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Chapter 22 - The Elusive Holy Grail of Justice

Members of social movements after getting floored by the illegal pahalwani of the police finally end up standing in front of a Judicial Magistrate or a Sessions Judge. Theoretically in a liberal democracy the judiciary is supposed to act as a check on the arbitrariness of the executive by critically perusing the charges being made out against the accused and the evidence being adduced in support when considering the application for bail. The cardinal principle being that a person is assumed to be not guilty until proven to be so beyond any shadow of doubt. There is also a provision in the CrPC for the judge to weigh the evidence brought against the accused before framing charges against her and if this is found to be inadequate prima facie then the case should be dismissed without wasting the time of the accused and the court. There have been innumerable pronouncements by the Supreme Court, which have considerably strengthened this provision (CrLJ, 1990 p 1869). Similarly the Supreme Court has time and again upheld the 'Rule of Prudence', which states that the evidence of the police or confessions and statements made to them should always be discounted by the magistrates while trying cases as the latter are prone to fabricate statements against people and especially against political activists who question the lawlessness of the state (Venkatesan, 2001).Yet the lower judiciary acts as if it is an arm of the executive and treats all those brought before them as hardened criminals irrespective of the quality of the evidence being produced against them and the work they are doing.

When Subhadra was produced before the magistrate in the false case lodged against her when she had sat in a dharna before the police station the magistrate told her that she should not do "netagiri". In Hindi speaking areas in India any attempt at organising people against oppression is pejoratively referred to by the upper classes as netagiri, which literally means leadership. The upper classes are the "netas" or leaders and the lower classes and all those who fight for them can never aspire to be netas but must be doomed to do only netagiri, which the police invariably snuff out. Subhadra not one to take such language lightly told the magistrate that he had no right to make such a comment and should restrict himself to what was mentioned in the case papers. A debate ensued in which Subhadra questioned the legitimacy of the IPC itself since it was a colonial law, which should have been struck down because it violated the Constitution in many respects. The upshot of all this was that Subhadra along with the other women were refused bail despite the case against her being a bailable one and sent to jail. It is of course another matter that they would not have bailed themselves out even if offered bail, as it was their intention to go to jail anyway as part of a jail bharo campaign. Subhadra complained against this arbitrariness of the magistrate to the District Judge and the High Court but the result was that the magistrate became even angrier and slapped a fine on her.

Subhadra subsequently went on hunger strike in jail as mentioned earlier demanding that she be released unconditionally on a personal bond as she was not a criminal but a political activist. This forced the police higher ups to agree to withdraw the case after review and she was immediately released. However, later the Inspector General and the Superintendent of Police who had acceded to this demand got transferred and so eventually the police in their perversity did not withdraw the case. As we have seen there have been many such instances of the administration and the police promising to act on the demands of agitators to make them take back their agitation only to renege later. The animosity of the initial magistrate and the apathy of the one after him meant that eight years elapsed before the case finally came to an end. Some witnesses were examined but still the case dragged on, as others were yet to show up. The case being a false one should have been dismissed at the

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charge stage itself. Due to preoccupation with other work an application was not made at the charge stage for discharge. However since in the other case in tandem with this one Subhadra had been acquitted, an application was made saying that this was a case in which she had been needlessly implicated for the same incident and thus been subjected to "double jeopardy". The magistrate perversely rejected this application and Subhadra refused to go to the High Court in appeal saying that she would not avail of a facility that would not normally be availed of by adivasis because of their poverty.

Nothing of course has come of the case because eventually Subhadra has been acquitted for lack of evidence but nevertheless the time of the court and the accused was wasted over a period of almost a decade so that other people too do not dare to do "netagiri". The police just fabricate cases so as to harass the accused who has to get herself bailed out and then attend court dates interminably and pay the fees of the lawyer. Indeed in the hundreds of cases that have been filed by the police against activists and people of the environmental movements in the western Madhya Pradesh region over the past two decades there has not been even a single conviction barring one. This was the case filed by the police on us for having blocked the highway in Alirajpur in 1990. By the time the case came up to the charge stage most of the activists had left the area and so the case would have dragged on and on for years in the absence of these activist accused. So we thought it prudent to plead guilty to having blocked the road and plea for mercy from the magistrate. Since the public prosecutor did not object to this we were given a warning by the magistrate and let off without any jail sentence or fine. A momentary weakness on our part that has dogged me ever since because the police mention this with glee in the file they have compiled on me. It proves conclusively that I am not only a criminal but a self confessed one to boot!

