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JUSTICE BHAGWATI AND INDIAN ADMINISTRATIVE LAW

M. P. JAIN*

I

PREFATORY

In this paper, the author has set before himself a rather modest aim, viz., to take note of some of the significant opinions delivered by Justice P. N. Bhagwati in the post-emergency era starting from 1978, which may have the potentiality of profoundly influencing the course of development of the Indian Administrative Law in years to come. An attempt is made here to analyse the issues of Administrative Law raised in these opinions, the answers given by Justice Bhagwati to those problems of Adiministrative Law and what impact, if any, these opinions have already made, or may make on the future growth of Administrative Law in India. Needless to say that the writer regards Justice Bhagwati as one of the creative Judges in the Supreme Court whose impact has already been felt on the course of development of Administrative Law.

II

JUDICIAL CREATIVITY

Before however entering the main theme of the paper, it is necessary to take note of one basic and fundamental question : what is the role or the function of a Judge, especially of a Judge of the highest court in the land ? Is the function of the Judge merely to declare law as it exists, or has the Judge to make the law as well if the justice of the case before him so demands ? Answer to this question is very relevant to evaluate and assess the contribution of a Judge to the development of law in the society.[1] A pervasive debate has been going on for long on this theme in the common law world. From time to time, different views have been expressed by eminent Judges, lawyers and scholars on the proper role of a Judge. The traditional view has been that the function of a Judge is merely declaratory and not creative; that a Judge is only to find the law as it exists but not to make it; that the Judge was not to "pronounce a

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1. On this question, reference may be made to M. P. Jain, Role of the Judiciary in a Democracy, [1979] *J. M. C. L.* 239-302.

new but to maintain and expound the old one".[2] For example, even as late as 1951, Lord Jowitt, Lord Chancellor, rejected the law-making function of the judiciary. While speaking at the Australian Law Convention in 1951, he asserted :

> "It is quite possible that the law has produced a result which does not accord with the requirements of to-day. If so, put it right by legislation, but do not expect every lawyer ..to act as Lord Mansfield did, and decide what the law ought to be. He is far better employed if he puts himself to the much simpler task of deciding what the law is...please do not get yourself into the frame of mind of entrusting to the jndges the working out of a whole new set of principles which does accord with the requirements of modern conditions. Leave that to the Legislature, and leave us to confine ourselves to trying to find what the law is."

But this traditional view holds the field no longer. It is doubtful if even in the past this declaratory theory truly represented the judicial functioning in practice as there have been some great Judges in England such as Holt, Mansfield, Blackburn, Wright and Atkin who have tranformed common-law by their creative approach. In modern times, some of the Judges have openly avowed their creative role. For instance, Lord Reid has denounced the declaratory theory as a "fairy tale".[3] Lord Denning has openly preached that task of the common law is to act as an instrument of evolution in accordance with the changing needs of the society and the demands of justice.[4] He has decried the timid judicial approach to interpretation of statutes characterising it as "a voice of the past", "voice of the strict constructionist", "voice of those who go by the letter", "voice of those who adopt the strict literal and grammatical construction of the words, headless of the consequences". Lord Denning has declared that the literal method is completely out of date now and that the Judges are not now "impotent, incapable and sterile" in the face of injustice.[5] Lord Edmund-Davies has stressed that "like it or not, the fact remains that judges will continue to make law as long as our present system of determining disputes remain".[6] Many other Judges like Lords Diplock and Devlin have explicitly accepted the law-making role of the

2. Blackstone, *Commenaries* 69 (1808).
3. Lord Reid, The Judge as Law Maker, (1972) 2 *Jl. of of S. P. T. L.* 22-23.
4. Denning, *From Precedent to Precedent;* also, *The Discipline of Law* 9.
5. *Nothman* v. *Council*, [1979] 1 All E. R. 1943. Also, *Bradford Ciiy* v. *Lord Commissioner*, [1979] 2 W. L. R. 1.
6. Lord Edmund-Davies, Judicial Activism, (1975) 28, *Current Legal Problems*, 1, 2.

Judge in a democracy.[7] Many legal scholars and jurists have advocated the same approach.[8] Professor Griffith has very aptly remarked recently :

> "If the judicial function were wholly automatic then not only would the making of decisions in the courts be of little interest but it would also not be necessary to recruit highly trained and intellectually able men and women to serve as judges and to pay them handsome salaries."[9]

It is the creative function of the Judge that makes their job important and worthwhile and that is why their independence becomes meaningful. In the U. S. A., the creative function of the Judges has been much more heartily endorsed.[10]

Mr. Justice F. G. Brennan, a Judge of the Federal Court of Australia, has this to say of law-making by Judges :

> "The great judge is a bold judge, not because he chances his arm, but because he so perceives the philosophy and history of the law that he can sweep aside the incidental and reach for the essential, and fashion aud refashion the basic principles so that they serve the society of his time. Boldness is a function of both understanding and courage; Understanding of the deepest values of society, and courage in rejecting the applications of principle which serve an incompatible value, perhaps current at an earlier time.
>
> And so the significant contribution which judges are able to make to the society of their time is not confined to the application of principles, but includes more importantly the modification of principles to suit the public good of that time."[11]

Both stands of judicial approach to law, the liberal and the conservative, have been advocated by the Judges of the Supreme Court in India. Interestingly, wc find both these approaches being advocated from the Supreme Court Benches in 1981. The traditionalist approach has been expounded by Kailasam J. in *Jit Ram Shiv Kumar* v. *State of Haryana*[12] where the court expressed its dissent from the view advocated by

7. Lord Devlin, *Samples of Lawmaking*, 117; Lord Diplock, Judicial Development of Law in the Commonwealth, (1978) 1 *M. L. J.* cviii-cxiii.
8. Salmond, 16 *L. Q. R.* 376, 379; Grav, *The Nature and Sources of Law*, 84 (1931).
9. J. A. G. Griffith, *The Policics of the Judiciary* 16 (1977).
10. Jaffe, *English and American Judges* (1969) at 2 : "In the last few Years American judges have been prodigiously active in making new law."
11. New Growth in the Law—The Judicial Contribution, 6*Monash U. L. R.* 8 (1979).

Bhagwati J. in the *M. P, Sugar Mills*'[13] case on the question of applicability of the doctrine of promissory estoppel to the government and its instrumentalities. Kailasam J. has said[14] :

> "Lord Denning might have exhorted the Judges not to be timorous souls but to be bold spirits, ready to allow a new cause of action if justice so requires. These are lofty ideals which one should steadfastly pursue. But before embarking on this mission, it is necessary for the Court to understand clearly its limitations. The powers of the Court to legislate is strictly limited. "Judges ought to remember that their office is jus dicere and not jus dare, to interpret law, and not to make law or give law."

And further the learned Judge has said[15] :

> "The Courts by its very nature are most ill-suited to undertake the task of legislating. There is no machinery for the Court to ascertain the conditions of the people and their requirements and to make laws that would be most appropriate. Further two Judges may think that a particular law would be desirable to meet the requirements whereas another two Judges may most profoundly differ from the conclusion arrived at by the two Judges...."

At another place, expressing dissent writh the views of Bhagwati J. in the *M. P. Sugar Mills*' case, Kailasam J. has said :

> "We feel we are in duty bound to express our reservations regarding the "activist" Jurisprudence and the wide implications thereof which the learned Judge has propounded in his judgment."[16]

The activist view of judicial functioning has been advocated by K. Iyer J. in *Gujarat Steel Tubes Ltd.* v. *Its Mazdoor Sabha*[17]. The question was whether the word 'tribunal' in s. 11A of the Industrial Disputes Act would include an arbitrator appointed under s. 10A. Taking a liberal stance, K. Iyer J. answered the question in the affirmative. While doing so, he went into the question of the role of the Judges. He states at one place :

> Here we come upon a fundamental dilemma of interpretative technology vis-a-vis the judicative faculty. What are the limits of statutory construction ? Does creativity in his jurisprudential area permit travel into semantic engineering as substitute for verbalism ? It is increasingly important for developing countries, where legislative transformation of the economic order is an urgent item on the national agenda, to have the judiciary play a meaningful role in the constitutional revolution without fretting out flaws in the draftsman, once the object and effect are plain. Judges may not be too 'anglophonic' lest the system fail."[18]

12. AIR 1980 SC 1285; see *infra*.
13. See *infra*.
14. AIR 1980 SC at 1306.
15. *Ibtd*.
16. *Ibid*., at 1303.
17. AIR 1980 SC 1896,

Supporting 'creative interpretation', Justice Iyer characterises the statement that 'Judges declare the law and cannot make law' as "petrified literality" and "frozen faith". He refers to Justice Mathew adopting the following observation of Justice Holmes in *Kesavananda Bharati* :

> "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[19]

There is no gainsaying the fact that in a democratic society courts do and must play the role of law-makers. The judiciary has to play a vital role in the evolution of the law. In a democracy, the courts have to participate in the law-making and law-reforming process. They have constantly to make, unmake and remake the law. It is an endless process. There are many reasons as to why the courts have to undertake this crucial but delicate task. Human society is dynamic and so law cannot be static. The Legislature cannot always legislate at the same pace at which the society changes and so the courts have to fill in the void. A statutory provision may be open to several interpretations, and the court will have then to make a choice. Plain meaning of a law may lead to absurd or futile results, then the Judge has to adopt purposive interpretation of the law. Law is uncertain; it does not cover all the situation; new situations arise from time to time and the courts have to adapt and extend the well established principles of law. It has to be noted that the law-making function of the Judges is not comparable to that of the legislature. A Judge is bound by the factual context in which he has to apply a legal principle and he develops the law only to the extent necessary for the purpose of resolving the dispute before him. A legislature, on the other hand, is not so limited; it can make any law prospectively or retrospectively and on any matter it likes, subject only to the

18. *Ibid*., at 1919,
19. *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.
For Justice Holmes observation see *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 at 211 (1916). Also see, Sources and Techniques of the law in Edgar Bodenheimer, *Jurisprudence*, 323-443 (1974).

over-all constitutional limitations. Judges, thus, do not make the law on the same scale, or in the same manner, as does the legislature; Judges only supplement and not supplant legislative effort Where basic institutional changes are required, legislation will need to be undertaken. The important thing however is that it should be recognised and accepted on all hands that the Judges do make law. As Lord Denning says : "If the truth is recognised then we may hope to escape from the dead hand of the past and consciously mould new principles to meet the needs of the present." There is no need for the Judges to feel shy or be apologetic about their law-creative role. It is a social necessity. Law has constantly to respond to societal changes otherwise there may be statism in law and progress may be stalled. No legislature in the world, howsoever active it may be, can cope with the total law-making required by any dynamic society.

The creative approach of the Judge is extremely pertinent to the area of Administrative Law in India. This branch of law is still in its formative stage in India and this law can develop properly to keep pace with the developing and expanding administrative process only if the courts play a creative and active role and not merely a passive, mechanical or *status quo* role. The functioning of the government is undergoing metamorphosis, and therefore, precedents from the *laissez faire* era are hardly relevant to modern day administrative functioning in the welfare era. The basic purpose of Administrative Law is to develop norms to discipline and channelise administrative power. Administrative law forces the administration to adopt proper behaviour in its dealings with people. The powerful engines of authority must be prevented from running amok. The public authorities must be compelled to perform their duties. A heavy responsibility has fallen on the courts to develope system of administrative law in the modern administrative age. Vast powers are being conferred on the administration through legislation without procedural or substantive safeguards or standards, principles or policies being stated to regulate the exercise of administrative power. If the courts adopt merely a mechanical attitude and go on legitimising whatever power is conferred on the administration, then the rights and liberties of the people will be gravely endangered.

In India, the legislature has been extremely remiss in reforming administrative process or in laying down general principles of Administrative Law.[19a] On other hand, the powers and functions of the Administration are expanding by leaps and bounds. Administration has acquired

19a. See, M. P. Jain, Tasks before the Administrative Reform Commission, (1966), *Ban. Law J.*, 100-123.

immense capacity to affect individual life for good or evil. Therefore, if there is to be a semblance of rule of law in the country, it is for the Judges to fill the void and develop appropriate norms of administrative behaviour. Judges have to play a creative role by seeking to imply certain restraints in an otherwise broadly worded statute. It is only through adoption of that judicial technique that a body of administrative law can emerge. What is needed, therefore, is a forward-looking, activist, and creative Judge ready and willing to develop administrative law to fit the needs of the changing times. It is a herculean task indeed, but it is a task well worth attempting to nurse the democratic plant in the country.

A glance over the development of administrative law in England over the last two decades will be very instructive in this connection. In the 1950's, administrative lawyers in England were suffering from a sense of extreme frustration at the way the courts were handling the issues of administrative law. Legal scholars were commenting adversely and vehemently at the statism, lack of growth of administrative law, and lack of judicial creativity in this area, and were prodding the judges to show some dynamism and creativity to develop the principles of administrative law to meet the challenges of the newly developing administrative age.[20] At this time, administrative law had reached its nadir in England, and even some judges had signed the death certificate for administrative law and even said requiem for it.[21] But then suddenly the scene underwent a metamorphosis. Since 1963, there was a burst of judicial activity and the period of 1963-1981 has been a saga of judicial creativity in the area of administrative law in England. This law has been invigorated through a stream of judicial decisions, and judges have pursued an active policy of reforming and developing the principles of administrative law. To name only a few significant judicial pronouncements : the landmark case of *Ridge* v. *Baldwin*[22] transformed the judicial approach to the applicability of natural justice to administrative adjudicatory process. The celebrated *Anisminic* case[23] curtailed the scope of statutory finality clauses so that judicial control of administrative action is not taken away. The *Padfield* case rejected the notion of unfettered administrative discretion and sought to impose some judicial control over exercise of discretionary

20. Lord Devlin, 8 *Current Legal Problems* 14 (1956)
21. K. C. Davis, The Future of Judge-made Public Law in England : A Problem of Practical Jusrisprudence, (1961) 61 *Col. L. R.* 201. Lord Devlin said in 1962 : "The common law has now, I think, no longer the strength to provide any satisfactory solution to the proplem of keeping the executive under proper control....." *Samples of Lawmaktng*, 113 (1962).
22. [1964] A. C. 40
23. *Anisminic Ltd*, v. *Foreign Compensation Comm.*, [1969] 2 A. C. 147.

power. The judicial process has not yet lost momentum and many other exciting developments can be expected in this branch of law in the near future. Lord Diplock has characterised the development of Administrative Law in England through judicial decision-making as "the great achievement of law." He says further :

> "Public law, the mutual rights and duties of government and governed, now rivals private law, the mutual rights and duties of individual citizens as between one another, in the influence it has on human happiness and well-being. To have created what is virtually a whole new system of public law and to have laid down its principles all in the space of less than thirty years is no mean accomplishment for judgemade law. And, if I have my way, we have not finished yet."[24]

According to Lord Hailsham, the increase of judicial sensitivity to the abuse of power has been both beneficial and popular.[25] Talking about the Judicial creativity in the U. S. A. in the area of Administrative Law, Davis says :

> "The judges are often at their vary best, for they are not merely applying established law, but they are bringing unusual resourcefulness to the crucial area where law and government come together."[26]

And further[27] :

> "...but most of the strength of adminisrtative law comes from judicial creativity. Instead of limiting themselves to the narrow logic of applying propositions previously enunciated to new problems or new facts, the courts have often allowed themselves to make pragmatic judgments about accommodating the needs of governmental effectiveness to the needs of fairness."

Over the years, the Supreme Court in India has also shown signs of creativity in this area and has made worthwhile contribution to the development of administrative law.[27a] But the fact also remains that not all judges are imbued with the creative streak. Only some judges are endowed with the breadth of outlook necessary to develop and fashion the

24. *Supra*, note 7 at cxiii.
25. The Independence of Judiciary in a Democratic Society, [1978] 2 *M. L. J.* cxv.
26. Davis, *Administrative Law* xiii (1977).
27. *Ibid.*, 6.
27a. For a general introduction to Indian Administrative Law see, Jain and Jain, *Principles of Administrative Law* (1979).

law. But a great judge is one who is a judicial activist[28] and not one who merely beats a trodden path.

As will be clear from the several opinions taken note of here, Justice Bhagwati has set before himself this stupendous and noble task. Through his opinions he has sought to extend the principles of administrative law to take care of new situations and his approach is informed by the felt-need to support the individual when an injustice is being done to him by the all-powerful administrative machine. It is this aspect of Justice Bhagwati's opinions which is highlighted here. The judicial process has not yet lost mementum in India and many other exciting developments can be expected in this branch of law in the near future.

III

NATURAL JUSTICE

The first landmark case of the post-emergency era in the area of Administrative Law, and especially in the area of natural justice, is *Maneka Gandhi* v. *Union of India.*[29] Because of the important issues involved in the case, it was heard by a bench of seven judges comprising of Beg. C.J. and Chandrachud, Bhagwati, K. Iyer, Untwalia, Fazl Ali and Kailasam, J.I.J. The judges delivered five separate opinions running into over 100 pages of the Supreme Court Journal. The issues involved in the case were very crucial, e. g., what is the meaning of 'personal liberty' in Art. 21 ? What is the meaning of words 'procedure established by law' in Art. 21 ? When the passport of a person is sought to be impounded by the passport officer, is the passport holder entitled to natural justice ? The facts of the case were as follows.

The passport of the petitioner (who is the daughter-in-law of Smt. Indira Ghandhi who had just been defeated at the polls) was impounded by the Government of India acting under S. 10 (3) (6) of the Passport Act, 1667, in public interest.[30] The petitioner asked for a copy of the

28. Lord Scarman in *Duport Steel Ltd.* v. *Sirs*, [1980] All E. R. 529, 551 ; "Great Judges are in their different ways judicial activists." According to Jaffe : "The great Judge was great because when the occasion cried out for new law he dared to make it. He was great because he was aware that the law is a living organism, its vitality dependent upon renewal." See, *English and American Judges*, 1.
29. [1978] 2 S. C. J. 312; AIR 19 8 SC 597.
30. S. 10 (3) (c) of the Passport Act authorises the passport authority to impound or revoke a passport "if the passport authority deems it necessary so to do in the interest of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country, or in the interest of the general public."

statement of reasons for making the order as required by S. 10 (5).[31] To this the Government replied that it had decided "in the interest of the general public" not to furnish her a copy of the statement of reasons for making the order. The petitioner challenged the government's order through a writ petition in the Supreme Court under Article 32 on several grounds. One of the major grounds of challenge was that the order impounding the passport was null and void as it had been made without affording her an opportunity of being heard in defence. The question of scope of natural justice while impounding a passport was therefore directly raised in this case.

Bhagwati I. delivered one judgment on behalf of himself, Untwalia and Fazl Ali I. J. He emphasized upon the increasing importance of natural justice in the field of administrative law. He thus pointed out that natural justice is a great "humanising principle" intended to invest law with fairness and to secure justice and, over the years, it has grown into a widely pervasive rule affecting large areas of administrative action. The soul of natural justice is 'fair play in action'[32] and that is why it has received the widest recognition throughout the democratic world and has grown into a widely pervasive rule affecting large areas of administrative action. Fair play being the test of applicability of the doctrine of natural justice, there can be no distinction between a quasi-judicial function and an administrative function for this purpose. The aim of both administrative inquiry and quasi-judicial is to arrive at a just decision and "if a rule of natural justice is calculated to secure justice, or to put it negatively, to pervent the miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both." Bhagwati J. emphasized that the requirement of fairplay in action is as important in an administrative inquiry as in a quasi-judicial inquiry because, at times, an unjust administrative decision in an administrative inquiry may have far more serious consequences than a decision in a quasi-judicial inquiry.[33]

31. S. 10 (5) requires the passport authority impounding or revoking a passport to "record in writing a brief statement of the reasons for making such order and furnish to the holder of the passport .... on demand a copy of the same unless, in any case, the passport authority is of the opinion that it will not be in the interest of the sovereignty an l integrity of India, the security of India, friendly relations of India with any foreign country or in the interests of the general public to furnish such a copy."
32. This phase has been adopted by the Judge from the speech of Lord Morris of Borth-y-Gest in *Wiseman* v. *Borneman*, (1971) A. C. 297.
33. [1978] 11 SC J. at 344.

The epoch-making decision of the House of Lords in *Ridge* v. *Baldwin*[34] broadened the area of application of the rules of natural justice and restored light to an area "benighted by the narrow conceptualism of the previous decade."[35] This development in England has had its parallel development in India[36] culminating in the historic decision in *A. K. Kraipak* v. *Union of India*[37], where the Supreme Court had observed; "The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated." Thus, in the words of Bhagwati J.[38] :

> "The law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable."

In Justice Bhagwati's opinion two points emerge very clearly as regards the application of natural justice: (1) even when a statute does not expressly provide that natural justice is to be applied, it can still be implied and applied. Silence of the statute on this question is not conclusive of the question; (2) no distinction is to be made between administrative and quasi-judicial proceedings for this purpose. Natural justice is a highly effective tool devised by the courts to enable a statutory authority to arrive at a just decision and is calculated to act as a healthy check on abuse or miuse of power. Therefore, "its reach should not be narrowed and its applicability circumscribed."[39]

The power conferred on the passport authority is to impounding a passport and the consequences of impounding a passport would be to impair the constitutional right (under Article 21) of the passport holder to go abroad. The passport authority can iupound the passport only on certain specified grounds, set out in S. (3). The passport authority has to apply its mind to the facts and circumstances of a given case and decide whether any of the specified grounds exists which would justify impounding of the passport. Under S. 10 (5), the passport authority is also required to record in writing a brief statement of the reasons for making an order impounding a passport. Except in certain exceptional situations, the authority is obiigated to furnish a copy

34. (1964) A. C. 40. Jain & Jain, *Principles of Adm. Law*, at 110, 122.
35. Clark, Natural Justice; Substance and Shadow, (1975) *Public Law* 27.
36. *Associated Cement Companies Ltd.* v. *P. N. Sharma*, A. I. R. 1965 S. C. 1595; *State of Orissa* v. *Binapani*, A. I. R. 1967 S. C. 1269.
37. A. I. R. 1970 S. C. 150.
38. (1978) 2 S. C. J. at 347. Also see, *D. F. O.* v. *Ram Sanehi Singh*, A. I. R. 1973 S. C. 205; I. L. I., IX *A. S. I, L.* 261 (1973).
39. [1978] 2 S. C. J. at 348.

of the statement of the reasons to the passport holder. An appeal lies from the decision of the passport authority to the Central Government. In the appeal, the validity of the reasons given by the passport authority for impounding the passport can be canvassed. Bhagwati J., therefore, ruled that the power conferred on the passport authority is quasi-judicial in nature, and rules of natural justice would apply in the exercise of the power of impounding a passport. Even if the power be treated as administrative, natural justice must still apply on the view of the *Kraipak* case because the order seriously interferes with the constitutional right of the passport holder to go abroad, and entails adverse civil consequences to him.

The Government had argued that having regard to the nature of the action involved in the impounding of a passport, the *audi alteram pertem* rule should be excluded. If the passport holder were given a notice regarding the proposed impounding of the passport, he might make good his exit from India and thus the object of impounding the passport would be frustrated. Justice Bhagwati emphasized that "the life of law is not logic but experience" and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism. Therefore, the *audi alteram* rule would, by the experimental test, be excluded if it has the effect of paralysing the administrative process, or the need for promptitude or the urgency of the situation so demands. But, at the same time, it must be remembered that it is a rule of vital importance in the field of administrative law, and it must not be jettisoned save in exceptional circumstances where compulsive necessity so demands. "It is a wholesome rule designed to secure the rule of law and the Court should not be too ready to eschew in its application to a given ease." The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. The concept of natural justice is pragmatically flexible; it is not cast in a rigid mould; it may suffer "situational modifications." In some cases, there may be a sophisticated full fledged hearing; in other cases, there may only be a brief and minimal hearing; it may be a hearing prior to the decision or may even be a "post-dceisional" hearing. *Audi alteram partem* rule has 'circumstantial flexibility' so as to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise." Therefore, it would not be right to conclude that the *audi alteram partem* rule is excluded merely because the power to impound a passport might be frustrated, if prior notice and hearing were to be given to the person concerned before impounding his passport. The passport authority may impound the passport without giving a hearing first, but as soon as the

order impounding a passport is made, "an opportunity of hearing, remedial in aim, should be given to him so that he may present his case and controvert that of the passport authority and point out why his passport should not be impounded and the order impounding it recalled." As the passport authority is to furnish the person concerned the reasons for impounding his passport, he would be in a position to make his representation against impounding his passport. A fair opportunity of being heard following immediately upon the impounding order would satisfy the mandate of natural justice. This procedure must be read by implication into the Passport Act. The procedure prescribed by the Passport Act for impounding a passport would then be "right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness". Such a procedure would be in conformity with Art. 21.

As the Government had agreed in the instant case to provide the opportunity of being heard now to the passport holder after making the impugned order impounding the passport, the vice had been removed from the order of impounding the passport.

The significance of this aspect of Bhagwati J.'s opinion need be underlined as this may be the precursor of a new trend in Indian Administrative Law. Ordinarily, natural justice concept is processual and pre-decisional. The affected party ought to be heard before a decision is arrived at. But since natural justice is a flexible concept, it can be adjusted to the specific needs and exigencies of the particular administrative action. In *Maneka Gandhi*, the Court, for the first time, introduces the idea that hearing can be 'post-decisional, if there is a danger that 'pre-decisional' hearing would frustrate the administrative action in question. In this way, the concept of natural justice and the exigencies of the administration have been reconciled. Not to do so would have meant only one thing, viz., to completely deny hearing to the affected person because of the fear that administrative action would be frustrated in this situation. Now, by introducing the concept of post-decisional hearing, the scope and horizons of natural justice have been expanded in India as it is not now necessary to deny hearing in situations where pre-decisional hearing may be unsuitable because urgent action may be called for on the part of the administration. It is true that, as far as possible, the hearing shall be predecisional and not post-decisional, as there are several advantages in the former procedure, but if insistence on pre-decisional hearing means abandonment of hearing completely because of the exigencies of the administration then post-decisional hearing procedure can be adopted as some sort of hearing is better than no

hearing[40]. The procedure of post-decisional hearing appears to be in vogue in the U. S. A. in many situations[41].

Another positive aspect of *Maneka Gandhi* pronouncement is the emphasis laid by the court on giving of reasons for their decisions by adjudicatory bodies. Under section 10 (5) of the Passport Act, the concerned authority is to record reasons for impounding a passport and the reasons are to be supplied to the concerned passport holder on demand except when the authority thinks it to be against public interest to furnish the same. In the instant case, the passport authority had refused to supply the reasons to the petitioner for impounding the passport. When the impounding the passport was challenged in the Supreme Court, the concerned authority revealed the reasons, for making the impugned order in an affidavit in the court.

Bhagwati J. commented adversely on the refusal of the Government to give reasons to the passport holder for impoundiug her passport. The Government refused to furnish the reasons on the ground that it was not in the interests of the general public to do so. But when the writ petition was filed, the Government did disclose the reasons in the affidavit in reply to the petition. Commenting on this, Bhagwati J. said that it was a matter of regret that Government should have taken up this attitude. Looking at the reasons disclosed by the authority, it was clear that no reasonable person could possibly have taken the view that the interests of the general public would be prejudiced by the disclosure of these reasons. "This is an instance showing how power conferred on a statutory authority to act in the interests of the general public can sometimes be improperly exercised." If the petitioner had not filed the writ petition, she would perhaps never have been able to find out what were the reasons for which her passport was impounded and she was deprived of her right to go abroad. Bhagwati J. emphasized that the giving of reasons as required by section 10 (5) is a healthy check against or misuse of power. The order impounding passport can be quashed if the reasons of doing so are extraneous or irrelevant and there is no *nexus* between the reasons and the ground on which the passport has been impounded. This was a safeguard against improper or *mala fide* exercise of power. Bhagwati J. warned that the court would be very slow to accept the claim of the passport authority that it would not be in the interest of the general public

40 For a discussion on this question see, S. N. Jain, Administrative Law Aspects of Maneka Gondhi, *21 J. I. L. I.* 382 (1979). Also, Scewartz, Adm. Law 278, 212 (1976).

41 S. N. Jain, Administrative Law Aspects of Maneka Gandhs, (1979) 21 *J. I. L. I.* 382, 383-5; Schwarsz, *Administrative Law* 204, 212 (1976); *Arnett* v. *Kennedy*, 416 U. S. 134 (1974).

to disclose the resons. "The passport authority would have to satisfy the court by placing proper material that the giving of reasons would be clearly and indubitably against the interests of the general public and if the court is not so satisfied, the court may require the passport authority to disclose the reasons subject to any valid and lawful claim for privilege which may be set upon on behalf of the Government."[42] This is a very significant ruling as it means that the government is not the sole judge of whether public interest would be jeopardised or served by communicating the reasons for the order. The court can scrutinise the claim of the administration that giving of reasons is against public interest.

Another significant point made by Bhagwati J., as regards the development of administrative law in India, is the re-interpretation by the Supreme Court of Article 21 which insists on deprivation of life or personal liberty only 'according tc procedure established by law." Two crucial questions are raised in connection with Art. 21 : (1) what is the scope of 'personal liberty' in Art. 21 ? (2) What is the meaning of the expression 'procedure established by law' ? Bhagwati J. ruled that the expression 'personal liberty' should be given its 'plain natural meaning' and should not be read in a narrow and restricted sense and the attributes of personal liberty specifically dealt with in Art. 19 should not be excluded from Art. 21. In a pithy statement denoting the role of the courts in interpreting fundamental rights, Justice Bhagwati stated :

> "The attempt of the court should be to expand the reach of and ambit of the fundamental rights rather than attenuate their meaning and content by process of judicial construction."[43]

The term 'personal liberty' is of the widest amplitude and covers a variety of rights which go to constitute the personal liberty of man. Some of these attributes have been raised to the status of distinct fundamental rights and given additional protection under Art. 19. The right to go abroad falls under Art 21. On the second question, in *Gopalan,* the Supreme Court had interpreted Article 21 in extremely positivist terms taking the view that 'law' in Article 21 meant only the 'enacted' law and the procedure laid down in any such law, and that the notions of natural justice, reasonableness or due process of law were not to be introduced into Article 21. This view stood for the last 28 years until it came to be overruled in *Manek Gandhi.* The court now ruled that procedure under Article 21 has to include natural justice; that the procedure must be just and fair and reasonable otherwise it cannot be characterised as procedure at all, and

42. [1978] II S. C. J. at 336.

43. [1978] II S. C. J. at 340.

the law in questiou cannot qualify under Article 21. Thus, Bhagwati J. insisted that the concept of reasonableness must be projected into the procedure contemplated by Article 21.[44] The procedure, according to Bhagwati J.[45] :

> "...must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and that requirement of Article 21 would not be satisfied."

Bhagwati J.'s judgment represents the majority consensus of the court as Chadrachud, Untwalia and Fazl Ali, J J. agreed with him. On the question of providing hearing to the passport holder in the matter of impounding of the passport, all the other Judges (Beg. C. J., Krishnaswami Iyer, J. and Kailasam J.) agreed with Bhagwati J. that he ought to be heard by the Passport authority.

Another aspect of Bhagwati J.'s decision is his discussion of relevance of Art. 14 to administrative law. He emphasizes that to confer unguided and unfettered power on any authority is violative of the eqality clause contained in Art. 14. He laid down the principle in the following words[46] :

> "... When a statute vests unguided and unrestricted power in an authority to affect the rights of a person without laying down any policy or principle which is to guide the authority in exercise of this power, it would be affected by the vice of discrimination since it would leave it open to the Authority to discriminate between persons and things similarly situated."

But on this test, he did not find any flaw in S. 10 (3) (c) of the Passport Act, particularly the last ground viz. "in the interests of the general public." He did not think it could be characterised as "vague or undefined." These very words are to be found in Art. 19 (5). These words provide sufficient guidelines to the passport authority and his power is not therefore unguided and unfettered. Then there are procedural safeguards. The concerned officer has to record the reasons for impounding the passport; a copy thereof is to be given to the affected person save in certain exceptional circumstances; and there is provision for appeal against his decision.[47]

44. [1978] II S. C. J. at 340.
45. Ibid., at 343.
46. [1978] 2 S. C. J. at 350.
47. Bhagwati J.'s discussion on Art. 19 (1) (a) and Art. 19 (1) (g) are not being taken note of here as this fall more appropriately under constitutional law,

As we shall see, Bhagwati J. has made use of Art. 14 in his several subsequent pronouncements concerning administrative law as are noted below.

