CHAPTER IV

JUSTICE BHAGWATI'S ENRICHMENT OF FUNDAMENTAL RIGHTS:
PERSONAL LIBERTY UNDER ARTICLE -21
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4. 1. General

Article 21 of the Indian Constitution provides that "No person shall be deprived of his life or personal liberty except according to procedure established by Law." In the draft Constitution this personal liberty provision was incorporated in Article 15 along with the Equality provision later this was separated and renumbered as Article 21.

The legislative history of Article 21 is that, Draft Article 15 as originally passed by the Constituent Assembly provided that "No person shall be deprived of his life or liberty without due process of Law." On the suggestion of Drafting Committee two changes were made in this Article:

(i) Addition of the word "Personal" before the word 'liberty' and

(ii) Substitution of expression "except according to procedure established by Law" the first reason is that it liberty might be construed very widely so as to include even the freedoms already dealt with in Article.13 The second reason was that the substituted expression was more specific (cf. Article XXXI of the Japanese Constitution 1946).

1. This change was the result of a discussion which the Constitutional Advisor Sir BN Rau had with Frankfurter, Judge of the US Supreme Court. (Seervai H.M., constitutional law of India- A critical Commentary, Universal Law Publishing Co.Pvt.Ltd., Ed.2006, Vol.,II, at p.970).
2. Present Article.19
3. Note of the Drafting Committee in the Draft Constitution forwarded by Dr. Ambedkar to the President of the Constituent Assembly on 21-2-1948.
In the historical background, this Article 21 reminds one of the famous clauses of the Magna Carta: "No man should be taken or imprisoned, be seized or outlawed, or exiled, or in anyway destroyed save... by the law of the land. Further, Article 3 of the Universal Declaration of Human Rights, 1945 and Article 9(2) of the International Covenant on Human Rights 1950 have relevant provisions to say that this very important concept has universal application.

4.2. Right to Life and Personal Liberty

Natural Justice is a great humanising principle intended to invest law with fairness and to secure Justice. Fair procedure is the natural Justice. Procedure which is prescribed by the law for the purpose of depriving any person of his right of personal liberty must be reasonable, fair and Just. Fairness in action therefore requires reasonable opportunity to be defended by a lawyer.

The affected person must be given reasonable opportunity to be defended by a lawyer. But in the case, where the person affected is economically sound or capable to engage a lawyer can approach the court but the question is where the affected person is an indigent and illiterate what will be the position in administration of Natural Justice. For this issue one can find the answer from the judgments delivered by Justice Bhagwati on personal liberty, legal aid to the poor, speedy trial and safe guards of the accused person against preventive detention laws covered in the following study.

4.2.1. Meaning and Scope of Personal Liberty Prior to Maneka Gandhi's Case

Liberty is the very second objective enshrined in the Preamble of the Indian Constitution. As India is a Democratic Republic, if there is no

1. Signed in the year 1215 A.D
2. Liberty of thought, expression, belief, faith and worship
liberty then there may not be meaning of democracy. The meaning of the words personal liberty came for consideration before the Supreme Court for the first time in A.K. Gopalan v State of Madras. In this case the petitioner, A.K. Gopalan a communist leader was detained under the Preventive Detention Act, 1950.

The petitioner challenged the validity of his detention under the Act, on the ground that it was violative of his right to freedom of movement under Article 19(1) (d) which is the very essence of personal liberty guaranteed by Article 21 of the Constitution. His argument is that the words 'personal liberty' include the freedom of movement also and therefore the Preventive Detention Act, 1950 must also satisfy the requirement of Article 19(5) and the restrictions imposed by the detention law on the freedom of movement must be reasonable under Article 19(5) of the constitution. Further he contended that, Art. 19(1) and Art 21 should be read together because Art. 19(1) dealt with substantive rights and Art 21 dealt with procedural rights.

But the majority view of the Supreme Court was that there was no guarantee in our Constitution against arbitrary legislation encroaching up on personal liberty. Hence if a competent legislature makes a law providing that a person may be deprived of his liberty in certain circumstances and in a certain manner, the validity of the law could not be challenged in a Court of law on the ground that the law is unreasonable, unfair or unjust. Thus the Supreme Court interpreted the term 'law' as state made law and rejected the plea that by the term in Article 21 meant not the state made law but jus naturae or the principles of natural justice. But Fazal Ali, J. in his dissenting judgment held that the Act, 1950 was liable to be challenged as violative of Article 19.

1. AIR 1950 SC 27
In *Kharak Singh v. State of U.P.* 1 The Supreme Court held in majority that the domiciliary visits at night is plainly violative of right to sleep and comfort which are included in the expression personal liberty but it did not conceded the right of privacy and therefore an attempt to ascertain the movement of an individual was considered valid.

4.2.2. Justice Bhagwati’s contribution to the New Dimension of Personal Liberty

It is a striking feature of the development of Constitutional Law of India that after long struggle which may be said to have started, the minority view in A.K. Gopalan’s case. Until the decision in *Maneka Gandhi V. Union of India*, 2 the view which prevailed in the Supreme Court of India was that there was no guarantee in Indian constitution against arbitrary legislation encroaching upon personal liberty. 3

The decision given in Maneka Gandhi case by Justice Bhagwati created ripples in the nation. In this case the apex court not only over ruled Gopalan’s case but has widened the scope of the words personal liberty considerably. In this case Justice Bhagwati observed: The expression personal liberty in Art 21 is of widest amplitude and it covers a variety of rights which go to continue the personal liberty of man and some of them have raised to the status of distinct fundamental rights and given additional protection under Article 19. 4 The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction.

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1 AIR 1963 SC 1295
2 Maneka Gandhi v Union of India, AIR SC 1978, p.555
4 AIR 1978 SC p.597 & 619

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The facts of the case were that in 1977, when the Janata Government was in power and Congress-I formed the major opposition, Maneka Gandhi received a letter without reasons assigned from the Regional Passport Officer of Delhi to surrender her passport with in 7 days from the receipt of the letter. Subsequently the petitioner's passport was impounded by the Central Government under section 10(3) (C) of the
Passport Act, 1967. As a result she could not go out of India to fulfil a foreign engagement which she had orally accepted. When she asked the government to state the reasons the response was that in the interest of the general public the government had decided not to furnish a copy of the statement of reasons to her.

Hence, the Passport Act, 1967, gave the authorities the right to impound the passport and there was no specific provision in the Act which requires the authority to issue a notice before impounding the passport, the two key questions arose (i) whether the right to go abroad was a fundamental right embodied in the constitution and (ii) whether or not principles of natural justice were mandatory and authorities bound to follow them.

In the above context the Supreme Court held that the right to travel was part and parcel of personal liberty enshrined in Art. 21 of the constitution and that no one can be deprived of this right except by due process established by law. While delivering the leading judgment, Justice Bhagwati propounded the second issue that, “Does Art. 21 merely require that there must be semblance of procedure, however arbitrary and fanciful prescribed by law before a person can be deprived by personal liberty or should the procedure satisfy certain equities in the sense that it must be fair and reasonable. Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirement”. He then hold that, the procedure contemplated in Art. 21 could not be unfair or unreasonable. And this principle of reasonableness which was an essential element of equality or non arbitrariness pervaded Art. 14 like a brooding omni presence on the procedure contemplated in Art. 21 must answer the test of reasonableness in order to be in conformity with Art. 14.
Further *Justice* clarified that any procedure which is prescribed by law for the purpose of depriving any person of his right of personal liberty must be reasonable, fair and just because the golden thread of 'reasonableness' runs through out the entire fabric of the constitution and therefore no action of government should be unreasonable, unfair or unjust. This is how in this case Justice so to say improvised the necessity of reading the observance of principles of natural justice in Art. 21 of the constitution though, as said earlier, no such words *per se* existed in the law as it stood.¹

Thus, Art. 21 requires the following conditions to be fulfilled before a person is deprived of his personal liberty

- There must be a valid law
- The law must provide a procedure
- The procedure must be just, fair and reasonable and
- The law must satisfy the requirements of Art 14 and 19.