In the Anjanwara incident as many as four false cases involving such serious sections as attempt to murder were filed and some thirty odd people and activists were implicated in them. The police beat up most of the accused in custody and then paraded them in the streets of Alirajpur in handcuffs before producing them before the magistrate. In the initial stages the administration had through heavy publicity falsely propagated that we had used firearms and were secretly spreading naxalism and so poisoned the minds of the magistrates that they refused to hear anything that the accused might have to say. Thus despite the fact that the people protested that they had been beaten up and handcuffed the magistrate refused to record their complaints in a gross violation of the basic rights of the accused. I was the last person to be arrested in these cases a month after the first arrest and by that time there had been a tremendous amount of counter publicity regarding the truth of the illegalities committed by the police that had put the administration on the backfoot. So I was not beaten up but I was paraded in the streets of Alirajpur in handcuffs. When I pointed out to the magistrate that I had been produced in handcuffs before him despite several Supreme Court rulings that undertrial accused who are in custody are not to be handcuffed he said that in the special circumstances prevailing in Alirajpur the Supreme Court's ruling did not apply there and the police had the discretion to handcuff anybody they considered to be dangerous. Nevertheless I insisted that it be put down in writing that I had been produced before him in handcuffs. He did so and this was to prove his nemesis later on.

In non-bailable offences the release of an accused on bail is at the discretion of the judge depending on the seriousness of the crime. The police routinely apply non-bailable provisions like attempt to murder or threat to murder and cook up some evidence through the use of their informers and then tell the public prosecutor to oppose the bail petitions of the accused. In such circumstances justice demands that the judges apply the rule of prudence

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and weighing the evidence before them grant bail to the accused as they are not criminals but social activists who have been agitating against the violation of their rights by the administration. But this rarely happens. In the Mehendikhera incident given the very hot false propaganda by the administration regarding my being a Naxalite who had armed and incited the adivasis into firing on the police and also into setting up an explosive trap for blowing them up my bail application was not moved at all in the first month after my arrest. In this time widely publicised enquiries by many independent commissions had established that the administration had resorted to illegal destruction of the villages of the Sangathan, killed four of its members in arbitrary police firing and then cooked up a false case against us. Yet the District Judge refused to grant bail when an application was made despite the flimsy hearsay evidence on which I had been arraigned. Immense pressure was brought to bear on him by the administration to refuse me bail and it worked.

This perverse tendency of the executive putting pressure on the lower level judiciary not to grant bail to the accused and send her to jail affects adversely not only the millions of small fry like Subhadra and I but even powerful corporate bosses. The incident mentioned earlier in which one IIT Kharagpur student had sold sleazy Video CDs through the internet auction site Baazee.com is a case in point. Two school students in Delhi had sex with each other and the boy filmed this with the camera on his mobile phone. He later circulated the clip to his friends and gradually it reached a wider and wider circle finally hitting the World Wide Web. Someone at IIT downloaded it and circulated it on the local area network and from there another student copied it into Video CDs which he then advertised on Bazee.com suitably titling them to camouflage the contents. Once the CDs began to be sold they slowly came to the notice of the girl's parents who are politically well connected and the row they kicked up resulted in the police waking up and swinging into action. Internet auction sites operate in such a way that it is impossible to physically verify the goods sold and so the sites get an agreement from the seller to abide by their sales policy which bans the sale of all objectionable merchandise and lays the responsibility for any damages caused squarely with the seller. The whole operation of selling and buying takes place automatically through the Internet. The people operating the systems do not know anything about the nature of the products being sold except what the sellers reveal to them. Thus there is no way in which the CEO of Bazee.com or his staff could be held culpable for the sale of the sleazy Video CD through the site. Yet he was not only wrongly arraigned for "publishing of information that is obscene in electronic form" but due to the political pressure put on the magistrate before whom he was produced after his arrest he was not granted bail and made to cool his heels in jail for a few days (Singh, 2004). Even lobbying by the powerful software mughals of India could not save him.

