work under the same employer”, is an excellent example of judicial creativity and has tremendous potential to bring justice to numerous employees who are the real but neglected lot at the base of nation building.

A critic greeted the actual decision in the case but doubted was its ratio decidendi: could easily of disparities in wage structure in various sectors of public employment 11. But given the political will and administrative concern, the principle with its limited scope should pose no problem in its effective implementation. As the critic himself said: “Perhaps at present the court is content
on providing equality of wages within each government, bank, insurance company, university, etc. 12. The principle being unambiguous, the word "Perhaps" is superfluous.

Another critic mounted a scathing attack on the judgement. He charged the court with a lack of serious thinking about the disastrous consequences of its ruling and was convinced that it would open a floodgate of litigation that the central and State Governments would go in liquidation if parties in pay scales of their employees and those of public undertakings were enforced. In his view, the goal could be achieved through a gradual and slow process of change of the nation as a whole, not by a decree of the court. The criticism is both baseless and opposed to reason. The ruling has not resulted into explosion of litigation; the governments are not doomed, and the public exchequers are not emptied. The decision, having restricted application, and its economics have been thoroughly misunderstood. Its countrywide implementation, even at every level of public employment would not cost the treasury even a fraction of wasteful expenditure the governments and public undertakings knowingly incur. Moreover, there is a complete failure on the part of the critic to appreciate the developmental role of a modern welfare state constitutionally mandate to modernise a traditional society, from which the judiciary as one of its wings cannot be isolated. The Supreme court has played an activist role as the apex court of this country since Maneka Gandhi V. Union of India 14 in providing relief in a variety of situations to the poor and the oppressed, in arousing people's consciousness about their rights and duties, and in reminding slumbering sentinels of the nation of their assigned tasks. Otherwise, the critic would not have excluded the judiciary from participating in the development role assigned to the state.

The Randhir Singh decision was affirmed and expanded within two years by a constitution bench of the Supreme Court in D.S. Nakara V. Union of India 15 giving relief to pensioners. Justice Desai representing the court, explained the objective of a socialist state thus.

149
The principle aim of a socialist state is to eliminate inequality in income and status and standard of life. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave. This amongst other on economic side envisaged equitable distribution of income. This is a blend of marxism & Gandhism leaning heavily towards Gandhian Socialism. The Judge added:

The less equipped person shall be assured a decent minimum standard of life and exploitation in any form shall be eschewed. There will be equitable distribution of national cake and the worst off shall be treated in such a manner as to push them up the ladder.

Within a period of about two years of its affirmation and expansion in D.S. Nakara, the Randhir Singh ruling was followed by the Supreme Court in several cases, for example, Ramachandra Iyer V. Union of India and P. Savita v. Union of India. In the former, the irrational and arbitrary differential treatment in the matter of pay scale accorded to some professors by the Indian Council of Agricultural Research was struck down and the revised pay scale granted. Similar, the latter saved the equality doctrine from being flouted by authorities under the cover of artificial division of senior draughts men in the Ministry of Defence Production resulting in unequal scales of pay for the same work.

It is evident that the exposition of constitutional law in Randhir Singh added a new dimension to service jurisprudence. It, however, gave rise to some whispering dissent in that the doctrine was extended beyond permissible limits. In fact, the verdict went unheeded, it made no dent into the steel frame of bureaucracy and had no impact on political managers of the state.

Within one year of P. Savita, the Supreme court was aging confronted in Surinder Singh v. Chief, C.P.W.D. With the usual argument of laissez faire state on “an all too familiar argument with the exploiting class," that the doctrine of
equal pay for equal work was a mere abstract doctrine incapable of being enforced in a court of law. Justice Reddy of Randhir Singh fame, representing the court was “not a little surprised than such an argument should be advanced on behalf of Central Government 36 years after the passing of the constitution and 11 (in fact 10) years after the Forty-second Amendment proclaiming India as socialist republic." Actually, this was a sarcasm; the judge was unhappy over the callousness of the government and, citing Randhir Singh, reminded the government that like all organs of the state it was constitutionally committed to the directive principle, one of which enshrined the principle of equal pay for equal work. He added that Governments and public sected undertaking “are expected to function like model and unlighted employers,” and arguments such as the one advanced in the case “showed ill-come from (their) mouths.

An interesting situation came up in Surnder Singh, whereas the beneficiaries of Randhir Singh, Ramchandra Iyer and P. Savita were permanent and better off employees and those of D.S. Nakara pensioners the claimants of relief in Surinder Singh were poor dialy-wage worker employed for several years by the Central Republic Works Department (C.P.W.D.). They demanded parity in their wages (salary and allowances) with those of regular and permanent employees of the department on the basis of doing identical work. Justice Reddy quickly granted the relief in view of his Randhir Singh decision affirmed in D.S. Nakara and he further relied upon the following directions issued by Chief Justice Bhagawati and Justice Sen. in another recent case, namely, Nehru Yuvak Kendras.

It must be remembered that in this country where there is so much unemployment, the choice for the majority of people is to starve 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 Article 14.... It makes no difference whether they are appointed in sanctioned posts or not. So long as they are performing the same duties, they must receive the same salary and conditions of service as class IV employees.

The Government was thus frankly and rightly told by the justices of the court that an exploitative agreement entered into between poor daily rated workers under the pressure of circumstances, which are not of their own creation, and the government of a socialist state, running a foul of the basic rights of employees, would stand amended so as to accord equal treatment to them.

Thus, have fallen under the shooting range of Randhir Singh ruling extensive administrate activities of the governments and their offshoots. So, cruel and incredible are these that they squeeze millions of workers by deliberately subjecting them to a kind of bondage of low-paid daily employment which they have to accept by force of circumstances. The authorities would no longer be able to justify their discriminatory treatment of persons under their employment by applying too mechanically the doctrine of classification laid down under Article 14 to the daily wage earners.

The decision in Surinder Singh is, however, applicable to casual employees of the Center only as the Randhir Singh ruling is restricted to “identical work under the same employer,” May be in some future case the Supreme Court widens the scope of its decision by saying “identical work under the state generally”.

One may qualify Surinder Singh itself as unique ruling in the applied Randhir Singh principle in an altogether different setting. But it hardly matters so long as the judicial process so initiated remains a continuum. Surinder Singh may then be taken as a milestone. It appears the justice of Randhir Singh and DS. Nakara might have contemplated a situation such as the present one when Justice Reddy made a reference to the underprivileged in the former and Justice Desai to the worst off in the latter and both of them (Justice Desai more explicitly) laid
emphasis on economic equality in a socialist state, even though the facts did not present as alarming a situation as in the present case.

An added attraction of Surinder Singh is the following observation of Justice Reddy.

We hope that the Government will take appropriate action to regularise the service of all those who have been in continuous employment for more than six month\textsuperscript{28}.

This was not a direction but a judicial advice to the government to fulfill its constitutional obligation. This might have become a direction from a giving court had the counsel. This might have become a direction from a giving court had the counsel for petitioner raised the issue that the non regularisation of series of casual employees who had worked for a specified period of time itself violated the doctrine of equality as expounded in Randhir Singh. He could have alternatively agitated the point scored in the present case. May be he thought it wise to take a safer course at this stage and leave the demand for regularisation of their services under the Government to a future case; or be abstained from choosing a harder directed payment of on par emoluments but not regularisation of services in the absence of sanctioned post\textsuperscript{29}. Happily, the apex court is now seized on the plea of non-regularisation of services of casual labourers beyond a certain period as a violation of the equality doctrine\textsuperscript{30}, and one may hope that the underprivileged and the worst off would get their due.

The judicial justice done in Surinder Singh aroused hopes in not only about 19,000 casual labourers of the C.P.W.D\textsuperscript{31}, but several lakhs of such workers\textsuperscript{32}, employed in various departments of the Central Government\textsuperscript{32}. The decision did not, however, click with the officialdom and their counsel. They felt that it would subject the exchequer to heavy burden\textsuperscript{34}, and that unequal should not have been treated as equals. Their view was threat the class held a distinct legal status, some distinguishing features being the nature of employment, the source and method of recruitment, accountability and responsibility and subjection to service rules. Such
a case, according to them, was a case of permissible classification and hence differential wages were justified\(^{35}\). An insensitive executive machinery, despite its constitutional obligation to act in aid of the Supreme Court\(^{36}\), however, failed to act. Nothing short of a political action in the form of strike by workers’ union, paralyzing the civic life in various ways, could force the government to respect and implement the verdict\(^{37}\). The executive should have realised that the national loss is social and economic terms through such political actions is often much more than what the nation would spend on giving legitimate dues to the needy and deserving, and that, apart from legal requirement, in showing reverence to court, which it expects and claims from the citizenry, it would maintain democracy. How to cast off the court’s dependence on the executive for enforcing its judgments and orders deserves serious consideration by legal scholars.

How is that the post-verdict thinking in official circles about the classification being reasonable and hence unequal wages justified did not strike the Government counsel during debates in the court? How is it that he did not confront the court with such an important point (certainly stronger than the one raised) and, on the contrary, harped on the discarded old theory that “equal pay for equal work” was an abstract principle incapable of being enforced by courts? Perhaps he fell short of material to make out an acceptable distinction or he was so sure of the Halloweens of the argument that he did not deliberately advance it. On its face, the plea of permissible classification in the present setting may look sound and attractive, but in its deeper analysis it would stand exposed as, even through the basis of classification could be intelligible, it would have no rational nexus with the objectives of classification, namely, efficiency and desired output of work. The plea would also braked own on the touchstone of social justice which demand, in the larger interest of equality, parity in wage structure for doing identical work. Though it is highly unethical and wholly contrary to constitutional philosophy of soci-economic justice to employ workers on daily wages for long year\(^{38}\), for argument sake let us say that persons working on a day-to-day basis
may prove even more efficient and more work-oriented that permanent ones in order to sustain themselves in job, and would feel psychologically content if at least accorded an equal treatment along with their regular employed brethren.

In determining questions of parity in wages, the right test has been pointed out by a government officer turned research scholar, “is there difference in the nature of work? If not, then the parity in wages is the only answer.” Indeed, the true focus has got to be functional and the decisive test the nature of the activity. In this view, it would be difficult to sustain any official justification of the classification and hence of differential wages.
JUDICIAL ACTIVISM AND RIGHT TO LIFE UNDER ART-21.

The scope and meaning of Article 21 has been augmented in various ways now through judgments in public interest litigation cases (PIL). The judgement in state of Himachal Pardesh and Another v. Shri. Umed Ram Sharma and other 1, however breaks new grounds. Unlike other PIL cases, which interpret right to life as right to livelihood, this case interprets it not only as right to livelihood but also right to means to livelihood. This raises some very basic questions about the limits and the directions in which Article 21 can be interpreted. It also presents an occasion for reflecting on some basic issues on the role of law and the nature of our constitution. But first, the facts of the case which are as follows:

Scheduled Caste residents of villages Bhainkhal, Baladi and Bhuko in Shimla district addressed a letter to the Hon’able Chief Justice of H.P. High court, complaining that there was no proper road in this area. This not only affected their livelihood but also their development. They also pointed out that the sum allocated by the Government for the construction of the road was insufficient, and moreover even this money was appropriated by the corrupt officials. The letter was treated as a Writ Petition by the H.P. High Court.

The court held that: Every person is entitled to life as enjoined in Article 21 and in the fact of this case read in conjunction with Article 19(1)(d) in the background of Article 38(2), right to life embraces not only physical existence but the quality of life and for residents of hilly areas, access to road is access to life itself.

