

The Expectations and Challenges of Judicial Enforcement of Social Rights

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1. INTRODUCTION

A discussion on the Indian jurisprudence in the area of economic and social rights has to begin with the Constitution. The Indian legal system is complex: Inherited from the colonial and common law model¹, the formal legal system is based on a written constitution, in effect since 1950. The Constitution delineates the enforceable fundamental rights and the non-enforceable Directive Principles of State Policy (DPSP) as well as the powers and obligations of the State. A significant feature of the Constitution of India is the principle of checks and balances by which every organ of state is controlled by and is accountable to the Constitution and the rule of law. The validity of the decisions of the Government can be challenged in the Supreme Court or the High Courts and writs of mandamus are available to enforce the State's obligations. Also, the laws made by the legislature can be struck down by these courts, if found contrary to the provisions of the Constitution. In addition, there are a number of statutes, both at the federal and provincial (state) levels that touch upon various aspects of economic, social and cultural rights.

These broad powers of constitutional review, combined with far-reaching legislation, have proved critical in the judicial enforcement of economic, social and cultural rights, which has produced a vast body of case law in the Supreme Court and the High Courts. This piece cannot traverse the entire gamut of these sources for want of space and so is confined to discussing the broad contours of the law and some of the significant decisions handed down by the Courts seeking to enforce economic and social rights in India.

The first part of this article sets out the position of socio-economic rights in the Indian Constitution. This is followed by an overview of the position in relation to access to legal services, the growth of judicial activism and public interest litigation. The judicial decisions in areas of specific rights, including the rights to housing, health care, food, work and education are thereafter discussed. The penultimate section seeks to review the impact of

judicial intervention. The conclusion is an assessment of the Indian experience in judicial enforcement and protection of economic, social and cultural rights.

2. SOCIO-ECONOMIC RIGHTS WITHIN THE CONTEXT OF THE CONSTITUTION

The Constitution of India, in its preamble, reflects the resolve to secure to all its citizens 'justice, social, economic and political; liberty of thought, expression, belief, faith and worship and equality of status and of opportunity'². Among the fundamental rights guaranteed to all persons under Part III of the Constitution are the rights to life (Article 21) and the right to equality (Article 14). Freedom of speech and expression, the freedom to assemble peaceably, the freedom to form associations, the freedom of movement and residence, and the freedom to practice any profession and to carry on any occupation, trade or business³ are also part of the chapter on fundamental rights (See Article 19). These are subject to reasonable restrictions on the grounds of sovereignty and integrity of the country, security of the State, public order, decency or morality⁴. The right to equality under article 14, the right against double jeopardy and self-incrimination under Article 20, the right to life under Article 21 and the right to be informed of the grounds of arrest and the right to consult and be defended by a legal practitioner of one's choice under article 22 are available to all persons⁵, while the freedoms enumerated under Article 19 are available for enforcement only by citizens.

The remedy provided in the Constitution for violation of rights and against unlawful legislative and executive acts is to approach the High Courts under article 226 and the Supreme Court under article 32 of the Constitution. Judicial review of executive action, legislation and judicial and quasi-judicial orders is recognized as part of the 'basic structure' of the Constitution⁶. The power of judicial review cannot be taken away even by an amendment to the Constitution⁷. The Supreme Court as the final word on the interpretation of the Constitution. The law declared by the Supreme Court is binding and enforceable by all authorities – executive, legislative and judicial⁸.

Part IV of the Constitution lists out the Directive Principles of State Policy (DPSP). Many of the provisions in Part IV correspond to the provisions of the international Covenant on Economic Social and Cultural Rights (CESCR). For instance article 43 provides that the State shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage,

conditions of work that ensure a decent standard of life and full enjoyment of leisure and social and cultural opportunities, and in particular the state shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas. This corresponds more or less to Articles 11 and 15 of ICESCR⁹. However some of the rights in the ICESCR, for instance the right to health (Article 12 of the ICESCR) and a plethora of other economic, social and cultural rights, have been interpreted by the Indian Supreme Court to form part of the right to life under article 21 of the Constitution thus making it directly enforceable and justiciable¹⁰. As India is a party to the ICESCR, the Indian legislature has enacted laws giving effect to some of its treaty obligations and these laws are in turn enforceable in and by the courts¹¹.

At the time of drafting of the Constitution, it was initially felt that all of the rights in the DPSP should be made justiciable. However, a compromise had to be struck between those who felt that the DPSPs could not possibly be enforced as rights and those who insisted that the Constitution should reflect a strong social agenda¹². Consequently, article 37 of the Constitution declares that the DPSP 'shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws'.

The subsequent amendments to the Constitution have emphasized the need to give priority to the DPSPs over the fundamental rights. In the context of land reforms, the 25th Amendment to the Constitution in 1971 inserted Article 31C¹³ which insulated from judicial challenge a law giving effect to the DPSPs in article 39 (b)¹⁴ and 30 (c)¹⁵ of the Constitution. The statement of objects and reasons in the Bill that introduced this amendment made it explicit that the intention was to give priority to the directive principles over the fundamental rights¹⁶.

2.1 COVERAGE OF DISADVANTAGED GROUPS AND NON-NATIONALS

The recognition in the Indian Constitution of the need for affirmative action provisions for socially and educationally disadvantaged groups is significant. In India, certain classes of citizens have historically and socially suffered discriminatory treatment, including those officially known as Scheduled Casts (SC) and Scheduled Tribes (ST). Article 15 (4), which prohibits discrimination on the grounds of religion, race, caste, sex or place of work, nevertheless contains a provision that permits the State to make 'any special provision for the

advancement of any socially and educationally backward classes of citizens or for the SCs and STs'¹⁷. In the matters of public employment also, the State can make special reservation in favour of 'any backward class of citizens, which, in the opinion of the State, is not adequately represented in the services under the State'¹⁸. The Traditions and customs that are followed by the tribal communities in different parts of India have been allowed to continue even after the making of the Constitution and Article 244, read with Schedule V to the Constitution, ensure the preservation and protection of the tribal culture, customs and traditions.¹⁹

The Indian Constitution recognises religious minorities as well as linguistic minorities. There are specific provisions in the chapter on fundamental rights that recognizes the right of 'every religious denomination or any section thereof' to have the right to establish and maintain institutions for religious and charitable purposes and to manage their own affairs in matters of religion²⁰. An educational institution for a religious minority that is not financially supported by the State is free to devise its own admission procedures subject to regulation by the State²¹.

2.2 HORIZONTAL APPLICATION

The specific wording of the different provisions of the Constitution indicates whether it is enforceable only against the State or also against individuals and non-state entities. For instances, article 14 requires that 'the State shall not deny to any person equality before the law or equal protection of the law within the territory of India'. Article 15 (1) also requires that 'the State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them'.²² On the other hand, article 15 (2) which guarantees that 'no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restrictions or conditions with regard to' access to shops, public restaurants, use of wells, tanks, bathing places, roads, is enforceable even against other persons, including associations, firms or corporations²³. Article 17, which abolishes untouchability, and article 23, which prohibits the trafficking of human beings and degrading forms of forced labour, are likewise enforceable even against individuals and non-state entities. The prohibition in article 24 against employment of children below the age of 14 years in any factory or mine or in any other hazardous employment is also enforceable not only against the State, but against corporations as well.