The most galling thing about the lower courts is that an accused has to attend the court at regular intervals regardless of whether the proceedings are going on or not. The magistrates can absent themselves, the witnesses may not deem it fit to be present but that does not matter. The accused has to be present or a warrant is issued against her for not attending court and she is put back into jail or has to produce sureties all over again. Chhotelal when he was externed had given in writing through his lawyer that he would not be able to attend the many cases he had against him and so he should be spared attendance till he was either given relief by the High Court or he had served his term. This had no effect and the magistrate issued warrants against him in all his cases when he had not attended the court dates of these cases. When finally he won the externment case from the High Court he submitted an application to the magistrate that he should be allowed to attend court dates without having to get himself new sureties in view of the High Court order, which clearly

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stated that he had been illegally victimised by the administration violating all canons of natural justice. This did not carry any weight with the magistrate who ordered him to get fresh sureties or go to jail.

The lawyers too are no better. They have a vested interest in the cases dragging on for years and giving them continuous earnings. Most lawyers try to prolong the cases and get as much money out of the accused as is possible. Moreover, even if a lawyer does want to pursue his clients' interests with gusto the magistrates and judges have so much discretion in giving judgments that they can easily make or mar a case depending on their rapport with the lawyer. Thus when a lawyer is unusually feisty then invariably he finds his cases being adversely settled by the magistrate. In such a circumstance the lawyer would lose his clientele. Thus even sympathetic lawyers do not want to take up the cudgels for political activists for fear of jeopardising their practice. As one lawyer once said to me if the magistrate says that the sun rises in the west then the lawyers too have to agree and say that that is so! This was in connection with one case in which the police had not submitted the chargesheet even after the lapse of six months in a summons case or a case that was of a minor nature. The CrPC provides that on such an occurrence the case should be dismissed immediately. I pressed the lawyer to submit an application for dismissal of the case along with the relevant rulings of the High and Supreme Courts. The magistrate said that she would give the police some more time before deciding on the matter. We pressed for a decision on the matter in the subsequent court dates but nothing would materialise as the magistrate would neither reject our application nor dismiss the case. Finally our lawyer said that he could not do anything, as the magistrate would become angry if he pressed her too much. The case has now been dismissed because the High Court has sent down strict orders that all frivolous cases should be dismissed without delay. This is the way in which the lower courts operate totally on the whims and fancies of the magistrates and judges.

This is also why our lawyer in Alirajpur was fearful of the SDM there. The civil service administrators in India are also executive magistrates who sit in judgment, to the woe of the common people, on some law and order issues and many other laws like those with regard to the settlement of land records. Here too they have vast discretionary powers and can easily give an adverse judgment which then has to be challenged at a higher level necessitating much trouble and expense. They too can make life hell for a lawyer who rubs them the wrong way. After the Anjanwada incident the madcap District Collector threatened our lawyer in Alirajpur with serious consequences if he moved bail applications for us. Medha Patkar had to plead in court on our behalf in the immediate aftermath of the crackdown and arrests and lawyers had to be brought in from outside Madhya Pradesh to move our bail applications later. This District Collector even had the sign board on our office in Alirajpur torn down by the police ruling that it was a "defacement of public space"! A feckless administration has no qualms in abusing its magisterial powers against the faceless masses they are ostensibly supposed to serve.

The prolonging of cases gives the clerical staff in the courts too the chance to earn extra money. It is common practice for these people to take small bribes from the accused to give them their court dates. Not obliging them would mean getting court dates at very short intervals. This takes place under the eyes of the magistrates and judges. Once I asked one of these clerks whether they gave a cut of their earnings to the magistrates. He said that they did not do so in a direct manner. The magistrate would say one day to the clerk that he had gone to the market and found that a certain shop had a very good brand of cooking oil on sale. He would ask if the clerk would not purchase a fifteen-litre can of the cooking oil and bring it to

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his home. The clerk has no option but to oblige! This is of course only the tip of the iceberg. The magistrates and judges regularly take hefty bribes to decide cases in favour of one party or other. This has become so much of a menace that recently the Madhya Pradesh High Court had to terminate the services of many magistrates and judges on finding that the complaints of corruption against them were true (CC, 2005).

