Laches and the Right to Constitutional Remedies:
Quis Custodiet Ipsos Custodes?

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I

This Court has laid down in I.C. Golaknath... that the Parliament cannot by amending the Constitution abridge the fundamental rights conferred under Part III of the Constitution. If we are to bring in the provisions of Limitation Act by an indirect process to control the remedies conferred by the Constitution it would mean that what the Parliament cannot do directly it can do indirectly by curtailing the period of limitation for suits against the Government.... Should this Court, an institution primarily created for the purpose of safeguarding the fundamental rights... narrow down those rights? The implications of this decision are bound to be far reaching. It is likely to pull down from the high pedestal now occupied by the fundamental rights to the level of other civil rights. I am apprehensive that this decision may mark an important turning point in downgrading the fundamental rights guaranteed under the Constitution.1

With this stirring reproach to his brother judges, Justice Hegde registered his solitary dissent against the majority decision in Tilokchand Motichand v. H.B. Munshi. It seems amazing that this reproach had to be made almost in the wake of the court’s momentous decision in Golak Nath1 and in the context of the impending reconsideration of that decision by the Supreme Court. This reproach was furthermore directed against two judges who helped to form the majority in Golak Nath (Justices Hidayatullah and Sikri).

It seems, at first sight, bizarre that Justice Hidayatullah, whose opinion was decisive for the formation of the majority in Golak Nath, should in Tilokchand exert his leadership in favour of the abridgement of article 32.

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It is strange that the self-same judge who insisted that the fundamental rights cannot be allowed to become the ‘playthings’ of a legislative majority in Parliament should now lend his leadership to a view which seems to make the rights a plaything of the judicial majority of the Supreme Court.

And the strangeness of all this becomes indeed a matter of wonder when we realize that Indian constitutional lawyers who suffered hypertension in the wake of Golak Nath failed to display even a quiver of anxiety in response to Justice Hegde’s stirring dissent. The Tilokchand decision does not seem to have received anything more than a passing notice or a strident headnote condemnation, aside from one or two somewhat detailed commentaries.

The principal thesis of this paper is that the Tilokchand decision in effect amends article 32 to mean that the right to constitutional remedies is subject to reasonable restrictions in the interests of administration of justice. The wisdom of such an amendment remains highly debatable even if one maintains (as the author does) that notwithstanding Golak Nath the court has as much authority as Parliament to amend so as to abridge fundamental rights. If Parliament has no authority to amend these rights neither has the court. But if either has this power, both have.

The author has elsewhere since long maintained the view that given our ‘mixed’ Constitution, the court is a co-ordinate branch of constitutional policy-making, together with Parliament. Both Parliament and the court who have this power must exercise it with wisdom and restraint and with due regard to the impact of their decisions on the constitutional polity of India. This may itself require as much self-abnegation on the part of the court as the court often rightly expects from Parliament.

Be that as it may, the examination of larger themes is permissible only if the Tilokchand holding really restricts or abridges the right to constitutional remedies.

4. See the Editorial Note to the S.C.C. report of Tilokchand which begins: “The majority view...is...wholly wrong”.

The Tilokchand litigation concerned principally the sales tax liability of the appellant firm during the period April 1, 1949 to 31 October 1952. Out of an overall turnover of a little over Rs. 13,142,165/- the firm sought and obtained a refund of Rs. 26,563.50 under the protection of article 266 of the Indian Constitution. The firm obtained the refund in 1957, but it was required to produce receipts from consumers outside the State of Bombay for the refund of sales tax to them. The firm did not comply, protesting instead the legality of this requirement. Subsequently, on March 17, 1958, an order of forfeiture was passed under section 21(4) of the Bombay Sales Tax Act, 1953.

Immediately on the forfeiture order (i.e., on March 28, 1958), the appellant petitioned the Bombay High Court in certiorari, on the ground of violation of articles 19(1)(g) and 265 of the Constitution, besides contending that the order was “ultra vires, bad and inoperative”. A similar application was presented to the Bombay High Court in the unreported Pasha Bhai Patel and Co. (P) Ltd. case. The learned single judge of the High Court delivered the main judgment in the latter case, but not directly on the Tilokchand situation. This fact is of some importance because the learned judge of the High Court ruled:

This appears to me to be a gross case where even if I was of the opinion that the order is invalid and involved violation of fundamental rights, I would not in my discretion interfere by way of issuing a writ. I am not depriving the petitioner of any other appropriate remedy. I have therefore decided to dismiss this petition on that single ground.

The Division Bench of the Bombay High Court dismissed the appeal preferred by Tilokchand on the sole ground that they would not review the discretion exercised by the learned single judge at the first instance. Their Lordships, however, made it clear that:

We may observe that we are not dealing with this case on the merits at all...We have decided this appeal on the limited ground that Mr. Justice K.T. Desai having exercised his discretion, no case is made out for our interference with the exercise of that discretion.

In a subsequent case the Supreme Court struck down on September 29,
1968, section 12(9)(f) of the Bombay Sales Tax Act, 1946, as unconstitutional, on the ground that it violated article 19(1)(f). On February 9, 1968, four petitioners, including Tilokchand, came before the Supreme Court praying that the three orders of the sales tax authorities—dated March 17, 1958, December 18, 1958, and December 24, 1958,—be quashed.

III

The above reconstruction of the facts seems clear enough but there is some difference concerning whether Tilokchand had in fact raised the contention before the Bombay High Court that his fundamental rights were violated.

The learned single judge of the Bombay High Court made, we recall, the ruling in Pasha Bhai Patel case which also applied to Tilokchand. But we do not know, and neither did the learned judges of the Supreme Court, the precise facts and legal issues raised in the Pasha Bhai Patel case. It is also noteworthy that of the five learned judges of the Supreme Court (Chief Justice Hidayatullah and Justice Sikri, Bachawat, Mitter, Hegde) only Justice Mitter and Justice Bachawat stressed the fact that Tilokchand raised the issue of violation of fundamental rights (article 19(1)(g) ) at the first instance. Indeed, Chief Justice Hidayatullah goes to the extent of expressly stating:

He [the appellant in this case] set out a number of grounds but did not set out the ground on which ultimately in another case the recovery was struck down by this Court.11

Similarly, Justice Sikri categorically states:

The grounds extracted above show that it never struck the petitioner that the provision could be challenged on the ground ultimately accepted by this Court.12

Justice Hegde is altogether silent on this aspect in his dissent.