Maneka Gandhi decision is of great sinificance for the future development of constitutional and administrative law in India. It introduces the concept of reasonableness of procedure in Article 21 and also widens the scope of the concept of personal liberty. In a number of cases subsequent to *Maneka Gandhi*, the Supreme Court has worked out the implications of reasonable procedure vis-a-vis personal liberty, especially in the area of preventive detention. This case has also made a deep impact on the administration of criminal justice in India. We are not however directly concerned with this aspect of the matter in this paper. A broad ambit has now been given to the expression 'personal liberty' found in Article 21. This expression is not to be read in a narrow or restricted sense, e. g., the right to foreign travel, and, hence to get passport, is now held to be a part of personal liberty. It will thus mean that procedural fairness is ensured over a wide area of administrative process affecting an individual. It will he possible for the courts to imply natural justice in some form in laws affecting personal liberty. The *Maneka Gandhi* case has given a new direction to the development of the administrative law in so far as it has widened the scope of applicability of natural justice to administrative proceedings. The judgement of Bhagwati J. removes some of the cobwebs existing in the area of natural justice. For instance, it is now categorically stated that natural justice being 'fair-play in action' applies to all proceedings, administrative or quasti-judicial in nature. Therefore, it is a move towards universalisation of natural justice in administrative process in India. Natural justice is now to be regarded as a rule rather than an exception in administrative proceedings. The future judicial approach in this area has now to be that natural justice applies in all administrative proceedings unless an exception can be worked out in favour of any specific administrative procedure. As emphasized by Bhagwati. J., natural justice may be excluded if its effect in a particular situation is to paralyse administrative process or the need for promptitude or the urgency of the situation so demands. But, before a court accepts an exclusion of natural justice rule in a given situation, the court must make every effort to salvage this cardinal rule to the maximum extent permissible. Natural justice is a flexible concept and is amenable to capsultation under the compulsive pressure of circumstances. Therefore, it means that the courts have to try to seek to what form, can natural justice made applicable to an administrative proceeding. Complete

exclusion of natural justice from any administrative proceeding is the extreme limit which has to be a rare exception. If, in a case, it is not possible to hold pre-decisional hearing then post-decisional hearing may be held such as whithdrawal of a passport. The 'normal' thing is to hear before deciding. But if in a situation, this does not appear to be feasible then hearing may be held after a tentative action has been taken by the administration. The *Maneka Gandhi* case is slowly but surely conditioning judicial thinking in India. *Menaka Gandhi* is a momentous step forward in the Indian Administrative Law.[49]

IV

PROMISSORY ESTOPPEL

Another *cause celebere* and momentous decision by Justice Bhagwati in the area of administrative law, and especially on the question of applicability of the doctrine of promissory estoppel against government and its authorities, is *M. P. Sugar Mills* v. *State of U. P.*[50] Bhagwati and Tulzapurkar JJ. constituted the Bench and Bhagwati J. delivered the opinion of the Bench. The Supreme Court had enunciated the doctrine of promissory estoppel, and applied it, as early as 1968 in the famous *Anglo-Afghan* case.[51] In the words of Bhagwati J. "It was in this case that the doctrine of promissory estopple found its most eloquent exposition".[52] Since then many contradictory and confusing dicta had been made by the Judges showing that the judicial attitude on the question of applicability of estoppel against administrative bodies remained equivocal and ambivalent.[53] Thus there arose a lot of confusion around this doctrine. By and large the courts showed reluctance to apply this doctrine to government and its instrumentalities. Then came the momentous decision of Bhagwati J. in the *M. P. Sugar Mills* case. Bhagwati J. re-

49. For comments on *Maneka Gandhi* see, M. P. Singh, Administrative Action in violation of Natural Justice Affecting Fundamental Rights : Void or Voidable, [1979] II S. C. C. JI. I; S. N. Jain, Administrative Law Aspects of Maneka Gandhi, 21 *J. I. L. I.* 382 (1979),
50. AIR 1979 SC 625.
51. *Union of India* v. *Anglo-Afghan Agencies*, AIR 1968 SC 718.
52. AIR 1979 SC at 642.
53. The doctrine was applied against a municipality in Century Spg. & *M.fg. Co. Ltd.* v. *Ulhasanagar Municipal Council*, AIR 1971 SC 1021.
The doctrine was again affirmed ley the Supreme Court in *Turner Morrson & Co. Ltd.* v. *Hungerford Trust Ltd*, AIR 1972 SC 1311. It was repudiated in an *obiter dicta* in *M. Ramanatha Pillai* v. *state of Kerala*, AIR 1973 SC 2641, and in *Exctse Commissioner* v. *Ram Kumar*, AIR 1976 SC 2237 In *Radhakrishna Agarwal* v. *State of Bihar*, AIR 1977 SC 1496, the court approved the decisions in *Anglo-Afghau aud Cennury Spinning*.

enunciated, re-expounded and gave a new vigour to this doctrine in order to put some restraint on government's treating its promises as merely scraps of paper. This case is destined to have a powerful impact on the future growth of Indian Administrative Law. The Court has evolved the doctrine on the basis of equity in order to protect innocent and unsuspecting persons from being injured by acting on the promises and the representations made by government officials.

In *Anglo-Afghan Agencies*, the Central Government announced an export promotion scheme through an administrative order. Under the Scheme, a person exporting woollen goods was to be entitled to import raw materials of equal value. When an exporter claimed import entitlement, he was not given the same equal to the value of his exports but much less in value. He contested government's decision and the government countered by saying that the scheme being merely of an administrative nature was not binding on it. The Supreme Court held that the scheme was binding on the government and that the exporter was entitled to get the benefit promised by it. Even though the scheme had no statutory basis and was merely administrative in nature and character, the government could not ignore the promise made by it at its mere whim. The claim of the exporter was founded upon "the equity which arises" in his favour as a result of the representation made on behalf of the Union of India in the scheme and the exporter's action in acting upon that representation under the belief that the government would carry out the representation made by it.

In *M. P. Sugar Mills*, the Government of Uttar Pradesh announced a scheme of exempting new industrial units from sales tax for three years. The government also gave a categorical assurance to the petitioners to the effect that, if they set up a vanaspati factory in the State, its product would be exempt from sales tax for three years. Acting on this assurance, the appellants set up their factory. Later, the government went back on this promise, and sought to withdraw the exemption from sales tax before the stipulated period. This was challenged through a writ petition. The Supreme Court ruled that the government was bound by its promise or assurance on the ground of equity. The government had argued that the appellants' concern was quite profitable and so no prejudice was caused to them by acting on the government's assurance and setting up the factory. Bhagwati J. ruled that what was material in the situation was the "altering of the position" by the petitioners and not the "prejudice" caused to them. "The detriment in such a case is not some prejudice suffered by the promisee by acting on the promise, but the prejudice which would be caused to the promisee, if the promisor were

allowed to go back on the promise." In the instant case, the relevent taxing statute contained a clause authorising the government to grant exemptions from sales tax to new enterprises. The government could therefore issue a notificatinn under this statutory provision honour its promise.

Another plea which the government had raised against the appellants was that of waiver. But Justice Bhagwati rejected this plea on the ground that the government had not raised it in its affidavit filed in reply to the writ petition. He also emphasized that it is an elementary principle that waiver is a question of fact and that it must be properly pleaded and proved. The government had not taken the plea at the first opportunity. The plea was raised for the first time at the time of hearing of the writ petition. This was not right. Explaining the nature of waiver, Bhagwati J. emphasized that waiver means abandonment of a right and this may be express or implied by conduct. The basic condition, however, is that it must be "an intentional act with knowledge." There can be no waiver unless the person concerned is fully informed as to his right, and with full knowledge of such right, he intentionally abandons it. In the instant case, there was nothing to show that the appellants had full knowledge of their right and that they intentionally abandoned it.

The highlight of this case is a full-fledged discussion by Justice Bhagwati of the doctrine of promissory estoppel as applicable in the area of administrative law. He has emphasized that the basis of the doctrine is equity. Lord Denning recently discovered the doctrine in the *Hightrees* case.[54] Bhagwati J. expounded the relevant principle as follows :[55]

> "...where one party has by his words or conduct made to the other a clear and unequivocal promise wihich is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow .him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not."[55]

This principle is much broader than the principle of estoppel followed in England. But the court has justified the broad principle on the

54. [1956] 1 All E. R. 256.
55. AIR 1979 SC at 631.

ground that it is based on equity and that equity is flexible. In England, equitable estoppel can be used by and large only as a defensive or passive tool and not for offence.

This means that it cannot found a cause of action (except as a proprietary estoppel). On the orher hand, in India, estoppel can be used both for defence as well as offence.

Undoubtedly, in thus enunciating the above-mentioned broad principle, Bhagwati J. has performed a very creative function. This doctrine has vast potentiality as a juristic technique to do justice between government and citizen. If this doctrine is allowed full play then it would seriously erode the principle of consideration in the law of contracts which is regarded as an anachronism in modern juristic thought.[56] That aspect is not under consideration here. What we are concerned here with is the creative streak in the judgment of Bhagwati J. which applies the doctrine of estoppel against the government and other administrative authorities. Both in England and the U. S. A., there exists doubt as to how far this doctrine is applicable against the government and by and large the courts have adopted a somewhat restrictive, conservative and cautious attitude in this regard.[57] In India, the present case greatly strengthens the trend which was revealed in the Supreme Court decision in *Anglo-Afghan Agencies* case,[58] but which had been undergoing ups and downs since then in India. The Indian courts were not able to make up their minds as to which way to go in applying the doctrine.[59]

The government makes a promise knowing or intending that it would be acted upon by the promisee. When the promisee, in fact, acts in reliance upon the promise, and alters his position, then the government would be held bound by the promise; the promise would be enforceable against government at the instance of the promisee, notwithstanding the fact that there is no consideration for the promise and that is it not recorded in the form of a formal contract as required by Art. 299 of the constitution.

56. AIR 1979 SC at 634, Lord Wright in an article in 49 *Harv. L. R.* 1225 remarked that the doctrine of consideration in its present from serves no practical purpose and ought to be abolished.
57. In England, the principal authority against applying the doctrine of promissory estoppel to the government is *Howell* v. *Falmouth Boat Construction Co. Ltd.* 1951 A. C. 837. The principal authority in the U. S. A. is *Federal Crop Insurance Corp.* v. *Meryill,* [1947] 332 US 380. Also see *infra.*
58. AIR 1963 SC 718.
59. Note 53, *supra.*

In a vigorous observation, Justice Bhagwati defends this position. He observes :

> "It is elementary that in republic governed by the rule of law, no one, howsoever high or low, is above the law. Every one is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual insofar as the obligation of the law is concerned; the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel ? Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of "honesty and good faith ?" Why should the Government not be held to a high "standard of rectangular rectitude while dealing with its citizens ?"[60]

The doctrine of executive necessity cannot be invoked by the government to get out of its promise. This doctrine was emphatically repudiated by the court in *Angeo-Afghan,* and the supremacy of the rule of law was thus established. If the government does not want its freedom of executive action to be hampered or restricted, the government need not make a promise knowing or intending that it would be acted upon by the promisee and he would alter his position relying upon it.

But if the government makes a promise, and the promisee acts in reliance upon it and alters his position, then there is no reason why the government should not be compelled to make good such promise like any other private individual. According to Bhagwati J.[61] :

> "The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the courts and the legislatures must, therefore, be to close the gap between law and moraliity .....The doctrine of promissory estoppel is a significant judicial contribution in that direction."

Bhagwati J. has spelt out the following exceptions to the doctrine of estoppel :

(1) Being an equitable doctrine, it must yield when the equity so requires. If the government can show that having regard to the facts as

60. AIR 1979 SC at 643.
61. AIR 1979 SC at 644.

they have subsequently transpired, it would be inequitable to hold the government to the promise made by it, the court would not raise an equity in favour of the promisee and enforce the promise against the government.

(2) The court would not also enforce the promise if public interest suffers in fulfilling the promise made by the government. But the government cannot claim exemption from the liability to carry out the promise on some "indefinite and undisclosed" ground of necessity or expediency. It is for the court to decide on the basis of the facts disclosed by the government whether it would be inequitable to enforce the liability against the government. It is only when the court is satisfied that the overriding public interest requires that the government should not be held bound by the promise but should be freed from it, that the court would refuse to enforce the promise against the government. In the words of Bhagwati J. "The court would not act on the mere *ipse dixit* of the government, for it is the court which has to decide and not the government whether the government should be held exempt from liability. This is the essence of the rule of law."

(3) The doctrine cannot also be applied in the teeth of an obligation or liability imposed by law.

Bhagwati J. referred to *Howell*[62] which was an authority for the proposition that promissory estoppel cannot be invoked to compel the government to do an act prohibited by law. The Judge refused to hold *Excise Commissioner, U. P.* v. *Ram Kumar*[63] as an authority against the applicability of the doctrine of promissory estoppel against the goverment. There the government had made no promise and so there was no occasion to apply the doctrine of estoppel. Bhagwati J. also held that nothing in *Sipahi Singh*[64] case could persuade the court to take a different view as regards estoppel. There the respondent was unable to show that there was any factual basis for applying the doctrine of promissory estoppel. Justice Bhagwati J. noted that in *Radhakrishna Agarwal* v. *State of Bihar*[65], the *Anglo-Afghan*[66] case was approved.

Referring to the fact-situation in the instant case, Bhagwati J. pointed out that a categorical representation was made on behalf of the government that the appellants' proposed vanaspati factory would be exempt

62. *Howell* v. *Falmouth Boast Construction Co.*, 1951 A. C. 837.
63. AIR 1976 SC 2237.
64. *Bihar Eastern Gangetic Fishermen Coop.* V. *Sipahi Singh*, AIR 1977 SC 2149.
65. *Supra*, note 53.
66. AIR 1977 SC 1496.

from sales tax for three years. The government made the representation knowing or intending that it would be acted upon by the appellants. The appellants did act upon this representation and set up the factory. Thus, the factual basis for setting up the doctrine of promissory estoppel was present. The plea of the government that the doctrine was not applicable in the instant case because the appellants' factory was making profit, and thus no prejudice was caused to the petitioners by their acting on its assurance and setting up the factory, was rejected by the court saying that it is not necessary "to attract the applicability of the doctrine of promissory estoppel, that the promisee, acting in reliance on the promise, should suffer any detriment.

> "...in order to invoke the doctrine of promissory estoppel it is enough to show that the promisee has, acting in reliance on the promise, altered his position and it is not necessary for him to fnrther show that he has acted to his detriment."

Bhagwati J. emphasized that what was material in the situation was "the altering of the position" by the petitioners and not any prejudice caused to them. "The detriment in such a case is not some prejudice suffered bye the promisec by acting on the promise, but the prejudice which would be caused to the promisee, if the promisor were allowed to go back on the promise."

Since the appeltants in the instant case had altered their postion, the government was bound to make good the representation made by it. Since the U. P. Sales Tax Act authorises the government to grant exemptions from sales tax, the government can legitimately be held bound by its promise to exempt the applicants from payment of sales tax. If there were no provision in the taxing Act enabling the government to grant exemption, it would not be possible to enforce the representation against the government because the government cannot be compelled to act contrary to the statute. The court ordered the refund of tax money paid by the appellants to the government by way of sales tax which the government was not entitled to charge.

Both in the U. S. A. and England, there exist doubts as to how for the doctrine of estoppel is applicable against the government and by and large the judicial attitude has been to adept a somewhat restrictive, conservative attitude in this regard. For example, in the U. S. A., in *Federal Crop Insurance Corp.* v. *Merrill*,[67] the Supreme Court denied that estoppel was applicable against the government. Schwartz has criticized the reasoning used by the court in *Merrill* to deny any remedy as having

67. (1947) 332 U. S. 380.

"all the beauty of logic and all the ugliness of injustice." Schwartz has suggested that estoppel may not be applied against a statute (as distinguished from the regulations of the agency itself, as *Merrill*), but that it should apply in all other situations. "Both reason and policy argue that prejudicial reliance warrants invoking the doctrine of estoppel against the government in other cases."[68]

This approach has recently been vindicated in the U. S. in *Brandt* v. *Hickel*.[69] The Indian position as depicted in the present case is far in advance of the position achieved in the U. S. A. so far on the question of estoppel. The present case also appears to be very much in advance of the position existing at present in England as well.[70]

The principle of promissory estoppel as expounded in the above case has been applied by the Supreme Court recently in *Bhim Singh* v. *State of Haryana*.[71] This case straightaway reiterates the principle of *M.P. Sugar Mills*. The State Government had held out certain specific promises as inducement for its employees to move into a newly created department. The Supreme Court ruled that the employees having believed the representations by the State Government, and having acted thereon, could not be denied the rights and benefits promised to them.

In *Jasjeet Films (P) Ltd.* v. *Delhi Development Authority*,[72] the Delhi High Court accepted in full the doctrine of promissory estoppel against the government as enunciated by Bhagwati J. in *M, P. Sugar Mills*. Wed J. pointed out on the basis of the above case that for invoking the doctrine of promissory estoppel; it was not necessary for the party claiming relief to show that he had altered his position acting on the representation of the promisor. However, on the facts of the case, he found that there was no basis to apply the doctrine against the Delhi Development Authority.

After the vigorous and forceful plea of Justice Bhagwati in *M. P. Sugar Mills* in favour of applying the doctrine of promissory estoppel to the Government and its agencies, the hope was that all doubts on this score would be given a quietus for future and the doctrine would be applied without any mental reservation by the Judges.

But it now appears that that is not to be. Again a bench of two Judges of the Supreme Court consisting of Kailasam and Fazl Ali JJ. has

68. *Administrative Law*, 134-106 (1976)
69. 427 F. ad 53, 57 (9th circuit); Schwartz, *id.* at 135-6.
70. De Smith, *Judicial Review of Adm. Action*,100-105, 173-8 (1980).
71. AIR 1980 SC 768.
72. AIR 1980 Del. 83.
73. AIR 1980 SC 1285,

differed from all that Bhagwati J. had said in *M. P. Sugar Mills*. Again, the whole question has been thrown in the melting pot. This significant case is *Jit Ram Shiv Kumar* v. *State of Haryana*[73] and the court's opinion has been delivered by *Kailasam* J.

The Municipal Committee of Bahadurgarh established a *mandi* at Fateh. The Committee resolved in 1916 that the purchasers of the plots in the mandi would not be required to pay octroi duty on goods imported within the mandi. Handbills were distributed for the sale of plots on this basis. In 1917, the committee passed another resolution immunizing the mandi from payment of octroi for ever. This state of affairs continued till 1953. In 1954, the committee reiterated the same position in a resolution and the State Government confirmed the resolution. Thereafter the committee changed its mind and resolved to levy octroi in the mandi but the State Government annulled this resolution. In 1965, again the committee resolved to levy the octroi and this time the Haryana Government approved the resolution. Thereupon, the committee started charging octroi duty on the goods imported into the mandi. The petitioners challenged the committee's resolution as well as the government's sanction as illegal, *ultra vires* and without jurisdiction. The court ruled (Kailasam J. on behalf of himself and Fazal Ali J.) that the action of the Government cannot be questioned because—(i) it is in exercies of its statutory functions and the plea of estoppel is not available against the State in the exercise of its statutory functions; and, further, (ii) even on facts, the plea of estoppel is not available as against the Government as it made no representations to petitioners. The court also rulled that the municipality cannot be estopped from levying octroi in the market on on the basis of its earlier resolutions because it had no authority to exempt the Market from the octroi. Such a resolution was *ultra vires* its powers. "When a public authority acts beyond the scope of its authority the plea of estoppel is not available to prevent the authority from acting according to law. It is in public interest that no such plea should be allowed." Kailasam J. has not given any reasons as to why such a resolution was *ultra vires* the committee.

Coming to the question whether the committee was bound by the doctrine of promissory estoppel, the court answered in the negative. It invoked the earlier decisions of the Supreme Court[74] that the

74. *Excise Commissiouer*, v. *Ram Kumar*, AIR 1976 SC 2237 following N. *Ramanatha Pillai* v. *State of Keala*, AIR 1973 SC 2641 and *State of Kerala* v. *Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd.*, AIR 1973 SC 2734. See, XIII *A, S. I. L.* 506 (1976); IX A.S.I.L. 277 (1973). For comments of Bhagwati J. on these cases see *Supra* notes 63-66.

principle of estoppel is not available against the Government in exercise of legislative, sovereign or executive power. The court has thus refused to move ahead of the position it adopted in 1976. For the most part, it has depended on the old English cases on the point as if administrative law in England has been static and has not moved ahead.[74a] The most interesting part of Kailasam J. 's opinion is its treatment of the Bhagwati J. 's opinion in the *M. P. Sugar Mills' cases*. Kailasam J. has said in *Jit Ram* that Bhagwati J. 's decision is not in accordance with the view consistently taken by the Supreme Court. So, the two benches of the Supreme Court, both having two Judges each, have taken different attitudes on the question of applicability of the doctrine of promissory estoppel to government and its instrumentalities. The conflict really is between the traditionalist and the futuristic approaches. And Kailasam J. makes it very clear when he observes :

> "We feel we are in duty bound to express our reservations regarding the "activist" jurisprudence and the wide implications thereof which the learned Judge (Bhagwati J.) has propounded in his judgment."

Kailasam J. says that to hold that the government is not subject to the doctrine of promissory estoppel is in public interest. This amounts to saying that the promises made by the government are not worth the paper on which they are written. Will it be in public interest if people were to have an idea that government promises have no intrinsic value and that they rely on them at their risk ? Will this promote or retard the functioning of the government ? The Government makes promises every day, the most recent example of this being that of bearer bonds for those who did not pay their income tax in full. If people are not to have any faith in government promises, then the functioning of the Government will become extremely difficult if not impossible. Therefore, it is in the interest of the proper working of the government that its promises have some legal validity otherwise the government will have no credibility left in the eyes af the people. Obviously, the court has not taken these considerations in view in overruling the application of promissory estoppel to Government.

Kailasam J. has cited *Federal Crop Insurance Corp.* v. *Merrill* [1947] from the U. S. A. in support of his view that promissory estoppel does not apply against the Government.[74b] But, he has not followed the subsequent development of the law in the U. S. A. There is *Moser* v.

74a. The main case *Howell*, *supra*, note 62.

74b. *Supra*, note 67.

U. S.[75] and *Brandt* v. *Hickel*[76] which cannot be reconciled with *Merill.* There are several cases from the circuit courts estopping the government. In *U. S.* v. *Georgia Pacific Co.*,[77] the court applied equitable estoppel against the government. The court said : "We find that the dictates of both morals and justice indicate that the Government is not entitled to immunity from equitable estoppel in this case". Davis regards this as "an outstanding opinion estopping the government".[78] The state courts also apply estoppel against the state government. The New York Court of Appeals has flatly declared : "Estoppel may apply to a municipality".[79] As Davis has stated : "During the 1970s the movement away from the rigid view that state and local government cannot be estopped has been quite pronounced...."[80] The Government to the extent possible ought to be held to the same standard of rectilinear rectitude that it demands from its citizens.[80a]

Anyway because of the recent contradictory judicial pronouncements, the law of promissory estoppel has become very muddled and it is hightime that the matter is considered by a full bench of the Supreme Court and the law be clarified and brought up-to-date. Bhagwati J. in expounding the doctrine of promissory estoppel has taken enough care to protect public interest to a legitimate extent in the exceptions he has engrafted on the doctrine. Bhagwati J.'s pronouncement in *M. P. Sugar Mills* is both principled and pragmatic as it promotes rule of law as well as protects legitimate public interest. It is therefore preferable to *Jit Ram.* In *Jit Ram*, instead of blindly and flatly repudiating the entire doctrine, the court ought to have investigated the point whether the specific factual situation there (especially the fact that no octroi had been levied in the *Mandi* for nearly 48 years) brought it or not under any of the exceptions enunciated by Bhagwati J in *M. P. Sugar Mills.*

That would have been a far more creative and pragmatic an approach in the direction of developing administrative law in India.

There is another aspect of the matter which the court has not considered in *Jit Ram.* Should statutory bodies be treated at par with government in the matter of non-application of promissory estoppel ? There are

75. 341 U. S. 41 (1951).
76. *Supra*, note 69.
77. 421 F. 2d. 92, 103 (9th Cir. 1970).
78. Davis, *Adm. Law*, 541,
79. *Planet Const. Corp.* v. *Board of Education*, 7 N. Y. 2d 381 (1960). Also, *Rand* v. *Andreatta*, 60 Cal. 2d 846 (1964).
80. Davis, *Adm. Law—cases—Text—Problems*, 541—3 (1977).

so many statutory bodies carrying on commercial and business activities. Should their promises also be of no avail ? Should every promise to act or not to act in a particular manner be regarded as *ultra vires ?* It is one thing to say that when a mandatory duty is imposed by law it must be fulfilled. But it is a different thing altogether to assert that when only an enabling discretionary power is conferred on a public body, and most of the statutory powers are of such a nature, the Government cannot make a promise as to how it proposes to exercise it in future. Can all such promises be treated as *ipso fact* null and void ?

Lastly, no purpose is served by the court saying that "by its very nature", the court is "most ill-suited to undertake the task of legislating." It is too late in the day to repudiate a law-making role by the Supreme Court. Innumerable examples can be cited of the creative role played by the Supreme Court in India. And, of course, there is the whole school of Jurisprudence, known as the Realist School, which asserts that the courts are involved in making law all the time. In the field of administrative law especially, judges do not always have to go by the established law as administrative law is of recent origin and is growing and has to grow. Most of the pre-1963 judicial pronouncements in the area of administrative law have already been by-passed by the courts in England and there is no reason as to why the courts in India should feel bound by these old restrictive decisions. The judges have thus not merely to apply the so-called established law but have to bring an unusual resourcefulness to the crucial area of administrative law where "law and government come together".[81]

V

BENEFITS AND DISCRETION

Another outstanding judicial pronouncement made by Bhagwati J. in 1979 is in *Ramana Dayaram Shetty* v. *The International Airport Authority of India.*[82] This case has made a dent in an area which has traditionally been regarded hitherto as being purely discretionary. The great importance of the case lies in the fact that it seeks to regulate government discretion in a newly developing area, viz., conferment of government largess and benefits on individuals.

As formulated by the Supreme Court itself, the following interesting but significant questions arose in this case :—

81. Davis, *Adm. Law of the Seventies.* (1976).
82. AIR 1979 SC 1628. The Bench consisted of Bhagwati, Tulzapurkar and Pathak JJ. The Judgment was delivered by Bhagwati J.

(1) What are the constitutional obligations on the state when it takes action in exercise of its statutory or executive power ?

(2) Is the state entitled to deal with its property in any manner it likes or award a contract to any person it chooses without any constitutional limitations upon it ?

(3) What are the parameters of its statutory or executive power in the matter of awarding a contract or dealing with its property ?

(4) When the government invites tenders for a contract, subject to certain conditions and terms, is the government entitled to by-pass those conditions and accept a tender of a person who does not fulfil those conditions ?

The great relevance of these questions can be seen from the fact that, in modern times, state is the source of much wealth. In the modern era of a welfare state, government is increasingly assuming the role of the dispenser of a large number of benefits. More and more of an individual's wealth to.day consists of the new forms of property. More and more individuals and businesses enjoy largess in the form of government contracts, licences, quatas, mineral rights, jobs etc. Most of these forms of wealth are in the nature of 'privileges', though some may be regarded as legal rights.[83] There is thus need to develop some norms to protect individual interest in such wealth. The basic question is to regulate and discipline government discretion to confer such wealth assumes greater and greater importance in the life of the nation, there is going to be greater and greater competion for such wealth among individual claimants. Therefore, the courts will be increasingly called upon to intervence and mediate in such disputes and develop norms to see that injustice is not done to the individual by the state. In this context, therefore, the question whether or not persons dealing with government enjoy any legal protection assumes great significance and relevance. Can the state withhold, grant or revoke a contract at its pleasure ? Is the government in the same position in this respect as a private person ? In *Ramana*, generally speaking, the court has answered these questions in the negative, and herein lies the great importance of Bhagwati J.'s pronouncement in ***Ramana.*** The court has ruled that the government or any of its instrumentalities cannot exercise its discretion in an arbitrary manner even in the matter of granting a privilege. The government is still the government when it acts in the matter of granting largess and it cannot act arbitrarily in this respect. The government cannot claim to stand exactly in the same position as a private individual. Government cannot therefore give or

83. Charles A. Reich, The New Property, 73 *Yalc L. J.* 733, (1964).

withhold largess "in its arbitrary discretion or at its sweet will", and that "Government action be based on standards that are not arbitrary or unauthorised."

The *International Airport Authority* is a statutory body set up by statute of Parliament. In the instant case, the Authority issued a notice on January 3, 1977, inviting tenders for running a second class restaurant and two snackbars at the airport at Bombay. The Authority prescribed certain norms of eligibility for the tenderer.

The Authority awarded the contract to one Kumaria whose tender was the highest and who appeared to satisfy all the conditions mentioned in the notice inviting tenders. Kumaria then took necessary steps by way of purchase of necessary equipment (coolers, crockery, etc.) for running the restaurant and the snack bars. The Authority failed to hand over possession of the premises to Kumaria as the previous contractor (Irani) running the restaurant and snack bars did not vacate the premises although his contract with the Authority had come to an end. There was some litigation between Irani and the Authority but Irani did not succeed. Then Ramana filed the write petition in October, 1977, challenging the Authority in accepting Kumaria's tender. Ultimately, the matter reached the Supreme Court by way of special leave under Art. 136.

One of the contentions of the petitioner was that Kumaria did fulfil the conditions of eligibility stipulated in the notice inviting tenders. The court went into this question and found that "the test of eligibility laid down in the notice was an objective test and not a subjective one."[84] The norms of eligibility were reasonable, and non-discriminatory. The court further found that Kumaria was not eligible to submit the tender in terms of the norms of eligibility prescribed, and that the action of the Authority in accepting the same contravened the terms of the notice inviting tenders.

The next important question considered by the court was whether there was anything wrong in the Authority accepting the tender of Kumaria. The answer to this question constitutes the most crucial part of Justice Bhagwati's opinion. The Authority had sought to counter the petitioner's argument by the counter-argument that the conditions of eligibility mentioned in the notice did not have any statutory force as the notice had not been issued under any administrative rules and therefore, even if the notice was not adhered to by the Authority, the matter was not justiciable and furnished no cause of action to the petitioner.

84. AIR 1979 SC at 1634.

The Authority claimed that it was competent to reject all tenders received by it and negotiate directly with any one for entering into a contract with him. This was even clarified in the notice itself. The court accepted this part of the Authority's contention but ruled, nevertheless, that, in the instant case, in fact the Authority did not reject all the tenders outright and directly negotiate with Kumaria for awarding the contract. On the other hand, the truth was that the Authority did accept Kumaria's tender. The action of the Authority could not therefore be justified by the argument that it could have achieved the same result by rejecting all the tenders received by it and entering into direct negotiations.

The petitioner himself was not a tenderer. The question therefore arose : Did he have *locus stands* to file the writ petition ? The court ruled that he had *locus standi* for his complaint was not that his tender was rejected as a result of improper acceptance of Kumaria's tender but that he was differentially treated and denled equal opportunity with him in submitting a tender. Had he known that non-fulfilment of the eligibility requirement would be bar to the consideration of a tender, he also would have submitted a tender and competed for obtaining a contract. Bhagwati J. ruled that the Authority had laid down a norm or standard of eligibility, and since Kumaria did not satisfy the prescribed standard or norm of eligibility, the Authority was not competent to entertain his tender. In doing so, the action of the Authority became clearly discriminatory, "since it excluded other persons similarly situated from tendering for the contract and it was plainly arbitrary and without reasons." Justice Bhagwati expounded the relevant principle on this point as follows :[85]

> "It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them."

This rule is supportable under Article 14 as well but it does not rest merely on Article 14.[86] It has an independent existence apart from Art. 14. "It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority." Today, the individual comes so much in "relationship of direct encounter with State power-holders," that it has become necessary "to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise." The very essence of the

85. *Id.* at 1635
86. Art. 14 see M. P. Jain, *Indian Constitutional Law*, 410.

rule of law and its bare minimal requirement is that every action of "the executive government must be informed with reason and should be free from arbitrariness" and it does not matter in applying this principle whether the "exercise of the power involves affectation of some right or denial of some privilege,"[87] Government's discretion is not unlimited in that it cannot give or withhold largess in its arbitrary discretion or its sweet will. Justice Bhagwati thus enunciated the crucial principle as follows :[88]

> "It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms or largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm, which is not arbitrary, irrational or irrelevant. The power or discretion of Government in the matter of grant of largess including award of jobs, contracts, quotes, licences etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norms in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary but was based on some valid principle which in itself was not irrational: unreasonable or discriminatory."

Besides being a principle of general administrative law, this principle also flows directly from Art. 14 which stikes at arbitrariness in state action and ensures fairness and equality of treatment. Justice Bhagwati observed on this point as follow[89] :

> "It must therefore follow as a necessary corollary from the principle of equality enshrined in Art. 14 that state is entitled to refuse to enter into relationship with anyone, yet if it does so, it cannot arbitrarily chose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from snch standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground."

87. A. I. R. 1979 se at 1636.
88. *Id* at1637-8

Referring to *C. K. Achutan* v. *State of Kerala*,[90] Bhagwati J. stated that there the court did not intend to lay down any absolute proposition permitting the state to act arbitrarily in the matter of entering into contracts with the third parties.

Both having regard to the constitutional mandate of Art. 14, as also to the "judicially evolved rule of administrative law," the Authority in question was not entitled to act arbitrarily in accepting the tender of Kumaria but was bound to the standard or norm laid down in the notice inviting tenders. If there was no acceptable tender from a person satisfying the eligibility condition, the Authority could have rejected all the tenders and invited fresh tenders prescribing a less stringent standard or norm. But it could not depart from the standard or norm set by itself and arbitrarily accept Kumaria's tender, for by doing so it denied equality of opportunity to others similarly situated. Acceptance of Kuma ia's tender was invalid as being violative of the "equality clause" in the Constitution as also the rule of administrative law inhibiting arbitrary action.

In spite of this ruling, Bhagwati J. refused to set aside the Authority's decision it the instant case awarding the contract to Kumaria. In view of the peculiar facts and circumstances of the case, he felt that it would not be a sound exercise of discretion to upset the Authority's decision and avoid the contract. The petitioner personally had no real interest in the result of the litigation. He was put up by Irani to deprive Kumaria of the benefit of the contraet secured by him. The writ petition did not appear to have been filed bona fide by the petitioner to protect his own interest. There was also the element of laches on his part in filing the petition after the the tender had been ccepted by the Authorito. In the meantime, Kumaria had spent large sum of money to put up the restaurant and snack bars and it would therefore be most inequitious to set aside the contract at this stage.

This pronouncement has several notable points. Hitherto, in several cases, the Supreme Court had ruled that when government choses one person over another to enter into a contract with it, the aggrieved party could not claim the protection of Art. 14 because the choice of the person to fulfil the particular contract must be left to the government.[91] Now, this opened and unrestricted choice of the government in the matter of awarding contracts has been restricted; the government is to act in this matter in conformity with some reasonable and non-discriminatory stan-

89. *Id.* at 1943
90. AIR 1956 SC 490.
91. Jain & Jain, *Principles of Adm., Law*, at 616 .

dards or principles. Further, on general principles of administrative law, an authority is to be held bound to the standards which it says it would follow in exercising its powers to confer benefits; it cannot deviate from them with impunity and throw the proclaimed 'standards' to the winds. That will be arbitrary action on its part. Even in the matter of conferring privileges on the people, the government has to follow some norms which are "rational, relevant and non-discriminatory". Thus, in inviting tenders, the norms or standards governing the tenderers should be reasonable and non-discriminatory and government should not depart from these norms arbitrarily and without proper justification. The position advocated here is in line with the judicial thinking in countries like the U. S. A. and England where the concept of 'privileges' is being slowly eroded and being transformed into that of 'right'. As Schwartz observes[92]:

> "The privilege-right dichotomy is in the process of being completely eroded."

But the position reached by the court in the *International Airport Authority* case is for in advance of the position yet reached in either the U. S. A. or England as regards the disciplining of government's discretion to confer benefits on the people, especially in the matter of entering into contracts. This is a very positive aspect of the contribution made by Justice Bhagwati through his pronouncement in *Ramana*.

The idea propounded in *Ramana* that the state does not enjoy unlimited power in the matter of conferring benefits on individuals has been taken one step further ahead during the year 1980 in *Kasturilal* v. *State of Jammu & Kashmir*.[92a] In *Ramana*, Bhagwati J. had emphasized that the state cannot act in a discriminatory manner in conferring benefits. In *Kasturi Lal*, the court emphasized that the state cannot confer an undue advantage on any one at its own cost. Any arrangement arrived at between the state and an individual must be reasonable and fair to both the parties. It was fortuitous that like the *Ramana* opinion, Justice Bhagwati got the opportunity to deliver the court's opinion in *Kasturi Lal* and thus carry forward the views propounded by him in *Ramana*.[92b]

The Supreme Court speaking through Bhagwati J. had spoken of the development of law in this significant area as follows :[93]

> "Some interests in Government largess, formerly regarded as privileges, have been recognised as rights, while others have been

92. Schwart 2, *Admtnistrative Law*, 223, 230 (1976). The most significant case on this point is *Goldbery* v. *Kelly*, 397 U. S. 254 (1970).
92a. AIR 1980 SC 1992.
92b. The other Judges on the Bench were Tulzapurkar and Pathak JJ.
93. *Ibid.*, at 1999.

given legal protection not only by forging procedural safeguards but also by confining, structuring and checking Government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the Government cannot give largess in its arbitrary discretion or at its sweet will or on such terms as it chooses in its absolute discretion."