This is a clear cut departure from the law of the land which had been followed for at least 27 years prior to this decision starting from the case of *A.K. Gopalan*.² The judgment, in this case, delivered by Justice Bhagwati marked a watershed in the history of Constitutional Law of India.

4.2.2.1. Right to live with Human Dignity

In *Maneka Gandhi*’s case the Supreme Court held that the right to live is not merely confined to physical existence but it includes with in its ambit the right to live with human dignity.

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Again, Justice Bhagwati came with a more refined definition of personal liberty in *Francis Coralie Mullin V. Administrator, U.T. of Delhi* and expanded its scope by observing that: "The right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing ourselves in diverse forms, freely moving about and mixing and commingling with fellow human beings".

In this case under detention, the petitioner experienced considerable difficulty in having interview with her lawyer and the members of her family especially her daughter aged about five years and her sister, who was looking after the daughter, were permitted to have interview with her only once in a month. She was not allowed to meet her daughter more often, though a child of very tender age as some criminal proceedings was pending against the petitioner for attempting to smuggle hashish out of the country.

For the purpose of her defence in such criminal proceeding, it was necessary for her to consult her lawyer, but even her lawyer found it difficult to obtain an interview with her because in order to arrange an interview, he was required to obtain prior appointment from the District Magistrate, Delhi and the interview could take place only in the presence of Customs officer nominated by the Collector of Customs. This procedure for obtaining interview caused considerable hardship and inconvenience and there were occasions when even after obtaining prior appointment from the District Magistrate Delhi, her lawyer could not have an interview with her since no Customs Officer nominated by the Collector of Customs remained present at the appointed time. Thus the petitioner was effectively denied the facility of interview with her lawyer.

\[^1\] AIR 1981 SC 746
and even her infant not being allowed to see his mother except once in a month.

This restriction on the face of it appeared to be unfair. In this context justice Bhagwati observed that, ‘right to life is enshrined in Art. 21 and life cannot mean merely physical or animal existence. It must mean the case of every limb and faulty through which life is lived’.

Again in the same case, speaking on the issue of rights of under trials and their personal liberty to have an interview with a lawyer of her own choice and to meet family members, friends further Justice Bhagwati explained that “obviously, the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or computation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world.” Thus, he felt surely a mother’s desire to see her offspring and vice versa, is the very basic human requirement and the fabric of Indian family school which makes the nation great.

Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable fair and just procedure established by law which stands the test of other fundamental rights. Obviously any form of torture or cruel inhuman or degrading treatment would be offensive to human dignity and constitute an in road into this right to live and it would, on this view, be prohibited by Art. 21 unless it is in accordance with procedure prescribed by law, but no law which authorizes and no procedure which leads to such fortune or cruel, inhuman or degrading
treatment can ever stand the test of reasonableness and non-arbitrariness it would plainly be un constitutional and void as being violative of Article 14 and 21. 

Further in regard to the question whether the right to life is limited only to protection of limb or faulty or does it go further and embrace something more, Justice observed; The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and coming tiny with fellow human beings. ‘Personal Liberty’ would include the right to socialize with members of the family and friends subject, of course, to any valid prison regulations and under Articles 14 and 21 such prison regulations must be reasonable and non-arbitrary. If any prison regulation or procedure laid down by it regulating the right to have interviews with members of the family and friends is arbitrary or unreasonable, it would be liable to be struck down as invalid as being violative of Articles 14 and 21.

4.2.2. Relation between Article 14, 19 and 21

In Maneka Gandhi's case the Supreme Court has over ruled the view expressed by the majority in A.K. Gopalan’s case and held that Art. 21 is controlled by Art. 19 that mean it must satisfy the requirement of Art. 19 also and the procedure contemplated in Article 21 must answer the test of reasonableness in order to be in conformity with Art.14. Speaking on the inter dependence of Art. 14, 19 and 21 in Maneka Gandhi’s case Justice Bhagwati observed thus, 'It is not a valid argument to say that the

1 Francis Coralie Mullin V. Administrator, Union Territory of Delhi, AIR, 1981 SC 746
2 Maneka Gandhi v Union of India ; AIR 1978 SC 555.
3 AIR 1950 SC 27
4 AIR 1978 SC 623-24
expression personal liberty in Art. 21 must be so interpreted as to avoid overlapping between Article 21 and Article 19(1)'.

4.3. Personal Liberty and Right to Speedy Trial

A court of law is a temple of justice where people go with the hope and belief that justice will be done to them. As justice delayed is justice denied justice must be done with in a reasonable time. Due to various technicalities and complexities of the procedure, delay in trial is an inherent defect of the criminal justice system. This results in a large number of cases pending before the court and great sufferings and harassment to the accused and due to this prolonged trial the poor accused in India were in fact denied justice.

The problem of delay in justice system is neither new nor peculiar to the Indian judicial system. The expeditious trial is the facet of criminal jurisprudence. Speedy trial in fact helps the prosecution, the accused as well as the state because lengthy pre-trial detention causes over crowding of jails. Moreover, maintaining the prisoner in jail is costly. Further the longer an accused in free awaiting trial, the more tempting becomes opportunity to jump bail and escape. For the short comings of delay in justice Justice had cited two reasons in an article that, the slow wheel of justice entangled in procedural complaints, over burdened judiciary lawyers' strikes is the prime reason and the second reason is antiquated system of bail that majority of the cases of the poor are unable to satisfy the police or magistrate.

The right to speedy trial has not been specifically provided under Art21 of the Constitution of India, the same is implicit in the right to

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personal liberty. And this right to speedy trial was embedded in the Criminal Procedure Code, 1973 under sec. 309 which says that (1) in every inquiry or trial, the proceedings shall be held as expeditiously as possible¹.

The constitution of USA guarantees the right to speedy trial expressly in the 6th Amendment which provides, “in all criminal prosecutions the accused shall enjoy the right to speedy and public trial. In United States speedy trial is one of the constitutionally guaranteed right.

4.3.1. Justice Bhagwati's Contribution to Speedy Trial

With the new phase of Judicial Activism in Post Maneka Gandhi's case the Judgments based on this landmark judgment, one can say that the expression in the concept of personal liberty and the procedure established by Law a new idea had risen acquiring dizzy heights and exciting dimensions.

Soon, after Maneka Gandhi's case Justice Bhagwati had one more opportunity for further development of Law embodied in Article 21 was the case of Hussainara Khatoon v Secretary, State of Bihar², which was brought to the notice of the Supreme Court basing on a News Paper article appeared stating that there was large number of under trial prisoners in Bihar jails. The names of few prisoners were given who had been in jail for almost 5 to 7 or even 9 years without even their trial having commenced. Enthused by the expanded interpretation of Article 21 Ms. Hingorani Devi, a Lady Advocate, filed a writ petition before a bench consisting besides others, of Justice Bhagwati claiming a writ of habeas corpus for seven persons named there in and for those many others who

¹. Section 309 of the Cr. P.C. 1973 says that (i) in every inquiry or trial, the proceedings shall be held as expeditiously as possible.

². AIR 1979 SC 1360
were languishing in the Jails of Bihar State without their trials having started.

The Bench immediately took cognizance of the writ and issued a notice directing the state of Bihar to file an affidavit stating the names of the prisoners who were languishing in the Jails of Bihar State for more than two years without their trials having commenced. When the affidavit was filed after about a month and half, to the astonishment of the bench, it revealed that there were about 30,000 including women and children such prisoners and out of these about 300 to 400 had been in Jail for a period longer than the maximum to which they would have been sentenced if they had been convicted. It is true that some of them had already suffered their Jail term even before the commencement of their trial. The Court promptly ordered the release of about 300 to 400 persons. Thus the principle of speedy justice propounded in Maneka Gandhi's Case, nurtured in M.H.Hoskot's case and came of the age in Hussainara Khatoon's Case.

The revelation of findings in Hussainara Khatoon V. Home Secretary, State of Bihar is a shocking state of affairs in regard to administration of Justice in the State of Bihar. Justice Bhagwati held that, a procedure prescribed by Law for depriving a person of his liberty can not be considered as reasonable, fair, and just unless that procedure ensures speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as reasonable, just and fair and it would fall out of article 21. There can be, therefore, no doubt that speedy trial, means reasonably expeditious trial. Therefore expeditious trial is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.