Part IV A of the Constitution, which was inserted by the 42nd Amendment in 1976, sets out, in article 51A, fundamental duties which, among others, require every citizen of India ‘to promote harmony and spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women’,²⁴ and a citizen who is a parent or guardian ‘to provide opportunities for education to his child or as the case may be ward between the age of 6 and 14 years’.²⁵

Thus, there are various provisions in the Constitution that are reflective of the horizontal application of rights in the context of the universal characteristics of non-discrimination as well as the unique characteristic of the particular right.

2.3 INTERNATIONAL LAW AND THE CONSTITUTION

Article 51 (c) of the DPSP requires the State to ‘foster respect for international law and treaty obligations in the dealings of organized people with one another’. Under article 253 of the Constitution, the Parliament has the power to make any law ‘for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body’. For instance, the Immoral Traffic (Prevention) Act, 1956, was enacted following the ratification by the Government of India of the International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Similarly, Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, was enacted pursuant to India becoming a signatory to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region.

The Indian Judiciary has in the recent past drawn on international human rights law to redress the grievance of women facing sexual harassment at the workplace. In *Vishaka v. State of Rajasthan*²⁶ it was declared that the provisions of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), to which India was a State party, were binding and enforceable as such in India. The Court proceeded to adapt several of the standards and norms contained in the CEDAW provisions while formulating binding guidelines which would remain in force till such time the Parliament enacted an appropriate law²⁷.

2.4 LEGAL STANDING AND ACCESS TO LEGAL SERVICES

The challenge of providing equal and effective access to justice has been daunting for successive governments, legislatures and the judiciary. Although the Constitution in article 39 A, a directive principle of State policy, requires the State to secure that 'the operation of the legal system promotes justice' and that it ought to provide free legal aid by suitable legislations or schemes, much remains to be done to deliver the constitutional promise. One response to the problem has been the judicial innovation of 'Public Interest Litigation' (PIL), which has enabled issues concerning the underprivileged sections of society to be brought before the courts. A precursor to this was the Supreme Court invoking its power of judicial review, and in assertion of its predominant role as the interpreter of the Constitution, to expand the scope and content of the right to life under article 21 of the Constitution and introduce the notion of substantive due process. This is discussed in the Section that immediately follows.

2.5 SUBSTANTIVE DUE PROCESS

In the initial phase the Supreme Court was reluctant to recognize any of the directive principles as being enforceable in the courts of law. In fact, it was held that 'the directive principles have to conform to and run subsidiary to the chapter on fundamental rights'²⁸. In the *Fundamental Rights* case²⁹, the majority opinions of the Supreme Court of India reflected the view that what is fundamental in the governance of the country cannot be less significant than what is significant in the life of the individual. One of the judges constituting the majority in that case said: 'In building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles'³⁰. This view that both the fundamental rights and DPSP are complementary, 'neither part being superior to the other', has held the field since³¹. However, even here the Court has retained its power of judicial review to examine if in fact the legislation under examination is intended to achieve the objective of article 39(b) and (c), and where the legislation is an amendment to the Constitution, whether it violates the basic structure of the Constitution³². Likewise, courts have used DPSP to uphold the constitutional validity of statutes that apparently impose restrictions on the fundamental rights under article 19 (freedom of speech, expression, association, residence, travel and to carry on business, trade or profession) as long as they are stated to achieve the objective of the DPSP³³. The DPSPs are seen as aids to interpret the

Constitution and more specifically to provide the basis, scope and extent of the content of fundamental right³⁴.

The recognition that the fundamental rights chapter (Chapter III of the Constitution) implicitly acknowledges the right of substantive due process had to wait for nearly three decades after the commencement of the Constitution. In 1950 in *A. K. Gopalan v. State of Madras*³⁵, the Court felt constrained to adopt a legalistic and literal Interpretation of article 21 as excluding any element of substantive due process. It was held that as long as there was a law that was validly enacted, the Court could not examine its fairness or reasonableness. This view underwent a change in 1978, soon after the internal emergency during which there were large-scale violations of basic liberties and political rights³⁶. This was done through a series of cases of which *Maneka Gandhi v. Union of India*³⁷ was a landmark. The case involved the refusal by the Government to grant a passport to the petitioner, which thus restrained her liberty to travel. In answering the question whether this denial could be sustained without a pre-decisional hearing, the Court proceeded to explain the scope and content of the right to life and liberty. The question posed and the answer given now was: 'Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously the procedure cannot be arbitrary, unfair or unreasonable'³⁸. Once the scope of article 21 had thus been explained, the door was open to its expansive interpretation to include various facets of life. In 1981, in *Francis Coralie Mullin v. The Administrator*³⁹, the Supreme Court declared:

The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.

2.6 RIGHT TO LEGAL AID

In 1987, the Indian Parliament enacted the Legal Services Authorities Act (LSAA) which gives an expansive meaning to 'legal services' to include legal advice apart from legal representation in cases. Section 12 of the LSAA lists out the categories of persons automatically entitled to legal aid without having to satisfy a means test. This includes a member of the historically and socially disadvantaged groups (Scheduled Caste or Scheduled Tribe)⁴⁰; a victim of trafficking in human being or forced labour; a person with disabilities and 'a person under circumstances of underserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster'⁴¹. The LSAA set up a network of legal aid institutions at the village⁴², district⁴³, and state level⁴⁴ and the National Legal Services Authority (NALSA)⁴⁵. These authorities usually comprise members of the judiciary and the executive at the local level.

The functions of NALSA under section 4 of the LSAA include organizing 'legal aid camps, especially in rural areas, slums or labour colonies with the dual purpose of educating the weaker sections of the society as to their rights as well as encouraging the settlement of disputes through *lok adalats*'⁴⁶ and 'taking necessary steps by way of social justice litigation with regard to consumer protection, environmental protection or any other matter of special concern to the weaker sections of the society and for this purpose, give training to social workers in legal skills'⁴⁷. Although the LSAA envisages a proactive role for judges, its core area of activity has centered around the organizing of *lok adalats* since it is seen as a useful case management device. They are held periodically, on court holidays, within the court premises and the 'benches' comprise a judge, a lawyer and a social worker. Pending claims in courts for land acquisition compensation, motor accident compensation, insurance claims and claims by banks against defaulters are the most common categories of cases sent to the *lok adalat*. A reference to the *lok adalat* can be made by any one of the parties to the litigation. There are no appeals from the decisions of the *lok adalat* that record a compromise⁴⁸. Encouraged by the 'settlement' of a large number of cases⁴⁹, the LSAA was amended in 2002 to enable the setting up of 'permanent' *lok adalats* which can dispose of disputes involving certain public utilities⁵⁰ even if no settlement is reached⁵¹.

The organization of *lok adalats* and legal aid camps has not necessarily been a success⁵². More importantly, they underscore the failures of the formal legal system. The reasons

offered the persuading the litigant to participate in the *lok adalat* are usually that the pending dispute in court would entail unforeseeable delays, prohibitive costs and uncertain results⁵³.

