Introduction

by

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I. CREATIVITY, CRAFTSMANSHIP AND COMMUNICATION

A. JUDGES AS LAW-MAKERS

In this last quarter of the twentieth century, very few people would venture to contest or deny the elementary proposition that appellate judges not merely declare the law, or apply it, but that they also make or create law. Judges of the Indian Supreme Court have demonstrated this truth not merely by creating law but also by creating constitution; they have not just amply exercised their legislative power but they have also exercised constituent power.¹ This latter proposition may well appear controversial² but its truth will sooner or later


² See, e.g., Garg, R. D.: "Phantom of Basic Structure of the Constitution: A Critical Appraisal of the Kesavananda Case", (1974) 16 J.I.L.I. 243 at 267-69. Garg would like the judicial review power to be merely the power of interpretation. His criticism is not really analytical but rather ideological. He agrees that in V.rajaleela Madhav v. Spl. Deputy Collector, AIR 1965 SC 1017 the Supreme Court, in effect, exercised "constituent power". But he prefers to call it the judicial usurpation of this power. He sees "dangers" in my attribution of constituent power to the Court. My point, however, is and has been that the Court possesses constituent power alongside with legislative power, given the nature of our constitutional polity. Whether, and how far, and how the constituent power (continued)
have to be acknowledged as surely as the truth of the proposition, now universally accepted, that appellate judges make law.

It would, by the same token, be accepted that the doctrine of *stare decisis* today, in India and elsewhere, amounts clearly to no more than this: "there is no sufficient reason for departing from the principles laid down in their prior decisions, judges should not depart from them". 3 What constitutes "sufficient reason", "departing" and "principles laid down in... prior decisions" are also matters which only judges could decide. And it is futile to lay down any guidelines as to how they ought to decide these questions. The task of the jurist is only to hold a mirror, from time to time, to which judges can see how they appear to those who, relieved from the pressing need to decide cases themselves, formulate successive images of the work of the judiciary.

For the Indian Supreme Court, the doctrine of *stare decisis* is not problematic, although from time to time judges do engage in self-conscious articulation concerning the need to follow precedents in the interests of stability and justice. 4 The judges of the Supreme Court apparently lack "precedent-consciousness". 5 There have been activist judges who have often enough just refused to take note of a relevant precedent which represented an obstacle to the judicial path. 6 While this should be actually exercised is a different matter altogether. On this issue, wholly *a priori* determinations are apt to be sterile. Without the existence, and acceptance, of this power by the Court how could it have dealt with the extraordinary Thirty-ninth amendment which it partly invalidated in *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1? 7


5 Id. 450.


is somewhat understandable, the not-so-activist judges also give short shrift to precedent, without much carefult effort at distinguishing cases. 8 The phenomenon of retroactive disassociation or dissent from one's own earlier judgment, indicative of refreshing judicial integrity, is also not unknown; 9 nor is the related phenomenon of explaining the holding of one's earlier opinion in a later case. 9 Sometimes, a judge assigned to write an opinion for the Court adopts such an opinion, which he, on an earlier occasion, expressed only which was manifestly a decision on Article 14 rather than Article 31(2). See, Baxi, U.: "State of Gujarat v. Shamiltal: Requirom for Just Compensation?", 1969 9 Jaipur L. J. 29 at 35-36.

7 For example, in *Gobind v. State of M. P.*, (1975) 2 SCC 148, Justice Mathew (speaking for the Court) adopted the dissenting opinion of two justices (K. Subba Rao and J. C. Shah) in *Khuraj Singh*, AIR 1963 SC 1295, as good law, despite the fact that a majority of four Justices had declined the contention that Part III guaranteed the right of privacy. With some effort, *Khuraj Singh* could have been distinguished on facts or law, in any event, the effort was called for. The result in *Gobind* is preferable but it raises problems in terms of *stare decisis*, (See pp. LXXIII-LXXVI infra). See also Dhavan, op. cit. supra note 4 at 43. He observes: "It appears that in India the authority of an earlier case may depend on the manner in which a particular Bench is constituted".

8 *Vajravelu* was retroactively "dissent" from by Justice Hidayatullah in *State of Gujarat v. Shamiltal Mangodas*, (1969) 1 SCC 509. His candid confession that his concurrence in *Vajravelu* opinion was somewhat unanticipated and reason given therefor, even cease unusual problems for the tenability of *Vajravelu*. See the analysis in Baxi, op. cit. supra note 6 at 45.

9 See, e.g., Justice Khanna's endeavour in *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1 at 114-117 (thereafter cited as *Indira Gandhi*) where he clarifies (though not at all strictly called for) his opinion in *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 (hereafter called *Kesavananda*). He says now that he had not "laid down" in the latter case that fundamental rights are not a part of the "basic structure". He interprets his observations in *Kesavananda* pertaining to "secular character" of the State as an aspect of the basic structure to mean that the "rights guaranteed by Article 15 pertain to the basic structure of the Constitution" (116). *Indira Gandhi* did raise the question whether some provisions of the Thirty-ninth Amendment violated the basic structure (such as democracy, rule of law etc.). It did not involve any argument on fundamental rights. Justice Khanna's retrospective "clarification" aggravates the already acute complexities of *Kesavananda*; besides, he, through this clarification, accords a basic status to Article 15 but to no other fundamental right. One cannot say whether this was his final view or he had no other opportunity to further clarify his views. Was this disturbance of the logic and reasoning of original opinion really necessary? If it was necessary, it has not been adequately made.
as a minority opinion. There has been at least one instance where a leading case has been completely misquoted and misunderstood by a succession of Supreme Court judges introducing, in the process, incorrigible distortions. Finally, without being exhaustive, there is the problem of pure inadvertence: the Supreme Court just happens to overlook its earlier decisions in a kind of collective amnesia enveloping the Bench and the Bar.

Many plausible explanations for this phenomenon can be advanced. And some people may say that what is happening is not all that bad because following precedents, with its associated tortuous legalistic techniques of distinguishing prior cases, is not a good thing anyway. It is not our purpose here to examine either the explanations which can be advanced or to explore the virtues and vices of "precedent-consciousness". It is sufficient to highlight here the peculiar Indian twist to the common law transplantation called stare decisis. Indian judges would have been free to make law had they been rigorously following the doctrine: they act even more often as judicial law-makers by the more eclectic recourse, and non-recourse, to precedents.

We are principally concerned to trace some implications of the axiom that appellate judges make law. One implication is clear: they have the power to make law, within, of course, certain inherent limitations and contingencies of judicial process. This power to make legislative decisions is not an unmixed blessing. The power to take decisions also exposes the decision-makers to some vulnerabilities. What has been said of state is true of judiciary also:

While it has been traditionally believed that the power of state depended on the number of decisions it could take, the more decisions the modern state has to handle, the more helpless it becomes. Decisions do not only bring power; they also bring vulnerability.

Judges as law-makers are vulnerable in terms of diffuse pressures from Government, Parliament, media and public criticism. The criticism by the Bar is a form of more organized pressure. Sensitivity to sustained academic critiques also makes judicial law-makers feel vulnerable. Even more inhibitory is the Court's managerial standpoint for the retention and exercise of this perhaps "inherent" power. But this makes the high authority assured by Article 141 of the Constitution somewhat problematic. The real question is whether such power ought to exist in the first place in a democratic society. Indeed, one may ask: "does such power violate what the Court itself has so seminally developed as the "doctrine" of the basic structure of the Constitution?"

ing would be the apprehension of vigorous dissenting opinions by brother judges.

There is thus a psychodynamic kind of pressure on judges to convert the *mixed* blessing of power to take decisions into an *unmixed* blessing. This may be done through excessive legalism or through a pretence—overt or covert—that judges do not legislate. This pretence may, by insensible degrees, convert itself into a kind of moral conviction. Such pretence, when successfully institutionalized, may serve certain worthwhile social functions. But it remains important for the jurist and the judge to realize that it is after all a pretence, nurtured by some kind of “decidophobia”. It is important not to succumb to all this and keep on identifying the ineluctable role-obligations of judicial law-makers.

B. MODELS OF CRAFTSMANSHIP

A second consequence of the truth that appellate judges do make law is that judicial craftsmanship becomes as important a value as judicial creativity. I highlighted this point as follows in my critique of Kesavananda:

If appellate judges are to make law (as they have to and do) they must adopt standards of craftsmanship at least equal to those of legislative craftsmen. Appellate judges are not entitled to say what they do not mean or to mean what they do not say. For, what they say and mean has a community-wide importance. Accordingly, they are under a duty to decide first what is “necessary” to decide, and then decide it.

Justice Chandrachud (now Chief Justice) has in a recent case rebutted this view in one short and clear sentence: “No judgment can be read as if it is a statute.” The pointed rebuttal of my above-quoted position is important not just as betokening the new responsiveness of the Supreme Court to juristic writings. It is important primarily as a valuable assertion of judicial law-making role. Justice Chandrachud is, in effect, saying: “We do make binding law but we do it through judgments not through statutes”. Judges evolve rules as to how statutes have to be read; assuredly, these very rules of statutory interpretation should not be applied in understanding judgments. So far there can be no disagreement. The disagreement is on what standards and types of craftsmanship should a judicial law-maker observe.

The fundamental features of judicial law-making are, the discursive style and rhetorical reasoning. These features clearly offer a different medium of law-making as compared to ‘legislative’ law-making.

We should recall that these very features—rhetorical argumentation and discursive discourse—of judgment-writing are designed to solve some basic problems arising out of the legislative technique of law-making. One of these involves the contention that the text of legislative formulation is not clear. The appellate judiciary has to devise answers to the question: “when can it be said, with appropriate justification, that the text is not clear?”. Another resultant, but equally basic, problem follows upon the determination, by whatever criteria, that the text is not clear. The question at this stage is: how is the legislative intention to be discovered or ascertained or (as is usually the case) judicially imputed?

See Stone, supra note 3 at 638-668.

Kaufmann, W.: FROM DECIDOPHOBIA TO AUTONOMY: WITHOUT GUILT AND JUSTICE (1973) 1-34.


16 See Stone: LEGAL SYSTEMS AND LAWYERS' REASONINGS (1964) 300-357; esp. 327-37 for an elaboration of the ‘New Rhetorics’ and its relevance to legal reasoning. See also his reference (at 327) to John Wisdom's analysis of legal reasoning where he compares lawyers' reasoning as involving reasons which are “like the legs of a chair, not the links of a chain”.

17 “Since appellate judges do legislate constantly though interstitially within the common law culture, the real question, and the cardinal ground for evaluation, lies not so much in what the legislator intended but what intention judges ought to impute to the legislators in a given litigious situation”. Baxi, U.: “Goodbye to Unification? The Indian Supreme Court and the United Nations Arbitration Convention” (1975) 15 J.I.L. 355 at 357. Justice Mathew has appreciated and employed this approach in Supd. and Remembrancer of Legal Affairs v. G. K. Navaikal, (1975) 4 SCC 754, where he frankly stresses the need for judicial attribution of “purpose” to a statute.
clear text, what contexts, and with what justifications, may be appropriately taken into account? Judicial process is designed to rationally structure the quest for satisfactory answers to these and related questions in each patterned situation of conflict of interests.

One salient norm of craftsmanship, which in the present opinion, automatically follows is that the determination that the legislative text is not clear should itself be a clear determination by the judiciary. In other words, the rationale of interpretative effort invested by the court in a specific situation must be clearly articulated. Another norm of judicial craftsmanship, immanent in the foregoing description of the salient task of appellate judicial activity, is that (sooner or later, at one or the other level of appellate hierarchy) doubts concerning the legislative intention in law-making should not be settled in such a way as to require further interpretative effort to determine as to what the judicial intention in its law-making judgment may be. In other words, law-making exercises by courts should, as far as possible, not create the very same puzzles which the judicial process is designed to resolve in case of law-making by legislatures.

Judicial law-making has other distinctive characteristics besides the two features of discourse so far emphasized. These are often sought to be brought out most clearly by a contrast with legislative law-making. The legislature, it is often said, is far better equipped than judiciary to make law. The broad directions of legislative proposals emanate from policy planning. The legislative draftsman has at his command a large number of previous legislative models, indigenous as well as foreign. The legislative proposals thus formulated are

50 E.g. the extraordinary problems created by the appending of the summary to *Kesavananda*. The summary purports to state “the view of the majority in those writ petitions” and makes nine points. See the critical analysis of Seervai’s position in the article cited supra note 1 at 62-64. The Court’s order in *Shivakant Sinha*, op. cit. supra note 17, is quite at variance with what could be said to have been the unanimous holding by all the five Justices in that case. Cf. Seervai, H. M.: *The Emergency, Future Safeguards, and the Habeas Corpus Case* (1978) at ix.

exposed to public discussion and scrutiny and modification by legislators as well as lobbyists. Functionally, competent bodies (like the joint select committees or law reform agencies) are available to further vet the legislative package. What emerges as law is thus a composite product of many talented minds. It is normally believed that judicial law-making has no counterparts for the above processes and mechanisms. This is not wholly true. Judicial law-making in modern times, is not just a product of judges alone. Bentham long ago said that the law is made by “judge and company”, by which he meant to underscore the importance of the Bar. Where the Bar and Bench are functionally literate, juristic writings on law also make some impact on judicial law-making. Moreover, the time-honoured requirement of advertoence to past decisions ensures that cumulated wisdom of lawmen is not altogether ignored in the judicial law-making process.

Indeed, one may (with some venturesomeness) liken precedents in judicial law-making to the work of functionally appropriate screening or whetting bodies in the legislative law-making process. One may view precedents thus as functional equivalents of legislative proposals at various stages of law-making process. Precedents (law-making exercises) of courts of co-ordinate jurisdiction which differ *inter se* may be conceptualized as alternate legislative proposals for other courts and for the highest court as well. Juristic commenation may serve, for responsive bar and judiciary, as a source of diffuse pressure: on certain issues, it might be so organized as to be functionally equivalent to lobbying. Liberal reference to overseas cases and juristic writing often provide proposals for judicial law-making. Arguments at the bar, the liberal use of the technique of intervenors, and extended oral hearings are at least notionally comparable to debates on legislative proposals in legislatures.

To be sure, the inputs into judicial law-making are of a different order and somewhat differently structured than those in ordinary legislative process. But judicial law-making pro-

51 Dhavan, R. supra note 4 at 105-112.
cess, by the same token, bears detailed comparison with legislative law-making process. There are elements which can be conceptualized as functional equivalents of elements in legislative law-making process.\footnote{22}

One may elaborate this last point further by an impolitic reference to politics within the Court and the politics of the Bar. The history of Indian Supreme Court in terms of politics, factionalism, coalitions and leadership conflicts has yet to be written. However, since 1973, supersession of judges phenomenon, the hitherto almost socially invisible phenomenon of politics within the Court has acquired high visibility. With the public and political attacks on the appointment of Chief Justice Ray and Beg, puline judges have been reluctant to accept the leadership of the Chief Justice of India. The tendency began even on the eve of supersession. Four judges simply refused to sign the entire summary in Kesavananda, which at best contained one or two controverted aspects. The number of separate concurring opinions and perhaps also dissent, started to increase. Quite a few unusual, unprecedented things happened during the Chief Justiceship of Ray and Beg JJ. Chief Justice Ray, when faced with an application to have expunged all that part of Justice Beg's opinion reviewing the evidence as assessed by Justice Jagannath Sinha in Indira Gandhi case, simply asked Justice Beg to respond to it on the ground that it was his opinion. Justice Beg passed an order giving eleven points why the opinion should stay whole and unexpurgated. The Court, as a whole, thus simply disappeared from the scene. Ray C.J. had not much support from his own colleagues, as well as the Bar, when he convened the full Court, after Indira Gandhi decision, to reconsider Kesavananda. He had to abandon the attempt, putting the Court in a rather awkward position.

Chief Justice Beg had also considerable problems. A striking instance is provided by the State of Rajasthan v. Union of India, (1977) 3 SCC 592 where Justice Goswami had this to say at the end of his opinion:

I part with the records with a cold shudder. The Chief Justice was good enough to tell us that the acting President saw him during the time we were considering the judgment after having already announced the order and there was mention of this pending matter during the conversation. I have given the matter the most anxious thought and even the strongest judicial restraint which a Judge would prefer to exercise, leaves me no option but to pass this record hoping that the majority of the High Office of the President, who should be beyond the high-watermark of any controversy, suffers not in future. (p. 671)

Obviously, Chief Justice Beg had no inkling of Justice Goswami's "cold shudder". He was constrained to issue a Press Statement clarifying that the Acting President met him only "to invite him to a wedding reception of his son and did not utter a single word about the constitutional case". The reception was on May 7, 1977 where Chief Justice Beg “was likely to meet the Acting President and Ministers of the Union Government”. He accordingly mentioned his desire to brother justices that reasons for the judgment be delivered before May 7; the reasons were delivered, in the event, on May 6.

\footnote{22} Given these comparisons, law-making judgments of higher courts have to be functional equivalents of Parliamentary Hansards. Judgments must reflect the contending statements of what is and ought to be and the main lines of concord and discord between and among judges, past and present, and the Bar. Accordingly, judicial law-making requires what has been so aptly called "reasoned elaboration".\footnote{23}

"Reasoned elaboration" would at least entail: (a) clear formulation of issues at hand; (b) formulation of rival legal positions urged at bar; (c) advertoence to precedents; (d) enunciation of policy or value preferences guiding criteria of choice-making and (e) articulation, in a precise manner, of the law actually made. "Reasoned elaboration" will necessarily entail semantic precision, logical rigour, and avoidance of internal inconsistencies requiring subsequent interpretative effort or raising doubts, in any case, concerning the validity of the judgment.\footnote{24a}

We may know the real truth only much later. But it is clear that the Chief Justice insisted on a specific deadline and Justice Goswami resented it. Justice Beg adds another perfectly proper reason that the judgments should be delivered before the closing of the Court. But that had nothing to do with the meeting with Ministers and the Acting President on May 7.