1 AIR 1979 SC 1360.
In these series of cases the second petition was filed before the Supreme Court by Hussainara Khatoon. As far as concerned to the second petition Justice Bhagwati observed that "where under trial prisoners have been in jail for periods longer than the maximum term for which they would have been sentenced if convicted, their detention in jail, is totally unjustified and in violation of fundamental rights and when Article 21 provides that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by Law, it is not enough that there should be some semblance of procedure provided by Law, but the procedure under which a person may be deprived of his life or liberty should be reasonable, just and fair."

Further he observed that, the real problem in the implementation of this right is the working capacity of the administration and the judiciary. To solve this problem it becomes necessary that efficiency of the existing frame work should be increased and the strength of the prosecution and the courts should also be enlarged. This exercise may involve huge expenditure but the state can not be permitted to deny this constitutional right on the ground of inadequate financial resources. Hence, Justice Bhagwati aptly pointed out that "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 has to be done by the State. It is also the constitutional obligation of the Supreme Court. As the guardian of the Fundamental Rights of the people, as a sentinel in the que vive to enforce the Fundamental Right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening

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2. Hussainara Khatoon V. Home Secretary, State of Bihar, AIR SC 1979 1377::
3. 1980 SCC (1) 98

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the investigation machinery, setting up new Courts, building new Courts, Homes, providing more staff and equipment to the Courts, appointment of additional Judges as other measures calculated to ensure speedy trial.

In the next and third petition filed by Hussainara Khatoon, Justice observed that: "Where certain under trial prisoners remained in Jail without trial for periods longer than the more term for which they could have been sentenced if convicted, and such persons had been in detention for periods longer than the maximum terms as prescribed in provision to section167 (2) of the CrPC without their trial having been commenced, their continued detention was clearly illegal and in violation of their fundamental right under Article 21 of the Constitution as such they must released forth with.

With regard to the duties of the police further, he held that "when police investigation has been delayed by over 2 years, the charge sheet must be submitted with in a further period of three months and if that is not done, the State Government might well withdraw such cases.

In the case of Kadra Pehadia v. State of Bihar, Justice Bhagwati went a step further and gave necessary directions to the Government of Bihar and High Court including a direction to create additional Courts for speedy disposal of cases pending since long time. He reiterated the Hussainara’s case judgement and held that, “It is obvious that some drastic steps are necessary to be taken in order to set right this distressing state of affairs. What ever steps are necessary to be taken by the prosecution for the purpose of day-to-day trial of such cases shall be adopted and the trial of such prisoners shall not be delayed on any such Count”.

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1. Ibid
2. AIR 1982 SC 1167
4.4. Justice Bhagwati’s contribution in humanising the Law of Bail.

The provision of bail has a property oriented approach which proceeds on the assumption that risk of monetary loss is the deterrent against fleeing from justice. The Bail in criminal justice means release of the accused pending trial.

The provisions of bail in the CrPC included the release of accused on personal bond with surety or without surety. In the matter of bailable offences where the accused was entitled to secure bail under section 436 of CrPC as a matter of right it was not granted by the Court unless the accused was able to secure a surety. On the other hand in the matter of non bailable offences the grant of bail was treated not as a matter of right but it was at the discretion of the court and in most of the cases the bail was refused.

There is no provision regarding the grant of bail in Indian constitution unlike in the American constitution\(^1\). But, the criminal procedure code of 1973, under sections 436 to 450 contains provisions for bail and it provides that the accused should produce sureties for his release on bail. For the first time in Babu Singh v. State of UP\(^2\) the Supreme Court of India held that the refusal of bail was a deprivation of liberty and it must satisfy the requirement of Article 21 and a fundamental right to bail is implicit under Article 21. The most tragic feature which is responsible for a large number of poor people languishing in jails is the reluctance about the accused charged with small offences.

The Meaning and Scope of Personal Liberty, prior to Maneka Gandhi’s case is that Art.21 guaranteed the right to life and personal

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1. The 8\(^{th}\) Amendment to the American Constitution provides that “excessive bail shall not be required”.
2. Babu Singh Vs State of UP; AIR 1978 SC 527
liberty to citizens only against the arbitrary action of the executive and not from legislative action by a valid law. Now under Art 21 the expanded form of personal liberty right of life and personal liberty of citizen not only from the Executive action but from the Legislative action also. The expanse covers the criminal jurisprudence also which includes Right to speedy trial, free legal service and Bail.

4.4.1. Justice Bhagwati’s judgments concerning Bail

The law required that the surety has to be person who would be willing to satisfy the court about his solvency for which he had produced sufficient evidence was the position in the Bail procedure until the Cr PC Amendment Act, 2005 was passed. And before this amendment Act, 2005 the question was that how and where from a poor and indigent accused person can get a surety.

So the system prevalent required monetary bail to be given, even suppose that legal aid was provided and the court made an order that the detainee would be released on bail of even, say Rs.1000/- or Rs.5000/- or

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2. Provisions for Bail under Cr PC 1973: Sections from 436 to 466 of CrPC 1973 deal with the provisions relating to Bail and Bonds. (1) Under section 436 of the CrPC bailable offences & Bail, any person other than a person accused of a non – bailable offence is arrested or detained at any time while in the custody or at any stage of the proceeding the accused may be released on bail.

In cases where a person is unable to give bail within a week of the date of the arrest, it shall be the sufficient ground for the officer or the court to presume that he is an indigent person and he shall be entitled to get the bail with out surety . This was inserted by Cr PC Amendment Act, 2005 to the CrPC 1973.

Section 437 of CrPC, 1973 deal with Bail in the cases of non bailable –offences. Sec.437 provides that when any person accused of, or suspected by the commission of any non bail able offence is arrested or detained with out warrant he may be released on bail except where the accused has been guilty of an reasonable grounds to believe that offence punishable with or imprisonment of life; and in case had been previously convicted of an offence punishable with death, imprisonment of life or up to 7 years or more or he had been previously convicted on two or more occasions of a non bail able and cognizable offence.
even surety. It is too hard to believe that a person would be willing to pay the amount or give a surety to a poor accused and give a personal bond to the court that in case the accused fails to appear whenever required by law, he would be responsible for the amount of the bail. This was obviously the reason why a large number of detainees were unable to get themselves out of prisons where they were confined.

This inherent injustice situation has noticed by Justice Bhagwati while dealing with Hussainara Khatoon v Secretary, State of Bihar case. He went on with his extensive expansion programme which was started with Maneka Gandhi v Union of India's case and stated that bail was a basic human right and was enshrined in the International Covenant of Civil and Political Rights.

The instant case which has great potential and import in the law of bail came for consideration before the Supreme Court by way of public interest litigation filed by a lady advocate of the Supreme Court and which was adjudicated by Justice Bhagwati. While dealing with this case Justice expressed anguish over the prevailing Bail system in India, thus: “What faith can these lost souls have in the judicial system which denies them a bare trial for so many years and keeps them behind bars, not because they are guilty, but because they are too poor to afford bail and the courts have no time to try them. It is a travesty of justice that many poor accused, 'little Indians, are forced into long cellular servitude for little offences' because the bail procedure is beyond their meager means and trials don’t commence and even if they do, they never conclude. Now, one reason why our legal and judicial system continually denies justice to the poor by keeping them for long years in pre-trial detention is our highly unsatisfactory bail system”.

2. AIR 1979 SC 1360
The bail system, he observed, suffers from a property oriented approach which seems to proceed on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. The Code of Criminal Procedure, even after its re-enactment, continues to adopt the same antiquated approach as the earlier Code enacted towards the end of the last century and where an accused is to be released on his personal bond, it insists that the bond should contain a monetary obligation. This system of bail operates very harshly against the poor and it is only the non-poor who are able to take advantage of it by getting them released on bail.