The Court accordingly directed the Superintending Engineer of P.W.D. to proceed with the construction of the road and to complete the work assigned to it during the course of the current financial year. The court further directed the Engineer to make an application to the State Government demanding an additional sum of Rs. 50,000 for the purpose and to report the progress in construction with regard to the case.
The State of Himachal Pradesh filed a petition for special leave to appeal before the Supreme Court whether in view of Article 220 to 207, the High court had power to issue prerogative writs under Article 226 to regulate financial matters in the State.

Justice V.D. Tulzapurkar, R.S. Pathak and Sabyasachi Mukherji, J.J., of the Supreme court, noted that the question of separation of powers is indeed important, but that in this case the H.P. High court had not taken over the functions of the executive or the legislature. They highlighted that the more important fact was the utter deprivation of life opportunities for the hill people, and that the H.P. High court had moved in the right direction in reinterpreting Article 21. They cited the authority of Sani Ram2, Kharak Singh3, A.V. Nachane4, Olga Tellis5, Municipal Council, Ratlam6, Francis Coralie Mullin7, and other cases.

The reason this case is significantly different from other cases relating to Article 21 is that it applies a principle of Judicial interpretation which generates an open ended arena of meaning. Whether such a legal strategy is legally prudent in the long-run for the development of law. The other issue that arises from this case is about the limits and divisions of power between the judiciary and the executive. The Bench, undoubtedly, quotes Madison, Lock and other to support its view about the division of power. But, it's questionable whether the view of these jurists and philosophers apply to law when the very nature of legal enterprise is changed by such interpretations of Article 21. These issues need some deeper reflections.

To begin with, let us first note the Jurisprudentially ramifications of Article 21. There are two aspects to the interpretations of this Article, the first relates to the internal problems of meaning and scope and the second to the purposes for which this interpretation is being done.

The first internal problem of meaning and scope is this: the notions of livelihood and means to livelihood are much wider than that of life. The range of
goods, offices, and opportunities required to sustain livelihood are far too many. For example, housing is just as necessary for livelihood as roads. Once it is agreed that right to life includes rights to having roads in accordance with 19(1)(d), one may as well claim that it entails right to having a house in accordance with 19(1)(e)- the right to reside, for one cannot reside without a house. Similarly, if right to move freely through India, 19(1)(d), entails rights to roads than it also includes right to having public transport, for one cannot commute without transport. In the same vein one may correctly interpret 19(1)(a) – freedom of speech and expression – as implying right to possessing the means to it; telephones, walkie-talkie, radio, etc. once right to life is interpreted as right to livelihood and the means to it, the rights proliferate alarmingly. The scope of Article 21 is endangered by its view width of meaning. How does one delimit its domain in a manner that gives precise meaning to the Article without defeating the court’s purpose.

Some tentative suggestions are as follows: invocation of light, after, is an invocation of some claims of entitlement. Claims are of two types: needs and desert. Need is a lack of the ensemble of means required to realize the human goods of preservation and development. Desert rests on the possession of some quality that places an individual in a preferred position relative to some good. Most PIL cases relating to Article 21 involving rights pertaining to needs, not deserts. The scope of the Article can be limited to such rights alone, but then a explicit theory of needs would have to be evolved by the courts.

But at this stage one must stop to ask; is enforcing the wider interpretation of Article 21 the only legal way to obtain the minimum need for the deprived people? Moreover, it is the legally most efficacious way to achieve what is desired? Neither the judgments nor the literature around the cases have gone into these two basic questions. They have naively claimed that such “judicial activism” through new interoperations of Article 21 has brought about a major change in our colonial legal heritage. Assertions or vein glorious proclamations are one thing,
actual change another. There are two basic reasons why this type of "judicial activism" is not as active as it is prima-facie made out to be. First, there are problems emerging from theory of precedence—as to what type of judgments can really qualify as precedence in the case law-making processes. Second, there are issues relating to the constitutional aspirations, Vis-à-vis judicial activism—does the constitution itself envisage an active role for the judiciary? And if so, is it rightly reflected in what has been achieved through re-interpretation of Article 21?

The judiciary's liberty to break away from the conventional modes of judgement writing does not entail the liberty to flaunt some basic jurisprudential principles of precedence. Our judges it seems have not cared to inform themselves of some basic jurisprudence relating to theory of precedence. Not any and every judgement is capable of becoming a precedence merely because it has been enunciated in case. There are internal logic (both syntactical and semantically) properties of arguments, which are necessary if a judgement is to really become a precedence. The minimal structural requirement of the argument is just this that the obiter dicta must deductively follow from the 'reasons' of the judgement; that the reasoning must be based on a ratio of general, applicability whose domain of operations is determinate; the ratio itself must, of course be either a constitutional principle or some other basic jurisprudentially principles, and the invoked general principle of law (or natural justice) must coherently hold together with other constitutional basic legal principles; the reasoning would have to make explicit these other principles as well as its relationship with the ratio. Evidently, there is much more to the theory of precedence that what has been mentioned here; this is not the occasion, however, to discuss the theory itself. What is important to note is the nature of judgments in light of the theory. One may note that in the Olega Tellis19 (slum Dwellers) case, the obiter dicta is neither logically Ratlam11 case invoked no general constitutional or basic legal principle in its ratio nor related it to other operational legal principles, as such it enunciates no general principle of determinate applicability. There are similar
problems with the judgments in the Down Valley Mining Case, 12, the shriram Fertilizers 13 cases and other cases relating to right to life. In fact, one can discern a similar apathy for structural and jurisprudentially aspects in PIL judgement in general.

It Is not for the sake of my personal jurisprudential interest that I wish to draw the judge’s attention towards the theory of precedence. Nor do I disagree with prof. Upendra Bali that suffering must be taken seriously 14. My plea is that to take suffering seriously one must take the law-making enterprise seriously too. In the absence of this judgement become decree by fait, they become remedies for specific events, nor precedence for general application. As such it detracts from the objectivity of law, it makes justice seeking a subjective enterprise dependent upon the judge and not upon the rule of law. If the rule is not developed, the public will always be apprehensive whether similar justice can be attained when the Judges change.

Negative criticism without positive suggestions will obviously not do. One must squarely face the question. What manner of precedence making will lead to the generation of the rule of law and not merely of rule by judges? This takes us to the constitutional ethos. It was evident to the constitution-maker that the total weight of the earlier exploitative colonial laws for out-weighted the liberation mandate of the constitution. The constitution making was not the final ending of colonialism, but only a step-a major Tran formative leap which would allow the future generations to create a just society. The enacted constitution is only an instrument for realizing this. Since the majority of the law concerning directly regulate the life and livelihood of the vast poor majority-are of colonial heritage15. The constituent Assembly could not take upon itself the task of changing all these laws. This had to be done by the future legal system. To achieve this they gave the emerging judiciary a most magnanimous power through Article 13. It gives the judiciary a major power to review and repeal all past and future laws, which are inconsistent with the constitutional aspirations. The Article lays down a major
moral and legal obligation on the judges. Have the judges stood up to the moral obligation entrusted to them by the Constituent Assembly? Has any one so far complied a list of how many colonial laws, and their sections thereof, are inconsistent with fundamental rights and directive principles and which directly or indirectly affect the life or livelihood of the poor? If seriously researched, these would surely run into thousands. The alternative is to wait till these laws came up for scrutiny in litigation. But have the judge's preview in litigations? The point is that the right-to-life litigation are precisely those cases which have provided the judges the opportunity to scrutinize, repeal or amend the colonial laws which deprive the poor people of their livelihood. Amongst such laws are the Indian Forest Act.1927, the Land Acquisition Act.1894, the Factories Act, 1947, the Mines (Regulation and Development) Act, 1947, the Town Planning Acts and numerous other municipal laws.

In each case the judges have taken the easy way out, they have not asked: the implementation of which laws cause the loss of life and livelihood to the poor people? They merely look at the circumstantial effects and seek specific case remedies. Evidently, if justice is to be done to protect people right to livelihood, it is the cause that must be eradicated, so that all future generations are protected, merely providing remedies for the present effect will not do. As mentioned, the power to eradicate, so that all future generations are protected, merely providing remedies for the present effects will not do. As mentioned, the power to eradicate the causes is given to the judiciary through Article 13. Unfortunately, the textbook writers on the Indian Constitution do not seem to understand the significance of Article 13 by and large. They describe it merely as a "principle of interpretation". The Article is anything but a principle of interpretation, it is a principle of mighty judicial power-a power which can transform the lives of at least 500 million people if properly used. The Judiciary has of course realized that Article 13 is not a mere principal of interpretation. After Golaknath 17, it wrested back the power (which the parliament has usurped) through Kesavananda Bharti18 and
Minerva Mills 19. The point, however, is not the mere having of power for review but to what end has this power been used? Although the judiciary may congratulate itself for having regained the power, the people of India will not assess its greatness by the mere fact of acquisition of power, but the goals that are achieved in exercise of this power. Public interest litigation specially the right to life cases, have provided ample opportunities to the judiciary to exercise the power, but it has missed using it in almost all cases.

The Jurisprudence concerning Article 13, Visa-a-Vis its relation to the preconstitutional laws, has not been well developed. In Keshava Madhava Menon v. State of Bombay 20 in 1951, the Supreme Court held that Article 13(1) does not have retrospective effect, i.e. all pre-constitutional laws cannot be declared void on this basis. However, in the same year in the State of Bombay v. F.N. Balsara21, the court developed the 'rule of sever ability, according to which the in constant parts of the past laws can be separated from the Act and declared void, so that the whole Act does not become invalid and Article 13(1) would not have retrospective effect, subsequently in Bhikaji Narain Dhakras v. State of M.P. 22 and other cases the court also developed the doctrine of eclipse according to which the inconsistent parts of the past Acts become 'eclipsed' hence inoperative, unless a constitutional amendments takes away the prohibition cast on them.

Even if the retroactive of Article 13(1) is not allowed to do away with the past explorative laws, the Indian Courts are well-equipped with the twin armoury of the "rule of sever ability" and the "doctrine of eclipse" to deal with all those laws which infringe people 'right to life or livelihood.

What has this power of Article 13(1) to do with theory of precedence of judicial activism-one may wish to ask again? Let us retrace and summaries the arguments step by step.
Judicial activism does not mean merely expanding the meaning of Article 21 and 14, in widening their meaning indeterminately the very specificity of the Articles is endangered.
Judicial activism means taking upon oneself the task of amending and facing up to the vast majority of pre-constitutional law, which in fact are causative in exploiting the right to livelihood. The power for doing this is available through Article 13.

The litigants need not and should not seek remedies for their loss merely under Article 21. For long-term solutions they must also challenge the constitutionality of the very laws which brought about the loss in the first place.

To create proper precedence the judges must (a) present a judgement in a manner whose parts are deductively correlated; b) invoke and spell out not just basic concepts, such as of dignity, development and stopple, but actual legal principles of natural justice of constitutional law

C) in their arguments, show how the rights of liberties provided by these basic principles are infringed or impossible to realize due to other past laws amongst the past laws they must distinguish the causative laws (i.e., those which bring about the conditions of deprivation) from regulative laws (i.e. those which merely regulate the life of the people after their life resources or livelihood has been taken away.

They must invoke Article 13 or the authority of other case law to repeal those sections of past Acts which directly cause deprivation;

They must lay down new norms in place of the repealed ones, specifying clearly what would constitute ‘similar circumstances’ for the future.