Bhagwati J. pointed out that there are two limitations imposed by law which structure and control the discretion of the Government in this behalf : (i) in regard to the terms on which largess may be granted; (ii) in regard to the persons who may be recipients of such largess. As regards the first limitation, it flows directly from the thesis that, unlike a private individual, the State cannot act as it pleases in the matter of giving largess, such as awarding a contract or selling or leasing out its property. Whatever it does, government is always the government. Therefore, the government cannot exercise its powers arbitrarily or capriciously or in an unprincipled manner; it has to exercise its powers for the public good. In the words of Bhagwati J. :[94]

"Every activity of the Government has a public element in it and it must, therefore, be informed with reason and guided by public interest; Evcry action taken by the Government must be in the public interest; the Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated."

Therefore, if the Government awards a contract or leases out or otherwise deals with its property or grants any other largess, its action would be liable to tested for its validity on the touchstone of "reasonabless and public interest" and if it fails to satisfy either test, it would be unconstitutional and invalid. Bhagwati J. emphasized that Art. 14 strikes at arbitrariness in state action and since the principle of reasonabless and rationality, which is legally as well as philosophically an essential element of equality or non-arbitrariness, is projected by this article, it must characterise every govermental action, whether it be under the authority of law or in exercise of executive power without making the law. If any governmental action fails to satisfy the test of reasonableness and public interest and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be struck down as invalid. It means that the Government cannot act in a manner which would benefit a private party at the cost of the state, for example, the government cannot give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless

94. Ibid.

there are other considerations which render it reasonable and in public interest to do so. It is on a total evaluation of various considerations which have weighed with Government in taking a particular action, that the court has to decide whether the action of the Government is reasonable and in public interest. Bhagwati J. pointed out that "this ground of invalidity, namely, that the governmental action is unreasonable or lacking in the quality of public interest, is different from that of mala fides though it may, in a given case furnish evidence of mala fides,

The second restriction on the Government power to confer largess is as regards the persons to whom it may be granted. The Government is not free, as an ordinary individual is, to select the recipients for its largess in its absolute and unfettered discretion. Government may not deal with any one, but if it does so, it must do so, fairly without discrimination and without unfair procedure. The government cannot confer a largess whether by giving jobs or entering into contracts or granting other forms of benefit on any one it pleases; its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant; any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground. The principle of reasonablness and non-arbitrariness in governmental action lies at the 'core of our entire constitutional scheme.'

In the instant case, an order passed by the Government of Jammu and Kashmir granting to the respondents the right to extract resin from certain area was challenged. One of the grounds of attack was that the terms on which the contract was granted were highly disadvantageous to the State and entailed considerable loss of revenue to the Government exchequer. After reviewing the fact and circumstances in which the grant was made, the Supreme Court rejected this contention. A condition of the grant was that the respondents wouid set up a factory within the State to process the commodity. They had also agreed to hand over a part of the resin extracted by them to the State Government at a very concessional price. In the circumstances, it was not possible to say that any benefit conferred on the respondents at the cost of the State. Nor could the court agree with the contention that the action of the State was arbitrary or unreasonable. The court's conclusion was that the impugned order was "unquestionable and without doubt, in the interest of the State" and there was nothing in it which could possibly be condemned as arbitrary or irrational. It is true that there was no advertisement in the papers inviting offers in respect of the right of extraction of resin in the area in question, but the fact is that the extraction rights were given by way of alloca-

tion of raw materials for feeding the factory to be set up by the respondents. If it were a case merely of granting tapping contract *simpliciter* then, without doubt, the State would have to auction or invite tenders for securing the highest price. But here the deal was a part of the proposal to set up a factory and so the State was not bound to advertise and it could enter into an arrangement by negotiation with the concerned party. The impugned order of the State was reasonable and in the interest of the State. No favour was shown to the concerned party as it was much more experienced and definitely snperior to the petitioners. The petition of the petitioners challenging the order of the State was rejected as Bhagwati J. speaking for the court found no flaw therein.

The highlight of this judicial pronouncement is that in conferring any benefit or making any grant, the government has to take care that it does not discriminate among individuals, and that the grant is in the interest of the state and not at its cost. The sum and substance of the matter is that the state action should not be arbitrary or unreasonable either from the individual or the state point of view.

VI

AUTHORITY

Having arrived at the principle of no-discrimination and no arbitrariness in governmental action in the matter of conferring a benefit on an individual through two different channels, viz., (1) on the basis of general principles of administrative law; and (2) on the basis of Art. 14, Justice Bhagwati considered two significant questions in *Ramana :*

(a) Are the general principles of administrative law binding on a body like the International Airport Authority as well, or are they confined only to government departments ?

(b) Is Art. 14 applicable to the International Airport Authority ? To answer this question, it was necessary to answer another question : Is the International Airport Authority an 'authority, for the purposes of Art. 12 of the Constitution ?

It was necessary to answer this question because the Fundamental Rights (including Art. 14) can apply only to a body deemed to be an 'authority' within the purview of Art. 12. Justice Bhagwati answered all these questions in the affirmative.

As regards question (a), Bhagwati J. stated that the government may act through the instrumentality or agency of natural persons or of juridical persons. The Government has created many corporations to carry

out its functions. The government could carry out these tasks departmentally through its own service personnel, but keeping in view the specialised and highly technical nature of some of the tasks to be performed, they are handed over to the corporations because the framework of civil service appears to be inadequate to handle such tasks. Accordingly, Justice Bhagwati stated the following principle in this connection :[95]

> "The corporations acting as instrumentality or agency of Government would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself, though in the eye of the law, they would be distinct and independent legal entities. If Government acting through its officers is subject to certain constitutional and public law limitations, it must follow *a fortiori* that Government acting through the instrumentality or agency of corporations should equally be subject to the same limitations."

Thus, Bhagwati J. expressly stated that the principles of administrative law are applicable not only to the Government as such but also to its instrumentalities as well. But, the next question however is how to determine whether a corporation is acting as an instrumentality or agency of the Government ? What are the tests to determine whether a corporation established by statute or incorporated under law is an instrumentality or agency of the Government or not ? Was the International Airport Authority an instrumentality or agency of the Central Government ?

For this purpose Justice Bhagwati has enunciated the following tests :

(1) Where a corporation (whether statutory or incorporated under a law such as the Companies Act, 1956 or the Societies Registration Act, 1860) is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law or the charter of its incorporation, it is an instrumentality or agency of the Government.

(2) If the entire share capital of the corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.

(3) If there are no shares or shareholders, it would be a relevant factor to consider whether the administration is in the hands of a board of directors appointed by the government. But this test may not be determinative, because even though the Directors are appointed by the

95. A. I. R. 1979 S. C. at 1638.

government, they may be completely free from governmental control in the discharge of their functions.

(4) Referring to the relevant U. S. cases,[96] Bhagwati J. drew the principle that a private agency, if supported by extraordinary assistance given by the state, may be subject to the same constitutional limitations as the state. In his own words ;

> "But if extensive and unusual financial assistance is given and the purpose of the Government in giving such assistance coincides with the purpose for which the corporation is expected to use the assistance and such purpose is of public character, it many be a relevant circumstance supporting an inference that the corporation is an instrumentality or agency of Government."

For example, where the State financial assistance is of such a magnitude as to meet almost the entire expenditure of the corporation, it affords some indication of the corporation being impregnated with governmental character.

(5) Where state financial support is not so large, a finding of state financial support plus an unusual degree of control over the management and policies might lead an operation to be characterised as 'State action.'

(6) So also the existence of deep and pervasive state control may afford an indication that the corporation is a state agency or instrumentality.

(7) It may also be a relevant factor to consider whether the corporation enjoys monopoly status which is state conferred or state protected. "There can be little doubt that state conferred or state protected monopoly status would be highly relevant in assessing the aggregate weight of the corporations" ties to the State.[97]

Whether the operation of the corporation is an important public function. Thus, as stated by Douglas J. : "When private individuals or groups are endowed with powers or functions governmental in nature, they become agencies or instrumentalities of the state."[98]

This formulation raises the problem of defining what are governmental functions. In the welfare state when government discharges extensive functions it is very difficult to define what functions are governmental and what are not. Besides the traditional functions of the government, in modern times, government operates a multitude of public enterprises and discharges a host of other functions. "If the functions of the corporation are of public importance and closely related to governmental functions it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government." As Mathew J. stated in *Sukhdev* v. *Bhagatrami*[99] :

> "institutions engaged in matters of high public interest or performing public functions, are by virtue of the nature of the functions performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered governmental functions".

Bhagwati J. warned that it is difficult to distinguish between governmental functions and non-governmental functions. Such a distinction is not perhaps valid any more in a social welfare state. "But the public nature of the function, if impregnated with governmental character or 'tied or entwined with Government' or fortified by some other additional factor, may render the corporation an instrumentality or agency of Government.

The above particularisation of relevant factors to determine whether a corporation is an instrumentality of government is not exhaustive. There is no cut and dried formula to determine this question. The Government functions are ever growing and become complex. Of the factors mentioned above, no single factor will yield a satisfactory answer and the court will have to consider the cumulative effect of these various factors. "It is the aggregate or cumulative effect of all the relevant factors that is controlling".[100]

Bhagwati J. stressed the point that where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as the Government itself. It should be bound by the rule mentioned above inhibiting arbitrary governmental action when the corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and "it cannot act arbitrarily and enter into rela-

96. *Kerr* v, *Eneck Pratt Free Library*, 149 F2d 212. Also see, Thomas P. Levis, The Meanidg of State Action, 60 *Col. L.R.* 1083.

97. Vide Douglas J. in *Catherine Jackson* v. *Metropolitan Edison Co*,, (1974) 419 U. S. 345.

98. *E. S. Evaus* v. *Charles E. Newton*' (1966) 382 U. S. 296. Also Arthur S. Millar, The Constitutional Law of the Security State, 10 *Stanford L. R*, 620, 644.

99. A. I. R. 1975 S. C. 1331. Also see *Pfizer* v. *Ministry of Health*, (1964) 1 Ch. 614; *Marsh* v. *Alabama*, (1945) 326 U. S. 501. *Evans* v. *Newton*, (1966) 382 U. S. 296; *Smith* v. *Allwright*, (1943) 321 U. S. 649. In *Sukhdev*, the question discussed was whether a statutory body like the ONGC or the LIC or IFC was an authority under Art. 12. Mathew J. enlarged the concept by holding that any instrumentality or agency of the Government falls under Art. 12.

100. A. I. R. 1979 S. C. at 1642. Also, Douglas J. in *Jackson* v. *Metropolitan Edison Co*. (1974) 419 U. S. 345.

tionship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance."

As regards question (b), Justice Bhagwati referred to *Rajasthan Electricity Board* v. *Mohan Lal*[101] where, in his words, the test to determine whether a constitutional or statutory authority would be within Art. 12 would be whether it has been invested with statutory power to issue binding directions to third parties, the disobedience of which would entail penal consequence or it has the sovereign power to make rules and regulations having the force of law. This test was followed by Ray C. J. in *Sukhdev*.[102] Justice Mathew however propounded a broader test in *Sukhdev*, viz,. whether the body in question is an instrumentality or agency of the Government ? If it is, it would be an 'authority' within Art. 12. Justice Bhagwati preferred to follow the test laid down by Mathew J. as being more satisfactory. Explaining the use of the words "instrumentality or agency of Government," Bhagwati J. stated that it does not suggest that the corporation should be an agent of the government in the sense that whatever it does should be binding on the government. "It is not the relationship of principal and agent which is relevant and material but whether the corporation is an instrumentality of the government in the sense that a part of governing power of the state is located in the corporation and though the corporation is acting on its own behalf and not on behalf of the government, its action is really in the nature of state action."[103]

After surveying the provisions of the International Airport Authority Act, 1971, the court came to the conclusion that the Airport Authority is an 'instrumentality or agency' of the Central Government and also falls within the definition of the "state" in Art. 12, as every test discussed above is satisfied. Thus, both Art. 14 and the judicially evolved rule of administrative law would apply to such a body.[104]

101. A. I. R. 1969 S. C. 1857.
102. *Supra*, note 101.
103. A I. R. 1979 S. C. at 1647-1648.
104. The relevant features of the Authority are : The Central Government constitutes the body and appoints all its members: the Government can remove any member; many powers vested in the Government were transferred to the authority; the Government has provided capital to the authority; the Government approves the programme of activities and financial estimates of the authority; its yearly audited accounts are placed before Parliament; an annual report of the authority is also laid before Parliament; the Government can supersede the authority under certain specified circumstances; the Government can give written directions to the authority on questions of policy which are binding on it; Government has power to make rules while the authority can make regulations breach of which may be made penal.

Undoubtedly, first Mathew J. in *Sukhdev*, and now Bhagwati J. in *Airport Authority*, have sought to broaden the scope of 'state' in Art. 12. Bhagwati J, 's opinion has been greatly influenced on this point by Mathew J. 's opinion in *Sukhdev* which ought to be characterised[105] as the seminal opinion on the road to broadening t he scope of Article 12. But one interesting question can be raised here. Is it necessary, in case of a statutory body, to go into the question whether it is an instrumentality or agency of the Government to regard it as falling under Article 12 ? Cannot the very fact that it is statutory be regarded as sufficient for this purpose ? A reading of Justice Bhagwati's opinion indicates that he does not regard the statutory character of a body as adequate to bring it under the purview of Article 12, or to designate it as an instrumentality or agency of the Government for applying general principles of administrative law thereto. According to his thinking, there should be something more superadded to its statutory character for this purpose, for, in spite of the *Airport Authority* being a statutory body he, nevertheless, elaborately analysed its statutory provisions to see whether the tests laid down by him are applicable to it or not, and when some of these tests were satisfied then only he called it as an 'authority' as well as an instrumentality or agency of the Government,

In the opinion of this writer, it will be far simpler for all concerned to adopt a straight forward test that a statutory body by itself, without anything more, should be regarded as an authority as well as an instrumentality to be subject to the same discipline of administrative law as the government itself. There is really no need to super impose any other test on a statutory body to determine whether it is an authority or government instrumentality for purposes of applying administrative law to it. When the state sets up a statutory body, it is presumed that the activity to be undertaken by this body is one in which the state is interested and which the state desires to promote. Otherwise, why should the government go to the extent of passing a law and set up a statutory body ? Further, the International Airport Authority Act contains standard provisions which can be found practically in the parent statute of any other statutory corporation like the ONGC, LIC or the Finance Corporation held to be authorities in *Sukhdev*. There is nothing special in any of these statutes which is not to be found in any other parallel statute. Besides, there are a number of other bodies, like the Universities, which are statutory bodies, but which are under much less government control in matters of policy than a statutory corporation. For example, where a standard provision in the parent Act of a corporation is that the government can

105. A. I.R. 1975 S. C. 1331, 1359, 1360.

issue a directive to it on matters of policy, there may be no such provision found in a university statute as the University autonomy has to be preserved. The Universities do receive government funds, but most of the tests laid down by Bhagwati J. are hardly applicable to such a body as a University. No one will argue that a university need not function according to the principles of administrative law or ought not to be regarded as 'authority.' There have been innumerable cases where the courts have applied the principles of administrative law and Fundamental Rights to the universities. Things will become much simpler if a general norm were to be accepted viz., that every statutory body ought to observe principles of administrative law like any other government department, and be subject to the Fundamental Rights. This writer is not aware of any statutory body not having been held to be an 'authority' under Article 12 irrespective of the functions discharged by it or not having been subjected to the principle of administrative law.[106]

Then there is the question of non-statutory bodies. Bhagwati J.'s thesis in *Airport Authority* is general in nature and appears to be applicable to non-statutory bodies as well although the body immediately involved was a statutory body. Non-statutory bodies may by classified as government companies and other bodies. In the view of this author, a government company *ex hypothesi* should be characterised as an authority under Article 12. Most of the tests laid down by *Bhagwati* J. are applicable to such an organisation. Government sets it up to promole an activity; it prefers a non-statutory set up to a statutory set up and such a body can be legitimately regarded as an 'instrumentality or agency' of the Government. Non-statutory government companies in which the government has a large financial stake and control over management ought to be characterised as government instrumentalities, as it is necessary to subject such bodies to judicial control to makc them accountable. The truth is that, apart from the form, there is very little difference of substance or functions between a statutory and a non-statutory government undertaking, but a non-statutory body set up by government is much less accoun-

106. See, *J. P. Kulshrestha* v. *Allahabad Uuiversity*, AIR 1980 SC 2141 where the Supreme Court quashed selection of academic staff made by the University. In *Stute Bank of India* v. *Kalpaka Transport Co.*, AIR 1979 Bom. 250, the Bombay High Court characterised the State Bank as 'state' under Art. 12. See, XV *A. S. I. L.* 351 (1979). In *U. P. Warehousing Corporation* v. *Vtjay Narain*. AIR 1980 SC 840, the U. P. Warehousing Corporation and in *Premji Bhai Parmar* v. *Delhi Development Authority*, AIR 1980 SC 738, the Delhi Development Authority have been held to fall under Art. 12. All these are statutory bodies. Also, M. P. Jain, The Legal Status of Publie Corporations and their Employees, 18 *J. I. L. I.* 1 (1976).

table today than a statutory body, and so the government is tempted to set up more and more non-statutory bodies.

Before Bhagwati J.'s opinion in *Airport Authority*, government companies were not characterised as "authorities" under Article 12.[107] Mathew J.'s opinion in *Sukhdev*, although capable of being interpreted broadly, had exerted only a marginal effect on judicial thinking in this respect. It seems to this reviewer that after Bhagwati J.'s opinion in *Airport Authority* the future development in the area of administrative law may lie in the direction of holding non-statutory corporations as authorities.

A policy reason to bring in such bodies within the net of Article 12 is that if such bodies are kept outside Article 12 then Fundamental Rights cannot apply to them. In that case, government may feel encouraged to adopt such administrative structures on a big scale only to by-pass the rigours and discipline of Fundamental Rights which will thus come to naught.

There is however a much wider question. There are numerous and diverse non-statutory private bodies in existence. Government may use any such body to promote its programme and policies. How far such a body can be characterised as an instrumentlity of the government? Some of the tests mentioned by Bhagwati J. to decide whether a body is an instrumentality of the government are relevant and pertinent to such a private body. The American cases cited by him also refer to the situation when public character can be imparted to a private body. The next phase of development will hopefully lie in this direction. Nothing more need be said on this point at this place. We have to wait till the ramifications of this part of Justice Bhagwati's opinion are worked out by the courts in course of time.[108]

VII

HABEAS CORPUS

The last decision of Justice Bhagwati to be taken note of in this paper is *Icchu Devi* v. *Union af India*.[109] In this case, the detenu under the COFEPOSA Act challenged his detention on several grounds, of which one ground was found to be fatal, viz., the detaining authority did

107. *M. L. Nohria* v. *G. I. Gorp. of India*, AIR 1979 P and H 183: *Abdul Ahad* v. *Govt. Wollen* Mill, AIR 1979 J. and K 57; *Sabhajit Tewary* v *Union of India*, AIR 1975 SC 1329; *Sachida Nand* v. *Union of India*, 1979 Lab. 1. C. 963.

108. See, (1979) : Andh. W. R. 176.

109. AIR 1980 SC 1983.

not serve on the detenu copies of several documents on which the authority had relied in the grounds of detention. The high water mark of this pronouncement is the deep concern expressed by the court regarding upholding personal liberty. Bhagwati J. on behalf of the court (consisting of Bhagwati and Venkataramiah JJ.) pointed out that in case of an application for a write of *habeas corpus*, the court does not, as a matter of practice, follow strict rules of pleading nor does it place undue emphasis on the question : On whom does the burden of proof lie ? "Even a postcard written by a detenu from jail has been sufficient to activise this Court into examining the legality of detention." The court has consistently shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a *prima facie* case invalidating the order of detention. Whenever a petition for a writ of *habeas corpus* has come before the court, it has almost invariably issued a rule calling upon the detaining authority to justify the detention. When a rule is issued by the court, it becomes incumbent on the detaining authority to satisfy the court that the detention of the petitioner is legal and in conformity with the mandatory provisions of the law authorising such detention.[110] The court has also insisted that, in answer to this rule, the detaining authority must place all the relevant facts before the court which would show that the detention is in accordance with the provisions of the law. The detaining authority cannot take the plea that a particular ground has not been taken in the petition.[111] Justice Bhagwati emphasized[112] : "Once the rule is issued it is the bounden duty of the Court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and the citizen is not deprived of his personal liberty otherwise than in accordance with law."

The practice followed in India departs from that obtaining in England where observance of strict rules of pleading is insisted upon even in case of an application for a write of *habeas corpus*. But, the Supreme Court has adopted the liberal practice in view of the peculiar socio-economic conditions prevailing in the country. The Indian people are poor, illiterate and ignorant and lack financial resources to find access to the courts. Therefore, it would be unreasonable to insist that the petitioner should set out clearly and specifically the grounds on which he challenges the order of detention and make out a *prime facie* case in

110. See, *Ntranjau Singh* v. *State of M. P.*, AIR 1972 SC 2215; *Sheikh Hanif* v. *State of W. B.*, AIR 1974 SC 679; *Dulal Roy* v. *The District Magistrate, Burdwan*, AIR 1975 SC 1508.

111. *Nazamuddin* v. *State of W. B.*, AIR 1974 SC 2353.

112. *Mohd. Alam* v. *State of W. B.*, AIR 1974 SC 917; *Khudiram Das* v. *State of W. B.*, AIR 1975 SC 550.

support of those grounds before a rule is issued, or to hold that the detaining authority should not be liable to do anything more than just meet the specific grounds of challenge put forward by the petitioner in the petition. The Supreme Court has always placed the burden of showing that the detention is in accordance with the procedure established by law on the detaining authority because of Art. 21. Emphasizing upon the great value attached by the court to the right of personal liberty, Justice Bhagwati stated :

> "This constitutional right of life and personal liberty is placed on such a high pedestal by this court it has always insisted that whenever there is any deprivation of life or personal liberty, the authority responsible for such deprivation must satisfy the court that it has acted in accordance with the law. This is an area where the court has been most strict and scrupulous in ensuring observance with the requirements of the law ..... The court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved in the release of a possible renegade."[113]

The court has gone on to point out that personal liberty is one of the most cherished values of mankind; without it, life will not be worth living and it is, therefore, necessary that the courts always lean in favour of upholding personal liberty. The power of preventive detention is an extraordinary power can be exercised strictly in accordance with the provisions of the Constitution and the law. As preventive detention encroaches upon personal liberty, it is the solemn duty of the courts to ensure that this power is exercised strictly in accordance with the requirements of the Constitution and the law. Even a slight deviation from the law may result in the order of preventive detention being quashed. The court may release a detenu even if detention may have been valid till the breach occurred. If there is a breach of any provision of law, the rule of law requires that the detenu must be at liberty, however wicked or mischievous he may be.

In the instant case, a smuggler detained under the COFEPOSA Act was released by the court on the ground that there was undue delay in supplying to him the copies of the documents and other materials relied upon in the grounds of detention, and there was unreasonable delay in considering the representations of the detenu.[114] The court cautioned that it was not pronouncing upon the validity of the order of detention but merely holding that continued detention of the petitioner became

113. AIR 1980 SC 19 8.

114. See *V. J. Jain* v. *Pradhan*, AIR 1979 SC 1501.

illegal because of non-compliance with statutory and coustitutional requirements. The court did not feel happy in releasing a possible smuggler but the court justified this by saying that the power of preventive detention being a "draconian" power is tolerated in a free society as a "necessary evil." Justice Bhagwati cautioned that "the law cannot be subverted particularly in the area of personal liberty, in order to prevent a smuggler from securing his release from detention" for law has to be the same for every body. Bhagwati J. oberved[115] :

> "This court would be laying down a dangerous precedent if it allows a hard case to make bad law. We must, therefore, interpret the provisions of the Constitution and the law in regard to preventive detention without being in any manner trammelled by the fact that this is a case where a possible smuggler is seeking his release from detention."

VIII

EPILOGUE

As has already been stated above, this paper does not purport to be an exhausitive survey of the role played by Justice P. N. Bhagwati as a Supreme Court Judge in the development of the Indian Law. This paper presents a sample of law-making by the Judge only in one crucial area of the Indian Law, viz. Administrative Law, The Indian Administrative Law is still at the threshold of its development and in its formative stages. For a proper development of this branch of law what is needed is a partnership between the Parliament and the Judiciary designed to impart strength to the law and institutions to discipline administrative power and to keep it within proper checks so that it may not run amok but do good to the people and the society. As Lord Denning has stated sounding a note of warning : the vast powers of the administration, if exercised properly, may lead to a welfare state, but, if abused, they may lead to administrative despotism.[116]

Unfortunately, in India, Parliament has not so far thought it fit to improve Administrative Law. The fate of the Torts Bill and the Lokpal Bill are direct testimony to the legislative apathy in this area. While great strides have been made recently in other countries towards improving Administrative Law and establishing proper institutions and mechanism to control and supervise the administration, nothing of the kind has been done so far in India. Even to the Law Commission has not so for cared to direct its attention to the reform of the Indian Administrative Law.[117]

115. AIR 1980 SC 1987.
116. Lord Denning, *Freedom under the Law* 126 (1949).
117. See, M. P. Jain, Tasks befor the Administrative Reform Commission, (1966) 2 *Ban. L. J.*, 100-123.

Therefore, the main brunt of developing Adminitrative Law, to keep pace with the developing administrative process, falls on the Judiciary and especially on the Supreme Court. The judiciary has to assume initiative, leadership and responsibility to protect individual's life, liberty or property against undue administrative action. The Supreme Court Judges will thus have to play an innovative and oreative role in developing Administrative Law. The burden of this paper is to highlight this aspect and to present Justice Bhagwati's contribution in this direction as a model and a sample of what the Judges can achieve, and must seek to achieve, by way of improving Administrative Law.

Justice Bhagwati in his opinions has shown great awareness of the needs of the times, viz., arbitrariness should be eliminated in state action and that arbitrary exercise of power should be stopped.[118] Power is a trust and no one has a right to misuse it. The individual citizen is at present dwarfed by the state. It is thus the great historic function of the judiciary in modern times to create safeguards against abuse of executive and administrative power. Judges have to exereise a significant creative role in expounding, expanding and revising public law so as to control administrative power. This has to be the constant endeavour of the judiciary in a democratic society for the government usually does not like itself to impose limitations on its powers and the legislatures are relatively subservient to the executive and do not usually do what the Government does not want. Justice Bhagwati is deeply aware of this mission of the judiciary in a democracy. Perhaps, to end this paper, nothing better can be done than to quote his own words underlining the great need in India to develop a viable system of administrative law so as to maintain rule of law. Justice Bhagwati says in *Ramana*[119] :

> " ...the great purpose of the the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found. It is indeed unthinkable that in a democracy governed by rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitriness."

It is clear from the opinions surveyed here that these are not mere formal words but that Justice Bhagwati has endeavoured to translate these sentiments into practical legal propositions. It may be hoped that Justice Bhagwati will continue to be guided by these sentiments in future as well and continue his efforts towards the vindication of tule of law in India contributing towards the development of Administrative Law.

118. *Amarjit Ahluwalia* v. *Staet of Punjab*, AIR 1975 SC 984, 1990.
119. *J. A. A.* v. *Ramana*, AIR. 1979 SC at 1636.

JUSTICE BHAGWATI AND PERSONAL LIBERTY

Dr. C.M. JARIWALA*

I. Introduction :

Article 21 of the Indian Constitution guarantees the fundamental right to life and personal liberty. It says that no person shall be deprived of his life or personal liberty except according to the procedure established by Law. This shortest worded fundamental right clause has been subjected to judicial dissection. The judges, especially of the Supreme Court, have given multi-coloured shades of meaning to article 21. It is said that Justice Bhagwati is one of the leading judges of the Supreme Court of India who has been the champion of the cherished right to personal liberty. The present study makes an attempt to find out the juridical philosophy of Justice Bhagwati with respect to the right to personal liberty.

Justice Bhagwati, a freedom fighter, was the Judge of the Gujarat High Court and also its Chief Justice. He was on the Bench of the Gujarat High Court from 1960-1973 for nearly 13 years. Since 1973 he has been a Judge of the Supreme Court of India. Thus he has twenty years of valuable experience in the judiciary at the State and the national level.

At the High Court level, it is unfortunate that there was not a single case where Justice Bhagwati was a member of the Bench deciding personal liberty cases.[1] And therefore, it becomes difficult to get an insight into his juridical approach at the High Court level. There were few personal liberty cases at the High Court level because article 32, in itself a fundamental right, guarantees the right to move directly the Supreme Court for the enforcement of the fundamental right. Any person whose right to life or personal liberty was illegally infringed, normally took the help of the article 32 and sought the protection of the Supreme Court instead of enforceing the fundamental right through the High Court under article 226.

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1. This information is based on the cases reported in AIR Guj. Secti n 1960-1973,

At the Supreme Court level,[2] however, there have been sixty five personal liberty cases decided by the Court of India where Justice Bhagwati was one of the members of the Bench. In twenty six of these cases, the Supreme Court of India protected the right to personal liberty. Justice Bhagwati delivered in all 37 judgements out of which two were separate concurring opinions, and in two cases he gave minority opinion. In thirteen cases Justice Bhagwati granted protection to the petitioners under Article 21. In four cases he issued direction to the appropriate Government to comply with certain conditions so as to avoid any infringment of article 21. In two cases even though Justice Bhagwati Court[3A] held that the action of the governmental authorities was illegal, in the light of the assurance given by the authorities the Court did not grant any protection to the petitioners. The years 1974 and 1975 are important in the history of the Bhagwati Court when Justice Bhagwati delivered twenty three opinions for the Court out of which in nine cases the right to personal liberty was safeguarded against unlawful deprivation of the said right by the State.

II. Concept of Personal Liberty :

The scope of the right to personal liberty received three dimensional judicial approach in the very first case of the Supreme Court of India immediately after the commencement of the Consi·titution of India.[3] The majority judgement adopted the restricted approach and opined that the word personal biberty in article 21 meant only "liberty relating to or concerning the person or body of the individual."[4] On the other hand Justice Fazal Ali, dissenting, gave an expansive interpretation to the concept of personal liberty to give article 21 the status of residuary freedom clause.[4A] But Justice Das adopted a moderate view by adopting a midway path between the two extremist opinions.[5]

The three dimensional concept came before the Bhagwati Court for the first time for judicial scrutiny in the *Habeas Corpus* case.[6]. This was a case which came before the court when the proclamation of emergency

2. Data is based on the Supreme Court cases reported in the A. I. R, 1973-1980 and The Unreported Judgement, Supreme Court, Jodhpur, 1973-1980 (hereinafter referred to as *U. J.* (*S. C.*)
3. *A.* K. *Gopalan* v. *State of Mad,*, A. I. R. 1950 S. C. 27
3A. The Bhagwati Court means the judgement delivered by Bhagwati, J., for the Court.
4. *Id* at 37 *per* Kania C. J.; *Id* at 71, *per* Patangali Sastri, J.; *Id* at 97 *per* Mukherjea, J.
4a. *Id.* at 53-55.
5. *Id.* at 111.
6. *A. D. M. Jabalpur* v. *S. Shukla*, A. I. R. 1976 S. C. 1207.

was inforce in the country. Justice Bhagwati was of the opinion that the words 'personal liberty' in article 21 included all the attributes of person of liberty. However, he left the question open as to what those attributes were and thus the area of identification and definition of personal liberty was left open for future cases.[7]

In arriving at the above conclusion Justice Bhagwati upheld the minority view of Subba Rao and Shah, JJ. in the *Khark Singh* case[8] and declared the majority opinion as incorrect. In that case the majority court took the stand that the term personal liberty was compendious term to include varities of right constituting the personal liberty of man excluding those provided under article 19 (1). The freedom of movement under article 19 (1) (d) according to the majority view, was excluded from the area of personal liberty under article 21.[9] On the other hand Subba Rao J., for self and Shah, J., was of the opinion that the term personal liberty included all the varities of right constituting personal liberty and some of its attributes were included in article 19 (1).[10] In order to support his stand Justice Bhagwati took the help of the *Bauk Nationalisation*[11] case and thus overruled the majority opinion in the *Kharak Singh* case. The Bhagwati Court in the present case comes near Justice Fazl Ali's[12] expanive approach to the said term. Thus after twenty five years of the judicial restrictivism, the Court adopted a liberalist view and gave the term personal liberty a shade of residuary freedom.

The question of delineating and defining the term personal liberty, which was left open by the Bhagwati Court in the *Habeas Corpus* case, was taken up by the learned judge in the *Maneka Gandhi* case.[13] In this the petitioner's passport was impounded in the public interest by the government of India and the government did not furnish the reasons for its deccision. The petitioner claimed protection of the Supreme Court on the ground, *inter alia*, of the violation of her right to go abroad which was included in the right to personal liberty guaranteed under article 21. This point came came up for the first time before the Supreme Court in

7. *Id.* at 1361.
8. *Kharak Singgh* v. *State of U. P.;* A. I. R. 1963 S. C. 1295.
9. *Id.* at 1302 per Ayyangar, J.
10. *Id.* at 1306.
11. *Cooper* v. *Union of India*, A. I. R. 1970 S. C. 564. Though a property right case, yet the Court by way of *obiter* declared the *Kharak Singh* minority view as correct approach.
12. *Gopalan* v. *State of Mad.*, A. I. R. 1950 S. C. 27, 53-55
13. *Menaka Gandhi* v. *Union of India*, A. I. R. 1978 S. C. 597 (Per Bhagwati J., jointly with Untwalia and Murtaza Fazi Ali, JJ., rest of the judges concurring)

the *Satwant Singh* case.[14] Subba Rao, C. J., delivering the majority judgement on behalf of himself, Shelat and Vaidialingam, JJ., opined that the right to go abroad was included in the right to personal liberty. But Justice Hidayatullah, dissenting, was of the opinion that the right to demand a passport and in turn to go abroad was not included in the right to personal liberty. Following the *Satwant Singh's* majority, the *Maneka Gandhi* case, Justice Bhagwati upheld that "personal liberty" within the meaning of article 21 included within its ambit the right to go abroad. However, Justice Kailasam confined the said term to freedom from restraint of person. He adopted a restricted view because according to him "article 21 used the word 'personal' before "liberty".[15]

The learned judge before coming to the above conclusion dealt with the background philosophy of the fundamental right. He pointed out as observed by Granville Austin[16] that the fundamental rights were indelibly written in the subsconscious memory of the race which fought well-nigh thirty years for securing freedom from British rule and they found expression in the Constitution of India. In the light of this theme he observed that the court should expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by judicial construction.[17] One finds here judicial activisim in the field of the personal liberty jurisprudence. The Bhagwati Court held that the term personal liberty in article 21 was of the widest ampllitude and it should be interpreted accordingly. The Supreme Court of the United States have interpreted the liberty clause of their constitution to mean the residuary freedom clause.[18] And with this shade of colour Justice Bhagwati painted the Indian personal liberty concept. The Supreme Court of India,[19] while interpeting the term 'personal liberty', is also marching in tune with the Bhagwati Court's wave length.

