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JUSTICE P.N. BHAGWATI: TORCHBEARER OF INDIAN LEGAL REALISM

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ABSTRACT

This paper aims to trace the importance of judiciary in the interpretation of various statutes and laws especially the Constitution Of India. It attempts to construct a bridge between the notion of legal realism which had originated in America to that of Judicial Activism in India. While delving deeper into this discourse, we spot Late Justice Oliver Wendell Holmes's, Late Justice Learned Hand's appreciation towards a judge made law and link it with that of Late Justice P.N. Bhagwati's conception of Judicial Activism. The research is historical and comparative in as much as it targets historical and contemporary analysis of the American and Indian inclination towards a judge made law.. However, it is majorly doctrinal in its methodology as it attempts to deconstruct various statutes, case laws, articles, journals and commentaries. The pattern and procedure followed before penning down the paper was inclusive of classification of principles that were laid down by all the three judges while interpreting the ancient laws and statutes in coherence with the current social circumstances. This provided for a comprehensive study altogether. The paper encapsulates within itself three segments : i) introduction, which elaborates on legal concepts like legal formalism and legal realism, a comparative analysis between the same, the importance and the scope of legal realism enunciated by Late Justice Oliver Wendell Holmes and Late Justice Learned Hand that is discussed further in the paper, ii) the origin of Judicial Activism in India by eminent personalities like Justice P.N. Bhagwati, Late Justice Krishna Iyer and drawing a parallel between the American and Indian inclination towards a judge made law, and, iii) a synopsis of the major principles laid down by Late Justice P.N. Bhagwati while interpreting the erstwhile Constitution in sync with a concise and substantive line of argument.

1. INTRODUCTION

1.1. AMERICAN THEORIES OF ADJUDICATION:

1.1.1 LEGAL FORMALISM:

Christopher Columbus Langdell, an American Jurist was the propounder of the term "legal formalism" also known as judicial restraint. It is a theory and a rule of interpretation employed by the judges to adjudicate a particular factual matrix in accordance to the letter of law by employing a deductive logic and not to go beyond it. Langdell had also once quoted that the only resources which are necessary to decide upon the case are the facts at hand and a law library. This could be well understood in Isak Dinesan's, "Out of Africa"[2341]: It recounts a dialogue between the Merchant of Venice and a Somali man named Farah. Farah had come to know that Shylock, the landlord of Antonio was denied to a pound of flesh as in the Venettian law, shedding of a citizen's blood is forbidden. Farah stated that this was injustice on the part of the landlord and the same could have been avoidable. When asked as to how flesh could be obtained without the shedding of blood, Farah stated, "he could have used a red hot knife. That brings out no blood."[2342]

From the above mentioned excerpt, one could easily trace several literalist arguments made by may modern judges who refuse to look beyond the statues and identify its very purpose.[2343] Legal formalism can also be termed as an autonomous discipline in which the judges only require the facts of the case, law and its blind application. This manner of adjudication does not take into account normative issues like morals, politics and other social phenomena. In the case of Bowers Vs. Hardwick[2344], the United States Supreme Court upheld the constitutionality of a Georgia Sodomy Law in the ration of 5:1 which had criminalized private sexual intercourse between homosexuals in 1986. Though this decision was later overruled in the case of Lawrence Vs. Texas[2345], it serves as a classical example of the usage of legal formalism as a tool for adjudication by the judges which ignores the individual identities, social distress and encroachment into the private lives of the individuals. John.F.Manning states that statutory absurdity arises from the problem of statutory generality.

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[2341] Isak Dinesen, Out of Africa (Modern Library 1992) (lst ed 1937)

[2342] Richard A. Posner, Law and Literature: A Misunderstood Relation96-97 n 38 (Harvard 1988)

[2343] Farber, Daniel A. "Legal Formalism and the Red-Hot Knife." The University of Chicago Law Review, vol. 66, no. 3, 1999, pp. 597–606. JSTOR, www.jstor.org/stable/1600418

[2344] 478 U.S. 186 (1986)

[2345] 539 U.S. 558 (2003)

He also states that a sensitive consideration of the circumstances would help to solve the problems created by statutory absurdity.[2346]

One of the major reasons why the judges in the erstwhile era used to employ legal formalism was because of the doctrine of separation of powers which owes its origin to Baron de Montesquieu. Separation of powers took place between the executive (implements the law), the legislature (makes the law) and the judiciary (applies the law). In order to protect the sanctity of separation done, the judge made law was not emphasized upon much as the same would lead to the criticism to the judges.

1.1.2. LEGAL REALISM:

Legal Realism arose in America as an anti thesis to legal formalism. Late Justice Oliver Wendell Holmes was a jurist, associate judge of the Supreme Court of the United States and also served as an Chief Justice in the year 1930. He is also considered as the Father of the American Realist Movement and the prediction theory of law. His prediction theory states should be defined as a prediction of how the Courts should behave? His notion was based on a argument which he had made on "bad men". According to him, a bad man would not care about ethics and the concepts of natural law, but would do anything to be out of jail or escape from the payment of damages.[2347] Thus a predication can be made by taking into account certain social facts before coming to the actual conclusion. Though this theory had been criticized by Professor HLA Hart in his book called Concepts of Law, the prediction theory was still a base to the American Realist Movement.