If the version of facts given by Justices Mitter and Bachawat is correct, then there is a striking incongruity in the facts as perceived by them and as perceived by his brother judges (Chief Justice Hidayatullah and Justice Sikri). If we are to assume that the Mitter-Bachawat statement of facts is correct, then there is ample room for arguing that the court gave its judgment per incuriam. It remains possible to argue persuasively that Chief Justice Hidayatullah’s judgment may have been in favour of the petitioner had the learned judge appreciated the fact that the petitioner did raise the issue of the violation of his fundamental rights.

The argument that the Tilokchand decision was per incuriam can be rebutted only on one fine ground. The Supreme Court held the impugned law as constitutionally invalid under article 19(1)(f). Petitioner Tilokchand had never raised this ground at the first instance, although he had raised the problem of the validity of the impugned law under a sister clause, namely, article 19(1)(g). So far this argument proceeds, the two judges were perfectly correct in saying that the petitioner never impugned the law on the precise ground on which it was later invalidated. Therefore, there is no per incuriam decision.

Such an argument is plausible but it would not unfortunately survive a microscopic reading of the judgment. It is abundantly clear that neither Chief Justice Hidayatullah nor Justice Sikri was thinking of the precise article 19(1)(f) ground. Thus, the main difficulty which Justice Sikri had with petitioner was that neither he nor his counsel ever ‘thought of’ challenging the validity of the law under article 19. Chief Justice Hidayatullah is equally explicit on this point: he states that the petitioner did not ‘set out’ the ground of unconstitutionality in the first instance.13

The other argument against the present view would simply be that technically this error or misapprehension by Chief Justice Hidayatullah and Justice Sikri does not really amount to a per incuriam decision. For, the latter notion refers only to the court’s overlooking a binding precedent (whatever this may mean) or an applicable statute. It may, therefore, be said that there is no warrant for a loose use of such a technical and sophisticated notion in the present context.

At a technical level, this may well be the position. But who has laid down that the category of per incuriam is closed? A manifest error in appreciating even the existence of a major contention of violation of a fundamental right is an error no less consequential than overlooking of precedents and statutes for the enforcement of fundamental rights than it is for administration of justice. It is only a matter of taste, embelished by a penchant for dogmas, which inhibits the use of the label per incuriam in the present context. The author would have no quarrel with anyone not

11. Tilokchand, supra note 1 at 116.
12. Id. at 121.
13. Another way of avoiding per incuriam characterization is to maintain simply that the Bachawat-Mitter statement of the petitioner's contention before the Bombay High Court is incorrect. This does not seem plausible; for, the learned Single Judge of the Bombay High Court expressly refers to this not being a fit case for discretionary relief under article 226 even if the petitioner's fundamental rights were violated.
wishing to use this label, provided that the point of fundamental error (and its effects) by the court is appreciated.

IV

The central issue in Tilokchand, as perceived by the court, was whether any time limit could be imposed for article 32 petitions and if so, whether the court could borrow, as it were, the relevant provisions of the Indian Limitation Act. On this issue Justices Bachawat and Mitter had no difficulty in holding that the relevant periods of limitation ought to be applied to article 32 petitions. Justice Sikri also favours some period of limitation, which may be as short as one year for petitions under article 32, though like Chief Justice Hidayatullah, Justice Sikri does not see any need to "tie our hands completely with the shackles imposed by the Indian Limitation Act."14

Only Justice Hegde questions all the premises of the 'majority' brethren on this issue. He maintains that the power conferred under article 32 upon the court is not a discretionary power like the one conferred upon the High Courts under article 226. Article 32 would be defeated as a guaranteed fundamental right if the judicial power involved in its exercise was converted into a discretionary power. Justice Hegde goes so far as to question what Chief Justice Hidayatullah and Justice Sikri describe as a conventional practice of the court in disallowing stale claims. Indeed, he maintains that the "law reports do not show a single instance, where this Court has refused to grant relief to a petitioner in a petition under Article 32 on the ground of delay".15

Before we examine in depth any of these judicial opinions, we ought to ascertain the exact period of the 'delay' involved. Chief Justice Hidayatullah discovers a delay of 'few years' because the petitioner did not come before the Supreme Court during the period 1958 to 1968. Justice Bachawat holds that the petitioner paid money to the State 'under coercion' and the suit for the recovery of the money should have been filed within three years from the date of payment in 1959-60, so the petitioner's claim was stale by about eight years. Justice Mitter reaches the same conclusion but adds that if the petitioner's claims could be classified as a suit for recovery of money paid under protest in satisfaction of a claim made by the revenue authorities, article 16 of the Limitation Act, 1908, would so apply as to bar the suit after one year. Justice Mitter's opinion shows that the delay could be estimated differently as follows: (a) applying article 16 of the Limitation Act, 1908, the delay will be of about eight years; (b) applying article 113 of the Limitation Act, 1964, and/or article 120 of the

14. Tilokchand, supra note 1 at 118.

15. Id. at 135.

Limitation Act, 1908, the suit for recovery of monies paid under coercion should have been filed by January 1, 1967, so that the delay is little over one year. Justice Sikri concludes that the payment was made under a mistake of law, not under coercion, and that if the principles of the law of limitation were to apply the relevant period was six months after the discovery of the mistake of law. On this view, Tilokchand was well in time to petition the court under article 32 since this discovery occurred with the Supreme Court judgment invalidating the relevant Bombay Sales Tax Act provision on December 2, 1968. The petitioner came before the Supreme Court on February 9, 1969. The question of 'delay' is altogether irrelevant to the dissent of Justice Hegde.

The determination of the 'delay' involved is obviously not solely a question of fact but involves rather a legal decision characterizing the substantive issue in a particular manner. When we approach the matter thus, it becomes clear that only Chief Justice Hidayatullah is consciously joining issue with Justice Hegde. The former takes the view that the petitioner should have approached the court around 1958-59, after the article 226 remedy had proved abortive. Justice Hegde seems to be saying that the court has no authority under the Constitution to so require.