Also relevant in the context of economic and social rights is the fact that legal aid is still seen as a welfare measure to which the recipient has no 'right'. It therefore, does not come as a surprise that the legal services that are presently available are poorly utilised⁵⁴. The reasons could be general lack of awareness of the availability of legal aid, the belief that a person who gets help for 'free' is disabled from demanding quality service and, thirdly the disinterestedness of lawyers and legal aid administrators in providing competent legal assistance.

These factors explain in large measure why civil society groups continue to approach the High Courts and the Supreme Court in PIL cases for the redress of many of the grievances of the citizens in the area of economic and social rights. As the ensuing discussion on the specific areas of these rights show, the remedies under the statutes concerning them are hardly enforced. This could be attributed to both a lack of awareness of their provisions or plain indifference of those charged with the responsibility of their enforcement.

2.7 JUDICIAL ACTIVISM AND PUBLIC INTEREST LITIGATION

A reference has already been made to the internal emergency that was in force between 1975 and 1977 and its aftermath and this contributed significantly to the change in the judiciary's perception of its role in the working of the Constitution. On the political front the new formation that emerged at the end of the internal emergency was unstable. It was already collapsing by 1978/ 1979, which was when the judiciary initiated PIL, an entirely judge-led and judge-dominated movement⁵⁵. The judges who were responsible for this innovation had earlier submitted reports, as part of expert committees, to address the issue of providing effective legal aid⁵⁶. The recommendations in these reports, which envisioned PIL as a tool for delivering legal services, were however not acted upon by the executive government of the day. The development of the jurisprudence of economic, social and cultural (ESC) rights is also inextricably linked to this significant development.

What made PIL unique was that it acknowledged that a majority of the population, on account of their social, economic and other disabilities, were unable to access the justice system. The insurmountable walls of procedure were dismantled and suddenly the doors of

the Supreme Court were open for issues that had never reached there before. By relaxing the rules of standing and procedure where even a postcard would be treated as a writ petition, the judiciary ushered in a new phase of activism where litigants were freed from the stranglehold of formal law and lawyering⁵⁷.

The past two decades have witnessed range of PIL cases on diverse issues – human rights, environment, public accountability, judicial accountability, education, to name but a few. In the earliest of the PIL cases, *Hussainara Khatoon v. State of Bihar*⁵⁸ the Supreme Court recommended release of the indigent prisoner on personal recognizance bonds, rather than on unaffordable monetary bail bonds. Another instance of creative judicial activism was in moulding reliefs for rickshaw pullers from Punjab facing problems of obtaining finances to purchase rickshaws⁵⁹.

3. NATURE OF ORDERS AND TECHNIQUES

In the sphere of economic, social and cultural rights, PIL orders invariably have two distinct parts- the *declaratory* part and the *mandatory* part. Declaratory orders and judgments, without consequential directions to the state authorities, require acceptance by the State as to their binding nature under article 141 and 144 of the Constitution before implementation can follow. The judgement in *Unnikrishnan J.P. v. State of Andhra Pradesh*⁶⁰ is an instance of a declaration: the ‘right to education is implicit in and flows from the right to life guaranteed under Article 21’ and that ‘a child (citizen) has a fundamental right to *free education* up to the age of fourteen years’⁶². The State responded to this declaration nine years later by inserting, through an amendment to the Constitution, article 21-A, which provides for the fundamental right to education for children between the ages of 6 and 14: Mandatory orders, on the other hand, are specific time bound directions to the errant administrative or state authority requiring it to take specific steps. For instance, the PIL that sought strict implementation of the Pre-Natal Diagnostic Technique (Regulation and prevention of Misuse) Act 1994, aimed at preventing the malaise of female foeticide, has witnessed the Supreme Court making periodic orders for time bound compliance. The Court has explained this technique to be that of ‘continuing mandamus’ where the Court keeps the case on board over a length of time for ensuring the implementation of its directions.

The Court has been required to be innovative in its PIL jurisdiction and has thereby been able to overcome the apparent difficulties posed by these cases. First, the Court usually is concerned with the importance of the cause and will persist with the case even where it finds that the petitioner is not acting bona fide or where the petitioner does not wish to pursue the case further. In either case, the Court can continue with the petition, even without the presence of the petitioner, by appointing an *amicus curiae* instead.⁶⁵ Since the Court does not insist on formal pleading and petitions in PIL, it usually appoints a senior counsel as *amicus curiae* to assist it in addressing the issue in legal terms, sifting out the relevant facts from the documents and pleadings and in helping sharpen the focus of discussion, conscious of the contingencies of judicial functioning.⁶⁶ This however can result in the petitioner losing control of the case, giving rise to understandable misgivings.

Secondly, while deciding disputed facts, the Court will in the first instance call for a response from the Government, local authority and any other opposing party. Where the objectivity or veracity of the response is in doubt, or where there is no response at all, the Court will appoint commissioners to verify the facts and submit a report to the Court.⁶⁷ The same device can be adopted at the stage of implementation of the Court's orders.⁶⁸ Where technical questions that do not admit of judicially manageable standards are involved, the Court can take the help of commissioners or expert bodies. In environmental matters, the Court usually requests an expert or specialist body, like the National Environment Engineering Research Institute, to ascertain the facts and submit a report to the Court together with recommendation on possible corrective measures.⁶⁹ The Court will hear objections to the report before deciding to either accept⁷⁰ or reject it.⁷¹

The Court usually builds into its directions a fore-warning of the consequences of disobedience or non-implementation. Thus, while laying down a detailed schedule for conversion of the mode of motor vehicle plying on Delhi roads to clean fuels, the Court warned that violation of the order would invite action for contempt of court.⁷² In the post judgment phase, too, the Court has often retained the case on board for monitoring the implementation of its directions. Thus, the PIL case, in which detailed guidelines concerning arrests were laid down, has been listed with fair regularity and the directions monitored till the present, six years after the main judgement.⁷³

4. ANALYSIS OF SPECIFIC RIGHTS

4.1 RIGHT TO WORK

The right to work is expressed in the Indian Constitution as a directive principle of State policy, which is not enforceable in the courts. Article 41 provides that ‘the State shall within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public, assistance in cases of unemployment , old age, sickness and disablement, and in other cases of undeserved want.’⁷⁴ As regards the rights in work, two of the provisions in Chapter III of the Constitution contain enforceable fundamental rights: non-discrimination(article 14) and equality of opportunity in matters of public employment(article 16). There are other DPSP provisions that recognize the rights in work.

Article 42 enjoins the State to make ‘provisions for securing just and humane conditions of work and for maternity relief’. Article 43 provides that the State shall endeavour to secure a living wage and a decent standard of life for all workers. There are number of laws, as enumerated in Appendix I of this chapter, that seek to give effect to these DPSPs. The most recent is the National Rural Employment Guarantee Act, 2005, which is an acknowledgement of the minimum one content of the right and requires the State to not only identify a ‘poor household’ but also provide one able bodied member of such household one hundred days of work to tide over the severe problem of rural unemployment during non-agricultural seasons.