Nor is it clear as to why Judges may have been placed "in any embarrassing situation during the vacation", if the judgments were not ready by that time. (p. 697)

The story of the initiation of contempt proceedings concerning the appointment of the new Chief Justice on the eve of Chief Justice Beg’s retirement is yet to be fully told. But brother justices were clearly far from enthused at Chief Justice Beg’s desire to proceed with the matter. [See In re Shant Lai, (1978) 2 SCC 479 and In re S. Mulgankar, AIR 1978 SC 727.\footnote{25a}

During Ray-Beg years, and especially the post-emergency Court under Beg C.J., the Indian Supreme Court almost ceased to be a court in the institutional sense. It instead became an assembly of individual justices.\footnote{26a}

One hopes that despite the unfortunate and unseemly controversy over the appointment of Justice Chandrachud as the Chief Justice of India the trend will now be reversed. If the requirement of seven-judge benches for deciding constitutional challenges to legislation (ushered in by the Forty-second Amendment) had not been so summarily abolished, the new Chief Justice would have been able to accelerate the processes of healing and cohesion. But even without this, the gentle and gracious personality of the Chief Justice should help to subdue the public manifestation of intra-personal conflicts among justices of the Supreme Court, and to reverse the trend towards the disintegration of the Court as an institution.

See for a lucid analysis of the notion Stone J. supra notes 3 and 18 at 678-80 and 316-21 respectively. See e.g., supra note 20.
Indeed, clarity of thought and expression is an irreducible minima of judicial craftsmanship. While clarity may not be by itself enough, and the virtues of inconsistency, and its creative uses, may justly be celebrated in some contexts, judicial law-makers are under a duty to say what they mean in a manner that both lawmen and potential litigant may understand and be able to operate with.24 Would it be going too far to say that intelligibility and clarity as features of judicial law-making are an essential aspect of notions of ‘justice’ and the ‘rule of law’? Is not there an inner morality of judicial law-making?25

C. Communication - Constituencies and Craftsmanship

When, however, we regard the bulk of appellate judicial process in terms of judicial legislation, we begin to appreciate why and how even this irreducible minima of clarity and intelligibility may often be difficult of achievement. Both legislative law-making and judicial law-making involve adjustment of conflicting social interests; both involve a degree of adherence to principle and a degree of expediency and ad hoc choice making. This may make the resultant law complex and often confused.

Institutional factors also affect the quality of law made, both in legislatures and courts. If we look only at courts, we may find counterparts to the problems which also face non-judicial legislators. The court may be overloaded with work; consciousness of arrears may generate intra-institutional pressures favouring expedition to excellence. This may further be aggravated by the inability of the Bar to assist judicial law-makers by adequate citation of precedents or by styles of argumentation inimical to clarity, consistency or cogency. Fluctuating bench structure may also allow little opportunity for judges to develop expertise or even a stable judicial memory of decision-making patterns. Ideological and personal differences among judicial law-makers, prompting separate

concurring or dissenting opinions, may also expose judicial craftsmanship to special hazards.26

Similarly, when we view appellate judicial process in frankly legislative terms, we also begin to understand that appellate opinions and judgments have multiple constituencies. This fact introduces yet another set of problems in the maintenance of high standards of judicial craftsmanship. Judgments or opinions as law-making exercises do not obviously exclusively address themselves to the instant litigant parties. An appellate judicial decision may be an attempt at authoritative communication with many groups, besides the instant parties. It may be addressed to other levels of appellate judiciary, tribunals and subordinate courts. In certain cases, the constituency of communication may be the law enforcement bureaucracy—the police, prison administrators, custodial administrators (as in children’s homes) etc.27 In some cases, the communication-constituency may be the general bureaucracy itself—all decisions on administrative law designed to mould exercises of administrative power provide an excellent example. In yet other situations, the communication-constituency may be the legislature and its sub-institutions: the legislative draftsmen, law reform agencies etc. In private law areas, one may find as many communication-constituencies as the various types of litigants who come before the court (arbitrators, contracting parties, married people, families in dispute etc.). Indeed it has been suggested that “Indian law must be educative... to leave moral choices to individuals to still a principle imported from the west which has not yet naturalised itself in India. Law is an instrument of national education


26 See supra note 22.

27 A striking example of this kind of communication is provided by Justice Krishna Iyer in Hirad Mallick v. State of Bihar, (1974) 4 SCC 44 where the learned Judge openly exhorts the bench, bar and law reformers to move towards reform of sentencing process so as to include transcendental meditation education in our ‘British Raj prisons’. Also see his “footnote” (a separate concurring opinion) in Indian Performing Right Society v. E. I. M. Pictures Assn., (1977) 2 SCC 820 where Jaswant Singh J. delivered the opinion for himself and Krishna Iyer J. but the latter made a strong plea in a “footnote” to the decision for re-definition of “musical work” in the Copyright Act.
and is consciously to be used as such". Professor Derrett goes further to say "A decision which does nothing to advance the cause of improvement in national mores may be technically correct (i.e. not 'bad') but it could be a weak decision and therefore possibly wrong". This attitude is all the more to be accepted in the case of momentous decisions affecting the nature of the polity in India like Kesavananda.

In India, appellate law-makers tend to have a more specialized professional communication-constituency: namely, the Bar. The Bar is, notionally a learned profession. It has to be said, however, that, by and large, the Bar in modern India has developed a surprising indifference to sources of juristic learning and is in that sense professionally illiterate. Some judges—particularly on the Supreme Court—have self-consciously taken up the task of introducing in their opinions literature on law not strictly necessary for the decision but necessary for pedagogic purposes.

Most appellate judges are aware that their judgments and opinions have multiple constituencies. When they engage in the art of simultaneous communication with many such constituencies, not merely does their work increase but tensions emerge in the very styles of judicial craftsmanship. The more self-consciously the judge seeks simultaneous communication with multiple constituencies, the less attractive and adequate becomes the legalistic model of judicial craftsmanship. The more this model is subverted, the less clear

becomes the scope and nature of the law made by judges and more fragile the patterns of mutual agreement amongst them.

Indian appellate judges—more so judges on the Supreme Court—constantly find themselves torn between the legalistic and non-legalistic models of judicial craftsmanship. They make their choices, for one or the other, but the choices are not stable ones; and sooner or later eclecticism prevails. This is an unenviable, but ineluctable, dilemma of craftsmanship facing judges of the Supreme Court. I understand Justice Chandrachud to be formulating this dilemma unerringly when he observes "No judgment can be read as if it is a statute". This implies a rejection of the norms of wholly legalistic mode of judicial craftsmanship. The outlines of an alternate model are not, by the same token, wholly clear or accepted either.

In their quest for rule of law and justice, Indian judges and jurists need to self-consciously evolve some degree of consensus on the basic norms of judicial craftsmanship. In what follows, we attempt to discover the norms followed by one distinguished judge in the course of his work on the Supreme Court.

II. JUSTICE MATHEW'S CRAFTSMANSHIP

A. LIMITATIONS OF THE STUDY

This study of Justice Mathew's creativity and craftsmanship is unfortunately limited in several respects. The first major limitation is that the study relates only to the period 1971-76 while he was at the Supreme Court. We have had,

28 Derrett, supra note 24 at 31.
29 Ibid.
30 The observations of Professor Derrett add a new dimension to the study of the impact of judicial legislation. The distinction between 'symbolic' and 'instrumental' legislation, the former primarily designed to change attitudes and the latter designed to modify behaviour and different methods to study these different types of envisaged objectives, can be extended to judicial law-making as well. The empirical question here would be: How far has Kesavananda helped to "advance the cause of improvement in national mores"? One variable there would be the professional illiteracy of the Bar. See Baxi, supra note 1 at 45.
31 Kesavananda, Indira Gandhi are clearly in many parts purely didactic. Most, almost all, opinions of Justice Krishna Iyer are, with respect, clearly didactic. As to Justice Mathew's contributions, see pp. XXX infra.
32 See supra note 17.
32a There has been some notable thinking of judicial craftsmanship and style in Indian legal literature. Some of this is to be found in memoirs and autobiographies by eminent judges and lawyers; critical commentary on judicial style will almost always be found in case-comments, treaties and extended reviews of the judicial decisions. For recent materials see, e.g., Jethmalani, R., "Judicial Gabblegogy" (1973) 2 J. Bar Council of India 55 at XX et seq.; Nambiar, K.B., "Mr. Jethmalani and 'Judicial Gabblegogy' " (1974) 1 SCC (Journal) 68 and Sharma, K. M., "Judicial Grandiloquence in India: Would Fewer Words and Short Oral Arguments Make for Better Judgments?" (1973) 4 Lajwasa 192.
for various reasons, no opportunity to examine the steady evolution of Justice Mathew's judicial consciousness and craftsmanship for the earlier period when he was a judge at the Kerala High Court. A complete study will have to include a close examination of his High Court opinions. We, however, assume that the dominant elements of his craftsmanship and consciousness reflected in his work with the Supreme Court represent continuities, rather than any sharp breaks, with his judicial past.  

Justice Mathew delivered a total of eighty-three opinions (as reported in AIR) while on the Kerala High Court for the period June 5, 1962 to October 3, 1971. The AIR reporting of High Court cases is highly selective and for that reason furnishes a rather meagre number of opinions by Justice Mathew. I owe to Mr. Kaushik Jay Kapur the following classification of Justice Mathew's opinions for the High Court:

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<th>Type of Opinion</th>
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<td>Opinions for Division Bench</td>
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<td>Judgments for Full Bench</td>
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One of the most notable opinions is Justice Mathew's learned dissent in Narayanan Namboodripad v. E. M. S. Namboodripad, 1966 KLT 299 at 324. Justice Mathew disagreed with the majority which held as cogent the statement of Mr. Namboodripad which, *inter alia*, said that "judges are guided and dominated by class hatred, class interests and class prejudices and where evidence is balanced between a well-dressed pot-bellied rich man and a poor, ill-dressed and illiterate person the judge instinctively favours the former". Mr. Namboodripad had gone on to say that his party "had always taken the view ... that judiciary is a part of the class rule of the ruling classes. And there are limits to the sanctity of the judiciary. The judiciary is weighted against workers, peasants and other sections of the working class and the laws and the system of judiciary essentially serve the exploiting classes." (Id. at 324).

Justice Mathew did not agree with the views of the respondent but defended his right to hold and articulate these. He did not agree with the Marxist-Leninist theory of State or deductions from the theory (p. 338), nor with Mr. Namboodripad's view that judges should "express the popular will in their judgments and orders" (p. 333). But he was clear that the blast of the theory or the deductions therefrom need not jolt the judges out of their moorings at this late hour. Judges must learn to transcend their own convictions, and to leave room for much that they would hold dear to be done away with, short of revolution, by orderly change of law. They must not forget that what seem to them first principles are believed by half their fellowmen to be wrong. (See Holmes, *Collected Legal Papers* page 293) (Id. at 337).

Indeed, what the respondent had expressed was a "hackneyed idea". No "untoward calamity" befell "on the administration of justice, or on the public allegiance to law from the currency of the idea", whose "tendency to impair the administration of justice is practically nil" (Id. at 341).

Justice Mathew reasoned at two levels. At the common law level, he was clear that however much "you may torture the dictum of Lord Atkin in *Ambard v. Attorney General*, AIR 1936 PC 141, it will not yield the result contended by the petitioner, namely, that the intention of the speaker is immaterial, if the tendency of the speech is to create bad opinion among the public about the administration of justice*. He then proceeded to lay down the applicable standard in terms which a draftsman of a statute cannot but emulate. (See p. 343).

At the second level of constitutional law, Justice Mathew was able to hold, applying the "reasonableness" test, that it will be found that the interest of society in itself government by free discussion is much more important than the maintenance by coercive processes of artificial and hypocritical respect for courts and judges. Kant said in his *Metaphysic of Morals* that love as an internal feeling cannot be commanded. So also is respect. (Id. at 343).

Justice Mathew is able to demonstrate, in a cogent manner, that in *Kedar Nath v. State of Bihar*, AIR 1962 SC 955 the criterion formulated by the Supreme Court is "very near the real and present danger test". Accordingly, as in sedition, the criterion for the law of contempt as a "reasonable restriction" on the right of free speech would not be whether a speech has a tendency to create a bad opinion about the judiciary but whether it is calculated to bring about some substantive evil to the administration of justice in any real sense of the term ... . The reason for applying the test would be that that alone might be a reasonable restriction upon the fundamental right of free speech. (Id. at 345).

Finally, Justice Mathew warned that the "court by its pronouncement today is interfering with free trade in ideas and their competition in the market and to that extent with democratic process" (emphasis added). He urged self-restraint: "I do not think, we are the best judges of the truth of the matter because of the natures of the allegiations, the possibility of our bias in the matter, and the summary nature of this proceeding". He insisted, vainly as it turned out, that court "should not be over-sensitive of criticism of themselves" because they "are the guardians of the liberty of citizens in this country". (Id. at 346).

In *E. M. S. Namboodripad v. T. N. Namboodir*, (1970) 2 SCC 325, the elaborate learning and rigorous formulations of the dissenting opinion of Justice Mathew did not receive much attention, probably because the learned counsel (Famented Shri V. K. Krishna Menon) did not choose to prefer to rely closely on them. There is only one short paragraph in the judgment concerning the freedom of speech; and an equally short paragraph on the question of the standard or criterion by which contempt may be established (see pages 333 and 339). Counsel obviously, and characteristically, preferred the more flamboyant and pugnacious course of arguments maintaining that the entire notion of "scandalizing the
a prerequisite to a comprehensive study of any judge. A third limitation is that the study focuses wholly on his judicial
judges or courts" has gone into desuetude and that the right to free speech gave immunity to "the appellant... to give expression to the teachings of Marx, Engels and Lenin". (Id. at 352). Mr. Menon was unable to suppress the sneer that "many people learn about communism through Middleton Murray!". It was this observation which really provoked Chief Justice Hidayatullah to elaborate his own understanding, based upon his own reading of the Marxist and neo-Marxist classics, in five closely printed pages of a near about seven page judgment. Contrary to this, unfortunately, contributed to the neglect of Justice Mathew's learned dissent, which (with respect) does contain a very cogent statement of the rationale and scope of the law of contempt. The sorry state of indifference to this seminal dissent continues; even Justice Krishna Iyer in his interesting "long, inconclusive essay in contempt jurisprudence" in In re: S. Mulaungkar, AIR 1978 SC 727, 735 does not once mention Justice Mathew's dissent.

We come across another very interesting dissent by Justice Mathew in V. Punnun Thomas v. State of Kerala, AIR 1969 Ker 81 at 86. In an incisive analysis of the "privilege" concept, Justice Mathew insisted that a departmental order blacklisting a contractor should be quashed simply because it stigmatized the contractor without his having been given a fair hearing. He recognized that what was involved here was not a violation of right; all that had happened was that the government was exercising its (Hohfeldian) liberty not to enter into contract with the blacklisted party. But blacklisting without fair hearing, infringed the interests of reputation, which is (in Poundian terms) an interest both of personality and substance. When such possibilities exist, legal powers of the government are to be limited. While the government no doubt has the legal power to create privileges and rights by its actions, the government is not and should not be as free an individual in selecting the recipients for its largess. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal (emphasis added : id. at 90).

We were hoping to redress this lack, albeit partially, by persuading Justice Mathew to provide a short autobiographical note to this volume. We had underestimated Justice Mathew's reticence. In the absence of any fuller account we have to be content with the more formal details of his rich and varied life.

Kuttiyil Kurien Mathew was born on January 3, 1911. He was educated at St. Ephrem's English High School, Mannanam; Arts College and Law College at Trivandrum. He enrolled as an Advocate of the (former) High Court of Travancore on January 24, 1939; he was the Advocate General of the State of Kerala from November 1, 1960 to June 4, 1962. He was Additional Judge of the Kerala High Court from June 5, 1962 and was appointed as a permanent Judge on October 27, 1966. Justice Mathew was elevated to the Supreme Court on October 4, 1971. He retired on January 3, 1976. Towards the end opinions and does not attempt to relate these with the extra-
judicial writings assembled here; but some connections are fairly obvious. A final and related limitation is that the study is not a jurimetric study. It uses no well-established jurimetric methods nor does it provide statistical correlations of voting behaviour of Justice Mathew in relation to the brother judges. Overall, therefore, this introduction to Justice Mathew's work is far from comprehensive and many future tasks remain. Nonetheless, it is hoped that it raises some general issues concerning judicial process as well as the functioning of the Supreme Court of India.

Justice Mathew delivered in all 132 opinions. Of these, 8 are dissenting opinions, 9 are concurring opinions and the remaining are judgments for the court. These opinions and of his tenure of office and after retirement, he undertook the Chairmanship of the Enquiry Commission to examine the circumstances under which Shri L. N. Mishra, a Union Cabinet Minister, died in a bomb explosion at Samastipur. The report of the Commission submitted to the Government is bound to be jurisprudentially valuable as it explores, inter alia, one of the important questions of the application of the Nuremberg principles to Indian law. Unfortunately, as of this date, the report is confidential; one hopes that in the interests of juristic learning it is released before too long. See for e.g. the jurimetric study of the Indian Supreme Court, Gadbois, George H. Indian Supreme Court Judges: A Portrait, 1969 Law and Society Review, 317.

Such an attempt would have been worthwhile but proved impossible. The book has been much delayed; the author's administrative work schedule did not allow him to extend the scope of this study.

Only the opinions recorded in the volumes of the SCC are here counted. The year-wise breakdown is as follows :

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The actual figure, needless to say, may be a little higher than here recorded.

There are two dissents in 1972; none in 1973; two in 1974; three in 1975 and one in 1976.

