CHAPTER-VI
ADOPTION OF NON-ADVERSARIAL PROCEDURE
AND APPOINTMENT OF COMMISSIONS

6.1 Introduction

“It is true that the adoption of this non-traditional approach is not likely to find easy acceptance…. But if we want the fundamental rights to become a living reality and the Supreme Court to become a real sentinel on the qui vive, we must free ourselves from the shackles of outdated and outmoded assumptions and bring to bear on the subject a fresh outlook and original unconventional thinking.”¹

Fair, economic, reasoned and quick deliverance of justice is the aim of every legal system. When a person is confronted with a dispute, either his right is in jeopardy or duty is unnecessarily cast upon him, which is harmful to his interests. Laws are the rules prescribed by the society for the government of human conduct. A law is also described as a body of principles recognized and applied by the State in the administration of justice². Thus, it is an instrument, which helps the people living in a society to co-exist peacefully with one another in an orderly manner.³

There are mainly two types of laws substantive and procedural law, substantive law defines the rights duties and liabilities of the people. All the rights, duties and liabilities defined by the substantive laws can be ascertained and realized by the use and application of procedural laws, which are also called as adjective laws. The procedural laws or the adjective laws, define the pleadings, procedure and proof of which are applied in practice. Dispute resolution through judicial enquiry before the court of law ascertains

the rights, duties and liabilities of the respective disputed parties. In this process, the procedural law puts the substantive law in motion and facilitates justice. The procedural law should be complimentary to substantive law, substantive law is the end and procedural law becomes means to achieve the end. So, in this process procedural law should not become hurdle to realize justice. In India the adversarial judicial method is adopted which has been alleged by some experts that it is not suitable in a public interest litigation where parties are not adversary in nature.

6.2 Meaning and Nature of Adversarial system of Justice

On the basis of the nature and the basic characteristics of any dispute resolution system, they can be broadly classified into Adversarial and non-adversarial which is also called as Inquisitorial System. In reality these terms have no simple or precise meaning and no one country’s system can be described as demonstrating the “pure” version of either model. Adversary mode of justice is close to Anglo-American system and its past colonies. It advocates the supremacy of law, that is, equal treatment of law for all segments of society. It places the court in the neutral position that is equivalent to an umpire in a football game. Therefore, legal representation from both sides is indispensable part of this system. It insists upon due process of law. Adversarial system is also called as accusatorial system. In the traditional adversarial system, the lawyers of each party are expected to present contending points of view to enable the judge to decide

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the issue for or against a party. In this system, the disputants necessarily deny the claim or allegation of each other, irrespective of it being indisputable truth. The procedural formalities force them to rebut each other. In such a system, where a civil case is filed, the pleadings of the opposite parties differ in a diametrically opposite direction making it very complicated, to identify the real issues to be adjudicated. In criminal cases, the charges are framed on the one hand and on the other hand, the accused provides arguments or explanation to dispute each and every contention, or piece of evidence. The role of the presiding officer in the Court is to consider all the oral and documentary evidence placed before him on the bases of the framed issues and see whether the contentions are proved or not by the respective disputed parties. This system is rigid and formal as law prescribes the rules even before the dispute arises and the Court has to meticulously follow every such procedural rule. The adversarial procedure reflected by evidence led by either party and tested by cross examination by the other party has become a part of Indian legal system as it is embodied in the *Code of Civil Procedure, 1908* \(^9\) *The Code of Criminal Procedure, 1973* \(^10\) and *The Indian Evidence Act, 1872*. \(^11\)

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\(^9\) Act No. 5 of 1908. Section of 26 of Order IV provides the Institution of Suits, Sections 27 – 32 of Order V, deals with Issuance of Summons and Penalty for default, Order X authorizes the court to examine the Parties of suit, Order XI empowers the court to order for discovery and inspection of documents, Order XVI enables the court to issue summon to witness attend the court, Section 33 of Order XX authorizes the court to pass the Judgment and Decree, Sections 36 to 74 of Order XXI authorizes the court to Execute the Decrees and Orders, and Sections 75 to 78 of Part III of Order XXVI enables the court to appoint Commission.

\(^10\) Act No. 2 of 1974. Chapter VI deals with Process to Compel Appearance, deals with Summons, Sections 70 to 81 deals with Warrant of Arrest, Sections 82 to 86 deals with Proclamation and Attachment, Sections 87 to 90 deals with other rules regarding process, Chapter VII deals with Process to Compel the Production of a things. Sections 91 to 92 deals with Summons to Produce, Sections 93 to 98 deals with Search Warrants, Sections 99 to 101 deals with General Provisions relating to Searches, Sections 129 to 148 of Chapter X deals with Maintenance of Public Order and Tranquility, Sections 177 to 189 of Chapter XIII deals with jurisdiction of the Criminal Courts in Inquiries and Trials, Sections 200 to 203 of Chapter XV deals with Complaints to Magistrates, Sections 204 to 210 of Chapter XVI deals with Commencement of
This has been observed by Supreme Court in *Bandhua Mukti Morcha v. Union of India*. The trial needs the disputed parties to come up to the Court with their own lists of witness and documents to prove their contentions. The examination and cross-examination of the witness are done in the presence of the opposite party to the dispute. The trial involves the process of adjudication, where charges are tried for proving the guilt. A trial ends with a formal legally binding judgment or decree, which is binding and enforceable. In this system, the Court of law functions as an independent dispute redressal institution of the State. This system would promote the supremacy of law, fairness in the proceedings. Individual can work their daily life without any fear, interference or undue encroachment upon their private life and property by public officials of the state. This is very much necessary to promote justice, freedom and progress.