The result is that either they are fleeced by the police and revenue officials or by touts and professional sureties and sometimes they have even to incur debts for securing their release or, being unable to obtain release, they have to remain in jail until such time as the court is able to take up their cases for trial. Justice cautioned as to the above situation that which may lead to grave consequences like; '(1) though presumed innocent, they are subjected to psychological and physical privations of jail life, (2) they are prevented from contributing to the preparation of their defence and (3) they lose their job, if they have one, and are deprived of an opportunity to work to support themselves and their family members with the result that the burden of their detention almost invariably falls heavily on the innocent members of the family'.

It is here that the poor find that the legal and judicial system oppressive and heavily weighed against them and a feeling of frustration and despair occurs upon them as they find that they are helplessly in a position of inequality with the non-poor. The Legal Aid Committee appointed by the Government of Gujarat under the Chairmanship of Mr.
Justice Bhagwati, emphasized this glaring inequality in these words\textsuperscript{1}: “the bail system, as we see it administered in the criminal courts today, is extremely unsatisfactory and needs drastic change. In the first place it is virtually impossible to translate risk of non-appearance by the accused into precise monetary terms and even its basic premise that risk of financial loss is necessary to prevent the accused from fleeing is of doubtful validity. There are several considerations which deter an accused from fleeing is of doubtful validity. There are several considerations which deter an accused from running away from justice and risk of financial loss is only one of them and that too not a major one”.

Besides, while dealing with Hussainara’s case, Justice pointed out the factors to consider in grant of bail and procedure to be adopted in giving of bond in the following way: “Ours is a socialist republic with social justice as the signature tune of our Constitution and Parliament would do well to consider whether it would not be more consonant with the ethos of our constitution that instead of risk of financial loss, other relevant considerations such as family ties, roots in the community, job security, membership of stable organizations etc., should be the determinative factors in grant of bail and the accused should in appropriate cases be released on his personal bond without monetary obligations”\textsuperscript{2}.

As the protocol of monetary bail was not of much help to the poor people as obviously many could not afford to pay the amount or furnish surety, Justice stated that: ‘the courts must abandon the antiquated concept under which pre-trial release is ordered only against bail with sureties. That concept is outdated and experience has shown that it has done more harm than good’. And he laid down the guidelines for grant of bail with

\textsuperscript{1} Report of the Legal Aid Committee, Government of Gujarat, 1971

\textsuperscript{2} Hussainara Khatoon v. Secretary, State of Bihar : AIR 1979 SC 1360
out such pre conditions stating that "if the court is satisfied, after taking into account, on the basis of information placed before it that, the accused has his roots in the community and is not likely to abscond, it can safely release the accused on his personal bond. And to determine whether the accused has his roots in the community which would deter him from fleeing, the court should take into account the following factors concerning the accused:

- "The length of his residence in the community,
- His employment status, history and his financial condition,
- His family ties and relationships,
- His reputation, character and monetary condition,
- His prior criminal record including any record or prior release on recognizance or on bail,
- The identity of responsible members of the community, who would vouch for his reliability,
- The nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non-appearance, and
- Any other factors indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear.

This decision regarding the amount of the bond should be considered as an individualised decision depending on the individual financial circumstances of the accused and the probability of his absconding. When the accused is released on his personal bond and what we have said here in regard to the court must apply equally in relation to the police while
granting bail and he is solvent enough to pay the amount of the bond if he fails to appear at the trial and in consequence the bond is forfeited.".

With regard to the duties of the Magistrate, Justice Bhagwati held that "under provision (a) of sub-section (2) of section 167 of the CrPC on the expiry of 90 days or 60 days, as the case may be from the date of arrest, the attention of the under trial prisoners was drawn to the fact that they were entitled to be released on bail and the state government must also provide at its own cost a lawyer to deal with the application for bail. This is the constitutional obligation of the state government and the magistrate and if this is strictly carried out, there will be considerable improvement in the situation in regard to under trial prisoners and there will be subservience of the rule of law". Hence, he ordered for the release of prisoners forthwith on their personal bond.

4.4.1.1. Bail to a person sentenced to life imprisonment for an offence under Section 302 of the IPC.

The practice not to release on bail a person, who has been sentenced to life imprisonment was evolved in the High Courts and in the Supreme Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period.

The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period

1. Hussainara Khatoon v. Secretary, State of Bihar: AIR 1979 SC 1360
of five or six for an offence which is ultimately found not to have been
committed by him and the Court ever can not compensate him for his
incarceration which is found to be unjustified.

This situation was occurred in the case of Kashmira Singh
Vs. State of Punjab ¹ wherein the appellant filed an application for bail,
pending the hearing of an appeal by special leave. The appellant contends
that pending the hearing of the appeal he should be released on bail. As
the practice of the Supreme Court as also in many of the High Courts has
been not to release on bail a person who has been sentenced to life
imprisonment for an offence under Section 302 of the Indian Penal Code
and the issue considered was that whether this practice should be departed
from and if so, in what circumstances.

In the instant case² appellant was convicted by the Sessions Court
for an offence under Section 323 of the Indian Penal Code and sentenced
to suffer six months' rigorous imprisonment. There was also a charge
against the appellant for an offence punishable under Sec. 302 of the
Indian Penal Code but he was acquitted of that offence by the Sessions
Court and hence the State preferred an appeal against the order of acquittal
to the High Court. This appeal was allowed and the High Court set aside
the order of acquittal and convicted the appellant of the offence under Sec.
302 and sentenced him to suffer imprisonment for life. The appellant
thereupon preferred a petition for special leave to appeal to the Supreme
Court and special leave was granted to him. The appellant filed an
application for bail pending the hearing of the appeal, but the application
was dismissed. Since the appeal did not reach hearing for a long time, the
appellant preferred another application for bail which is the present case.

¹ 1977-AIR (SC) 2147, 1977-SCC-4-291
In the present case, the appellant after serving out the sentence of six months' rigorous imprisonment for the offence under Section 323 imposed upon him by the Sessions Court was on bail throughout the duration of the appeal before the High Court and since the appeal was allowed and he was convicted for the offence under Section 302 and sentenced to life imprisonment, he surrendered before the court and presented his petition for special leave to appeal to the apex Court. Since then, the appellant has been in jail and the total period he has spent in jail so far is about four and a half years.

In the above state of affairs Justice Bhagwati observed that, the appeal is of 1974 and it is not likely to come up for hearing for at least another two years since the Supreme Court was hearing appeals preferred in the year 1972. And the very fact that this Court was granted to the appellant special leave to appeal against his conviction shows that, in the opinion of this Court, he has prima facie a good case to consider under these circumstances, further Justice held that “as far as petty offences concerned, the law is now settled that the accused must be released on his personal bond and sureties need not be insisted upon. Justice Bhagwati refers to this improvisation in law as 'humanising of the law of bail'".

4.5. Legal Aid: Justice Bhagwati

Free Legal Aid to the poor is an essential element of fair trial procedure for securing justice to all on the basis of equal opportunity for defence. The Britishers brought with them and have left in legacy the expensive system of administrative legal justice, which has made the legal aid to poor in obvious necessity.

Although it is true that Legal Aid idea did exist in an embryonic form since the declaration of the Magna Carta, but in modern times it developed and reached maturity only in the 20th century. The modern
welfare state has not lagged far behind in enacting and enforcing benevolent legal measures for conferring Justice to the most neglecting section of the community. The part played by Judiciary in clarifying and enlarging the ambit and scope of this doctrine with in the corners of legal and constitutional provision is note worthy and commendable.

The idea of Legal Aid owes its origin to the inability of the poor to retain lawyers. The concern for the poor man has been a part of legal development in all democratic and progressive societies. This manifested itself in the passing of a variety of welfare laws and allocation of funds for welfare activities. The non-use or limited use of the legal system by the poor and perhaps the over-use of it against the poor is the structure and organization of the legal profession itself.

4.5.1. Development of the concept of Legal Aid in India

The concept of legal aid is no longer continued to exemption from court fee and providing a lawyer for indigent whose cases have been already reached the court. Legal Aid is now to be treated as part of the programme to secure to the poor and disadvantaged their just share of the benefits of society.