Liberal constitutional democratic best practice as it has evolved today stands on the two pillars of justice and pluralism (Rawls, 1993). Any nation is bound to have citizens with a plurality of sometimes incompatible moral, religious, philosophical, social and economic views and so to be fair to all of them a democratic one must give all its citizens the opportunity to voice and practice their views without fear. However, this freedom and equality cannot be absolute but have to be circumscribed to ensure justice for all and also the smooth running of the affairs of the nation. Thus liberal democratic justice envisages that each person has an equal right to the most extensive basic liberty and that social and economic inequalities are so arranged that they are both to the greatest benefit of the least advantaged and attached to offices and positions of governance open to all under conditions of fair equality of opportunity (Rawls, 1999). Once again this is very close to Ruskin's and so Gandhi's anarchism and also Marx's Communism with the difference that unlike the latter this theory of justice is well coded into a constitution and laws to be administered through a due process of law by an executive that is both accountable to an electorate which periodically elects it by a process of free and fair elections and is monitored by an independent judiciary. Unfortunately in India both these checks have been weakened by the overwhelming power of the executive.

The only saving grace in this sordid story is that the higher courts and especially the Supreme Court currently functions with much more appreciation of the crucial watchdog role of the judiciary in a liberal democracy committed to social, economic and political justice and so some relief can be gained from the arbitrary and illegal actions of the executive as well as its failure to implement beneficial legislation. However, this was not the case as far as the poor were concerned in the first two decades after independence when the higher judiciary used its power of judicial review to block progressive legislations being enacted by the parliament and the state legislatures, especially those relating to land reform. The judges in that era were "drawn from a class and raised to a class which is allergic to the socio-economic commitment to the widening poverty sector .... guarantors of the status quo" (Krishna Iyer, 1985, pp 14). Things came to a head in the early nineteen seventies when the Supreme Court held as *ultra vires* or unconstitutional the legislations regarding the nationalisation of banks (AIR, 1970 SC 564) and the abolition of the privy purses of the erstwhile princes (AIR, 1971 SC 530) saying that they infringed on the fundamental right to property of the aggrieved persons. This problem arose because at the time of its framing the fundamental rights including the right to property had been made justiciable in the Constitution while the directive principles of state policy were to be made justiciable through later legislation. Thus when these legislations began to be enacted they were challenged as being violative of the fundamental rights which were superior to the directive principles of state policy having been made justiciable from the beginning and the Supreme Court supported this argument.

This was at a time when the Naxalite uprising had made it clear that drastic legislative steps would have to be taken to address the growing poverty and frustrations of the masses in the country side and Indira Gandhi had just come to power with a massive electoral mandate on the slogan of "Garibi Hatao" or remove poverty. Parliament was thus forced to amend the Constitution to make the attaining of the goals of social and economic justice for the vast

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majority of the citizens provided for in the directive principles of state policy override the provisions of fundamental rights of individuals. These amendments were challenged and in a far-reaching majority judgment in favour of the toiling masses of this country the Supreme Court upheld their constitutionality one of the judges ruling that ".... the fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience..... (as) in building a just social order it is sometimes imperative that fundamental rights should be subordinated to directive principles" (AIR, 1973 SC 1461). In a later judgment the Supreme Court went even further and ruled that when the constitutionality of welfare legislation calculated to benefit the weaker sections is challenged then the state should submit a "Brandeis Brief", first popularised by the American lawyer and later judge of the Supreme Court Louis Brandeis in 1908 (Strum, 1988), detailing the socio-economic circumstances and statistics that had inspired the enactment (AIR, 1975 SC 1146). After this the Supreme Court in another historic judgment broadened the interpretation of Article 21 of the Constitution which secures the fundamental right to life and liberty of a citizen to mean not just a right against unjust or illegal detention but a right to live with dignity, severely restricting the arbitrariness of the executive while at the same time exhorting it to play a proactive role in ensuring this in reality (AIR, 1978, SC 597). Finally the Supreme Court in yet another landmark judgment relaxed the rule of locus standi, which had maintained that only that person whose fundamental right had been infringed could approach the higher courts for remedy, by allowing "public spirited citizens" to file writ petitions on behalf of poor and indigent people whose rights had been infringed (AIR, 1981 SC 298).