### 6.2.1 Advantages of adversary mode of Justice

The adversary system is conventional system which is followed in most of the democratic countries including India that has the following advantages.

a) It insists upon strict observance of procedural law. Due process of law is regarded as the most appropriate method to attain justice. Violation of procedure leads to injustice.

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b) The position of the court is independent regarded as that of an umpire. Both parties contest in the court. The court is to see whether the game being played before it is fair and conducive to justice or not by following the principles of natural justice. Each party to the suit has to be given equal opportunity to be heard.

c) The representation by lawyer from both sides is indispensable. According to *Code of Civil Procedure, 1908*, each party to the suit may represent by himself or through advocate. If the litigant is lay man, it is better to represent through advocate because he is well versed with the law and know the procedure to be followed from the stage of instituting a suit till the execution of judgment.

d) Judge reserves comment until all evidence from both parties is heard which makes the judge appear more neutral.

The role of judge in adversary system is like passive neutral umpire. Therefore he has to hear both party’s evidence and arguments before passing any judgment or decree which makes judge to be impartial.

### 6.2.2 Disadvantages of the adversarial system

Even though adversary system has number of advantages equally it has disadvantages also which are as follows,

a) The basic tenet of adversary system is that it is parties who have to collect the evidence and produce before the court. Thus, collection of evidence is costly affairs. Therefore it is only haves can afford it but not have not’s. Obviously the adversary system does not provide equal level field to parties to suits.
b) Parties only provide evidence favorable to their arguments. It is known fact that the parties will always hide the real facts of the case because the parties want the judgment in their favour.

c) Parties may argue against each other without regard for truth, because the pursuit of winning often overshadows the search for truth and thus parties are sometimes inclined to ignore the truth.

d) Conduct of trial of accused is the basic requirement of criminal justice system in which the accused is presumed to be innocent and guilt of accused is proved beyond reasonable doubt by prosecution. Hence trial can be delayed, prolonged, and likely to be costly. These flaws are further aggravated because the procedures of court are too lengthy and too detail from the issuance of summons to till passing of the judgment.

e) In adversarial system the courts are strictly adhered to the rules and regulation of procedural law. For every matter in the court the parties are required to submit the application under respective rules which is rigid and cumbersome. Therefore the court’s main focus is on how to settle the dispute rather than settling the dispute.

Because, of some demerits involved in this system the courts have sometimes slowly departed from adversarial system to non-adversarial system. The traditional system is fair where the parties are adversary in nature. Especially in public interest litigation cases courts adopting non-adversarial method of justice is much needed and welcome in the interests of justice.
6.3 Meaning and Nature of Non-Adversarial system of Justice

In non-adversarial procedure again there are two types of litigation first one is known as Cooperative litigation and second one is called Inquisitionary litigation. Non-adversarial system meant that the relationship between the parties is largely one of communication and cooperation, rather than discord and conflict.\textsuperscript{14} This kind of litigation is a perfect model which P.N. Bhagwati, the then Chief Justice of the Supreme Court aspired for public interest litigation. He perceived public interest litigation as a cooperative effort on the part of the claimant,\textsuperscript{15} the court, the government and the public official to see that basic human rights become meaningful for the large masses of people. Accordingly this type of procedure is known as non-adversarial cooperative litigation, the reason being that it presumes that the parties will voluntarily reach their agreement and take necessary action. Here, the role of the Court changes from that of its traditional role which revolved around determination of facts and issues and passing of a decree. Instead, in cooperative litigation the court takes on its shoulders three different functions, i.e. one, that of an ombudsman where it receives complaints from the citizens and then brings the important ones to the attention of responsible government officials. Second, the court acts like a forum wherein it provides a setting for clean and calm discussion of public issues or providing emergency relief through an interim order. Third, the court acts as a mediator wherein it suggests possible compromises and moves the parties towards an agreement.\textsuperscript{16}

But it is suitable nicely only in situations wherein the facts complained of are not disputed and both parties admit and come to an understanding that action is required to be