If the issue is thus sharply (or starkly) presented, one very startling conclusion results, which has escaped even the incisive reach of Justice Hegde's dissent. The conclusion is that if we follow the logic of Hidayatullah opinion, then article 32 imposes a duty as well as a right. Indeed, on this view, the citizen has no right to constitutional remedies under article 32 unless he fulfills his duty to approach the court immediately or in some reasonable time stipulated by the court. Seen thus, an article 32 guarantee of a right is emasculated to a mere benefit which can be circumscribed by the court at its volition. And the opinions of Justices Sikri, Bachawat and Mitter reinforce this conclusion.

At the heart of Tilokchand lie these capital issues: What is the scope of article 32? Who has the final power to abridge or curtail it?

V

The threshold question is one simply of the ambit of the right to constitutional remedies. Interpretative effort is only called for if article 32 formulations are blurred or equivocal. In any case, close textual analysis must precede examination of policy approaches to the interpretation of article 32.

The Constitution makes it admirably clear that the right to constitutional remedies is a fundamental right. Under clause 4, this fundamental right is
not to be suspended "except as otherwise provided in the Constitution." But from here on the manifest clarity of article 32 seems to ebb. For, article 32(1) instead of guaranteeing in terms a right to constitutional remedies, guarantees merely "the right to move the Supreme Court by appropriate proceedings for the enforcement of fundamental rights."

True, article 32(1) obviously entitles a person or citizen to move the court for the enforcement of fundamental rights, but this right must be exercised through "appropriately proceedings". The Constitution nowhere defines what are "appropriate proceedings" for moving the Supreme Court. Obviously, the court has to decide the appropriateness of the proceedings. It may say what proceedings are "appropriate" and indeed determine the very scope of the term "proceedings". The court has to make law either through the interpretation of the term "appropriate proceedings" or under its rule-making power by virtue of article 145(1)(c). Whichever way it does this, the court (being included, as will be seen later, in the definition of State under article 12) cannot "take away" the right to move itself which is a guaranteed right. It is a moot point whether interpretations of article 32(1) or rules elucidating "appropriate proceedings" under article 145(1)(c) can be said to unconstitutionally "abridge" article 32 guarantee. Thus, when the court applies the doctrine of res judicata, or constructive res judicata or laches, the problem of whether in particular situations application of these doctrines is an impermissible "abridgement" persists. Also persistent is the problem whether the cumulative impact of such "abridgements" amounts to the court's "taking away" the article 32 right.

Be that as it may, article 32(1) by itself provides only a right to move the court for the enforcement of fundamental rights. Many scholars argue that is all. But this cannot be the case. If any person has the right to move the court, the court is under a corresponding duty to be so moved. Although the term "move" can be interpreted restrictively so as to denote a most casual consideration of the petition or the mere act of receiving it, it is not controversial to say that the bare text of article 32(1) imposes an obligation upon the Supreme Court to take appropriate action if the case is proven.

What then is the significance of the court's power to interpret the term "appropriate proceedings"? It is submitted that, in strict Hohfeldian analysis, we have here a case of legal duty qualified by a privilege. The Hohfeldian co-relative of privilege is a "no-right". We would then have to say that if the court holds that a particular way of moving it for the enforcement of the fundamental rights is not in the nature of "appropriate proceedings", no right of the individual is thereby violated. But surely this privilege—no-right relation occurs within the context of a right-duty relation. That is to say, the court is not free to say that it is under no legal duty to be moved. It is. It can only say that it has a privilege to hold that a particular manner of initiating proceedings before it is not "appropriate". The court has a similar privilege to define the term "proceedings".

We now turn to article 32(2) which, as is well-known, empowers the court to issue "directions or orders, or writs...for the enforcement of any of the rights conferred by this Part". This language of article 32(2) is regarded by some scholars to mean that the court is enabled, in cases of proved violations of fundamental rights, to issue certain orders, directions and writs. The argument is that if article 32(2) is an enabling provision, an empowering one, the court has a discretion whether or not to use that power. The conclusion follows inescapably that article 32(1) guarantees a right; 32(2) invests the court with power. There thus arises a dualism between the two provisions: one under which the court is under a legal obligation to be moved, another under which it has a power which it is under no legal obligation at all to exercise.

The conclusion is manifestly wrong because the reasoning is entirely fallacious. The correct juristic analysis is that the constitutional obligation cast upon the court to be moved for enforcement of part III rights is coupled here with attendant powers to be so moved. The court cannot be moved to any worthwhile effect under article 32(1) if it did not have a power to issue "directions, orders or writs". Since the power is conferred in the aid of a constitutional obligation, the exercise of that power cannot at all be discretionary. Whenever an appropriate proceeding as determined by the court is before the court, the court must issue directions, or orders or a writ. And the "direction, order or writ" must be for the enforcement of a fundamental right if the right is found to be in need of such enforcement. Only the Supreme Court (or a court empowered under article 32(3)) can decide whether right is violated or it needs to be enforced. The moot point here is: Can the Supreme Court itself say otherwise? That is, can the court say that even though the right is violated or needs enforcement, it will not exercise its article 32(2) power?

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16. In Daryao v. State of U.P., A.I.R. 1961 S.C. 1457 the court held that the "argument that Art. 32 does not confer upon a citizen the right to move this Court by an original petition but merely gives him the right to move this Court by an appropriate proceeding according to the nature of the case, we are not disposed to entertain the unsound".

17. E.g., Alice Jacob, "Laches : Denial of Judicial Relief under Articles 32 and 226", being a paper presented at the I.L.I. Seminar on Administrative Law (Nainital, May 1973) p. 16. Professor Jacob maintains that Article 32(2) is "an enabling provision" and the court is not "bound to give relief in all instances of infringement of fundamental rights discarding certain cardinal principles of administration of justice...."; see also Seervai, supra note 5.
The answer to this is that it may say so; but when the court so says its judgment is vitiated by unconstitutionality and, even on a strictly legal positivistic approach, the judgment is not entitled to obedience, it being void under article 13. A judgment or an order of the court is undoubtedly a law under article 13. It determines no doubt the legal relations inter partes. But decisions for the enforcement of part III rights also create law which is binding on all courts throughout the territory of India. If this answer is correct (and the author believes it is) then article 32(2) cannot at all be regarded as conferring a power merely; it must be appreciated as conferring the power to enable the court to perform its constitutional obligation.

From this viewpoint, the decision by the Supreme Court to dismiss a petition in limine, or on the grounds of laches, res judicata (constructive or otherwise) presents massive problems. This is so because the court in these cases is not really saying that the allegedly infringed fundamental rights need no enforcement. Rather, the court is saying that it itself will not examine that issue at all. With great respect it is submitted, the court has no authority to do so, more so since the right to constitutional remedies is itself a fundamental right.