As far as the experience in case before the courts, the results have not been encouraging. In one of the early cases of enforceability of the right to work was tested. The context was the large-scale abolition of posts of village officers in the State of Tamil Nadu in the south of the country. The Court disagreed with the contention that such abolition of posts would fall foul of the DPDP, stating:

It would certainly be an ideal state of affairs if work could be found for all the able bodied men and women and everybody is guaranteed the right to participate in the production of national wealth and to enjoy the fruits thereof. But we are today afar away from that goal. The question whether a person who ceases to be a government servant according to law should be rehabilitated by giving an alternative employment is, as the

law stands today, a matter of policy on which the court no voice.⁷⁵

A possible approach the Court could have adopted was to keep the case on board and require the Government to formulate a scheme for alternative employment to the workmen. The issue of non-implementation of the law abolishing the pernicious practice of bonded labour came for consideration in *Bandhua Mukti Morcha v. Union of India*.⁷⁶ This was a PIL case in the Supreme Court brought by an NGO highlighting the deplorable condition of bonded labourers in a quarry in Haryana, not very far from the Supreme Court. The Court drew on the DPSPs while giving extensive directions to the state government to enable it to discharge its constitutional obligation towards the bonded labourers:⁷⁷

The right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy from particularly clauses (e) and (f) of Article 39 and Article 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women and of the tender of age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State has the right to take any action which will deprive a person of enjoyment of these essentials... where legislation is already enacted by the State providing these basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21.⁷⁸

To overcome the hurdle on account of the non-enforceability of the DPSP provisions, the Court drew on article 21 and in effect recognized the rights in work as being enforceable.⁷⁹ But this trend has seen a slow but sure reversal, particularly in the context of the rights in work. For instance in 1988 case concerning the regularization of the services of a large number of casual (non-permanent) workers in the posts and telegraphs department of the Government, the Court was prepared to invoke the DPSP and recognize the lack of choice of the disadvantaged worker. It said:

The Government cannot take advantage of its dominant position, and compel any worker to work even as a casual labourer on starvation wages. It may be that the casual labourer has agreed to work on such low wages. That he has done because he has no other choice. It is poverty that has driven him to that state. The Government should be a model employer. We are of the view that on the facts and in the circumstances of this case the classification of employees into regularly recruited employees and casual employees for the purpose of the paying less than the minimum pay payable to employees in the corresponding regular cadres particularly in the lowest rungs of the department where the pay scales are the lowest is not tenable.⁸⁰

However, in October 2005 the question whether this decision requires reversal was considered by the present Supreme Court in a case involving the question of regularizing the services of casual workers who had been working for the state government in Karnataka for period ranging between ten and twenty years.⁸¹

This trend can also be attributed to the impact of the economic policies that have accompanied liberalization. In 1983, the Court was prepared to recognize the right of workmen of a company to be heard at the stage of the winding up of such company. The Court invoked article 43A, a constitutional directive principle, which required the State to take suitable steps to secure participation of workers in Management.⁸² However, in 2001, in a challenge by workmen to the decision of the Government to divest its shareholding in a public sector undertaking in favour of a private party, the Court refused to recognize any right in the workmen to be consulted.⁸³ The Supreme Court has also declined to read into the law concerning abolition of contract labour any obligation on the employer to re-employ such labour on a regular basis in the establishment.⁸⁴

In the context of both the right to work and right in work, the trend of judicial decisions has witnessed a moving away from recognition and enforcement of such rights and towards deferring to executive policy that has progressively denuded those rights.

4.2 RIGHT TO SHELTER

There is no express recognition of the right to shelter under the Indian Constitution. The judiciary has nevertheless stepped into recognize this right as forming part of article 21 itself⁸⁵. However, the Court has never really acknowledged a positive obligation on the State to provide housing to the homeless. Even in much cited decision in *Olga Tellis v. Bombay Municipal Corporation*,⁸⁶ where the Court held that the right to life included the right to livelihood, it disagreed with the contention of the pavement dwellers that since they would be deprived of their livelihood if they were evicted from their slum and pavement dwellings, their eviction would be tantamount to deprivation of their life and hence be unconstitutional.⁸⁷ This trend has continued ever since. In *Municipal Corporation of Delhi vs. Gurnam Kaur*,⁸⁸ the Court held that the Municipal Corporation of Delhi had no legal obligation to provide pavement squatters alternative shops for rehabilitation, as the squatters had to legal enforceable right. In *Sodan Sing v. NDMC*,⁸⁹ the Supreme Court reiterated that the question whether there can be at all be a fundamental right of a citizen to occupy a particular place on the pavement where he can squat and engage in trade must be answered in the negative. In a case concerning slum dwellers in Ahmedabad, despite the Court making observations about the DPSPs creating positive obligation on the State 'to distribute its largesse to the weaker sections of the society envisaged in Article 46 to make socio-economic justice in a reality',⁹⁰ no actual relief was granted to the slum dwellers.

As in the area of the right to work, there has been a marked regression in the area of the right to shelter, compounded by the bringing of PIL cases to the courts by other classes of residents seeking eviction of slum dwellers as part of the protection and enforcement of the former's rights to a clean and healthy environment as demonstrated by the following case.

FORCED EVICTIONS: A CASE STUDY IN MUMBAI

The PIL case brought by the Bombay Environmental Action Group (BEAG)⁹¹ in the Bombay High Court in February 1995 contended that the Sanjay Gandhi National Park had been encroached upon in a large scale by slum dwellers who had put up unauthorized structures and that the authorities were indifferent to the resultant threat to the park. On the basis of the recommendations of a committee appointed by it to examine the problem, the High Court on May 7, 1997 passed a detailed order in regard to removal of encroachments and eviction of

unauthorized occupants. The High Court at this stage did not give any notice or hearing to the slum dwellers. A cut-off date of January 1, 1995 was fixed; those slum dwellers who did not figure in the electoral rolls for the area by the date would be ineligible for any rehabilitation and could be forcibly evicted.⁹² The provincial state government was required, within eighteen months, to relocate those eligible to a place outside the boundaries of the National Park and thereafter demolish the structures occupied by them. Until such time electricity and water supply to the structure could be continued.

By the time the case heard next on July 17, 1999, 20,000 structures had already been demolished, but the rehabilitation of those eligible was yet to be completed. The Government informed the Court that at the alternate sites, which were at a considerable distance, each eligible dweller would be allotted pitches of 15 ft. by 10 ft. for which they each had to pay Rs.7000 in four installments. When the slum dwellers complained of arbitrariness in the preparation of lists of eligible persons, the High Court appointed a grievance redressal committee comprising two retired judicial officers and a bureaucrat and mandated that the committee's decision would be final and not be called into question in any court or Tribunal. It directed that the map prepared and the survey carried out by the forest department and submitted to the court was to be treated as final.⁹³

In a further order passed on March 13, 2000 the High Court expedited the demolitions and decried the attempts by the association of slum dwellers to ask for resettlement on the periphery of the park. The Court said: 'There is no question of this aspect being considered either by the committee appointed by this court or by the petitioners and for that matter even by the court'⁹⁴. The demolitions soon gained momentum and were carried out at the rate of 1,000 structures a day with the alternate sites either not being made available or not being equipped for any form of resettlement. Only about 4,000 families could find resources to pay the amount stipulated. The rest found it plainly unaffordable. This led to protests that were brutally put down. The High Court on 17 April, 2000, passed a further order prohibiting demonstrations and agitations within 1 km of the periphery of the national park. Having no alternative, the slum dwellers on April 26, 2000, moved an application before the High Court seeking to be joined in the BEAG's writ petition and be given a hearing. The High Court refused to pass orders and adjourned the hearing on the application to a date beyond the summer recess of the court⁹⁵. By then the demolitions were complete.