In their orders they must specify clearly the actual bodies on whom the duty falls for the purposes of the realization of the rights, so that the rights and duties are properly correlated in each case.

The above list is not meant to be exhaustive, but only an indicator of rational expectancy. The points may be better illustrated with some examples. Take the Doon Valley Mining case for instance. Here the concern was to save the ecology of the area so as to protect the livelihood of the deprived people. Now, it is well-known that a great deal of the ecological destruction in the area is done at the
behest of the Forest Department which permits contractors to mine, even in ‘reserved’ forests. If ecology is the serious concern, the Court could have seized the opportunity to invoke Article 13 and repeal and amend certain sections of the India Forest Act which gives the Department the authority to bring about ecological disaster in a totally unchecked manner. But the court did not do so. Amending the Forest Act which causes the ecological devastation would have had a far greater repercussion, as a precedent, that the delivered Judgement. The Tehri Dam case similarly presents an opportunity to go into the rationalization of the whole issue of compensation in the land.

Acquisition Act, the Forest Act, etc. The issue of compensation to the poor people who are deprived of land or livelihood resources, needs to be seriously reconsidered. Ad hoc remedies by the Court are not long-term solutions. To take another example, the recent Shriram Fertilizer gas leak case presented an opportunity not only to think about the compensation to the victims, but also to remedy the Factories Act, the Delhi Municipalities Act and those relating to town planning.

So much for the legal task, let us turn now to the other issue, of division of power, between the judiciary and the executive, as it relates to the issue.

To begin with, one must first understand why in this decade the people have begun to turn to the judiciary instead of the government for protecting their livelihood. It is a matter of historical contingency that the executive and legislative division of our civil society have failed to provide the necessary conditions for livelihood and the means to it for a large number of citizens. It is hence that the people rush to the court as a last resort to attain the necessities of life. However, there are internal limits to what the law can achieve.

In this case, it arise from the peculiarity of this right. Right to life is a positive in rem right, that is, it is a right in relation to all people (the state) the realization of which does not depend upon one’s own action but positive action by
others. The other in this case is some department of the legislative, executive or some private corporate body. The duty to realize the right, therefore, falls on such bodies. Insofar as every right is necessarily correlated with some duty, in every PIL case of this kind the courts must, not only locate the body on whom the duty falls but also intervene in the executive function. How much of the executive function the judiciary takes over well depend upon the nature of the duties involved.

In the present case, the Supreme Court Judges deny that executive functions were taken over by the judiciary. Clearly monitoring, regulating or administering specific tasks which pertain to public good is not the task of the court. They usually deal with the law and not administration. Hence, it is questionable whether in this case the Supreme Court is right in interpreting the courts action as purely juridical. The point is not that the court should have recognized the non-judicial. The point is not that the court should have recognized the non-judicial action of the H.P. Court but, insofar as the right to life is a positive in rem right whose realization depends upon official actions by bodies other than the courts, in interpreting and enforcing Article 21 the court must confess or face the fact that they are undertaking a task which involves more than law-making, namely, the executive implementation of the law. They are doing so because the other organs of the state fail in their respective functions. Such a recognition evidently raises basic questions about the separation of powers and the social context in which such separation is tenable. This case does not go into this basic question, it simply reiterates what Adam Smith, Thomas Paine, Madison and other have said about separation of powers, without looking at the socio-political context in which it was said or the theoretical assumption about the state within which the separation is to be accepted. Evidently, this is not the occasion to go into the foundational issues, the inevitability of the court’s intervention in the executive function when it takes up the sovereign task of the realization of positive rights, is all that needs to be noted here. This intervention is inevitable because the realization of a positive
right to life demands obtaining needs and deserts; in other cases, the courts are normally equipped to obtain only justice.

What is the upshot of this case and the arguments herein? These can now be briefly summarized. Litigation on the basis of right to life necessarily demands a theory of needs and deserts, which the courts will have to evolve by and by. However, the realization of such needs need not be tied up to Article 21 alone. This is an easy and immediate remedy but not judicial form, the point of view of long-term development of law and of a just society. The same ends can be attained, albeit in a more laborious way, by undertaking actual legal reform in the manner suggested. This will not detract from the efficacy or the promptness of the remedies, it will, however, demand more homework by the judges and the litigants. However, if one understands the ethos of the constitution, one will understand that this homework is a moral obligation too. The executive and the legislative bodies of the society do not have legal expertise, nor are they as closely involved with the complexity of the law as the judiciary is. The major task of law reforms was therefore delegated to the judiciary livelihood base of the rural and treble people have continued for over three decades after Independence. In not addressing itself to these laws, in cases which provided the opportunity, the judiciary makes it evident that it has not understood its constitutional task very clearly. It evades law reform by taking up legal strategies which never get to the heart of the matter. In face of the actual task for nation building, such strategic can only be called "escapism" not in a derisive sense, but in the same of its true psychological use.
RIGHT TO SPEEDY TRIAL AND JUDICIAL ACTISM
HUSSAINARA CASES: JUSTICE TO POOR:

The case of Hussainara Khatoon V. State of Bihar (A.I.r. 1979 S.C. 1360) is a significant landmark in the history of personal liberty. It brought to the notice of the Supreme Court that thousand of undertrial in Bihar had spent long years in jails, in some cases as many as ten years, awaiting trial of offences carrying lesser punishment. Bhagwati J. moved by the undertrial misery delivered a profound verdict on poverty and justice, reflecting creativity and concern for the poor.

Although injustice involved in Hussainara Case was colossal, the constitution and the criminal Procedure code neither guaranteed a right to speed trial nor created a bail system sensitive to the problem of the poor. They did not prescribe the maximum period for which a magistrate can keep an undertrial without trial in jail. They also failed to provide specifically that the under trial’s imprisonment without trial should not exceed the maximum period of imprisonment prescribed for the offence imputed to him.

The Seventy-eighth Report of the Law commission of India stated that on January, 1, 1975 out of 2,20,146 prisoners, 1,26,772 (that is 57.6 per cent) were undertrial. It was further stated that 90.9 per cent of the prisoner in the Ambala Central Jail and 88.7 per cent of the prisoners in the New Delhi Central Jail were under trials. It is not known as to how many of them were charged with bailable offencence.

It was disclosed by Bihar in this case, that during of imprisonment of the undertrials without trial ranged from a few month to ten years. There were cases in which such imprisonment had exceeded he maximum imprisonment prescribed for offence they were charged with. In addition to persons charged with offences, there were also destitute men and women victiims of crime, kept in jail by way of protective custody. No information was made available as to how many of them were produced and how many time before the Magistrates under Sec. 167 of the criminal procedure Code.

Bhagwati, J. tried to identify the shortcoming in the administration of criminal justice, responsible for this tragic state of affairs. He found that an unsatisfactory bail system and delays in courts had frustrated the undertrials quest for justice and stated that their poverty was their crime. He observed: (at. P. 1362).
"It is necessary therefore that the law as enacted by the Legislature and as administrated by the court radically change its approach to pre-trial detention and ensure reasonable, just and fair procedure which as a creative connotation after Maneka Gandhi's case."

Bhagwati J. with Kasuhal J. Concurring, tried to make the bail system more compassionate to the poor in more ways than one. He also read in Art.21 the right to speedy trial.

In Hussainara-II, Bhagwati J. with Sen. J. concurring, (A.I.R. 1979 S.C. 104) sought information from the Government of Bihar as to whether undertrials had been produced before magistrate under Sec.157(2) of the Criminal Procedure Code, which required authorisation of a magistrate every 15 days for the detention of a person. He also wanted to know whether the investigation in offence triable as summon was completed as required in sec. 167(5) within six months. He drew attention to sec. 468 of the Criminal Procedure code, which provided that except in case permitted by the code, no court should take cognizance of an offence if the charge-sheet was filed after the prescribed period of limitation. He held that detention of persons covered by Sec. 468 contravened Art.21 and hence they should be released forthwith.

It was also disclosed that there were quite a few women prisoners who were in jail without even being accused of any offence, merely because they happened to the victims of an offence or were required for the purpose of giving evidence or were in protective custody. Bhagwati J. Held that this protective custody violated Art.21 and directed the Government to set up welfare and rescue homes to take care of the destitute women and children.

In Hussainara III, Bhagwati J. with Desai J. concurring, (A.I.R. 1979 S.C.1369) reprimanded the respondent state for keeping the undertrails in jails for period longer than the period of imprisonment prescribed for offence they were charged with. It was observed ; (at. P.1372).

"This discloses a shocking states of affairs and betrays complete lack of concern for human values. It exposes the callousness of our legal and judicial system which can remain unmoved by such enormous misery and suffering resulting from totally unjustified deprivation of personal liberty."
He ordered the release of these persons forthwith as their continuous detention was unconstitutional.

He found that undertrials charged with bailable offences were still in jail, presumably because they were too poor to furnish bail and to engage a lawyer. He further found that some magistrates instead of monetary bail with sureties which the poor undertrials were unable to furnish. He said that such unfortunate situation cried aloud for introduction of an adequate and comprehensive legal service program. He regarded it as an essential ingredient of reasonable, fair and just procedure that a prisoner who is to seek his liberation through the court's process should have legal services made available to him. He observed:

"The state cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The state is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose is be done by the State"

In Hussainara-IV, Bhagwati J. with Chinnappa Reddy and Sen.J.J. concurring (A.I.R.1979, S.C.1377) elaborated the theme of right to legal aid after reprimanding the respondent for keeping undertrials in jail for periods longer than the maximum period of imprisonment for offences they were charged with and for keeping lunatics and person of unsound mind in jail. He described legal aid as "an absolute imperative " equal justice in action. And "delivery system of social justice. If an accused, confronted with loss of liberty and too poor to engage a lawyer was not provided with free legal services by the State. " The trail itself may run the risk of being vitiated as contravening Art 21 (at.p.1381).

On the remand of undertrials to judicial custody on numerous occasions they were produced before the magistrates, Bhagwati. J. said that it was difficult to believe that they must have applied their mind to the necessity of remanding those undertrials to judicial custody (at.p1379). he was also doubtful whether on the expiry of 90 days or 60 days, as the case may be, of the detention from the date of arrest, the attention of the undertrial was drawn to the fact that they were entitled to be released on bail under proviso (a) of sub-section (2) of Sec.167. In such cases, every magistrate must tell the under tail that he
was entitled to release and the state must provide the poor under tail with a lawyer at its own cost.

As regards the completion of investigation within six months as required in sec. 167(5), he expressed the court's amazement and horror at the leisurely and almost lethargic manner in which investigation into offences seems to be carried on. He underlined the need to overhaul and streamline the investigative machinery so that the judicial process may be set in motion without any unnecessary delay.

In Hussainara V. Bhagwati J. with Chinnappa Reddy J. concurring, (A.I.R 1979 S.C. 1819) ordered the release of undertrials charged with multiple offence and languishing in jail for the maximum terms for which they could be sentenced on conviction even if the sentence awarded to them were consecutive and not concurrent. In regard to under tails, charged with multiple offence and languishing in jail for periods exceeding the maximum terms, if the sentences awarded to them were concurrent but not consecutive, he ordered their release on bail on executive a personal bond of Rs. 50 without any surety and without verification of finance solvency.