Seervai argues, however, that no “fundamental right is conferred to obtain relief from the Supreme Court regardless of all considerations relevant to the administration of justice.” Such a statement standing alone cannot signify anything more than an elaboration of Seervai’s personal preferences which, though entitled to some weight, cannot be regarded as more authoritative than the plain text of article 32. And Seervai is normally a champion of the rule that the clear text is compelling.

Realising this, he argues as follows:

...Article 32(2)...confers a power to issue writs. This power is not expressly coupled with a duty, nor can be a duty to exercise the power be implied because the writs there mentioned, except habeas corpus, were discretionary in England and in India. The language of article 32(2) is, unfortunately for this view, even more clear than what Seervai allows. It is more clear because first the power is the power to issue “directions, orders and writs”. Second, the writs are inclusive of five typical writs but not exhaustive. New writs could be evolved, which are unknown elsewhere. To say that this cannot happen is to impute disingenuity to Indian lawyers and judges. Third, and equally important, the powers to issue writs is the power to issue writs in the nature of five writs therein mentioned. So the fact of their being discretionary in England is not constitutionally conclusive in India. The expression write “in the nature of” five historic writs does not necessarily refer to the discretionary nature of the writs. The words “in the nature of” rather refer to the mode of proceedings and judicial order upon hearing and disposal of the same.

By the same token, the argument that the Supreme Court has treated article 32(2) as discretionary as far as the issue of the writs is concerned is scarcely an argument for saying that it is necessarily right in so doing. Golak Nath showed that an approach to amending power employed by the court for nearly seventeen years may yet be declared wrong.

Indeed, Seervai himself seems to disagree with his above-quoted views. In his treatise on constitutional law, he goes so far as to say that the judgments of the Supreme Court which suggest, or state, that the grant of an appropriate writ under Art. 32 is discretionary, are not correct because they overlook the difference between the English and the Indian law brought about by Art. 32(1).

Moreover, to say that article 32(2) power is not expressly coupled with a duty is to say the right guaranteed by the Constitution has no co-relative duty or to say that the duty is discretionary but the right is somehow fundamental. Such a statement is absurd from a strictly analytical viewpoint.

The article 32(2) power is necessary to discharge article 32(1) duty. And article 32(2) is on any approach a provision ex abundanti cautela. Suppose the constitutional text give no specific power to the court at all. Can it be seriously urged that the court, therefore, had no power to discharge a duty cast upon it by the guarantee of fundamental right in article 32(1)? When the constitutional duty and power are so explicit, it is scarcely necessary to have recourse to tenuous denial of implied duty-power relation in article 32.

Furthermore, the meaning of the proposition that article 32(2) power is discretionary is not at all clear. Discretion means choice. The Supreme Court may choose to issue a writ or not issue it. None can seriously argue against the view that the power is discretionary in the sense that if a case is not made out at all for the issue of a writ or a direction, the court may properly decline to issue it. The words “for the enforcement of rights conferred by this Part” occurring in article 32(1) and (2) make this very

18. Seervai, supra note 5 at 37.
19. Id. at 37-8.
commensensical point abundantly clear. If the rights do not need to be enforced because their violation is not proven, then no writs or directions need be issued. But can we really maintain that the court has discretion whether or not to issue writs, directions or orders if the rights need enforcement? Indeed not. Seervai himself elsewhere argues that such refusal to issue writs to protect fundamental rights would be an “abdication of the duty laid upon the Supreme Court”.24 Indeed, Seervai himself (and quite rightly so) argues that even under article 226 the ‘discretion’ enjoyed by the High Courts in the issuing of the writs must be properly exercised in the matter of fundamental rights. This means virtually that the High Courts must give relief if a case for relief is made out in a matter involving fundamental right.22

The question whether relevant considerations as are routinely employed in administration of justice should apply to article 32 is a question of policy and not merely a question of textual analysis of article 32. It does not help clear thinking to coalesce two distinct questions. The crucial questions here, tolerating no obfuscation, are: are considerations of public policy underlying administration of justice—(embodied in doctrines like res judicata, laches, etc.)—to be imported in enforcing fundamental rights, including the right to constitutional remedies? If so, does the Constitution authorize the court to so do? These questions do not even begin to emerge so long as we continue to pour our preferences and values in the text of the Constitution which is compellingly clear.

To conclude this section, let us reiterate the following results of strict juristic analysis of article 32. The article creates the following jural relations:

(i) a right in the allegedly aggrieved person to move the court by appropriate proceedings and a duty in the court to so moved for the enforcement of fundamental rights;

(ii) this latter duty is coupled with power (by article 32(2)) vested in the court to facilitate its discharge; the power has its correlative liability of the State for its action to be judicially reviewed;

(iii) the court has the privilege to determine what ‘proceedings’ are ‘appropriate’ to article 32 and no right of aggrieved person is violated by the court’s exercise of this privilege.

23.  *Tilokchand*, supra note 1 at 114. Is the analogy between the Chancery Court and the Indian Supreme Court apposite?
25.  *Id.* at 115.
27.  *Ibid*.
226 which can go into the controversy “more comprehensively than this Court can under Article 32”.

From all this, it follows that the court does put itself under restraint in regard to article 32 petitions and the “practice has now become inveterate”.

As regards petitions involving delay “curbs on the enforcement of the fundamental rights through legislative action might be questioned under Article 13(3)”. Nevertheless, the learned judge requires “the utmost expedition”; the aggrieved should “move the Court at the earliest possible time and explain satisfactorily all semblance of delay”. Chief Justice Hidayatullah refuses, unlike his brethren in the majority, to lay down any specific limitation periods but would leave the determination of stale claims as such to the context of each fact-situation. To this extent, and only to this extent, is the judicial power under article 32 ‘discretionary’. It must be said, with respect, that Chief Justice Hidayatullah is here meeting the objections of Justice Hegde but has been unable (with respect) to persuade his brethren to be so flexible.