Justice is the foundation of all good governments and the every survival of democracy and the rule of law depends on the effective access to justice, this was the well known principle all over the world. In England the Legal Aid Act, 1949\(^2\) contained the provision for legal Aid in civil cases and it extended to criminal cases in 1967. In USA the initiative was taken by the judiciary in involving the fundamental right to legal aid. In

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India legal aid schemes were initiated by few Justices of High Courts. However this is not a new phenomenon. Unlike in America where the 6th Amendment to the constitution provides that "in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defence", in India one may not have Legal Aid as Fundamental Right, but inclusion of Article 39A in the Constitution, it is now regarded as an essential part of the administration of Justice. Art 39A provides that: Equal Justice and Free Legal Aid - 'the State shall secure that the operation of the Legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid by suitable legislation or schemes or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities'.

The Central Government also took initiative by appointing committees for legal aid schemes. In 1973 Justice Krishna Iyer presented his report to the Government of India, and in 1978 both Hon'ble Justice

1. (In 1893 justice Mahamood of the Allahabad High Court delivered dissenting judgment the question was whether the court could divide his case by merely looking at his papers. Justice Mahamood held that the pre-condition of the case being headed could be fulfilled only when some body speaks. [The Hindustan Times (New Delhi 9, July 8 1996)]) The very early schemes of legal aid were developed under the aegis of Justice N. H. Bhagwati (The Bombay Committee Report, 1949) of the Bombay High Court (whether N. H. Bhagwati in father of P. N. Bhagwati) and Justice Trevor Harris (The Bengal Committee Report, 1950) of the Calcutta High Court. Apart from these efforts such schemes were formulated in the states of Uttar Pradesh (1952), West Bengal (1953) and Madras (1954) which could not be implemented effectively due to organizational, financial and administrative reasons (Madhur, L. N. Implementation of Legal Aid: Organisational, Financial and Administrative, (1997), Kur, L. J. 97).)


P.N. Bhagwati and Hon’ble Justice V.R. Krishna Iyer presented a report on Legal Aid Schemes. Both Judges were later appointed by the Government of India as another High Power Committee to examine their own reports or fresh and suggest a plan of action for implementation of legal aid to the poor in the country as a whole. In 1971 Justice Bhagwati had been appointed by the Gujarat Government for suggesting ways and means of providing free legal services to the poor.

4.5.2. Justice Bhagwati’s Contribution in the Development of Legal Aid programmes in India.

The matter of implementing a legal aid programme is so essential in a country where poverty was vehemently crying out from every nook and corner. Thousands of people were languishing in jails because they could not afford a lawyer. This apathy had prompted the apex judiciary to take this step forward, holding that Legal Aid was a part and parcel of reasonable, fair and just procedure, the doctrine propounded in the Maneka Gandhi case.

Hon’ble Justice PN Bhagwati and earlier to him Justice V.R. Krishna Iyer influenced the shaping of a new philosophy of legal aid through two important reports and innovative judgments. Thus the judiciary with its creativity and social consciousness pronouncements maintained that right to legal aid is an integral part of Art 21 of the constitution.

Initially, in Janardhan Reddy v State of Hyderabad² and Tara Singh v. State of Punjab³ cases the court has held that there was no right to

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3. Tara Singh V. State of Punjab, AIR 1951 SC 411
counsel, but the opportunity to engage a lawyer of one's choice contemplated in Art 22(1) of the constitution was held to be available.

The Concept of free Legal Aid for the speedy trial flouted from Maneka Gandhi's decision and matured in M.H. Hoskot where justice Krishna Iyer declared that free Legal Aid is the state's duty and not the government's charity and came to reality, in Hussainara Khatoon's case.

In Hussainara's case, knowing the shocking state of affairs in regard to administration of justice in the state of Bihar where about 30,000 prisons were languishing in jails for more than 3, 5 and ten years even for petty offences and some women prisoners kept in prison merely for the purpose of witness. In the above state of affairs, Justice Bhagwati expressed his anguish thus: "We are talking passionately and eloquently about the maintenance and preservation of basic freedoms. But are we not denying human rights to these nameless persons who are languishing in jails for years for offences which perhaps they might ultimately be found not to have committed. This 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".

Further, referring to Article 39-A which is the fundamental in the directives Justice emphasised that, the right to free legal services is, therefore, clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Art. 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons of such a poverty, indigence or incommunicado situation and the state is under a mandate to provide a lawyer to an  

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Hussainara Khatoon V. State of Bihar; AIR 1979 SC 1360

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accused person if the accused person does not object to the provision of such lawyer.

In Veena Sethi V State of Bihar the Free Legal Aid Committee Hazaribagh, brought to the notice of the court through a letter about the illegal detention of certain prisoners in the Hazaribagh Jail for two or three decades without any justification. At the time of their detention prisoners were declared insane but after wards they became sane but due to the inaction of authorities to take steps to release them they remained in jails for 20 to 37 years. In the above state of affairs Justice Bhagwati held that, the prisoners remained in jail for no fault of theirs but because of callous and lethargic attitude of the authorities and therefore entitled to be released forthwith. In this case Justice Bhagwati had an occasion to stress upon the need of adequate institutions for looking after the mentally sick and stated that, ‘the practice of sending lunatics or unsound mind persons to the jails for safe custody is not at all a healthy or desirable practice’.

Further, in Khatri v. State of Bihar, Justice Bhagwati held that, the police are supposed to enforce the law and not to break it, but here it seems that they have behaved in a most lawlessness manner and defied not only the constitutional safeguards but also perpetrated and it is a crime against the very essence of humanity. It’s a barbaric and cruel act to believe that how ruthless and inhuman to deprive the eyesight of fellow human beings. Justice expressed his regret for non compliance of the decision of the highest court in providing free legal services to the poor and indigent by many states despite the constitution declares in Art. 141 that the law declared by the Supreme Court shall be binding through out the territory of India.

1. AIR 1983 SC 399
2. 1981 – SCC – 1 – 623, also known as Bhagalpur Central Jail Case
With regard to the duty of the state Justice Bhagwati observed that, "the state is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the state and the state cannot avoid pleading financial or administrative inability. Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the magistrate. Therefore the state is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the magistrate as also when he is remanded from time to time".

With regard to the failure of the Magistrates and Sessions Judges in discharging the obligations in the case of blinded prisoners where the accused were not asked for the legal representation hence the lower court was not provided the same, Justice Bhagwati directed the Magistrates and sessions judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that "he is entitled to free legal services at the cost of the state.''

Again justice Bhagwati reminded the duty of the Magistrate and sessions judge to inform the indigent accused about their right to free legal services as²: 'It is common knowledge that about 70 percent of the people in the rural areas are illiterate and even more than that percentage of people are unaware of the rights conferred upon them by the law. There is so much lack of legal awareness that it has always been recognized as one of the principal items of the programme of the legal aid movement in this

country to promote legal literacy. It would make mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services.

Further, *Justice* directed the state of Bihar and required every other state in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or *incommunicado* situation, and held that, 'to provide legal service the only qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require but free legal services need not be provided by the state'.

In *Sheela Barse v. State of Maharashtra* Justice Bhagwati endowed with the guidelines for the protection of prisoners whilst continued it from maltreatment and injustice meted out to them. This petition is based on a letter addressed by Sheela Barse, a journalist, complaining of custodial violence to women prisoners where they are confined in the police lockup in the city of Bombay.

In this context, *Justice* issued some directions and they summed up as: Whenever a person is arrested by the police without warrant he must be immediately be informed of the grounds of his arrest and his entitlement to bail, printed copy of the pamphlet in three languages shall be affixed in each cell and police lockup.....and .....will immediately give intimation of the fact of legal aid services at the cost of state. For this

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purpose the state government will provide necessary funds to the concerned legal aid committee for carrying out this direction.

When Justice Bhagwati became the Chief Justice of India in the year 1986, Centre of Legal Research V. State of Kerala's\(^1\) case came for consideration before the apex court in which the question arose whether voluntary organizations or social action groups engaged in the legal aid programme should be supported by the state government and if so, to what extent and under what conditions?. In the above state of affairs, Justice Bhagwati observed positively that: "There can be no doubt that if the legal aid programme is to succeed it must involve public participation. The state government undoubtedly has an obligation under Art 39A of the constitution which embodied a directive principle of state policy to setup a comprehensive and effective legal aid programme in order to ensure that the operation of the legal system promotes justice on the basis of equality.