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\item \textsuperscript{15} Interview with the then C.J., of the Supreme Court Bhagwati P.N., \textit{Frontline}, October 9, 1986 p.11.
\item \textsuperscript{16} \textit{Supra} note 14.
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taken. In Kannanaikil,\footnote{Kannanaikil v. State of Bihar, W.P. No.8136 of 1983.} a startling act of communal violence against a rural Harijan community was brought to light which the local police had ignored. On a writ petition filed before the Supreme Court, the state government did not deny any of the facts; on the contrary it fully cooperated in providing interim protection and long-term relocation and rehabilitation of the victims of communal violence, thus finally resolving the matter. Similarly, in Sheela Barse\footnote{Sheela Barse v. State of Maharashtra, AIR 1983 SC 378, at pp. 381-82.} a journalist, Sheela Barse, made revelations about the fact of recurrent custodial violence done to women in Bombay Central Jail. The court provided a “forum” for a meaningful and result-oriented fruitful discussion as to what steps should be taken to protect women prisoners from custodial violence. Thus, the case demonstrated the new role of an interesting fact that the State of Maharashtra, through its advocate, offered full cooperation in laying down the guidelines, and also readily accepted most of the suggestions made by the court.

The second type of “non-adversarial” procedure developed and described by the Apex Court is “inquisitionary litigation”. In this process, the parties do not collaborate, but the court steps out of its passive role, which is characteristic of adversarial litigation, to take an active role in investigation of facts. This type of litigation is also called as “inquisitorial litigation” because of its correspondence to the inquisitorial judicial system which is typical of continental jurisprudence. This type of litigation is a corollary to the “representative standing” having the same function of lowering the barriers which traditionally separate the poor from courts. This was espoused by Bhagwati, P.N. J. In Bandhua Mukti Morcha\footnote{Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802.} wherein he observed:
Where one of the parties to a litigation belongs to a poor and deprived section of the community, and does not possess adequate social and material resources, he is bound to be at a disadvantage as against a strong and powerful opponent under the ‘adversary system of justice’ because of his difficulty in getting competent legal representation, and more than anything else, his inability to produce relevant evidence before the court.

Therefore, when poor litigants come before the court, particularly for the enforcement of their fundamental rights, it is necessary to depart from the adversarial procedure and evolve new procedure. This will make it possible for the poor and the weak to bring the necessary material before the court for the purpose of securing their fundamental rights. In public interest litigation (here in after referred as PIL) there are no winners or losers and the mindset of both the lawyers and judges can be different from that in ordinary litigation.\(^{20}\) The Court, the parties and their lawyers are expected to participate in resolution of a given public problem. This is explained by the Court in Dr. Upendra Baxi.\(^{21}\) In the words of Supreme Court in People’s Union for Democratic Rights v. Union of India,\(^{22}\) “We wish to point out with all the emphasis at our command that public interest litigation is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief”.\(^{23}\) Even, Bhagwati J., had disapproved the application of adversary method in PIL because it leads to injustice where the parties are not evenly balanced in social or economic strength, secondly the

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\(^{20}\) Supra note 17, p. 167.

\(^{21}\) Dr. Upendra Baxi v. State of U.P., (1986) 4 SCC 106 at 117. As, It must be remembered that this is not a litigation of an adversary character undertaken for the purpose of holding the State Government or its officers responsible for making reparation but it is a public a public interest litigation which involves a collaborative and cooperative effort on the part of the State Government and its officers, the lawyers appearing in the case and the Bench for the purpose of making human rights meaningful for the weaker sections of the community.

\(^{22}\) AIR 1982 SC 1473.

\(^{23}\) Ibid.
difficulty in getting competent legal representation and thirdly poor litigant’s inability to produce relevant evidence before the court.\footnote{Supra note 19 at pp. 814-816.}

Pathak J.\footnote{Ibid., at pp. 839-41.} concedes that the role of the court in civil litigation is that of a passive neutral umpire, whereas in public interest litigation it is more assertive, and “it assumes a more positive attitude in determining facts”. Though, his Lordship makes no direct observations on the adversarial procedure of justice, but his general observations are in concurrence with Bhagwati and A.N. Sen, JJ. On all counts,\footnote{Ibid. at p. 845.} it would suggest that he supports the side-tracking of the adversarial procedure in appropriate cases. Even A.N. Sen, J, has endorsed\footnote{Ibid., at pp. 849-50.} the judgment of Bhagwati J.

Pathak J., however, has administered certain sound notes of caution when he observes that “… the court must exercise the greatest caution and adopt procedures ensuring sufficient notice to all interests likely to be affected”. He continues:

“… [W]hatever the procedure adopted by the Court it must be procedure known to judicial tenets and characteristic of a judicial proceeding. There are methods and avenues of procuring material available to executive and legislative agencies, and often employed by them for the efficient and effective discharge of the tasks before them. Not all these methods and avenues are available to the court. The Court must ever remind itself that one of the indicia identifying it as a court is the nature and character of the procedure adopted by it in determining the controversy”.

He also lays down at least one clear criterion, \textit{viz.} “If there is a statute prescribing a judicial procedure governing the case the court must follow such procedure… where however the procedure prescribed by the statute is incomplete or insufficient, it will be open to the court to supplement it by evolving its own rules. Nonetheless the supplementary procedure must conform to all stages to the principles of natural justice”.