Four separate concurring opinions are delivered in 1973; two each in 1974 and 1975 and one in 1976.

The total figure here is 115. The year-wise breakdown is as follows :

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judgments, closely perused, provide a tolerably clear outline of his approach to the judicial task as well as judicial process in general. They also hold some clues to the principal values he held, although a notable feature of his craftsmanship is his reticence in canvassing his personal value-commitments. These emerge very sharply, however, in his dissenting and occasionally in the concurring, opinions. When juxtaposed with his extra-judicial writings (presented in this book) one does get a more rounded view of the judge as a thinker and a human being.

B. SOME SALIENT FEATURES OF CRAFTSMANSHIP

Some salient features of Justice Mathew’s craftsmanship are easily stated. He tends, on the whole, to accept the legalistic mode of craftsmanship. His opinions are by, and large, marked by rigorous logical analysis, close adherence to precedents, and measured exegesis on statutory provisions. There is to be found in his opinions, generally, a clear formulation of legal principles and justifications. His position is one of judicial self-restraint. This has both procedural and substantive implications.

Procedurally, Justice Mathew is generally insistent that the court may only decide the issues in dispute before it and do no more than that. He also insists that it “is a wise tradition with courts not to decide a constitutional question if the case can be disposed of on other grounds.” He is conscious that a general discussion of principles in a judicial opinion may lead to an inference that the court adopts the principle discussed by it wholesale and without any qualification and therefore always painstaking in his clarifications of the scope of the observations. He believes, with Felix Frankfurter, that the Supreme Court in its own administration of justice must enforce “those rigorous standards of judicial administration which alone will give us the freshness and vigour of thought and spirit that are indispensable for wise decisions in the causes that are legitimately committed to us.” The procedural implication of this approach is that the court should apply strict standards in accepting special leave petitions under Article 136. It also follows, at least for Justice Mathew, that the High Courts should also be partners in maintaining the rigorous standards of administration of justice. The rate of reversal of High Court decisions, and restoration of subordinate judiciary’s or tribunal’s decision is rather striking for all the opinions delivered by Justice Mathew for the Court. In quite a few

43 See e.g., the admirably brief opinion of the Court in Union of India v. K. P. Joseph, (1973) 1 SCC 194 at 196 where he clearly states that:

To say that an administrative order can never confer any right would be too wide a proposition. There are administrative orders which confer rights and impose duties. It is because an administrative order can abridge or take away rights that we have imported the principle of natural justice of audi alteram partem into this area.

Accordingly, he grants appropriate relief in the instant case; but he does not part with the case without clearly observing: “we should not be understood as laying down any general proposition on this question”.

44 Ram Dayal v. Narbada, (1973) 1 SCC 569 at 571 (emphasis added). The quotation is from Ex parte Peru, 318 US 578 (1943).

45 A rough random count shows about 50% reversal for the High Court decisions. A more rigorous study may lead to some interesting findings. What is the overall rate of reversal and approval of High Court decisions in Supreme Court? This rate may indicate a number of correlations. For example, is the reversal related to the overall competence of the bench and bar at State levels? Or does it indicate the search for more individuated justice at the Supreme Court level? Or does it indicate more simply the desire of the Supreme Court to extend its own jurisdiction? Or the level of professional talent (including the retired High Court judges practicing at the Supreme Court Bar and the chamber practice by retired Supreme Court judges) available to the Supreme Court?

A social scientific study of this aspect holds great promise for the understanding of institutional relations between the Supreme Court and the High Courts and of the self-images of the Supreme Court itself. Some structural problems can also be better understood through such studies (for example, the growing work-load and arrears). Studies could be pursued also at more sophisticated levels of discovering patterns in approvals and reversals in terms of the previous affiliations (at Bench and
cases, the learned justice found himself unable to sustain the
infringement of the very procedural norms that he has so
firmly and clearly projected both in precept and practice.44

Justice Mathew values highly, clarity and cogency in
judicial exposition and the making of law. As already noted,
he perceives that "wise decisions" are a function of "freshness
and vigour of thought". Justice Mathew displays these very
qualities of thought which he cherishes and extols in areas of
law which are obdurately complex. State of Maharashtra v.
Salvation Army (which involved the knotty distinction between
"tax" and "fee")47; G. K. Krishnan v. State of Tamil Nadu
(involving the concept of "compensatory tax" under the
heavily non-obstane ridden Part XIII of the Constitution)48;
Shankaran v. Lakshmi (raising formidable questions of conflict
of laws)49 and the very fine points of dissent from the majority-
opinion delivered by Justice Bhagwati (itself, characteristically,
a very closely and subtly reasoned opinion) in Daniarajji Vrajrajji
v. Chandraprabha50 on the interplay between legislation and
custom in tribal adoption provide notable examples of cogent
legalistic craftsmanship. The formulation of law in these
decisions may well be an envy of many judges.

Justice Mathew noticeably avoids making comments
outside the framework of a case. In Anarchand Irani v.
Union of India52, an advocate who was injured in a railway
accident filed the suit in a wrong court, after the expiration of
one year time limit, and misconstrued the relation between

Bar of the individual Supreme Court Justices. Similarly, it would be
interesting to ascertain whether reversals occur more often than approvals
over certain High Courts (and certain subject-matters) or whether they are
randomly distributed.

44 See e.g. M. L. Sethi v. R. P. Kapur, (1972) 2 SCC 427 concerning, inter
alia, the jurisdiction of the High Court under Section 115 of the Civil
Procedure Code, 1908. The opinion contains fine analysis of the notions of
"lack" and "excess" of jurisdiction.

47 (1975) 1 SCC 509.
48 (1975) 1 SCC 375.
49 (1975) 3 SCC 351.
50 (1975) 1 SCC 612 at 625.
51 (1973) 1 SCC 155.

the requirement of notice to the government for the institution
of a suit and the time periods specified in the Indian Limitation
Act, 1908. As a result, he was held not to be entitled to relief.
The fact-situation presents a telling comment on the knowledge
of the law by legal practitioners themselves in matters affecting
their own rights; it has also some elements of provocation
constantly presented by the retention of Section 80 of the
Civil Procedure Code requiring two months' notice to the
government prior to the filing of the suit. Both these elements
would have provoked activist justices to comment on the
strangeness of the facts and the law in the matter.52

Justice Mathew steadfastly refuses to digress and deals with
the whole matter clinically.

Indeed, Justice Mathew is reticent to a fault. Sushil Kumar
Sen v. State of Bihar53 was a situation for a judicial cri de coeur.
There the State of Bihar, which originally intended to com-
penstate the land-owner at Rs. 14 per katha of land was uti-
mately required to pay as much as Rs. 200 for the same measure
of land. This happened because while the State got vacated,
on review, the decree dated August 18, 1961 fixing Rs. 200
as the compensation amount, the decree passed on review by
the lower court on September 26, 1961 (allowing Rs. 75
per katha as compensation) was declared wrong by the High
Court (on the purely procedural ground that the review should
not have been allowed). The State did not file an appeal
against the August 18, 1961 decree when the High Court dis-
allowed the September 26, 1961 decree. The High Court had
in substance clearly decided on merits that Rs. 75 was the
correct compensation amount (as per the decree of Septem-
ber 26, 1961) and thus disallowed the petitioner's cross-appeal.
Justice Mathew, speaking for the Court, had to reverse the
High Court.

The Court's opinion shows no sign as to whether it regards
this logical-legal outcome as satisfactory or just. It is content
to expound on the technical aspects of the law under Order 47,
Rule I of the Civil Procedure Code. It is left to Justice Krishna Iyer to mourn the decision. He “regretfully” concurs with “the result reached by the infallible logic of the law” set out by Mathew, J. But, “the mortality of justice at the hands of law” so “troubles a judge’s conscience” as to constrain him to point “an angry interrogation at the law reformer”.

He pleads for vesting some element of judicial discretion and appeals to Parliament to consider the “wisdom of making the judge the ultimate guardian of justice”. He also pleads that it is not “too radical to avert a breakdown of obvious justice by bending, sharply, if need be, the prescriptions of procedure”. He ends his anguished preoration thus: “The wages of procedural sin should never be the death of rights”.

Of course, there can be two views on the policy aspect of the Court’s holding. People can argue cogently that if the state shows lack of legal initiative it must pay the cost of inefficiency. On the other hand, people can equally forcefully argue that there should be more effective ways of handling bureaucratic inefficiency than allowing the petitioner to earn a windfall out of tax-payer’s hard earned money. Whatever be one’s position on the substantive policy, one wonders whether the Court may not call specific attention of the legislature to the obvious unacceptability of a situation where through some quirk of procedural law the State had to pay Rs. 200 instead of Rs. 75 per katha, despite the fact that the latter amount was adjudged to be fair and just by the High Court.

There are clearly two responses to this question. Judges who believe in restraint, and reticence, would say (as Mathew, J. and Ray, C.J., albeit impliedly) : “We have expounded the law. It is for the legislature to decide whether they like and accept what we have expounded as law, or whether they dislike and reject what we thus expound. The decision to like or dislike,

...to retain or change, must be a free decision of the legislature”. The activist judicial response is: “if you find it wrong to bend the law in the interest of justice as you see it in a case, at least ask the legislature to authorize you in future to enable you to so bend the law”. The chances are that the legislature (that is the legislative wing of Law Ministry, the Law Commission and members of legislature) may not come to know of judicial response (in either modalities) and that judges may also themselves forget it on future occasions, given the growing tendency of the Bar, in most cases, to argue without advertisement to proper authorities. But between the two types of approaches, “angry interrogations” hurled from the Bench may have greater prospect of legislative attention than an entirely untrodden clinical exposition of the law.

Justice Mathew’s craftsmanship is manifest in several decisions, not involving constitutional law, which he wrote for the Court or where he occasionally dissented from the majority. A tribute to his craftsmanship is evidenced in Union of India v. Sri Sarda Mills, where majority begins the judgment by saying “we have had the advantage of reading the judgment written by our learned brother Mathew” and ends by regretting its “inability” to agree with his judgment. In this case, the question was whether the respondent Mill, having recovered about Rs. 32,254 from the insurers and having subrogated all rights to the insurers, was competent to maintain a suit against the railway administration for the loss. Ray and Dua, JJ. held, agreeing with the Madras High Court, that the Mill had a cause of action. The majority left open the question whether the words assigning all rights against the administration in the letter of subrogation amounted to an “assignment” on the rather simple ground that the “insurance company has not sought to enforce any assignment”. If this was the real basis of the decision, it was surely unnecessary for the Court to inconclusively elaborate whether a bare right

54 (1975) 1 SCC 774 at 777.
55 Ibid.
56 Ibid.
57 Ibid.
58 Ibid. (emphasis added).
59 (1972) 2 SCC 877.
60 Id. at 878.
61 Id. at 882.
62 Id. at 881.
to sue can be assigned or whether such right can, under certain circumstances, be assigned as an aspect of a wide-ranging assignment of rights under contract or property. Obviously, this wholly casual exercise is a response to Justice Mathew’s learned dissent where he identifies the nature of the insurance contract as a “contract of indemnity and indemnity only” and decides, after quoting the text of the letter of subrogation, that this case involved an assignment. Having so decided, he concludes with a cogent analysis of legislative and judicial authorities, that in regard to cases of subrogation as applied to contracts of indemnity, the right to sue, along with all other “rights and remedies of the assured” can validly be transferred. He finds it logically “impossible to understand, how, after the assignment, the assignor can still maintain a suit”.

The majority opinion does not meet any of these arguments; what is more (with respect) it does not really seek to do so! This must explain the rather rare gesture of deference by the majority to their dissentient colleague; while that represents a tribute by his own brethren to Justice Mathew, it remains puzzling that the majority would neither offer a reasoned rebuttal to his analysis nor agree to adopt his opinion as that of the Court. Be that as it may, no one reading this judgment can fail to appreciate the care and concern with which Justice Mathew approaches his task in this case.

A Problematic Decision

We cannot conclude this general review of Justice Mathew’s craftsmanship without commenting on his decision for the Court in M. K. Papiah & Sons v. The Excise Commissioner. In Papiah a three-judge bench (Mathew, Krishna Iyer, Goswami, JJ.) was confronted with Section 22 of Mysore Excise Act, 1965, which provided for delegation of power to fix excise rates. The question was whether the Act provided any guidelines for the exercise of delegated power. The Karnataka High Court preferred to read the guidelines into the Preamble which underscored the twin objectives of increase in revenue and discouraging of consumption of liquor. It sustained the legislation against the charge of excessive delegation. Justice Mathew, for the Court, declared his doubts as to whether the Preamble of the Act gave any “guidance for fixing the rate of excise duty”. Despite this, the Court proceeded to save the section from the vice of excessive delegation by holding that as long as the legislature held the power to repeal or revoke the delegation there was no abdication to vitiate the delegation of power. This view was emphatically elaborated by Justice Mathew (for himself and Ray, C.J.) in his concurring opinion in Gwalior Rayon but was equally emphatically negatived by three other judges (Khanna, Balagiriswami and Bhagwati, J.J.).

The Court in Papiah does not even acknowledge the existence of Gwalior Rayon, let alone indicate the divergence of judicial positions manifest in that case.

Two questions arise out of the Papiah decision. One is whether it declares any binding law at all; the other concerns the propriety of de-recognising Gwalior Rayon altogether. On the first question, it has been argued that Papiah has no legal force “as it goes counter to the majority view in Gwalior Rayon”.

This view proceeds by grouping the opinions led by Khanna, J. as “majority” and by Mathew, J. as “minority” on the issue of delegation being valid provided the delegator retains the power to repeal. Clearly, on this issue there was such a division (as we shall note in some detail later). On the other hand, it is equally clear that all the five judges upheld the delegation on the ground that it was not unguided.

63 (1972) 2 SCC 877 at 881.
64 Supra note 59 at 884 (emphasis added).
65 Id. at 889.
66 Ibid.
67 (1975) 1 SCC 492.

(1975) 1 SCC 492, at 495.
69 Ibid.
70 Supra note 59 at 498.
72 Id. at 113-114. See also p. XLI infra.
Justice Mathew wrote the concurring opinion to indicate that even if there was no guidance, the delegation may be held valid on the test of the delegator retaining the power to repeal. He, applying this test as well, held the delegation of power to tax in Gwalior Rayon to be valid. It is just possible that Gwalior Rayon could be read closely to yield the proposition that observations on the scope of power of abdication were strictly in the nature of dicta, and therefore not controlling in Papia. Papia could then be the first case, in effect, holding that all delegated legislation is void so long as power to repeal is not parted with. The authority of Papia will then stand until reviewed by a bigger bench, where the considered dicta in Gwalior Rayon could then be agitated. This is the only way in which one could save Papia from being per incuriam.  

But all this effort should have been, in the first instance, invested by the Bar and the Bench. Neither can easily justify the Court overlooking so recent a decision: Gwalior Rayon was delivered on December 21, 1973 and Papia on February 20, 1975. Even if the bench structure in the two cases was different, Justice Mathew was a common factor. One has to await exercises in judicial autobiography to understand how such a good craftsman as Justice Mathew happened to overlook an important earlier decision. The tendency of overlooking earlier decisions is generally on the increase in the Supreme Court, but this is precisely where one looks to good and great judges to act as a brake on the erosion of the authority of the Supreme Court by its own inadvertence.

III. JURISTIC ACTIVISM

A. SOURCES OF TENSION

Two aspects of Justice Mathew's approach warrant close attention in this context. One is his extraordinary attempt to combine judicial self-restraint with juristic activism and the other is the effortless ease, and remarkable aptness with which he is able to apply jurisprudential learning and insights to the task of judicial law-making. Both these aspects, cumulatively, modify his overall restraintsivist position as well as his adherence to legalistic craftsmanship. They also generate psychodynamic tensions, which in a lesser mind would have led to logical inconsistencies or rank eclecticism. Justice Mathew has to be esteemed highly for his self-conscious attempts to manage the inherent tensions in a manner that leaves his preferred models of judicial craftsmanship and creativity, more or less, intact. It is not to be expected that anyone, least of all an overburdened Indian Supreme Court Judge, would wholly be able to manage the tensions in a satisfactory manner. What is important is that Justice Mathew self-consciously endeavours to do so and succeeds in doing so on most occasions.

In order to understand the source and the scope of the tensions thus arising, we must first understand the very distinction made by us between judicial self-restraint and juristic activism. By the latter we mean the introduction and elaboration of new ideas and conceptions without at the same time actually using these in deciding the case at hand. These ideas and conceptions are, by definition, thus not necessary for the decision. By the same token they are intended for future creative uses, by the Bench and the Bar, should an occasion arise for their use.

We can readily perceive now the sources of tension. The decision, or the agreement with the decision, is restraintsivist in essence; the "reasoned elaboration" is however activist in essence. The impulse to use new juristic material to justify the present decision has to be carefully inhibited; but the inhibition itself is not a total one. The impulse needs an outlet. Besides the actual effort at providing this outlet, in a satisfactory way, there is the pressing need to justify the juristic activism stance in a cogent way. And the act of justification itself creates an additional source of tension and self-conflict if a judge is consciously and conscientiously following the legalistic, rather than an eclectic, model of craftsmanship. How, for example, is such a judge to deal with "precedents" which run counter to all that he is expounding? He is in no
position to “distinguish” or “overrule” them because he is aware in the first place that he is introducing new material manifestly through massive obiter dicta, and is at pains to make it clear that this is how the opinion has to be read. But if he is to leave the relevant precedents altogether aside, this choice may tend to defeat the very enterprise of imparting new ideas and techniques he is so painstakingly incorporating in his opinion. The dissenting judge is thus likely to glaringly expose the exercises of juristic activism as analytically unsound and as undesirable policy. If this happens, the judge indulging in juristic activism may feel apprehensive concerning the dissemination and acceptance of his ideas among different judgment-constituencies. He has thus to rebut at least the overt or covert allegation of judicial adventurism. This further aggravates his problems of justifying juristic activism.