Meaning of Procedure Established by Law :

In the very first case on personal liberty[20] the Supreme Court of India by majority interpreted the expression "procedure established by

14. *Satwant Singh* v. *A. P. O., New Delhi*, A. I. R. 1967 S. C. 1836.
15. Id. at 676.
15. Id. at 676
16. Ganville Austin, *The Indian Constitution-Corner stones of a Nation.* 1972, 50
17. *Id.* at 622.
18. 16. *Munn* v. *Illinois* (1876) 94 U. S. 113; 142; *per* Field, *J. Mcyer* v. *Nebraska* (1923) 262 U. S. 390, 392 *per* Mc Reynolds, J.
19. See for example : *Snnil Batra* v. *Delhi Admine.*, A. I. R. 1978 S. C. 1675, 1727; *M. H. Hoskat* v. *State of Mah.*, A. I. R. 1978 S. C. 1548.
20. *Gopalan* v. *State of Mad.*, A. I. R. 1950 S. C. 27.

law' to mean 'procedure prescribed by the Statute.'[21] But Fazl Ali, J., the only dissent, was of the opinion that the procedure prescribed must satisfy the four requirements of principle of natural justice and that the law should be just law.[22] Justice Bhagwati in the *Habeas corpus* case[22A] did not deviate from *Gopalan's* majority view. But the aftermath of emergency cleared his clouded vision and in the *Maneka Gandhi* case[23] he firmly settled the law that the above expression required that the procedure must be 'right, just and fair' and not 'arbitrary, fanciful or oppressive.' The above position was arrived at through inter-linking the 'procedure' of article 21 with the principle of reasonableness under article 14.

In this case the Central Government while impounding the passport of the petitioner did not give her either an opportunity of hearing or the reasons for impounding her passport despite request made by her. It was argued on behalf of the government that the Passport Act, 1967 did not provide for such procedure and there was no need of following such procedure. But the Bhagwati Court, rejecting the contention, held that there was non-observance of the rule of natural justice embodied in the maxim *audi alteram partem :* no decision shall be given against a party without affording him a reasonable hearing. Though the Court reached to the conclusion that the order impounding her passport attracted the provision of article 21 yet, the petitioner could not get the relief demanded except that the Court ordered that the petitioner be given within two weeks an opportunity of hearing and that her representation be dealt with expeditiously.[23] This order was passed in the light of the assurance of the government to remove the defect in the process of impounding her passport.

It may be noted that article 13 (2) says that if the State takes away or abridges any of the fundamental rights, it shall be void to extent of the contravention. In the present case when the Court opined that the order was violative of article 21. then it should have quashed the order of impounding the passport of the petitioner and directed the passport authorities to restore the petitioner's right go to abroad. The Bhagwati Court in the present case though injects new blood in the one time defunct artery of 'procedure established by law' yet, the judicial activism in the final

21. Id. at 39 per kania, C. J., *Id* at 72-73 *per* Patangali Sastri, J.; *Id* at 102 *per* Mukherjea, J.; *id* at 114-115 per Das, J.
22. *Id* at 60. See also Patanjali Sastri, J., *Id* at 102 and Mahajan, J., Id at— though not adopted minority view on the point yet, a liberal voice can be seen in their opinions.
22A. *A. D, M.; Jabalpur* v. *S. Shukla,* A.I.R. 1976 S. C. 1207,
23. *Maneka Gandhi* v. *Union of India,* A.I.R. 1978 S. C. 597, 630.

analysis missed the real path of justice. Such an approach of the judiciary will encourage the government first to violate the fundamental right and then later on assure the court that they would make good the defect. Had the judiciary declared the action of the government void, the authorities, if wanted, could have passed a fresh order avoiding the draw-backs pointed out by the court. Thus processual justice could have complied with the requirement of article 21.

The expending horizons of 'procedure established by law' bears testimony in the *Hussainara Khatoon* cases. In the *First Hussainara Khatoon* case[24] a writ petition for a writ of habeas corpus was filed before the Supreme Court for the release of undertrials subjected to unnecessary prolonged detention in prison. These under-trials included men, women and children and some of whom were behind the bars for periods ranging from three to ten years without their trial having been commenced so for. In these cases the offences with which some of them were charged would not warrant punishment for more than a few months, perhaps for a year or two. Justice Bhagwati speaking for the Court on behalf of himself and Koshal, J., held that even though the fundamental right chapter did not specifically include the right to speedy trial but following the ratio of the *Maneka Gandhi* case, it was implicit in the broad sweep and content of article 21. He emphasised that the compliance with the requirement of article 21 did not merely require that some semblance of a procedure should be prescribed by law but that the procedure should be 'reasonable, fair and just.' And the procedure which did not ensure a reasoneble quick trial would, according to the Bhagwati Court, fall foul of article 21.[25] However, Pathak, J., refrained from making any final comment or obervation as to the application of article 21 until the final determination of the habeas corpus petition. Thus the dynamic interpretation of the expression the 'procedure established by law' gave birth to the fundamental right of speedy trial.

Another extension of the above expression can be seen in the *Second Hussainara Khatoon* case.[26] This writ petition came up for hearing before the court pursuant to the directions given by the court in the *First Hussainara Khatoon* case. In the present case the attention of the court was directed towards those cases where the under-trial were unable to engage a lawyer who would appraise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that behalf. Justice Bhagwati, issuing the

24. *Hussainara Khatoon* v. *State of Bih.,* A.I. R. 1979 S. C. 1360.
25. *Id* at 1365.
26. A. I. R, 1979 S. C. 1369.

order of the Court, opined that when a procedure did not make available legal services to an accused person who was too poor to afford a lawyer and had to go through the trial without legal assistance, then such a procedure would not be regarded as reasonable, fair and just as required under the expression 'the procedure established by law.' The Court held that the right to free legal services was implicit in the guarantee of article 21. According to the court this right was available to every accused person who was unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or in-communicado situation unless the accused person himself waived such a right. The right of the under-trial prisoner to the assistance of a lawyer provided at State cost implict in article 21 was also supported in the *Third Hussainara Khatoon* case[27] where the court by an order issued direction in that regard.

The free legal aid services was in the mind of Justice Bhagwati for a pretty long time. His father Late Justice N.H. Bhagwati, judge of rhe Supreme Court, who was the Chairman of the Bombay Legal Aid Committee fought for the implementation of the legal aid scheme, right from the commencement of the Constitution of India. Now Justice Bhagwati is trying to make the dreams of his father a reality. He has been a Chairman of the Legal Aid Committee at the all India level. Through the Committee's report he recommended time and again to the Government of India to implement the legal aid services as soon as possible. But not much development has been made in that regard, The learned Judge, realizing the force of judicial direction as compared to the recommendation of the Committee, gave the free legal service the status of fundamental right under article 21. The direction issued by the judiciary would require the State to provide for the free legal aid to every person who is in peril to loose his personal liberty[28]. This recognition was given by its counterpart in the United States as far back as in the year 1937.[29] In India the judicial direction and the constitutional mandate in article 39 A now provides for free legal aid. However, one must not be too enthusiastic about a scheme without looking to the practical problems involved.

In *Maneka Gandhi's* wave length, Justice Bhagwati went alone in dissent[29A] even to strike down section 302 of the Indian Penal code

27. A. I, R, 1979 S. C. 1377,
28. A.I.R. 1979 S. C. 1377 at 1381. See the contra approach in *Janardhan Reddy* v. *State of Hyd.*, A. I. R. 1961 S. C. 217.
29. *Johnson* v. *Zerbst*, 304 U. S. 458 (1937); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).
29A. *Bachan Singh* v. *State of Punj.*, A. I. R. 1980. S. C. 818, 945.

in so far as it provided for imposition of death penalty as an alternative to life sentence. He declared such punishment ultra vires and void as being violative of articles 14 and 21 since it did not provide any legislative guidelines so as to when life should be permitted to be extinguished by imposition of death sentence. The learned Judge did not glve reasons for the order which he opined would be given ofter the reopening of the Court. It is surprising that even on the closing of the year 1980, the reasons still remained undelivered.

Preventive Detention :

Preventive detention has received constitutional recognition under article 22 sub-articles 4 to 7 under the Fundamental Right Chapter, And sinee the commencement of the Indian Constitution, the Indian Parliament has passed under different nomenclatures almost a permanent law relating to preventive detention. It is a short cut to put a person behind the bars without trial and thus it gained the ill fame of being a draconian measure. When the Supreme Court started operating the dragon in the very first case, it could only amputate by majority of the court Section 14 of the Preventive Detention Act, 1950 which excluded judicial scrutiny of grounds of detention.[30] Immediately after Justice Bhagwati was elevated to the Supreme Court of India, the Court in the second phase cut down Section 17 A of the Maintenance of Internal Security Act, 1971.[31] The judiciary also freed detenus who were illegally detained by the authorities.

With this environment in the Supreme Court[32] Justice Bhagwati, in his very first case on personal liberty, was confronted with the problem of balancing the right to personal liberty against preventive detention. There were forty-five cases decided by the Supreme Court where Justice Bhagwati was one of the members of the Bench; whereas, in twenty cases the Court ordered the petitioners to be set free forthwith. Out of these forty-five cases in thirty-three cases the detention orders were passed by the Government of West Bengal. Justice Bhagwati himself delivered judgement for the court in twenty-six cases out of which in twelve cases the orders of detention were set aside. He had to his credit one dissenting opinion favouring the case of the detenu and one concurring with

30. *A. K. Gopalan* v. *State of Mad.*, A. I. R. 1950 S. C. 27.
31. *S. N. Sarkar* v. *State of W. B.*, A. I. R. 1973 S. C. 1425.
32. *K. Sanval* v. *Dist, Magis, Darieeling*, A. I. R. 1973 S. C. 2684.
33. Data based on the A. I. R. Supreme Court section and U. J. (S. C. 1973-1980.
34. *Khudiram Das* v. *State of W. B.*, A. I. R. 1975 S. C. 550, 555 *per* Bhagwati, J.

the majority judgement.[33] The above case law may be analysed under the following heads.

I. Ground of Detention

Arttcle 22 (5) affords protection to a person detained under any law providing for preventive detention. This includes that such person shall, as soon as may, be, communicated the grounds on which the order of detention has been made. This requirement is based on two reasons : Firstly, the detaining authority cannot whisk away a person and put him behind the bars at its own sweet will. Secondly, once the detenu knows the facts and materials which are the basis of his detention, he can make an effective representation against the order of detention.[34] It is not just enough to give the detenu facts and materials constituting the ground but it must, according to the learned judge, be 'fairly and fully put across to the detenu'.[35] The judiciary, which means either the Bhagwati Court or the Court in which Mr. Justice Bhagwati was a one of the members has given rise to many other requirements arising out of the above condition.

A. The ground must be relevant.

The ground of detention must be reievant to the ground on which an order of detention is made. The Preventive Detention Act, 1950 and the Maintenance of Internal Security Act, 1971 in Section 3 authorises the authorities to detain any person with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, the security of India, the security of the State, the maintenance of public order, the maintenance of supplies and services essential to the community, etc.

In *Gora* v. *State of W. B.*,[36] the ground of detention referred to only one incident which narrated that the petitioner along with other associates armed with lethal weapons, including fire arms, raided the house of one 'A' and looted away cash, ornaments, etc. Further at the time of operation he fired indiscreminately disregarding human lives and their safety and this resulted in the death of two neighbours. It was further mentioned that the action of the petitioner created such panic in the locality that the local people felt a sense of insecurity and thus he acted in a manner prejudicial to the maintenance of public order. Mr. Justice Bhagwati, following the test laid down by Hidayatullah C. J. in *Arun*

35. *Haru Sarkar* v. *State of W. B.*, A. I. R. 1974 S. C. 2240,
36. A. I. R. 1975 S. C. 473. See also *Gandhi Sardar* v. *Union of India*, A. I. R. 1975 S. C. 755-Bhagwati, J. delivered opinion of the Court.

Ghosh's case,[37] held that looking to the serious act of dacoity, which was committed at dead of night, armed with lethal weapons and using them indiscriminately resulting in grevious injuries to two persons, it created a panic in the locality and seriously disturbed the even tempo of the community in the village. And thus there was clearly disturbance of public order. In another case the ground stated that the petitioner along with his associates had gone to a village armed with bow and arrows, lathis, daggers and so much terrorised the people that they had to take shelter in nearby jungle. This ground was declared to be relevant to the maintenance of public order.[38] In *Bankatlal's* case,[39] the court examined the relevancy of the ground of food adulteration to the maintenance of supplies & services essential to the community. In the present case the petitioner indulged in food adulteration activities on a large and organised scale. Sarkaria, J., for himself and Bhagwati, J., held that the food adulteration activity, particularly of an organised kind, was an activity prejudicial to the maintenance of supplies and services essential to the community. It may be pointed out that the food adulteration activity as such does not directly obstruct the flow of supplies and services essential to the community. The mere fact that the State is not able to curb the said offence, should not give rise to the application of draconian power of preventive detention. Once the area of the grounds is extended then activities even indirectly connected with the grounds may attract preventive detention. Thus the judiciary must be slow in allowing even remote extension of the ground.

b. The Ground must not be vague

The ground should not be ambigious. If the ground is vague, the petitioner will not be in a position to know clearly the reasons for his detention and thereby he would not be in a position to make an effective representation against the order of detention. In *Ohab S. K.* v. *State of W. B.*,[40], the ground mentioned "23 hours" without mentioning the date. The petitioner unsuccessfully claimed that his detention should be set aside as the ground was vague. But the court held that in the sequance of the timings "23 hours" would mean to any reasonable person said hours of the same day. The court also did not allow the plea of the

37. *Arun Ghosh* v. *State of W. B.*, A. I. R. 1970. S. C. 1128, whr Hidayatullah, C. J., made a fine distinction between 'law and order' and 'public order' laying down the criteria that if, an alleged act disturbs the current life of the community, it would come within 'the arena of 'public order'.
38. *Kali Charan* v. *State of W. B.*, A. I. R. 1975 S. C. 999.
39. *Bankat Lal* v. *State of Raj.*, A. I. R. 1975 S. C. 522.
40. U. J, (S. C.) 1975, 98.

vague ground where the ground of detention did not mention the name of associate.[41]

The duty of the detaining authority does not cease merely on the communication of the ground but the detenu must be able to understand the contents of the ground. In case of a detenu who is illiterate, it is necessary that the contents of the ground should be explained to him in his language. Thus where the detenu was given a translated copy of the ground of detention in his vernacular and the authority explained to the petitioner the contents of the ground in his mother tongue, Hindi, the court held that there was communication of ground of detention to the petitioner.[42]

Apart from the grounds of detention, there may be other particulars which might have been taken into consideration while making the order of detention. Has the detenu the right to get these particulars as well ? Article 22 (5) requires that the detenu shall be communicated with the grounds on which the order of detention has been made. Section 3, subsection 3 of the Preventive Detention Act provided that the authority making the order of detention, in addition to the basic facts and materials which constituted the grounds of detention, was also required to send "such other particulars as in his opinion have a bearing on the matter". In *Khudiram Das's* case,[43] the petitioner demanded 'other particulars' as a matter of right to make an effective representation. But the Bhagwati Court rejected the above demand. He observed[44] :

> There is nothing in Article 22 (5) of the Constitution or in any provision of the Act which requires that these other particulars should be communicated to the detenu. The only requirement of communication is in regard to the basic facts and materials which constitute the ground of detention and if there are "other particulars" besides the ground of detention which are communicated to the State Government, they need not be disclosed to the detenu.

It is submitted that the Bhagwati Court in the instant case missed a chance of imposing one more control on the arbitrary excercise of the preventive detention power. The Court instead of allowing the detenu to know the detailed reasons for his detention asked the detenu to shut his eyes once he got the grounds of detention. This way there may

41. *Darogarai* v. *State of W. B.*, A. I. R. 1975 S. C. 983. See also *Gdut Ali.* v. *State of W. B.* A. I. R. 1974 S. C. 894.
42. *Daroga Rai* v. *State of W. B.*, A. I. R. 1975 S. C. 983.
43. *Khudiram Das* v, *State of W. B.*, A. I. R. 1975 S. C. 550.
44. *Id* at 562.

be certain facts in "other particulars" but the detenu will not get it. And in such circumstances how far it is justified to say that in absence of these particulars. the detenu will still be in a position to make an effective representation. The observation of Ray, C. J., in *H. Saha's* case[45] which required :

> the order of detention should set out *all* the materials on the basis of which the appropriate Government comes to a conclusion that it is necessary to detain a person.

may be said to be the correct approach in the light of the above remark.

In the year 1980, the same Court adopted a liberalised approach in the above matter. In the *Icchu Devi* case[46] the detenu was served with the grounds of detention but inspite of his repeated requests certain documents, statement and tape-recorded conversations mentioned in the ground of detention were not supplied to the detenu. On the basis of this irregularity the Bhagwati Court rightly quashed the order of detention. Justice Bhagwati opined[47] :

> It would not therefore be sufficient to communicate to the detenu a bare recital of the ground of detention, but copies of documents, statements and *other materials* relied upon in the ground of detention must also be furnished to the detenu.

The right of effective representation has been extended in the present case to club the power to detain any person at the sweet will of the government authorities. This will give the detenu a more safeguard in gettlng judicial protection.

The detenu in the *Icchu Devi* case was an alleged hardened smuggler detained under the Conservation of Foreign Exchange and Prevention of of Smuggling Activities Act, 1974. And Justice Bhagwati was aware of the fact that to set free a smuggler would mean that he would once more resume his nefarious activites causing incalculable mischief and harm to the economy of the Nation".[48] But in the zeal of upholding the right to personal liberty, the cherished value of mankind, he observed[49] :

> The law cannot be subverted, particularly in the area of personal liberty, in order to prevent a smuggler from securing his release. This court would be laying down a dangerous precedent if it allows a hard case to make bad Law.

45. *H. Saha . State of W. B.*, A. I. R. 1974 S. C. 2154 (*emphasis supplied*).
46. *Icchu Devi* v. *Union of India*, A. I. R. 1080 S. C. 1983, 1988.
47. *Id.* at 1988, 1989. *(Emphasis supplied)*
48. *Id.* at 1986
49. *Id.* at 1987

The right to personal liberty is one of the precious possessions of the mankind and without it life would not be worth living. People have laid down their lives to secure, protect and preserve the tender plant of personal liberty. The Court has preserved the cherished value regardless of the social cost involved.

There were series of cases where in the affidavit filed by the District Magistrate said that the petitioner was a 'notorious wagon breaker' or 'notorious stealer of railway property' but the ground of detention mentioned only one incident. The petitioners case was that as this ground was not communicated to them which attracted article 22 (5), and they should be set free forthwith. The Bench consisting of Palekar, Bhagawati and Iyer, JJ., have adopted double standards. In *Anil Dey's*[50] and *Alek Mohammad's*[51] cases, Krishna Iyer, J., took the view that the declaration of the District Magistrate that the petitioner was a 'notorious stealeres of railway property' did not affect the detention of the petitioner and there was no question of insufficient communication of the grounds. On behalf of the court be observed :

> It is self-evident that sophisticated signal equipment cannot be removed by a layman or at yro. Indeed it requires a certain measure of technical skill and electrical experties ... All that has been done in the affidavit in opposition is to set out more fully what is thus capsuled in the seemingly single act communicated. To abridge is not always, to omit.

It may be recalled that in the above cases there was only one ground which mentioned in the first case that the petitioners committed theft in respect of signal materials,[50] and in the second, that he committed theft of telephone cable wires.[51] In the light of only one incident and the declaration of the District Magistrate, it is difficult to say that there was nothing else in the mind of the detaining authority and thus the court should have declared the ground of detention as insufficient. This was only technical expertised view of the court which restricted the judicial protection in those cases.

It is surprising that Justice Bhagwati, who was a member of the Bench deciding the above two cases, took a different view in *Mondal's case.*[52] In this case the only incident mentioned in the ground of detention was that the petitioner along with his associates broke open a railway

50. *Anil Day* v. *State of W. B.*, A. I. R. 1974 S. C. 832.
51. *Alek Mohemmad* v. *State of W. B.*, A. I. R. 1 974 S. C. S. C. 889.
52. *G. H. Mondal* v. *State of W. B.*, A. I. R., 1774 S. C. 895, see also *Haru Sarkar* v. *State of W. B.*. A. I. R S. C· 2240 the Bhagwati court opinion.

wagon and while committing theft of rice, he was caught red handed. And his act was prejudicial to the maintenance of supplies and services essential to the community. The affidavit filed by the District Magistrate in reply to the petition mentioned that the detenu was one of the notorious wagon breakers and was engaged in systematic breaking of railway wagons. According to the Bhagwati Court "the ground on which the order of detention was really made, therefore, included the ground that the petitioner was a notorious wagon breaker who was systematically engaged in breaking railway wagons and committed the theft of rice and wheat." As this ground was not communicated to the detenu so that he could make an effective representation, the Court issued a writ of habeas corpus quashing and setting aside the order of detention. A similar approach was also followed by the Bhagwati Court in *Debu Mahto's,*[53] *Dharman Raj's*[54] and *Haru Sarkar's*[55] cases and in *Deben Das's* case[56] justice Palekar speaking for the same Bench also joined the stream of the Bhagwati Court's justice.

From the above opinions one may feel that Bhagwati and Palekar, JJ., were lining together in protecting the right of the detenu; whereas. Justice Iyer had a lone voice. But in the year 1975 the same Bench through Justice Bhagwati in *Madhab Roy* v. *State of W. B.,*[57] followed Iyer Court's approach in the *Anil Dey* case. In the present case the ground mentioned only one incident of theft committed by the petitioner of copper return feeder wire of railway traction ; whereas, the affidavit of the District Magistrate said that the petitioner was one of the notorious anti-social element of Shyamnagar P. S. Justice Bhagwati defending the ground as sufficient sang in Iyer Court's tune when he pointed out that though the incident was isolated yet, "it connotes a course of previous conduct of such or similar activities where specialised experience has been acquired and specialized kind of mischief has been planned to be perpetuated." And thus aecording to the learned judge the additional words that the petitioner was one of the notorious *anti-social element* indulging in committing theft of copper feeder wire" was "really nothing but *an elaboration of what is already implied* in the apparently single solitary incident communicated to the petitioner".[57A]

53. *Debu Mahto* v. *State of W. B.* A., I. R. 1974 S.C. 816. See author's comment in (1975) 15 S. C. J., 10.
54. *Dharman Rai* v. *State of W. B.*, A. I. R. 1974 S. C. 897.
55. *Haru Sarkar* v. *State of W. B.*, A. I. R. 1974 S. C. 2240.
56. *Deben Das* v. *State of W. B.*, A. I. R. 1974 S. C. 1149.
57. *A* I. R. 1975 S. C. 255.
57A. *Id.* at 257 (*emphasis supplied*).

It is submitted that the court in the present case fails to fulfil its solemn duty to uphold the right to personal liberty. Firstly, as compared to *Anil Dey's* and *Alek Mohammed's* cases, in the present case the District Magistrate used the words 'anti-social element' which itself is very vague and may mean different things at different time and place. Had the District Magistrate used the words 'notorious stealer of copper feeder wire of railway', this could have been considered as the elaboration of the ground. But with this new addition, the ground given to the detenu, cannot be considered as "fairly and fully" communicated to the detenu. Secondly, the implication drawn by the judiciary is so technical that a reasonable persons may not imply the same thing. It seems that the judiciary, in the light of the rising wave of such activities which have serious and disturbing consequences, has diverted the course of justice to deal firmly with such activities rather than allow itself to lean in favour of upholding personal liberty.

C. The authority must apply its mind

It is necessary that the authority who is detaining a person must apply its mind. Section 3 of the law relating to preventive detention of 1950, 1971 and 1974 requires that the authority making on order of detention must be statisfied before making such order that the activity of the detenu is prejudicial to warrant an action under the law. The satisfaction may be subjective or objective. This distinction raises the question as to the scope of judicial review.

In *Binod Bihari's* case,[58] the petitioner was served with the Hindi as well as English version of the order of detention together with the grounds also in Hindi and English. The English version of the ground of detention recited that the District Magistrate was satisfied that if the detenu was allowed to remain at large he would indulge in activities prejudicial to 'the maintenance of public order' 'or' 'security of the State'. The use of the words 'or Security of State', according to the petitioner, showed that the District Magistrate did not apply his mind and the order of detention should be quashed. Justice Bhagwati, rejecting the contention, held that there was no infirmily in the order of detention because : firstly, the addition of these words was obviously the result of inadvertance and no argument could be founded upon it; secondly, Hindi being the official language of the state, it was the Hindi version of the grounds of detention which must be regarded as authentic and the validity of detention must be judged with reference to the Hindi version.

58. A. I. *R.* 1974 S. C. 2125.

The another instance is *Manilal Singhanias's* case.[59] The High Court was convinced that there were some defects in exercising the preventive detention measure and on that ground it set aside the order of detention. But when the case came before the Bhagwati Court the learned Judge even though felt that there were some defects when he said "But a doubt does begin to gaow at the mind of the Court, " and held "we do not want to express any opinion".[60] The judicial inactivism is also evident in the present case when the learned judge, without setting aside ihe order of detention, said "we are glad that the State government and the District Magistrate have stated before us that they would not re-detain the first respondent on the same material".[60A] The Court was thus satisfied on the apology of the authority and forgot its solemn duty to quash the order of detention and safeguard the cherished right to personal liberty.

The Supreme Court of India have quashed the order of detention where the detentions were on two disjunctive grounds. The Court took the stand that this mistake on the part of the authorities showed that they did not apply their mind.[61] Moreover, the Court has adopted a microfine approach in cases of preventive detention.[62]. They have not hesitated in striking down the order of detention even in case of breach of law "in the slightest measure".[63] It is submitted that the inadvertence on the part of the authority handling the draconian measure should not be allowed. In the present case the Court was convinced that there was a mistake on the part of the detaining authority but the judicial activisim was restricted in this area even though the grounds were given in two versions. The Bhagwati Court itself in *Dulal Chandra's* case[64] held that a mistake in the grouud of detention would result in quashing the order of detention. In this case the affidavit filed by the District Magistrate mentioned that he had made a mistake, still the Court set aside the order of detention. However, the learned judge pointed out that had the District Magistrate made a subsequent affidavit stating on oath that he committed the mistake with the explanation for making such a mistake then the Court would have consider the matter otherwise.

59. A. I. R. 1974 S. C. 2125.
60. A. I. R. 1976 S. C. 456
60A. *Id* at 201.
61. *Krishori Mohan* v. *State of W. B.*, A. I. R. 1972 S. C. 1949; *Akshoy Konai* v. *State of W. B.*, A. I. R. 1973 S. C. 300.
62. See author's, Microfine Judicial Approach in Preventive Detention Cases, *Ban. L. J.*, 1975, 103.
63. *Icchu Devi* v. *Union of India*, A. I. R. 1980 S. C. 1983, 1988.
64. *Dulal Chandra* v. *State of W. B.*, A. I. R. 1974 S. C. 2361.

There were another group of cases where the petitioners had challenged the order of detention on the ground that there was a time gap between the dates of 'affecting act' and order of detention and in such cases it would be presumed that there was no real and genuine satisfaction of the detaining authority required under section 3 of the Maintenance of Internal Security Act, 1971. Palekar's[65], Bhagwati's[66] and Iyer's[67] Courts had taken the stand that a time gap of five months between the 'affecting acts' and the order of detention could not be said to be so unreasonable as to negative the genuineness of subjective satisfaction of the authority making the order of detention. In *Gora's* case,[68] Mr. Justice Bhagwati did not declare unreasonable a delay of even six months. A time gap of seven months resulted in quashing and setting aside the order of detention by the Palekar Court.[69]

In *S. K. Nizamuddin's* case,[70] though there was a gap of only two and half months in detaining the petitioner persuant to the order of detention yet, the Bhagwati Court held that there was no 'real and genuine' subjective satisfaction arrived at by the authority making the order of detention. The reason given was that no satisfactory explanation was given by the authority for such a delay.

On the basis of the above case law, one can safely generalise that whether a delay is good or bad will depend on facts and circumstances of each case and no mechanical time limit may be set so as to bring it within the purview of reasonable delay. But when no explanation is forth coming, the court must scruplously examine the subjective satisfaction of the authority using the extraordinary power of preventive detention.

The above advance tends to blur the dividing line between the subjective satisfaction and objective satisfaction. The English courts have confined their area of investigation to the subjective satisfaction only[71]. But the American Courts have not set any area of unreviewable discretion.[72] The Indian judicial activism has reached the territorial water of the unreviewable discretion but it is still away from the shore. The learned judge has recognised this position in *Khudiram Das's* case where he

65. *Olia Malick* v. *State of W. B.*, A. I. R. 1974 S. C. 1816.
66. *Malwa Shaw* v. *State of W. B.*, A. I. R. 1974 S. C. 957.
67. *Gdut Ali Miah* v. *State of W. B,,* A. I. R. 1974 S. C. 973.
68. *Gora* v. *State of W. B.*, A. I. R. 1975 S. C. 473. See also *State of Ori.* v. *Sri Manilal Shnghania*, A. I. R. 1976 S. C. 456.
69. *Lakshman Khatik* v. *State of W. B.*, A. I. R. 1974 S. C. 1264.
70. *S. K. Nizamuddin* v, *State of W, B.*, A. I. R. 1974 S. C. 2353.
71. *Smith* v. *Rest Eilor Rural District Council*, 1956 A, C, 736; *Fawceet Prop, Ltd.* v, *Buckingham County Council*, 1961 A. C. 635.
72. *U. S.* v. *Wunderlich*, (1951) 342U. S. 98;

emphathetically stated that howsoever faint or delicate the line of demarcation might be the Supreme Court never failed to recognize it.[73] In this judicial current the learned judge in *Singhania's* case[74] set aside the judgement of the High Court of Orissa where according to him, the High Court travelled a little beyond its jurisdiction" and it was sitting in appeal against the findings of the District Magistrate". Once again the scope of judicial review was restricted only to the area whether the subjective satisfaction reached by the District Magistrate was based on no material at all or was such as no reasonble person would arrive at on the basis of the material which was before the District Magistrate.[75] Thus the pendulum once again swings on the side of the English Court. This will whittle down the edifice of judicial controls built by the Indian Supreme Court after a long struggle.

D. The time limit prescribed be followed

The law relating to preventive detention generally prescribes time limit for the completion of the preventive detention process at different levels, for example, the time limits are prescribed for giving of the grounds, giving the right of representation; consideration of the representation by the advisory board; consideration of the representation by the Government, etc. These time limits are written under the mandate of the Constitution of India which in article 22 sub-articles (4) and (5) provides for an expeditious action in the preventive detention process. And when the preventive detention machinery proved to be lethargic, the Supreme Court of India gave them a jolt.[76]

In *Gora* v. *State of W. B.*[77] the affidavit filed by the Dirstrict Magistrate, explaining the reason for the delay in sending the report to the State government until 2nd Jan. 1974, stated that 29th December, 1973 was the day when the order of detention was made and that day was Saturday and on that day he had passed eight other orders of detention, it was not possible for the typist to complete the work in one single day. Next day was Sunday, and on Monday the District Magistrate was very busy in connection with the food procurement work in the district and the next day being public holiday, he could send the report only on 2nd Jan. 1974. The Bhagwati Court opined that looking to the explanation

73. *Khudiram Das* v. *State of W,, B,* A, I, R, 1975 S, C, 550, 558,
74. *State of Ori,* v' *Sri Manilal Singhania,* A. I. R. 1976 S, C, 456, 457
75. *Id* at 457-48. See also the *Habeas Corpus* case, A. I. R. 1976 S. C. 1206, 1386 *Per* Justice Bhagwati—the restricted view "is the correct law on the Subject'".
76. *Abdul Sukkur* v. *State of W. B.*, A. I. R. 1972 S. C. 1915, *Kala Chand* v. *State of W. B.*, A. I. R. 1972 S. C. 2254.
77. A. I. R. 1975 S. C. 473.

of the District Magistrate, it was "sufficient to show that he sent the report to the State government with all reasonable despatch and there was no avoidable delay on his part". However, the learned judge pointed out "we do not wish to underscore the need for *strict compliance* with the requirement of Section 3, Sub-section 3."[78] It is submitted that the present case falls in the category of those cases where the judiciary instead of leaning in favour of peresonal liberty, unduly endorsed the action of the authority making the order of detention. Section 3, sub-section 3 of the Maintenance of Internal Security Act, 1971 uses the word "forthwith" instead of the words "as soon as". It denotes an extremely expeditious process. The fact that it was not possible for the typist to complete the work denotes as if they had pile of material to type. Normally, at the first instance the District Magistrate sends only the report of detention. Further, to say that as the District Magistrate was busy in the food procurement, he had no time to sign the report, cannot be considered as a reasonable excuse in case where the right to personal liberty is in jeopardy. As per the statutory provision the government shall consider the report within twelve days of the making of the order of detention and it would decide whether or not to approve of the detention order. If the word 'forthwith' is liberally interpreted then the report will be forwarded to the government at the eleventh hour of the time limit and the government will mechanically put its stamp of approval. Moreover, the constitutional obligation to furnish the earliest opportunity to make a representation would loose its meaning if no expeditious process is followed.

Another piece of unnecessary time consuming process in the Secreteriate with respect to preventive detention is evident in *State of Ori.* v. *Manila.*[79] There was a delay of twenty two days in considering the representition of the detenu. The explanation given was that the District Magistrate received the representatiou on the same day. He despatched it to the State Government on 24th October, 1974. The Home Secretary endorsed it on 25th October, 1974 to the Deputy Secretary. The Secreteriat was closed for Puja Holidays from 20th October to 27th October, 1974 and 30th October was again a holiday. The deciding Assistant put the matter to the Head Assistant on 31st October 1974 and he put his remark and sent it on 4th November, 1974 to the Deputy Secretary. The Additional Chief Secretary processed it on 6th November, 1974. On 7th November 1974 he endorsed it to the Chief Minister who was incharge of Home Department. He was absent from 7-12th November 1974 and on his return on 12th November 1974 he disposed of the representation

78. *Id* at 478.

79. A. I. R. 1976 S. C. 456

and rejected it. On the basis of this explanation, the Bhagwati Court opined that the delay was 'satisfactorily explained' and quashed the order of the High Court which held that there was undue delay. The present process is nothing but a piece of red-tapism. The learned judge instead of raising voice against such a cumbersome process upheld its validity.