Thus, the Hussainara case, in line with Sunil Batra (A.I.R. 1978 S.C. 1675), Hascot (A.I.R. 1978 S.C. 1548) and Maneka Gandhi (A.I.R. 1979 S.C. 597) cases, manifest the non-traditional role of the Supreme court in the field of judicial activism and has highlighted the shortcoming of the administration of criminal justice, bringing to the attention of all concerned the need to streamline the investigation machinery, the bail system, the prison administration and legal services program. The underlying philosophy of this approach in the recognition that poverty is no crime and that constitutional mandate makes that abundantly clear.
JUDICIAL ACTIVISM AND FAMILY LAW:
MUSLIM DIVORCEES RIGHT

Women in our society have occupied a position of subordination due to various historical reasons. The social policy did not favour economic independence of women. The social system operated harshly against them in such important matters as inheritance, marriage, divorce, adoption and maintenance. Since the advent of independence and promulgation of constitution there has been a shift in the social policy towards granting of equal rights to women in economic and social fields. Equality has been codified, some omnibus provisions rather direct the state to ensure a just, social, political and economic order in all the institution of national life. The equality of women has been promoted and protected by obligating the state to minimise the inequalities. These constitutional commitments are backed by various legislations the chief among them are the Hindu Marriage Act, 1955, The Hindu Adoptions and Maintenace Act, 1956. Thus a substantial bias against women in the Shastric Hindu Law was removed in order to bring about a radical change in the status and role of Hindu women on the basic premise of equality. However, the developments in post-independent era have not reached the Muslim women to furnish some instalments of social justice. Although the movement towards a Uniform Civil Code is still on, the attitude of the governments irrespective of their laudable pronouncements is not to initiate any reforms in Muslim Law unless the demand for them emanates from the community itself. Generally, the court also acquiesced in the position by an attitude of non-intervention when dealing with discrimination against women under Muslim law. Muslim law relating to marriage, Divorce, Maintenance and Succession has been made "Supra fundamental rights. Reforms in the Muslim Law are made to depend upon the vociferous, dominant and privileged male members of the community appreciating a need to cast aside their privileges and advantages to further a just cause of women.
The exploitative practices have been undermined and some major ameliorative steps have been taken towards the liberation of women. Dowry Prohibition Act, 1961, prevention of immoral Traffic 1986, special Marriage Act, 1954 Medical Termination of Pregnancy Act, 1969 and some labour welfare legislations provide for all women, Hindu and non-Hindu, some basic rights of rational humanism. All the same the Volte-face made the government during the enactment of the maintenance provisions in the bill on the code of criminal procedure in 1973 will go down in the annals of parliamentary history with few parallels. With regard to maintenance of a wife, the Muslims in India were governed by the provisions of section 488 of the criminal procedure code of 1898. 4 A wife without filing any matrimonial suit could live apart from the husband and seek maintenance provided she had a just ground for living apart, and seek maintenance provided she has a just ground for living apart. But maintenance could be claimed during the subsistence of marriage. In order to redefine the duties in this regard and to provide more efficacious remedies to the beneficiaries under the law, the code was revised in 1973. Section 125 3 of the new code confers a right on a wife, aged parents and minor children to secure an order of maintenance from the Magistrate. The right in the form of relief granted to dependant wives by the provisions of the code, in the strict sense, does not come within the ambit of criminal procedure code. However in the interest of social justice section 125-127 of the criminal Procedure Code provide a summary and inexpensive remedy to dependent wives, children and parents for obtaining maintenance. An important explanation was incorporated into section 125 whereby "Divorced Woman" was included within the definition of wife. This was purposely done to prevent unscrupulous husbands from frustrating the legitimate maintenance claims of their wives by just divorcing them under their personal laws. The Muslim members of the House objected to the explanation clause, as it was opposed to Muslim concept of marriage and divorce. 6 Rejecting the objection of the members- the Minister of State for Home Affairs defended the bill on the ground that the explanation in
section 125 did not affect the civil status of the husband, wife or ex-wife in any way. Inspite of these objection the bill was passed by the Lok Sabha with the explanation intact.

The orthodox leaders of Muslim community mounted an agitation. The result was that the Government had to budge. The decision of the House in respect of Section 127 was rescinded. It was while conceding to the demand of Muslim members that Section 127(3) (b) was incorporated to exempt Muslim from the provisions of section 125 so much so as they applied to divorced wives, once payment of dower (Mahr) due on termination of marriage by divorce was proved, the relevant portion of this section, as amended reads.

a) Where any order has been made under Section 125, in favour of a woman, who has been divorced by, or has obtained a divorce form, her husband, the Magistrate shall, if he is satisfied that:

b) "The women has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order.

c) The woman has obtained a divorce from her husband and that she had voluntarily surrender her rights to maintenance after her divorce, cancel the order for the date thereof",

The meaning of Section 127(3)(b) was far from clear. The Bombay High Court held that the payment of dower on divorce will satisfy section 127(3) (b) and that, therefore, the Magistrate will have no justification to make an order under section 1258. In contrast, it was held by Kerala High Court that dower payment is outside the purview of section 127(3)(b)9. A controversy also arose since the enforcement of the new code on the ground of its inconsistency with the Muslim Law of Maintenance. The position became complex, and confused by the exception clause in section 127.
The purpose of this paper is to evaluate the role of the Supreme Court in interpreting and defining the provisions of the Criminal Procedure code relating to Muslim divorcees' right to maintenance so as to indicate the extent to which the court under the tide of Social change has helped the cause of Muslim divorce in the country. The creative role of the judiciary has become all the more necessary in view of the changing social milieu where the community expects the judges and administrators to be "Progressive", "activist" and "realist" rather than idealist and archaic. The Supreme Court by its judicial creativity in some cases has assisted the forum Muslim Women and has given a forceful articulation of the principle behind the statutory construction in furtherance of social justice and emancipation of women. The court has shown commendable perception of the social realities in arriving at these decisions. For a proper understanding of the relevance and adequacy of the law relating to Muslim divorce ' right to maintenance the judicial exposition of the law has been discussed under two major headings.

Supreme Court's Exposition of Law before Shah Bano's case

The law relating to Muslim Divorces as laid down by the Supreme Court can be discussed under following headings.

a) Customary Payment when Absolve Husband from Paying Maintenance.

The Apex court was called upon to interpret this beings provisions in Bai Thaira V/s Ali Hussain. The court held that on a plain reading of the Explanation (b) to section 125(1) of code it is clear that every divorced wife, otherwise eligible, is entitled to the benefit of maintenance allowance and the dissolution of marriage makes no difference to the right under the code. In this case the court had to determine so far as a Muslim woman was concerned, the content of the expression, "the sum which under any personal law of the parties was payable on divorce". Replying to the question whether clause 3(b) of
section 127 barred the divorce's right to maintenance, the court held that "no husband can claim under section 127(3) (b) absolution from this obligation under section 125 towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do the duty for maintenance allowance. 13

The amount paid as Mehr has to be considered, but it is necessary that there be some co-relation between the sum payable under a maintenance order before the husband could claim immunity from an order under section 125 of the code of Criminal Procedure. During the course of the judgement Justice V.R. Krishna Iyer observed.

Payment of Mahr money as customary discharge is within the cognizance of section 127(3)(b). But what was the amount of mahr? Rs. 5000 interest from which could not keep the woman's body and soul together for a day... unless she was ready to sell her body and give up her soul. The complex of provision in Chapter IX has a social purpose. All used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets... Where the husband, by customary payment at the time of divorce, has adequately provided for the divorce, a subsequent series of recurrent doles in contraindicated... The key note thought is adequacy of payment which will take reasonable care of her maintenance. 14

The court further held that payments of illusory amounts by way of customary or personal law requirement will be considered in reducing the rate of maintenance but cannot be considered as wiping it out altogether. Justice V.R. Krishna Iyer, J. observed.

The payment of illusory amounts by way of customary of personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that rates unless it is a reasonable substitute. The legal sanctity of payment is certified by the fulfillment of the social obligation, not by a ritual exercise rooted in custom... The purpose of the payment under any customary or
personal law must be to abviate destitution of the divorcee and to provide her with wherewithal to maintain herself.  

Thus, payment of mahr was a matter to be taken into consideration, but it would not automatically disentitle a divorced woman to a maintenance order under section 125. The court would look behind the 'ritual exercise' of payment to the amount actually paid, the means of the husband and the needs of the divorced wife. Social policy of the secular welfare state, underlying and forming the provision of the new code, protected the "derelict divorce" whatever her religious denomination and regardless of her personal law, unless that personal law had already granted her such protection against moral and material degradation as the courts considered adequate in all the circumstances of the case. Section 127(3)(b) of the Code operated to protect the husband form double liability, not to deprive a divorce of her statutory right under section 125 in circumstances where payment under customary or personal law left her inadequately provided for. 

Bai Tahir's cases generated a mixed reaction in the country. The orthodox Muslim opposed the decision of the Supreme Court on the score that it was an interference with the Muslim personal law. Danial Latifi while forcefully supporting the decision of the Supreme Court in Bai Tahira stated that the judgement was "entirely consistent with the verse of the Holy Quran" and that since it restored to the to the Muslim women her Quarnic rights, "Everyone who is votary of the Holy Quran shall applaud it," Tahir Mahmood while appreciating the judgement has observed. The supreme Court decision in Bai Tahira is a liberal ruling and conforms to the spirit of Islamic law on the subject. The decision of the Supreme to the spirit of Islamic law on the subject. The decision of the Supreme court is progressive and has given a helping hand by socially responsive judicial process to Muslim divorces having no adequate provision for maintenance. The court has not given pedantic but purposeful meaning to the provisions of the code and the decision is a remarkable example of judicial creativity to assist destitute Muslim divorces. The orthodox and dominant male
members of the community were blind to their plight and the government was covered down and it failed to alleviate the sufferings of Muslim divorces. The supreme Court by the fiat of the interrogation as accomplished what the community and government failed to provide. The notable feature of the Judgement being that it seeks to interpret the language of a legislation in the light of goals enunciated in the constitution.

The following year Krishna Iyer, again delivered the judgement for the court in Fuzlunbi V. Vali 22 and reiterated that "Section 125 and 127 and a Secular Code deliberately designed to protect destitute women, who are victims of neglect during marriage and divorce; it is rooted in the State's responsibility for the welfare of the weaker section of women and children and is not confined to members of one region or religion.23 In his strongly worded judgement Krishna Iyer, J. admonished a Division Bench of the High court to Kerala, against whose decision the case came in appeal to the Supreme Court, for not following his earlier ruling on the subject in Bai Tahira.24 Commenting on the Division Bench's decision, Krishna Iyer J. said.

If her plea has substance, social justice has been jettisoned by judicial process and a just and lawful claim due to a woman in distress has been denied heartlessly and lawlessly... the Sessions Court and the High Court who had before them the pronouncement of the Supreme Court, chopped legal logic to circumvent it. Reading their reasoning, we are left to exclaim how the High Court argued itself out of Bai Tahir's case by discovering the strange difference.

If her plea has substance, social justice has been jettisoned by judicial process and a just and lawful claim due to a woman in distress has been denied heartlessly and lawlessly... The Session Court had the High Court, chopped legal logic to circumvent it. Reading their Supreme Court, chopped legal logic to circumvent it. Reading their reasoning, we are left to exclaim how the High Court argued itself out of Bai Tahir's case by discovering the strange difference.25
The decision which had in the learned judge's opinion, been arrived at to his "bafflement by the fine art of skirting the real reasoning in Bai Tahira, a mischief, unintended by the court may be, but embracing to the subordinate judiciary "26. In the course of his judgement, Krishna Iyer, J. Observed.