These are some of the reasons which usually compel a restraintivist judge to employ sparingly the juristic activism techniques. But howsoever sparingly he uses them, the problem of justifying their use remains whenever they are used. We mention here two major examples of juristic activism of Justice Mathew. On both occasions, he drew inspiration from the decisional law of and juridical writings on, the American Supreme Court. In Sukhdev Singh v. Bhagatram, he developed the wider sociological notion of the state and imported the American doctrine of “state action”; in St. Xavier’s College Society v. State of Gujarat, he elaborated on the doctrine of unconstitutional conditions. The elaboration of these notions is done in a careful and rigorous manner, with clear and repeated clarifications saying that these observations are supplemental, rather than constitutive, to the decision in the case.

B. Pleasures and Perils of Justice Activism

All these problems are strikingly illustrated by Sukhdev Singh where the issue was, simply put, whether certain statutory public corporations (like the Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation) formed a part of the inclusive definition of “State” under Article 12 of the Constitution. If they were so regarded, certain fundamental rights and remedies guaranteed in the Constitution would become available to the employees of statutory public corporations. Justice Mathew agreed with the majority led by Chief Justice Ray in holding that such bodies fell within the ambit of Article 12. He, however, proceeded in his concurring opinion to enunciate a contemporary conception of the nature of the State. He then proceeded to observe that: “the governing power wherever located must be subjected to fundamental constitutional limitations” and elaborated the doctrine of “State action”. Obviously, the doctrine of State action, too widely formulated, would convert, in modern era, any and every agency as that of State. Hence during the course of elaboration, the learned Justice formulated the following propositions:

(a) a “finding of State financial support plus an

80 Note how the issue for decision is formulated by the Judges. Ray C.J. (for himself, Chandrachud and Gupta JJ.) phrases it as a question as to whether these statutory corporations fall within the definition of “state” within the meaning of Article 12. Mathew J. formulates the issue, with reference to the prior decisions, as follows:

“... whether despite the fact that there are no provisions for issuing binding directions to the third parties the disobedience of which would entail penal consequence, the corporation set up under statutes to carry on business of public importance to the life of people can be considered as state”. (p. 448)

The first half in effect sums up the principle of decision in Rajasthan Electricity Board v. Madan Lal, AIR 1967 SC 1857; the second half admirably states the nature of the public corporations in relation to Article 12.

81 See, for a vivid projection of some of the consequences, the dissenting opinion of Justice Alegiriswami: Sukhdev Singh 463 at 483-84. Also see, for an able analysis of the dissenting opinion Jain, M. P., “The Legal Status of Public Corporations and their Employees”, (1968) 18 J.I.L.I. 1 at 18-29.

82 Sukhdev Singh 459-62.
83 Ibid.
84 Id. 452.
85 Id. 453-59.
86 Ibid.
unusual degree of control over management and policies might lead one to characterize the operation as State action". 87

(b) the “combination of State aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a State agency”; 88

(c) if a “given function is of such public importance and so closely related to governmental functions as to be classified as a governmental agency, even the presence or absence of State financial aid might be irrelevant in making a finding of State action” ; 89

(d) in all these determinations, courts should be aware that it is today very difficult to sustain the rationality of the distinction between governmental and non-governmental functions. 90

Predictably, Justice Alagiriswami, in his dissenting opinion, was quick to point out that three relevant “precedents” were overlooked by the majority, including Justice Mathew. 91 While admiring “the vast amount of learning and philosophical considerations” 92 of Justice Mathew’s opinion, he was able to say that the latter “realizes that the earlier decisions of this Court do not support the view taken by him or my other learned brothers”. 93 Justice Alagiriswami pointedly refers to Shabha-bit Tewari v. Union of India—a judgment delivered the same day by the same bench by Ray, C.J. (for the Court) holding that the Council for Scientific and Industrial Research was not “really an agency of the Government” because the Council was not a statutory corporation like the ones involved in Sukhdev Singh but merely “a society incorporated in accordance with the provisions of the Societies Registration Act”. 94 Neither the fact that the Prime Minister of India was its President nor the fact of a substantial degree of governmental control was decisive to convert it into a State agency under Article 12.95

In thus deciding, the Court relied on the very three leading decisions which were wholly overlooked by the majority in Sukhdev Singh.

How does Justice Mathew justify his activist stand in the face of such criticism? As one who usually follows the legalistic model of craftsmanship, he has to concede that one of the greatest sources of our strength in Constitutional Law is that we adjudge only concrete cases and do not pronounce principles in the abstract.96

But, he has to immediately add that there comes a moment when the process of empiric adjudication calls for more rational and realistic disposition than that the immediate case is not different from preceding cases.97

The discomfiture at recourse to the strategy of juristic activism is writ large here. It is aggravated when we add to it Justice Mathew’s acquiescence with Tewari relying on that very model of “non-rational” and “non-realistic” disposal of cases. The source and the scope of tension in blending of juristic activism with judicial restraint are both manifest here.

It is not necessary for us to enquire as to whether these three “precedents” really constituted binding law and if it did whether in Sukhdev Singh these could be validly distinguished.98 But it is clear that on Justice Mathew’s criteria there was ample scope for him to hold that the Council fell within the definition of State under Article 12. Justice Mathew made no endeavour to apply Sukhdev Singh criteria in Tewari. Instead, he makes it possible to say, despite his learned opinion in Sukhdev Singh, that he ultimately relied on the narrow criterion of the statutory

87 Sukhdev Singh 454.
88 Ibid.
89 Ibid.
90 Ibid.
91 Sukhdev Singh 463.
92 Id. 484 (emphasis added).
93 Ibid. (emphasis added).
94 (1975) 1 SCC 485 (hereafter cited as Tewari).
95 Id. 486.
96 Sukhdev Singh 447.
97 Ibid.
98 But see the perceptive note on this aspect by the Editor of the Supreme Court Cases at 428 of the report. See also M. P. Jain, op. cit. supra note 81.
creation of public corporation as his sole basis of concurrence and that he thereby undermines his own juristic activism.

Sukhdev Singh thus illustrates fully the potentialities and the hazards of juristic activism. These too have a peculiar Indian twist. Both Sukhdev Singh and Tewari were cases admitted in 1972 (the former by way of special leave, the latter by way of writ petition). Both were heard by the same bench during 1972-75. Draft opinions for both were written around the same period; this explains why Justice Alagiri swami is able to refer to Tewari in his Sukhdev Singh dissent. It is almost certain that arguments at Bar in both cases did not refer to the “State action” doctrine and literature; Justices Ray, Chandrachud and Gupta may have seen Justice Mathew’s opinion in Sukhdev Singh but since Chief Justice Ray had the privilege of writing for the Court, and since Justice Mathew was not in fact disagreeing with the conclusion, Chandrachud and Gupta, J.J. decided to adopt the opinion of Ray, C.J. Nor did Alagirswami, J. dissent specially on the state action aspect of Justice Mathew’s opinion, although he disagreed with him on the law-policy questions as such.

All this dreary elaboration is necessary to understand the peculiar twist of juristic activism involved here. Juristic activism is intended to address the bench and the bar constituencies, as well as all kinds of governmental agencies, concerning possible lines of future developments of law in the area. By their very nature, juristic activist strategies cannot perform this function contemporaneously as here. In order for juristic activism to be so contemporaneous, the judge resorting to it has to be activist, not restraintivist. If Justice Mathew was a judicial activist, after concurring the way he did in Sukhdev Singh, he would have dissented in Tewari. And the dissent could have been very brief, invoking Sukhdev Singh criteria and their application. But all that Justice Mathew was urging in Sukhdev Singh was a future course of alternative development, not an instant course of such development.

C. USES OF JURISPRUDENTIAL LEARNING IN JUDICIAL LAW-MAKING

The widely prevalent misconception holding that juris-
antonym, he is clear that voidness arising from Article 13 can only be voidness in personam. "Rights", he says, "do not exist in vacuum. They must inhere always in some person whether natural or juridical." Indeed, Justice Mathew stresses that a "realistic approach has been eroding the doctrine of absolute nullity in all cases and for all purposes." If a law is "otherwise good and does not contravene any of their fundamental rights, non-citizens cannot take advantage of the voidness of the law for the reason that it contravenes the fundamental rights of citizens and claim that there is no law at all.

The other major aspect of the controversy stems from the contribution of Justice Venkatarama Aiyar, particularly in *Sundararamaier*. He there drew a distinction between a law made without legislative competence and a law which violated constitutional limitations on legislative power. The former would be "absolutely" null and void and *non est*; the latter was simply "unenforceable". The "unenforceability" arises out of the fact that it is eclipsed by the provisions of fundamental rights. When the long shadow of eclipse is removed, this type of law will be automatically revived from the date of the removal, and even retrospectively, if it were to be so provided. On the other hand, a law void for lack of legislative competence does not so revive upon provision of such competence; it has to be re-enacted. In *Deep Chand*, Justice Subba Rao (following his own lead in *Basheshar*) proceeded, in total disregard of the distinction formulated in *Sundararamaier* (which was again not even cited), to hold that no such distinction could be made.

Justice Mathew, fully adverting to *Sundararamaier*, says

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103 *Ambica Mills* 671.
104 Ibid.
105 *M. P. V. Sundararamaier v. State of A. P.* AIR 1958 SC 252 (hereafter cited as *Sundararamaier*).
106 AIR 1959 SC 648.
107 AIR 1959 SC 149.
108 See Seervai, supra note 100 at 1879-80.
109 *Ambica Mills* 672.
110 Ibid.
111 See the passage from Kelsen: *General Theory of Law and State* (1945; A. Wedberg trs.) 161 quoted in *Ambica Mills* at 673.
112 Ibid. (emphasis added).
since no law is absolutely null and void or non est in itself. Judges have a duty to choose between alternate parameters of nullity provided by the need to decide whether a law is to be or not to be.

And he illustrates his point with a telling effect when in his earlier quoted observation he defines legislative competence as an amalgam of both legislative powers and restrictions placed by Part III upon these powers. He is saying, in effect, that laws which are legislatively thus incompetent should be annulled in a manner which would require their re-enactment when the incompetence is cured. Amibica Mills thus illustrates how grounding in jurisprudence can help law move forward in crystal-clear directions. The choice of a particular direction of this movement, however, must ineluctably remain with the judges as an aspect of their "sovereign prerogative".

We turn now to another telling example of Justice Mathew's harnessing of jurisprudential insights to judicial law-making. In Mahalinga Thambiran v. Arulnandi Thambiran114 the well-worn problem of whether mahantship was 'property' or an office was once again agitated.

It was argued that mahantship was property, because a person can be nominated by the will, and the nomination could be revoked before the will came into operation. Justice Mathew held that no conclusion can be drawn as regards the legal character of mahantship from the mere fact that it can be willed away. He expressly limited the holding in Sampandha case115 to the custom of Kasi mutt which required mahants to be nominated through a will.116 He further brought out the sui generis character of the requirement of nomination under the law of charitable endowments and reasoned that nomination, unlike a will, operates in present, creating a legal status.117

114 (1974) 1 SCC 150 (hereafter cited as Thambiran).
115 Gyanam Sambadha Pandara Sannadhi v. Kandasami Thambiran, ILR 10 Mad 375.
116 Thambiran 157.
117 Id. 158.

119 Thambiran 161.
121 See Baxi, supra note 1 at 45.

INTRODUCTION

Clearing the ground thus, Justice Mathew proceeded to hold that mahantship was a status, not just a piece of property. For an understanding of the conceptions of status, he turned to the justly renowned jurisprudential writings on the subject. Agreeing with Professor Graveson that the social interest aspect of status has been gravely neglected in judicial decisions,118 Justice Mathew proceeded to hold:

whether or not a particular condition or relationship is one of status or not depends primarily on the existence and extent of the social interest in the creation and supervision of such a condition or relationship. The test is not a simple one of existence or non-existence of the concern of the society; it is also one of the degree of concern.119

To be sure, judges, including Justice Mathew, could have arrived at the result without advertonce to jurisprudential learning. But the rationale and value preferences justifying the result would have been wholly reliant on precedents, which in themselves may not have supplied any controlling justification. Certainly, the Thambiran holding provides a more satisfactory disposal of the case in terms of policy choices by the Court. In addition, it opens up future judicial discourse on distinctive ways of looking at the problems of "status", which are obviously not just confined to the law of religious endowments.

No account of Justice Mathew's work can be complete without the mention of his brilliant and profoundly reasoned opinion in Kesavananda,120 an extraordinary case which produced eleven opinions full of wisdom and learning and replete with future starting points for new developments in law and Constitution. Indeed, I believe that Kesavananda is not merely "a reported case on some articles of the Indian Constitution" but it is "... the Indian Constitution of the future".121 All
opinions bear repeated reading and contemplation. But I was moved to say of Justice Mathew's opinion that it "ensures him of the fame of being Cardozo of India".122

The reason for this spontaneous tribute lies in Justice Mathew's masterly use of contemporary jurisprudential thinking in an attempt to solve the fundamental puzzles of Indian Constitution and polity. His Kesavananda opinion is by itself a mini-treatise on jurisprudence and on the uses of jurisprudence in judicial law-making. What is most remarkable is the rich grasp of the subtle and fine points of jurisprudential thought as is illustrated by his perceptive and incisive invocation of Kelsen in formulation of the distinction between 'constitutional' and 'legislative' powers,123 the analysis of natural

versial. He maintains in his article that had the distinction, as highlighted by him, been "argued or available in contemporary literature in readily assimilable form" at the time of Golak Nath decision, the decision would have been indeed different. Surely, the distinction was available in a "readily assimilable form" (clearly in terms of constitutional and jurisprudential theories, if not in those of Indian Constitutional law) in the writings of Professors Julius Stone and Wolfgang Friedmann upon whom Tripathi relies; it was also available in excerpts from Kelsen in Lloyd's INTRODUCTION TO JURISPRUDENCE at 328 (1959) and in K. C. Wheare's MODERN CONSTITUTIONS (1960): this last source has been stressed by Professor S. K. Agarwala in his review of Tripathi's book in 15 J. I. L. J. 658 at 660 (1973). Be that as it may, the question is whether the availability of this distinction in these sources and especially in Tripathi's work (where, it must be stressed again, he related it to Golak Nath) would, by itself, have been a causal factor for the outcome in Golak Nath (or Kesavananda). Can we assign causal primacy to just one, and that too a purely normative, factor? A whole range of normative and policy factors were operative in Golak Nath: some justices, if pressed with the Kelsenite distinction, might still have disregarded it or overcome it with a view to reach a preferred result. Alternatively, can one explain Kesavananda holdings on Article 13 exclusively or primarily on the ground that contemporary literature was available in "readily assimilable form"?

The other proposition by Professor Tripathi in his Telang lectures is that "there is no difference between constitution and its amendment". He says:

An amendment is, as Mr. Justice Hidayatullah has put it, "a part of the Constitution in little". That is why an amendment made according to the procedure prescribed in the Constitution—whatever that procedure may be—is as good as the Constitution, and, in fact, superior to it in the sense that it repeals and replaces a part of the Constitution as it existed before the Constitution (Id. at 20-emphasis added).

This paragraph, coming from the pen of so careful an author, is puzzling on many counts. It appears from the first part of the passage that Tripathi accepts pure positivism of Kelsen: just any procedure for amending the constitution may be prescribed and all amendments will become parts of the constitution once they are adjudged to fill the prescribed procedure. But Tripathi goes further in the second half of the passage when he attributes superiority to the amendment over the constitution as it pre-existed. This is not quite consistent with the positivistic stance. How can we say that a part of a constitution is superior just because it is incorporated through an amendment? What does one mean by "superiority"? Is it a legal or moral quality? In any case, must an amendment always be 'superior', whether so intended or declared by the text or regardless of its moral qualities?

Be that as it may, some very important questions arising from the basic norm analysis of Kelsen have yet not been raised. It is correct, and if correct at all useful, to say that the whole of the Constitution is the basic norm? Or to say that only that part of the constitution is the basic norm which provides criteria of validity of all other norms? Are criteria of validity of the amendment of a constitution, whenever expressly provided, a part of the basic norm? If so, are limitations on the amendatory power, whether express or implied, also a part of the basic norm? If we (continued)
democracy, equality and freedom

adopt the view that criteria of validity of legal norms found in the Indian Constitution constitute its basic norm, how do we identify these norms? Do we find these in Part I, read with the three entries as construed by the judiciary, and as limited by Part III or also in all other relevant provisions of the Constitution? But since these also can be changed by the exercise of Article 368 power, do we regard only that article as the basic norm of the constitution?

Moreover, be it recalled, that the basic norm is a norm presupposed to be valid. It has to be presupposed to be valid when it is by and large effective. Who is to presuppose the basic norm to be valid in a situation produced by Golak Nath or Kesavananda? In these situations, Parliament presupposes one version of amendatory power as the (or a part of the) basic norm; the Court presupposes another version of the amendatory power to be valid. What then is the jurist to presuppose to be valid? How is he to go about discovering and determining which of the two versions is "by and large effective"?

Whether or not Indian scholars and judges have the inclination to undertake sustained Kelsenite analysis of this problem, one thing ought to be overwhelmingly clear to all, even by the raising of these questions. And that is that only maximum analytical clarity can facilitate the perception and making of the very crucial and ultimate policy and value choices. Kelsenite analysis does not, contrary to Professor Tripathi's or Justice Mathew's views, compel us to adopt the view that Article 368 is the sole content of the basic norm of the Indian Constitution or that there is no bar to the exercise of amendatory power created by Article 13 (prior to the Twenty-Fourth Amendment) or that there are no implied limitations on the amendatory power; or that every purported amendment, following any prescribed procedure, is necessarily, in fact and in law, a part of the Constitution. Kelsen endeavoured to provide us with a general theory of law and state; that theory prescribes that the basic norm may have any content, that it must be presupposed to be valid by jurists and lawmen and that they may not so presuppose unless they find that whatever they wish to presuppose as valid basic norm is "by and large effective".