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24 Supra note 19 at pp. 814-816.
25 Ibid., at pp. 839-41.
26 Ibid. at p. 845.
27 Ibid., at pp. 849-50.
In *Bandhua Mukti Morcha v. Union of India*, the vital question is in respect of the evidentiary value of the commissioner’s report. The Respondent argued that commission report is not cross examined. Therefore it should not be accepted as evidence. But Bhagwati, J. observed, that respondent argument is untenable otherwise it leads to introduction of adversary system into PIL which is not acceptable. He, on the other hand, thought it appropriate to supply copies of the reports of the commissioners, when received, to the parties who would dispute the facts and the data mentioned in the report by filing affidavits, and the court could then adjudicate upon the issues involved which is considered to be quite reasonable.

In the same case Pathak, J. did not entertain the objection to the admissibility and relevance of the reports of the commissioners appointed by the court on the ground that the record did not show whether any attempt is made by the respondents to call them for cross-examination. It is to be inferred from it that Pathak, J. is for cross-examination even if the proceedings were not adversary; or is it that he wants to keep his options open on the issue? His observations are capable of both the inferences. It seems that the question of the application or non-application of adversarial procedure under Article 32 is a vital question. It means a total departure from the procedure which the Supreme Court was thus following in writ petitions. The culture of the legal profession is geared to adversarial procedure. If adversarial procedure is not to be applicable in public interest litigation matters, the parties must know as to what the mechanisms of the alternative procedure(s) are. The laying down of the guidelines for the non-adversarial procedure is,

28 AIR 1984 SC 802.
29 Ibid.
therefore, equally important. The inability of vast masses to produce relevant evidence before the court, and so is their difficulty of getting competent legal representation and genuine concern for the same is but natural, but then the court must make a rational assessment if it is in a position to adopt non-adversarial procedure in all PIL matters and all that involves.\(^{32}\)

The person who is acting *pro bono publico* and decides to file PIL cannot be expected to manage the collection of facts, data and evidence on his own because it would discourage such people to file the PIL petition. Moreover, petitioner is not having any personal interest. Obviously, under such circumstances it is the court that is expected to collect data and evidence which would facilitate the cause of needy people. It seems to be obviously desirable that permanent, trained and experienced fact-finding machinery is to be set up under the control and supervision of the Supreme Court.\(^{33}\) It is surprising that no such suggestion has come from the Supreme Court thus far. The adversarial procedure for PIL matters is not ideal because it sometime leads to injustices where parties are not evenly balanced in social or economic status therefore, the need for innovation in the procedural requirements. Two judges bench of Supreme Court comprising S.M. Fazal Ali, and Venkataramiah, JJ. In *Sudipt Mazumdar*,\(^{34}\) have, laid down guild lines for the appointment of commissions. Where the facts disclosed in the letter are not sufficient to take action, the district magistrate or the district judge should be asked to enquire into the matter and make a report to the Supreme Court to ascertain whether there is any cause of action for further action. If the report of the district magistrate is happens to be positive, the Court may appoint commission. However, the question whether cross-examination of

\(^{32}\) *Ibid.*

\(^{33}\) *Supra* note 14, at p. 272.

the facts and evidence mentioned in the report of the commissioner is necessary or not is not answered. Further the Court said that the parties should be given necessary legal aid and the same should be referred to a local court having jurisdiction over the matter. However, the Court said we feel that this case should be placed at this stage itself before the Constitution Bench to give proper guidelines on the various issues involved in it.

The adversarial procedure for PIL matter is disapproved because it sometimes leads to injustices where parties are not evenly balanced because of social or economic disability; therefore the need for innovation in the procedural requirements. PIL involves collaborative and co-operative efforts on the part of the state government and its officers, the lawyers appearing in the case and the bench, for the purpose of making human rights meaningful for the weaker sections of the community.

6.3.1 Advantages of non-adversarial mode of justice

The non-adversarial method comprises the methodology of negotiations, conciliation, and mediations which focuses on finding the truth and solutions for the problem rather than finding who is right or wrong. Thus it has the following advantages.

a) The court plays substantive role to secure justice in non-adversarial method. Further the court’s object is to find out ideal solution which is suitable to both parties. Thus court in PIL does not adhere to strict procedural laws.

b) Minor error in the procedure is ignored, if the purpose of justice is served. Procedure is not held vital, ultimate justice is regarded as the goal. In non-adversarial method of justice importance is not given to the following of the procedures but, to arrive at a proper conclusion within a short span of time.

35 Supra note 31, at p. 25.
c) The court plays active role in non-adversarial method by way of appointing commissions, taking opinion of experts and collecting evidence on its own. Therefore any distortion of evidence, dubious practice followed by the parties or by the lawyers can be easily detected with the effort of the court.

d) Speedy justice is indeed the basic right of every litigant which is much depends upon the active role of judiciary. As it has been observed that the court takes active role in non-adversarial method. Therefore speedy justice is essential feature of non-adversarial method.

e) The courts in non-adversarial method does not focus much on the past events because it’s object is to see that such thing should not happen in the future. Therefore it tries to find out some solutions which are suitable to both parties by taking into future aspects. Naturally both parties are in win-win situations. Thus remedies under non-adversarial method are ideal and equitable.

f) In non-adversarial method the court itself makes enquiry, if required collects evidence, further appoints commissions, and even seeks expert opinion. All these efforts on the part of the judiciary relieve poor litigants from the burden of expenses and man power. Thus non-adversarial method provides equal protection of law to poor litigant.