Before we examine the application of the principles formulated by Chief Justice Hidayatullah to the instant case, it is worthwhile to ponder some aspects of his opinion. One cannot at the outset help being struck by the fact that the learned judge thinks that article 32 avails against State action considered as governmental action of any and every kind excepting action by the Supreme Court. In a way this is quite justifiable; the court is the instrument for the enforcement of the fundamental rights and for the review of State action. But article 12 defines the term ‘State’ inclusively. Analytically, it is quite proper to say that courts are also a part of the constitutional conception of the State under article 12. And in practice this is true of all courts in their relation with the Supreme Court. For example, a High Court judgment can be brought in review before the Supreme Court on the ground that the judgment violates a fundamental right. If the plea is sustained, or even entertained and heard, it is clear that the court action is being viewed as State action. Indeed, Chief Justice Hidayatullah has been (with respect) among the first to appreciate this submission in his seminal dissent in Naresh Mirakkar’s case.

29. Ibid.
30. Ibid.
31. Ibid.
32. Tilokchand, supra note 1 at 116.
34. Tilokchand, supra note 1 at 118.

The Supreme Court must regard itself as a part of State under the definition of article 12, even if there may not be any further reviewing authority over its decisions. Just as governmental or legislative action may violate a fundamental right, so may a judgment of the Supreme Court. This indeed is the main rationale in the court’s having an inherent power to overrule its own decisions. When on a matter of interpretation of the fundamental rights, the court overrules itself, this itself can be regarded as a review of the court action as State action by the court itself. We must conclude (with respect) that the dichotomy between ‘State’ and ‘Court’ is fallacious, and if not avoided could lead to the very situation which Justice Hegde so strongly complains about, namely, the court can claim the prerogative of diminishing fundamental rights which prerogative it hitherto denies to Parliament, in one way or the other.

Of course, to speak thus is to assume that the fundamental right so diminished is crystal clear in its ambit. Indeed, article 32 is thus clear. It may be, as Justice Sikri points out, that the “article nowhere says that a petition howsoever late should be entertained and a writ or order or direction granted, howsoever remote the date of infringement of the fundamental rights”. But, this while true is (with respect) quite beside the point. For, it can be equally cogently said that the article also does not state anywhere that late petitions should not be subject-matters of writ, order or direction. If article 32 is not self-sufficient in the statement of its scope, then the court has to act as a Constitution-maker.

The principal ground of Chief Justice Hidayatullah’s conformance with the outcome in Tilokchand is that there exists a practice whereby the court has regulated the proceedings under article 32. Each of the five types of practices described by the learned Chief Justice has the effect of preserving the integrity, value and utility of the right to constitutional remedies. Taken together, their net impact must be to reinforce, rather than limit or defeat, this important guarantee. And Chief Justice Hidayatullah’s proposed case-by-case restriction on article 32 right on the ground of laches is indeed a part of the total network of practices having this overall impact. Unfortunately, the hunters of the ratio decidendi of this case will scarcely show deference to Chief Justice Hidayatullah’s delicacy of statement and guarded approach. For the ratio-hunters, the joint effect of the judgments by Justices Sikri, Bachawat and Mitter will be adequate: they would be able to confidently claim that the ratio of the Tilokchand case is that the limitation law provisions would apply to article 32 even if this frustrates in certain cases the very object of the guarantee.
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VII

Perhaps, Justice Hegde, when he questioned the existence of a prior practice under which the doctrine of laches was applied to article 32 petitions was really taking issue with the rather sweeping statement of Justice Sikri that: "In practice this Court has not been entertaining stale claims by persons who have slept over their rights." Chief Justice Hidayatullah has not gone thus far: he seems to be approaching Tilokchand as a situation of first impression.

Be that as it may, Justice Hegde seems to be questioning any sort of practice which would have the effect of limiting the exercise of the right to constitutional remedies. Even if Justice Sikri is correct in asserting that the doctrine of laches has already been silently at work in petitions under article 32, Justice Hegde is equally correct to point out that this is no longer permissible from first impression.

Apart from the question of the court's power to impose any restrictions on article 32 petitions on the ground of laches, Justice Hegde seems to be questioning the policies and wisdom of the assertion that not only would the court take notice of "belated and stale claims or...of the evidence of neglect of one's rights for a long time" but that the Court should do so. Justice Hegde argues that once the delay is introduced as a ground for the defeat of the constitutional remedies, this auto-limitation on judicial power will become firmly entrenched in practice. As he puts it:

We may console ourselves by saying that the provisions of the Limitation Act will have only persuasive value but they do not limit the power of this Court. (sic) But the reality is bound to be otherwise. Very soon the line that demarcates the rule of prudence and the binding rule is bound to vanish as has happened in the past.

This then is the primary response of Justice Hegde to the learned Chief Justice's view that the court should, in appropriate situations, exercise its discretion so as to deny the remedies under article 32 on the ground of laches. But there are other subsidiary responses to be found in Justice Hegde's opinion. One is that for him the fear of stale claims, or "forgotten claims and discarded rights" against the government, is an 'exaggerated one'. It is indeed true 'that as years roll the petitioner's task is bound to become more and more difficult.' Second, Justice Hegde hints at the paradoxical position that arises as a result of the 'majority' holding: the court has ruled that fundamental rights cannot be waived in the

justly well-known Basheshar Nath case 37a but now a right which cannot be willed away thus is nevertheless to be regarded as constructively relinquished by the parties through laches. The learned judge also emphasizes that article 32 right is in fact the backbone of the whole chapter on the fundamental rights: to limit that right is by definition to limit the realization of all other rights.

This indeed is a very formidable dissent and one wonders how the Tilokchand court could still come to the decision it ultimately did.

VIII

Even if to some of us Justice Hegde's fears of routinization of laches as a bar to invocation of article 32 may seem exaggerated, the Tilokchand decision itself nurtures these very fears. Chief Justice Hidayatullah's opinion provides a good starting-point, since he is most reluctant to lay down a general period of limitation for the invocation of article 32 remedies. He would pay scrupulous attention to the context of each case before arriving at a decision that laches constitute a bar. Let us follow the learned judge in his application of his own precepts to the Tilokchand situation.

As has already been pointed out in section III of this paper, the very starting point of Chief Justice Hidayatullah's reasoning is that the petitioner did not raise the ground of unconstitutionality in the first instance before the Bombay High Court. On a closer scrutiny of the facts as stated in five separate opinions, the author has suggested that this very statement of Chief Justice Hidayatullah is perhaps sufficient ground for characterizing the whole decision as per incuriam.