Even by the harmonizing payment under personal and customary laws with the obligation under section 125 and 127 of the Cr.P.C. the conclusion is clear that the liquidated sum paid at the time of divorce must be a reasonable and not an illusory amount and will release the quantum husband from the continuing liability only, if the sum paid is realistically sufficient to maintain the ex-wife and solvage her from destitution which is the anothema of law. The perspective of social justice to the complex of provisions from section 125 to 127 of the Criminal Procedure code. 27.

The interpretation of Section 127(3)(b) of the code made in the case of Bai Tahira and confirmed in Fazulanbi was admittedly based by the Supreme Court.

**Judicial Activism And Hindu Law:**

With the adoption of the constitution of India in 1950 the principle of equality between both sexes is recognised. Discrimination in favour of females is, however, permissible in certain situations, but in no case she can be discriminated against.

The practice of bigmacy was considered to be a social evil and was done away with by the Hindu Marriage Act. 1955 which came into force on 18.5.1995. The Act amends and codifies law relating to marriage among Hindus. Section 5 of the Act provides that a marriage may be solemnized between any two Hindus if conditions mentioned in that section are fulfilled and one of those conditions contained in clause (I) is that neither party has a spouse living at the time of the marriage. To give full effect to this provision section 11 of the Act, inter alia, provides that any marriage solemnized after commencement of the Act
shall be void if it contravences the condition as to monogamy. Moreover in order to make bigamous marriage an offence Section 17 of the Act provides that any marriage between two Hindus solemnized after the commencement of the Act is void if at the date of such marriage either party had a husband or a wife living and the provision of section 494 and 495 of the Indian Penal Code shall apply accordingly, therefore any person who solemnizes bigamous marriage renders himself/herself liable to be punished under the aforesaid sections of the Indian Penal Code.

The restrictions as to monogamy contained in Section 5(1) of the Hindu Marriage Act is mandatory and any marriage solemnized in contravention thereof is void initio. It is no marriage at all and no consequences of a marriage except the legitimacy of children follow it. The parties to such a marriage do not acquire the status of husband and wife and therefore no right and duty is attached thereto. It cannot be doubted that a man would have greater love and affection for the lady with whom he contracts a second marriage and therefore rarely on occasion may arise where the second wife may have to seek the assistance of law for restitution of conjugal rights or maintenance. On the other hand, she rather enjoys a superior position in the family. The provision as to inheritance of the assets of such male by the second wife can be evaded since he has power to bequeath his property by will to any person. He may gift away his property to her during his lifetime or may bequeath his property including his share in the coparcenary property in her name leaving nothing for his legal wife and even for children if he may desire so. This aspect needs to be considered and a suitable legislation imposing restrictions on the power of such man to make a gift or will is desirable.

Although a bigamous marriage is a null and void marriage and no decree from a court is necessary for declaring from a court to the effect that such marriage is void. Who may get such a declaration issued by the court? Section 11 of the Act provides that such a marriage may be declared void by a
decreed of nullity on a petition presented by either party to the marriage. Thus, the right to get such bigamous marriage declared null and void is available to the spouses of the subsequent marriage and none else. The first wife not being a party to the subsequent marriage has no right to get the decree of nullity under the Hindu Marriage Act. The Allahbad High Court in Jokhan Prasad Misra v. Lakshmi Devi has held that either party thereto clearly means either party to the marriage sought to be declared null and void. A petition by a person who is not a party to the marriage sought to be declared null and void will not be under section 11 of the Hindu Marriage Act. However, the first wife can file a suit under the ordinary law for a declaration that the marriage of her husband with the second wife is illegal and void. A suit by the first wife for such a declaration is, therefore, to be filed according to the provision of Section 9 of the Code of Civil Procedure read with section 34 of the Specific Relief Act.

Though the right of the first wife to seek a declaration of nullity in respect of a subsequent marriage of her husband with another lady under the ordinary law has been recognized yet the Hindu Marriage Act being a special legislation does not provide for any such relief. It is desirable that such a right may be granted under this act. The locus standi in respect of seeking such declaration may also be extended to any recognized welfare institution or organisation.

Moreover, the remedy of getting a declaration as to nullity of such marriage, if any party intends to do so, and procuring the bigamist punished under the penal law is to be sought after the solemnization of the subsequent marriage. The first wife, therefore, is to wait till her husband actually solemnizes the proposed bigamous marriage. There is no provision in the Hindu Marriage Act which enables a person to file a petition for permanent injunction restraining the other party against the intended marriage and therefore, a district judge has no jurisdiction to grant a permanent injunction restraining such a marriage. In such case also the courts have recognized the right of the aggrieved party to seek perpetual injunction under the ordinary law. In Shankarappa v. Bassama, the
question before the Mysore High Court, in a revision petition was whether a suit
brought by a person claiming to be the wife of the defendant for an injunction
restraining the defendant for contracting a second marriage is cognizable by a
Civil Court. The court observed.

Now the purpose of section 5 of the Hindu Marriage Act was
to introduce monogamy and if section 11 of the Act authorized the presentation of
a petition for a declaration that a bigamous marriage was void by the spouse
complaining against it and if section 17 of that Act makes an act of bigamy an
offence punishable under section 494 of the Penal Code cognizance of which
could be taken as provided by section 198 of the code of criminal procedure only
upon a complaint made by a person aggrieved by such an offence who could only
be one of the two spouses affected by the act of bigamy, what is my opinion
cannot be controvert is that the purpose of section 59J] of Hindu Marriage act was
to create an obligation between the two spouses each of whom was prohibited
against taking another while there is a spouse living. The obligations created by
section 5(1) is in favor of this living spouse and that obligation is that so long as
that spouse is living neither the wife or the husband as the case may be shall take
another.

I am, therefore, disposed to take the view that the plaintiff in
this case when she sought the injunction in her suit was seeking the prevention of
the breach of an obligation existing 1 her favour and therefore entitled to seek that
injunction under Section 54 of the Specific Relief Act.12

The High Court read the obligation in Section 5(1) and
provided her the relief under Section 54 of he Specific Relief Act read with
Section 9 of the Civil Procedure Code under which provision every Civil Court
can exercise jurisdiction in all suits of a civil nature except in suits whose
cognizance is expressly or impliedly barred. Since Section 11 of the Hindu
Marriage Act operates only after the solemnization of that marriage and so also
section 17 which makes the provisions of Section 494 and 495 of the Penal Code
applicable to it, the Hindu Marriage Act, it is clear, provides no remedy to a person who seeks the prevention of the commission of what is not only prohibited by Section 5 (I) but also made an offence by Section 17 of that Act. The court, therefore, held that the jurisdiction of the Civil Court was not to be barred expressly or impliedly to issue perpetual injunctions in such cases.\textsuperscript{13} Permanent injunction may also be issued under Section 39 Rule 2 of Code of Civil Procedure restraining the husband to contract and bigamous marriage.\textsuperscript{14}

Notwithstanding aforesaid rulings of the High Courts insertion of a suitable provision in this regard in the Hindu marriage Act, a special legislation, may be desirable.

It has been seen that a bigamist is liable to be punished under Section 494 of the Indian Penal Code with a stringent punishment which may extend to 7 years imprisonment and in case the offence falls under Section 495 of the Penal Code the punishment may extend to 10 years of imprisonment. Inspite of such a stringent penal provision the instances of bigamous marriages are not wanting. There are instances where press coverage is given to such cases of bigamous marriage particularly of film stars.

It is beyond doubt that in overwhelming majority of bigamous marriages the accused persons go unpunished and are not prosecuted even. It is beyond the comprehension of a layman that Inspite of the penal provisions of the law why are there very few prosecutions for bigamy. He is not aware of Section 198 of Code of Criminal Procedure\textsuperscript{15} according to which no court can take cognizance of this offence except upon a complaint made by some person aggrieved by the offence. And in case the husband commits bigamy the first wife is a person aggrieved. In case the fact of first marriage is concealed from the second wife she is also the person aggrieved. Proviso C to sub-section 1 of Section 198 provided that where the person aggrieved by an offence under Section 494, Penal Code is the wife, her father, mother, brother, sister, son, daughter, her father's or mothers brother or sister may prefer a complaint on her behalf. With a
view to afford the much needed help to the aggrieved woman in such cases the words "or with the leave of the court, by any other person related to her by blood, marriage or adoption" have been inserted by Act 45 of 1978. It implies that only the wife or any one of the persons mentioned in the proviso can make a complaint and none else can do so. The general rule is that any person having knowledge of commission of an offence may set the law in motion by a complaint even though he is not a person injured by an offence. This section embodies one of the exceptions to this general rule. The Supreme Court in G. Narasimhan v. T.V. Chokhappa has observed, "Section 198, thus, lays down a exception to the general rule that a complaint can be filed by anybody whether he is an aggrieved person or not. The section is mandatory, so that if a magistrate were to take cognizance of such an offence on a complaint filed by one who is not an aggrieved, the trial and conviction of he accused in such a case by the magistrate would be void and illegal."

The object of this provision is to prevent busy bodies from intervening in, what may be called, offences of private or personal character specified therein and to limit the right to set the machinery of law in motion only to the person who has directly or indirectly suffered by the act complain of.

The observation of the High Court may be correct in its application to defamation but it may not be advisable to extend it to cover the offence of bigamy and call it an offence of private or personal character. The offence of bigamy concerns the society at large and therefore cannot be treated to be an offence of private or personal character.

Majority of the married ladies, particularly in the rural set up are economically or otherwise dependent on their husbands whose company is indispensable for them. Any husband in such a case can easily exploit her position to make her to consent to his second marriage with another lady. She is left with no alternative but to given her consent even when she does not desire to do so. The possibility of extracting such a consent by threats of divorce, desertion, and
non-maintenance etc. cannot be ignored. In some cases she is made instrumental in procuring the second wife for her husband. This being so, no other relation chooses to file a complaint and the bigamist goes unpunished. It is desirable that the offence of bigamy may be treated at a wrong against the society and made cognizable, non-bailable and non-compoundable. But no police officer below the ank of a Deputy Superintendent of Police may be allowed to make arrest for or investigate, such offence.

Strict requirement of performance of the customary rites and ceremonies with regard to the second marriage also takes the bigamous marriage out of the mischief of Section 494 of the Indian Penal Code and the bigamist evades punishment. The Supreme Court in Bhaurao v. State of Maharashtra\textsuperscript{19} has held that "Section 17 of the Hindu Marriage Act makes the marriage between two Hindus void of two conditions are satisfied: (i) The marriage is solemnized after the commencement of the Act; and (ii) at the date of such marriage either party had a spouse living. If the marriage which took place between the appellant and Kamla in February 1962 cannot be said to be solemnized that marriage will not be void in virtue of Section 17 of the Act and Section 494 Indian Penal Code will not apply to such parties to the marriage a had a spouse living."\textsuperscript{20} In Gopal Lal v. State of Rajasthan\textsuperscript{21}, the Supreme Court after discussing case law\textsuperscript{22} on the point, observed:

Where a spouse contract a second marriage while the first marriage is still subsisting the spouse would be guilty of bigamy under Section 494 if it is proved that the second marriage was a valid one in the sense that the necessary ceremonies required by law or by custom have been actually performed. The vioidness of the marriage under Section 17 of the Hindu Marriage Act is in fact one of the essential ingredients of Section 494 because the second marriage will become void only because of the provisions of Section 17 of the Hindu Marriage Act.
The prosecution has to prove that the bigamist has actually performed the rites and ceremonies according to law or custom of the parties in order to procedure his conviction for a second bigamous marriage. In case the prosecution is not able to prove the observance of all the rites and ceremonies the accused cannot be convicted for bigamy even if he might have an intention to marry and living with the second wife. In the cases where the rites and ceremonies are dishonestly or fraudulently avoided the accused is liable to be punished under Section 496 of the Indian Penal Code, in which case, it is not clear, whether the first wife may be a person 'aggrieved' within the meaning of Section 198 of the Code of Criminal Procedure or not. This situation cannot be ignored too.