6.3.2 Disadvantages of non-adversarial mode of justice

Though non-adversarial method is considered to be ideal, ethical and equitable by considering its advantages but it has darker face also which are as follows.

a) Participation of the court in the inquisition of the case may lead it to biased attitude. The court itself makes enquiry by way of appointment of
commissions, and supervises the enquiry or investigations. Thus it discharges the role of investigator and also adjudicates the same disputes. Naturally, the question is how investigator can be adjudicator because such adjudicator may not reject his own evidence which is likely leads to biased attitude.

b) It has been observed that no strict procedure is followed with regard to filing of litigation. The procedure varies from one case to another in PIL regarding entertainment of the petition that may lead to subjective test which would create confusion and uncertainty that is not ideal for sound legal system.

c) The courts are used to accept the letter as writ petition and issued to notice to other party without verifying the credentials of the content of the letter some time consumes the valuable time of court and even disrepute the other party reputation if the contents of written letter turns out be false and malicious.

d) The courts often concentrate more on the making the law, administering by directions than interpreting the law. This may lead to violation of the basic principle of separation of powers.

e) In non-adversarial procedure the courts instead of dispensing justice, will have to take upon themselves administrative and executive functions which leads burden of the courts and courts is likely to abdicate the primary functions of delivery of justice.

The adversarial process is cumbersome and rigid because it sticks to the technicality of the procedure of the law. Further, this process based upon the allegation and counter-allegation which is not conducive to settle the certain disputes. Moreover, the judge plays the neutral role hence the delivery of justice is delayed and may not be
complete justice also. On the other hand, non-adversarial procedure mainly comprises the methodology of negotiation, mediation and conciliation which are flexible and ideal. This methodology does not give due importance to the technicality of procedure. Further the judges plays active role which facilitate the delivery of justice speedily and moreover the justice also complete. The whole object of non-adversarial system is to see that deprived should get justice at the earliest. The shift from adversarial to non-adversarial in PIL is inevitable when courts started resolving conflicts between the liberty and authority and more so when the concept of the State underwent a sea change. With transition from *laissez-faire* state to welfare state, the nature of judicial review changed and courts could not continue to remain passive. Unlike in litigation involving the private dispute, public law litigation involves the greater public interest. Therefore, the courts had to gradually evolve a new paradigm of judicial process for public law adjudication.\(^{37}\)

The Supreme Court started adopting non-adversarial procedure in certain cases. This means a total departure from the procedure which the courts were thus far following. The ethos of legal profession is geared to adversary procedure. But Bhagwati J., disapproved the adversarial procedure for PILs in *Bandhua Mukti Morcha v. Union of India*,\(^{38}\) for the reason that it sometimes leads to injustice where the parties are not evenly balanced in social or economic strength, firstly because of the difficulty in getting competent legal representation and secondly, because of his inability to produce relevant evidence before the Court. Meanwhile, the Court is experimenting with several strategies to collect facts. It asks the social activists,\(^{39}\) teachers,\(^{40}\) advocates\(^{41}\) and researchers\(^{42}\) to


\(^{38}\) AIR 1984 SC 802 at pp. 814-816.

\(^{39}\) *Akhil Bharatiya Soshit Karamchari Sangh (Rly) v. Union of India*, AIR 1981 SC 298. The Court adopting non-adversarial method appointed social scientist including doctors to report to the Court.
visit particular locations for fact finding and to submit a quick and complete report. These activities are to be financed by State under the Court order. In addition, the Court has in a number of cases of torture or ill-treatment called upon medical specialists to submit comprehensive reports and suitable therapy at State cost. In some cases it has asked the district judge not merely to ascertain facts but also to monitor the implementation of the various directions given by the Court. In the above mentioned cases the Court adopted the non-adversarial method in appointing the commissions.

6.4 Appointment of Commissions

In a non-adversarial or inquisitorial method the primary device used by the Court is the appointment of special commissions. The commissions serve three functions. The first function is to propose remedial reliefs and monitor their implementation. Generally the commissions supervise the implementation of remedial reliefs by taking the assistance of non-legal experts and using the methodologies drawn from the physical and social sciences.\(^\text{43}\) The second function of the commission is to gather *prima facie* evidence of the facts and data.\(^\text{44}\) A third function of a commission is to decide factual issues on authority delegated by the court.\(^\text{45}\)

The commissions are appointed on the rationale that the petitioners in public interest litigation cases are not able to produce enough evidence in support of their case. In the public interest litigation, the petitioner acting *pro bono publico* cannot be expected

\(^{40}\) *Sheela Barse v. State of Maharashtra*, AIR 1997 MP 223. The High Court appointed Dr. (Miss) A.R. Desai, director of College of Social Work, Nirmala Niketan Bombay, to visit the Bombay Central jail and interview the women prisoners whether they had been subjected to any torture or ill-treatment.