A telling feature of the above case is that at no stage did the BEAG or the Government or even the Court think it necessary to solicit the views of the slum dwellers who were in fact the ones directly affected. None of the orders reflect their point of view. To compound this, no attempt was made to find out whether the plan of the park submitted by the forest department or the list prepared by it of the eligible encroachers was in fact correct or not. The device of having the aggrieved slum dwellers approach a grievance redressal committee and preventing them from approaching any other court or even the High Court directly, meant that they would be denied access to justice and would not have any judicial remedy against an adverse order made without hearing them. Inequitably, the burden was on the slum dweller to show that he was wrongly categorized as being ineligible for an alternative site. Considering the difficulty for a person to have her name included in an electoral roll, the choice of the electoral roll as the qualifying requirement meant that a larger number of person would be rendered ineligible and faced the prospect of immediate demolition of their hutments and consequent eviction. Preservation of the national park appears to have been prioritized over the bundle of survival rights – to shelter, health and education, to name a few – of the slum dwellers.

4.3 RIGHT TO HEALTH

This has been perhaps the least difficult area in terms of justifiability for the Supreme Court, but not in terms of enforceability. Article 47 of DPSP provides for the duty of the State to improve public health. However, the Court has always recognized the right to health as being an integral part of the right to life⁹⁶. The principle was tested in a case of an agricultural labourer whose condition, after a fall from a running train, worsened considerably when as many as seven government hospitals in Calcutta refused to admit him as they did not have beds vacant. The Supreme Court did not stop at declaring the right to health to be a fundamental right and asked the Government of West Bengal to pay him compensation for the loss suffered. It also directed the Government to formulate a blueprint for primary health care with particular reference to treatment of patients during an emergency⁹⁷.

In *Consumer Education and Research Centre v. Union of India*⁹⁸ the Supreme court, in a PIL case, tackled the problem of health of workers in the asbestos industry. Noticing that long years of exposure to the harmful substance could result in debilitating asbestosis, the Court mandated the provision of compulsory health insurance for every worker as enforcement of the worker's fundamental right to health. Other health-related issues that have been

considered in PILs include the quality of drugs and medicines being marketed in the country⁹⁹, the rights of the mentally ill¹⁰⁰, and the minimum standards of care to be observed in mental hospitals¹⁰¹.

In the area of the right to health, the conceptual framework has not been difficult to evolve with the Court readily recognizing it as part of the enforceable right to life¹⁰². Secondly, the identification of emergency medical care as a core right has been a useful yardstick to evaluate the extent of State obligations. It should be possible to contend that the health policy priorities of the State will have to be tailored to meet these specific minimum obligations.

4.4 RIGHT TO EDUCATION

The insertion of article 21-A in Part III of the Indian Constitution in the year 2002¹⁰³, which provided for the fundamental right of education to all children between the ages of 6 and 14, occurred at the end of a process that was triggered off by the judgement of the Supreme Court of India in *Unnikrishnan J. P. v. State of Andhra Pradesh*¹⁰⁴. The occasion was the challenge brought by private medical and engineering colleges to provincial state law regulating the charging of 'capitation' fees from students seeking admission. The college managements were seeking enforcement of their right to do business. The court expressly negated this claim and proceeded to examine the nature of the right to education. The court refused to accept the non-enforceability of DPSP and the margin of appreciation claimed by the State for its progressive realization. The Court asked:

It is a noteworthy that among the several articles in Part IV, only Article 45 speaks of a time-limit; no other article does. Has it no significance? Is it a mere pious wish, even after 44 years of the Constitution? Can the State flout the said direction even after 44 years on the ground that the article merely calls upon it to endeavor to provide the same and on the further ground that the said article is not enforceable by virtue of the declaration in Article 37. Does not the passage of 44 years – more than four times the period stipulated in Article 45 – convert the obligation created by the article into an enforceable right? In this context, we feel constrained to say that allocation of available funds to different sectors of education in India discloses an inversion of priorities indicated by the Constitution. The Constitution contemplated a crash programme being undertaken by the State to achieve the goal set out in Article 45. It is relevant to notice that Article 45 does not

... speak of the “limits of its economic capacity and development” as does Article 41, which inter alia speaks of right to education. What has actually happened is – more money is spent and more attention is directed to higher education than to – and at the cost of – primary education. (By primary education, we mean the education, which a normal child receives by the time he completes 14 years of age). Neglected more so are the rural sectors, and the weaker sections of the society referred to in Article 46. We clarify, we are not seeking to lay down the priorities for the Government – we are only emphasizing the constitutional policy as disclosed by Articles 45, 46 and 41. Surely the wisdom of these constitutional provisions is beyond question...¹⁰⁵

The Court then proceeded to examine how and to what extent this right would be enforceable¹⁰⁶. The decision in *Unnikrishnan* has been applied by the court subsequently in formulating broad parameters for compliance by the Government in the matter of eradication of child labour:

Now, strictly speaking a strong case exists to invoke the aid of Article 41 of the Constitution regarding the right to work and to give meaning to what has been provided in Article 47 relating to raising of standard of living of the population, and Articles 39 (e) and (f) as to non-abuse of tender age of children and giving opportunities and facilities to them to develop in a health manner, for asking the State to see that an adult member of the family, whose child is in employment in a factory or a mine or in other hazardous work, gets a job anywhere, in lieu of the child. This would also see the fulfillment of the wish contained in Article 41 after about half of a century of its being in the paramount parchment, like primary education desired by Article 45, having been given the status of fundamental right by the decision in *Unnikrishnan*¹⁰⁷.

The significance of *Unnikrishnan* has been the identification of primary education as a minimum core of the right to education, and this was implicit in the wording of article 45 which set an outer time limit for the ‘progressive realization’ of the right. Secondly, it prompted a constitutional amendment that formally acknowledged the transformation of this right from a DPSP to an enforceable fundamental right. The importance of the case also lies in its impact on judicial decision making where creativity and innovation are key determinants to effective intervention.

4.5 RIGHT TO FOOD

The issue of recurrent famines in some of the drought-prone regions of India has received a mixed reaction in courts. When a PIL case concerning starvation deaths in some of the poorest districts in the state of Orissa was taken up for consideration, the reaction of the Supreme Court in 1989 was to defer to the subjective opinion of the executive Government that the situation was being tackled effectively¹⁰⁸. In the early 1990s, the National Human Rights Commission (NHRC) was approached by civil society groups to take action, but its intervention also had only limited success¹⁰⁹. The Indian Supreme Court's current engagement, again in a PIL case, which confronted the paradox of food scarcity while the State's silos overflowed with food grains in the midst of starvation, has been a contrast to the earlier response.