The ball of judicial activism in support of the rights of the oppressed was set rolling after this as the floodgates were opened to a plethora of Brandeis Briefs in support of human, economic, social, political and environmental rights being filed in the form of public interest litigations or class actions on behalf of the poor who were being exploited or otherwise harassed by the administration or vested interests. The provisions of the Constitution thus began to be interpreted in a way that was much more favourable to the poor. Dr Ambedkar had in the Constituent Assembly commented with regard to the fundamental right to Constitutional remedies, "If I was asked to name any particular Article in this Constitution as the most important - an Article without which this Constitution would be a nullity - I could not refer to any other Article except this one.... it is the very soul of the Constitution and the very heart of it" (CAD VII pp 953). Thus it can safely be assumed that prior to the relaxation of locus standi rules in 1981 and the various other pro poor judgments of the nineteen seventies mentioned above the Constitution was indeed a nullity for the vast majority of poor citizens in this country due to the conservative outlook of the judges. Doubts have recently begun to be expressed regarding the commitment of the Supreme Court to social justice and the efficacy of public interest litigation for securing the rights of the poor after some adverse judgments in a few cases following the liberalisation of the economy in the nineteen nineties and most notably its deciding to wash its hands off the thorny issue of proper rehabilitation and resettlement raised by the NBA (Bhushan, 2004). Nevertheless overall the positive intervention by the higher courts, which continues despite such aberrations, has provided great support to the beleaguered mass environmental movements in general and to those in Madhya Pradesh and Chhattisgarh in particular. It can be said without hesitation that without this support of the higher courts these mass movements would have long folded up and people like I would either have been permanently behind bars or forced into inaction by the illegalities of the executive and the insensitivity of the lower judiciary.

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In the Anjanbara incident KMCS went directly to the Supreme Court alleging custodial torture and public handcuffing. The Madhya Pradesh Government took the notice issued to it by the apex court lightly and maintained in its reply that it had been right in doing what it had done because the petitioners were a gang of criminals. The Supreme Court Bench led by the Chief Justice came down hard on the respondents saying that it would order them all to go to jail for such a blatant violation of human rights in the face of repeated orders by it against custodial torture and handcuffing. The bench gave the respondents another chance to refile their response in a proper manner failing which they would all be sent to jail for contempt of court. This shook up the Government of Madhya Pradesh and the respondents. Since all the respondents had not been present hand delivery of the notices to those that had been absent was ordered. This led to a hilarious denouement when the KMCS members went to deliver these notices to the policemen concerned as they fled at the sight of the notice bearers. One head constable fled from the police station to his house and when he was followed there escaped via the backdoor and made haste to hide himself in some other house. The adivasis had the time of their life seeing the police run away from them in this manner. The Government of Madhya Pradesh then submitted a revised response saying it was sorry for what had happened and that one of the policemen had been suspended and all the major officials involved starting from the District Collector and the Superintendent of Police had all been transferred. Nevertheless the apex court ordered an investigation by the Central Bureau of Investigation (CBI) into the allegations made by the KMCS.