\(^{41}\) *Sunil Batra (II) v. Delhi Administration*, AIR 1980 SC 1579. The Court authorized Dr. Y.S. Chitley and Shri Mukul Mudgal, advocates to visit the prison and report to the Court. And in *Ram Kumar Mishra v. State of Bihar*, AIR 1984 SC 802.


\(^{43}\) *M.C. Mehta v. Union of India*, AIR 1987 SC 1086.

\(^{44}\) *Supra* note 19.

to spend money from his pocket to collect the evidence. Hence, it is necessary for the Supreme Court to appoint commissions in respect of collecting the evidence. Where an action is brought on behalf of the poor and the disadvantaged by any citizen acting *pro bono publico*, it may not always be possible for him to gather all the relevant material and place it before the court. In such cases, the Supreme Court would be failing in discharge of its Constitutional duties if it refuses to intervene.  

6.4.1 Power to appoint commissions

The powers of the Supreme Court to appoint commissions must be strictly derived from the *Supreme Court Rules, 1966* and the *Code of Civil Procedure, 1908*. However, the provisions of the aforementioned statutes are not exhaustive. Therefore, the court is free to appoint a commission if it is found necessary for the purpose of securing enforcement of a fundamental right in exercise of its constitutional jurisdiction.

6.4.2 When a commission must be appointed

A commissioner is appointed by the courts for ascertaining facts. The commissioner is, however appointed to ascertain facts only if on the basis of the knowledge so acquired, the court is able to offer effective relief in the case. If no relief may be granted, the court must refrain from appointing a commissioner only for the purposes of satisfying its own curiosity. However, it may take recourse to the

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46 *Supra* note 19.
47 Order XLVI empowers the Supreme Court to appoint Commission.
48 Order XXVI of Code of Civil Procedure 1908 empowers the courts to appoint Commissions.
49 *Supra* note 19.
50 See Article 32 of the Constitution.
51 *Supra* note 8, at p. 245.049.
52 A Commissioner was appointed to verify the violation of the fundamental rights of the bonded laborers and report the same to the Court. *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.
appointment of such a commission when the truth cannot be found out otherwise. Where the allegations are verifiable on records, the court may itself examine the same\textsuperscript{54}.

6.4.3 Practice of Appointing Commissions

The Supreme Court has evolved the practice of appointing commissions for the purpose of gathering facts and data in relation to complaints of breach of fundamental rights made on behalf of the weaker sections of society.\textsuperscript{55} In recent years, commissions have been appointed by the courts increasingly in matters relating to protection of environment and those challenging large infrastructure projects.\textsuperscript{56} In most public interest actions relating to protection of environment and the prevention of pollution\textsuperscript{57}, the courts have appointed commissions performing, simultaneously or separately, the investigative, advisory and the monitoring roles.\textsuperscript{58} In many other cases the Apex Court appointed district judges and magistrates for ascertaining the true facts and doing justice.\textsuperscript{59}

6.4.4 Evidentiary Value of Commissions

The reports of the commissioners appointed by the courts constitute \textit{prima facie} evidence of the facts and data gathered by the commissioner.\textsuperscript{60} Once the report of the commissioner is received, if the parties to the case want to dispute any of the facts or data stated in the report, they may do so by filing an affidavit in the court. The court then considers the reports of the commissioner and the affidavits that may have been filed, and proceed to adjudicate upon the issues arising in the petition. It would be entirely for the

\textsuperscript{54} \textit{Guruvayur Dewaswom Managing Committee} v. C.K. Rajan, (2003) 6 Scale 401. (Only when the court arrives at \textit{prima facie} finding that ‘all is not well’ it must appoint a Commissioner)
\textsuperscript{55} Supra note 19.
\textsuperscript{57} Supra note 8, at p. 245.053.
\textsuperscript{58} \textit{Rural Litigation and Entitlement Kendra} v. \textit{State of Uttar Pradesh}, AIR 1985 SC 652.
\textsuperscript{60} Supra note 8, at p. 245.054.
court to consider what weight to attach to the facts and data stated in the report of the commissioner. However, it would be incorrect to state that since the statement made in the report of the commissioner is not tested by cross-examination it has no evidentiary value at all.61

In the past the Supreme Court has sometimes appointed a District Judge, a professor of law, a journalist, an officer of the Court, an advocate, and sometimes a social scientist as a commissioner, for the purpose of carrying out an enquiry or investigation and making a report to the Court.62 These commissions are appointed on the grounds that the petitioners in PIL cases are not able to produce enough evidence in support of their case: the person acting pro bono publico cannot be expected to spend money from his own pocket to collect the evidence. So, the court must do something about it to protect the fundamental rights of the weaker sections of the society by appointing commissions. *Sunil Batra (II) v. Delhi Administration*63 is the best example of the court using the services of the advocates to ascertain the truth of the complaint of the torture practiced on prisoners in Tihar Jail, New Delhi. It authorized advocates to visit the prison meet the prisoners, see relevant documents and interview necessary witnesses and enquire about surrounding circumstances and the cruel scenario of events. The court appreciated the efforts of the two advocates and accepted their findings. Similarly in *Ram Kumar Mishra*64 the Court appointed the petitioner, an advocate, and the District magistrate, Bhagalpur to conduct a joint enquiry and report whether ferries operated by the