Many distinguished judges and jurists (including Justice Mathew and Professor P. K. Tripathi) may wish to presuppose that Article 368 is the basic norm of the Indian Constitution, that this Article gives unlimited powers to amend the Constitution (including the selfsame Article as well as criteria of validity of all other laws) and (they must be saying) that all this has to be presupposed because it is by and large effective. They are also saying that it ought to be effective, and insofar as their views are accepted they themselves impart them some effectiveness. But other judges and scholars, may with equal credibility and integrity take (as they have) an equally opposed view on each of the components of the presupposition of the basic norm and they too may invest it, by the same "bootstrap operation", their views concerning the grundnorm with effectiveness. Both sides may use the Kelsenite toolkit with equal cogency, an outcome which the lamented Hans Kelsen would not at all have seen (quite rightly) as problematic to the utility and value of his lifework.

Indira Nehru Gandhi v. Raj Narain provides a further striking demonstration of Justice Mathew's jurisprudential virtuosity. It also shows what a strict self-disciplinarian Justice Mathew was. Justice Mathew (like other 'dissentients' in Kesavananda—Ray, C.J., Beg and Chandrachud, J.J.) was able to overcome the initial intellectual difficulty of reconciling his reasoning in that case with the impelling need to hold that Article 329A was constitutionally impermissible. Ray, C.J. and Mathew, J. had not even (with Dwivedi and Beg, J.J.) signed a summary of the "view by the majority" in Kesavananda. In Indira Gandhi, the initial problem before the three learned justices was: how to maintain consistency in their own approaches to the plenary power of Parliament to amend the Constitution. Ray, C.J. simply proceeded (in spite of the inconsistency with his Kesavananda position) to say that "constituent power may exercise judicial powers but it has to apply law." Beg, J. somehow found it possible to say that Article 329-A, whose precise and manifest purpose was to oust judicial consideration of the merits of the election dispute, did not oust judicial review of merits. He thereby, in effect, amended the Thirty-ninth Amendment.

Justice Mathew refused to take an easy way out of his

126 Id. 845-50.
127 Id. 880-81.
128 Id. 787.
130 See Baxi, supra note 1 at 61-64 for the problems concerning the legal status of the "summary". Why Justice Mathew joined Ray C.J., Dwivedi and Beg JJ. in not signing the "summary" will, given his reliance, perhaps never be known.
131 Indira Gandhi 48 (emphasis added).
132 Beg J. says in so many words: "In any case, no useful purpose will be served now by our declaring anything beyond that clause (4) of Article 329A does not so operate as to bar the jurisdiction of this Court to go into and determine the merits of the appeals before us by applying the Act of 1951". Indira Gandhi 241. See for an overall critique of the decision Baxi, U., "Some Reflections on the Nature of Constituent Power" in The Indian Constitution: Trends and Issues (1978 : Indian Law Institute, forthcoming) 122-43.

Kesavananda 865-70, 880-81.
Id. 883-86.
Unlike Ray, C.J., he does not say that Kesavananda did not decide that there were any implied limitations, arising out of the doctrine of basic structure, to the amending power of Parliament. Justice Mathew could have resorted to the more cogent scholarly arguments designed to show that "no common ratio decidenti can be found between the opinion of the six judges led by Chief Justice Sikri" and that "the construction and the scope of the amended ... Article 368 will ... have to be treated as res integra". Instead (and quite rightly, in the present submission), he straightaway concedes (like Chandrachud, J.) that there was a seven-judge majority for the proposition that "the power conferred under Article 368 ... was not absolute".

Having done so, in conformity with the basic norm of judicial discipline, he then proceeds to identify "democracy" as an aspect of the basic structure doctrine. Article 329-A had removed past, present and future operation of the Representation of People's Act, 1951, to election disputes affecting the Prime Minister and Speaker; and despite the absence of any applicable law had, in effect, adjudicated the dispute between Mr. Raj Narain and Mrs. Indira Gandhi. In so doing, the amending body neither "ascertained facts of the case" nor "applied any norms for determining the validity of the election". This was an "exercise of a despotic power" which would "damage the democratic structure of the constitution".

In so holding, Justice Mathew emphasizes the generality of law as its defining characteristic, and reinforces this argument by a large-hearted recourse to Austin, Blackstone, Bagehot, Carter, John Locke, Kelsen, St. Thomas Aquinas and Rousseau. He also provides an acute analysis of the notion of judicial function. In a fine stroke of judicial exegesis on Kesavananda, he is able to raise clear doubts as to whether Article 14 (equality before the law) was an aspect of basic structure discovered or invented by the 'majority' opinions. Even when he accepts judicial discipline, Justice Mathew thus preserves juristic autonomy in dealing with 'precedents'.

Of course, neither of these landmark opinions is immune from criticism on jurisprudential grounds. We have elsewhere provided detailed critiques of both these opinions. But these critiques further nurture jurisprudential dialogues: they do not, and cannot, distract from jurisprudential learning and wisdom so effortlessly and presciently manifest in these admirable opinions.

IV. JUDICIAL SELF-RESTRAINT

Justice Mathew is a votary of judicial self-restraint and a brilliant exponent of the styles and rationales of restraint. One principal tenet of judicial self-restraint is respect for legislature as a co-ordinate branch of government. This manifests itself not just in reluctance to invalidate legislative provisions but also in insistence on the presumption of constitutional validity of legislative action. Concurrent with this attitude of deference to the collective wisdom of legislature, is a posture of judicial humility. Underlying restraint and humility, and even deference, is the perennial anxiety concerning legitimacy of judicial review and its scope. Justice Mathew insists that "we must be fastidiously careful to observe the admonition ... that we do not sit as a super-legislature". Justice Mathew reminds the Court that "the legislature has after all the affirmative responsibility. The courts have the power to destroy, not to reconstruct".

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138 Id. 129-135.
139 Id. 137-38.
140 See Baxi, supra notes 1 and 132.
142 Ambica Mills 678 (emphasis added).
Justice Mathew has been unable to initiate a sustained dialogue with his colleagues on the Court on the legitimacy, scope and techniques of judicial restraint. Partly, this is due to the shifting composition of court, where judges with long tenures to sustain self-conscious thinking on judicial process (i.e. what they ought to be saying and doing) are exception rather than the rule. Partly, for the same and related institutional reasons (heavy workload, variable support from the Bar, lack of research assistance) judges tend to shift their positions, case by case, from activism on the one end of the spectrum to abnegation at the other. But it would be wrong to account for this phenomenon only by institutional factors: ultimately the choices which have to be made in adopting a consistent intellectual and value posture are so hard that a judge may be forgiven for adopting the rather easy way out of case-by-case eclecticism. The disadvantage of all this is a lack of authentic articulation of the role of judges as seen by themselves, and of the Court, in promotion of constitutional values; and the resulting all-round uncertainty as to what would the court choose to do in a situation raising similar types of law and policy questions.

From this standpoint, Justice Mathew has to be credited with having adopted, more or less consistently, the policy of restraint and thereby occasioning some episodic articulation in the Court on the theme of judicial restraint. The two major occasions of this articulation involve Justice Mathew as a protagonist and Justice Khanna as an antagonist of self-restraint. There is beating of drums and exchange of fire. Let us turn to those decisions.

In Khan Chand, Justice Mathew did not agree with Ray C.J., Khanna, Alagiriswami and Bhagwati J J. who struck down a law authorizing the State Government to requisition any moveable property “if it considers it necessary and expedient to do so”. The majority found “arbitrariness and power to discriminate writ large” on the “face” of the provision and struck it down on the ground of “total absence of guidelines” for the exercise of this discretionary power. Justice Mathew, in his dissenting opinion, protested vigorously at the invalidation. He found that the state can only exercise the power when it is necessary or expedient to do so in “public interest, or public good or purpose”. The absence of this phrase from the provision was not at all sinister; for (asked Justice Mathew) could any “court have said or could any court say . . . on reading the section, that the power conferred upon the State Government could be exercised for any private purpose”? (This is precisely what the majority did not) He then issued a strong warning:

In determining the constitutionality of the Act we would construe it in such a manner as to sustain it and every possible presumption will be indulged for that purpose. Our attempt should be to preserve and not to destroy. Respect for a coordinate branch of government . . . demands it . . . Our duty of deference to those who have the responsibility of making the law has great relevance in this context.

He, accordingly, urged judicial humility. This brought forth an anguished rebuttal and forceful assertion of judicial duty and power from Justice Khanna. He said, “it would be wrong to assume that there is an element of judicial arrogance in striking down an enactment”. Notions of “judicial humility” would, if logically pursued, erode the constitutional remedies “in a large number of cases”. The majority almost sought to reprimand Justice Mathew. Justice Khanna observed:

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144 Khan Chand 555.
145 Id. at 555 (per Khanna J., for the majority) ; also see 556-60.
146 Id. 561
147 Id. 566
148 “The attitude of judicial humility . . . is not an abdication of the judicial function. It is a due observance of limits”. He further said : “a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed . Khan Chand 566.
149 Khan Chand 558.
150 Ibid.
Abnegation in matters affecting one’s own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interests of others against measures which are violative of the Constitution is fraught with serious consequences.\textsuperscript{149}\textsuperscript{a}

\textit{Khand Chand} is notable for its liveliness and pungency of the judicial dialogue on styles of activism and restraint, although it is clear that Justice Mathew was fully justified on facts in protesting at the majority invalidation of the provision. The majority mistook Justice Mathew’s call for institutional deference and judicial humility. Clearly, Justice Mathew was not preaching judicial abnegation (the other regarding abnegation, so sharply described by Khanna J.). He was rather demarcating \textit{levels} of decision-making at which restraint was appropriate and \textit{levels} where activism was called for. Humility and restraint, in his opinion, are necessary insofar as judicial approach to the conferral of discretionary powers is concerned; the court should be slow to invalidate such conferral. For, “it is not contrary to the rule of law that powers should be vested in public officers for performing public functions”\textsuperscript{150} However, activism—even of an evangelical variety—was permissible, even necessary, at the level of actual \textit{exercise} of discretionary power: “what the rule of law requires is that any abuse of power by public officers should be subject to the control of courts”.\textsuperscript{151} This discernment of realms for restraint and activism is one of the principal contributions of Justice Mathew; indeed, it is one of his strengths. While this discernment has enabled Justice Mathew to retain his activist axe for the \textit{exercise} of discretionary powers, other justices who saw no vice in “judicial arrogance” have been themselves unable to satisfactorily check the actual use of discretionary power, their approach varying from case to case.

A striking example of the above-mentioned fact is provided by \textit{Shri Rama Sugar Industries v. State of A. P.}\textsuperscript{152} a judgment delivered on the very same day as \textit{Khan Chand}. Interestingly, the majority in \textit{Shri Rama} comprised Ray, C.J., Khanna and Alagiriswami, JJ. (the latter formulating its opinion). These three justices were also in majority together with Bhagwati, J. in \textit{Khan Chand}. Justice Bhagwati joined Justice Mathew in the dissent in \textit{Shri Rama}. In \textit{Shri Rama} the decision of the Government not to give tax incentives to new and expanded sugar factories and to confine the incentives only to these types of factories in “co-operative sector only” was challenged on the ground that this exemption was contrary to the express text of the statute and that classification of the factories adopted did not have any nexus with the object of the Act. In short, the question was whether the Government can, as a matter of policy, decline to give tax exemption for the very categories of factories for which the Act empowered the Government, in its discretion, to do so.

Justice Alagiriswami (for himself, Ray, C.J. and Khanna, J.) ruled that the state was justified in limiting tax incentives to new and expanding sugar factories in the co-operative sector and that such an enunciation of policy did not in any way fetter the discretion of the Government to consider each application on merits.\textsuperscript{153} Justices Mathew and Bhagwati dissented. Justice Mathew opined that:

\begin{quote}
Generally speaking, an authority entrusted with a discretion must not, by adopting a rule or policy, disable itself from exercising its discretion in individual cases.
\end{quote}

The authority was, of course, entitled to formulate rules and policies; but these should not “be based on considerations extraneous to those contemplated or envisaged” in the Act.

\textsuperscript{149}\textsuperscript{a} \textit{Khan Chand} 558.

\textsuperscript{150} Id. 563.

\textsuperscript{151} Ibid.

\textsuperscript{152} (1974) 1 SCC 534, hereinafter cited as \textit{Shri Rama}. Both \textit{Khan Chand} and \textit{Shri Rama} were decided on December 17, 1973.

\textsuperscript{153} \textit{Shri Rama} 542; also see 539-542. The majority took judicial notice of the economics of the sugar industry in support of its decision (539-40).

\textsuperscript{153} \textit{Shri Rama} 547. See also Sathe, S. P.: “Discretion and Policy: A Note on Shri Rama Sugar Industries v. State of A. P.”, (1974) 16 J.L.I.L. 457. Sathe maintains that on this point there is agreement between the majority and the dissent.
The dissenting Judges felt that these criteria were violated in the present case.

One would have expected Justice Mathew to take the view he took; but, by the same token, one would also have expected Justice Khanna (and Ray, C.J. with Alagiriswami, J.) to join the dissent. Unlike Khan Chand, the statute here categorized areas of discretionary action quite specifically: should not the exercise of the discretionary power then have been confined to the specific categories of the statute? Instead, three majority judges in Khan Chand acquiesce in the Shri Rama majority opinion that “how a power is to be exercised has got to be decided by taking into consideration the whole of the background of the Act and the purpose behind it”. Indeed, the power has to be exercised by “taking into consideration all the relevant factors relating to sugar industry”.

These formulae indicate a very wide benediction on the exercise of discretionary powers. Indeed, if one is to be so liberal in determining the validity of the exercise of discretionary power, it would be inconsistent to be less liberal in sustaining the statutory conferment of discretionary power in the first place. With a little effort, justices who struck down the conferment of legislative power in Khan Chand could have found guidelines and purposes in the entire statute to sustain the impugned section. The “whole of the background of the Act and the purpose behind it” formula used in Shri Rama to sustain a mere exercise of discretionary power could have been used in Khan Chand to sustain the conferment of such power.

The attack on judicial self-abnegation makes a point transcending Khan Chand. The point is: should the legislature be allowed to confer vast discretionary powers on the executive without applying its mind? Should not the courts insist on a minimum application of legislative mind in terms of clear formulation of guidelines for the exercise of discretionary power? It can be argued that this must be done, that judicial control is needed not just at the level of exercise of power but also at the level of legislative grant of the power to the executive. The aspect arose sharply in Gwaiior Rayon, involving challenge to a provision in Central Sales Tax Act on the ground that it involved “excessive delegation”.

Justice Mathew repels this charge with the majority and finds that the delegation was not excessive as the objects and purposes of tax levy by States were articulated by the central law. But the main thrust of his separate concurring opinion is to suggest that all delegation of legislative power should be regarded as valid per se by courts so long as the legislature retains the power to revoke the power thus delegated.

The test for recognizing the validity of delegated legislation is not whether or not the delegating statute has formulated the “essential legislative policy” but whether there has been any abdication of the legislative power to repeal or revoke the delegation. Justice Mathew takes this view because he, realistically, accepts the dominant patterns of transfer of

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134 Shri Rama at 547. Justice Mathew wondered in the course of his opinion as to the source of “inspiration” for the policy. He observed that the policy decision of the Government would have been understandable if it had “any warrant in the directive principles” but there “is no provision” in Part IV “which would warrant the particular predilection now shown by the Government to the factories established in the co-operative sector”.

135 Dr. Sathe, in his comment on the case cited supra note 153, finds that Mathew J. was not right in so observing as Article 39(b) and (c)—the overarching clauses concerning distribution so as to promote the “common good” and avoid the “common detriment”—include within their fold the promotion of co-operative industries. Perhaps, Sathe is right; but can Article 37(b) and (c), without further concretization in subsequent directives, be made to yield and sustain a definite concrete economic policy, as the one involved here? See for a general analysis of the problematical of “the common good” Baxi, U.: State of Gujarat v. Shantilal: A Requiem for Just Compensation?”, (1969) 9 Jaipur LJ 29, 58-97.

136 Shri Rama 539.

137 Id. supra note 103.

138 Id. 104, 115 (per Khanna J.) ; 126 (per Mathew J.).

139 Id. 114-126. esp. 121-26.
power from the legislature to the executive in modern complex economically organized societies. He favours the abdication test also, with a view to restore the dignity of judicial process which is impaired by judicial attempts to somehow find the formulation of "essential legislative policies" in the vacuous generalities of delegating statutes.\textsuperscript{141} He says: "... the hunt by court for legislative policy or guidance in the crevices of a statute or nook and cranny of its preamble is not an edifying spectacle".\textsuperscript{142}

Predictably, this kind of judicial toleration of delegation (which would make the stock-in-trade tactic of pleading "excessive delegation" more or less futile) evokes sharp reactions. Justice Khanna (again with Alagiriswami and Bhagwati, JJ.) totally rejects the concept of "abdication" as a "test" for validity of delegated legislation. He pours scorn:

What is the exact connotation of the word "abdication", and whether there is proper use of the word "abdication" if the Legislature retains the right of repealing the law by which uncanonical and unguided power is conferred upon another body for making subordinate legislation are questions which may have some attraction for literary purists or those indulging in semantic niceties; they cannot, in our view, detract from the principle ... that the legislature must lay down the guidelines, principles or policy for the authority to whom power to make subordinate legislation is entrusted.\textsuperscript{143}

Justice Khanna gives a hypothetical example of delegation of power to make criminal law, with a view to combat alarming crime situation, to an official. He then asks, rhetorically: "Can it be said that there has been no excessive delegation even though the Parliament omits to lay down ... any guidelines or policy ...?"\textsuperscript{144} The mere power to repeal the delegation is not, for Justice Khanna, any antidote to the "vice" of such delegation.