But precluding this, let us note that the learned Chief Justice insists that the petitioner must have brought the High Court decision to review before the Supreme Court. The petitioner, according to the learned judge, was not labouring under any mistake of law. To the argument that he was, the Chief Justice would respond: "To that I answer that law will presume that he knew the exact ground of unconstitutionality." Given this knowledge, it follows that the petitioner had the duty to activate the court in review; if he failed to do so, he can scarcely have the windfall from the judgment favouring another petitioner several years later who had the enterprise to have the law invalidated by the court.

There are many difficulties with this reasoning. First, even accepting that the petitioner should have had the knowledge of the ground of

35. Ibid.
36. Tilokchand, supra note 1 at 114.
37. Id. at 136.
38. Id. at 116.
unconstitutionality (which, we repeat, he had) it does not follow that he could not commit a mistake of law or that he had the duty to pursue his constitutional remedies. These are really two separate points but both are duty to activate the court. Do not knowledgeable men also commit mistakes? Both Chief Justice Hidayatullah and Justice Sikri have held (as instance but from this the latter does arrive at a conclusion that the Hidayatullah approach to the presumption of knowledge of the law, mistake of law becomes an impossible notion. One cannot know the law and yet be mistaken about one's rights and obligations under it. This is a strikingly plausible and logical conclusion but so is the opposed conclusion that knowledge does not necessarily carry with it immunity from error.

The allied point, equally debatable, is that the petitioner, having at any rate an imputed knowledge of the law, was under a duty to proceed in review to the highest court in the land or, to put it differently, was under an obligation to continue with his pursuit of redress. If he did not, he must have good reasons for not doing so and these must be recognized as such by the court. As pointed out earlier, such an approach makes article 32 a source of obligation and even a (a Hohfeldian) liability. But this is nowhere perceived in Tilokchand.

Moreover, Justice Hegde who makes a conscious effort to meet the above argument of Chief Justice Hidayatullah sees no vice in the petitioner's abandonment of the litigation. He challenges the presumption that the petitioner knew the exact ground of unconstitutionality (in fact, as shown in section III of this paper he did know near-exactly the ground). The learned judge observes:

A mere impression of a party that a provision of law may be ultra vires the Constitution cannot be equated to knowledge that the provision is invalid. Hope and desire are not the same thing as knowledge. A law passed by a competent Legislature is bound to be presumed to be valid until it is struck down by a competent court. 39

The presumption of validity of legislation, if carried too far may, of course, result in making article 32 guarantee merely a paper guarantee, specially when it comes to be popularly accepted by citizens and rigorously employed by the courts. And under such a presumption, once (and if) a law is declared unconstitutional every person must be deemed to have been labouring under a mistake of the law. The Hidayatullah presumption of knowledge of the law tends towards infallibility of the subjects of the legal order; the Hegde presumption of constitutional validity of enacted legislation has the consequence of making everyone fallible once its invalidity is discovered.

At any rate, the simple question is: why discriminate among parties who claim to be beneficiaries of a favourable constitutional decision? Let us recall that Tilokchand petitioned under article 32 because he had already paid monies under a void statutory provision. The parties whose sales tax proceedings under the same invalid law are still pending and who have not paid their monies, however, do not have to summon anything more than the court decision invalidating the law in their favour. Unless the invalidating decision makes use of prospective overruling techniques, why should Tilokchand be treated differently?

Of course the court's simple answer is summed up in one word: laches. But Tilokchand was guilty of laches only if the Hidayatullah rationale is incontrovertible. That is, we have to impose on Tilokchand the exact knowledge of the law together with an obligation to exhaust all judicial remedies. If we instead take the Hegde assumption of prima facie constitutional validity, then there was no delay on the part of Tilokchand. He discovered his mistake in September 1967 and came before the court in February 1968. Even if the law of limitation applied, he was well within time to seek the court's protection.

On the Bachawat-Mitter approach, however, the petitioner did not labour under any mistake of the law but rather paid the money under coercion. But that does not take us out of our present questioning. For, the coercion of State itself must be treated as occasioned by a mistake of law. The State acted on the belief that the relevant law was valid. But the court in 1967, by invalidating the law, has made the belief a mistaken one. In yielding to the coercion by the State, which was mistaken in law, were not the petitioners in Tilokchand also acting under a mistake of law?

The conclusion is inescapable that even if the law of limitation was in some way relevant to article 32, Tilokchand was wrongly decided and was in one major respect a per incuriam decision.

IX

We now come to the two basic policy issues: one, are the considerations of public policy underlying the administration of justice to be imported in the enforcement of fundamental rights, including the right to constitutional remedies? And second, is the court or Parliament (or are both institutions) competent to so do? We will here consider only the first question, leaving the second question answered by our observations so far.
The first, a far-reaching, question needs to be handled with utmost care and objectivity, specially in relation to article 32 which is the backbone of part III of the Constitution. The court has always appreciated that article 32 imposes a constitutional duty of great importance on the Supreme Court. Even the Daryao court, which imported the bar of res judicata into article 32, displays a mature awareness of this duty, which stands reinforced by a rigorous analysis of the constitutional text (see section IV of this paper).

Moreover, be it noted, article 32 is in terms confined to the enforcement of fundamental rights. This means that the court acting under article 32 is not necessarily acting as a general administrator of justice, which it does under other provisions of the Constitution. The term ‘administration of justice’ has two referents. It refers to implementation through adversary processes of laws competently enacted and affecting the aggrieved parties. ‘Administration of justice’ also means that the courts are not merely courts of law but courts of justice. The first meaning of the term is the common one; the second is well understood but not normally invoked by the use of the term ‘administration of justice’. In relation to the part III rights it is arguable that their mere enforcement is consistent with justice in this wide sense.

The Daryao court has operationalized for the first time (to the author's knowledge) the idea that while article 32 is a guaranteed fundamental right, that right is, as indeed all fundamental rights are, "based on high public policy." This statement by itself is unquestionable; but the use of this idea in and after Daryao raises difficult problems of law and policy. To these we now turn.

In Daryao, as is well known, the bar of res judicata is applied not as a technical rule. Chief Justice Gajendragadkar, for the court, takes great pains to emphasize that the doctrine of res judicata is itself based on 'high public policy'. Similarly, Chief Justice Hidayatullah in Tilokchand bates his ultimate conclusion on considerations of public policy.