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61 Supra note 19.
63 (1980) 3 SCC 488.
respondent were established and covered by the *Minimum Wages Act, 1948*\(^65\). The report of the joint enquiry held against the respondent was acted upon by the court to uphold the claim of the workers. The court also took the help of two advocates in *Bandhua Mukti Morcha*\(^66\) and appointed them as commissioners to visit stone quarries, interview workers with a view to find out whether they are willingly working and also to enquire about conditions in which they are working. Their report prompted the decision in this case and heralded the era of release of bonded labourers throughout the country.

Bhagwati J. in the *Bandhua Mukti Morchava v. Union of India*, has held that Order XXVI of the *Civil Procedure Code* and Order XLVI of the *Supreme Court Rules, 1966* which lay down that the commission can be appointed only for the purpose of examining witnesses, making legal investigations and examining accounts, are not exhaustive and do not detract from the inherent power of the Supreme Court to appoint a commission for the ends of justice. Pathak J. also concedes it and so does A.N. Sen J. Pathak J., however, lays down an important caveat to the effect “… that the Court would do well to issue notice to the respondents, before appointing any commissioner, in those cases where there is little apprehension of the disappearance of evidence”.\(^67\) These caveats if uniformly applied, as it should be, would mean quite a change in the practice of the appointment of commissions in PIL cases. The respondents would, in most cases, resist the appointment of commissioners, put facts figures and other evidence to establish that there is no *prima facie* case to proceed with the petition. Then the court would not be able to proceed *ex parte* on one version only.

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\(^65\) Act No. 11 of 1948.
\(^66\) AIR 1984 SC 802.
\(^67\) AIR 1984 SC 802 at p. 845.
The Court in its enthusiasm to do justice to the poor and helpless has also utilized the services of social scientists, who including doctors to decide the controversy in a just and fair manner. In *Akhil Bharatiya Soshit Karamachari Sangh (Rly.)*\(^{68}\), as is well known, started because of the report of three social scientists, who were appointed by the People’s Union for Democratic Rights to enquire and investigate into the conditions under which the workers employed in various Asiad Projects, were employed. The report indicated payment of less than minimum wages, non-payment of equal wages and violation of various other statutory provisions. The report forms the basis of the judgment which is a landmark in constitutional history. Similarly in *Rural Litigation and Entitlement Kendra*\(^{69}\) the court appointed a committee of experts to study and report the impact of working of limestone quarries and effect, if any, to ecology and hazard to healthy environment. The Committee submitted its three reports classified the limestone quarries and divided them into three groups. Category A of these quarries where the adverse impact was relatively less and B was less impact and category C covered those quarries which were directed to be closed down on account of deficiencies regarding safety and hazards of more serious nature. This report accepted by the Court insofar as it concerned limestone quarries of categories A and C and extensive directions were given with regard to category B. the Committee was directed to consider those schemes with a view to ascertain whether it was possible to maintain ecological balance of the area and avoid hazardous to public health. Report of this committee formed the basis of the final order of the court, which satisfied the requirements of the people living in Mussoorie Hills range.

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\(^{68}\) AIR 1981 SC 298.

\(^{69}\) (1985) 2 SCC 431.
The Apex Court has also shown its confidence in District Judges and Magistrates for ascertaining facts for doing justice in seriously disputed cases. In *Kamaladevi Chattopadhyay*\(^{70}\), the complaint made by the petitioner was that, several children were detained in Central Jails at Ludhiana and Amritsar because of their being captured during the army action within the precincts of the Golden Temple, Amritsar. Report of the District Judge, Ludhiana disclosed rather a sad state of affairs and indicated that several women and their children were detained as alleged. The Court acting on the report directed immediate release of those women and children. Similarly in *Sheela Barse*\(^{71}\), the court directed District Judges all over the country to nominate the Chief Judicial Magistrate or a Judicial Magistrate to visit district jails and sub-jails within their area for ascertaining how many children below the age of 16 years were confined in jail and for what offence, if any. But in this there was some delay in sending reports to the Supreme Court and hence the court requested the High Courts to monitor the submission of these reports. It also appears that there was some delay there also; hence the court expressed its displeasure about it and directed the Registrar of every High Court to secure its compliance within the specified date. These efforts of the Supreme Court attracted attention of the country towards the problem of Juvenile Justice and ultimately paved the way for enactment of *The Juvenile Justice Act, 1986*.\(^{72}\)

A journalist namely Krishnan Mahajan of the *Indian Express* was appointed as Commissioner along with Dr. Upendra Baxi, a law Professor to report to the Supreme Court in *Gulshan v. Zila Parishad*.\(^{73}\) Subsequently in a number of cases lawyers were

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\(^{71}\) *Sheela Barse (I) v. Union of India*, AIR 1986 SC 1773.