In April 2001, the People's Union for Civil Liberties approached the Court for relief after several states in the country faced their second or third successive year of drought and, despite having 50 million tones of food stocks, failed to make available the minimum food requirements to the vast drought-stricken population. To being with, the Court identified the area of immediate concern, ordering governments 'to see that food is provided to the aged, inform, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them'¹¹⁰. The states were directed to ensure that all the Public Distribution System (PDS) shops were reopened and made functional. Thereafter the states were asked to identify the below poverty line (BPL) families in a time-bound schedule and information was sought on the implementation of various Government schemes that were meant to help people cope with the crisis¹¹¹.

This was followed by identification by the Court of the most vulnerable states where hunger and starvation were widespread. On November 28, 2001, the Court made a detailed order containing three major components¹¹².

- The benefits available under eight nutrition-related schemes of the Government were recognized as entitlements.
- All state governments were asked to provide cooked midday meals for all children in government and government-assisted schools.

- Governments were asked to adopt specific measures for ensuring public awareness and transparency of the programme.

Acting on the information provided to it, the Court was able to specify the minimum quantities of food and nutrition that had to be made available: each child up to the age of six years was to receive 300 calories and 8-10 grams of protein; each adolescent girl 500 calories and 20-25 grams of protein; each malnourished child 600 calories and 16-20 grams of protein. Following up on this, the Supreme Court in May 2002 gave further directions empowering village administrative bodies (gram sabhas) to oversee the distribution of food supplies under the schemes and setting up grievance redressal mechanisms.

The right to food petition has been instrumental in ensuring the extension of the mid-day meal programme to most of the states in country. Civil society groups have used the Court's order as a useful campaign tool and to seek accountability and information from ration shops under the public distribution system. The Court on its part has persisted with the monitoring of its directions and the supervision of the effectiveness of the steps taking in compliance with its directions¹¹³.

5. IMPACT OF JUDICIAL INTERVENTION

The intervention by the Court in a wide range of issues, including those involving economic, social and cultural rights, has generated a debate about the competence and legitimacy of the judiciary in entering areas which have for long been perceived as belonging properly within the domain of the other organs of state¹¹⁴. But that by itself may not explain the necessity for the Court's intervention in the larger perspective of the development of the law and of healthy democratic practices that reinforce public accountability. To place the debate in its perspective, it may be necessary to briefly recapitulate the implications of judicial intervention through PIL in the area of ESC rights.

The positive implications include:

- Finding a space for an issue that would otherwise not have invited sufficient attention. The decision in *Vishaka*,¹¹⁵ for instance, has brought into public discourse the issue of sexual harassment of women in the workplace, which had otherwise been ignored by the executive and the legislature. It becomes immediately useful, as a law declared by

the Supreme Court, to demand recognition and enforcement of the right to access judicial redress against the injury caused to women at the workplace.

- Catalysing changes in law and policy in the area of ESC rights. Many of the recent changes in law and policy relating to education in general, and primary education in particular, are owed to the decision in *Unnikrishnan*¹¹⁶.
- Devising benchmarks and indicators in several key areas concerning ESC rights. For instance, the decision in *Paschim Banga*¹¹⁷ delineates the right to emergency medical care for accident victims as forming a core minimum of the right to health and the orders in *PUCL v. Union of India*¹¹⁸ underscore the right of access for those below the poverty line to food supplies as forming the bare non-derogable minimum that is essential to preserve human dignity.
- Development of a jurisprudence of human rights that comports with the development of international law. PIL cases concerning environmental issues have enabled the Court to develop and apply the ‘polluter pays principle’¹¹⁹, the precautionary principles,¹²⁰ and the principle of restitution.¹²¹

There are a host of other issues that arise in the context of the Court’s intervention through PIL and to some of these we now turn.

5.1 COURT AS ARBITER OF THE CONFLICT OF PUBLIC INTERESTS

The PIL case brought before the Supreme Court in 1194 by the Narmada Bachao Andolan (NBA), a mass-based organization representing those affected by the large-scale project involving the construction of over 3,000 large and small dams across the Narmada river flowing through Madhya Pradesh, Maharashtra and Gujarat, provided the site for a contest of what the Court perceived as competing public interests: the right of the inhabitants of the water-starved regions of Gujarat and Rajasthan to water for drinking and irrigation on the one hand and the rights to shelter and livelihood of over 41,000 families comprising tribals, small farmers, and fishing communities facing displacement on the other. In its decision in 2000, the Court was unanimous that the Sardar Sarovar Project (SSP) did not require re-examination either on the ground of its cost-effectiveness or in regard to the aspect of seismic activity. The area of justifiability was confined to the rehabilitation of those displaced by the SSP¹²². By a majority of two to one¹²³, the Court struck out the plea that the

SSP had violated the fundamental rights of the tribals because it expected that: ‘At the rehabilitation sites they will have more, and better, amenities than those enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of society will lead to betterment and progress’¹²⁴. The Court acknowledged that in deciding to construct the dam ‘conflicting rights had to be considered. If for one set of people namely those of Gujarat, there was only one solution, namely construction of a dam, the same would have an adverse effect on another set of people whose houses and agricultural and would be submerged in water’¹²⁵. However, ‘when a decision is taken by the Government after due consideration and full application of mind, the court is not to sit in appeal over such decision’¹²⁶. Even while it was aware that displacement of the tribal population ‘would undoubtedly disconnect them from the past, culture, custom and traditions’, the Court explained it away on the utilitarian logic that such displacement ‘becomes necessary to harvest a river for the larger good’¹²⁷.

5.2 LEGITIMACY AND COMPETENCE

The majority opinion in the Narmada case further highlighted the two principal concerns of the justiciability debate – legitimacy and competence. It declared that ‘if a considered policy decision has been taken, which is not in conflict with any law or is not malafides, it will not be in public interest to require the court to go into and investigate those areas which are the functions of the executive’²⁸. Further, ‘whether to have an infrastructural [sic] project or not and what is the type of project to be undertaken and how it is to be executive, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken’¹²⁹. The dissenting opinion, however, found that there was in fact no environmental clearance for the project as required by the law and it directed that ill such clearance was accorded ‘further construction work on the dam shall cease’¹³⁰. The majority’s concerns about lack of competence to adjudicate on the issues raised was answered in the dissent thus. ‘The many interim orders that this court made in the years in which this writ petition was pending show how very little had been done in regard to the relief and rehabilitation of those ousted. It is by reason of the interim orders, and, in fairness, the cooperation and assistance of learned counsel who appeared for the states, that much that was wrong has now been redressed’¹³¹.