Leaving aside for the moment the question whether Daryao and Tilokchand results are justifiable, let us raise the elemental question: are fundamental rights to be equated with considerations of public policy? In other words, is it justified in law and policy to balance a fundamental right with a general aspect of public policy not finding specific articulation in part III?

In answering this sort of question, we have to remember two things. First, article 13 binds the court as it binds all other organs of the State. Article 32 is a fundamental right and even if fundamental rights are now unamendable, Kesavananda Bharati's case does not hold in terms that article 32 does not pertain to the basic features or framework of the Constitution which are unamendable. Indeed, judicial review (principally secured by article 32) figures implicitly and explicitly in the seven judgments constituting the decision of the court in that case.40

We have also to remember that the term 'public policy' is notorious for its unmanageability. It is normally used as a residuary category of judicial law making power—either by express delegation in the legislative text or by judicial usurpation (or convention).

Seen in this light, we have to distinguish between and among public policy considerations—a public policy which is embodied as a guaranteed right is one thing; such a set of considerations arising from routine administration of justice is another. The first, we might say, is constitutionally sanctified public policy statement; the second is judicially sanctified public policy statement. The fact that the Constitution is what the judges say it does mean (with great respect) that judges can say just anything they please. And judges should not be pleased to say that a constitutional public policy statement is as good as any other, specially when they reiterate that it is the Constitution which they are expounding.

What can then be balanced without qualms are two formulations of public policy on the same level: Article 19(a) to (g) can be balanced with article 19(2) to (6). But can article 19(1)(d), freedom of speech and expression, be balanced with a public policy consideration lying outside article 19(2)? The answer, at least for the present writer, is in resounding negative.

The difficulty in relation to article 32, it might be urged, is that there is no explicit textual formulation of countervailing public policy. But this is, strictly speaking, not the correct position. Article 32(4) authorizes suspension of article 32 as provided by other provisions of the Constitution. This shows that the Constitution-makers (including Indian Parliament until Golak Nath) felt that no other public policy consideration warranted specific inclusion in the text of the guarantee. They, however, did not subject the right to remedies to any other reasonable restrictions or to considerations of public policy arising from the administration of justice.

X

Assume, arguendo, that the basic premise of Tilokchand is correct and the court can subject article 32 to those considerations of public policy.

40. Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461. To be sure, the eleven judgments in the case can be subjected to widely divergent interpretations and the seven 'majority' judgments, for the most part take in only by necessary implication judicial review through article 32 as pertaining to the essential framework of the Constitution. The author holds himself to the position in the text in full confidence that when the mysteries of Kesavananda oracles are deciphered it will stand reinforced.
arising from administration of justice. Do Tilokchand reasoning and outcome support such considerations?

Can it be said that the court can apply the periods of limitation regulating filing of suits to the extraordinary remedies guaranteed by article 32? Limitation law is applied because it is a law competently and constitutionally enacted. Its very provisions, being no more than ordinary exercises of legislative power, must stand the scrutiny imposed by part III. How can a law thus ultimately subservient to the Constitution help decide the question of the scope of the fundamental right to remedies? The Daryao court implicitly recognizes this problem when it refuses to apply res judicata as a technical rule of civil procedure; but the majority in Tilokchand (especially Justices Bachawat and Mitter, and to some extent Justice Sikri) fail (with respect) to appreciate the above made point.

Two distinguished commentators have raised a further problem with imposition of laches, by analogy of the Limitation Acts, on article 32 remedies. H.M. Seervai and V.G. Ramachandran differ drastically in their conclusions but they are united in attacking the court’s authority to do so. Both feel that laying down limitation periods is a legislative function. The court should not engage in ‘judicial legislation’.41

To be sure, the Supreme Court nowhere figures as a legislator for the whole or part of the territory of India in part XI of the Constitution. But the court has power to make law in settling disputes—this is clear because Article 141 says “the law declared by the Supreme Court shall be binding on all courts within the territory of India.” It needs no learned discussion to maintain that declaring law is a species of law-making, however uncomfortable the votaries of the purity of the judicial function might feel about it. Jurisprudentially speaking, the maxim that appellate judges make law bears now the familiarity of an ancient truth. Therefore, the court’s authority can only be questioned on the plain text of article 32. Ramachandran, like the present writer, so does; Seervai does not, generating thereby a very fatal inconsistency in his approach. Seervai is pleased that ‘fundamental rights’ are “no longer a magic spell in a court of justice” and that “all considerations relevant to the administration of justice apply to the enforcement of fundamental rights as they apply to the enforcement of other rights.”42 Justice, he says, should occupy the “high pedestal”,43 which Justice Hegde reserves for fundamental rights.

But as it turns out, Seervai disagrees with Justice Hegde merely to succumb to the ‘magic spell’ of the word ‘justice’.

Seervai totally forgets to ask the question: What is justice? To do what justice requires may lead to even greater and more judicial legislation which Seervai generally abhors! Is it ever just to deny a fundamental right to remedies to an article 32 petitioner? Is it just to Tilokchand to have his properties attached and sold by the government under a provision that the court itself had declared void being unconstitutional? Is it just to require a petitioner who believes on legal advice that he is not likely to succeed to nevertheless try his luck out by proceeding immediately to the Supreme Court by way of review? True, the monies Tilokchand had collected from the out-of-State consumers, with or without mistake of law on his part, were perhaps not his own; but neither did they lawfully belong to the government.

There is a related aspect raised by Dr. S.N. Jain, who points out that, despite the recommendations of the Direct Taxes Administration Enquiry Committee in 1959, the tax authorities remain entitled to reopen the assessments if subsequently favourable judicial decisions become available. So long as this is the case, Jain recommends that “a taxpayer...be allowed to file a writ petition within the same limitation period within which the department could reopen the case.”44 But as such periods are different in various states, Jain suggests that a uniform standard would not be possible for all cases.

It might be said that even if all this is right, Chief Justice Hidayatullah was certainly justified in requiring article 32 petitioners to come to the court with utmost expedition and with cogent explanations for delay. Everyone has so far agreed that this is the best policy. The author is afraid that it is only the second best policy, the best being to enforce article 32 as it stands.

One reason for saying this is simple enough. Suppose that a petitioner X is advised competently (but, as it might later turn out, erroneously) or entirely incompetently that he has no hope of article 32 relief. When another petitioner Y who is better advised overturns a statutory provision under which X was liable, can X say to the Supreme Court that he made a mistake in not coming before the court? If he says so, would that be a reasonable explanation?