But despite the sense of social commitment which animates many of the officers in the Administration, no legal aid programme can succeed in reaching the people if its operation remains confined in the hands of the Administration. It is absolutely essential that people should be involved in the legal aid programme because the legal aid programme is not charity or bounty but it is a special entitlement of the people and those in need of legal assistance cannot be looked upon as mere beneficiaries of the legal aid programme but they should be regarded as participants in it". Justice preferred voluntary organizations and social action groups to involve people in legal aid programmes as these organizations are working amongst the deprived and vulnerable sections of the community at the grass-root level and they know from their own experience the unmet legal needs of the people and the problems and difficulties encountered by these neglected sections of Indian humanity.

\(^{1}\) AIR 1986 SC 1322
Therefore Justice Bhagwati observed that, voluntary organizations and social action groups must be encouraged and supported by the State in operating the legal aid programme but it must take into account the socio-economic conditions prevailing in the country to adopt a more dynamic posture. And such voluntary organization or social action group shall not be under the control or direction or supervision of the State Government or the State Legal Aid and Advice Board and these should be totally free from any Governmental Control.

The another case, which is an appeal by special leave raised a question of considerable importance relating to the administration of criminal justice in the country came before the Supreme Court is the case of Sukdas V. Union Territory of Arunachal Pradesh. The question raised in the instant case is whether an accused who on account of his poverty is unable to afford legal representation for himself in a trial involving possibility of imprisonment imperilling his personal liberty, is entitled to free legal aid at State cost and whether it is obligatory on him to make an application for free legal assistance, or the Magistrate or the Sessions Judge trying him is bound to inform him that he is entitled to free legal aid and inquire from him whether he wishes to have a lawyer provided to him at State cost and if he is not so informed and inconsequence he does not apply for free legal assistance and as a result he is not represented by any lawyer in the trial and is convicted, hence the conviction vitiated and liable to be set aside.

In the above situation, Justice Bhagwati, C.J.I, reiterated the observations made in the case of Khatri and elaborately analysed the object of legal aid programmes and the need of legal awareness among the people in the following terms: “we have almost 50% population living below the poverty line and around 70% is illiterate and large sections of

1. AIR 1986 SC 991
people just do not know that if they are unable to afford legal representation in a criminal trial, they are entitled to free legal assistance provided to them at state cost. The facts giving rise to this appeal are not material because the question posed for our consideration is a pure question of Law. The appellants were entitled to free legal assistance at State cost when they were placed in peril of their personal liberty by reason of being accused of an offence which if proved would clearly entail imprisonment for a term of two years”.

But for the question whether this fundamental right could lawfully be denied to the appellants if they did not apply for free legal aid he observed that, it is obvious that, in India even not only illiterate, but even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor are suffering in this land. Their legal needs always stand to become crisis oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer for consultation and advice in time. Moreover, because of their ignorance and illiteracy, they cannot become self-reliant and they cannot even help themselves. The law ceases to be their protector because they do not know that they are entitled to the protection of the law and they can avail of the legal service programme for putting an end to their exploitation and winning their rights. The miserable condition in which the poor find themselves can be alleviated to some extent by creating legal awareness amongst the poor that is why it has always been recognized as one of the principal items of the program of the legal aid movement in the country to promote legal literacy.

_Further, Justice_ reminded the duty of Magistrates, Sessions Judges and the duty of the State Government to make provisions for grant of free
legal service to the poor and indigent accused, and the consequences of their inaction were expressed in the following manner¹: "The High Court persisted in taking the view that since the appellants did not make an application for free legal assistance, no unconstitutionality was involved in not providing, them legal representation at State cost. It is obvious that in the present case the learned Additional, Deputy Commissioner did not inform the appellants that they were entitled to free legal assistance and inquire from them whether they wanted a lawyer to be provided to them at State cost. The result was that the appellants remained unrepresented by a lawyer and the trial ultimately resulted in their conviction. This was clearly a violation of the fundamental right of the appellants under Article 21 and the trial must accordingly be held to be vitiated on account of a fatal constitutional infirmity and the conviction and sentence recorded against the appellants must be set aside".

Thus, the judgements of the Supreme Court through Justice Bhagwati discussed above are really based upon sound reasoning to achieve the goal enshrined in Article 39A of the Constitution and these decisions reveal his passion to promote social justice in India.

4.5.3. Justice Bhagwati's concern for the protection of the Rights of Juvenile and Women prisoners.

In Hussainara Khatoon v Secretary, State of Bihar,² where thousands of persons were detained in various jails for years among those few women prisoners are also kept with out even being accused of any offence and merely because they happen to be victims of an offence or they are required for the purpose of giving evidence or they are in "Protective Custody". Justice Bhagwati expressed his anguish for the

¹ SukDas v. Union Territory of Arunachal Pradesh; AIR 1986 SC 991
² AIR 1979, SC dated 26 Feb. 1979 :: 1980, SCC (1) 93
above situation in the following terms: "the expression 'Protective Custody' is a euphemism calculated to disguise what is in real and in truth and nothing but imprisonment. These women who have been kept in Jail under the guise of protective custody have suffered involuntary deprivation of liberty for long periods without their fault. And this so-called 'Protective Custody' is nothing short of a blatant violation of personal liberty guaranteed under Article 21 of the Constitution because we are not aware of any provision of Law under which a woman can be kept in Jail by way of protective Custody or merely because she is required for the purpose of giving evidence".

Speaking on the same issue further Justice directed the Government of the State of Bihar stating that, the Government in a welfare state must set up rescue and welfare homes for the purpose of taking care of women and children who have nowhere else to go and who are otherwise uncared for by the Society. And it is the duty of the Government to protect women and children hence they should be released and taken forthwith to welfare homes or rescue homes and should be kept there and properly looked off.

Similarly in Munna v. State of UP, Justice Bhagwati explained the object of the children Acts enacted by states all over the country that, "Juvenile delinquency is, by and large, a product of social and economic maladjustment. Even it is found that these Juveniles have committed any offences, they cannot be allowed to be maltreated. They do not shed their fundamental rights when they enter the jail". Where the object of punishment being reformation by sending juveniles to jails no social objective can be gained and more over, in Jails they would come in to contact with hardcore criminals and lose whatever sensitivity they may have to finer and nobler sentiments. Besides, a nation which is not

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1. AIR 1982 SC 4 :: 1982 SCC (1)345
concerned with the welfare of its children cannot look forward to a bright future.

In Francis Coralie Mullin V. Administrator, Union Territory of Delhi's case Justice opined that the right to life includes living a life with human dignity which includes spending time by the detenu with her five year old daughter too.

In Sheela Barse V Union of India the matter came for consideration before Justice Bhagwati, C.J.I., in regard to the speedy trial of children below the age of 16 years and their welfare. This is an application of writ petition filed under Article 32 of the constitution for release and to the production of complete information of children below the age of 16 years detained in jails with in different states of the country. Also to make direction by the Supreme Court to all the High Courts and District Judges to submit to it information of children in jails and sub-jails, existence of juvenile courts, homes and schools and for a direction that a District Judges should visit jails or sub-jails with in their jurisdiction to ensure that children are properly looked after when they are in custody as also for a direction to the State Legal Aid Boards to appoint duty counsel to ensure availability or legal protection of children involved in criminal cases.

In this regard Justice made an order dated 13-8-1986 issuing various directions in regard to physically and mentally retorted children as also abandoned or destitute children who are lodged in various jails in the country for safe custody. And a direction was also made to the Director General of Door Darshan & All India Radio to give publicity seeking cooperation of Non Governmental Social Organisations in the task of rehabilitation of these children.