Whatever has been discussed herein is generally true with respect to the Special Marriage Act 1954 as well.

But in Ashok V. Rupa Bipin Zaveri the supreme court invoked its inherent jurisdiction under article 142 to dissolve a marriage and award compensation to the wife of that marriage. A petitioner for divorce by mutual consent had been filed in a civil court. The wife, however, subsequently withdrew the consent. The civil Court therefore, dismissed the petition. The husband appealed to the High Court and a single Judge of the Gujarat High Court held that the marriage had irretrievably broken down and therefore granted a decree of dissolution. The wife appealed to the division bench of the High Court, which reversed the order of the Single judge and restored the order of the civil court whereby the petition for divorce had been dismissed. The husband had without waiting for the decision of the appeal married another woman and had begotten a child for such illegal second marriage. He therefore obtained special leave of appeal to the Supreme Court. The Court held that in view of the fact that the husband had remarried and had got a child and that he had made allegations of unchastely against his wife, the marriage has irretrievably broken down and therefore the sustenance of such a marriage would not serve the interests of either
spouse. The court therefore ordered the dissolution of marriage and asked the husband to pay Rs. 10 Lakhs as compensation to the wife.

The Court thus added irretrievable breakdown of marriage as a ground for divorce, which had not been provided by the Hindu Marriage Act. The decision was criticized on several grounds. It was not only against the provisions of the Hindu Marriage Act but also against gender justice. The court legitimized the second illegal marriage, imposed a divorce on the wife on the first legal marriage, and almost made such illegal act purchasable by awarding compensation to the wife of the first marriage. Irretrievable breakdown of marriage has not been recognized in India matrimonial law as a ground for divorce not by default but purposely. A proposal to bring it in was opposed by most Women's organizations, who pleaded that its inclusion would act to the great disadvantage of women. How could the court undertake such a significant legal change in such a cavalier manner.

The court used article 142 almost so as to be law unto itself. A review petition against that decision was made and the court has referred the question of its competence to the constitution bench of the supreme court.
JUDICIAL ACTIVISM AND LAWS RESPECTING COMPENSATION / EXEMPLARY COSTS:

Recent jurisprudence of the Supreme Court of India is marked by an unprecedented activism, especially in the area of fundamental rights. The activist philosophy of the Court in this area is evident in several spheres, but a few may be mentioned.

First, the Court has expanded the meaning of the term ‘State’ under Article 12 thereby bringing more bodies within the reach of Fundamental rights.\(^1\) Thus, the scope of application of fundamental rights has been widened. Second, through the judicial activism blazed by the Menaka Ghandi\(^2\) decision, the Supreme Court has brought in procedural reasonableness in Article 21 seemingly by so simple a logical reasoning that one wonders why it did not occur to the Supreme Court before Maneka Gandhi despite pointers by Fazal Ali, J. in Gopalan case,\(^3\) at the threshold of the Constitution.\(^4\) The post-Maneka Gandhi cases resulted in the outburst of due process decision converting much Article 21 into a regime of positive rights. Consequently, Article 21 has turned to be a residuary article encompassing all other rights which are not specifically mentioned in Part III. Personal liberty rights in Article 21 have been held to include the right to speedy trial,\(^5\) the right to get legal aid,\(^6\) the right not to hand-cuffed routine only and the right to livelihood.\(^7\) Third, the activist interpretation of Article 21 has been accompanied by new doctrines to provide the right to effective justice. This has been achieved by widening the rule relating to locus standi in public interest litigation.\(^8\) The Supreme Court has shed away the traditional technicalities associated with writs Article 32. In evolving the technique of public interest litigation, which is essentially “not in the nature of adversary litigation” but “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”\(^9\) the Court has opened its doors for those two, because of lack of resources, awareness or other disabilities, had no access to the Court. They can now get justice through the Court.\(^10\) Not only this, the Supreme Court has gone even to the extent of compelling the state to make the right effective. Hitherto the Supreme Court was content by granting reliefs in the nature of declarations, injunctions and release from detention in proceedings under Article 32. The Supreme Court perhaps in an
unprecedented manner has now started giving monetary relief in proceedings under Article 32, though that notion yet remains to be concertized by 'reasoned elaboration' and much remains to be done to make that notion meaningful. The limited purpose of this paper is to analyse the implications of the new judicial endeavour to provide monetary relief under Article 32 to the victims of governmental non-action, victimisation or repression.

The Supreme Court has granted two types of monetary reliefs under Article 32, namely, 'Compensation' and 'exemplary costs.' Though the idea of compensation to the victim is implicit in both the concepts yet exemplary costs are essentially in the nature of 'punitive damages.' Exemplary costs serve as a measure of punishment to the state and at the same time a measure of damages to the victim. They fulfill the twin objectives. Compensation, on the other hand, has only the victim in view and the wrongful damage done to him.

RAISING THE QUESTION:

When the cases of prison injustice came to the notice of the Supreme Court, the Court thought it was its duty to enforce the fundamental rights of the prisoners by taking positive action. It thought of devising new strategies to meet the situation. The question of judicial power to grant monetary relief in cases of violation of fundamental rights was raised before the Court in Bhagalpur Blinding case. There the Counsel for the blinded prisoners asserted a constitutional right to get compensation for the damage caused by police excesses. The Court agreed that "in the light of dynamic constitutional jurisprudence" such a claim could be made. It asked "why should the Court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious Fundamental Rights to life and personal liberty?" The Court, however, did not give any categorical answer to the question whether such compensatory relief could be granted under Article 32. The Court simply by-passed the issue saying that it would be 'academic' in the absence of proof that the prisoners were blinded while in police custody by the police.
The question of providing compensation was raised again in Sant Bir. Here also the Court appreciated the need to compensate the victims of lawless law enforcement but left the question still open to decide at the next hearing.

RUDAL SHAH: AN-AD-HOC-APPROACH:

Rudal Shah is, perhaps, the first decision signaling the judicial concern to “repair the damage” done by the officers of the state to the victimized citizens. Soon thereafter, in the scholarly writings, this concern was hailed as “a major breakthrough in the protection of human rights and promotion of responsible government.” While repairing the damage by awarding compensation, the Court reiterated its dissatisfaction against the traditional reliefs.

Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the powers of this court were limited to passing orders of release from illegal detention.

On of the ways satisfy such claim based on illegal detention would be “to mulct its violators in the payment of monetary compensation.” Therefore, the Court awarded Rs, 35,000 as “an interim measure” without disturbing the right of the victim to recover compensation by appropriate proceedings in lower courts. The court made it clear that the order for compensation was only in the “nature of a palliative.” Thus, it was not true recompense for the harm suffered by the prisoner. The court in fact could not have done more than this in the absence of a clear determination as to whether the act of the state officers was deliberate or negligent or merely illegal. Apparently such a kind of enquiry, on sound public policy, could not be undertaken in proceedings under Article 32 because it necessarily required going into facts by admitting evidence and by allowing the examination of witnesses. Such a kind of enquiry would have over-burdened the already over-worked court and would have been in departure of the well established practice of the court. The decision in Rudal Shah was in fact the product of the peculiar circumstances associated with the case – a person kept in jail for 14 years Inspite of orders passed for his release by a court of competent jurisdiction, the callousness of the state authorities towards the prisoner, the inability of the state of explain the delay of 14 years in his release and the discourtesy shown by the state authorities towards the court.
26 The anguish and indictment expressed by the Court to the authorities in Bihar is clear at several places in the judgement. The outcome was further facilitated by the fact that the state did not controvert by raising factual or legal issues leaving the claim of the petitioner factually as well as legally encountered. The Court had no doubt that if the petitioner had filed a suit for damages in lower courts, it would be granted. The whole approach of the Court is at best merely tentative. It has not referred to any case and has not answered the question raised by the precedents in the field of liability of the state for the acts of its servants. There is a long list of cases propounding the principle that the state is not liable for the acts of its servants during the course of exercise of sovereign functions and if the police while engaged in such function causes some harm, no compensation could be awarded against the state. Rudal Shah does not make it clear as to whether those precedents still persist or they do not apply to proceedings under Article 32 for compensation.

Some further observations can be made on the decision in Rudal Shah. First the Court, it seems, will order compensation in those cases only where the circumstances and the situation speak for themselves. Where the facts are not clear, on sound public policy, it would perhaps not be appropriate for the court to admit evidence and to allow the examination of witnesses. We have seen that in Khatri, the Court did not award compensatory relief as in its view the facts were not clearly established that the petitioners were blinded in police custody by the police. Second the Court has not said in unequivocal terms that the right to get compensation for the violation of personal liberty rights is also a guaranteed fundamental right forming part of Article 21. Compensation is one of the reliefs which the Court may grant Article 32 for the effective enforcement of the fundamental rights. That leaves the matter with the Court to award compensatory relief in appropriate cases. Rudal Shah indicates that the Court will not ordinarily or in every illegal detention. It will award compensation only in those cases where the facts are revolting, outrageous and unusual indicating clear callousness on the part of authorities. This is why the court refused damages or compensation barely eight days after Rudal Shah in jiwan Mal Kochhar V. Union of India. In this case, the petitioner claimed damages for “humiliation and indignity” suffered by him because of certain remarks made by the Supreme Court and Madhya Pradesh High Court in their judgments in
certain criminal appeals. The state officials were responsible for these remarks. The Supreme Court was satisfied with the declaration that these remarks will not be taken into account in any damages and compensation cannot be granted in this proceeding under Article 32 of the Constitution.”34 The Supreme Court has made it clear in Bhim Singh v. State of J and K35 that:

When a person come to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his Constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation.36

The Court in this case awarded a monetary compensation of Rs.50,000 to an M.L.A. whose arrest, s evident from the affidavits and other evidence before the court, was mala fide and made with the deliberate intention to prevent him from attending the session of the legislative assembly. It is clear, therefore, that the monetary compensation will be given when the attitude of the authorities is either callous or mischievous or malicious. Where the deprivation of personal liberty by the state functionaries is ‘shocking’, the Court consider it ‘gravely unjust’ to ask the victim to go to the civil court for compensation.37 Will it be less unjust to ask a person who has been deprived of his personal liberty less ‘chockingly’ to go to the civil court for compensation where he is almost certain to get nothing? A claim for compensation against the state in civil courts has to pass through several hurdle is the claim of the state to sovereign immunity based on the P & O’s38 distinction between sovereign and non-sovereign functions. This distinction has been perpetuated by the Supreme Court.39 Unless the Supreme Court specifically discards the colonial hangover of sovereign immunity and several other hurdles are removed, most of the victims of governmental lawlessness are not likely to get anything. The decisions of the Supreme Court in the category of Rudal Shah and Bhim Singh then will only be the symbols of the Court’s anguish and nothing. Third, there are jurisdiction limitations under Art.32 to award monetary relief individually against the officials responsible for harassment or lawlessness. Relief can be awarded only against the state under Art. 32. This might assuage the feelings of the victim but it is doubtful as to whether it would be sufficiently deterrent in the absence of some individual

191
responsibility for the recalcitrant officials. Fourth, will the court award compensation for the violation of fundamental rights other than those under Article 21? So far the compensatory relief has been awarded in those cases only where there had been the violation of life or personal liberty and it is appropriate that such remedy be limited to this "most precious" fundamental rights. Its extension to other fundamental rights will raise the complex problem of assessing in monetary terms the exercise of certain fundamental rights such as the right to speech and expression, right to religion etc. It will be a doubtful public policy to relocates a substantial amount from the public exchequer for private redress. Increasing use of compensation remedy may also give an impression that if the state is ready to spend some money. It can purchase the right to continue to inflict constitutional deprivations on its citizens.