Surely, Justice Khanna's weighty objections deserve thought. But do they meet the underlying message of Justice Mathew? All that the latter is saying is that the judicial response to the plea of "excessive delegation" is, in 99% of cases, the unduly interfering and illogical hunt for legislative policies in the "crevices of a statute or nook or cranny of its preamble". Whether we follow the "abdication" test or the "essential legislative policy" test, the rate of invalidation of delegating statutes is statistically insignificant. Should not the courts in such a situation straightforwardly adopt the abdication test, thereby diverting the focus of judicial challenge not so much on the conferment of the power but the justness of its actual exercise? Thus perceived, the choice is not (as Justice Khanna put it) between a "long line of authority" versus indulgence in "semantic niceties".\textsuperscript{144} Rather, it is between dispersal of judicial and litigative energies on the one hand and a more sustained attack on the exercise of delegated power in terms of fairplay and substantive justice.

The basic issue thus is: should the courts "police" delegation zealously or should they "police" actual exercises of power under delegated authority? Justice Mathew's contribution lies precisely in the raising of this question consistently in various contexts.\textsuperscript{145}

V. JUSTICE MATHEW AND FUNDAMENTAL RIGHTS

(A) LIMITS TO JUDICIAL SELF-RESTRAINT: PREFERRED FREEDOMS?

As already seen, Justice Mathew is no doctrinaire res-
preferred freedoms approach to Article 19. Professor A. R. Blackshield, writing in 1968, found that there were only "flimsy" indications to suggest any emergence of the preferred freedoms approach in the decisions of the Indian Supreme Court, but immediately went on to observe that if anything, we would have to say that thus far the Indian decisions have given us a "double standard" in reverse, with property rights given more vigilant protection than personal and spiritual ones.

He expressed the hope that with Justice Hidayatullah's agonizing about the misplacement of the property right among the fundamental rights provisions, this unsatisfactory double standard approach would be replaced by a more satisfactory one. Whatever be one's differences with the assessment that the Indian Supreme Court has been following the "double standard" approach in reverse, one cannot deny, after Kesavananda, that the preferred freedoms approach is now an integral part of the constitutional adjudication process. This is not the place to develop this theme fully here but it is

In India, insofar as the preferred freedoms approach has been consciously adverted to, it has been done so only with a view to its repudiation. Justice Mudholkar was explicit in 1962, speaking for the Court, that there is no scope for the

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168 Ibid.

169 The phrase is Professor Freund's; see his article cited supra note 166.

170 See, for a general discussion, materials cited in notes 166, 167 supra; and Baxi: "The Little Done, the Vast Undone . . .


172 Blackshield, supra note 167, at 71.

173 Ibid.

174 "Our Constitution accepted the theory that the right to property is a fundamental right. In my opinion, it was an error to place it in that category; of all the fundamental rights it is the weakest", Golak Nath v. State of Punjab, A.I.R. 1967 SC 1643 at 1699.

175 Blackshield, supra note 167, at 92.

176 It is time to replace our impressionistic observations by an adequate quantitative and qualitative analysis of Supreme Court decisions. Where would we place the Court's decisions on rights of minorities or the review of reasonable restrictions on Article 19 rights or the decisions on compensatory discrimination clauses in this kind of "double standards in reverse" approach? Certainly, even as regards Article 31(1) and (2) the Court's performance has been, on the whole, not one which favours property over "general welfare" or "liberty". I pointed this out even in the wake of Golak Nath: see "Little Done, Vast Undone . . .

177 See Baxi, article cited supra note 1, as regards the right to property under Article 31(2). The more general aspects of the "basic structure" and "essential features" do illustrate that Judges do not give equal weight to all the provisions of Part III, and would pick and choose among rights which need protection.
important to note, in the present context, that Justice Mathew has, in some of his decisions for the Court, consciously highlighted the preferred freedoms approach.

In *Ambica Mills*, Justice Mathew was explicit on this approach. He observed:

Laws regulating economic activity would be viewed differently from laws which touch and concern freedom of speech and religion, voting, procreation, rights with reference to criminal procedure etc. 118

He was clear that there are good reasons for “judicial self-restraint if not judicial deference to legislative judgment” in laws relating to the “utilities, tax and economic regulations”. 119 In another case, he further concretized, quoting *Ambica Mills*, the range of “economic regulation” to include “fiscal and regulatory matters” within it. 120 in such matters

the court not only entertains a greater presumption of constitutionality but also places the burden on the party challenging its (law’s) validity to show that it has no reasonable basis for making the classification. 121

It was this approach which led Justice Mathew to conclude, for the Court, in *S. Kodar v. State of Kerala* 122 that an additional sales tax of 5% imposed upon dealers with a turnover of ten lakh rupees per year did not violate Articles 14, 19(1)(f) or 19(1)(g). 123 The latter two provisions were not violated because the tax was not “confiscatory” and was held reasonable; equality before the law was not violated either, because the classification was reasonable. It was so held because the “object of the tax is not only to raise revenue but also to regulate the life of the society”. 124 This object was served by the classification based on the “capacity of a dealer...to pay tax” on the index of the “quantum of turnover”. 125 The large dealers occupy “a position of economic superiority”; 126 such dealers form “a class by themselves” 127. The tax measure was further reinforced by the judicial awareness that the “flat rate is thought to be less efficient than a graded one as an instrument of social justice”. 128

Justice Mathew has on all these occasions, speaking for the Court, upheld economic legislation touching on fundamental rights to equality before the law and property. He is, however, quite anxious to maintain the high constitutional status, against state invasion, of other rights. We will look at his active solicitude for personal liberty a little later in this

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118 *Ambica Mills* 677.
119 *Id.* 678.
120 Supra. and Remembrance of Legal Affairs v. G. V. Navalakha, (1975) 4 SCC 754 at 759.
122 (1974) 4 SCC 422 (hereinafter cited as *Kodar*). Although the citation refers to *State of Kerala* as a respondent, there is no reference in the judgment to any statute, of Kerala! Perhaps, identical legislations were civil appeals from Madras High Court. The civil appeals were filed writ petition according to the first para of the judgment. This may be; but we have no benefit of knowing whether the Kerala statute was the as virtually identical, disregarding certain differences? This point is also overlooked in the comment by S. N. Jain, see infra note 188.
123 *Kodar* at 427.
124 *Id.* 428.
128 *Kodar* at 427. Professor S. N. Jain’s critique of this decision in (1974) XI A.S.L. 473 at 496-98 is unappreciative of Justice Mathew’s overall position, here outlined, on “preferred freedoms”. Surely, he overlooks that this was a much a decision on interpretation of Articles 14 and 19 as on sales tax. One finds no mention of the decisional law on Article 14 in Jain’s comments. He also does not seem to appreciate that the present case involved an appeal from *Sundaram Industries (P) Ltd. v. State of Tamil Nadu*, (1972) 29 STC 567 which he had earlier criticised. Jain’s comment is solely directed to show that such taxes may become confiscatory (5% may become 50%); but confiscatory tax is clearly invalid in terms of the holding in the instant case. Jain does not derive any support from the majority opinion in *Stewart Dry Goods Co. v. Lewis*, 294 US 550 or criticize the impressive minority opinion of Justices Cardozo (for himself and Justices Brandeis and Stone) on which Justice Mathew expressly bases his opinion. Nor does he argue cogently, against the principle of progressive taxation, as applied to sales tax. The latter is an important aspect by itself and needs development by reference to tax economies and comparative taxation legislation. Until this is accomplished, one may do well to acquiesce with the approach adopted by Mathew J. in the instant case.
part. Here we will focus primarily on his approach towards minority rights, as illustrated by his separate concurring opinion (for himself and Chandrachud, J.) in *St. Xavier's*.189

In *Xavier’s* Justice Mathew negated sharply the argument that the minority institutions had no fundamental right to obtain recognition or affiliation unless they submit to regulations which apply to all educational institutions, regardless of whether they were maintained by majority or minority communities.190 Justice Mathew, in effect, held that only such regulations may validly extend to minority institutions under Article 30 as are related to “the excellence of educational institutions in respect of their educational standards”.191 Subject to this determination, minority institutions have a right to affiliation and recognition as an integral aspect of the constitutional right to maintain and administer educational institutions of their choice. Article 30 is thus a near-absolute right.

This is clearly an example of “preferred freedoms” approach in operation. How does Justice Mathew justify this departure from his overall restraintivist positions? First, he refers to the Court’s insistence “time and again” on the “importance of a searching judicial enquiry into legislative judgment” affecting minority rights.192 Legislative judgments ought not to be allowed to “curtail rights intended to protect” minorities.193 Second, he finds support in Chief Justice Stone’s famous footnote in *Carolene Products*.194 One major ground on which Chief Justice Stone preserves active assertion of judicial review is that judicial deference to legislative wisdom must not be allowed to undercut the normal democratic processes by allowing legislations to display “prejudice against discrete and insular minorities”.195 The minorities may not be able to find protection in political process and courts ought, therefore, to show special solicitude in statutes affecting their guaranteed rights.196

However, Justice Mathew goes further in justifying “preferred freedoms” approach. He justifies his stand on the ground that:

The parents have the right to determine to which school or college their children should be sent for education.197

And he reinforces this by saying:

The fundamental postulate of personal liberty excludes any power of the State to standardize and socialize its children by forcing them to attend public schools only.198

And further:

There can be no surrender of constitutional protection of right of minorities to popular will masquerading as the common pattern of education.199

Indeed, this right of minorities is the “only legal barrier to confine the bursting expansionism of the new Educational Leviathan”.200

All this sits rather strangely with Justice Mathew’s stout refusal to subscribe to any notion of implied limitations on Article 368 in *Kesavananda*. There the learned Justice observed that the fundamental rights “themselves have no fixed content: most of them are mere empty vessels into which each generation


190 Xavier’s 798.

191 Id. 813.

192 Id. 803.

193 Ibid.


195 Supra note 194 ; also Xavier’s 802-803

196 Ibid. Conceptually, the Court here takes the role normally assigned to political parties in opposition. See, as regards the political process safeguards to fundamental rights, Baxi article cited supra note 170 at 398-404.

197 Xavier’s 800

198 Id. 801 (emphasis added)

199 Id. 802.

200 Id. 801.
must pour its content in the light of its experience". \(^{201}\) Moral claims textured in Part IV may overweigh the priority claimed by Part III of the Constitution. Judicial review of amendments to the Constitution on the ground that they give priority to Part IV over Part III is declared by Justice Mathew as simply "impermissible". \(^{202}\)

The language of Xavier's seems, in the final analysis, to be the language of "essential features" and the "basic structure". This feeling is reinforced by Justice Mathew's adoption of "democracy" as an aspect of Kesavananda 'ratio' in Indira Gandhi. \(^{203}\) Xavier's (which followed Kesavananda but preceded Indira Gandhi) contains observations to suggest that preservation of Article 30 rights is an aspect of 'democracy'. Justice Mathew observes, for example, that the parental right in education is the very pivotal point of democratic system. It is the touchstone of difference between democratic education and monolithic system of cultural totalitarianism. \(^{204}\)

Article 30 emerges also as an aspect of 'pluralism', which may be considered encompassed in the "basic structure" doctrine. \(^{205}\)

Can Article 30 be amended away on the ground that some moral claims of Part IV require it to be done so? \(^{205}\) It cannot be done if one integrates Justice Mathew's positions in Xavier's with his acceptance of Kesavananda 'ratio' in Indira Gandhi. But if this emerges to be his position, how do we understand his Kesavananda opinion at all?

There can be two distinct, but related answers. First, it may be said that Justice Mathew regards Article 30 as near-absolute in relation to the exercises of legislative power on some version of the approach of "preferred freedoms". This latter can hardly be extended to exercises of constituent/amendatory powers. Kesavananda involved a discourse concerning the scope of these powers, not of legislative powers. The two levels of discourse must be kept apart: the "preferred freedoms" approach operates only at the level of legislation. Second, at a more technical level, isolated observations in Xavier's can hardly be read to yield and maintain a proposition that Article 30 is an aspect of basic structure, particularly when the observations of this nature are made by a justice who refused to adopt the doctrine of basic structure.

The first objection offers a way out of the impasse. Clearly, the "preferred freedoms" approach has not been used in the country of its origin for adjudging the validity of amendments to the Constitution. There should be no reason why in India too this approach should be extended to the amendments to the Constitution. Xavier's stands on its terms, presenting no tensions with Justice Mathew's positions either in Kesavananda or Indira Gandhi opinions.

The second objection could now be pressed in service to reinforce the first. Surely, no thought of scope of amendatory power or of basic structure was present in Xavier's. Clearly, the expressions used in Xavier's must be confined to their context. At best they explicate the rationale of higher judicial scrutiny towards Article 30 (say, as against Article 31). Justice Mathew is merely saying in Xavier's that he would more zealously protect Article 30 right as compared with Articles 14, 19(1)(f) and (g), and 31. It would be careless to transplant Xavier's opinion to Article 368 sphere.

Perhaps, these two answers cumulatively offer a way out of the tensions in the three opinions. But doubts assail us. Surely, the doctrine of "basic structure" is an application of "preferred freedoms" approach at the level of constitutional amendments. Whatever may or may not be the case elsewhere, the "preferred freedoms" approach has been used in India to adjudge the validity of both statutes and constitutional amendments. \(^{206}\)

\(^{201}\) Kesavananda 881.
\(^{202}\) Ibid.
\(^{203}\) See text accompanying notes 133-34 supra.
\(^{204}\) Xavier's 801 (emphasis added).
\(^{205}\) Id. Also see Justice Khanna's views in Indira Gandhi, though they relate (in the final analysis) to Article 15; see note 9 supra.
\(^{206}\) It is conceivable though not likely that implementation of Part IV may require modification or sacrifice of some of Article 30 rights. Such possibilities exist in relation to Articles 41, 45 and 46.

\(^{207}\) See notes and text accompanying notes 174-177.
Furthermore, it is quite tenable to read the so-called isolated observations in Xavier's in an integrated manner so that they relate to its context as well as transcend the context. Article 30 rights are near-absolute; minority groups cannot surrender the rights, unconstitutional conditions attached to the exercise of these rights may not be sustained. Article 30 is seen as involving the “fundamental postulate of personal liberty” and as an aspect of “democracy”. Surely, all this represents juristic activism par excellence. Justice Mathew's observations could be used in future to support the argument that Article 30 is beyond the reach not just of legislative but of constituent power, being an aspect of basic structure.

(B) Detention Jurisprudence: Vindication of Personal Liberty

In the few decisions he had the occasion to formulate for the court, Justice Mathew has made richly supportive contributions to the Supreme Court's massive “detention jurisprudence”. This is seen not so much in the few routine decisions as in Prabhu Dayal Deorah v. District Magistrate, Kamrup where he unequivocally uses legalism in pursuit of the values of personal liberty. Justice Mathew (himself and Mukherjee, J.) struck down the first ground of detention as vague and accordingly struck down the entire order, following earlier judicial decisions. He also negated the argument

208 Xavier's 807.
209 The indeterminacies in the articulation of 'basic structure' components both in Kesavananda and Indira Gandhi decisions could be fruitfully harnessed for this task.

The Forty-fifth (Constitution) Amendment Bill prescribing a voting of 51% at a referendum for amendments to "democratic" and "secular" characteristics of the Constitution (as well as provisions of Part III) tend in the direction of making Article 30 rights practically unamendable. Even if reference to Part III is ultimately deleted, strong arguments (arising out of the exercises in the text) would remain possible that amendment to Article 30 would attract the referendum requirement on the ground that it affects both 'democracy' and 'secularism'.

212 Prabhu Dayal 111-14.

that in view of the detenue’s statutory right to represent to the Advisory Board under the MISA, the Court may not exercise its original writ jurisdiction under Article 32 until the Board had an opportunity to consider the representation. Justice Mathew held that the detenue’s right under Article 22(5) of the Constitution did not include the right just to afford the earliest opportunity of making a representation but it also included “within its compass the right to be furnished with adequate particulars of the grounds of detention order”. Violation of this right entailed invalidation of the detention order.

Ordinarily, Justice Mathew, with his usual reticence, would have rested his judgment for the court with the foregoing points. But Justice Beg chose to dissent, in somewhat strong terms. Justice Mathew's spirited response to the dissent makes Prabhu Dayal specially noteworthy as revealing the underlying value preferences.

Justice Beg maintained that in this case the grounds were seriously disputed by both sides on the issue of their being vague. This issue can only be properly decided on facts, he said, by the Advisory Board. "Seriously disputed facts", he urged, "cannot properly be decided by this Court" in a proceeding under Article 32. The Court could not decide on facts whether the grounds were vague simpliciter under its Article 32 jurisdiction. It can only decide whether the grounds are "so vague as to disable petitioners from making effective representation" against the detention order. Justice Beg is aware that such cases, however, "would be exceptional". It is thus, according to him, necessary to preserve intact the jurisdiction of the Advisory Board.

Although Justice Beg uses the distinction between "preventive" and "punitive" detention earlier in course of his dissent, he later maintains that if disputed questions of fact

213 Id. 110, 113.
214 Id. 112-13.
215 Id. 119-120.
216 Id. 120 (emphasis added).
217 Id. 123.
are to be determined under Article 32 in case of preventive detention, “it is difficult to see why the principle could not be extended so that an undertrial prisoner . . . could insist that the question of his innocence or guilt be tried and determined by this Court directly pending his trial by a court of competent jurisdiction”.218 Finally, he cautions that “habeas corpus proceeding should test the legality of detention and not the draftiness of the officer who passes a detention order or sends grounds of his satisfaction”.219

This is truly an astonishing dissent, although this is not the right occasion for us to dissect it. Justice Mathew graciously declines to shred apart the positions held by Justice Beg but is unable to let the dissent pass without some rebuttal. What he said deserves to be quoted here verbatim both for what is said and the way it has been said:

The facts of the cases might induce mournful reflection how an honest attempt by an authority charged with the duty of taking prophylactic measures to secure the maintenance of supplies and services essential to the community has been frustrated by what is popularly called a technical error. We say and we think it is necessary to repeat, that the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of personal liberty is largely the history of insistence on observance of procedure. And observance of procedure has been the bastion against wanton assaults on personal liberty over the years. Under our Constitution, the only guarantee of personal liberty for a person is that he shall not be deprived of it except in accordance with the procedure established by law. The need today for maintenance of supplies and services essential to the community cannot be over-emphasized. There will be no social security without maintenance of adequate supplies and services essential to the community. But social security is not the only goal of a good society.