It was in the year 1980 only that again passion of the Court leaned in favour of personal liberty when Mr. Justice Bhagwati, for himself and Venkataramiah, J., declared the delay of thirty days as unreasonable delay[80]. Now he raised the voice against the time consuming process in the Mantralaya and said "it is difficult to see why the concerned officer in the Mantralaya should have taken seven days for just forwarding a copy of representation of the detenu..." The Bhagwati Court now uses the words "as expeditiously as possible[81]" in place of "unreasonable delay". for the preventive detention process. This change over shows the court's concern for expeditious process in the preventive detention measure.

The requirement of expeditious preventive detention process raises an important question : How long a person may be put behind the bars under the above measure ? The Bench, consisting of Palekar, Bhagwati and Krishna, Iyer, JJ., adopted a similar view in personal liberty cases.[82] In all the cases Mr. Justice Krishna Iyer delivered the judgement. He was of the opinion that how long the detention was necessary was a matter for the government and not the Court to decide. However, the learned judge appealed to the government that no detenu should languish in prison cell for a day longer than the administrator thinks it "*absolutely* necessary for the critical safety of society"[83]. These champions of personal liberty have shown great concern over the prolonged detention. Justice Krishna Iyer, speaking for the *Trimurti Court* observed[84] :

> Prolonged imprisonment without trial alienates the individual against society and makes him a vengeful enemy when he ultimately emerges from the prison cell. Indeed it is a serious injury inflicted on an individual by the State which can be justified as a measure of social defence only in *extreme circumstances*. But to jail a man on subjective satisfaction of possible pre-judicial activity and to forget

80. *Icchu Devi* v. *Union of India*, A. I. R. 1980 S. C. 1983,

81. *Vimal Chand* v. *Pradhan*, A. I. R. 1979 S. C. 1501, 1503.

82. *Anil Dev* v. *State of W. B.*, A. I. R. 1974 S. C. 832; *Gdut Ali Miah* v. *State of W. B.*, A. I. R. 1974 S. C. 894. See also *Keshab Chandra* v. *State of W. B.* A. I. R. 1974 S. C. 1739.

83. A. I. R. 1974 S. C. 832, 836. (emphasis supplied) *(Trimurti Court* here indicates the Bench consisting of Palekar, Bhagwati and Krishna Iyer, JJ.)

84. A. I. R. 1974 S. C. 613. See authors Comments 1974 J. I. L. I., 306.

about him after the statutory formalities have been performed is *not fair* to the constitutional guarantee. It is appropriate for a democratic government not merely to confine preventive detention to serious cases but also to review periodically the need for the continuance of the incarceration.

One of the most important dissent of Justice Bhagwati is in the area of the duration of the preventive detention measure. This was his first minority view immediately after his elevation to the Bench of the Supreme Court of India. In *Fagu Shaw* v. *State of W. B.*,[84] the petitioner was detained under the Maintenance of Internal Security Act, 1971. Section 13 of the Act together with Section 6 (d) of the Defence of India Act, 1971 provided that a person could be detained under the Act for a period of twelve months or until the expiry of the Defence of India Act. It was argued that article 22 (7) (b) required a definite maximum period for which a person could be detained and the present provision, providing for indefinite detention, was against the provision of article 22 (7) (b). The petitions were heared by a Bench of five judges consisting of Ray, C. J , Mathew, Chandrachud, Alagiriswami and Bhagwati, JJ. The Majority judgement was delivered by Mathew J., for himself, Ray, C. J. and Chandrachud, J , the minority view was of Justice Bhagwati; and Alagiriswami concurred with majority. The majority court held that as the maximum time limit was already prescribed there was no violation of article 22 (7) (b). However, on this point Alagiriswami though upheld the conclusion of the majority court he opined that there should be some maximum definite period.

Now coming to the dissenting opinion of Jastice Bhagwati, one can clearly see his zeal for protecting the right to personal liberty.[85] The learned judge in the passion to protect personal liberty interpreted the words "maximum period" in article 22 (7) (b) to mean a definte period reckoned in terms of years, months or days and that no period could he said to be a maximum period unless it predicted its beginning and end in terms of year, months or days. According to the learned judge in the present case, the period of detention was dependent on the expiry of the Defence of India Act, 1971 which could not be counted in terms of months or years, the order of detention was bad. The minority view has two beneficial effect : firstly, nobody will suffer incarceration in jail for an indefinite period avoiding vagueness in the preventive detention measure;

85. See his father, Justice N. H. Bhagwati's contra approach in a *property right* case where he held the period of requisition of immoveable property was "the present war and six months thereafter" was a "clear and definite period". *Juggilal Kamlapat* v. *Collector, Bombay*, A. I. R. 1946 Bom. 280.

secondly, when Parliament cannot pass a law relating to preventive detention providing for indefinite detention, it will have to bring the matter to the floor of the House again for continuance of such a measure. This will impose a check on Paliament's preventive detention power. This was the position with respect to the Preventive Detention Act, 1950 whose life was initially one year and the duration of detention under that Act was coterminus with the expiry of the Act. Thus after one year the matter had to be debated in Parliament once again for its further continuance. In the present case majority Court was still under the crutches of *Gopalan's* majority ;[86] whereas, Bhagwati's opinion leaves the path of technical justice and now travels through the processual justice.

It is unfortunate that the learned judge in the same year sitting in the *Trimurti Court* in *Keshab Chandra's*[87] case joined the majority side in the *Fagu Shaw* case. Now Krishna Iyer, J., giving opinion of the court consisting of himself, Palekar and Bhagwati, JJ., reiterated the stand of majority in *Fagu Shaw's* case. In this case the major ground of attack was based on the absence of any definite time-limit for the duration of the detention, since, according to the petitioner, "till expiry of Defence of India Act, 1971" did not satisfy the constitutional condition. The learned judge, rejecting the contention, pointed out, "However, this point does not survive now, having been overruled by a decision of this court in *Fagu Shaw* v. *State of West Bengal.*"[88] The Krishna Iyer Court uses the word 'a decision.' This may give a feeling to the reader that in *Fagu Shaw's* case there was an unanimous opinion. The learned judge did not touch the minority view of Justice Bhagwati. This indicates that the conference of *Trimurti* convinced Justice Bhagwati so much so that he had to forgo his philosophy and now lean in favour of the majority of *Fagu Shaw's* case. It is surprising that neither Justice Bhagwati opened his mouth to defend his previous stand nor Krishna Iyer, J., said anything with regard to minority view. The fact that Krishna Iyer, J., supported the majority, implies that according to him including Bhagwati, J., who was also a party, the minority did not lay down the correct approach in the matter. Thus with one stroke Justice Bhagwati at the start of his carrier as the judge of the Supreme Court applied a back gear to his journey towards the horizons of personal liberty.

(E) Other Safeguards

One of the safeguards under article 22 (5) says that the authority

86. *A. K Gopalan* v. *State of Mad.*, A. I. R. 1950 S. C. 27.
87. A. I. R. 1974 S. C. 1739.
88. *Id.* at 1739 (emphasis supplied).

passing the order of detention must afford the detenu the earliest opportunity of making a representation against the order of detention. The Bhagwati Court insisted that the opportunity should be "comprehensive and effective."[89] Once the detenu made a representation then Section 8 of the Maintenance of Internal Security Act, 1971 imposes an obligation on the appropriate Government to consider his representation. This Section does not say as to who must consider the representation of the detenu. This lead to an unsuccessful argument that it should be considered by an independent authority. This argument had the support of Fazl Ali and Mahajan, JJ., a minority view on this point in *Gopalan's* case.[90] These Justices were of the opinion that no justice could be said to be secured unless the representation was considered by "some impartial person." The Bhagwati Court[91] repeatedly held that the representation must be considered by the appropriate government *itself*. It was also pointed out that the above conclusion should not mean that the appropriate government could reject the representation of the detenu in a casual or mechanical manner. The consideration, according to the court, must be 'real, proper' and 'unbiased'.

When the appropriate government considered the representation : Is it necessary that the government must give reasoned order or speaking order ? In *John Martin's* case[92], one of the contentions on behalf of the petitioner was that the order of the government, made after considering the representation of the detenu, did not disclose any reasons for rejecting the representation of the detenu and on this ground it was invalid. Justice Bhagwati, following *Hardhan's*[93] case held "there need not be a speaking order", "all that is necessary is that there should be a real and proper eonsideration by the government." It is unfortunate that the five judges Bench in *Hardhan's* case did not cite at all *Bhut Nath's* case.[94] In this case Krishna Iyer's court came to the above conclusion with the following observations "It must be self-evident from the order that the substance of the charge and the essential answers in the representation have been impartially considered", and that "a brief expression of the principal reasons is desirable." Had there been the *Trimurti Court* in *John Martin's* case, it would have set another control on the preventive detention measure. On the contrary the findings in *John Martin's* case

89. *Khudiram Das* v. *State of W. B.*, A. I. R. 1975 S. C. 550,555.
90. *Gopalan* v. *State of Madras*, A. I. R. 1950 S. C. 27, 66, 85.
91. *S. K. Sekawat* v. *State of W. B.*, A. I. R, 1975 S. C. 64, 65, (emphasis supplied) : *John Martin* v. *State of W. B.*. A. I. R. 1975 S. C. 775, 778.
92. *John Martin* v. State of W. B., A. I. R. 1975 S. C. 775.
93. *Hardhan Saha* v. *State of W. B* , A. I. R. 1974 S. C. 2154.
94. *Bhut Nath* v. *State of W. B.*, A. I. R. 1974 S. C. 806, 814.

would encourage the appropriate government to follow the mechanical process of putting signature on the order which may say "considered the representation and rejected the same." Merely reading the above order, will make difficult for the detenu as well as the court to read the mind of the authority considering the representation of the detenu. There were cases where the authority "with a view to wresting a favourable decision from the court" said that it had considered the case of detenu but the Bhagwati Court after a detailed examination, held that in fact there was no consideration of the case at all.[95] In the matter where the right to personal liberty is in peril, the Supreme Court have shown a great concern. But the super fast preventive detention express, led the Bhagwati Court to sidertrack the issue of speaking order.

The preventive detention is an easy tool in the hands of the authority to put behind the bars any person without trial. This is a convinient process to bypass the detailed procedure required under the ordinary criminal law. In this area there were cases where the detenu claimed protection of the Supreme Court on the ground that the order of detention was bed either because of collateral exercise of the power or on the ground of mala fide. The Bhagwati Court did not allow the contention in cases where initially there were some criminal cases pending against the detenu and later on were dropped on the ground that nobody dared to give evidence against him and the preventive detention machinery was geared up to prevent him from acting pre-judicially. When the authority was reasonably satisfied "that it was futile to proceed with the criminal case and it was decided to drop it against the petitioner," then the court permitted the use of the extraordinary measure.[96] The preventive detention therapy was given to the hardened, habitual or notorious criminals. Sarkaria, J., speaking for the court, consisting of himself and Bhagwati, J., allowed the measure to prevail even in case of food adulteration activity provided that it was "particularly of an organised kind" or "Where the malaise is out grown and malignant."[97]

Justice Bhagwati in one of his important dissent in *Fagu Shaw's* case,[98] could have attacked the prescription of indefinite period of detention on the ground of the distinction between "preventive detention" and "punitive detention." The preventive detention measure is not to punish a person for committing an act but it is to intercept or prevent him before he commits the act. If a person is subjected to an indefinite

95. *Satva Deo Prasad* v. *State of Bih.*, A. I. R. 1975 S. C. 367, 370.
96 *Gora* v. *State of W. B.*, A. I. R. 1975 S. C. 473, 476.
97. *Bankal Lal* v. *State of Raj.*, A I. R. 1975 S. C. 522, 528.
98. A. I. R. 1974 S. C. 613.

incarceration in the exercise of the above measure it would mean that in the garb of preventive detention, the authority aims at punishing the person. Such an exercise of the power would attract the pleas of unreasonableness and colourable exercise of power. It is the solemn duty of the Court to safeguard the right to personal liberty against the slightest illegal encroachment. The Court must keep an eagle's eye on the transformation of preventive to punitive colour. The *Trimurti Court* have taken the stand that how long a person should undergo incarceration was a matter for the State and not the judiciary to decide.[99] But judicial sensitivity in this area would allow the judiciary to open a new window to glance at the not permitted area.

One of the important protections claimed against the preventive detention measure is the application of article 19 in this area.[100] This plea had a long chequered history in India. At the very first start the court completely closed its eyes to all the directions except the one in article 22 sub-articles (4), (5), (6) and (7). And the personal liberty which was under shadow of preventive detention could not get the nourishment from article 19. On the silver jubilee of the nascent Indian personal liberty, the Supreme Court gave one of the most valuable gift by breaking the isolation of article 22 and introduced it to article 19 and 14.[101] However, it did not change the position. The preventive detention still ruled supreme in its empire, In *Fagu Sharw's* case, Justice Bhagwati tried to encroach in the said empire when he observed[102] :

> The maximum period specified by the Parliamrnt must obviously be a *reasonable* one, because otherwise the Parliamentary law would be bad as offending clauses (a) and (d) of article 19 (1). So much is *clear and beyond dispute.*

But the unfortunate part was that he raised a lonely voice, that too in minority. Though the Bhagwati Court in the subsequent cases[103] maintained the stand that the law relating to preventive detention had to meet the requirement of article 19 yet it upheld it as a valid piece of legislation. The high frequency wave length of the Bhagwati Court in *Maneka Gandhi's* case adopted the same tune even in its *obiter dicta.* The court has been allergic to the preventive detention therapy and it has repeatedly stigmatised the measure as draconian, black law or the first class enemy

99. *Gdut Ali miah* v. *State of W. B.* A. I. R. 1974 S. C. 894, 895. *Keshab Chardra* v. *State of W. B.*, A. I. R. 1974 S. C. 1739, 1739,
100. *Gopalan* v. *State of Mad.*, A. I. R. 1950 S. C. 27. A I. R. 1950 S. C. 27.
101. *H. Saha* v. *State of W. B.*, A. I. R. 1974 S. C. 2134.
102. *Fagu Shaw* v. *State of W. B.*, A I. R. S. C. 613, 628 (emphasis supplied).
103. *Khudiram Das* v. *State of W. B.*, A. I. R. 1975 S. C. 550.

of the right to personal liberty but it put the stamp of validity on the ground of "right and just and fair". It is unfortunate that Bhagwati Court's activist role in the area of personal liberty jurisprudence, had no effect on preventive detention law which continued almost as a routine and a part of Indian culture.

The Bhagwati Courts allergy to preventive detention is evident from the fact that the Court ordered the release of the detenu forthwith without a reasoned order. Once it was satisfied that his detention was illegal, the Court had no patience to wait for its written judgement and ordered the detenu to be released before the judgement of the Court.[104] The Court also did not stick to the rigid technicalities of the habeas corpus process.[116]

Personal liberty in Emergency :

Article 359 (1) provided that the President, while the Prooclamation of emergency was in force, by an order could suspend the enforcement of such of the rights conferred by Part 111. Whenever emergency was proclamed in India, the right to life and personal liberty was the main casualty of the Presidential order. The enforcement of the above right was normally suspended during the continuance of the proclamation of emergency. Once the enforcement of the said right was suspended, the question still remained whether there was any scope of judicial review to enforce the said right in any name or manner. This question eame up in *Makhan Singh's* case.[106] Justice Gajendragadkar, speaklng on behalf of majority, opined that in case the President by an order suspended the enforcement of the right to life and personal liberty, it was not open to the detenu to activise the jurisdiction of the competent court to enforce in substance the said right. However, the majority judgement delineated the area of judicial review even during emergency. For example, the enforcement of right other than those mentioned in the Presidential order; the contravention of any statutory provision or if the detention order was mala fide, these were some of the pleas not barred by the Presidential order. But Subba Rao, J. as the then was, in his dissent did not adopt a technical approach and maintained that even during emergency the said right could be enforced through Section 491 of the Criminal Proeedure Code if the detenus were detained in contravention of articles 14, 21 and 22.

104. *Dedu Mahto* v. *State of W. B.*, A. I. R. 1974 S. C. 816, *G. A. Mondal* v. *State of W. B.*, A. I. R, 1974 S. C. 895.
105. *C. Sanyal* v. *Dist. Magistrate, Darjeeling*, A. I. R. 1973 S. C. 2684, 2689, *A. D. M. Jabalpur* v. *S. Shukla*, A. I. R. 1976 S. C. 1207, 1383.
106. A. I. R. 1964 S. C. 381.

When this matter came up before Bhagwati, C. J., of the Gujarat High Court, the learned judge endorsed the majority view in *Makhan Singh's* case.[107]

Soon after Justice Bhagwati's elevation to the Bench of the Supreme Court one can see his enthusiasm to protect personal liberty single handed in Lord Atkin's style. This is evident from his minority view in *Fagu Shaw's* case when he advocated[108] :

> The fact that we are living to-day in an emergency should not colour our interpretation of the Constitutional provision. The Constitutional provision must speak the *same voice* whether it be in times of emergency or in normal times.

In *A. D, M. Jabalpur* v. *S. Shukla*,[109] the respondents challenged the legality and validity of the orders of their detention to which the State's preliminary objection was that during the continuance of the Proclamation of emergency as the President by order had suspended the enforcement of the rights conferred by articles 14, 21 and 22, and further that Section 18 of the Maintenance of Internal Security, Act, 1971 as amended by the Act of 1975 provided that no person (including a foreigner) detained under this Act shall have right to personal liberty by virtue of natural law or common law, if any, their plea for judicial protection could not survive. The Supreme Court by majority ordered that in the light of the Presidential order dated 27th June, 1975 no person had any *locus standi* to move any writ petition for habeas corpus under article 226 before a High Court on the ground that the order of detention was bad as it did not comply with the Act or was mala fide or was based on extraneous considerations. The five judges Bench consisted of Ray, C. J., Khanna, Beg, Chandrachud and Bhagwati, JJ. Though all the judges delivered separate opinion yet, the majority view was taken by Ray, C. J., Beg, Chandrachud and Bhagwati, JJ., and the minority view was taken by Khanna, J. Justice Bhagwati though concurred with the majority order yet, differed on certain points. The learned judge took the stand that in view of the Presidential order, the right to personal liberty could not be enforced by the High Court under article 226 in the name of natural right or rule of law. He came to the above conclusion on the basis of the case law in India and its counterpart in the United States, England and Ireland. According to him these were "recognised and embodied as a constitutional principle in Article 21 and it cannot have any distinct and separate existence apart from that

107. *Jayntilal* v. *Union of India*, A. I. R. 1980 Guj. 108.
108. *Fagu Shaw* v. *State of* ∧. B. A. I. R. 1974 S. C. 613, 636 (emphasis supplied)
109. A. I. R. 1976 S. C. 1207.

article". This would mean that the judicial review would be under total eclipse during emergency so far as the right to personal liberty was concerned. Moreover, the words "for any other purpose" in article 226 was interpreted not to give any additional right in that regard.

The detenus had taken the plea that the Presidential order did not bar the plea of mala fide or absence of requisite subjective satisfaction of the detaining authority. They took the support of the majority view in *Makhan Singh's* case. But the learned judge, rejecting the contention, did not allow the plea in the light of the Presidential order. It may be pointed out that when the learned judge was the Chief Justice of the Gujarat High Court,[110] he supported the majority opinion in *Makhan Singh's* case. But in the present case he opined that some of the observations of the majority judgment were obiter and had no binding effect. However, he did not completly ruled out the possible scope of judicial review even during emergency. For example, positive legal right with respect to personal liberty, if any, could be enforced; the judicial remedy, except the writ of habeas corpus could still be available to the detenu, etc.

Now coming to the provision of the Maintenance of Internal Security Act, 1971 as amended by Act 39 of 1975, in section 16A(a) provided that the grounds, information and materials on which the order of detention was based or the declaration under sub-section (2) or sub-section (3) was based "shall be treated as confidential and shall be deemed to refer to matters of State and to be against public interest to disclose. It was contended that the said section precluded the jurisdiction of the High Court under article 226. The learned judge, rejecting the contention, held that it enacted a genuine rule of evidence. This interpretation thus closed one more avenue of the detenu to resort to judicial review. Now the court as well as the detenu will not be in a position to know the ground on which an order of detention is made or *purported* to have been made (emphasis supplied). This will not allow the detenus to resort to even those areas of judicial review which were carved out by the learned judge. Moreover, the word 'purported' would give, the executive a clean slate to deal freely with the right to personal liberty and thus destroy the cherished right. This was the apprehension and fear of the detenus which though the learned judge accepted "not altogether be ruled out"[111] yet, he put on it the stamp of constitutional validity.

The above observations show that the learned judge deviated from his path of real justice and adopted technical justice and upheld the

110. *Jayantilal* v. *Union of India*, A. I. R. 1970 Guj. 108. Id at 1378,
111. *Id* at 1382.

Presidential order issued during emergency. It is surprising that though the same judge himself pointed out "I have always leaned in favour of upholding personal liberty", and furthermore advocated for judicial vision of rationality or "the law, spoke the same language in war and peace" yet, it seems that the emergency in the country clouded his vision when he confessed :

> I cannot assume to myself the role of Plato's 'Philosopher King' in order to render what I consider ideal justice between the citizen and the State.

In this wave length he even tuned "howsoever, unfortunate this situation might be, that cannot be helped". The judicial passivism has its aftermath in the Report of the Shah Commission of Inquiry, 1978.

The failure of the judicial sensitivity activised the constituent power to keep article 21 outside the purview of article 359(1). Now the Constitution (Forty-fourth Amendment) Act, 1978, provides that the enforcement of the right to personal liberty shall not be suspended even during emergency. This has brought to the Indian soil a reality which still remains a pious hope of the western jurisprudence.

When the Supreme Court came out of the emergency shock, it not only started singing the pre-emergency tune but also marched forward in its path of real justice.[112] Justice Bhagwati, who was also a party to the chorus, was the leader of the team in *Maneka Gandht's* case. In his zeal to protect personal liberty, the learned judge has even gone to say that the right to life and "personal liberty enshirned in article 21.....stand on an altogether different footing from other fundamental rights" and he treated article 21 as "the basic structure of the constitution."[113] Once article 21 of the Constitution is put in the category of the basic structure provision then neither Parliament nor the constituent power can exercise their powers in such a way to affect or destroy the basic structure. Now article 21 imposes three dimensional restrictions : first on the executive; second on Parliament; and last on even constituent power. This has placed the Indian personal liberty clause at the highest altitude in the world's liberty jurisprudence.

Conclusion

The present study is confined to Justice Bhagwati's contribution in the area of personal liberty upto the year 1980. Though this is a very

112. *Maneka Gandhi* v. *Union of India*, A. I. R. 1978 S. C. 597. In *special Courts Bill*, 1978, A. I. R. 1979 S. C. 478.

113. *Minnerva Mills Ltd.*, v. *Union of India*, A. I. R. 1980 S. C. 1789, 1832 Justice Bhagwati concurring with the majority view on this point.

short period to assess the judicial craftsmanship yet, Justice Bhagwati has made important contributions.

One of the most important contribution of the learned Judge is that he nourished the tender plant of personal liberty to grow so big as to give shelter to the residuary freedom. This expensive approach has on the one hand given multi-coloured shades to the concept of personal liberty and, on the other, imposed constitutional limitations on those who unnecessarily played with the right of personal liberty. The second count down started when the word 'procedure' was given the meaning 'fair, reasonable and just procedure'. This was an important achievement where the judiciary in order to safeguard the said right, resorted to judicial constituent power. It has put the wave length of the personal liberty somewhat near the frequencies of Fazl Ali, J's and Atkins, J's. The height still remains unfullfilled as the word 'law' is not duly activised and further all the postulates of principle of natural justice have yet to be bloomed fully.

The moment Justice Bhagwati assumed the office of the judgeship of the highest court of the country, he was confronted with the problem of balancing of the right to personal liberty and the preventive detention measure. His approach was to build a plexus so as to catch the executive authority the moment it became arbitrary or unjust or travelled beyond its jurisdiction. The data given above shows that Justice Bhagwati was all through busy in firmly dealing with those authorities whose action was arbitrary, unjust or illegal. But when the activities of the detenu were prejudicial to the even tempo of life of the community or to the maintenance of supplies and services essential to the community and the detenu was validly detained, the court affirmed the order of detention. The learned Judge, while balancing the right to personal liberty against the preventive detention, leaned in favour of personal liberty. He tried to give protection to the right to personal liberty even in case of slightest encroachment. He tried to enlarge the area of judicial control in this area.

According to him if the activity disturbed the even tempo of life of the community, it would be relevant to the maintenance of public order. The majority of case law dealt with detention on the ground of maintenance of supplies and services essential to the commuuity. In this case the ground was adjudged as relevant if the activity was on a large scale or the detenu was a notorious or hardened criminal. As regards the plea of vague ground, in none of the cases Justice Bhagwati allowed this plea because there was no vagueness in the ground communicated to the detenu. The scope of insufficient ground was now enlarged so as to give one more

safeguard to the detenu against his detention that of getting all the materials relied upon by the authority while making the order of detention. This has curbed the area of sweet will of the detaining authority.

The Bhagwati Court adopted a cautious and careful approach in examining the application of the mind of the detaining authority. Any casual or mechanical attitude on the part of the authority resulted in quashing the order of detention.

The satisfaction of the authority making the order of detention was another area where the Bhagwati Court penetrated the judicial vision even in the no entry area. The dividing line between within and beyond judicial review in case of subjective and objective satisfaction maintained by the English court and also by the Supreme Court of India in its previous case law, has been blurred by the Bhagwati Court. This enlarged X ray of the brain of the detaining authority will give the court a chance to assess the real cause of detention. However, the learned Judge, maintained that the judicial review was still restricted in the matters of necessity and duration of detention.

The requiremenl of time limit in the preventive detention process was interpreted by the Court to mean an expeditious or jet line approach in the above process. Any lathergic or easy going attitude of the authority was enough for the court to set free the detenu forthwith. The case law has brought to light the red-tapism of the bureaucrat in the Secretariat. But unfortunately this disease has not attracted the judicial treatment. The court may under the dose of 'just procedurc' minimise the delaying tactics of pass on game with the detenu's file.

The court maintained the distinction between the preventive and punitive detentions. Mr. Justice Bhagwati was of the opinion that the preventive detention should not be indulged in as a matter routine to by pass the ordinary criminal law process. But he allowed the preventive detention therapy in case of notorious or hardened criminals who tried to block the course of ordinary criminal justice.

Inspite of the judicial activism in the above areas, the court was slow in applying article 19 and the principles of natural Justice in their fullest swing. The slow speed was due to two imporatant speed breakers; firstly, the constitutional shelter to the draconian measure: and secondly, the preventive detention was becoming a part of Indian legal system[114]. The judicial sensitivism was at the lowest ebb in the year 1976. The per-

114. The Prevantive Detention Act, 1950 which survived upto 1969; the Maintenance of Internal Security Act, 1971, continued for 7 yrs; the National Security Act, 1980 which continues till to date.

sonal liberty plant, which Justice Bhagwati had nourished, had to bow down before the emergency tornado. The judicial depression resulted in inflation in the preventive detention market. The Judiciary became a silent spectator of the atrocities on the cherished right to personal liberty. Had the Judiciary kept in its sub-conscious mind the Atkinian philosophy of "speaking the same language in war and peace," the Shah Commission's report would not have been so voluminous. But it seems that the court was apprehensive of the fact that if the activist role was followed it could have far reaching consequences including the danger to the very existence of the power of judicial review.

Now coming to the judicial process in action, during eight years of the functioning of Bhagwati's Court there was only one dissenter in *Maneka Gandhi's* case. This shows Justice Bhagwati's concern for judicial collectivism. The judicial collectivism is also reflected in the functioning of the *Trimurti Court* where the learned Judge had to sacrifice his great philosophy in *Fagu Shaw's* case to adjust himself to the judicial level of the *Trimurti Court*. The constitution of the Bench in personal liberty case was a pointer towards the *Trimurti Court* taking the shape of a personal liberty court.

His love towards personal liberty is evident from the fact that in two important cases, he was alone in dissent and he also gave concurring opinions favouring the right to personal liberty. Moreover, to expediate the judicial remedy in case of illegal deprivation of the said right, the Bhagwati Court did neither wait for the reasoned order of the court nor follow rigid technicalities in the habeas corpus process and set free the detenu without any loss of time.

In order to appreciate the historical background of the right to personal liberty, the learned Judge did not stop at the Magna Carta but he went down as far back as the Sastric Text, However, he did not take the help of the intention of the framers of article 21. He extended his vision to the English, American and I rish experiences so that the Indian clause does not lag behind in the developmental process of the world's liberty jurisprudence. The comperative approach has helped the court to balance the American and English approaches for interpreting article 21.

Justice Bhagwati was not an orthodox judge who confined his vision only within the ivory tower. At times he looked to the outside world to get the real picture. He glanced to the economic situation in the country while dealing with smuggling activities; the deteriorating public order problem in the light of increasing large scale theft of the railway properties, and hardened and notorious criminals; emergency

environment in the country; the activities in Mantralays; he even inspected the prison, etc.

The judicial remedies granted by the Court consisted of not only the writ of habeas corpus but also directions and guidelines to the appropriate authorities. The learned Judge never hesitated in passing stictures against clandestine actions. Wherever necessary he suggested reforms in the existing provisions.

One of the important quality of his judgements is that the learned Judge has mastery over writing judgement which is least confusing and easily communicable to its consumers.

Justice Bhagwati is no doubt a great supporter of the individual's right but he also sang in socialist tune. The legal aid and the speedy trial are some of the instances where the learned Judge delivered social justice enshrined in the preamble to the Indian costitution.

To sum up Justice Bhagwati has launched the India personal liberty craft in the direction, which if not interferred with, may take its flight to the highest altitude of the world's personal liberty jurisprudence.

THREE CONCEPTS OF EQUALITY : COMPENSATORY DISCRIMINATION IN INDIAN AND AMERICAN CONSTITUTIONAL LAW

GREGORY H. STATON*

The Constitutions of both India and the United States of America are equalitarian documents. The Fourteenth Amendment of the U. S. Constitution guarntees the equal protection of the laws to all, regardless of race, color, reliagion, or national origin. Article 14 of the Indian Constitution guarantees equality before the law and equal protection of the laws to all persons. Articles 15 and 16 prohibit discrimination in public employment and other activities of the State against any citizen on grounds only of religion, race, caste, sex, or place of birth.[1] These equalitarian

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1. Costitution of India (part III fundamental rights) right to equality.

Art. 14. *Equality before law*—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Art. 15. *Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth*

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) Access to shops, public restaurants, hotels, and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(4 inserted by the Const. (1st Am) Act, 1951, w. e. f. 18.6.1951)

Art. 16 *Equality of opportunity in matters of public employment*

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

guarantees are spelled out in regard to education in Article 29 (2) of the Indian Constitution, which says "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them." In the U. S., racial discrimination in educational and employment programs funded by the Federal government was outlawed by Titles VI and VII of the U. S. Civil Rights Act of 1964. "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Yet the Indian and American societies remain stratified into unequal castes and races. Both societies are the historic products of systematic inequality. In the U. S., the median family income of Blacks is only sixty per cent that of Whites.[2] Although Blacks represent 11.5% of the population, they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers, and 2.6% of the university professors.[3] Inequality between castes in India is pervasive. In the most extensive survey of castes ever done in an Indian state, the Karnataka Backward Classes Commission found that members of the Scheduled Castes (Untouchables) have a per capita income that is only fifty-five per cent of the state average. Though they make up 13.14 per cent of the population, they possess but 8.31 per cent of the Class IV and above government jobs. Their literacy rate is one fifth of the state average. Their rate of graduation from secondary school is one third of the state average.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

2. U. S. Dept. of Commerce, Bureau of the Census, *Current Population Reports*, Series P—60, No, 107, at 7 (1977) (table 1).

3. U. S. Dept, of Commerce, Bureau of the Census, *Statistical Abstract of the United States* 25, at 407-480 (table 662) (based on 1970 census).

Brahmins, in contrast, though only 4.23% of the state population, hold 8.3% of the upper grade state jobs have a literacy rate of 93.8% compared to the state average of 20.6%, have a secondary school graduation rate more than six times the state average, and hold more than 25% of the seats in the state's medical colleges.[4]

The Indian government provides preferential treatment to Scheduled Castes and Tribes and other Backward Classes in many government programs, in employment, and in education. These preferences have often taken the form of "reservations"—minimum quotas in government jobs and places in educational institutions that must be filled by members of disadvantaged groups if qualified members of such groups apply for the positions. Since 1961, the U. S. government has required affirmative action on the part of government agencies and contractors. They must actively recruit Black and other minorities and encourage their promotion.[5] Thousands of educational institutions and employers have undertaken such affirmative action programs.

Whether preferential treatment for disadvantaged individuals or groups can be reconciled with "equality before the law" and "equal protection of the laws" depends on the concept of equality used by those who judge. In this article, I shall define three concepts of equality that are commonly used, and too often confused, by courts in the U. S. and in India. The three concepts have very different consequences when applied to programs that affect the disadvantaged. I will show how the three concepts have been used in several important decisions concerning compensatory discrimination in India. I will then turn to the U. S.

4. *Report of the Karnatak Backward Classes a Commission*, L. G. Havanur, Chairman, in five volumes, 1975.

The table below summarises the data for four upper castes compared with the Scheduled Castes :

Cast	% of state population 1972	Per capita annual income 1972 in rupees	% of state emplyees above Class IV 1972	% literacy 1951	Secondary School Leaving Certl ficate Passes por thousand in caste population 1972
Brahmin	4.23	888	18.30	93.8	10.33
Lingayat	14.64	1200	19.90	29.8	2.33
Maratha	3.45	377	3.15	29.3	2.17
Vyshya	.59	967	.88	70.8	6.54
State average	—	703	—	20.6	1.69
Scheduled Castes	13.14	389 (approx)	8.31	4.6	1.56

5. John F. Kennedy was the first President to call for "affirmative action in Executive Order 10925 (1961) ordering federal contractors to take such steps.

Supreme Court's decision in the *Bakke* case for a comparative look at how the three concepts were used in the several opinions in that case. In the comparison I will show that the word "equal" has been used in India in subtly but importantly different ways from the American usage, ways adapted to the Indian Constitution and culture.

I

Three concepts of equality have been used in the Indian and American Courts.

Formal, individual equality is the type of equality usually intended as the norm in the civil and criminal courts. Formal equality means that each individual stands before the bar of justice without regard for the substantial differences that may inhabit the common human form. An individual's wealth, intelligence, good looks, athletic ability, race, or caste make no difference to the court. The only standard to be applied is whether the individual fits the classification for which the judgment is being made. Did this individual intentionally and without legal justification kill X ? If he did, regardless of whether he is Black or White, high or low caste, he committed murder and is to be punished appropriately. Fixed standards of punishment apply formal individual equality to sentencing as well. (The modern trend in sentencing is however toward the second type of equality, which will be discussed below). Formal, individual equality means that all people will be judged by a universal standard. Whether they fit the standard or not is all that will determine the outcome of the decision.