1. AIR SC 1986 1773
Further, Justice Bhagwati as a judge with humanistic values made observations in regard to the conditions existing in the jails and how it would adversely affects the children psychologically thus: “If a child is a national asset, it is the duty of the state to look after the child with a view of ensuring full development of its personality. It is elementary that a jail is hardly a place where a child should be kept. The incarceration in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, which despite statutory provisions and frequent exhortations by social scientists, there are still a large number of children in different jails in the country. It is the atmosphere of the jail which has a highly injurious effect on the mind of the child, estranging him from the society and breeding in him aversion bordering on hatred against the system which keeps him in jail”.

Therefore he directed the state governments to set up necessary remand homes and observation homes where the children accused of an offence can be lodged pending investigation and trial. On no account should the children be kept in jail and if a state government has not got sufficient accommodation in its remand homes or observation homes, the children should be released on bail instead of being kept in jail.

Some other judgments based on the land mark judgments pronounced by Justice Bhagwati are as follows, in A.R. Antulay V. R.S. Nayak¹, the Supreme Court made some guidelines for speedy trial and in Raghubir Singh V. State of Bihar,² the court hold that right to speedy trial is one of the dimensions of the fundamental right to life and liberty guaranteed under Article 21.

The series of decisions by the court discussed above are really based up on sound reasoning and helpful in preventing inordinate delay in

¹. AIR 1992 SC 1630
². 1986 SCC (4) 481
criminal justice system in India. It is true that as Justice Bhagwati stated in
dealing with Hussainara’s case, that unless the speedy and fair trial cannot
ensured to the accused persons it is a crying shame on the part of judicial
system which permits incarceration of men and women for such long
period of time without trial the under trial prisoners have over the years
ceased to be human beings.

4.6. Justice Bhagwati’s judgments on Death Penalty

In Bachan Singh v. State of Punjab,¹ the writ petitions were filed
before the Supreme Court challenging the constitutional validity of S. 302
of Indian the Penal Code 1973 read with S. 354, sub-sec. (3) of the Cr P:
C. in so far as it provides death sentence as an alternative punishment for
the offence of murder.

In this case Justice Bhagwati in his dissenting opinion observed that,
‘...my initial diffidence is overcome by my deep and abiding faith in the
dignity of man and worth of the human person and passionate conviction
about the true spiritual nature and dimension of man. "We must therefore
rid stare decisis of something of its petrifying rigidity".... a Judge feels
strongly that it is not competent to the State to extinguish the flame of life
in an individual by employing the instrumentality of the judicial process, it
is his bounden duty in all conscience, to express his dissent, even if such
killing by the State is legitimized by a previous decision of the court....
India has ratified two international instruments on Human rights and
particularly the International Covenant on Civil and Political Rights. We
cannot therefore consider ourselves bound by the view taken by a previous
decision of the court’ and he opined that ‘death penalty is cruel’.

¹. AIR 1980 SC 898::1982 AIR SC 1325 :: 1982 SCC (3) 24
Again in Attorney General of India v. Lachma Devi\(^1\), Justice Bhagwati, CJI, consisting one of a three member bench, delivering judgment by an order made it clear that, “the execution of death sentence by public hanging would be a barbaric practice clearly violative of Art. 21 of the Constitution and we are glad to note that the Jail Manual of no State in the country makes provision for execution of death sentence by public hanging which, we have no doubt, is a revolting spectacle harking back to earlier centuries. We have no doubt that the expectation of the Bench that an amendment might be made in the Rules providing for public hanging is bound to be belied. The direction for execution of the death sentence by public hanging is, to our mind, unconstitutional and we may make it clear that if any Jail Manual were to provide public hanging, we would declare it to be violative of Art. 21of the Constitution. It is undoubtedly true that the crime of which the accused have been found to be guilty - (on the merits or correctness of which we do not express any opinion since in one case a statutory right of appeal is given to the accused and in the other, leave to appeal has been granted and both the appeals would, therefore, be before this Court) is barbaric and a disgrace and shame on any civilised society which no society should tolerate; but a barbaric crime does not have to be visited with a barbaric penalty such as public hanging. We would wholly and unconditionally delete the direction given by the High Court in regard to the execution of the death sentence by public hanging”.

4.7. Right to Life and Clean Environment.

The rapid industrial development in modern times has created the problem of ecological imbalance which is peculiar to Bio rich diverse nation, India. Industrial progress of a society is the hallmark of progress, but its continuous threat to the environment became a sharp conflict

\(^1\).AIR 1986 SC 467 SC468
between development and environment pollution. The hazardous industrial waste causing enormous ecological imbalance, smoke, deteriorate exhaust fumes from motor cars and other combustion engines are injurious to the health and well being of the people and foul the atmosphere.

Air and Water life's essential requirements had become the most convenient receptacle for human waste and refuse. The preservation of wild life is looked as necessary for the preservation of ecological balance. The Directive Principles under 'Art 48-A' provided that "the state shall endeavour to protect and improve the environment and to safe guard the forests and wild life of the country. Under fundamental Duties Art 51-A (g) says that 'it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers, and wild life and to have compassion for living creature".

Now the right to environment became a fundamental right under Art 21 through the interpretations of the Supreme Court. The increased awareness on environment increased the writ petitions filing in the Courts regarding the protection of environment.

4.7.1. Justice Bhagwati's contribution in protection of Environment and Preservation of Ecological Balance

The importance attached to the protection and improvement of the environment has come to be recognized in many parts of the world. The preservation of forests and their renewal by aforestation has long been recognized in India as of great importance both with reference to rain fall and to prevent the soil erosion by depriving it of forests which protect it. The preservation of wild life is looked up as necessary for the preservations of ecological balance.
One more important and landmark judgement delivered by Justice Bhagwati during his tenure as the judge of the highest court in India, which was the first of its kind in the country came for consideration before the Supreme Court, related to environment, is the case of *Rural Litigation and Entitlement Kendra, Dehradun V. State of Uttar Pradesh.*¹

In the above stated case, the court directed for the closure of certain lime stone quarries on the ground that there were serious deficiencies regarding safety or causing hazards to individuals, cattle and agricultural lands. The case was argued at great length before the Supreme Court. The question raised was whether certain limestone mines should be left not to close. The committees appointed to look into the question gave different views. This gave way to appoint Bandopadhyaya Committee to give detailed report on the lime stone quarries.

Again in *Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh*² which is an offshoot of the above case i.e., R.L. & E Kendra, Dehradun, 1985, the only question which remained for consideration was whether schemes submitted by the mine lessees to the Bandopadhyaya committee under the earlier order of the Supreme Court had been rightly rejected or not and whether under those schemes, the mine lessee can be allowed to carry on mining operations without in any way adversely affecting environment or ecological balance or causing hazard to individuals, cattle and agricultural lands. As the case was the first of its kind relating to environment and ecological balance, having set out the effect of deforestation on the Himalayan Range and its likely effect on the supply of water in the Ganges, Yamuna, Brahmaputra and several tributaries, the case assumed very much importance.

¹ AIR 1985 SC 652 & 1985 (3) SCR 169
In the above context, Justice Bhagwati observed that 'it is for the government and the nation and not for the court to decide whether the limestone deposits from the Himalayan ranges should be exploited at the cost of ecology and environmental consideration. It may perhaps be possible to exercise greater control and vigil over the operation and strike a balance between preservation and utilization. The matter may be referred to an expert body for examination and on the basis of appropriate advice; government should take a policy decision and firmly impalement the same'.

Concluding his judgment P.N.Bhagwati C.J.I., further observed that "we must place on record our appreciation of the steps taken by the Rural Litigation and Entitlement Kendra...Preservation of the environment and keeping the ecological balance unaffected is a task which not only governments but also every citizen must undertake. It is a social obligation and let us remind every Indian citizen that it is his fundamental duty as enshrined in Art. 51A (g) of the Constitution."