Finally the CBI confirmed the allegations of torture and handcuffing that we had made and also revealed how the police had tampered with the daily logs and the case diaries to hide their culpability. The court directed the CBI to register cases against all the guilty officers and it also pulled up the magistrate, who had told me that the Supreme Court ruling on handcuffing did not hold in the special circumstances prevailing in Jhabua. When this magistrate went to the hearing, he was singled out for a special tongue-lashing for having not known the law despite being a member of the judiciary and the judges pronounced, "We are of the view that Magistracy requires to be sensitised to the values of human dignity and to the restraint of power. When it allows inhuman conduct on the part of the police, it exhibits both the indifference and insensitiveness to human dignity and constitutional rights of the citizens. There could be no worse lapse on the part of the judiciary which is the sentinel of these great liberties" (JT, 1994 (6) SC pp 60). The court also expressed its displeasure at "the sordid picture and sorrowful plight of public spirited men who desire to prevent exploitation of poor Adivasis" and stated "It cannot be denied that there have been acts by the police, which should concern everyone who values human rights. It cannot be said that the day of the silent poor is over. There is anger and bitterness among those who are poverty stricken. One should have regard to these aspects in enforcing law".

As mentioned earlier in the grossly fabricated false case that was instituted in the aftermath of the Mehendikhera firing the accused went to the High Court in appeal against the lower court's dismissal of the application for discharge. A massive revision petition supported with a host of case law citations and documents was filed for discharge of some of the accused and the removal of some charges against the others. Then began a theatre of the absurd. The prosecution would continuously demand time and avoid a final hearing on flimsy grounds. Their game plan was to delay the consideration of the case so that the lower court judge would proceed with the trial and then they could plead that since the trial had already started the petition was unmaintainable. The High Court judges too kept on changing and none would give the petitioners a stay on the proceedings of the lower court. Nevertheless the proceedings in the lower court were kept at a standstill by various means and the appeal was

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pursued in the High Court resulting in the order quashing the farcical charge of waging war against the state but keeping the other charges intact after five months. The problem for the High Court was that the prosecution, meaning the police, had appended the statements of as many as 106 witnesses in support of their charges. Now the High Court could not be expected to go through all those statements to ascertain our claim that these did not prima facie support all the charges made out against us. Thus by quantity if not quality the police try to get their investigations pass muster enough to entangle the accused in never ending litigation.

Subsequently this case is being heard in the lower court and already after some twenty-five witnesses, mostly independent ones, having been examined it has become clear that the case is totally fabricated. But now the remaining witnesses who are mostly police and forest staff are loathe to come to the witness stand given the rigorous cross examination that the earlier ones have had to face and so the case like the other ones against us is dragging on. The other day the main witness and the person who lodged the FIR, a police sub-inspector, came and stood in the witness stand all prepared to hold forth against the accused. The defence lawyer requested the judge that the prosecution be made to produce the daily log of the police station and the case diary in the court so that the police inspector's statements could be tallied with the entries made there. Immediately the inspector began to cough convulsively and plead that he was seriously ill and that he was in no position to give evidence and should be spared for the day! Despite protests from our lawyer that this would mean unnecessarily prolonging the case in contempt of the rulings of the Supreme Court regarding the expeditious disposal of cases the judge went along with the patent play acting of the police inspector and let him escape for the day. The case has been going on for four years and it will take at least four years more at this rate before it will be disposed of with judges changing in the meantime and the newer ones having to be briefed all over again about the details of the case. A modern equivalent of the classical Sisyphean curse!

The judgments of the Supreme Court in the Bhopal Gas Tragedy and the NBA case have already been mentioned. The NBA in fact continued to depend heavily on the Supreme Court to get some purchase against the highhandedness of the executive even after the latter finally disposed of the case allowing the construction of the SSP dam to continue. This is because the Supreme Court made it clear that the construction of the dam would proceed only in stages subject to the proper rehabilitation of the oustees being displaced at each stage as per the provisions of the NWDT Award. Since proper rehabilitation had not been done and the number of oustees had gone up with the inclusion of the names of the major sons the work on the dam did not progress for some time as the NBA filed objections to any proposal for further construction giving the details of the incomplete rehabilitation (Patkar, 2005). This strategy was later adopted for the Indira Sagar Dam also. While the Narmada Hydro-Development Corporation and the Government of Madhya Pradesh rode rough shod over the protests of the people and forcibly evacuated the town of Harsud in 2004 without providing proper compensation and rehabilitation its efforts to do the same with the rest of the villages in the submergence zone in 2005 also have been stayed by the High Court of Madhya Pradesh and it has been prevented from closing the gates of the dam until the people to be affected are all properly compensated and resettled (Palit et al, 2005).