Applied to situations of substantial inequality, formal equality does not take the substantial inequality into consideration. All that decides is the universal standard. If the standard determined for entry into a college is a score of 80 out of 100 on an aptitude examination, whether the individual who has applied is a Black or a White, a Brahmin or a Harijan, will make no difference. If he makes the requisite score, he will be admitted. If he does not make it, he will be rejected. Formal, individual equality is the type of equality usually desired by those who advocate selection by "merit" alone. It is the standard of those who believe that equal protection of the laws means that the government must be "colorblind".

Weighted individual equality or *substantial individual equality* allows the substantial differences between individuals to be taken into consideration in applying the standards of classification. Again suppose that the score normally required for admission to a college is 80. Experience has shown that applicants who come from a deprived background will be

unlikely to make the requisite score. Therefore a system of handicaps will be used, a system of compensatory preferences. Those from the deprived background need only score a sixty to be admitted. The standard to be applied may thus be particularized to the individual's substantial content. Weighted individual equality nevertheless attempts to take each individual case individually. It does not allow group quotas or reservations. The unit to be dealt with is the individual. If no members of a group meet the standards set, no one from that group will be admitted. A common metaphor for this concept of equality is the handicap horse race. A horse known to be faster than others will be made to carry a handicap weight. If that horse still wins the race, the purse will still be his. There are no quotas or reservations guaranteeing entry into the winner's circle, just weighted advantages accorded to the individual participants in the competition. The important feature of this concept of equality is that although weights assigned to individuals may be determined by their membership in a particular class (race or caste), the competition remains a competition between individuals. As I shall show, it is this concept of equality that was endorsed by Justice Powell in the *Bakke* decision and it is this concept that is the main rival to the concept of formal individual equality in the United States.

Proportional group equality is the concept of equality that lies behind systems of quotas or reservations. In this concept the key unit is not the individual. It is the group. The individual is granted preferential treatment as a member of a group if the group is shown to be under-represented or systematically unable to compete on a formally equal basis with other groups for the job (or other highly valued thing) being sought. Standards of selection are applied particularistically, not universalistically. An individual only has to compete against other members of his group, not against a universal field. The objective of those who apply the standard of proportional group equality is to equalize the distribution of benefits between groups. It is group-based, rather than individual based, distributive justice. Individuals may benefit, but only as members of groups.

Proponents of proportional group equality often advocate it to rectify unequal distribution of jobs, etc. that is the result of systematic distribution on a group basis. It is a group approach to a group problem. In America, supporters of this approach point to the long history of systematic discrimination against Blacks and argue that the surest way to bring about proportional group equality is to institute quotas in hiring and college admissions until Blacks obtain their proportionate share of the society's benefits. In India proponents of reservations argue that distribution of societal benefits has been based on caste membership for millenia, and

the best way to rectify the systematic inequality in India is to redistribute the benefits to the poor and backward on a cast group basis.

II

The Constituent Assembly that drafted the Indian Constitution included Articles 16 (4), 46, 330, 332, 335, 340, 341, and 342 to enable the government to grant special preferential treatment to Scheduled Castes and Tribes and Other Backward Classes. Article 16 (4) provides that Article sixteen's prohibition on discrimination in employment shall not prevent such preferences. "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts 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".[6] In *State of Madras v. Champakam Dorairajan*[7] the Supreme Court held that the provision allowing reservations in employment did not extend to educational institutions. Soon thereafter, Parliament passed the Constitution First Amendment Act adding Clause 4 to Article 15. "Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes."[8] Most of the Indian cases concerning reservations have been concerned with how to reconcile Articles 16 (4) and 15 (4) with the guarantees of equality and non-discrimination in the rest of Articles 14, 15, 16, and 29.

In Madras, a quota system had been used to select members of all caste groups for public employment. In *Venkataramana V. State of Madras*[9] the Supreme Court struck down the quota system and held that only "backward classes" (Article 16 (4) could receive reservations. The question remained just who the "backward classes" are.[10]

Under Article 340 of the Constitution, the Central Government appointed a Backward Classes Commission in 1953 to "determine the criteria to be adopted in considering whether any sections of the people...(in addition to the Scheduled Castes and Tribes) should be treated as socially and educationally backward classes; and, in accordance with such criteria to prepare a list of such classes..."[11]. In the Parliamentary debates preceding

6. Constitution of India, Article 16 (4).
7. AIR 1951 SC 226. See also AIR 1951 Mad 120.
8. Constitution of India, Article 15 (4).
9. AIR 1951 SC 229.
10. For a through discussion of this question see Marc Galanter, "Who are the Other Backward Classes". Economic and Political Weekly, Vol. XIII, Nos. 43 & 44, Oct. 28, 1978 pages 1812-1828.
11. *Report of the Backward Classes Commission*, Vol. I, page 2, 1955. (Kaka Kalelkar, Chairman).

the appointment of the commission, it seems clear that most people thought the list of backward classes would consist of named castes and communities.[12] The Commission was "eager to avoid caste" but "found it difficult to avoid caste in the present prevailing conditions".[13] The units that the Commission designated as "backward classes" were for the most part castes and sub-castes. Thus the commission adopted a group approach to backwardness, one well suited to the proportional group concept of equality. Yet the Chairman, in his introduction to the Commission Report, virtually repudiated the group nature of the report's conclusions and said "it would have been better if we could determine the criteria of backwardness on principles other than caste".[14] He believed that designation by caste would perpetuate caste divisions. He advocated instead universalistic criteria of backwardness based on residential, economic, and educational measures of *inatividuals*. "The nation has decided to establish a classless and casteless society, which also demands that backwardness should be studied from the point of view of the individual and, at the most, that of the family. Any other unit will lead to caste or class aggrandisement. Let us therefore try to find criteria of backwardness that could eschew ideas of caste or class.[15] In contradiction to the Commission's lists of castes, the Chairman adopted a weighted individual concept of equality. This contradiction was not lost in Parliament and the caste based lists of the main body of the report were roundly condemned when they were laid on the table of both houses of Parliament. The Home Minister led the criticism of the report.[16] The recommendations of the commission were never put into effect. The definition of who were the backward classes thereafter fell largely on the state governments.

The states of Mysore (now called Karnataka) had instituted preferential hiring for members of the "backward communities" as early as 1921. All castes except Brahmins were designated "backward", 95% of the people in the state. Mysore's system of preferences had become a complete system of reservations by 1960, when the High Court of Mysore heard a challenge to the government orders of 14 May, 1959 and 22 July, 1959 reserving 65% of the seats in educational institutions to all castes but Brahmins, Baniyas, and Kayasts. Over 90% of the population was thus classified as backward. Percentages were set for groupings of castes and

12. Majumdar, Nabendu Dutta, "The Backward Classes Commission and Its Work" in *Social Welfare in India*, Government of India Planning Commission, 1960, p. 219.
13. *Report of the Backward Classes Commission*, Vol. 1, p. 41.
14. *Report of the backward Classes Commission*, Vol, 1, p. XIV.
15. *Ibid.* at p. XIV.
16. Ministry of Home Affairs Memorandum on the *Report of the Backward Classes Commission*, Delhi, Government of India Press, 1956, p. 34.

unfilled places for a grouping could not be competed for by members of other castes. In *Ramkrishna Singh Ram Singh v. State of Mysore*[17] the High Court struck down the government order because it was based on no intelligible principles for choosing the castes. The order's designation of over 90% of the population as "backward" was ruled, "fraud on the Constitution". The court was, however, of the opinion that caste was a valid means of classification, S. R. Das Gupta, C. J. wrote, "I am also unable to accept the contention of Mr. Venkataranga Iyengar that backward classes cannot be determined on the basis of castes, and that they must always be determined on territorial, economical occupational or some such basis. ...A class may correspond to a body of persons grouped together on the basis of their castes. In my opinion therefore the competence of the Government to treat certain castes as backward classes cannot be ruled out."[18] The court suggested that an intelligible basis for determining the backwardness of a caste would be the percentage of literate members of the caste. It noted that the Mysore government order included many castes with literacy rates well above the state average of 13 per cent : Lingayots (18.8%), Rajputs (33.3%), Muslims (25%), Vaisyas (40%), and Jains (33.3%); etc. The court observed that the really backward classes did not benefit much from the government order because they were outcompeted by such groups. Inclusion of such "forward" groups made their designation as "backward" under Articles 16 (4) and 15 (4) a fraud on the Constitution.

It should be noted that the word "caste" can mean two things. It can refer to a corporate group. And it can refer to a rank. In the minds of most Indians, the two meanings always go together. Determining backwardness "on the basis of caste" (meaning a group rank) however is distinguishable from determining that a caste (a corporate) is backward. The determination in the latter case could be made by many criteria—literacy, income, land ownership, and representation in government services, for example. The courts in India often confuse the two meaning of caste. The court in *Ramakrishna Singh* seems to use both senses of the world, allowing the determination of backward to be a caste group.[19] Though the court threw out the Mysore Backward Classes list, except for the reservations for Scheduled Castes and Scheduled Tribes, it did not rule out proportional group equality.

17. AIR 1960 Mys. 338.
18. AIR 1960 Mys. 338 at 345.
19. For this distinction, I am indebted to Galanter "Who are the Other Backward Classes", *Economic and Political Weekly*, Vol. VIII, Nos. 43 & 44 Oct. 28, 1978. P. 1817, and to Havanur, *Report of the Karnataka Backward Classes Commission*, 1975, at Vol. I, p. 71.

The court did rule against the compartmentalization scheme used in Mysore. The castes were arranged in fourteen groups with from two to over 100 castes in each group. A quota was assigned to each group ranging from 1.2% to 8.5% of the seats in the colleges. Each group was allowed to compete for only its quota. The court held that this compartmentalization discriminated against backward castes in one group who could not compete for seats in the quota for another group. The court also observed that the groups were arranged so that one truly forward caste was in each group and that the forward caste would get the lion's share of the seats reserved in its category. The truly backward castes thus did not benefit.

The "lion's share" problem is one of the greatest difficulties with any system of reservations. Even if there are no caste groupings as in *Ramakrishna Singh*, the problem arises with individuals in a caste designated as backward. The most forward of the "backward caste" are the most likely to take the reserved seats. Thus, reservations do not necessarily help the very poorest and most needy.

The Mysore government responded to the *Ramakrishna Singh* judgment by appointing the Mysore Backward Classes Committee with Dr. R. Nagan Gowda as Chairman. The Committe was to advise the government on the criteria for determining the educational and social backwardness of the backward classes. In its interim report, the Committee applied a two pronged test : lower than average literacy and lower than average representation in government service. The units designated as "backward" continued to be castes (as corporate groups), 168 castes and communities were so designated, comprising 35.34% of the population. The literacy test excluded two politically powerful castes from obtaining the benefits of reservations. In the Government Order that followed on June 9, 1960, these groups, the Lingayats and Vokkaliga Bhunts, were omitted from the list of "backward classes." When they challenged the order in *S. A. Partha v. State of Mysore*[20] their exclusion was upheld. But the order was quashed because it added unfilled Scheduled Castes and Scheduled Tribes seats to the seats reserved for other Backward Classes, rather than throwing them back into the general "merit" pool. Such compartmentalization was held to violate the rights of applicants to the merit pool.

The Nagan Gowda Committee made its final report on May 15, 1961. It shifted its test of educational backwardness from literacy to the number of high school students per thousand in the community's population. The state average was 6.9 per thousand. All castes below this average were declared backward. Those less than half the state average were declared "More backward". For social backwardness, the committee chose to use

20. AIR 1961 Mysore 220.

caste rank as the test of backwardness, but it never seemed to actually apply this test. For government posts they added the test of representation in government service. On all the lists, Lingayats and Bhunts continued to be excluded, since they were above the state average by every test.

The Lingayats and Bhunts finally squeezed back onto the list of "backward classes" in the new Government Order that followed on 10 July, 1961, even though they were above the averages set by the Nagan Gowda Committee. 15% of seats were reserved for Scheduled Castes, 3% for Scheduled Tribes, and 30% for Other Backward Classes. The list continued to be drawn with caste groups as the units. The percentage of seats reserved was increased to 50% for Other Backward Classes by a further Government Order on 31 July, 1962, making a total reservation of 68%.

By including Lingayats, Bhunts, and Gangas, the Government Order brought the total Backward Classes to 74% of the population plus 14% for Scheduled Castes and Scheduled Tribes. This 88% total came very close to huge list of backward classes struck down in *Ramakrishna Singh.* The 68% seat reservation was even larger than the 65% in *Ramakrishna Singh.*

The rednubtable advocate Venkataranga Iyengar (whom I interviewed for this article) filed yet another challenge. The result was the most important decision of all, *M. R. Balaji v. State of Mysore*[21] decided by the Supreme Court on 28 September, 1962.

Six applicants to medical college and seventeen applicants to engineering college field writ petitions contending that they were not admitted because of the excessive and irrational reservations for backward classes in the Government Order. Candidates from backward classes with lower scores on their examinations were admitted instead of the petitioners. The petitioners contended, and the Court held, that the order was invalid because "the basis adopted by the order in specifying and enumerating the socially and educationally backward classes of citizens in the State is unintelligible and irrational and hence outside Article 15 (4)". The Court also held that the extent of the reservation was unreasonable and a fraud on the power conferred by Article 15 (4). The Court reasoned that 15 (4). is an exception to 15 (1) and 29 (2) and so it must not be interpreted so as to nullify the rights guaranteed to all citizens by those articles. Reservations for castes at or only slightly below the state average in education (the Lingayats, Bhunts, and others) could not be considered reservations for truly "backward classes". To be a backward class, a social group must be "in the matter of their backwardness comparable to Scheduled Castes

21. AIR 1963 SC 649.

and Scheduled Tribes".[22] Making reservations to benefit nearly 90% of the population was not what the Constitution makers intended by Article 15 (4). Similarly, reservation of 68% of the medical and engineering college seats was so excessive as to subvert the purpose of Article 15 (4). Reservations under Article 15 (4) should by and large not be for more than 50% of the seats.[23] Any more would interfere with the equal rights of those competing on merit. Those for whom the reservations may be made must be "classes of citizens whose average is well or substantially below the state average."[24]

The Court examined the criteria used by the Nagan Gowda Committee for designating classes as backward and criticized the Committee's use of caste (meaning in context, caste rank) as its sole determinant of social backwardness.

The Court praised a Maharashtra scheme that used income as the criterion for backwardness, but the Maharashtra income test had in fact been adopted for distributing scholarships. (Seats in Maharashtra medical and engineering colleges continued to be reserved for backward classes made up of caste and communal units, a fact not noted by the court.) The *Balaji* Court left caste rank as one possible measure of backwardness, but the Court held that caste rank could not be used as the *only* measure as it found the Nagan Gowda Committee to have done.

The Court's failure to distinguish the rank meaning of caste and the meaning of caste as corporate group has probably led to most of the confusion about the opinion. But a careful reading shows that the Court meant only to prohibit the sole use of caste rank as a measure of backwardness It was dubious about caste groups as units, but did not actually prohibit their use.

"The group of citizens to whom Article 15 (4) applies are described as classes of citizens, not as castes of citizens...In dealing with the question as to whether any class of citizens is socially backward or not, it. may not be irrelevant to consider the caste of the said group of citizens. In this connection it is however necessary to bear in mind that the special provision is contemplated for classes of citizens and not for individual citizens as such, and so though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the castes themselves."[25]

22. Ibid. at 658.
23. Ibid. at 663.
24. Ibid, at 661.
25. Ibid. at 659.

It is clear that the Court would prefer a universalistic criterion of backwardness, but it upheld the use of reservations. It pointed out that the quality of educational institutions will suffer if admissions are unduly liberalized, but added, "That is not to say that reservations should not be adopted, reservation should and must be adopted to advance the prospects of the weaker sections of society; but in providing for special measures in that behalf care should and must be adopted to advance the prospects of the weaker sections of society; but in providing for special measures in that behalf care should be taken not to exclude admission to higher educational centres to deserving and qualified candidates of other communities."[26]

The Court struck down the compartmentalization of reservations into categories for the "Backward" and the "More backward" with one group unable to compete for places reserved for the other. The Court's reasoning that this denied equal protection was similar to that in *Ramakrishna Singh.*

What concept of equality was used in the *Balaji* judgment? The problem with the judgment is that several concepts were used simultaneously. In its clear preference for merit based admissions the Court tended toward formal, individual equality. But it recognized the problem of backwardness and would allow reservations for backward classes, which it distinguished from backward castes.

If the decision is read to allow caste group to be used as the units designated as backward, then the Court can be said to have tolerated a proportional group equality. But the Court's use of "caste" generally referred to caste rank and not to caste groups as units. The Court seemed to prefer universalistic criteria of backwardness that would be as applicable to individuals as to groups. The Court left the question of whether a "class" can be made up of caste groups unresolved. In later judgments it attempted to "clarify" the *Balaji* decision in such a way as to show its preference for weighted individual equality, thus throwing *Balaji's* teleration of proportional group equality into doubt.

In response to the *Balaji* decision, the Mysore government abandoned caste in both its group and its rank senses in designating backwardness. A two-fold test was substituted, classifying as backward all individuals whose families earned less than 1200 rupees per year (the state average was 1330) and whose parents' occupations fell into any of the following categories : 1. Actual cultivator; 2. Artisan; 3. Petty businessman; 4. Inferior services (i. e. class IV in Government services or below, and corresponding classes or services in private employment, including casual labour); and 5. Any other occupation involving manual labour. This two-fold test was upheld by the Mysore High Court in *Viswanath v. State of* Mysore.[27] In *dicta,*

26. *Ibid.* at 662-663.
27. AIR 1964 Mys. 132, L. G. Havanur was one of the advoeates for petitioners.

however, the court recommended that "caste" (apparently in its rank sense) and "residence" should have been added to the two other tests because the results of the new Mysore classification system showed that the Mysore scheme did not help the "really backward classes."[28] Out of a reservation of 142 seats for backward classes, Brahmins qualified for 22 and Lingayats for 35 engineering college seats as members of the "backward classes" and in addition Brahmins and Lingayats continued to receive a disproportionate share of seats in the "merit pool." Brahmins obtained 33% of the total seats though they were only 4.28% of the state population.

The Suprems Court of India repudiated the Mysore court's *Viswanath* dictum in *Chitralekha v. State of Mysore.*[29] Subba Rao, J. wrote "We would hasten to make it clear that caste is only a relevant cricumstance in ascertaining the backwardness of a class and there is nothing in the judgment of this Court which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste. While this Court has not excluded caste from ascertaining the backwardness of a class of citizens, it has not made it one of the compelling circumstance affording a basis for the ascertainment of backwardness of a class."[30]

The Court went on to further "explain" the meaning of its judgment in *Balaji.* Its explanation indicated that the Court had really not intended to tolerate a proportional group concept of equality at all. What the Court said it had meant was based on a weighted *individual* concept of equality, in which caste *groups* were not to be the relevant units.

The Court based its "individual" approach to backwardness on the distinction between "classes" and "castes". The Court implied that classes should not be defined by designating certain caste groups as belonging to them. In its "explanation", the *Chitralekha* court thus actually went for beyond *Balaji* by repudiating "caste" in its group sense. *Balaji* had only said that caste *rank* could not be the *sole* measure of backwardness. Subba Rao, J. wrote.

"The important factor to be noticed in Article 15 (4) is that it does not speak of castes, but only speaks of classes. If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of the Scheduled Castes and the Scheduled Tribes. Though it may be suggested that the wider expression "classes" is used as there are communities without castes, if the intention was to equate classes with castes, nothing

28. AIR 1964 Mys. 132 at 139.
29. AIR 1964 SC 1823 S. K. Venkataranga Iyengar was again the advocate in this case.
30. *Ibid.* at 1833.

prevented the makers of the constitution to use the expression "Backward Classes or castes". The juxtaposition of the expression "Backward Classes" and Scheduled Castes in Article 15 (4) also leads to a reasonable inference that the expression "classes" is not synonymous with castes. It may be that for ascertaining whether a particular citizen or group of citizens belong to a backward class or not, his or their caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong.

"This interpretation helps the really Backward Classes instead of promoting the interests of individuals or groups who, though they belong to a particular caste a majority whereof is socially and educationally backward, really belong to a class which is socially and educationally advanced.

"If we interpret the expression 'classes' as 'castes', the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve. This anomaly will not arise if, without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not. On the other hand, if the entire sub-caste, by and large, is backward, it may be included in the Scheduled Castes by following the appropriate procedure laid down by the Constitution.

What we intend to emphasize is that under no circumstance a 'class' can be equated to a 'caste' though the caste of an individual or a group of individuals may be considered along with other relevant factors in putting him in a particular class."[31]

Though the shift in emphasis may seem subtle, the difference between the *Balaji* and *Chitralekha* decisions is very important. In *Chitralekha*, the Court for the first time advocated abandonment of the group concept of equality that had been the rule up to that time. In doing so, its reasoning was unhistorical and probably also unsound. The question regarding "class" and "caste" is not whether the two terms can be "equated", but rather whether "classes" can be composed of "caste groups". And eliminating the "forward" from a caste to be helped can be accomplished as easily through income ceilings as by abolishing the use of caste as a unit.

The word "class" in the Indian context has historically inextricably linked with "caste", L. G. Havanur in the Report of the Karnataka Backward Classes Commission, cites numerous examples of official use of the word "classes" to include caste groups. The "depressed classes" for example were defined in the Government of India Acts of 1919 and 1935 to mean

31. *Ibid.* at 1833-1834.

certain castes and communities. "The Scheduled Castes' means such castes, races, or tribes or parts or groups within castes, races, tribes, parts or groups which appear to the Governor General to correspond to the classes of persons formerly known as the depressed classes as the Governor General may by order specify."[32] Just before Independence, the Lahore High Court noted that "class" has a special meaning in the Indian context. "A class or section of His Majesty's Subjects is a set of persons all filling one common character and possessing common and exclusive characteristics which may be associated with their origin, race, or religion. The term *class* carries with it the idea of a readily ascertainable group having some element of permanence, stability and sufficiently numerous and wide-spread to be designated a class. It is in this sense that the expression was commonly understood in this country and it is in this sense that ought, in my opinion, be construed."[33] Numerous other examples are given by Havanur.

The distinction of "class" and "caste" by sociologists is probably behind the distinction made by the *Chitralekha* court. Andre Beteille observes that whereas caste and class once identified the same groups (upper castes were also the upper classes), the homology, has come "unglued", so to speak, with modernization.[34] Members of upper castes are no longer necessarily also of the upper classes. It is perhaps this process of ungluing *(decollage)* that has resulted in the Supreme Court's departure from the previous definitions of "class" in India. At any rate, the Court's radical distinction of "class" and "caste" is a departure from previous Indian usage.

The Supreme Court "explained" another aspect of its *Balaji* ruling in *T. Devadasan v. Union of India*[35] decided on August 29, 1963. A reservation of 17% of the promotions to Assistant Superintendant had been made for Scheduled Castes and Scheduled Tribes in the Central Secretariat Service. When reserved positions went unfilled by Members of Scheduled Castes and Tribes, they were carried forward into subsequent years and added to the percentage reserved for each year. The cumulative number of positions reserved had come to 65% of the total to be filled when the case was filed. Petitioner was passed over and members of Scheduled Castes and Tribes were appointed even though on a qualifying examination the petitioner had received a score of 61 and some of those promoted had scored only 35.

32. Cited in the *Report of the Karnataka Backward Classes Commission*, L. G. Havanur, chm., Govt. of Karnataka, 1975, Vol. I, at 60.
33. AIR 1947 Lahore 340.
34. Andre Beteille, *Caste, Class and Power*, 1971 University of Califoruia Press, Burkeley, Cal., U. S. A.
35. AIR 1964 SC 179.

The Court held that the *Balaji* decision made 50% the upper limit for reservations. "The ratio of this (Balaji) decision appears to be that reservations of more than half the vacancies is per se destructive of the provisions of Art. 15 (1)."[36] The *Devadasan* court extended this "ratio" to apply to government employment under Article 16 (1) as well.

What is most interesting about the *Devadasan* decision is that for once both the majority and a notable dissenter came to grip with the problem of defining equality.

Regarding Article 14, Mudholkar, J. for the majority said, "What is meant by equality in this Article is equality amongst equals. It does not provide that what is aimed at is absolute equality of treatment to all persons in utter disregard in every conceivable circumstance of the difference such as age, sex, education and so on and so forth as may be found amongst people in general. Reasonable classification is permissible." "Where the object of a rule is to make reasonable allowance for the backwardness of members of a class by reserving certain proportion of appointments for them in the public services of the state, what the State would in fact be doing would be to provide the members of backward classes with an opportunity equal to that of the members of the more advanced classes in the matter of appointments to public services. If the reservation is so excessive that it practically denies a reasonable opportunity for employment to members of other communities the position may well be different and it would be open then for a more advanced class to complain that he has been denied equality by the State."[37]

The Court went on to make it clear that it is individual, not group, equality that Article 16 (1) is intended to protect. "The guarantee is to each *individual* citizen and therefore every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee each year of recruitment will have to be considered by itself."[38]

In ruling out the "carry forward" provisions of the reservation scheme in the *Devadasan* case, the Court came down squarely against a proportional group concept of equality and for a weighted individual concept. The weighted individual concept of equality was also that applied in the vigourous dissent of Subba Rao, J. who would have upheld the carry forward scheme on grounds of strict judicial restraint. Subba Rao, J. argued

36. *Ibid.* at 185.
37. *Ibid.* at 185.
38. *Ibid.* at 187.

that Article 16 (4) left a power "untrammelled by the other provisions of the Article" and therefore open to even a *total* yearly reservation for scheduled castes and scheduled tribes until the percentage reserved for them in a service is attained. He noted the different facts in *Balaji*, a case governed by Article 15 (4) and one in which the reservation list included groups the court found to be non-backward. *Devadasan* depended on Article 16 (4), and concerned Scheduled Castes and Scheduled Tribes, whom no one argued were non-backward. Subba Rao noted that the *Balaji* 50% guidline was "intended only to be a workable guide but not an inflexible rule of law even in the case of admissions to colleges."[39]

Despite the different result he would have reached, Subba Rao J.'s definition of equality was in complete harmony with that of the majority. It was a weighted individual concept.

"Article 14 lays down the general rule of equality. Article 16 is an instance of the application of the general rule with special reference to opportunity of appointments under the State...If it stood alone, all the backward communities would go to the wall in a society of uneven basic social structure; the said rule of equality would remain only a utopian conception unless a practical content was given to it. Its strict enforcement brings about the very situation it seeks to avoid. To make my point clear, take the illustration of a horse race. Two horses are set down to run a race—one is a first class horse and the other an ordinary one. Both are made to run from the same starting point. Though theoretically they are given equal opportunity to run the race, in practice the ordinary horse is not given an equal opportunity to compete with the race horse. Indeed that is denied to it. So a handicap may be given either in the nature of extra weight or a start from a longer distance. By doing so, what would otherwise have been a farce of a competition would be made a real one. The same difficulty had confronted the makers of the Constitution at the time it was made. Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance, if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs. That is why the makers of the Constitution introduced clause 4 in Article 16".[40]

Although Subba Rao, J. stressed the weighted individual concept of equality, he did not seem to consider it at odds with job reservations.

39. Ibid. at 193.
40. Ibid. at 190.

The practical results that reservations can be justified as though there were "handicaps" to forward classes of candidates and thus individual in their effects. But in fact reservations are based on a proportional group concept of equality. Subba Rao, J. only partly addressed the inconsistency of reservation schemes with individual equality. "This provision (for reservation) certainly caused hardship to the individuals who applied for the second or third selection, as the case may be, though the non-Scheduled Castes and non-Scheduled Tribes, taken as one unit, were benefitted in the earlier selection or selections. This injustice to individuals, which is inherent in any scheme of reservation, cannot, in my view make the provision for reservation any the less a provision for reservation".[41]

Subba Rao, J. did recognize much more frankly than most judges the conflict between formal individual equality in a meritocracy and the type of equality found in a reservation system.

"If the provision deals with reservation—which I hold it does—I do not see how it will be bad because there will be some deterioration in the standard of service. It is inevitable in the nature of reservation that there will be lowering of standards to some extent; but on that account the provision cannot be said to be bad".[42]

The *Balaji* decision has been applied and interpreted in most of the cases since it was handed down. Since *Balaji* the courts have taken an activist role in passing on the constitutionality of many details of administering reservations. In *Chamaraja v. State of Mysore*,[43] the Mysore High Court upheld a reservation scheme in which the backward class candidates for medical college admitted in the general merit competition were counted toward fulfillment of the backward class reservation quota. An Andhra Pradesh Court had struck down an opposite scheme in which backward class candidates who would have been admitted on merit were denied admission because the reservation percentage for backward classes was "filled".[44] Thus reservations may be used as minimums but not as maximums.

In Abdul Latiff v. State of Bihar[45] a license was available for a ganja shop. There were 39 applicants, 7 from members of Scheduled Castes and Scheduled Tribes. Because of a government order giving preference to Scheduled Castes and Scheduled Tribes, the selection was made by drawing lots between the seven Scheduled Caste/Scheduled Tribe

41. *Ibid.* at 191.
42. *Ibid.* at 192.
43. AIR 1967 Mysore 21.
44. *Raghuramulu v. State of Andhra Pradesh*, AIR 1958 Andhra Pradesh 129.
45. AIR 1964 Patna 393.

applicants. The court held that this procedure violated the rights of the excluded applicants and exceeded the limits of government power under Article 15 (4). The court reasoned that 15 (4) is only an exception to Article 15 (1) and should not be interpreted to destroy or nullify the meaning of Article 15 (1). The court took a weighted individual or possibly even a formal individual view of equality, and rejected the proportional group concept of equality used in the selection procedure.

In Triloki Nath Tiku v. The State of Jammu and Kashmir[46] the proportional group concept of equality was again rejected. In that case two Kashmiri Pandits (an elite group) on a high school teachers seniority list were passed over for promotion because of a quota system allotting 50% of promotions to Muslims 30% to Dogras from Jammu and only 20% to Kashmiri Pandits. The Supreme Court held that reservations could only be used to benefit classes that were both socially and educationally backward. Mere inadequate representation in state services did not constitute a sufficient test. The Court threw out the reservation scheme because no evidence had been presented that any of the groups for which reservations were made were "backward". The court declared that whether a class is backward is a justicable issue, making explicit the activist role it had adopted in *Balaji*.

The most thorough and thoughtful discussion of reservations and the concepts of equality was given in the opinions handed down in 1976 in *State of Kerala v. N. N. Thomas*[47].

A Kerala government order allowed members of Scheduled Castes and Scheduled Tribes who had been promoted from lower to upper division clerks two years longer than others to pass a qualifying test. Over the years preferential treatment had given members of Scheduled Castes and Tribes seniority over many of their co-workers. The result was that in the promotion challenged by the petitioner, 34 out of 51 posts were given to members of Scheduled Castes and Tribes. Petitioner had passed the qualifying test though he lacked relative seniority, and he challenged the government order allowing members of Scheduled Castes and Tribes to continue in their higher posts (thus accruing yet more seniority) without passing the test. The result of the order was that the petitionor had not been promoted.

The Kerala High Court ruled that giving 34 out of 51 posts to Scheduled Castes and Tribes was excessive. The Supreme Court of India reversed, liberalizing its rigid 50% rule from *Devadasan*. The Court noted that the percentage of Scheduled Castes and Tribes in the entire Karela

46. AIR 1967 S. C. 1283.
47. AIR 1976 S. C. 490.

government service was only 2% for gazetted services and 7% for non-gazetted services. Scheduled Castes and Tribes made up 10% of the Kerala population. The Court steered around the 50% *Devadasan* rule by pointing out that seniority was the reason for the high percentage of promotions that went to members of Scheduled Castes and Scheduled Tribes and that seniority and membership in Scheduled Castes and Tribes were both reasonable classifications for promotion, not violating the equality guaranteed by the constitution. As long as the classifications did not impair efficiency in administration (a balance mandated by Article 335), they did not contravene Articles 14, 16 (1) and 16 (2).[48]

In a brilliant concurring opinion, Mathew J. discussed the meaning of the equality guaranteed in the Constitution. He distinguished what he called "formal" equality from "proportionate" equality. Formal equality which means absolutely identical treatment for all persons would result in equality in law but inequality in fact. "Equality in fact" may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations."[49] Proportionate equality is attained only when equals are treated equally and unequals unequally. "Proportional equality appeals to some criterion in terms of which differential treatment is justified."[50] The criteria must be relevant to the post. "As Aristotle said, claims to political office cannot be based on prowess in athletic contests. Candidates for office should possess those qualities that go to make up an effective use of the office."[51] Article 335 postulates that Scheduled Castes and Tribes have a claim to representation in the public service. Therefore membership in Scheduled Castes and Tribes can be a relevant and constitutional criterion to be used in selection for the public services.

Citing B. I. O. Williams[52], Mathew, J gave the example of a hypothetical society where great prestige was attached to being a member of a warrior class recruited only from wealthy families. A reformer opened the recruitment to all with the requisite physical strength. But because only the wealthy had such physical strength due to better nutrition they continued to monopolize the warrior class. "Such equality is quite empty. One knows that there is a causal connection between being poor and being under-nourished and being physically weak ... To give X and Y equality

48. *Ibid.* at 502.
49. *Ibid.* at 513, citing his opinion in *Ahmedabad St. Xavier's College Society v. State of Gujarat*, AIR 1974 S. C. 1389 at 1433.
50. AIR 1976 S. C. 490 at 513.
51. *Ibid.* at 513.
52. B. I. O. Wlilliams, "The Idea of Equality" in *Justice and Equality*, Hugh A. Baden ed., at 116.

of opportunity involves regarding their conditions where curable, as themselves part of what is done to X and Y and not part of X and Y themselves."[53]

Mathew, J., concluded that the guarantee of equality in the Indian Constitution must be for more than formal equality and that it implies differential treatment of persons who are unequal.[54] He cited several American cases in support of such a concept of equality, *Griffen v. Illinois*,[55] *Douglass v. Allffernisa*[56] and *Harper v. Virginia Board of Elections*.[57] Mathew, J., stated his view of equality most forcefully in his statement that "Whether there is equality of opportunity can be gauged only by the equality attained in the result."[58]

Applying such a concept of equality would mean that Article 16 (4) should not be interpreted as an exception to Article 16 (1). "If equality of opportunity guaranteed under Article 16 (1) means effective material equality, then Article 16 (4) is not an exception to Article 16 (1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz. even up to the point of making reservation."[59] Mathew, J. therefore upheld the Kerala scheme as within the state's constitutional powers.

Krishna Iyer, J. in a concurring opinion also interpreted the guarantee of equality to be for a "real not a formal equality." He upheld the Kerala reservation scheme, but also listed some of the dangers of reservation schemes in general :

(1) Benefits are by and large snatched away by the top creamy layer...."