218 Prabhu Dayal 127.
219 Id. 128.

There are other values in a society. Our country is taking singular pride in the democratic ideals enshrined in its Constitution and the most cherished of these ideals is personal liberty. It would indeed be ironic if, in the name of social security, we would sanction the subversion of this liberty. We do not pause to consider whether social security is more precious than personal liberty in the scale of values, for, any judgment as regards that would be but a value judgment on which opinions might differ. But whatever be of impact on the maintenance of supplies and services essential to the community, when a certain procedure is prescribed by the Constitution or the laws for depriving a citizen of his personal liberty, we think it our duty to see that procedure is rigorously observed, however strange this might sound to some ears.220

(C) FAGU SHAW: A PUZZLE

Justice Mathew’s opinion for the majority in Fagu Shaw v. State of West Bengal,221 delivered within about twelve weeks of Prabhu Dayal’s resounding vindication of personal liberty, comes as a jurisprudential anti-climax.222 Fagu Shaw raised the critical issue of the validity of the amended Section 13 of the MISA which prescribed that the “maximum period of detention for which any person may be detained in pursuance of Section 12 shall be twelve months from the date of detention or until the expiry of the Defence of India Act, 1971, whichever is later”.223 Two principal challenges were posed to this clause: one, that the section did not provide a “maximum period” for detention beyond three months without the advice of the Advisory Board and second, that Parliament was bound

220 Id. 114 (emphasis added). To all this Justice Beg’s answer is, in effect, that the matter should be left to the Board who “could do more than we could ordinarily do in the exercise of our writ jurisdiction”. He adds: “To allow the legally prescribed procedure for protection of personal liberty to operate freely and consistently with social interests preventive detention is meant to safeguard appears to be the path of judicial wisdom” Prabhu Dayal 127-28.
222 Prabhu Dayal was decided on October 11, 1973 Fagu Shaw on December 20, 1973.
223 Fagu Shaw 157 (emphasis added).
to prescribe such period by virtue of Article 22(4)(a), the proviso to that article and Article 22(7)(b) of the Constitution.251

Article 22(4)(a) provides that detention exceeding the period of three months may not be authorized by law unless the duly prescribed Advisory Board has reported before the expiration of three months that there is “in its opinion sufficient cause for such detention”. The proviso to Article 22(4)(a) stipulates that “nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament” under Article 22(7)(b). A person can be detained for a period longer than three months without the necessity of consulting an advisory board “with the provision of any law” made by Parliament under Article 22(7)(a) and (b). Under Article 22(7)(b) the maximum period for which “any person may be detained” may be prescribed by law made by Parliament.

Justice Mathew (speaking for Ray, C.J., Chandrachud, J. and himself) ruled that Parliament was not obligated by Article 22(4)(a) or by Article 22(7)(b) to fix the maximum period of time for detention. All that these provisions do is to “put a curb” on the “plenary” legislative powers of the States and the Union under Entry 3 of List III.252 The power to fix a period longer than three months is an ancillary power; and there could be “no limit to that period, except in the context of its reasonableness”.253

Both Justice Alagiriswami and Justice Bhagwati in their dissenting opinions adopted the view that it was obligatory on Parliament to prescribe a maximum period of detention, when the opinion of the advisory board was dispensed with. It was obvious, to Justice Alagiriswami, that the word “may” in Article 22(7) amounts to “shall”.254 Justice Bhagwati, in a brilliant exegesis on the text of Article 22(4)(a), its proviso, and Article 22(7)(b)255 and upon a careful consideration of precedents256 was able to arrive at a conclusion that these provisions were neither intended, nor can they be so interpreted, to allow uninhibited powers of detention for “indefinite duration”, thus rendering the “guarantee of personal freedom illusory and meaningless”.257 He held: “There can be no detention for a period longer than three months unless the maximum period is prescribed by Parliament” under Article 22(7)(b).258

Justice Bhagwati showed accommodation at this point of his argumentation. He said that the construction he was suggesting was, if not the only one logically tenable, on all accounts “a highly possible construction” of the constitutional provisions.259 He then asked: “Shall we not then lean in favour of freedom and liberty when we find that it can be done without any violence to the language of the constitutional provision?”260 He appealed for a frank and fearless, “broad and liberal” mode of interpretation.261 He urged that the Court should not adopt a “rather mechanical and literal construction” which defeats the intention of Constitution-makers.262 To all this, Justice Mathew’s answer was: Even if Parliament was held obliged to fix the maximum period of detention “such a fixation cannot be immutable”.263 “What then”, he asked, “is the great guarantee of personal liberty in the fixation of the maximum period of detention by Parliament, if that fixation can fluctuate with the mood of Parliament”?264

Even as a rhetorical question, this is a most unhappy, as well as unexpected, formulation. Justice Mathew has been foremost among Indian judges to accept the argument

251 Fagu Shaw 158.
253 Fagu Shaw 165.
254 Id. 183.
255 Ibid.
256 Id. 165-174.
257 Id. 174-75.
258 Id. 171.
259 Id. 174.
260 Id. 173.
261 Ibid.
262 Ibid.
263 Ibid.
264 Id. 163.
265 Ibid. (emphasis added).
that the mere possibility of abuse of power is no basis for denial of conferral of such power. The possible perversion of power, the Court has consistently maintained, is no valid test for determining the legality of the grant of power or the scope of the power.\textsuperscript{236} By the same logic, can it not be said that a wilful refusal to perform a duty cannot be a ground for justifying non-imposition of that duty?

May be, during the emergencies which are constitutionally proclaimed, Parliament is free from the judicial assessment whether the “maximum period” fixed by it is a reasonable one or not. This may happen because judicial review itself may be suspended during validly proclaimed national emergencies. It is common ground between majority and dissenting opinions that in normal times (that is non-emergency periods) the maximum period prescribed by Parliament would be justiciable on the ground of reasonableness. No question arises, in the latter situation, of Parliamentary caprice in fixing unreasonably long periods during normal times; so that a duty cast upon Parliament to fix a reasonable maximum period in these times is a duty that the Court may legitimately enforce. To the extent that judicial review is open, despite the automatic suspension of Article 19 upon the declaration of emergency, again the duty is capable of enforcement. It would, therefore, not be correct to say that if the interpretation suggested by the dissenting judges were to be accepted, no real results ameliorating the plight of persons to be detained would follow. All this furnishes additional arguments to demonstrate the weakness of Justice Mathew’s questionings.

Indeed, the rhetorical question formulated by Justice Mathew envisages the extreme situation of an irresponsible and irresponsible Parliament. Justice Bhagwati is able to say that “having regard to the pressure of democratic forces and public opinion” such an eventuality “would be highly remote”.\textsuperscript{239} The principal point is that this mood of suspicion of a coordinate branch of Government is wholly uncharacteristic of Justice Mathew. To allow such a mood to frustrate the modicum of constitutional assurance of fairplay to detenues is even more uncharacteristic of the learned Judge. Justice Mathew’s decision on this aspect can be neither satisfactorily explained on ground of policy nor on that of strict legalism. Justice Bhagwati’s dissent uses legalism in an exemplarily rigorous manner as a gateway to broader policy formulation: a task to which Justice Mathew himself is no stranger.

Assuming, however, that on this issue Justice Mathew’s approach is equally cogent,\textsuperscript{240} his stand on the second issue—whether the law had in fact provided a maximum period—is certainly not so. The argument of the petitioners, be it recalled, was that in fixing one year or the expiration of the emergency whichever is later, Parliament had failed to fix a maximum period. Both the majority and dissenting judges agreed that the words “maximum period” meant, grammatically, “the highest or greatest extent of time which fixes the outside limit”.\textsuperscript{241} But here the agreement ended.

Justice Bhagwati maintained that the “very notion of ‘maximum period’ carries with it a sense of definiteness”.\textsuperscript{242} He found it “indeed difficult to see how ‘maximum period’ can be said to be prescribed when no one knows how long it will be”.\textsuperscript{243} Justice Mathew, in response, emphasised the object of preventive detention and the consequent need that “the power to detain must be adequate in point of duration”;\textsuperscript{244} Justice Mathew went on to say:

\textbf{And, how can the power be adequate in point of

\textsuperscript{236} Cf. Baxi, supra note 1, at 65, for a related question. “To concede power on the assumption, hope or faith that legislatures will always act wisely and fairly is ... no better than to deny this power on the ground that it may possibly be abused. The latter, it has been reiterated ad nauseam, is no ground for denying power. When indeed will it be realized that, by the same token, the possibility of the benign use of the power is likewise no ground for conferring it?” (emphasis in original).

\textsuperscript{239} Fagu Shaw 174.

\textsuperscript{240} But see the weighty critique by Scevai, supra note 225. Also see Jariwala, C. M.: “Article 22(7)(b) : Prescription of ‘Maximum Period’ ... ”, (1971) 16 J.I.L.J. 306 at 309-10.

\textsuperscript{241} Fagu Shaw 163 (per Mathew J.), 177 (Bhagwati J.).

\textsuperscript{242} Ibid. 177.

\textsuperscript{243} Ibid. (emphasis added).

\textsuperscript{244} Fagu Shaw 164.
power or does it confer a power coupled with a duty?\textsuperscript{245} Surely, even as a matter of pure textual exegesis, there is ample scope for adopting the latter position. This analytical openness of choice becomes all the more strengthened by a policy of respecting the logic of the limited safeguards for persons to be detained provided in Article 22, which (be it remembered) occur in a chapter on fundamental rights.

The real difficulty lies in the policy approach adopted by the majority. Justice Bhagwati, realizing that Article 22 provisions offer at best fragile safeguards for persons detained, is keen to assert and reinforce such controls as these provisions envisage;\textsuperscript{this} was precisely the stand of Justice Mathew (as against Justice Beg) in \textit{Prabhu Dayal}. But in \textit{Faghu Shaw} Justice Mathew summarily dismisses the memorable dissenting formulation by Justice Bose, who said that the majority opinion in \textit{Krishnan}\textsuperscript{246} amounted to telling all residents of India:

\begin{quote}
Though we authorize Parliament to prescribe a maximum limit of detention if it so chooses, we place no compulsion on it to do so and we authorize it to pass legislation which will empower any person or authority Parliament chooses to name, right down to a police constable, to arrest you, and detain you as long as he pleases, for the duration of your life, if he wants, so that you may linger and rot in jail till you die, as did men in the Bastille.\textsuperscript{250}
\end{quote}

The dismissal by Justice Mathew, of these classic and haunting observations, was brusque: “we think the analogies to which the learned Judge referred to are, in fact, misleading and his reasonings from that not convincing”.\textsuperscript{251} The problem, said

\begin{itemize}
\item\textsuperscript{246} \textit{S. Krishnan v. State of Madras}, AIR 1951 SC 301.
\item\textsuperscript{247} Id. 312 (emphasis added); quoted in \textit{Faghu Shaw} 178.
\item\textsuperscript{248} \textit{Faghu Shaw} 160.
\end{itemize}
Justice Mathew, is “one of cold and dispassionate interpretation”, not of “rhetorical flourish”. 253

And again:

Detention without trial is a serious matter. It is only natural that it should conjure up lurid pictures of men pining in the Bastille. But malignant diseases call for drastic remedies. And it was this realization that made the Constitution-makers—all lovers of liberty—to reconcile themselves to the idea of detention without trial.254

This is not “cold and dipassionate” analysis. The question before the Court was not whether preventive detention, antithetical to personal liberty, was in law and policy good or bad, a necessary or unnecessary evil. Nor were justices of the Supreme Court called upon to test their diagnostic powers or to offer cures for pathological aspects of Indian society. Indeed, if one had to talk about “malignant diseases” and “drastic cures”, there was need to be even-handed: one had to be conscious of the possible “medical nemesis” as well. Mr. Seervai has put this point very acutely:

...the safeguards—feeble as they were—which our Constitution provided in relation to preventive detention were meant to secure that the malignity of the disease from which persons to be detained were alleged to suffer, was not made a cloak for the malignity of those who had it in their power to detain such persons.254

The transition from Prabhu Dayal to Faghu Shaw, so swift in time and so thoroughgoing, will long continue to puzzle students of judicial process and of Justice Mathew’s thought. Faghu Shaw deserves to be overruled at the first opportunity (though, somewhat paradoxically, one hopes it does not arise) on the only issue it decided—namely that a “maximum period” may well be “indefinite in duration”. On the other issue—whether Parliament was under a duty for a maximum period

252 Faghu Shaw 162.
253 Id. 162-63.
254 Seervai, supra note 225, at 534 (emphasis added).

we have only well-considered dicta from Justice Mathew, for the Court, on one hand and Justice Bhagwati on the other.255 The prescient analysis of Justice Bhagwati should command acceptance in the future.

(D) The New Domain of Personal Liberty: Privacy

If Faghu Shaw’s handling of Article 22 raised a puzzle, it was because one thinks of Justice Mathew as a staunch supporter of the values of liberty and dignity. He elevates these values to high constitutional status in unmistakable terms in his seminal opinion for the Court in Gobind v. State of M. P.256 In Gobind, Justice Mathew revitalizes and extends the lamented Justice Subba Rao’s memorable minority opinion in Kharak Singh257 where he maintained that the right to privacy was also an aspect of personal liberty under Article 21.258 Gobind assumes such a right and is more concerned to develop its contours. Gobind regards the right to privacy as a fundamental right, an independent right, emanating from the rights to personal liberty, freedom of speech, and freedom of movement.259 Since the right is an eminatory right, rather than a textual one, it (more than the latter rights) has not merely to “go through a process of case-by-case development”260 but has also to find its limitations through the same process.

Even as Gobind is forthright in its assertion of the dignity and autonomy of individuals as manifest in Part III, and the Constitution generally, it is concerned to stress that the right to “privacy” is not an absolute right. Justice Mathew formulates one dominant test: “Assuming that the fundamental rights have penumbral zones and the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling State interest”.261

255 Id. 526.
256 (1975) 2 SCC 148 (hereafter cited as Gobind).
257 AIR 1963 SC 1295 ; Gobind 153.
258 Ibid.
259 Gobind 155-56.
260 Id. 157.
261 Ibid. (emphasis added).
This is an example of judicial creativity at its best level. Discovery (or shall we say ‘invention’?) of a new right is one aspect of creativity: articulation of a broad formulation of its scope, and of legitimate constraints, is another aspect. In both, the Supreme Court is clearly exercising constituent power, that is the power of creating new facets of the Constitution.\textsuperscript{262} 

\textit{Gobind} uses the formula of “compelling State interest” not so much as a general importation to be applied in interpretation of fundamental rights but as a device to meet adequately the sui generis character of this “new” right and the attendant problem of its scope. The “reasonable restrictions” of Article 19 can be mechanically applied to the new right only if it was an emanation of rights guaranteed under Article 19 or even Article 21.\textsuperscript{265} But the new right can also be seen to emanate from “the totality of the constitutional scheme under which we...live” or the value of “individual autonomy” or the concept of “ordered liberty” or as arising cumulatively from all these sources.\textsuperscript{264}

\textit{Gobind} is anxious to preserve the rich indeterminacy and open-texture of the right to privacy, continuing the inspiration of Justice Subba Rao in \textit{Kharak Singh}. This could only be done by conceptualizing it as a sui generis right, limitations upon which have to be inductively formulated under the broad rubrics of “important countervailing interest” or “superior interest”

\textsuperscript{262} One would think that this is a wise exercise of constituent power. That the claims of privacy (autonomy/dignity) should be protected against state authority is easily accepted. But the question arises at a more general level whether ‘privacy’ is a value of human relations in India. Everyday experience in Indian setting suggests otherwise. Marriage parties and midnight music, wedding processions and morning bhajans, unabated curiosity at other people’s illness or personal vicissitudes, manifestation of good neighbourhood through constant surveillance by the next door neighbour (large number of Indian houses do not use curtains) are some of the common experiences. A question may arise whether privacy is not after all a value somewhat alien to Indian culture. (This can be measured by private nuisance litigation, for example). If so, can we expect \textit{Gobind} to indignant privacy values with a massive social spill over from its constitutional zones?

\textsuperscript{264} \textit{Gobind} 158.

\textsuperscript{265} Ibid.

\textsuperscript{266} The last two paras on page 158 of \textit{Gobind} (paras 33, 34) bear the distinct imprint of Krishna Iyer J. Krishna Iyer J. participated in the decision for the Court with Gopswami J. See the appreciative comments by Nariman, F. S.: “The Right to be Left Alone—A Fundamental Right”. (1977) XVII The Indian Advocate, 76. Nariman praises the “dexerous judicial steering and mild under-statement” with which the Court has “given the right to privacy a foothold for the Fundamental Rights Chapter” (Id. 83). He also admires the manner in which the Court has given “the right a new lease of life” by “neatly side-stepping the ratio of the larger benches” (Id. 81): in \textit{Kharak Singh} four Justices, speaking for the Court, categorically rejected the contention that the Constitution guaranteed any fundamental right to privacy; only Justices K. Subba Rao and J. C. Shah dissented. A similar view was adopted by an eight-Judge bench “though obliquely” in \textit{M. P. Sharma v. Satish Chandra}, 1934 SCR 1077.