EXEMPLARY COSTS: TWIN OBJECTIVES

Another type of monetary relief awarded by the Supreme court in proceeding under Article 32 is that of "Exemplary Cost". The exemplary costs are awarded generally not only to meet the cost of litigation and compensation for the harassment caused at the hands of authorities but also as a measure of punishment to the state for the wrong doing. Thus, it serves the twin objective of compensating the victim and punishing the state. In that sense, exemplary costs might be preferable to compensation. This will also create less legal problems as the court will not have to clarify its inconsistency with precedents.

In the two cases where exemplary costs were awarded, the fact situation amounted to civil contempt in that the order of the supreme court were disobeyed wilfully by the state authorities. This caused great suffering to the petitioners.

In Dewaki Nandan Prasad, The Supreme court awarded exemplary costs for international, deliberate and motivated harassment to the petitioner by not settling his pension claims even twelve years after the Supreme court had issued a mandamus to the authorities to do so. The petitioner had to come second time to the court which again issued the mandamus with the warning that if not carried out, it will be treated as contempt of court. The court awarded exemplary costs to the tune of Rs.25,000 to the petitioner for his harassment and oppressing at the hands of state authorities.
In Sbestian M. Hongray, where a writ was issued for producing two missing person alleged to have been illegally kept in army custody. There was ample evidence that they were last seen in the custody of army and that they were not released. The respondents in their affidavits asserted that that two persons were not traceable Inspite of their best efforts and therefore compliance with the writ was beyond their control. The court found that there was willful disobedience of the writ of the court by authorities by presenting misleading facts. It amounted to civil contempt of the court. The court, awarded exemplary cost to the tune of rupees on lakh each to the two wives of the missing persons for the torture the agony and the mental oppression through which the two ladies had to pass.

The Supreme Court has an undoubted power to award exemplary cost. Under Article 32, it empowered not only to issue writs but also to make any order etc. By its very nature, the exemplary costs, is a discretionary remedy. The two cases mentioned above make it clear that the court will have recourse to "exemplary costs" only in very exceptional circumstances where the state functionaries have acted in most oppressive or arbitrary manner by willfully disobeying the order of the court compelling the victim of the oppression to knock at the doors of the Supreme Court again.

Judicial activism as well as judicial pessimism or restraint have been the characteristics of various judges of the Supreme Court But if the country like India, where we want to bring about socio-economic changes, and improve the life conditions of the people and make basic rights available to them, it is necessary for a judge to adopt an activist approach.¹ The proper role of a judge is to do justice between the parties before him. If there is any law which seemingly impairs the process of justice, then it is the province of he judge to do all the legitimately can in its interpretation so as to do justice, in the instant case before him.² Judiciary is the custodian of the rights of the people. And law “becomes material force as soon as it has gripped the masses” and remains either a dead letter or an instrument of coercion so long as it does not align itself with the social-economic evolution of the masses whose destinies it is meant to guide and control. Law and social realities cannot move in different channels or vibrate on different
wavelengths. Any proponent of judicial unsociability and opponent of judicial activism will do well to read the long ago words of Sir Issac Newton:

It is the duty of the judiciary to recognize the development of the nation and to apply established principles to the position which the nation in its progress from time to time assume. The judicial organ would otherwise separate itself from the progressive life of the community and act as a clog department rather than as an interpreter.

Ends are means in times of crises. Therefore, justice is the end and justices the means. The only armoury available to the judiciary is the armoury of law. But the weapons can be used, misused abused and even allowed to rust. Fortunately, in our country the apex court has in recent times used the armoury of law in the right direction and has shown a lot of judicial activism in various spheres. From A. K. Gopalan to Maneka Gandhi, the Supreme Court has traveled from south pole to north pole as regards the interpretation of Article 21 dealing with life and personal liberty. The widest possible interpretation has been given to this most precious fundamental right so as to provide right to effective justice. One of the methods developed by the Supreme Court to make right to life and personal liberty effective is that in some cases it has granted exemplary costs to those persons whose right was violated by the State or its administration. These costs are nothing but punitive damages in substance though not in form.

EXEMPLARY COST FOR VIOLATION OF RIGHT TO LIFE AND PERSONAL LIBERTY: JUSTICE IN INDIVIDUAL CASES:

The traditional view supported the theory that “arrest and detention” is a “sovereign function” of the state and thus there is no liability of the state if these was illegal arrest and detention. But the judicial grammar of interpretation of Article 21 changed since Maneka Gandhi. One of the off-shoots of the new interpretation is that in some cases the court has considered the question of giving monetary compensation to one who may have unduly suffered detention or bodily harm.

The first case where this question was raised before the Supreme Court is that of Khatri v. State of Bihar. In this case, it was alleged that the police had blinded certain
prisoners and the State was liable to pay monetary compensation to them. Thus, an important question of constitutional importance was involved, viz. If a person is deprived of his right to life or personal liberty in violation of Article 21 by the state, can the court grant monetary relief to such person? Bhagwati J., (as he then was) observed:

Why should the court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious Fundamental Rights to life and personal liberty.\(^{12}\)

As regard the liability of the State to pay compensation for infringing Article 21, the Court answered in the affirmative saying that if it were not so, the Article 21 would be reduced as to the responsibility of the police officer was still under investigation, the court did not decide the issue.

In Sant Bir v. State of Bihar\(^{14}\), the court declared the detention of a prisoner as criminal 'unatic illegal. He had become perfectly sane and fit for discharge and yet had been kept under detention for over 15 years without any justification. The court directed that he be released from the jail forthwith. It also remarked that it was a matter of shame for the society as well as the administration to detain a person for over 145 years without any justification. But the question of compensating the victim of the lawlessness of the state was still left open.

Thus, in both the above cases the court showed its concern for the protection of right to life and liberty against the lawlessness of the state but did not actually grant any compensation to the victims.

In Rudul Sah v. State of Bihar,\(^{15}\) the Supreme Court quietly brought about a revolution breakthrough in "Human Rights jurisprudence" when it granted monetary compensation of Rs. 35,000 to a little Indian against the lawless act of the Bihar Government which kept him in illegal detention for over 14 years after his acquittal. Thus, the concern of the apex court for doing justice rather than mechanically applying the law based on precedents and wooden interpretation of the text brought the law closer to life and reinforced the legitimacy and credibility of the court particularly amongst the weaker section of the people.\(^{16}\) In this case, the writ petition disclosed a "sordid and disturbing state of affairs." Though the petitioner was acquitted by the court of session of Muzaffarpur on 3 June 1968, but he was released from the jail on 16 October 1982 for
which the responsibility was squarely on administration. The petitioner claimed under Article 32 that he should be released on the ground that his detention in the jail was unlawful. He also claimed curtained ancillary reliefs like rehabilitation, reimbursement of expenses which he might incur for medical treatment and compensation for the illegal incarceration.\textsuperscript{17} When the petition came up before the court for hearing the counsel for the state informed the court that the petitioner had already been released. Thus, the court was left with an important question to determine whether it could grant some compensation or exemplary cost against the state under Article 32 for his wrongful detention. Under the traditional approach, the only remedy was to file a suit to recover damages from the government but the difficulties of a suitor filing such a suit are innumerable. Happily the state’s counsel did no raise the “State and Sterile” objection.\textsuperscript{18} The Court expressed its feeling that it had no doubt that if the petitioner filed a suit to recover damages for his illegal detention, a decree for damages would be passed in that suit, though it was not possible to predicate in the absence of evidence the precise amount which would have been decreed in his favour.\textsuperscript{19} In these circumstances, the court observed:

\begin{quote}
(T)he refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated.\textsuperscript{20}
\end{quote}

Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of the court were limited to passing of orders of release from illegal detention. The court went on observing:

One of the telling ways in which the violation of that right can reasonably be prevented

From the above observation it is amply clear that the court departed from the traditional approach and forged the new tools to protect the precious right of life and liberty and also ignored the legal technicalities which might have been allowed to stand in the way. The pointer of the court that the “State must repair the damages done by its officers,” and it may have “recourse against those officers”, is certainly a step in the right direction. By this process, the chances of abuse of power by the officers of the state will be minimised.
Another important feature of this case is that the court left petitioners right to file regular suit to recover damages open. Also it expected the High Court of Patana to release prisoners who are in unlawful detention in the jails and to ask the State Government to take steps for their rehabilitation by payment of adequate compensation wherever necessary. But in the present case the sum of Rs.35,000 which was granted as an “interim measure” seems to be an inadequate amount to repair the damage done to his right to life and liberty for 14 years.

From the judgement of the court it appears that they had the question of ‘rehabilitation’ in their mind while granting exemplary costs. It seems really impossible that in the present days of rising prices the above mentioned amount will be adequate to get him medical treatment and to rehabilitate himself properly after being in jail for such a long period.

Rudul Sah also indicated that the court would award exemplary damages only when the right to life and personal liberty is “grossly violated” and when the “facts of such violation speak for themselves.”

In another case of Oraon v. State of Bihar, the echo of Rudul Sah was heard. This case was decided just 12 days after Rudul Sah and the Supreme Court awarded Rs.15,000 as compensation to an undetrial who was detained in the lunatic asylum for six years after he had been certified as fit for discharge.

In Devki Nanadan Prasad v. State of Bihar, the Supreme Court awarded exemplary costs of Rs. 25,000. Here the government had disregarded for a long period of 12 years the mandamus issued by the court to the government to pay pension to a retired civil servant. Being in a helpless situation, the petitioner had to approach the court second time. The court noted that the officers of the state harassed the petitioner “intentionally” and “deliberately.” Hence, it awarded him exemplary costs, and the arrears of the pension with interest @ 6%.

This case shows some departure from the previous cases. In this case the court awarded exemplary cost for intentional deliberate and motivated harassment.

In Sebastian M. Hongray v. Union of India, the Supreme Court in habeas corpus proceedings required the Government of India to produce two persons before it. These persons were taken by the military jawans to the military camp. The government failed to
produce them before the court and also expressed its inability to do so. The court found
the explanation of the government as incorrect and untenable. In fact, the truth was that
these two persons had met an unnatural death. The court, in the circumstances, keeping in
view the torture, the agony and mental oppressing undergone by the wives of the persons
directed to be produced, instead of imposing a fine on the government for civil contempt
of the court required that “as a measure of exemplary costs as is permissible in such
cases”, the government must pay one lac rupees to each of the aforesaid two women.28

From the above judgement it is evident that the exemplary costs can be given
where the person has undergone “mental torture and agony,” due to the ‘action of the
state’ or by ‘state servants’. But one fails to notice in this judgement any reference by the
Supreme Court that Kasturi Lal no more holds good. Also this case does not make
reference to any of other cases from Khatri to Rudul Sah in which, though the facts were
different, yet the concept of exemplary costs evolved. Hence, one is forced to reach at a
conclusion that the court did forge the new tools to remedy the wrong done by the state but
only in individual cases without laying down any precedent.