(2) Claims to backwardness are overplayed as a means to group advancement.

(3) They are not a lasting solution to the caste problems. The solution will come only "from improvement of social environment, added educational facilities and cross-fertilization of castes by inter-caste and inter-class marriages sponsored as a massive State programme."[60]

53. AIR 1976 S. C. 490 at 515.
54. *Ibid.* at 516.
55. 351 U. S. 12 (1955) (Indigent defendant was unable to appeal because he could not afford to buy the trial transcript, viclating equal protection of the laws despite formal "equality" of law requiring purchase.).
56. 372 U. S. 353 (1963)
57. 383 U. S. 663 (1966) (Virginia Poll tax violated equal protection clause.)
58. AIR 1976 S. C. 490 at 518.
59. *Ibid.* at 519.
60. *Ibid.* at 531.

Krishna Iyer, J. nevertheless upheld reservations because "reservation based on classification of backward and forward classes without detriment to administrative standards...is but an application of the principle of equality within a class and grouping based on a ratioual differentia, the object being advancement of backward classes consistently with efficiency."[61] Articles 14 to 16 do not dictate mechanical or literal equality but rather the progressive elimination of pronounced inequality.[62]

Fazl Ali, J. in his concurring opinion observed that classification on a rational basis with a close nexus with the object to be achieved is compatible with equality. Article 16 (4) then is not an exception to Article 16 (1). Instead it "covers and allows one form of classification among those that can be made under Article 16 (1)."[63] Fazl Ali would liberalize the 50% rule handed down in *Devadasan* and would allow the carry forward rule to be used. He noted the small percentage of Scheduled Caste and Scheduled Tribe members in the government services and implied that reservations should be judged by a proportional group equality rather than on the individual basis advocated in *Devadasan*. This reassertion of the proportion group concept of equality may indicate a resurgence of respectability for that approach.

The responses to the activist courts has been an increasing use of objective and intelligible criteria for measuring backwardness. But caste group remain the most common units designated as backward. In the most thorough and scientific study of the problem to date, the Karnataka Backward Classes Commission chaired by L. G. Havanur carried out massive surveys of the caste groups of Karnataka in order to gauge their socio-economic status, educational attainment political and economic position, and representation in government services. The results of the surveys were used to designate castes and communities to be granted reservations in educational institutions and government services. For educational institutions (under, Art. 15 (4),) 15 communities, 128 castes, and 62 tribes were designated backward. For government service (under 16 (4),) 9 communities, 115 castes, and 61 tribes were designated backward.[64] The Commission recommended reservation of 32% of educational seats and government posts for backward classes, in addition to the 18% reserved for Scheduled Castes and Scheduled Tribes. The percentage of reservations was thus kept at 50%

61. *Ibid.* at 536.
62. *Ibid.* at 537.
63. *Ibid.* at 555.
64. *The Report of the Karnataka Backward Classes Commission*, L. G. Havanur, chm., Gov't of Karnataka, 1975, Vol. I at 359-372.

The Karnataka Government Orders that followed in 1977 and 1978 added several groups to the list recommended by the Commission and raised the total reservation to 58%. The orders were challenged in *Dayanandaiah v. State of Karnataka*[65] decided by the Karnataka High Court on April 9, 1979. According to perliminary reports of that judgment and interviews with L. G. Havanur and Venkataranga Iyengar, (an advocate for Dayanandaiah) the High Court upheld the designation of caste by the backward Classes Commission but struck down the addition of the group in the Government Order, thus indicating the survey approach taken by the Commission and once again rejecting the addition of groups for whose inclusion no intelligible justification was given.

The formal individual concept of equality has never held much sway in Indian cases of compensatory discrimination. The trend in the Indian courts has been toward a weighted individual concept of equality, But the proportional group concept of equality has never completely been displaced largely because of the Indian Constitution's explicit permission of reservations. Recent cases such as *Thomas* indicate that the proportional group concept is still permissible in India and may be making a comeback.

III

In the United States, the trend has been away from the formal individual concept of equality to a weighted individual concept of equality. The proportional group concept was rejected by Justice Powell in the *Bakke* decision, though there is room for it in the opinion of Justice Brenna, White, Marshall, and Blackmun. Group concept of equality are not in harmony with the individualistic underpinnings of the American Constitution and American culture. and there have been very few court decisions supporting them. Preferences for members of groups are nearly always justified as weighted individual treatment. Reservation systems have seldom been upheld.

The U. S. Supreme Court opinions in the case of *The Regents of the University of California v. Allan Bakke*[66] demonstrate the use of all three concepts of equality.

The Medical School of the University of California at Devis employed two admissions programs to fill its entering class of 100 students. Sixteen seats were reserved for members of minority group (Blacks, Chicanos, Asians, and American Indians). These seats were filled by selection from a pool of "special applicants" to which only minority

65. Unreported at the time of writing. See *Deccan Herald*, Bangalore, April 10, 1979, pg. 1.
66. 438 U. S. 265 (June 28, 1978).

group members could belong. The special applicants were rated only against each other. 84 seats were filled by competition among all applicants in the "general pool" including the special applicants" who were considered in both pools.

Allan Bakke applied for admission in the general pool twice and was turned down twice. In both years, "special applicants" with considerably lower test scores and grade averages than Bakke were admitted to reserved seats. Bakke sued for injunctive and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and section 601 of Title VI of the Civil Rights Act of 1964. The California Supreme Court ruled that the special admissions program violated the Equal Protection Clause and ordered Bakke's admission. It also prohibited Davis from taking race into account as a factor in its admissions decisions.

Justice Powell's judgment for the Court unheld the California court's decision insofar as it ordered Bakke's admission and invalidated the Davis admissions program. But he did so on very different grounds, since he applied a weighted individual concept of equality rather than the formal individual concept of equality used by the California court. The California court held that Davis's admissions program must be completely colorblind. Yet such a colorblind admissions program had been tried at Davis with the result that almost no minority group members had been admitted. Justice Powell held that race may be taken into account in considering the applications of individual applicants. But because white applicants could compete for only 84 seats out of 100, a "line" drawn on the basis of race had been used—in effect a system of reservation. He held that racial classifications must be strictly scrutinized to determine if they are necessary to achieve constitutional state interests. Powell noted that "it is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. They are personal rights,"[67] not group rights. Powell rejected any group theory of equality including "two-class theories" of majority and minority rights under the Fourteenth Amendment. He found that the Davis quota system was not necessary to achieve the state's legitimate interests in ameliorating the disabling effects of identified discrimination, training more minority physicians, and achieving a diverse student

67. *Ibid.* at 289, citing *Shelley v. Kraemer*, 334 U. S. 1 at 22 (1948). The Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution states : "No state shall deny to any person within its jurisdiction the equal protection of the laws."

body. An individually based admissions program like Harvard's could achieve these goals just as well without quotas. Powell held that "the fatal flaw" in Davis's "preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment."[68] Because of the legitimate state interest in rectifying past discrimination race could be taken into consideration in judging the qualifications of individual applicants. But a system of group reservations (based on a proportional group concept of equality) violated individual rights under the Equal Protection Clause.

Mr. Justice Brenna, Mr. Justice White, Mr. Justice Marshall and Mr. Justic Blackmun in their opinion would have not only allowed race to be taken into consideration on an individual basis but would also have allowed the use of group quotas like Davis's. Therefore *Bakke*, would not have to be admitted.

Brennan, White, Marshall, and Blackmun first examined the legislative history of Title VI of the Civil Rights Act of 1964 and concluded that its remedial purpose did not bar the use of race conscious programs to ameliorate historic racial discrimination. They examined prior court decisions and concluded that racial classifications are not *per se* invalid under the Fourteenth Amendment. They held that the amelioration of past discrimination is a constitutional state interest and noted that Davis's admissions program was designed to achieve that goal. Strict scrutiny of racial classification meant asking whether the Davis program "stigmatized" any discrete group or individual and was reasonable related to its objectives. Concluding that it did not stigmatize, Brennan, White, Marshall and Blackmun judged the Davis program constitutional. They refused to rule against group approaches to rectifying past discrimination. "When individual measurement is impossible or extremely impractical, there is nothing to prevent a State from using categorical means to achieve its ends at least where the category is closely related to the goal."[69]

They judged that the Harvard individual approach to the problem was in effect no different than the Davis approach because it too resulted in preferences for minorities and exclusion of some whites.

Justice Marshall in his separate opinion emphasized the long history of group discrimination against American Black people He examined the history of the Fourteenth Amendment and the legislation that immediately followed it and opined the Amendment's framers were attempting to remedy the effects of past discrimination, not to ban state action to achieve that end. Barring race-conscious remedial action "would pervert the intent

68. 438 U. S. 265. (1978) at 320.
69. *Ibid.* at 377-378.

framers by substituting abstract equality for the genuine equality the amendment was intended to achieve."[70]

Marshall supported a group approach to equality more directly than did the Brennan opinion. He pointed to previous cases of group based preference that were upheld by the court and concluded that there is no need to find that those individually benefitted were actually victims of past discrimination,[71] In his clearest support for a proportional group concept of equality, Marshall noted that "it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroos have been discriminated against, not as individuals, but rather solely because of the color of their skins."[72] Marshal l therefore would have allowed group based programs to rectify past group discrimination, a position allowing the state to apply a proportional group definition of equality.

Justice Blackmun's separate opinion upheld the use of race as a factor in medical school admissions and allowed Davis's admissions program as "within constitutional bounds, though perhaps barely so."[73] But Blackmun's opinion never explicitly endorsed the group quota approach to compensatory discrimination, and he explicitly preferred the Harvard individual approach. Blackmun said, "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."[74] Blackmun's opinion seems to be predicated on a weighted individual concept of equality rather than on proportional group equality.

Mr. Justice Stevens, Chief Justice Burger, Mr. Justice Stewart, and Mr. Justice Rehnquist adopted a strictly individualistic approach to the case. They refused to rule on the constitutionality of the Davis admissions program and instead came to their decision on a formal reading of Title VI (Section 601) of the Civil Rights Act of 1964.[75] They found that Bakke had been excluded from participation in Davis's program of medical education because of his race. They interpreted Title VI as protecting *individuals* and as requiring "colorblind" application of its provisions. They clearly rejected the group approach to equality. "Both

70. *Ibid.* at 398.
71. *Ibid.* at 400.
72. *Ibid.* at 400.
73. *Ibid.* at 406.
74. *Ibid.* at 407.
75. 42 U. S. C., 2000 d.

Title VI and Title VII express Congress's belief that in the long struggle to eliminate social prejudice and the effects of prejudice, the principle of *individual* equality, without regard to race or religion, was one, on which there could be a meeting of the minds among all races and a common national purpose. See *City of Los Angeles, Dept. of Power and Water v. Manhart,* 46 U. S. L. W. 4347, 4349 ("the basic policy of the statute (Title VII) requires that we focus on fairness to individuals rather than fairness to classes"). This same principle of individual fairness is embodied in Title VI."[76]

Since Bakke, the individual, had been excluded because of hls race Stevens, Burger, Stewart, and Rehnquist ordered him admitted and upheld the ruling of the California Supreme Court.[77] Their interpretation of Title VI was based on a formal individual view of equality that would not allow race to be considered in deciding on Bakke's application.

Powell's opinion became the decision of the Court because he ordered Bakke admitted as Stevens, Burger, Stewart, and Rehnquist did but he also upheld the consideration of race in admissions programs as Brennan, White, Marshall, and Blackmun did. This middle position was predicated on a weighted individual concept of equality that rejected both the formal individual equality advocated by Stevens *et al.* and also the proportional group equality tolerated by Marshall and perhaps by Brannan, White, and Blackmum. Quotas and reservations arc out but race as a factor in weighting individuals was accepted.

The weighted individual concept of equality is in harmony with the American Constitution's emphasis on individual rights. Group concepts of equality are not. The concept of the individual is one of the key under pinnings of American constitutional law and social theory. The social contract theories of the framers of the American Constitution were based on a view of human beings as free individuals who voluntarily come together to form social institutions. The primary unit in such theory is the individual, not the group. Rights guaranteed by the Fourteenth Amendment have been interpreted as individual rights, not group rights, and Powell's decision in *Bakke* upheld that interpretation.

The Indian Constitution, on the other hand was written for the Indian culture. Dumont[78] and others have argued persuasively that the concept of the individual as a unit separable from his social milieu is foreign to traditional Indian culture. The Indian concept of the person

76. 438 U. S. 265 (1973) at 416.
77. *Ibtd.* at 421.
78. L. Dumont, *Homo Hierarchicus : Essai sur le system des Castes,* Paris : Gallimard, 1966.

according to McKim Marriott,[79] is rather that of the *individual*, a social being constituted by multitudinous social interactions and group affiliations. The most important status group affiliation in India is that of caste. A human being belongs to his or her caste from birth. A person's caste, both in the group and the rank sense, is inextricably part of his personhood. In India, therefore, a persons caste group membership and the situation of his caste in a total structural hierarchy are among his essential attributes. They are not adventitious qualities added by society.

In the Indian Constitution, the caste system is explicitly recognized, though many of the framers did not approve of it. It was recognized because any advocate of equality in India must take the caste system into account. A proportional group concept of equality was sanctioned in the Constitution's provisions for reservations.

Articles 15 (4) and 16 (4) allow group membership to be a determinent of a person's treatment by the State. The Indian courts have tended to prefer weighted individual equality, but they have allowed proportional group equality to be implemented in reservation systems.

The Indian Constitution embodies the Indian social concept of personhood. Because of the group nature of Indian concepts of the person, it is not surprising that group affiliation has been allowed a much more important role in Indian constitutional law than it has been recently in America. Proportional group equality in India would allow for reservation to achieve caste group equality. Because of the pervasive nature of the Indian caste system, this concept of equality is in harmony with the realities of Indian society and culture. The concept of the individual does certainly play an important role in modern Indian constitutional law but it co-exists with more traditional group concepts of personhood. It is thus understandable that in Indian constitutional law both individual and group concepts of equality co-exist.

American courts have almost unniversally used individual rather than group concepts of equality. The *Bakke* decision illustrates this American predeliction, and it is in harmony with America's individualistic culture and with the American Constitution. India's history, culture, and Constitution differs from America's and it is thus appropriate that in India individual and group concepts of equality have been applied by the courts in different ways, ways well suited to the Indian Constitution and culture.

79· Personal communication by Prof. *M*cKim Marriott.

THE "CONTRIBUTION TO LAW" LITERATURE : DEALING WITH INEQUALITIES TENURE, PARTICIPATION AND OPINION WRITING OF SUPREME COURT JUDGES

GEORGE H. GADBOIS, Jr*

During the early years of the Supreme Court's existence, most scholarly literature dealing with the Court focused upon the Court as an institution, and the decisions the Court produced. Virtually no attention was devoted to who the judges were (their background characteristics), how they arrived on the Court (the selection and appointment process), and the extent to which policy or doctrinal views of individual judges affected the decisional output of the Court. Not until the late 1960s was the anonymity of the judges violated, and their social, economic and political backgrounds examined carefully and systematically.[1] Around the same time, the first efforts were made to attempt account for the nature and direction of the Court's decisional output via empirical analysis of the behaviour of the judges.[2] With the exception of the Fourteenth Report of the Law Commission,[3] the Court was in its third decade before any noteworthy and sustained attention was devoted to the process of selecting and appointing judges. This literature was provoked by the first supersession, and initially was characterized by expressions of anger and anguish.[4]

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1. George H. Gadbois, Jr., "Indian Supreme Court Judges : A Portrait," *Law & Society Review*, Vol. 3, Nos. 2-3 (November 1968-February 1969), 317-336.
2. George H. Gadbois, Jr., "Selection, Background Characteristics, and Voting Behaviour of Indian Supreme Court Judges, 1950-1959," in Glendon Schubert and David J. Danelski (eds.), *Comparative Judicial Behaviour* (New York : Oxford University Press, 1969), 221-256, and "Indian Judicial Behaviour," *Economic and Political Weekly*, Vols. 3, 4 & 5 (Annual Number 1970), 149-166.
3. *Reform of Judicial Administration*, two volumes (Government of India, Ministry of Law, 1958).
4. See N. A. Palkhivala (ed.), *A Judiciary Made to Measure* (Bombay : M. R. Pai, 1973), K. S. Hegde, *Crisis iu Indian Judiciary* (Bombay and New Delhi : Sindhu Publications Pvt. Ltd., 1973), and Kuldip Nayar (ed.), *Supersession of Judges* (New Delhi : Indian Book Company, 1973). Except for two chapters in Nayar's book, these are sharply critical of the supersession. Supportive of the supersession are S. Mohan Kumaramangalam, *Judicial Appointments ; Analysis of the Recent Controversy Over the Appointment of*

But prior to the appearance of these three categories of literature drawing attention to the attributes, attitudes, and ascent of the judges, the very first type of literature that focused upon individual judges, and in so doing treated one as different from another, was that which chronicled and analysed the "contributions" of particular judges to various branches of law. The first flurry of this literature appeared in 1960, when the "contributions" of Justice N. H. Bhagwati and Chief Justice S. R. Das were examined in the *Journal of the Indian Law Institute*.[5] Within a few years, more "contribution" literature followed, dealing with Chief Justices Sinha, Gajendragadkar, and Subba Rao.[6] The early 1960s also saw the first, and only of which I am aware, autobiography by a former Supreme Court judge.[7] And in the mid-1960s, book-length quasi-biographies dealing with Gajendragadkar,[8] Subba Rao,[9] and Mahajan[10] were written by V. D. Mahajan.

the Chief Justic of India (New Delhi : Oxford and IBH Publishing Co., 1973), and A. R. Antulay, *Appointment of a Chief Justice : Perspective on Judicial Independence, Rule of Law and Political Philosophy Underlying the Constitution* (Bombay : Popular Prakashan Private Ltd., 1973). More balance and objectivity is found in Rajeev Dhavan and Alice Jacob, *Selection and Appointment of Supreme Court Judges : A Case Study* (Bombay : N. M. Tripathi Private Ltd., 1978).

5. M. P. Jain, "Justice Bhagwati and Administrative Law," *J. I. L. I.*, Vol. II (1960); H. C. L. Merillat, "Chief Justice S. R. Das : A Decade of Decisions on Rights of Property," *ibid.*; P. B. Mukharji, "Chief Justice S. R. Das and Equality Before Law," *ibid*
6. B. Sen, "Chief Justice Sinha," *J. I. L. I.*, Vol. VI (1964); R. L. Narasimhan, "Chief Justice Sinha : A Review of Some of His Decision," *ibid.*; T. S. Rama Rao, "Chief Justice Sinha and Property Rights," *ibid.*; S. N. Dhyani, "Justice Gajendragadkar and Labour Law," *Jaipur Law Journal*, Vol. VII (1967); P. K. Tripathi, "Mr. Justice Gajendragadkar and Constitutional Interpretation," *J. I. L. I.*, Vol. VIII (1966); P. W. Rage, "Contributions of Mr. Justice Gajendragadkar to Hindu Law," *ibid.*; G. Chandra, "Mr. Justice Gajendragadkar and Criminal Law," *ibid.*; J. D. M. Derrett, "The Contribution of Mr. Justice Subba Rao to Hindu Law," *J. I. L. I.*, Vol. IX (1967); T. S. Rama Rao, "Chief Justice Subba Rao and Property Rights," *ibid.*; and S. N Prashad, "Mr. Justice Subba Rao and Fundamental Rights," *All India Reporter Journal* (1967).

   Each of these "contribution" pieces is cited in Rajeev Dhavan, *The Supreme Court of India: A Socio-Legal Critique of Its Juristic Techniques*, (Bombay : N. M. Tripathi Private Ltd., 1977), 20, where he aiso lists major works written by the judges themselves.
7. M. C. Mahajan, *Looking Back* (Bombay : Asia Publishing House, 1963).
8. *Chief Justice Gajendragadkar* (New Delhi : S. Chand & Co., 1966).
9. *Chief Justice K. Subba Rao. : Defender of Liberties* (New Delhi : S. Chand & Co., 1967).
10. *Chief Justice Mehr Chand Mahajan* (Lucknow : Eastern Book Co., 1969).

The purpose of this article is to examine three factors (length of tenure, participation in decison-making, and opinion authorship) that have some considerable bearing upon the "contributions" a judge might make and, accordingly, upon the "contribution" literature. The likelihood of a judge "contributing" to some type of legal doctrine or area of law or policy is related to (a) the length of time he serves on the Court, (b) the number of decisions in which he participates, and (c) the number of opinions of the Court, or other forms of opinions (dissents, concurring judgments) he has the opportunity to write or, in instances of dissenting and concurring opinions, he chooses to write. Our concern here with these three factors is not meant to imply that there are not other, equally or more important, matters pertaining to a judge's potential "contribution." Another is the type of cases a judge is assigned. He may be well-versed in criminal law and have strong feelings about the death penalty, but unless he is assigned to panels dealing with these matters, he will be denied the opportunity to "contribute" in these areas.

Length of Tenure : It is assumed that longer a judge serves, the more likely it is that he will make some sort of "contribution". While this is probably a valid assumption for most judges, it is certainly conceivable that a judge who served but a couple of years could make a significant contribution, and it is equally conceivable that a judge with an uncommonly long tenure may make no noteworthy contribution. But length of tenure certainly has a bearing upon the opportunity a judge has to make a contribution.

From 1950 through 1980, no less than 68 judges served on a Court whose maximum strength (including the Chief Justice) was 8 until 1956, 11 from 1956 to 1960, 14 from 1963 to 1978, and 18 since 1978. This total of 68 includes the 13 who were serving at the end of 1980, including Islam and Varadarajan, who joined the Court in December 1980. Assuming that these 13 serve until reaching the mandatory retirement age of 65 years, the first 68 judges will have enjoyed an average tenure of only 6.25 ($6\frac{1}{4}$) years.[11] This is much shorter a tenure than they had on the High Courts before elevation to the Supreme Court. Even if we eliminated the seven who died in office (Kania, Hasan, Menon, Raju, Roy, Dwivedi, and Mukerjee) and the seven who resigned (Mukherjea, Imam, Subba Rao, Mudholkar, Shelat, Hegde, and Grover), because all but two or three of these were in their sixties when they departed, the average

11. In calculating the tenures of the first six judges, each of whom was first appointed was a judge of the Federal Court, the date of their appointment to the Federal Court has been utilized.

tenure would remain less than seven years. The tenure data are summarized in Table I.

Table I

Tenure of Supreme Court Judges, 1950-1980

0 – 2.9 years	3 – 5.9 years	6 – 8.9 years	9 – 11.9 years	12+years
8	29	14	14	3

It is evident that over half (37) of the judges served less than six years, which means, of course, that the median tenure is less than six years. Thus approximately five generations of judges have served on a Court only 30 years old. Both the youngest judge ever appointed and the eldest ever appointed are currently serving on the Court; the former is P. N. Bhagwati, who was appointed at age 51, and the latter is Islam, who was nearly 63 when appointed. There is no pattern to the average tenures of the judges. Those appointed in the 1950s had the longest (7.2 years) average tenures; the 16 appointed during the 1960s averaged only 5.3 years on the bench, and the 26 appointed in the 1970s served (or are expected to serve) an average tenure of 6.5 years.

It is not possible to say that only those judges who serve for at least a particular number of years would be able to make any noteworthy "contribution." It is more than likely, however, that upon arrival on the Court, judges spend some time "settling in", adjusting, and becoming socialized to their new environment and roles. If they are to make noteworthy "contributions", these are likely to come later rather than at first. If one were to assume that a "contributing" judge must have served for at least 6 years, an arbitrarily chosen but not unreasonable period of time, over half of the judges were denied an opportunity to make a "contribution."

Because of the convention, twice violated but now apparently revived, of naming the seniormost puisne judge as Chief Justice, there is a close relationship between long tenures and who the Chiefs have been. Only one of the 16 Chiefs served on the Court for less than six years, and that was the first, Kania, who died in 1951 just after reaching age 61.[12] Of the last dozen Chief Justices, from S. R. Das to Chandrachud. all but Ray and Beg (the beneficiaries of the two supersessions) were 55 or younger when first appointed to the Court, and served (or will serve in Chandrachud's case) at least nine years on the Court. These men spent

12. Had death not removed Kania from the bench, his Federal Court-Supreme Court tenure would have exceeded nine years, and neither Sastri nor Mahajan would have served as Chief Justice.

an average of 7½ years as puisne judges before, by virtue of the seniority they had accumulated, becoming Chief Justice.

Although unable to establish a threshold number of years a likely candidate for the contribution literature must serve, all of the contribution literature I have seen has dealt with judges who have served for six years or longer, and virtually all of it has dealt with Chief Justices, who are, of course, generally those who have also served on the bench the longest. Thus judges such as Dua, Palekar, Alagiriswamy, and Sarkaria, each of whom served until reaching age 65 but for tenures of only about three years each, are less likely candidates for the "contribution" literature than S. R. Das, Sinha, Gajendragadkar, and Subba Rao, all of whom served between 9-10 years.

Participation : Long service of the Court, while surely a factor affecting the magnitude of the "contributions" of most judges, is only one such factor. Merely "being there" for a half dozen years or more can mean little unless the judge participates in cases decided during his tenure, and unless he says something in the form of written opinions. Here we enter a realm which has not been subjected to the amount of scholarly attention it deserves. Let us consider the participation matter first, followed by the matter of opinion writing.

All judges have participated in the decision-making process, but there are enormous variations in the extent to which different judges have been involved. Because of the fact that there are almost always (*Golak Nath* and *Kesavananda,* in which all judges then on the Court participated, are among the small number of exceptions) several decision-making panels (divisional benches) functioning simultaneously, each staffed by a different subset of judges, a large amount of non-participation in case resolution is institutionalized. No judge has come close to participating in all of the decisions of the Court during his tenure. Indeed, from 1950-1967, of the 25 judges who completed their service during those years, the archetypal judge participated in an average of 32.6 percent of the decisions handed down by the Court during the time he was serving.[13] That is, a judge

13. These and other data used in the remainder of this paper come from an empirical examination of the first 3272 decisions of the Court, i. e., all those reported in the *Supreme Court Reports* from the Court's beginning in 1950 through Subba Rao's resignation in April 1967. For other analyses of these data, see Gadbois, "The Supreme Court of India : A Preliminary Report of an Empirical Study," *Journal of Constitutional and Parliamentary Studies,* Vol. IV, No 1 (January-March 1970), 33-54; "Supreme Court Decision Making," *Tke Ban. L. J.* Vol. 10 (1974), 1-49; and "Indian Judicial Behaviour," *op. cit.*

participated in only about one-third of the Court's overall decisional output.

But judges do not participate with equal frequency, and this 32.6 percent average participation ratio hides more than it reveals. To illustrate, let us look at the records of Gajendragadkar, Sarkar and Subba Rao. Each served for just over 9 years, and for most of this time they were colleagues (Gajendragadkar and Sarkar served from 1957-1966, and Subba Rao from 1958-1967). During Gajendragadka's tenure, 2392 decisions were reported in SCR; the figure for Sarkar was 2364 and for Subba Rao 2568.[14] Thus the length of time served, the actual years served, and the number of decisions of the Court during their years were very similar for these three judges.

When it comes to actual participation, however, there are enormous and not easily understood variations. Gajendragadkar was a member of decision-making panels in 993 cases, which computes to 41.5 percent of the 2392 decisions of the Court during his years. Sarkar participated in only 527 (22.3 percent) of the 2364 cases decided during his tenure. For Subba Rao, the figures are 779 participations (30.3 percent) in the 2568 decisions rendered during his years on the bench. Thus Subba Rao's participation ratio was close to the norm, Gajendragadkar's was way above the norm, and Sarkar's was exceptionally low. Indeed, of the 25 judges who began and completed their tenures from 1950-1967, only Imam, slowed down by a stroke, participated less frequently (19.4 percent) than Sarkar.

Gajendragadkar, then, participated in 466, or 46.9 percent, more decisions than Sarkar, and 214, or 21.6 percent, more decisions than Subba Rao. Why did Sarkar participate so little, and Gajendragadkar so much ? Because students of the Supreme Court have paid little attention to such matters, only incomplete answers are available. The only substantially documented answer to the question is that judges who dissent the most participate the least, and that judges who dissent infrequently participate the most.[15] Also, there is some evidence that the extent to which a puisne judge is tapped by the Chief Justice to be a member of a decision-making panel is related to his and the Chief's own policy preferences.[16] These two explanations, while important ones, are hardly sufficient to account completely for the overparticipation of Gajendragadkar or the underparticipation of Sarkar. Many other factors undoubtedly enter in. But the key probably lies with who happens to be the Chief Justice during a puisne judge's tenure. Obviously bench assignments are not determined by lottery or some systematic rotation scheme. Who sits on which panels, and how frequently, is a decision made by the Chief Justice. Table II looks again at the participation of Gajendragadkar, Sarkar and Subba Rao, with the data broken down in terms of participation rates during the regimes of different Chief Justices. Each was a puisne judge during most of S. R. Das's stewardship, and all of Sinha's and Gajendragadkar's years as Chief. The latter, upon retirement, was followed as Chief by Sarkar, and he, in turn, by Subba Rao.

Table II

Participation Rates by Chief Justice

Judge	Das	Sinha	Gajendragadkar	Sarkar	Subba Rao
Gajendragadkar	36.4	41.0	45.8	—	—
Sarkar	33.6	23.8	11.7	25.0	—
Subba Rao	23.4	27.8	37·9	33.3	30.3

Gajendragadkar participated least frequently (but still above the norm) under Das, and was well above the norm during Sinha's reign. And when Gajendragadkar himself was Chief from 1964-1966, he managed to participate in nearly half of his Court's entire decisional output. Sarkar's participation rate under different Chiefs varied the most, from about the norm under Das, to well under the norm under Sinha, and plummeted to a perplexing 11.7 percent under Gajendragadkar. Because Sarkar was Chief for only 105 days, during which time only 48 decisions were reported in SCR, the participation rates during his tenure as Chief mean little. Subba Rao was tapped to serve on benches relatively little by Das and Sinha, but surprisingly often (the two were poles apart ideologically)[17] by Gajendragadkar. When Chief Justice himself, Subba Rao participated in 77 of the 254 decisions of his chieftainship, i. e., just about the norm. But Subba Rao evidently chose with some care and purpose the panels on which he and others would serve, for Subba Rao, the greatest dissenter in the Court's history, and perhaps the Court's most notable libertarian, never was in the minority as Chief, and during his stewardship the individual won more often and the government lost more frequently than under any of his eight predecessors as Chief.[18]

14. It is important to note that whenever the "Memoranda" page of the SCR reported a judge on leave for a particular period of time, he was considered, in compiling these figures, as *not* a member of the Court during such leave periods. Thus such officially recorded absences would not serve to lower a judge's participation rate.
15. The relationship between dissent and participation was examined at length in "Supreme Court Decision Making," *op. cit.*, 31-34.
16. *Ibid.*, 24-34.
17. See "Indian Judicial Behaviour," *op. cit.*
18. *Ibid.*, 31.

Much more research is necessary before we can understand better the variation in the frequencies of participation by various judges in the work of the Court. For our limited purposes here, however, the relationship between participation and the "contribution" literature is apparent. If one has few opportunities to participate (or chooses not to participate often), he is a less likely candidate for a "contribution" piece than one who participates more.

Opinion Writing ; The "contribution" literature reveals that authors of such articles rely mainly upon written opinions in assessing the "contributions" of their subjects. This emphasis, of course, is well-placed, for unless a judge says things that form part of the written and public record of the Court, one would have to use other sources generally regarded as less satisfactory, such as off-the-bench speeches and writings. Moreover, scholars evidently consider the most fertile opinions to be those in which the judge speaks for the Court, i. e., writes the opinion of a unanimous Court, or of the majority if the decision is a divided one. Theoretically, a judge could write an opinion in every decision in which he had the opportunity to participate. When in the majority or a member of a unanimous bench, if he was the Chief, or the seniormost puisne judge on a bench on which the Chief was not a member, he could select himself as the spokesman of the Court, and author the Court's ruling. Judges otherwise situated, when not asked to write the Court's opinion, could wrire an opinion concurring with the outcome, or they could write a dissenting opinion. In practice, however, judges lack either the time or the inclination (or both) to write something in every case in which they participate.

Because most decisions of the Court during the first two decades (and evidently more recently also) were reached by benches composed of three or five judges, the expectation is that for approximately every four participations, there will be an opinion of the Court. And this is what the record reveals. There were 8563 participations by the 25 judges, and 2247 of these participations (26.2 percent of the total) were in the form of opinions of the Court. If writing the opinion of the Court was an equally shared responsibility or opportunity, the archetypal judge would then write about one-quarter of the Court opinions of panels on which he participated. But just as there was wide variation in the frequency with which judges served on panels, there was much variation also in opinion writing activity. Returning, for illustrative purposes, to Gajendragadkar, Sarkar and Subba Rao, we find that Gajendragadkar spoke (wrote) for the Court in 34.0 percent (338 of 993) of the cases in which he participated. Only Kania, who spoke for the Court in 20 of the 49 cases in which he participated during his abbreviated tenure, had a higher

(40.8 percent) ratio of opinions to participations. Of the 527 decision in which he participated, Sarkar for the Court only 22.0 percent (116 opinions) of the time. Subba Rao, slightly below the norm of participations, was considerably above it with an opinion writing ratio of 31.1 percent (242 opinions of the Court among his 779 participations). To the extent that there was an archetypal judge during the 1950-1961 period, he wrote 8.5 percent of all the rulings of the Court handed down during his tenure. For Gajendragadkar, the figure was 14.1 percent (338 opinions/2392 decisions); for Sarkar it was 4.9 percent, and for Subba Rao it was 9.4 percent.

The opinion of the Court is probably the most significant form of written impact an Indian judge can make (Dhavan argues that dissenting opinions have not played an important role.[19]) But as noted above, it is not only manifestation of a judge's written legacy that may be found in the official records of the Court. There are also concurring with the outcome, and dissenting opinions. Neither of these, however, was very frequent among the 25 judges; there were but 180 opinions concurring with the outcome, and 228 dissenting opinions. Thus our increasingly elusive archetypal judge wrote concurring with the outcome opinions in 2.1 percent of the cases in which he participated, and dissenting opinions in 2.7 percent of them.[20]

Again, however, the variation in the revealed propensities of the judges to write concurring or dissenting judgments is enormous. Gajendragadkar's 338 opinions for the Court represent *everything* he had to say; he never wrote a concurring opinion, and he never wrote a dissenting opinion. Sarkar is found at the other extreme. Evidently denied the opportunity to participate very often, and not often the spokesman of the Court when he did participate, he ranked first among our 25 judges in separate opinions concurring with the result (he wrote 31; Mudholkar was a distant second with 19), and he was second only to Subba Rao in dissenting judgments (38 to 45). So Sarkar wrote concurring opinions in 5.9 percent of the cases in which he participated.[21] Subba Rao's 13 concurring opinions represented 1.7 percent of his participations. Because

19. *The Supreme Court of India*, *op. cit.*, 31-37.
20. So far we have accounted for only 31 percent (26.2+2.1+2.7) of the participation of our archetypal judge. The remainder is participation without writing anything, i. e., simply voting in support of the outcome (68.6 percent), or voting in support of a dissenting judgment (0.4 percent).
21. In percentage terms, both Sastri (8.9 percent) and Fazl Ali (8.2 percent) demonstrated a greater propensity for writing opinions concurring with the result.