(continued)
(E) Social Content of Fundamental Rights

A distinctive aspect of Justice Mathew’s handling of fundamental rights is his constant endeavour to provide increasing social content and meaning to these rights. They are, in strict law, rights conferred upon individuals and groups; in strict law, also, they create obligations only upon the state. Justice Mathew, however, makes the dyadic jural relations into triadic ones by infusing wider social content into the conceptions of the guaranteed rights. Let us note, briefly, a few examples.

We have already seen how, in Xavier’s, Justice Mathew seeks to read into the rights of minorities under Article 30 of the Constitution the right of “parents to determine to which school” their children be sent to study.268 This “parental right in education”269 suggestively merges into a still wider notion: regimentation in education stands excluded by the “fundamental postulate of personal liberty”.270 Similarly, in his dissent in Bennett Coleman, the right to free speech is seen as inclusive of “the right of the community to hear”271 and the “right” of free press is regarded as inclusive of the “right of the community to read and be informed”.272 In Kesavananda, Justice Mathew is even more explicit on the point that the freedom of press “must now cover two sets of rights and not one only”.273

With the rights of the editors and publishers to

Nariman observes: “The right of privacy had two rounds in the Court—first before a bench of eight, then before a bench of six. In both it had been worsened. It could not have survived a third bout. It was thought that privacy as a fundamental right had been . . . burnt to a cinder. But the ashes of lost freedom are ever smouldering. In Gobind the cherished right has risen phoenix-like from the ashes”. (Id. 80). One hopes that the doctrine of precedent will not, also, rise phoenix-like to reduce the right to “smouldering ashes” once again.

268 See supra note 197.
269 See supra note 204.
270 See supra note 198.
271 Bennett Coleman Co. v. Union of India, (1972) 2 SCC 788 at 847 (emphasis added).
272 Id. 848.
273 Kesavananda 895.

express themselves there must be associated a right of the public to be served with a substantial and honest basis of fact for its judgments of public affairs. Of these two, it is the latter which today tends to take precedence in importance. The freedom of the press has changed its point of focus from the editor to the citizen.274

Gobind provides us with yet another example. The “right to be left alone”, the “right to privacy” is seen to arise from the need to be let alone: the need (in the classic formulation of Charles Warren and Louis Brandies) to maintain a distinction “between the ‘outer’ and the ‘inner’ life of man, between the life of the soul and life of body, between the spiritual and the material, between the sacred and the profane, between the realm of God and Caesar, . . . between society and solitude . . .”275 So basic is this need to maintain these distinctions, and so important are these for the “pursuit of happiness”, that judicial law-makers ought to assume that constitution-makers intended to protect the needs of privacy, autonomy and dignity.276 Anyhow, Justice Mathew says this is how the guarantees of fundamental rights must be read.

Let us take, as one last (though not final) example, Justice Mathew’s sensitive analysis of the right to property in Kesavananda. Property, he says, is “not an arbitrary ideal” but is “founded on man’s natural impulse to extend his own personality”.277 If one translates the language of “natural impulse” in terms of modern psychology one gets the reference to the socially legitimated needs. This socially approved need, then, for the extension of one’s personality requires “some property or capacity for acquiring property”278; for, without either there cannot be any liberty and without liberty there cannot be much scope “for proper development of character”.279

274 Ibid.
276 Gobind 155.
277 Kesavananda 884.
278 Ibid.
279 Ibid.
The legal right to property is thus an aspect of the satisfaction of this basic human need; the need is itself converted into a right.

But what kind of a right? Justice Mathew is no Benthamite conservative; he recognizes that the institution of private property has assumed most diverse forms and is "still susceptible to great unforeseen modifications". He follows the classification of Morris Ginsberg, (which I urged the Court to consider in my 1967 critique of Golak Nath.) What is needed is the protection of property (in Ginsberg's formulation) in the form of durable and non-durable consumer's goods and property "in the means of production worked or directly managed by their owners". The Constitution and legislative and judicial law-makers ought not, however, to protect the third form of property: "property in the means of production not worked or directly managed by their owners, especially the accumulation of masses of property of this kind in the hands of a relatively narrow class". Such property, which "gives power over man" is an "instrument" not "of freedom but of servitude". Obviously, such property will conflict with the liberty of other people and must be "derecognized".

How does Justice Mathew arrive at these formulations of fundamental rights? He is explicit concerning the method only in Bennett Coleman and the gloss placed on it in Kesavananda, and yet this is the method he follows in all the above mentioned cases. He proceeds to identify a need and then converts this

need into a right or an aspect of a guaranteed right. Thus, the "need of the consumer to get adequate and uncontaminated mental food" through the media is such "that he is under a duty to get it". The word "duty" is here used in an undifferentiated sense: in Hohfeldian translation what is imported here is a right of the consumer rather than his duty. The right to the freedom of press is thus inclusive not just of a right against the state but also of duties to the citizens. In another sense, the citizen is also under an obligation to participate intelligently in civic affairs, to acquire a civic competence: this is another distinct jural relation. Indeed, it is because of this duty that "his interest acquires the status of a right". This conversion of need into a set of right-duty relations, whose scope include the state, the press and people at large is justified on the ground that the market leaves the consumer totally dependent on what is produced and how it is produced: all that a reader of a newspaper can get is "through existing press organs"; the "protection of the freedom of the issuer is no longer sufficient to protect automatically the consumer or the community".

It would be wearisome to demonstrate in any further detail the application of Justice Mathew's method to the other cases here discussed. It is sufficient, for the present purpose, to reiterate that Justice Mathew has found and shown an illuminating way of converting 'needs' into 'rights'. In this process, he has constantly enriched the social content and meaning of the rights. This process is, however, not free from analytical and ideological hazards.

Clearly, at an analytical level, one might say that considerable confusion may result by reading the chapter on fundamental rights as not merely imposing obligations on the state but also on the holders of the rights themselves. In this manner of reading fundamental rights, the very identity of
rights and of bearers of rights and obligations would be, more or less, constantly shifting. To many thoughtful men, it may indeed seem preposterous that the right of free press imports at the same time obligations on the press to furnish informational bases for the attainment and exercise of civic competence or that the rights of the minorities to establish and administer educational institutions of their own choice are also an aspect of the wider right of the parents in education or of the community as a whole in diversity of education.

One might say that all this violates canons of analytical jurisprudence; and that on any Hohfeldian criterion many undifferentiated uses of the overworked notion of 'rights' are present in Justice Mathew's discourses. The latter charge must be accepted, although Justice Mathew is among the very few Indian justices to have grasped the subtleties of Hohfeldian analysis. But taken in their total context, many of Justice Mathew's observations in this regard do very clearly suggest that he does not contemplate fundamental rights as merely creating jural relations between the individual and the state. Rather, he contemplates Part III as going beyond the (broadly) dyadic relations. A whole range of Hohfeldian relations are involved in these provisions. It is surely possible, though we do not attempt this here, to persuasively analyse the decisions so as to avoid any charge of analytical confusion.

On the other hand, the ideological or philosophical difficu-

Thus, for example, the right to the freedom of the press is a rolled up expression covering a large number of legally enforceable claims on the agencies of the state; it also encompasses privilege — no right, powerability and immunity — disability relations of the press and the state. The content, scope and the sheer numbers of these jural relations change the moment the consumers are seen to have a role in these relations. If the right to the freedom of the press is interpreted so as to include the "right" of the reader to have honest and adequate news, the state is under a duty to exercise its power to impose "reasonable restrictions" on the right of free press. It is no longer a "privilege" of the state to do so; and the press is under a liability to have its "freedom" circumscribed. Even this is not too exact, still less a complete, Hohfeldian formulation. But this limited exercise would show that it is possible to conquer our initial surprise at Justice Mathew's formulations. The merit of a more rigorous Hohfeldian analysis would be to enable us to raise further analytical questions such as: is Justice Mathew contemplating a power coupled with duty (as suggested here) or merely a weak privilege — no right relation?

A related difficulty, albeit partly answered by the foregoing, concerns some very difficult aspects of the current controversy on conceptions of "development". One such conception, baldly put, is that "development" is that process through which the basic needs of human beings in each society are at least fulfilled. On some approaches to the notion of basic needs it is possible to say that civil and political rights of some are dispensable in the pursuit of acquiring and maintaining a minimum standard of basic need fulfillment for vast majorities of people. On such approaches, there would arise

28 Kesavananda 881.
a sharp conflict between basic human rights and needs. Critiques of such approaches maintain that it is important not to confuse basic needs with basic rights. ‘Basic human rights’ has (sic), for instance, been included in a list of basic needs. It is obscure, however, how one can ‘need’ a ‘right’; a ‘right’ has an autonomous existence, quite independent of whether one has a need or not, by virtue of some theory of law. A ‘need’ for a right cannot create a right, neither can a right be denied because it is in some sense not needed.294

Justice Mathew, of course, is not directly concerned with this debate in any of the decisions we have so far mentioned, except in Kesavananda where he avers: “The concept of liberty or equality can have meaning only when men are alive today and hope to be alive tomorrow . . . . the main task of freedom in India for the large part of the people is at the economic level”.295 But he is quite clear on the point that rights are devices for fulfilling needs, basic or otherwise. One may, according to him, derive rights from needs and some rights may clearly be denied (as the third type of parasitic property mentioned earlier) on the basis that they are not needed by the majority of the people. The relation between needs and rights is a fairly strong one in Justice Mathew’s thought: if rights have any autonomous existence, apart from needs, this lies in the fact that “there are rights which inhere in human beings because they are human beings—whether you call them natural rights or by some other appellation is immaterial”.296 Insofar as being human presupposes meeting of some basic

295 Kesavananda 879. Indeed, Justice Mathew comes quite close to the basic needs approach when he further observes: “There is a certain air of unreality when you assume that Fundamental Rights have any meaningful existence for the starving millions . . . . in particular contexts, fundamental freedoms and rights must yield to material and practical needs. Economic goals have an uncontestable claim for priority over ideological ones on the ground that excellence comes only after existence.”

296 Kesavananda 890

needs—both material and non-material—the ‘need’ for a right” does “create a right”, contrary to the passage quoted above.

The real message of the observations quoted above is, after all, not theoretical. Rather, critics of basic needs approach to development seem to be saying: “Do not concede that certain rights may be sacrificed in order that basic needs may be fulfilled by the state, since most authoritarian regimes, particularly in poor societies, tend to legitimize their power by the claim that such power is necessary to meet the basic needs of the vast majority of the populace”. Underlying all this is a negative attitude to state power, an attitude Justice Mathew is simply unable to adopt. In his view, the state must have vast powers, including the power to reformulate the constitution, in the interests of people and for the pursuit of the “common good”. Indeed, Justice Mathew is, on the whole, pro-state. But he has a very distinctive conception of the state, which now needs to be understood in its own terms.

VI. CONCLUSION: JUSTICE MATHEW’S CONCEPTION OF STATE

Much of Justice Mathew’s thinking—whether it be on the limits of amendatory power or the reach of delegation of legislative power to the executive or the nature and scope of the fundamental rights or rationales for judicial self-restraint—can be seen to be ultimately related to his distinctive conception of state. Justice Mathew, unlike many libertarian justices (for example, the lamented Justice K. Subba Rao), does not regard the state as a necessary evil. Nor does he, similarly, regard every increase in state power as a threat to the liberties of individuals. Justice Mathew has a benign conception of state. He does not regard the state as an organization of force: it is not, he says, “simply a coercive machinery wielding the thunderbolt of authority”.297 Rather, the state has to be viewed “mainly as service corporation”.298 Indeed, state exists and its only title to “exist is its claim to advance the

297 Sukhdev Singh 449.
298 ibid.
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On the other hand, the ideological or philosophical diffi-
culties remain acute. One may say that such interpretative essays by judicial law-makers as to the nature and content of civil and political rights weaken the rights themselves. More precisely, the contention here would be that the rights are guarantees against arbitrary state action, and that they set limits to state power. Any attempt to read rights in a manner which may tend to enhance that very power which the provisions of right seek in the first place to restrict is, therefore, objectionable in terms of the very logic of constitutional liberties. In this sense, rights are interpretatively non-negotiable. Justice Mathew is not unaware of this position; he simply prefers the alternate position which regards rights as mutable through the exercise of the state power. The latter he regards as beneficial rather than necessarily evil (a theme to which we turn briefly in the next section). He believes in the relative autonomy of each generation to make fundamental choices in its own time, place and circumstance. We recall his statement already quoted earlier: "The Fundamental Rights themselves have no fixed content: most of them are mere empty vessels into which each generation must pour its content in the light of its experience." Perhaps, the metaphor "mere empty vessels" puts the matter a bit too sharply; but it is clear that Justice Mathew is a relativist in his approach to fundamental rights. One may or may not agree with his positions: but the positions are both clearly advocated and consistently applied.

A related difficulty, albeit partly answered by the foregoing, concerns some very difficult aspects of the current controversy on conceptions of "development". One such conception, baldly put, is that "development" is that process through which the basic needs of human beings in each society are at least fulfilled. On some approaches to the notion of basic needs it is possible to say that civil and political rights of some are dispensable in the pursuit of acquiring and maintaining a minimum standard of basic needs fulfillment for vast majorities of people. On such approaches, there would arise
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296 Kesavananda 890
297 Sukhder Singh 449.
298 Ibid.
public good and serve the public interest". Judges, according to Justice Mathew, ought to start reasoning from this basis: they may, and often must, question the power of the state but seldom, if ever, its authority. Indeed, they must so interpret exercises of state power as to sustain the "true dignity" of the state (which in Jacques Maritain's memorable words) "comes not from power and prestige, but from the exercise of justice".

Justice Mathew is, of course, aware that there are other ways of looking upon the state. He acknowledges that the state may be regarded as an instrument of class domination or merely as a legal structure defining the relationship "between the governors and the governed" or even as "society itself". From some of these standpoints, every increase in state power may represent a corresponding increase of the capacity of the state to commit injustice and even practice tyranny. This problem does not loom large on Justice Mathew's horizons as in his image the state is an instrumentality of justice, welfare and progress.

The state, for Justice Mathew, is merely an association within a pluralist society. While it may have the monopoly over the use of legal force within such a society, it does not surely have any monopoly of power and authority. Indeed, there exist within society various centres of power and the state need not be the most salient centre. "Today", Justice Mathew observes, "probably, the giant corporations, the labour unions, trade associations and other powerful organizations have taken the substance of sovereignty away from the State". The growing power of these social groups needs to be equally constrained by the rule of law and justice requirements. But how is this to be done without augmenting the power of the state? Justice Mathew feels that the growth of "private power" compels "a reassessment of the relation between group power and the modern State on the one hand and the freedom of the individual on the other". This reassessment leads him, first of all, to the perception that the basic assumption of the Constitution is no longer tenable. That assumption was that "the State alone was competent to wield power" and, therefore, its power must be limited. But imposition of limitations upon state power do not necessarily, and in themselves, attain liberty and equality, especially in a country like India, which is a sub-continent full of harrowing injustices. Justice Mathew points out that "the essential problem of liberty and equality is one of freedom from arbitrary restriction and discrimination wherever and however imposed". He, therefore, urges that the Constitution "wherever possible should be so construed as to apply to arbitrary application of power against individuals by centres of power".

Clearly, Justice Mathew is not saying that state power should not be structured and restricted wherever necessary. But he is saying that this should not be done in a manner which would disable the state, in turn, from structuring and confining the accretion and exercise of "private" power. The state, in his conception, is to take on the role of a mediator between group power on the one hand and the freedom of individuals on the other. He is, accordingly, indulgent to the growth of state power and would regard it as legitimate insofar as it is directed to ensure both accountability and justice in the acquisition, management, distribution and exercise of "private" power. He would want to respect, as much as possible, the determination of state authorities as to the manner and scope of state oversight and control of "private" power. The progressive increase in state power, entailed in this process, does not by itself much perturb Justice Mathew as he shares a very benign, and one might say truly Christian, conception of state and its legitimacy in society.

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269 Khan Chand 562. The reference here is to "government".
261 Sukdev Singh 449; also see note 33.
260 Id. 451.
267 See supra note 300; see also d'Entrevess, A. P., The Notion of the State (1967) 21-36.
266 Ibid. (emphasis added).
265 Ibid. (emphasis added).
The negative face of the state is overwhelmingly present in public law litigation in the highest courts in most societies. This makes it understandable why great libertarian judges start—and are expected to do—from the premise that it is their obligation to safeguard individual freedoms from the predatory expansion of the power of the state. Justice Mathew alerts us, gently but cogently, that the predatory growth of “private” power is as much a menace to individual freedoms and good society as the similar growth of state power. The merit of Justice Mathew’s conception of the state is to highlight the more benign and ameliorative aspects of state power and authority. To the charge that such a conception will ineluctably involve the “risk of having too many functions of social life controlled by the State from above”, he would probably answer with Jacques Maritain that:

We shall be inevitably bound to accept this risk, as long as our notion of the State has not been restated on true and genuine democratic foundations, and as long as the body politic has not renewed its own structures and consciousness, so that people become more effectively equipped for the exercise of freedom, and the State may be made an actual instrument for the common good of all. Then only will that very topmost agency . . . cease to be at the same time a threat to the freedoms of human person as well of intelligence and science. Then only will the highest function of the State—to ensure the law and facilitate the free development of the body politic—be restored and the sense of the State be regained by the citizens. Then only will the State achieve its true dignity, which comes not from power and prestige, but from the exercise of justice.

Justice Mathew has attempted to restate the notion of the state on “true and genuine democratic foundations” and has tried to regain for law, in a pluralist polity, “its moral function, its function as a pedagogue of freedom”. Is one entitled to ask for more from our judges?

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208 See supra note 295.
209 Ibid.
210 See supra note 295 at 307.