One more important case pertained to the health and environment came for consideration before the Supreme Court, was M.C. Mehta Vs. Union of India. In this case the writ petition has been brought by way of PIL rose some seminal questions concerning the scope and ambit of Articles 21 and 32 of the constitution. The principles and norms for determining the liability of large enterprises engaged in manufacture and sale of hazardous products, the basis on which damages in case of such liability should be quantified and whether such large enterprises should be allowed to continue to function in thickly populated areas and if they are permitted so to function what measures must be taken for the purpose of reducing to a minimum, the hazard to the workmen and the community living in the neighbourhood. These questions which have been raised by

1 AIR 1987 SC 965 :: 1986 – SCC (2) 176
the petitioner are questions of the greatest importance particularly since,
following upon the leakage of MIC gas from the Union Carbide Plant in
Bhopal. The lawyers, judges and jurists are considerably exercised as to
what controls the hazards, whether by way of relocation or by way of
installation of adequate safety devices or where it is need to impose
restrictions on Corporation employing hazardous technology and
producing toxic or dangerous substances.

In the above state of affairs speaking through Justice Bhagwati the
apex court held that, it is undoubtedly true that chlorine gas is dangerous
to the life and the health of the community and if it escapes either from the
storage tanks or from the filled cylinders or from any other point in the
course of production it will affect the people at large.

In consideration of the above persistent risks and hazards Justice
laid down certain conditions stating that which shall be strictly and
scrupulously followed by Shriram Food and Fertilizer Corporation. Since
it is clear from the affidavits and the reports of the various expert
committees that the management of Shriram was negligent in the
operation and maintenance of the caustic chlorine plant and it did not take
the necessary measures for improving the design, quality of the plant and
equipment, installing adequate safety devices and instruments with a view
to ensuring the maximum safety of the workers and the community living
in the vicinity at any time it is found that any one or more of these
conditions are violated, the permission granted will be liable to be
withdrawn. Further, the court directed the management to deposit in the
court a sum of Rs. 20 lacs as and by way of security for payment of
compensation claim made by or on behalf of the victims of Oleum gas. In
addition, a bank guarantee to the satisfaction of the Registrar of this court
for a sum of Rs. 15 lacs to be deposited and that bank guarantee shall be
encashed by the Registrar, wholly or in part in case there is any escape of
chlorine gas within a period of three years from the date of this order resulting in death or injury to any workman or to any person or persons living in the vicinity. Subject to the above conditions the apex court allowed the partial reopening of the plant.

While delivering the judgment in M.C. Mehta’s case, Justice Bhagwati C.J. observed that “the enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding area must be absolutely liable to compensate for such harm. It should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part... And no one is against usage of Natural resources. Without using these resources mankind cannot survive. The thing is judicious usage of these resources and going for sustainable development. This is a must for mankind to survive....Preservation of the environment and keeping the ecological balance unaffected is a task which not only Governments but also every citizen must undertake. It is a social obligation and let us remind every Indian citizen that it is his fundamental duty as enshrined in Art. 51A(g) of the Constitution. If this fundamental duty is violated mankind is at peril”.

Therefore, it would be unwise to hold that the courts always favour environment without giving any significance to the development aspect when dispute arises between environment and development.

Banwasi Seva Ashram v. State of U.P. and others, is an Order made by the bench consisting of Justice Bhagwati and Justice Ranganath

1 M.C. Mehta v. Union of India: AIR, 1987 SC 1086
2 AIR 1987 SC 374
Misra on the basis of a letter received from Banwasi Seva Ashram operating in the Mirzapur District. The writ petition was registered under Art. 32. Grievance was made on several scores in that letter but ultimately the question that required detailed consideration was relating to the claim of the Adivasis living within Dudhi and Robertsganj Tehsils in the District of Mirzapur in Uttar Pradesh to the land and its related rights.

With regard to the above claim of Tribals the apex court in the instant order observed that: “It is common knowledge that the Adivasis and other backward people living within the jungle used the forest, area as their habitat. They had raised several villages within these two Tehsils and for generations had been using the jungles around for collecting the requirements for their livelihood, fruits, .... When a part of the jungle became reserved forest and in regard to other proceedings under the Act were taken, the forest officers started interfering with their operations in those areas”. Even steps for throwing them out under the U.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1972, were taken.

Further, on the issue of need and importance of economic development of the nation which is based on the industrial development, the Bench observed that “Indisputably, forests are a much wanted national asset. On account of the depletion thereof ecology has been disturbed; climate has undergone a major change and rains have become scanty. These have long term adverse effects on national economy as also on the living process. At the same time, we cannot lose sight of the fact that for industrial growth as also for provision of improved living facilities there is great demand in this country for energy such as electricity. In fact, for quite some time the entire country in general and specific parts thereof in particular, have suffered a tremendous setback in industrial activity for want of energy. A scheme to generate electricity, therefore, is equally of national importance and cannot be deferred from it.
Keeping all these aspects in view the court had given the following directions:

"So far as the lands which have already been declared as reserved forest under S. 20 of the Act, the same would not form part of the writ petition and any direction made by this Court earlier, now or in future in this case would not relate to the same. In regard to the lands declared as reserved forest, it is; however, open to the claimants to establish their rights, if any, in any other appropriate proceeding”.

Thus, the bench has taken into consideration all the issues such as the rights of the native people, ecological balance and at the same time industrial development. The efforts of the highest court in environment pollution control through PIL has very much importance and laudable.

After Justice Bhagwati’s retirement there are some other cases involving environmental issues filed before the Supreme Court on similar lines. For example, In M.C. Mehta vs. Union of India1 the apex court ordered the closure of tanneries at Jajmau near Kanpur, polluting the river Ganga. Further the court issued certain directions for the compliance of Kanpur Municipal Corporation to control and prevent the pollution of water in the river Gaga at Kanpur.

In Indian council for Enviro-Legal Action V Union of India2. The court issued appropriate orders and directions for implementing and enforcing the laws viz., Environmental (protection) Act, 1986, water (prevention and control of pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981 to protect ecology3.

Again in *MC Mehta’s case*, the Supreme Court has issued directions to cinema exhibition halls to exhibit slides containing the messages on environment and dissemination of information to the citizens through broad casting on All India Radio and issued certain direction to the Government to make environment as a compulsory subject in schools and colleges to that effect.

**Polluter Pays Principle:** Principle 16 of the Rio declaration states that: "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."

In *Rural Litigation and Entitlement Kendra Dehradun vs. State of Uttar Pradesh*, which was also known as the *Doon valley case*, dispute arose over mining operations in the hilly areas. The Supreme Court after much investigation ordered the stopping of mining work and held that:

"This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affection of air, water and environment."

However in 1991, in the *Rural Litigation and Entitlement Kendra vs. State of U.P.* the Supreme Court allowed a mine to operate until the expiry of lease as exceptional case on condition that land taken on lease would be subjected to aorestation by the developer. But as soon as the notice was brought before the court that they have breached the condition

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2. www. legal service india.com
and mining was done in most unscientific way, the Supreme Court directed the lessee to pay a compensation of three lacs to the fund of the monitoring committee. This has been directed on the principle of 'polluter pays'.

In S. Jagannath V. Union of India\(^1\) the apex court held that setting up of shrimp (small fish) culture farms within the prohibited areas and in ecology fragile coastal areas have adverse effect on environment and coastal ecology and economics and cannot be allowed to be set up anywhere in coastal regulation zone under CRZ notification.

**Dimensions of Personal Liberty**

![Diagram of Personal Liberty](image)

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\(^1\) AIR 1997 SC 811
Thus, it is quite obvious that the courts give equal importance to both ecology and development while dealing with the cases of environmental degradation. Environment and development are two sides of the same coin. Any one of these cannot be sacrificed for the other. On contrary, both are equally important for our better future. Thus the responsibility lies on the Supreme Court and the various High Courts to deal with these cases with caution of high degree, and then only, the nation will achieve the goal i.e. to secure a pollution free developed country for future generations.

![Chart 4.2 Justice Bhagwati's major judgements on Article 21 of the Constitution](image)

**Chart 4.2 Justice Bhagwati's major judgements on Article 21 of the Constitution**

From the above observations it can be understood that the Justice P.N.Bhagwati shown the multi faces of Article 21 by interpreting it with humanistic values and concern for society.
CHAPTER- V

FUNDAMENTAL RIGHTS: HUMANISTIC APPROACH OF JUSTICE
P.N.BHAGWATI IN PROTECTION OF BONDEDLABOURERS AND

HIS JUDGMENTS ON ARREST AND DETENTION