Sarkar participated much less frequently than Subba Rao, his ratio of dissenting judgments to all participations was 7.2 percent, considerably higher than Subba Rao's 5.8 percent. Sarkar's dissenting judgment rate was the highest of the 25 judges. (On four other occasions, Sarkar and Subba Rao voted with the minority without comment; Gajendragadkar did this only once, the only blemish on his otherwise perfect record of participating only on the winning side.)

Combining the three varieties of written opinions (of the Court, concurring with the outcome, dissent), Gajendragadkar's legacy was the 338 opinions of the Court; Sarkar's total was 185 (116+31+38), and Subba Rao's total was 303 (242+13+45). When these written opinion totals are divided by the number of cases in which each of these three participated, we find that when provided with the opportunity to say something, both Subba Rao and Sarkar said something for the record more frequently than did Gajendragadkar. Subba Rao's ratio of all opinions to participations was 38.5 percent (300/779). Sarkar was second with 35.1 percent (185/527), and Gajendragadkar trailed with 34.0 percent (338/993). All three were well above the norm, which was 31.0 percent for the 25 judges. Thus all three left a substantial legacy of opinions for students of the Court to analyze. Everything Gajendragadkar wrote represented the law of the land; only 62.7 percent of Sarkar's opinions can be so categorized, while 80.7 percent of Subba Rao's opinions proclaimed the law of the land.

To the extent that the "contribution" literature considers exclusively, or nearly so, opinions of the Court, and ignores or downplays concurring opinions and dissents, this practice might well be reconsidered. Both dissents and concurring opinions are uncommon, but their rarity may underscore their significance. Unlike opinions of the Court, where the author is speaking for others in addition to himself, dissents and concurring judgments are, on the Indian Supreme Court, generally solo performances in which the author is speaking only for himself. As such, they may tell us more about the "contributions" a judge is trying to make than those opinions in which he is speaking for a unanimous bench or a majority.

Conclusions : It is evident that length of tenure, participation in decisions, and opinions written are factors that have some bearing upon the magnitude and type of "contribution" a judge may make, Over the first matter the judge has no control; he cannot join the Court until the appointing authorities call him, and he must vacate his seat precisely at

age 65.[22] If those not appointed until their early 60s or late 50s are going to make a contribution, they must move quickly. We discovered that equal tenures do not mean equal participations or equality in speaking for the Court. Not enough is known about why some judges, such as Gajendragadkar, participated so much, and why others, such as Sarkar, participated so little. Little is known also about why there is so much variation in the amount of opinion-writing by judges, particularly opinions that speak for the Court. But because we know that the Chief Justice is involved in the process of selecting the judges for appointment to the Court, and because it is his responsibility to assign judges to the several division benches, and because he, by virtue of his office and seniority, determines who speaks for the Court in all cases in which he is a participating judge and in the majority, some of these mysteries may be solved by looking more closely at the Chief Justices. To the extent that these and related mysteries remain unsolved the "contribution" literature remains somewhat problematical. This article has raised more questions than it has answered. Perhaps authors of the "contribution" literature may be of assistance in unraveling some of these mysteries.

22. There have been a few instances of retired judges being recalled for brief periods of additional service, but this is not a common practice. Of the 25 we have been dealing with, at least four (Fazl Ali, N. C. Aiyar, Bose, and T. L. V. Ayyar) returned briefly after having reached retirement age.

BOOK REVIEW

Caste Reservation in India : Law and the Constitution by G. P. Verma pp. XVI & 164 Chugh Publications, Allahabad, Rs. 50 (1980).

The Indian policy of compensatory discrimination has created a lot of confusion leading to court cases, appointment of investigating commission and public discussion for the answer of the question : who are the backward classes in India ? This slim book by G. P. Verma[1] seeks to explore some of the issues relating to the policy of job reservations.

The book is divided into seven chapters covering wide-range themes such as the idea of equality, identification of backward classes, quantum of reservations, judicial treatment and State commissions etc.

In chapter I the author discusses the constitutional provisions relating to equality and protective discrimination. After referring to the rational basis test of Article 14, the author mentions Articles 15 and 16 and then describes Article 16 (4), as providing "a significant exception" and as carving "out a class or group from the scope of the main Article 16 (1)."[2] Here the author completely overlooks the seven-judge-bench decision of the Supreme Court in *State of Kerala* v. *N. M Thomas*[3] where the Court has overruled the earlier view that Article 16 (4) is an exception to Article 16 (1). The Court has held that Article 16 (4) is only an illustration or explanation of the right to equality in relation to backward classes. The State is not confined to reservation only as a means of promoting equality but is free to experiment all possible methods to raise the social and economic position of the backward groups. The crucial issue to be discussed by the author should have been whether the idea of compensatory discrimination is compatible with the idea of constitutional equality.

In chapter II entitled 'Identification of Backwards' the author refers to the difficulty faced in the Constituent Assembly over the definition of the concept of backward classes.[4] He agrees with Professor M. P. Jain that backwardness has become a vested interest and there is a near universal clamour of being designated as backward in order to enjoy the bene-

1. *Caste-Reservation in India : Law and the Constitution* (1980) by G. P. Verma (Hereinafter referred to as the author).
2. *Supra* n. 1 at 15.
3. A. I. R. 1976 S. C. 490.
4. *Supra* n. 1 at 22.

fits of reservation.[5] The author shows how the Kaka Kalelkar Commission's report countered rejection by the Central Government for its exclusive reliance on caste criteria. But the expressions used by the author like 'backwards' (to denote backward classes) and 'upwards' (to denote the advanced sections of the society) are somewhat strange and do not even remotely convey the idea of social groups. Ironically, the word 'backwards' would mean 'towards the back', 'in a direction opposite to the usual one' and will never convey the idea of a backward social group.

In Chapter III entitled 'State Commissions' the author contents himself by extracting material from decided cases and giving them the title, 'Mysore Experience', 'Kerala Experience', etc. The author makes no attempt to analyse the reports of the various investigating commissions appointed by State Governments from 1965 to 1978. Such committees or commissions reported in Jammu and Kashmir,[6] Kerala,[7] Karnataka,[8] Andhra Pradesh[9] and Tamil Nadu.[10] For instance, instead of discussing the recent report of the Havanur Commission, 1975,[11] the author still refers to the outdated Nagan Gowda Committee Report, 1961 discussed in *Balaji* v. *State of Mysore*[12] and believes that the 1961 report represents the "Mysore Experience",[13] "Kerala Experience" is explained through the cases decided by Kerala High Court[14] and the Supreme Court[15] on reservations under Article 15 (4). The author mentions the Pillai Commission Report 1965 on Article 15 (4) reservations but fails to notice the report of the Nettur Commission[16] which made very sensible proposals for reservation in services under Article 16 (4). One expected

5. *Id.* at 23-24.
6. *Report of the Backward Classess Committee : Government of Jammu & Kashmir*, 1969 (J. N. Wazir : Chairman).
7. *Report of the Backward Classes Reservation Commission : Government of Kerala*, 1970 (Nettur P. D. : Chairman).
8. *Report of the Karnataka Backward Classes Commission : Government of Karnataka*, 1975 (L. G. Havanur : Chairman).
9. *Report of the Backward Classes Commission : Government of Andhra Pradesh*, 1970 (Manohar Prasad : Chairman).
10. *Report of the Backward Classes Commission : Government of Tamil Nadu*, 1971 (A. N. Sattanathan : Chairman)
11. *Supra* n. 8.
12. A. I. R. 1963 S. C. 649.
13. *Supra* n. 1 at 38-40.
14. *State of Kerala* v. *Jacob Mathew*, A. I. R. 1964 Ker. 316; *Jacob Mathew* v. *State of Kerala*, A. I. R. 1964 Ker. 30; (These cases led to the appointment of the Pillai Commission which reported in 1965 suggesting the criteria for derermining backwardness for the purposes of Article 15 (4).
15. *K. S. Jayashree* v. *State of Kerala*, A. I. R. 1976 S. C. 2321.
16. *Supra* n. 7.

the author to present an accurate profile of the State practice on job-reservation by analysing the proposals of the various state commissions.

Chapter IV entitled 'Judicial Endeavour' discusses the decisional law on reservations. The author very rightly observes that in certain cases the Supreme Court had upheld caste-based classifications contrary to the principles laid down in *Balaji* according to which castes could not be equated with classes.[18] Towards the end of the chapter the auther reproduces the summary of the principles on reservations from from *Chohote Lal* v. *State of U. P.*[19] He concludes that "the courts have been able to instil some rational approach in this regard to some extent by insisting that caste cannot be the sole criterion to determine the backwardness."[20]

Chapter V deals with the problem of "Quantum of Reservations."[21] The author states the well-known *Balaji* rule that reservation should be below 50 per cent of the available places. But the discussion of the U S. Supreme Court decision in *Regents of University of California* v. *Allan Bakke*[22] in the chapter on the quantum of reservation is misplaced. *Bakke* is not even remotely concerned with the question of the extent of preferences. All that *Bakke* decides is that the use of 'racial quota' to benefit disadvantaged minorities is incompatible with the values underlying the equal-protection clause of the Fourteenth Amendment to the U. S. Constitution. In the present reviewer's opinion *Bakke* could have more appropriately been discussed in the chapter on 'equality'.

It is unnecessary to comment on the author's treatment of *United Steelworkers of America* v. *Weber*,[23] the full text of which was not available with the author at the time of the writing of the book under review. It may, however, be indicated that *Weber* is in no way comparable to *Bakke* because *Weber* concerned the action by private employers uncontrolled by the constitutional standards whereas *Bakke* concerned the State action controlled by the fourteenth amendment. The net result of these two holdings is that when a state institution like the University of California Medical School at Davis in the *Bakke* case uses racial quota, such quota violates the equal protection-clause but when a private employer like Kaiser Aluminum in *Weber* uses a racial quota, such quota is not

17. *Supra* n. 1 at 40-46.
18. *Id*. at 61.
19. A. I. R. 1979 All. 135,
20. *Supra* n. at 77.
21. *Id*. at pp. 79-105.
22. 98 *Supreme Court Report* 2733 (1978).

controlled by the constitution and is consistent with Title VII of the Civil Rights Act 1964.

In Chapter VI entitled "Socially Aegrestique-Medendo" the author begins with a sub-title "Redistributive Justice,"[24] but except some quotations from the opinion of Justice Krishna Iyer in *Thomas*, he makes no attempt to explain the concept and relate it to the notion of preferential treatment. The preferential policies can be justified respectively by arguments based upon distributive, compensatory and utilitarian justice. Since the idea of reservation is to counterbalance the deficiencies of the disavantaged groups due to historical and structural reasons, the philosophy underlying Articles 15 (4) and 16 (4) is perhaps, closest to the idea of compensatory justice rather than with the vague idea of redistributive justice.

After giving a brief account of the caste-system and its attendant evils, the author goes on to say that 'backwardness" is not a legacy of the socalled lower castes' and that the benefits of job-reservation should not be denied to the well-to-do families.[25] He argues that "there are backwards in every caste" and it would be ironical "that a boy coming from a a *Brahmin* family cannot get a job ... but a wealthy backward caste's son is selected."[26] He therefore argues that preference should be given to the "weaker sections coming from the upper strata of the social structure also."[27] The present reviewer agrees with the author that the prosperous segments amongst the once designated backward classes should now be denied the benefits of reservations but it is difficult to see how a poor Brahmin or every poor person from the upper strata of the social structure can be entitled to perferences. The aim of compensatory discrimination s not to eliminate all kinds of inequalities but to offset inherited inequalities. The members of the higher castes and communities have never been the victim of past or present societal discrimination. Removal of poverty or the elimination of other socio-economic disparities is the duty of a welfare-state which can be achieved through the general development programmes and it will be only confusing to mix up the other redistributive measures with the idea underlying compensatory discrimination.

The author refers to *I. T. O. Shillong* v. *N. Takin Ray Rymbai*[28] as upholding the exclusion of well-off members of a Scheduled Tribe from

23. 99 *Supreme Court Report* 2721 (1979).
24. *Supra* n. 1 at 106.
25. *Id* at 116.
26. *Id* at 117 (emphasis in the original).
27. *Ibid*.
28. A. I. R. 1976 S. C. 670.

the Scheduled Tribe classification in distributing facilities and benefits. He says that it was observed in that case ; "The Court in *Thomas* case did not discuss over inclusiveness or underinclusiveness but found that the state had the freedom to include or exclude beneficiaries, based on backwardness of the group into which they were born."[29]

But no such observation was made by the Supreme Court in *I. T. O. Shillong's* case. The author seems to have never checked up the text of the judgment and has simply lifted a footnote from the present reviewer's article published in 1978.[30] This footnote reads : "After the Thomas decision it is now possible to exclude well-off members of the Scheduled castes and tribes in distributing benefits. Thus in *I. T. O. Shillong* v. *Takin Ray Rymbai,* exclusion of well-off members of a scheduled tribe from Scheduled tribe classification in distributing benefits has been upheld." The Court in *Thomas* case did not discuss over-inclusiveness or under-inclusiveness but found that the State had the freedom to include or exclude beneficiaries based on backwardness of the group into which they were born."[31] See Alan Katz, *supra* n. 14 at 636.[31]

Apparently the above view has been expressed by Allan Katz in his article published in 1977.[32] The author could have avoided giving a mistatement of law had he cared to acknowledge the present reviewer's article from which he had lifted this quotation.

In the concluding chapter entitled 'Immediate Predicament' the author makes certain suggestions. The notable suggestions are that the backward classes should be selected on the application of multiple tests such as poverty, caste, occupation, place of residence, etc., that the designation of backward classes should precede a thorough investigation into the social and economic conditions of the people; that reservation should be below 30 per cent, that reservation-should be a temporary measure and that the well-off members among the backward classes should now be eliminated.[33]

The author suggests that the backward classes should be designated as "underdeveloped group" or "developing group"[34] so as to bring in "its arena the entire backward sections of the society which may include

29. *Supra* n. 1 at 127 f. n. 48.
30. Parmanand Singh 'Social Justice for the Harijans : Some Sociological Problems of Identification, Conversion and Judicial Review' 20 *JILI* 335, fn. 90. (1978)
31. See Allan Kartz, *Supra* n. 14 at 636.
32. Alan M. Katz "Benign Preferences—An Indian Decision and the *Bakke* case ? *American Journal of Comparative Law*, 611, 636 (1977).
33. *Supra* n. 1 at pp. 135-138.

an overwhelming majority of backward castes and may also include members of "upper" castes as well who may be suffering from identical handicaps."[35] In the present reviewers opinion the expression "developing group" or "underdeveloped" group would be inappropriate to denote socially and educationally backward classes.

The above observations and comments should not be read as detracting from the value of the study undertaken by the author. The value of the book under review will further be enhanced by a little effort made by the author by incorporating the suggestions made in this review.*

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34. *Id.*at 135.
35. *Ibid.*

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Shigeru Oda*, *International Law of the Resourees of the Sea*. Alphen aan den Rijn, The Netherlands : Sijthoff & Noordhoff (1979), 132-xii pp.

This relatively short text, though excellent exposition of the fundamental legal issues still confronting the Third United Nations Conference on the Law of the Sea (UNCLOS III), is in fact a reprinted edition, with up-dating supplements, of Judge Oda's Hague Academy lectures, which this reviewer had the privilege to attend in 1969. As a result of Judge Oda's subsequent course, presented to the external program of the Hague Academy of International Law, at its Tokyo session, he determined, first, that it was unnecessary to alter this basic position toward that portion of international law applicable to ocean resources and, second, that it would be desirable to add some of his contemporary thoughts in light of the continuing disputes sought to be resolved by UNCLOS III. Accordingly, supplements have been added to each of the reprinted chapters; however, these supplements relate to the subject matter of the original publication,[1] with the effect that newer topics that have arisen since 1969 are minimized, such as the two hundred mile economic zone.

The book presents a concise historical analysis and evaluation of fundamental issues still plaguing the world community. It is highly desirable, indeed absolutely essential, to comprehend the process through which the present international law of the sea has evolved, by the unilateral actions of governments, by the practice of states and regional groupings, and by the Geneva Conventions. The author's purpose, then, is to register his views toward these developments, particularly the period since 1950, so decisively influenced by the work of the International Law Commission and the Geneva conferences of 1958 and 1960. The inability (coupled with the unresolved legal criteria that are required to govern the exploitation of resources) of the two conferences, to resolve the limits of the high seas, the status of sedentary species, the legal status of the resources of the continental shelves, as contrasted with resources in the superadjacent seas, or the outer limits of the numerous continental shelves, still haunt the series of seemingly endless United Nations conferences.

Part I of the book, *Coastal Fishery Jurisdiction*,[2] stresses this historical approach, and it demonstrates the modification of the concept of

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1. 127 Recueil des Cours 355 (1969 II). By way of hackground to the present study see S. Oda, Caracas Session at the Third Law of the Sea Conference, 73 J. Int'l L. & Dip. 451 (1975) (summary in English).

2. S. Oda, *International Law of the Resources of the Sea* 3-76 (1979).

freedom of the seas, as concerns navigation and fishing. This material, which is impartially presented in such a manner as to objectively examine the positions of the several blocs of states, e. g. the industrialized nations, generally the members of the OECD, as related to the developing world and the less developed countries (LDCS), also takes into account the Japanese viewpoint, particularly as regards the harvesting of the king crab, salmon, and sedentary fisheries.

In 1969, it was recommended that the "treatment of sedentary fisheries.. should be exercised from the Continental Shelf Convention, since it is plain that there is no logical or historical basis for a uniform treatment of these two disparate problems."[3] These living resources, including the king crab, should not be treated differently from ordinary fishery resources. As of the period of the 1970's, the two hundred mile exclusive economic zones will govern the status of those living resources, contained therein. "On the other hand, the sovereign right of the coastal State to sedentary fisheries will, parallel to the outer limit of the continental shelf, extend beyond 200 miles from the coast in some cases."[4]

As is true of the entire text, the author is sympathetic toward the special dificulties faced by the land-locked, the self-locked, and those LDCs that lack the technology and financial stability required to exploit the resources contained within their two hundred mile economic zones, e. g the resources of the continental shelves and even fishing on the formerly free high seas. While also supporting the legal rights of the industrialized world, Judge Oda seeks an equitable sharing of ocean resources, including the deep seabed. The basis of his position is to be found in the application of equity and economic reality, as a phase of a policy approach, to modify the traditional law governing the high seas. Within this context, a plea is made for a greater degree of international cooperation as opposed to selfish unilateral actions. The need for increased cooperation becomes one of the underlying themes of his application of the policy orientation.[5] Such an approach further emerges in his discussion of the continental shelf and the unique difficulties that result from, *The Internatiol Law Relating to Marine Mineral Resources*, the topic of Part II.[6] Indeed, the remainder of the book is primarily concerned with continental shelf problems, as this legal (as contrasted with geological and geographic) concept has evolved since the early 1950s. Whereas the continental shelf (an accepted doctrine based on the geographic features of the earth's crust)

3. Id. at 74.

4. Id. at 75.

5. See e. g., id. at 43 passim.

6. Id. at 77-129.

is an accepted reality of international law, the new regime, as developed by the United Nations, becomes an indispensable rubric of the new international law. But some issues concerning their legal status have yet to be resolved, such as the extent to which the coastal state may claim sovereign rights over the shelf and its resources, and especially the boundary of the shelf, as for example among neighbouring and adjacent states. Considerable dificulty still remain unresolved as to the status of those portions of shelves extending beyond the exclusive economic zones. The author, quite properly, favors the application of national control over those regions extending beyond the two hundred mile economic zone and up to the outer edge of the shelf, precisely the boundary of the deep seabed.

The discussion is especially conscious of the rights of all states to utilise the waters superjacent to the continental shelves, particularly the right of free passage. Necessarily, there will be some conflict between the several competing uses of the seas; therefore, the ultimate solution must deal with the regime of the sea as a total entity, in order that maximum use and benefit result to the world community.

In this portion of the text, the historical analysis is especially well done, for the reader becomes aware of the emergence of forces that are modifying, in fact replacing, the traditional freedom of the seas. For example, in the division of a continental shelf located between two or more states, the equidistance line is rejected; it is also contended that the principle of equidistance did not constitute a rule of customary international law. Judge Oda seeks to have any division of continental shelves based on economic realities and an equitable distribution of resources and profits.[7] Accordingly, the interests of disadvantaged states and developing states will be taken into account; developed coastal states must make provision for the less fortunate, as is currently farvored at UNCLOS III. This reviewer also approves of the author's recognition of the interests held by those industrialized states, currently possessing the technical capability to exploit deep sea resources. Only a few states are in a position to fully exploit the resources of their own continental shelves and similarly, the deep seabed. Still, a reasonable share of the profits must be reserved for disadvantaged states. The final determination must await the conclusion of UNCLOS III. Hopefully the interests of the world community will be safeguarded.

The supplement to Chapter IV[8] can be considered as the heart of the book, because at this point, the several underlying themes merge, in

7. See e. g., id. at 90-103.
8. Id. at 104-08.

terms of the Informal Negotiating Text : equitable principles, possibly incorporated into bilateral treaties between those states directly affected, must likewise be incorporated within any final convention on the law of the sea. The text highlights the difficulties confronting states seeking to delimit the boundaries of continental shelves and to fairly exploit ocean resources, as for example the weaknesses in the negotiating texts and the nationalistic positions taken at UNCLOS III.

Chapter V, *Regime of the Deep Ocean Floor*, continues to examine the delimitation of the outer limits of the continental sheif, i.e. the extension of national jurisdiction over larger areas of the formerly free high seas; yet at the ocean floor a new legal order will govern. Areas beyond the continental shelf should be utilized for the benefit of mankind. Judge Oda, therefore, contends that the peaceful uses of the seabed are far too important to remain undefined by the international community. Thus, the legal regime will differ from that governing the continental shelf, for the reason "the significance of a new regime for the deep ocean floor will be in the fact that the common interest in the area will be preserved, in contrast to the narrower interest of the coastal State, as in the case of the continental shelf".[10] Nonetheless, who is entitled to exploit the resources of the deep ocean floor ?[11] What conditions will be imposed upon the industrialized powers, and private enterprises, that seek to exploit the resources of the seabed ? After summarizing the early efforts of the United Nations and its Seabed Committee, emphasis is placed on a division of the profits for the benefit of the world community, but primarily the least developed and geographically disadvantaged states. An international authority has been proposed in order to realize the objective. In fact, several far-reaching proposals have been promulgated to achieve this objective, such as an international system of registration and even a global licensing authority.

Realistically, the two hundred mile exclusive economic zone has abrogated much of the prior law governing ocean areas ; consequently, it would have been helpful if a bit more attention had been accorded the legal status of the exclusive economic zone. However, the regime of the deep seabed is the subject of another book, namely, *The Law of the Sea in Our Time II : The United Nations Seabed Committee 1968-1973;* and it is

9. Id. at 109-29.
10. Id. at 115. See also S. Oda, Law of the Sea Conference, 19 *Japanese Ann. Int'l L.* 80 (1975).
11. *International Law of Resources* at 116ff.
12. (1977). Gormley, Book Review, 14 *Ban.* L. J. 148 (1978). See especially, Oda, The Ocean : Law and Polit(cs, 25 *N. I. L. R.* 149 (1978)

the topic of the first half of *The Law of the Sea in Our Time I : New Developments 1966-1975.*[12]

The author has attempted to bring a degree of clarity to the various facets of the law, which have become confused and uncertain, owing to the seemingly endless debate within the United Nations General Assembly, the Seabed Committee, and the three major conferences on the law of the sea. This purpose has been accomplished by Judge Oda, with an objective and scholarly approach. As is true of his series of publications,[13] Judge Oda has rendered a major contribution in his efforts to resolve conflict and enable states, and their rationals, to utilize the resources of the oceans.

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13. E. g., notes 1 & 10 supra.

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Lectures on Criminal Procedure by R. V. Kelkar, 1980. Eastern Book Company, Lucknow. pp. 371. Price Rs. 25/-.

The book presents to the students of Law a brief and an extremely useful commentary on the provisions of Code of Criminal Procedure, 1973. A distinctive feature of the book is that an ably thought of logical sequence has been adopted therein to introduce and explain the large number of matters that stand covered by the provisions of the Code. And what is all the more admirable is that it has been done in a manner so as to drive home not only the contents of those provisions of the Code, but also, their actual significance in the prevention, investigation and trial of Crimes. A careful and analytical survey of the important provisions of the Code, under appropriate subject headings, is yet another worked feature of the book.

The Foot Notes "Exercise" and "Questions" at the end of each chapter further add to the utility of the book. They are bound to render effective help to the students, not only in summarizing the materials contained therein, but also, looking for relevant materials for further study. Exposition of the law, contained in the Code, as also declared by the Supreme Court, regarding some of the important provisions thereof, has been made with such clarity of thought and lucidity of expression that those for whom the Book is meant, will readily follow them.

From all these standpoints, Sri Kelkar richly deserves to be congratulated for having brought out an excellent book for the students. The book is highly recommended to them. The Publishers who deserve appreciation for giving a good get up to the Book and keeping the price of the book at a reasonable level inspite of the tremendous increase in the cost of publication.

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Indian Supreme Court and Politics by Upendra Baxi, 1980. Eastern Book Co., 34 Lal Bagh, Lucknow pp. xviix 272 Price Rs. 75/-.

The book under review contains three lectures delivered as the second series of Mehr Chand Mahajan Memorial Law Lectures by Professor Upendra Baxi of the Delhi University under the auspices of the Punjab University. The first lecture deals with "The Supreme Court and Politics", which is also the title of this book. The Second lecture entitled "The Twilight of Legitimacy : The Supreme Court and the Emergency" evaluates the performance of the Supreme Court during the 1975-77, i. e., from June 25, 1975 to March 20-24, 1977. The third lecture deals with the post-emergency period. The title of the lecture is "The Post-Emergency Supreme Court : A Populistic Quest for Legitimation."

Professor Baxi begins his first lecture by saying that Justice Mehr Chand Mahajan "would not have liked at all the themes of these lectures."[1] Perhaps, many students of law will not appreciate what Baxi has said in these lectures and also the way he has said. The reader gets the foretaste of the theme and content of these lectures the moment he reads the Introduction. Baxi observes : "And yet what has been said in this book had to be said. It has to be said because it is true. We may, or may not, want a government by judiciary; but, in certain respects, we have it already. We may, or may not, want justices to have the power to make law and even the Constitutions; but they have it and, what is more, they exercise it readily and regularly. We may, or may not, want them to be seen exercising this power even when they actually exercise it; but the truth is that the exercise of their power is writ large in the corpus of decisional law. The facts are all against the smug, often unexamined and inherited, assumptions."[2]

Professor Shri Dayal has pointed out in his Foreword to the book that since 1967 Baxi has been emphasising that "the judicial process at the Supreme Court level is a species of political process and constitutional adjudication is essentially a political activity expressed by the court through the medium of legal and jurisprudential language to preserve 'the mystery and mystique' of the judicial process and to maintain the illusion that all that the Court does is to interpret the law and the constitution."[3] It is now generally accepted by the students of law that the courts do make the law by the process of interpretation. But many will not agree with Baxi when he observes : " I believe it is time to take stock

1. Upendra Baxi, *The Indian Supreme Court and Politics*, 1(Hereinafter cited as BAXI).
2. Baxi at XI.
3. BAXI at VII.

and to say what judges regard as unsayable that the Supreme Court is a centre of political power."[4] He further explains it by stating that "it is a centre of political power simply because it can influence the *agenda af political action*, control over which is what power politics is in reality all about."[5] Baxi himself states that his view has not been taken seriously by other legal scholars" as it disturbs the smug ideologies or fantasies we still have about judicial power."[6]

No one will disagree with Baxi that in a democracy court can be used by the political parties. In his own style he observes : "Whether Justices of the Court like it or not, understand it or not care about it or not, the plain fact remains that the Court can be used for purely party political ends in certain situations beyond the control of the Court."[7] And in this sense, he is correct in saying that the Supreme Court is also the Court of the "last political recourse." But then he extends his argument that when the politicians start using the court for political purpose, the court cannot avoid politics in deciding the cases, and sometimes the court indulges in the politics of opposition[8]. It is necessary to mention at this stage that Baxi is in favour of the Supreme Court playing politics. Writing about the *Dissolution* case, he observes : "The dissolution case, it should be clear, is a political judgement and it should be frankly recognised as such. And when I say that it is a political judgement, this would be considered derogatory only by peoble who hold a 'nursery' or 'kindergarten' view of the judicial process. I do not see any objection in Justices of the Supreme Court taking account of hard political facts and discharging what they, in their conscience, feel to be their constitutional responsibilities in their role as the top adjudicators of the nation."[9] In fact, he has repeatedly emphasised that he favours the judges playing politics provided they play good politics, and not bad politics.

Thus, the basic issues raised by Baxi are that the Supreme Court is a centre of political power, that the judges of the Supreme Court play politics, and that they should play good politics. These are the issues which are likely to shock a person who has been educated and trained under the common law tradition. Even though one may not be under the illusion that courts only interpret the laws and do not make it, even though one does not intend to preserve the mystery and mystique of the

4. BAXI at 5.
5. BAXI at 10.
6. *Id.*
7. BAXI at 16.
8. *See.* at 25.
9. BAXI at 133.

judicial process, yet it is difficult to accept that the Supreme Court judges are playing politics, and there is no harm if they play good politics. There is no doubt that judgements of judges like Chief Justice Subba Rao and Justice Krishna Iyer and cases like *Golaknath*, *Keshvanand Bharti*, *Indira Gandhi*, *Shivkant*, *Dissolution* or recent *Additional Judges|Transfer of Judges case* give the impression that the Supreme Court is a centre of political power, but it should be also realised that it is the weakest "organ of the state and some political-oriented decisions cannot make it a more powerful centre of political power than the legislature or the executive. Baxi himself admits "that as a centre of power, the Court remains vulnerable. The Court has no constituency in the sense that politicians have. The advantage in having constituencies is that they support you when you need support—the constituencies may exact a price for support which you can then pass on the people at large through your decisions."[10] Therefore, any attempt on the part of the court to cut down the pre-eminence of legislative and executive branches of the state may ultimately affect the prestige and power of the court. Professor Shiv Dayal, in his Foreword, rightly points out that "Judicial ombudsmania and politics of power must have its limits lest the Court risk credibility and respect which it legitimately commands and should continue to command."[11] It should also be noted that in the second chapter Baxi has stated that during the emergency the Supreme Court was concerned about its self-preservation and there was a sense of fear among the judges, and this affected the decisions of the Court. As an instance, he has referred to the action of the Chief Justice convening a Full Court to review the *Kesavananda* decision, though later on the Full Court was dissolved. Baxi also refers to the fact that the Chief Justice of India agreed to recommend transfer of 16 judges without their consent during the emergency period in violation of past practices. Further, the decision of the court in *Indira Gandhi* was also, according to him, affected by the concern for survival and in the court adopted a defensive attitude. In this connection the decisions in *Shiv Kant* and *Bhanuda.* also become relevant.

The aforesaid discussion creates a doubt that the Supreme Court is a centre of political power in the Indian Constitutional system. Of course, from time to time, the Court has adopted activist role and the post-emergency period is a good illustration. As Baxi rightly observes : "The Court as a whole appeared determined to bury its emergency past by an astonishing range of judicial activism. It magnified some inherently ordinary cases into great constitutional controversies. If due process had

10. BAXI at 10.
11. BAXI at IX.

died three early deaths—in the Constituent Assembly, in *Gopalan* and in *Shivkant* during the emergency—it was to be reborn in *Maneka*. Once reborn, Justices decided on a vigorous breast-feeding of the new infant : they did not let a single occasion go by in which the due process interpretation of Article 21 could not be nurtured into a giant infant. Article 21 (bashed around quite a bit by the Executive and Courts in 1975-77) now began to become the soul of the Constitution."[12] Infact, Baxi correctly points out that in the post-emergency period the Supreme Court has become populistic. The court is showing "constitutional *Karuna*" to criminals, and recommending Transcendental Meditation to reform them. The Court has shown real concern regarding prison administration, bail and other aspects of administration of criminal justice including legal aid to accused. The cases like *Hoscot*, *Moti Ram*, *Sunil Batra* and *Hussainara Khatoon* are land-mark cases which have enlarged the scope of personal liberty.

However, it should also be noted that some judges have expressed their unhappiness about the activist role of the Court. Criticising the opinion of Justice P. N. Bhagwati in *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of Uttar Pradesh*[13], Justice Kailasam observed in *Jit Ram Shiv Kumar* v. *State of Haryana* as follows : "We feel we are in duty, bound to express our reservations regarding to the 'activist' jurisprudence and the wide implications thereof which the learned judge has propounded in his judgement."[14] Recently, Justice K. K. Mathew, Chairman, Law Commission, has expressed his view that while a judge should be activist in relation to personal liberty, he should be a pacifist while interpreting economic legislation, and court should give due weight to the wishes of the legislature.[15] One wonders whether the post-emergency euphoria will survive, or will disappear with the passage of time. Already, with retirement of Justice Krishna Iyer the activist movement appears to have slowed down. It should not be forgotten that Baxi has confined to the period which was surcharged with intense political feelings, and the Supreme Court could not remain aloof. But once the country returns to normalcy, the judicial activism may be affected. Much will also depend upon the new appointments to the court. There will always be judges who will make a distinction between constitutionality of a measure and its wisdom. While the court can decide the constitutionality, the decision regarding wisdom belongs to the domain of the legislature.

12. BAXI at 122-23.
13. A. I. R. 1979 S. C. 621.
14. A. I. R. 1980 S. C. 1285 at 1303.
15. See, *The Hindustan Times*, Saturday February 6, 1982 p. 8 Col. 6.

One may not accept all the "hometruths" stated by Baxi in this book, but still one has to appreciate and admire the contribution of Baxi towards behavioural study of the performance of the Supreme Court. This is a pioneering work in the area and provides a very interesting reading from beginning to end. In fact, Baxi should be congratulated for drawing the attention of the legal world towards the study of the Supreme Court as an institution, an area neglected so far. The reviewer will like to suggest that Law Schools in the country should prescribe a paper to study the working of the higher courts, and the present work can be used as a foundation material. The reviewer will also request the legal scholars to continue the debate which Baxi has started The emergency period and its aftermath provides rich material for the scholars to study the judicial process in action.

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