The issue of displacement of large sections of the population on account of the construction of a multi-purpose dam and the question of their right to rehabilitation again came up for consideration in *N. D. Jayal v. Union of India*¹³². This was a PIL questioning the decision

taken to construct the Tehri Dam at the confluence of the Bhagirathi and Bhilangana rivers in the Garhwal region of the Himalayas in the State of Uttaranchal. The petitioners contended that the structure of the dam and its location in a seismically active zone rendered it unsafe with the potential for irreversible harm to human life as well as the environment. The other issue concerned the rehabilitation of those in the villages that would be either fully or partially affected by the dam¹³³. It was contended that the environment clearance was conditional upon *pari passu* implementation of the rehabilitation and environmental plans and that in the absence of the rehabilitation of those affected, the construction of the dam ought not to be permitted. Two of the three judges constituting the bench that heard the case declined to examine the safety aspects of the dam, following the dictum in the *Narmada* decision holding that:

[W]hen the government or the authorities concerned after due consideration of all view points and full application of mind took a decision, then it is not appropriate for the court to interfere. Such matters must be left to the mature wisdom of the Government or the implementing agency. It is their forte The consideration in such cases is in the process of decision and not in its merits¹³⁴.

In regards to the rehabilitation issue, the Court accepted the version of the Government that there was 'substantial compliance with all the conditions'¹³⁵, and that the monitoring of the fulfillment of the conditions for environment clearance would be done by the High Court of Uttaranchal.

The dissenting judge differed on both aspects of safety as well as rehabilitation. Applying the precautionary principle based in international environmental law, but which had also become part of domestic law, it was held that 'it is only after 3-D non-linear analysis of the dam is completed and the opinion of the experts on the safety aspects is again sought that further impoundment of the dam should be allowed'¹³⁶. For the first time perhaps, it was thus acknowledged that:

[T]here are economic costs as well as social costs and environmental costs involved in a project of construction of a large dam. The social cost is also too heavy. It results in widespread displacement of local people from their ancestral habitat and loss of their traditional occupations. The displacement of economically weaker sections of the society and tribals is the most serious aspect of displacement

from the point of view of uprooting them from their natural surroundings. Absence of these surroundings in the new settlement colonies shatters their social, cultural and physical links¹³⁷.

The conflict of right in the context of dams and power project was also noticed:

When such social conflicts arise between the poor and more needy on one side and rich or affluent or less needy on the other, prior attention has to be paid to the former group which is both financially and politically weak. Such less-advantaged group is expected to be given prior attention by a welfare state like ours which is committed and obliged by the Constitution, particularly by its provisions contained in the preamble, fundamental rights, fundamental duties and directive principles, to take care of such deprived sections of people who are likely to lose their home and source of livelihood¹³⁸.

The purported major premise of the *Narmada* and *Tehri* decisions that it would neither be legitimate nor competent for courts to enter into the arena of policy decisions of the State concerning ESC rights is of course also belief in the decision in certain other PIL cases that suggest otherwise.

5.3 ENVIRONMENT V. LIVELIHOOD: AN AVOIDABLE PROBLEM

There are other contexts in which the Court's decisions exacerbate the conflicts between competing sets of rights and interests. In a PIL case concerning protection of the country's forest cover, the Supreme Court has, with a view to ensuring strict implementation of the various statutes concerning forests, given wide-ranging directions, including the complete ban on the felling of trees all over the country, directing that Governments will permit cutting of trees only after obtaining prior permission of the Court on a case by case basis¹³⁹ and setting up of a High Powered Committee to take over the functions of the state administration in regard to granting of licences for felling timber and imposing penalties for violations¹⁴⁰. The directions have had the effect of not only unilaterally and severely restricting the right's of forest dwellers to remain in and access the forest for fuel and other produce for their basic survival, but have also questioned the very legality of their status¹⁴¹. This has, however, not been accounted for by the Court and the attempts by the affected persons to access the courts for redress have been either denied or severely curtailed.

A PIL case brought forth seeking clearing of solid waste/ garbage in the major metropolises in the country, witnessed a concerted attempt by the Court, inter alia, to strictly enforce municipal laws that penalize littering of streets¹⁴³, to explore the possibility of privatizing the work of clearing garbage¹⁴⁴ and exempting the workforce from the protective cover of labour welfare legislation¹⁴⁵ of equal concern was the Court's perception that slum clearance was interrelated with garbage disposal since, according to the Court, 'slums generated a great deal of solid waste'¹⁴⁶. Likening slum dwellers on public land to 'pickpockets', the Court called for an explanation as to why large chunks of land acquired by the land development agency were occupied by slums¹⁴⁷. This was done without affording the slum dwellers an opportunity of being hearing and oblivious to the direct conflict of two competing public interests: the right of one set of urban dwellers to a clean environment and that of the slum dwellers to shelter¹⁴⁸.

5.4 MASS DISASTERS, MASS TORTS

The failures of the formal legal system in India, in the context of mass disasters, are best exemplified by the litigation arising out of the Bhopal disaster as the following case study demonstrates.

THE BHOPAL GAS LEAD DISASTER : CASE STUDY

When the legal MIC gas leaked from the factory of Union Carbide India Limited (now Eveready Industries India Limited) on the night of December 23, 1984, it triggered off not just one mass disaster, but several of them. Twenty years after the event, we have voluminous data that reveals a mind-boggling myriad of multiple disasters on several fronts.

Soon after the event, the Indian Parliament in 1985 enacted the Bhopal Gas Leak Disaster (processing of Claims) Act, 1985, by which the Union of India would be the sole plaintiff representing all the victims of the disaster who would be potential claimants for compensation in a court of law. This, it was believed, would ensure effective access to justice for the Bhopal gas victims. Armed with this Act, the Union of India filed a suit for compensation against Union Carbide Corporation (UCC) before Judge Keenan of the Southern District Court, New York. UCC erected a preliminary defence: it sought to demonstrate that the proper forum for adjudication of this suit was not the court in New York, but the one in India. UCC's expert witness in those proceedings, Nani Palkhivala, glibly asserted on affidavit: 'There is no doubt that the Indian judicial system can fairly and

satisfactorily handle the Bhopal litigation’¹⁴⁹. Accepting Palhivala’s description of the Indian legal system, Judge Keenan dismissed the suit subject to UCC submitting to the jurisdiction of Indian courts. Thereafter, in September 1986, the Union of India filed its suit against the UCC in the District Court in Bhopal. In February 1989, the Supreme Court of India approved a settlement whereby UCC would pay the victims \$US 470 million in full and final settlement of all civil and criminal claims, in the present and in the future. There was a huge public outcry that the settlement was a ‘sell-out’. Review petitions were filed challenging it. The Supreme Court justified its acceptance of the settlement on February 14, 1989 on the ground that ‘this court, considered it compelling duty, both judicial and humane, to secure immediate relief to the victims,’¹⁵⁰.

Twenty years after the settlement, the relief to the victims has been neither adequate nor immediate. The presumptions on which the settlement was worked out, 3,000 dead and 100,00 injured, underestimated the extent of the figures by a factor of five. In March 2003, the official figures of the awarded death claims stood at 15,180 persons and awarded injury claims at 553,015 persons. The range of compensation which was assumed would be paid in the settlement order was Rs.100,000 to 300,000 for a death claim, Rs.25,000 to 100,000 for temporary disablement and Rs.50,000 to Rs200,000 for permanent disablement. However, each death claim has resulted in an award of not more than Rs.100,000 and overwhelmingly an injury claim has been settled for as little as Rs.25,000.