Even though the Supreme Court has now sneaked out of the SSP case and pulled the rug from under the NBA's feet there can be no gainsaying the fact that from 1995 when the Supreme Court stayed the construction of the dam till 2006 when it finally distanced itself totally from the NBA's radical line its pronouncements did provide a fairly stable dance floor on which the NBA could choreograph its anti-dam jig. One of the comments about the

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Mughal Empire in India that preceded British rule is that one should not bemoan that it finally fell but should wonder that it survived for such a long period spanning two centuries. Similarly one should not crib about the Supreme Court having finally betrayed the oustees of the SSP as it was bound to do sooner or later but should be thankful that it too in chorus with the NBA chanted the slogan of " bandh nahi banega, koi nahi hatega" for as long as a decade.

Undoubtedly the most important judgment of the Supreme Court from the point of view of the advasis in the Fifth Schedule areas in India is that delivered in what has come to be known as the Samatha case (SCC 1997 (8) pp 191). The worst depredation that the adivasis have suffered in India is from the establishment of mines in their habitats. Right from the time of the British adivasis have been ruthlessly displaced from their lands and homes, without any worthwhile compensation, for mining as in most cases minerals are to be found in forest areas inhabited by adivasis and this process continues unabated. The provisions of the Fifth Schedule of the Constitution clearly state that land, including government land, in scheduled areas cannot be transferred to non-adivasis. Apart from this there are other statutes preventing transfer of adivasi land to non-adivasis. However, despite these provisions land in scheduled areas in Andhra Pradesh had been transferred to private companies and public corporations for the purpose of mining through leases. Samatha an NGO in Vishakhapatnam district challenged these leases as being unconstitutional in the High Court. The High Court rejected the Samatha contention that the private companies were juristically non-tribal 'person's and allowed the leases to continue. Samatha then appealed to the Supreme Court against this order of the High Court.

The Supreme Court upheld the Samatha argument that private mining industries were also non-tribal ‘person’s and hence all mining leases in tribal lands in scheduled areas to private industries are null and void. Although the case was filed on behalf of a few remote tribal villages in Andhra Pradesh, the Court's judgement is a boon to all the millions of adivasis in the nine states of India, which have Fifth Schedule areas. While the government could in the public interest still launch mining operations on its own it was expressly forbidden from leasing land to private parties. Instead the Court suggested that cooperatives of the adivasis be formed and the leases given to them along with appropriate training to run them. The Court also directed the Government to formulate an overall policy for development of adivasi areas so that the mining operations benefited the adivasis instead of devastating them as had happened earlier and even prescribed that twenty percent of the profits from these operations be set aside for this purpose. The Court further ruled that the permission of the adivasi gram sabhas would have to be taken before a mining project could be implemented. The Government filed a review petition against this judgment, which too was rejected by the Supreme Court. The Government even thought for some time about amending the Constitution to get round this judgment instead of heeding the sage advice that it should help in forming cooperatives of the adivasis for exploiting the natural resources in their areas and formulate a pro-adivasi development plan.

Similarly in the area of human rights the Supreme Court has continually intervened to monitor and control the persistent aberration of torture of those in custody whether in police lock ups or in jails. In a recent case it has noted with concern that "The dehumanising torture, assault and death in custody which have assumed alarming proportions raise serious questions about the credibility of the rule of law and administration of the criminal justice system.....the now celebrated decision in D K Basu versus State of West Bengal seems not even to have caused any softening of attitude in the inhuman approach in dealing with persons in custody.....death in police custody is perhaps one of the worst kinds of crime in a

civilised society governed by the rule of law and poses a serious threat to an orderly civilised society." (SCC 2005 (9) pp 631) The Supreme Court goes on to note, "Rarely in cases of police torture or custodial death, direct ocular evidence is available of the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues."