If the court accepts this ground as a satisfactory explanation, would the limitation of laches work at all? Every petitioner could so plead. If

41. See the articles cited in note 5, supra.
42. Seervai, supra note 5 at 35.
43. Id. at 38,
44. S.N. Jain, Law of Sales Tax, supra note 3 at 171.
court does not accept this ground, would it not be in effect saying “we will help you only if you hire very competent lawyers who advice you to always approach us under article 32”?

Even if the court could say this, the limitation of laches will not work if object of that limitation is to bring (as the next section hypothesize) the writ work of the court to a manageable level. For every lawyer will then understand the court to be saying: “Better proceed under article 32, whatever you may think of the success of the case. For, if you proceed by article 226, we will deny relief, except in review, by virtue of Dhiriao.”

Chief Justice Hidayatullah’s formulation is thus no practical answer to the problem. It is not sound, with great respect, even at the level of theory as the plain text of article 32 does not tolerate it.

And the formulation, most importantly, does not assure the just result in any situation. Let us take the extreme situation in which a petitioner literally sleeps over his rights for 25 years. His only explanation is that he slept over his rights. He did not even approach a single lawyer for advice. Has he thereby forfeited his right to move the court for a close examination of his case and an appropriate relief? Suppose further that in this situation there are no other vested rights of anyone else which will suffer if the legal position were reviewed and rectified by way of the enforcement of fundamental rights. Would it be just to cry laches and throw the petitioner out of the court? The author believes it would not be just.

But, it may be said, in real life such situations would rarely arise. In real life, we may only have to deal with Tilokchand or Rabindra Nath Bose. But the Hidayatullah principle does not seem to yield appreciably just results even in routine cases.

Under the Hidayatullah formulation Tilokchand had no satisfactory explanation for the ‘delay’. That, with respect, is not correct. The explanation for Tilokchand was that in 1958 the relevant Bombay sales tax provision was valid; in 1968 it turned out to be void. His explanation could have been, additionally, that after forfeiture he had no money and even if he had money he had, on rational legal advice, no hope. Besides, Tilokchand had raised the relevant constitutional question but the High Court in Bombay had, in a strong worded dismissal, said:

This appears... a gross case where even if I was of the opinion that the order is invalid and involved violation of fundamental rights, I would not in my discretion interfere by way of issuing a writ. 44

How many good lawyers will still say to their clients that the remedy under article 32 will pay better dividends? And how many clients will feel encouraged to put more money in the gamble after such strictures? It is noteworthy indeed that the statutory provision, ultimately overturned by the Supreme Court was heard on merits in Ahmedabad and not in Bombay. After the strong dismissal by the High Court, the relevant law was not simply challenged since Tilokchand.

The argument that under the Hidayatullah formulation laches will not be routinely employed is also not borne out of by Rabindranath Bose v. Union of India, 46 heard by a bench which included judges who were also decision-makers in Tilokchand. 47 There again the court said that the petitioner did not offer any ‘reasonable explanation’ for the ‘inordinate delay’. The court also felt that other vested rights might be affected since, roughly, the petitioner there sought to challenge appointments and promotions to income tax cadre made during 1945-50 in 1967.

The petitioners did try to explain the delay. They said that they made various representations to the government and did not come to know about all the facts till 1961. The court finds otherwise but maintains that even if this was the fact, six years constitute ‘inordinate delay’. 48 The other reason was that the petitioners waited for the outcome in a parallel case—the Jaisanghani’s case— which was disposed of only on 22 February, 1967. It was upon the basis of this case that they approached the court in 1967. The court merely says in response:

The fact that [the] case was pending before the High Court and later in this Court is also, no excuse for the delay in presenting the present petition. 49

Why not? Why is it unreasonable for the petitioners to await outcome of a case which is very substantially analogous to theirs? Or, in other words, is it reasonable for every petitioner to approach the court in relation to a similar alleged violation of fundamental rights?

It is all important to remember that the formulae are not enough; what the courts do with what they say (or doing things with words) is all important. This has been the enduring message of American realist jurisprudence. Both the Tilokchand and Rabindra Nath Bose cases have shown that it will be exceedingly hard to satisfy the court that the delay was ‘reasonable’. Surely,
even considerations cognate to the administration of justice do not require that such onerous tests be placed for the vindication of guaranteed fundamental rights. Such tests, besides being onerous, are neither reasonable nor suited (as the above analysis shows) to maximize the efficiency of the court.

XI

It seems that there may be one set of unarticulated reasons which is perhaps responsible for the bypassing (if the author may say so with respect) the very weighty objections raised by Justice Hegde in his dissent the grounds of which all his brethren must have known before the finalization of the judgment.

It is well known that a very substantial part of the court's workload arises from article 32 petitions. The Tilokchand majority might have felt that it would be unwise to expose the court to the continuing or fresh burden of stale and even relatively antiquated claims under Article 32. For, such an exposure would unduly limit the capacity of the court to process article 32 petitions which are properly before the court. The size of the workload also affects the efficiency of dispatch and turnover of the judicial output. Consideration of institutional efficiency at some stage also become intertwined with those of institutional prestige. Standing at the apex of the judicial pyramid, the court certainly must—both by precept and practice—evidence fulfillment of certain norms of judicial disposal, specially in relation to the minimization of judicial delays.

In sum, the author is pointing to the growing awareness in the court that ways must be found to restrict the overrecourse to article 32 as an alternative to the decline in the court's performance and its potential for leadership. Laches by parties offers an excellent starting point for such a policy in 1969, as res judicata seemed to offer in 1961.

All this is of course conjectural. But it offers a plausible explanation or the ease with which the Tilokchand majority was able to overcome the rather disquietingly searching critique of Justice Hegde. The reference by the learned judge to the 'exaggerated fear' of inundation of the court by parties reviving stale claims and the expression of the fear that application of the limitation law norms may be more routinely generalized furnish some substantiation of the above conjectures.

If this unstated aspect of the decision is the real reason for it, then Tilokchand decision is indeed a retrograde one. While the perceptions of the quantum of workload and its relation to institutional efficacy and prestige by the members of the court are much to be valued, these of necessity remain impressionistic, as well as inconclusive.