One should not forget that the Supreme Court while delivering any particular
judgement also makes law.29 In all the cases discussed earlier the court awarded the
exemplary cost only when the facts were established before it. But it has nowhere laid
down that the petitioner is entitled to exemplary costs under Article 32 for the effective
enforcement of his fundamental rights. Thus, the lack of precedent leads us to remedies
only in individual cases rather than to benefit the public.

But still the judgement in Sebastian M. Hongray is salutary and timely, insofar as
it reminds those in authority that they cannot get away with murder and that they will be
accountable through the writ of habeas corpus. The judgement is also of considerable
importance as the army has the power to arrest and question any person under the Armed
Forces (Special Powers) Act.30 Equally important is the fact that the Supreme Court
granted the exemplary costs on the basis of the complaint filed by a third party.31

Bhim Singh v. State of J and K32 is yet another instance where the court noted that
the police officers acted in the most high handed way and it awarded Rs.50,000 as
monetary compensation by way of exemplary costs to the petitioner so as to compensate
him “suitably and adequately”.33 In this case, the petitioner, a member of the Legislative
Assembly of he Jammu and Kashmir, was arrested by the police malafide, as is evident from the affidavits and other evidence before the court, and thus prevented him from attending the session of the Assembly. He was not produced before the magistrate within the requisite period. Hence his fundamental rights under Article 21 and 22(1) were violated. It was observed by the court;

When a person comes to us with the complaint that he was arrested and imprisoned with mischievous or malicious intent and that his Constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation. We consider this an appropriate case.

It is thus clear that the exemplary cost will be granted only in “appropriate cases.” Now the question is what do we mean by an “appropriate case.” One answer can be that where the person is imprisoned, arrested or detained with “malicious” or “mischievous” intent. Secondly, where any “legal” or “constitutional rights” were invaded.

If we accept the above propositions then the result would be that whenever right to life or personal liberty is violated the exemplary cost should be given. Or for that matter if any constitutional right is violated by the state, it must be compensated by the exemplary cost. But if this is done then the new forged tool of exemplary cost as evolved by the court will be abused, misused and ultimately by denuded of its substance. Presently the court has given a fairly wide interpretation to the right to life and personal liberty. Now the right to livelihood is considered as a part of right to life under Article 21. So much so that the right to means of livelihood is considered as a part of life and personal liberty. And the exemplary cost cannot be given in all these cases wherever there is inaction or violation by the state. It is clear that the recourse to exemplary costs is to be taken in exceptional situations where the administrative authority acts in grossly oppressive or arbitrary manner.
BASIS FOR QUANTIFYING THE AMOUNT:

In all the cases from Rudul Sah to Bhim Singh, in which the Supreme Court awarded the exemplary costs, no basis for quantifying the amount of exemplary cost was laid down by the Court. And perhaps this is the reason that the amount of exemplary costs varies in all these cases. Thus, the discretion to award exemplary costs and the amount of exemplary costs is left to the individual judge who is deciding the case which in our jopinion is not a good precedent. The court had an opportunity to award exemplary costs in a number of cases explained earlier and it was expected from the highest court that while making the law it should make it specific and should not leave the important question like the basis of amount to be awarded as exemplary cost to be decided in each individual case.

A critic has pointed out that the government should have been ordered to pay Bhim Singh not Rs.50,000 (which is chicken-feed for a state government) but Rs. 50 lacs so that the state officers think twice before taking the law into their own hands. It seems that the critic has taken into consideration only one aspect, i.e., the payment of maximum amount by wasy of exemplary cost to the aggrieved party. But will that prevent the state machinery from acting in the most “high handed way”, as it did in Bhim Singh. In that case the court pointed out that “if a personal liberty of a member of the Legislative Assembly is to be played with in this fashion, one can only wonder what may happen to lesser mortals.” For this if we only increase the amount of exemplary costs then that will burden the public exchecquer for private redress. And also the state will be in a position to buy the fundamental rights of the individuals. For this, it is suggested that the officers of the state who “intentionally” or “deliberately” violated with “malicious” or “mischievous” intent, personal liberty of the person, they should be held personally liable. Only then the state officers will act with care while dealing with other persons’ rights.

Another scholar has pointed out that in Rudul Sah and Devki Nandan, no basis for quantifying the amount of exemplary cost was indicated because of this reason that perhaps the “judges went by their intuition rather than nay rational basis” and that
“omission appears to be due to the fact that this was for the first time the Supreme Court was evolving a new principle, and once it becomes an integral part of our jurisprudence, the task of quantification could be performed by the subsequent cases”.

It is true that the Supreme Court evolved a new principle to grant exemplary costs in some extreme cases of authoritarianism but it did become the part of our constitutional jurisprudence as soon as the judgement was given by the court. Even if we presume that the “task of quantification” was to be performed by the “subsequent cases.” The court has decided cases after Devki Nandan and one fails to notice any basis for quantifying the amount of exemplary costs in Sebastan M. Hongray or for that matter in Bhim Singh. We also do not think that the “judges went by institution” rather that by “rational basis.”

People’s Union for Democratic Rights v. State of Bihar, is an important case where the Supreme Court laid women the working principle for the payment of compensation to the victims of ruthless and unwarranted police firing. In this case, at Arwal, about 21 persons including children died and many more were injured due to the unwarranted firing of the police. The Supreme Court observed.

Ordinarily in the case of death, compensation of Rupees twenty thousand is paid... We may not be taken to suggest that in the case of death the liability of the wrong doer is absolved when compensation of rupees twenty thousand is paid. But as a working principle and for convenience and with a view to rehabilitate the dependants of the deceased such compensation is being paid.

The Court further observed that without any prejudice to any just claim for compensation that may be advanced by the relations of the victims who have died or by the injured persons themselves, for every case of death compensation of rupees twenty thousand and for every injured person compensation of rupees five thousand shall be paid.

It is submitted that form the above observations of the Supreme Court, it is evident that though it has evolved a working principle of awarding compensation to the victims of the police atrocities but it is not a good working principle. Where the person has lost his life, he is paid only a meager amount of rupees twenty thousand only. Similarly, the court has not differentiated between the minor and major injury to the limbs or body of the person concerned. It may happen that the person may not die but with the police
atrocities he might lose his eyes, limbs and may become unable to earn his livelihood. Can we say that the suggested amount of rupees five thousand to such person will be sufficient to “rehabilitate” such persons, which is the primary object of the Supreme Court in evolving the working principle for the awarding compensation? Therefore, it is suggested that if life and liberty is to really have some meaning for the majority of the people, then for rehabilitating these persons often police atrocities some large amount should be paid as compensation and not as merely rupees five thousand or so. For analyzing this point we have o study the statutory authority empowering the court to grant exemplary costs.
STATUTORY LAW AND POWER TO GRANT EXEMPLARY COSTS:

As such there seems to be no statutory law empowering the court to grant exemplary costs. In Rudul Sah, Supreme Court explained its jurisdiction to grant exemplary costs or monetary compensation under Article 32. This article confers power on the court to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrantor and certiorari whichever may be appropriate for the enforcement of any of the rights conferred by Part III of the Constitution. The court observed:

It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts, Civil and Criminal. . . But the important question for our consideration is whether in exercise of its jurisdiction under Article 32, this court can pass an order for payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right . . . We ought to pass an appropriate order for the payment of compensation in . . . (writ) petition itself.

In M.C. Mehta v. Union of India, the Supreme Court approved the principle of awarding exemplary costs as evolved by the Supreme Court in Rudul Shah and Bhim Sing. It was pointed out that the Supreme Court under Article 32(1) is “free to device any procedure appropriate for the particular purpose of the proceedings, namely enforcement of a fundamental right under Article 32(1) the Court has the implicit power to issue whatever direction, order or writ is necessary in a given case including all incidental or ancillary powers necessary to secure fundamental right”. It was further observed:

The power of the court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental rights already committed.... The power of the court to grant such remedial relief may include the power to award compensation in appropriate cases.
Thus, the court can issue orders or directions for the payment of exemplary costs in "appropriate cases" under Article 32. In addition to this, Article 142(1) provides that the Supreme Court in exercise of its jurisdiction may pass such decree or make such orders as is necessary for doing complete justice in any cause or matter pending before it. This article also seems to confer an inherent power on the court to pass an order of "exemplary costs."" Because in cases like Rudul Sah and Bhim Singh the question of releasing the person from illegal detention was not before the court but in order to do "complete justice" to the aggrieved person for his illegal detention, the court awarded the exemplary costs. Justice is the highest quality in the moral hierarchy and that which is above justice must be based on justice, include justice and reached through justice. Thus, Article 32 must be read in the light of Article 142 and the court must grant exemplary costs wherever it is appropriate to do "complete justice."

But in Jiwan Mal Kochar v. Union of India, the Supreme Court once again followed the traditional approach and denied the petitioner of relief of damages/compensation by saying that the relief prayed for "cannot be granted in this proceeding under Article 32 of the Constitution." In this case, the petitioner claimed damages against the Union of India, the State of Madhya Pradesh and other officials involved for the loss, humiliation and indignity suffered by him as they were responsible for certain remarks passed by the courts in his absence. The court merely contended itself by passing the order that these remarks "shall not be taken into consideration in any proceedings" against the petitioner.

But in all other cases from Rudul Sah to Bhim Singh the court has granted exemplary costs under Article 32 in order to do "complete justice" in proceedings before it.
WHETHER HIGH COURT CAN GRANT EXEMPLARY COSTS WHILE EXERCISING WRIT JURISDICTION?

Let us also consider the question: Whether High Court can grant damages while exercising its writ jurisdiction? The Supreme Court answered the question in the negative in State of Punjab v. Dial Chand Gian Chand and Co.\textsuperscript{56} Probably the negative answer was given by the court because at that time Rudul Sah had not been decided and the court had not signalled the granting of monetary compensation under the writ jurisdiction. In the Code of Civil Procedure 1908, Section 35A deals with the compensatory costs in certain cases.\textsuperscript{57} But this does not apply to writ proceedings under Article 226\textsuperscript{58}. On the other hand, Section 151 of the Code provides: “Nothing in this Code shall be deemed to limit or otherwise affect this inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”\textsuperscript{59} On the basis of the analogy the principle contained in Section 151 will apply to petitions under Article 226 because under that article the High Court has the power to issue any order, directions or writs or any of them for the enforcement of any of the right conferred by Part III. Hence, there is inherent power in the High Courts to award exemplary costs.\textsuperscript{60}

But on the whole, the courts are reluctant to entertain claim for money relief under the writ jurisdiction. The main reason for this, it appears, is that such claim raises disputed question of fact and the courts are reluctant to go into such question in a writ petition. To remove this distinction on the part of the High Courts, the Law Commission in a working paper “Damages in Applications for Judicial Review” (1983) has proposed a legislation to enable an individual to combine the claim for damages with the claim for other relief in an Article 226 petition.\textsuperscript{61} Under the proposed Legislation it shall be discretionary but not obligatory for the High Courts to award damages even if the illegality of the act complained of is established. If this is done then it will remove one defect in the present procedural set-up and the claimant can seek both the remedies under the same petition. No such Legislation has been suggested for Article 32 petitions. This appears to be a lacuna in the proposed scheme.\textsuperscript{62}