Giving a major new direction to jurisprudence the Supreme Court questioned the "exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times when the prosecuting agencies are themselves in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of (such) a case.....often results in the miscarriage of justice and makes the justice delivery system suspect and vulnerable. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach at times of the courts as well because it reinforces the belief in the mind of the police that no harm would come to them if one prisoner dies in the lockup because there would hardly be any evidence available to the prosecution to implicate them in torture." The court cited approvingly the 113th report of the Law Commission which recommended amendments to the Evidence Act 1872 so as to provide that in the prosecution of a police officer for an alleged offence of having caused bodily injuries to a person while in police custody, if there is evidence that the injury was caused during the period when the person was in custody, the court may presume that it was caused by the police officer having custody of the person during that period unless the police officer can prove to the contrary. The Supreme Court recommended, "Appropriate changes in the law not only to curb custodial crimes but also to see that such crimes do not go unpunished. The courts are also required to have a change in their outlook, approach, appreciation and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach." The government has not yet listened to this sage advice to curb the pahalwani of the police.

We were benefited by the D. K. Basu judgment mentioned above to a certain extent in a case in which the forest officials had murdered one of our Sangathan members while on duty and the government was nevertheless refusing to pay compensation. After a long drawn legal battle when finally relief was given by the High Court to the tune of Rs 2,00,000 as compensation to the widow of the deceased then the Judge while passing the order made a note of this and another landmark judgment to the effect that -

1. Functionaries of the government cannot themselves become law breakers and adopt inhuman methods in trying to enforce the law against alleged offenders as they had done when they had murdered Roopsingh while ostensibly going to apprehend Balu for an alleged timber cutting offence (SCC 1997 (1) pp 416).

2. The Government is vicariously liable to compensate the victims of such lawlessness on the part of its functionaries and if it doesn't then it is the responsibility of the High and Supreme Courts to ensure that it does so (SCC 1993 (2) pp 746).

Possibly the most important and effective intervention of the Supreme Court ever has been that in trying to ensure the right to food for the vast majority of the poor in India under the larger rubric of the right to a dignified livelihood (Gonsalves et al, 2005). The Supreme Court has come down hard on the union and state governments in the course of hearing a petition filed by the Rajasthan unit of the PUCL regarding the anomaly of widespread hunger

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and malnutrition despite the existence of massive buffer food stocks with the Food Corporation of India. Commenting on the fact that it was more expensive to store these massive stocks of food grains than distribute them among the poor and needy it has coaxed the state governments to prepare lists of people living below the poverty line and has impressed upon the union government the need to ensure proper implementation of the various schemes it already has for providing food at cheaper prices or through relief works to such people. The Supreme Court has appointed Commissioners to monitor and report on the way in which its orders were being implemented. This case too like the D. K. Basu case on custodial torture has been kept pending so that the Supreme Court can continue to monitor the working of the government. Refusing to entertain the argument of financial incapacity of the government the Supreme Court has held that hunger spreads not because the State lacks the funds to act but it chooses to use its money elsewhere in "perverse expenditure logic."

The higher courts do provide some relief from the waywardness of the politicians and bureaucrats but approaching these forums is an expensive proposition. In most of the more famous cases like those of the Bhopal gas tragedy, the NBA, Samatha or PUCL Rajasthan, top-notch lawyers have appeared pro bono. However, apart from the Anjanbara case we ourselves have always had to hire lawyers paying through our nose. Even when deciding in favour of the poor petitioners rarely do the higher courts order as to costs. The petitioner is left to file a case for damages in the lower courts which as we have seen have little sympathy for their cause. Once Subhadra and I with our little nine-month old son were in Barwah to attend a court date. We went to the house of an old Socialist activist so that Subhadra could nurse our son before we went to the court and there, we met a member of the Bharatiya Janata Party. That person had already heard of our exploits but this was the first time we were meeting. He said that he himself had once taken part in a roadblock agitation and had been implicated in a case. That case had dragged on for eighteen years before finally ending a few weeks back. He had never again participated in any agitation for fear of more such cases. He said that Subhadra and I with our infant son making the rounds of the courts impressed him no end. He could not think of bearing such harassment to struggle against the state! This coming from the member of a mainstream political party shows how effective the colonial repressive laws and the conservative judicial culture of the lower magistracy are in stifling popular dissent and how elusive indeed is the Holy Grail of justice for the vast majority of the poor citizens of this country.

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