The astounding and inexplicable feature of the ‘settlement’ was that UCC was absolved of any liability for future claims. The defenseless population in Bhopal have been left to fend for themselves with no protocol for treatment being available to date. The report of the Gas Relief Department of the Government of Madhya Pradesh dated December 3, 1997 indicated that 22.8 per cent of the affected population suffered from general ailments, 62.46 per cent from throat disorders, 3.32 per cent from eye disorders, 5 per cent from potential disorders and 4.61 per cent from mental disorders. A study conducted in 1990 of 522 patients at two government hospitals meant for the gas victims revealed that over 35 per cent of the patients had been prescribed irrational, banned or unnecessary medicines; and 72 per cent had been given medicines that had no effect at all. A study undertaken by the International Medical Commission of Bhopal (IMCB) confirmed that the victims received at best only temporary symptomatic relief. Further, ‘the inadequacies of the environment’s health care system has led to a flourishing business situation for private medical practitioners. In the severely

affected areas nearly 70 per cent of the private doctors are not even professionally qualified, yet they form the mainstay of medical care in Bhopal¹⁵¹. The petition also pointed out the findings of the Comptroller and Auditor General that there were numerous financial irregularities in the utilization of the grants already made. Another serious issue pointed out was that '70% of the equipment in the hospitals and clinics under the department of gas relief are dysfunctional'¹⁵² and that there was a severe shortage of medicines and availability of medical facilities in Bhopal¹⁵³. This necessitated another PIL case by the victims in which the Supreme Court has issued directions appointing expert committees to monitor the medical relief and rehabilitation aspects¹⁵⁴.

The continuing suffering of the Bhopal gas victims has been compounded by the inability of the legal system to provide meaningful and effective redress. The disaster answers the prognosis of Marc Galanter that 'at its best, the Indian legal system's treatment of civil claims is slow and cumbrous'¹⁵⁵.

6. ASSESSMENT OF INDIAN EXPERIENCE

The discussion in this piece has largely concentrated upon the decisions of the Indian Supreme Court. The decades of the 1970s and 1980s witnessed a concerted move by the Court to transcend its earlier conservative phase and give a positive direction to the Court's intervention in issues concerning the poor and the disadvantaged. It did this through a creative interpretation of constitutional provisions and a welcome assertion of its powers. The judicial innovation of PIL as a tool to enable access to justice defined a new chapter in the evolution of The Supreme Court as 'a central player in people's lives.

There has been a discernible shift in the approach of the Court over the past two decades to issues concerning economic and social rights. The explicit adaptation of international law standards has been sporadic although one instance is the case concerning the sexual harassment of women in the workplace.¹⁵⁶ However, there are a number of cases where the orders passed are perfectly consistent with those norms. For instance, the directions issued in the cases concerning emergency medical care, compulsory free primary education and the right to food recognize the State obligation to provide the minimum core of the social right. However, as the decisions in the areas of the right to work and the right to shelter reveal, the judiciary appears to have unquestionably deferred to executive policy that has progressively denuded these rights. The policy decision to continue with large dams and projects that result

in the displacement of millions of people, many of them already socially and economically disadvantaged, has resulted in weakening the ability of such populations to find meaningful livelihood consistent with their right to human dignity. It results in depriving them of a host of other economic and social rights as well. The fact that many of these policies are in a draft form and are inconsistent with state obligations under constitutional and international law only adds to the difficulty.

The courts when approached with petitions seeking enforcement of economic and social rights are often required to content with barriers erected by the law and policy divide, the legitimacy and competence conundrum and the conflict of rights and public interests, to name a few. The discussion in this piece show how their efforts at overcoming these barriers are not consistent and at times ineffective. The need for intervention of the Court is nevertheless underscored by whatever positive impact it has had thus far on policy and law making in the sphere of economic and social rights. It has also helped to establish judicial standards for testing the reasonableness of executive and legislative action. Also, till the objective of providing effective access to justice through an institutionalized model of legal services delivery is achieved, the use of PIL as a legal aid tool will have to persisted with.

The unfinished agenda is a long one indeed. The Bhopal Gas disaster continues to be a grim reminder of the inability of the legal system to cope with the challenges posed by such calamities¹⁵⁷. it also serves to highlight the pervasive influence of transactional corporations in both law and policy making. The increasing instances of the State withdrawing from its welfare role and resorting to privatization of the control and distribution of basic community resources like water and electricity and for providing health care and education are a cause for concern for those wishing to assert the obligation of the State in the spheres of economic and social rights. The withdrawal of the State in these areas results in a prominent role for the corporate sector in the control of common resources of the community. While on the one hand this transition requires to be contested on the political and judicial fronts, there is a need for the law to clearly demarcate the liability of the corporate sector for the violation of economic and social rights. The international law standards, as much as domestic law, have to be shaped to meet this challenge. The Indian legal system is faced with the challenge of having to learn from the past and order its future. The Indian people have much hope and expectation of it.

Appendix – I

Table showing illustrative list of statues corresponding to particular economic, social and cultural (DSC) rights in provisions in the Indian Constitution:

Provision of the Indian Constitution	Corresponding Law Enacted by the Indian Parliament
Article 14 – Equality before the law and equal protection of laws	Equal Remuneration Act, 1976
Article 39(d) – Equal pay for equal work	
Article 15(3) – Affirmative action provision for women and children	Protection of Women in Domestic Violence Act, 2005 Juvenile Justice (Care and Protection of Children) Act, 2000
Article 39(f) – Right of Children against exploitation	The Child Labour (Prohibition Regulation) Act, 1986
Article 17 – Prohibition of untouchability	Protection of Civil Rights Act, 1955 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1986 The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993
Article 23 – Prohibition of traffic in human being and forced labour	The Immoral Traffic (Prevention) Act, 1956 The Bonded Labour System (Abolition) Act, 1976 The Contract Labour (Regulation and Abolition) Act, 1970
Article 24 – Prohibition of employment of children below 14 years in hazardous occupation	Factories Act, 1948 The Child Labour (Prohibition and Regulation) Act, 1986
Article 39 A – Equal justice and free legal aid	The Legal Services Authorities Act, 1987
Article 41 – Right to work	The National Rural Employment guarantee Act, 2005
Article 42 – Just and humane conditions of work	Minimum Wages Act, 1948
Article 43 – Living wage for workers	Payment of Wages Act, 1936 The Employees State Insurance Act, 1948 Maternity Benefit Act, 1961 The Beedi and Cigar Workers (Conditions of Employment) Act, 1966
Article 46 – Promotion of interest of SCs, STs and weaker sections	Scheduled Cases and Scheduled Tribes (prevention of Atrocities) Act, 1988
Article 47 – Right to minimum standard of living and public health	Mental Heath Act, 1987
Article 51(c) – Respect of international law and treaty obligations	The Protection of Human Rights Act, 1993 The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participations) Act, 1995