\(^{72}\) Act No. 53 of 1986.

appointed as commissioners. The Supreme Court appointed even bureaucrats, and expert bodies as commissioners. In environmental matters, the Court has relied upon expert bodies like the Central Pollution Control Board and the National Environmental Engineering Research Institute (here in after referred as NEERI) as to study the situation and submit a report to the Court.

The power to appoint Commissions under Article 32 read with Article 142 are wide enough to permit such a course of action in any matter before the Supreme Court. Commissions have also been appointed to propose remedial relief and monitor its implementation. The Court in Indian Council for Enviro-Legal Action v. Union of India, appointed NEERI as an expert body to study the situation of ground water and soil pollution.

The Court has also drawn upon empirical data and expert studies to decide whether pavement dwellers’ right to life and livelihood would be affected by their

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75 Dr. L. Mishra Joint Secretary, Government of India, is appointed as commissioner in Bandhua Mukti Mortcha case, (1984) 3 SCC 161 at p. 188.
76 (1985) 2 SCC 431.
77 The Central Pollution Control Board in M.C. Mehta v. Union of India, 1999 (4) SCALE 196.
79 Article 32 of the Constitution provides, for remedies for enforcement of fundamental rights. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. (3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.
80 Article 142 (1) provides, The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.
81 Supra note 7, at p. 165.
82 (1996) 3 SCC 212.
Likewise, the Court relied upon the opinions of experts to dismiss a PIL challenging dairy imports from Ireland on the ground that they were radioactively contaminated by the leak from the Chernobyl nuclear plant. However, in cases where there are rival contentions of expert bodies the Court will not intervene. Where the question concerned the seismic potential of the Tehri Dam site, the Court stated that it did not have the expertise to give a final opinion on the matter. The Court could only investigate and adjudicate if the government is not conscious of the inherent dangers.

The use of the commissions has enabled the Court to check the facts alleged by the petitioner as well as the State after a proper scrutiny without affecting its role as an adjudicator. However, this had to be done with circumspection lest it appear that in its desire to redress the grievance, the Court is going beyond its powers.

6.5 Conclusion

There has been a mindset that justice cannot be done unless the adversarial procedure is adopted. However, there is a considerable body of juristic opinion in India which believes that strict adherence of adversarial procedure can sometimes lead to injustice particularly where the parties are not evenly balanced in social or economical strength. Though traditional lawyers have been critical about departure from the mould of adversarial litigation with its precise pleadings and procedure, and while politicians have been uneasy about judicial encroachment into the area of policy-making, but the public by and large welcomed the interference of the Court through PIL by providing justice to the needy people. This is because of a common perception that the legislature is

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85 Tehri Bandh Virodhi Sangharsh Samiti v. State of UP, (1992) Supp 1 SCC 44. The issue has been brought back to the Court in N.D. Jayal v. Union of India, 2004 (9) SCC 362.
86 Supra note 7, at p. 166.
unwilling to take prompt remedial measures and the executive on the other side also is unwilling to enforce the existing law. Despite the problems of judicial predictability and the feeling that the constitutional balance may be affected, it has to be accepted that the far-reaching judgments in cases like the *Khatri (I) v. State of Bihar*,87 *Hussainara Khatoon v. State of Bihar*,88 and the *Sheela Barse v. Union of India*89 have provided desperately needed relief and exposed executive failings. Therefore, when the poor come before the court particularly for enforcement of the fundamental rights, it is necessary for the Court to secure and enforce their fundamental rights. The Supreme Court has thus opined that the problems of the poor that are now coming before the court are qualitatively different from those that have hitherto occupied the attention of the Court. They need a different kind of legal skill and a different kind of judicial approach. If it blindly follows the adversarial procedure in their case, they would never be able to enforce their fundamental rights and the result would be nothing but a mockery of the Constitution. The Court thus reiterated the need ‘to abandon the doctrine of *laissez faire* approach in the judicial process particularly where it involves a question of enforcement of fundamental rights and forge new tools, devise new methods and adopt new strategies including appointment of commissions for the purpose of making fundamental rights meaningful for large masses of people.90 The non-adversarial method always provides room for negotiation, conciliation and mediation which facilitates the justice according to the need based of both parties. Further, the judge’s active role in the form of investigation and appointment of commission leads to find out the truth which lessens burden of the

88 AIR 1979 SC 1369.
89 (1993) 4 SCC 204.
90 Supra note 19.
disadvantaged people makes the process more justice oriented. Indeed the process is speedy and less cost oriented. Thus, the duty of the Court to search for truth, pro-active role of judges, directing the investigation officers and prosecution authority with object of seeking the truth and focusing justice\textsuperscript{91} should have been included even in adversarial system otherwise the defects of adversarial system would continue to hunt the justice system in India.

\textsuperscript{91} Committee on Reforms of Criminal Justice System, (New Delhi: Ministry of Home Affairs, Government of India, 2003), p. 265.