As per the Black Law Dictionary, legal realism is a theory which is employed by the judges to benefit the larger sections of the society and it is also very useful for the purpose of policy implementations.[2348] It is opposed to the mechanical, uncontroversial and strict statutory interpretation of laws and is reflective of the present sociological discourse. Holmes

[2346] Manning, John F. "The Absurdity Doctrine." Harvard Law Review, vol. 116, no. 8, 2003, pp. 2387–2486. JSTOR, www.jstor.org/stable/1342768

[2347] Holmes, Oliver Wendell. "The Path of the Law." Harvard Law Review, vol. 110, no. 5, 1997, pp. 991–1009. JSTOR, www.jstor.org/stable/1342108

[2348] "What Is LEGAL REALISM? Definition Of LEGAL REALISM (Black's Law Dictionary)". 2019. The Law Dictionary. https://thelawdictionary.org/legal-realism/

stated that life of law cannot be logic but experience.[2349] Legal realism, legal positivism and legal pragmatism can be used interchangeably. Many analytical positivists like Bentham, Mills had made an instrumental approach in law long before the American Realist Movement.[2350] Their ideas of classical utilitarianism and legal positivism encouraged Holmes to make changes in the judicial decision making. Late Justice Learned Hnd was a big admirer of Holmes and has presented many lectures in Harvard Law School on his theories of legal realism. A story which popularly known as "Do Justice" was written by Late Justice Learned Hand in order to pen down, the notion of legal realism according to his idol, Late Justice Oliver Wendell Holmes:

Once, both I and him were having lunch together after which I had dropped him to his place. While getting off his carriage, I wanted to provoke a response from him and so I had said to him, "Well, Goodbye Sir, Do Justice! To that he replied, "That is not my Job. My job is to play the game according to the rules".[2351]

As per the above mentioned excerpt, it is clear that he did believe in the bifurcation between law and justice but not in a manner proposed by the formalists ut scientifically. He believed that law and justice should not be thought of while adjudicating the facts of a particular case. Experience, social stigma and intuition should be employed in order to decipher the factual matrix and the then conclusion which is arrived at arrived at becomes justice.

There are many cases in which Holmes had utilized the approach of legal realism.He was also termed as the great dissenter of the legal fraternity. Some of the most landmark cases are as follows: In this case of Otis Vs. Parker[2352], Holmes held due process of law meant the protection of fundamental rights only of the citizens from unreasonable legislations and did not take economic interests or economic well being into account. In the case of Silverthorne Lumber Vs. United States[2353], Holmes held that an evidence obtained by the police through illegal means though valid as per the given fourth amendment but this would

[2349] Mr. Justice Oliver Wendell Holmes, the Completely Adult Jurist, in Jerome Frank, Law and the Modern Mind 253 -60 (1930)
[2350] Grey, Thomas C. "Holmes and Legal Pragmatism." Stanford Law Review, vol. 41, no. 4, 1989, pp. 787–870. JSTOR, www.jstor.org/stable/1228740
[2351] Herz, Michael. "'Do Justice!": Variations of a Thrice-Told Tale." Virginia Law Review, vol. 82, no. 1, 1996, pp. 111-161. JSTOR, www.jstor.org/stable/1073568
[2352] 187 U.S. 606 (1903)
[2353] 251 U.S. 385 (1920)

prejudice the interests of the accused and hence cannot be admitted in the court of Law. Thus the "fruit of the poisonous tree" doctrine came into light. One of the most popular dissent of Holmes was in the case of Lochner Vs. New York[2354], though this case upheld the constitutionality of the Bakeshop Act of the New York Legislature, 1895 which stated that there is no time limit for working hours of the labourers. But Justice Holmes in his dissent stated that due process and especially substantive due process of law should ensure the principles of fairness. Thus the Act stands unconstitutional as per the dissent given by Holmes.

1.1.3. THE CONFLICT:

In common law, reliance has to placed upon both (legal formalism and legal realism) the American theories of adjudication and not sole dependence on one of the two. The critiques of legal formalism itself has led to the inception of legal realism. Further, criticizing Holmes's predictive theory of law, professor Hart in his book "Concepts of Law" stated that, if law was just a prediction, judge with legal facts beside him is pondering as to "how will I decide the case". Such an approach completely disrupts the approach that judges employ legal rules to guide their direction rather than predicting their eventual holdings.[2355] Many critics observe that legal realism complicate, exaggerate and riddle the law with gaps and contradictions. Lastly, since most of the legal questions are simple and clear cut, application of the legal rules would suffice and application of the same would negate the realist's strong claim of legal indeterminacy. Though, Holmes's theory envisaged a lot of criticisms, it relaxed the rigid bifurcation created by the separation of powers, thereby empowering the judiciary to play a major role towards the welfare of the people.

2. INDIAN HOLMES IN THE MAKING

2.1. PARALLEL WITH THE INDIAN JUDICIARY:

[2354] 198 U.S. 45(1905)
[2355] Hughes, Graham. "Professor Hart's Concept of Law." The Modern Law Review, vol. 25, no. 3, 1962, pp. 319–333. JSTOR, www.jstor.org/stable/1093179

Many similarities can be witnessed between the evolution of American and the Indian judiciary India was also a result of the British colonization. But in India, codification took place on the basis of certain recognized customs and traditions which soon led to a conflict of interests between the higher and the lower strata of the society. Further, even after independence in 1947, most of the then statutes remains oppressive and repressive to women and the downtrodden sections of the society. Thus with the advent of eminent jurists like Late Justice P.N. Bhagwati and Late Justice V.R. Krishna Iyer , the importance of judge made law was enhanced and Late Justice P.N. Bhagwati can also be viewed as a person similar to that of Late Justice Oliver Wendell Holmes. Like legal realism (introduced by Holmes), judicial activism was introduced by Late Justice P.N. Bhagwati.

2.1.1. INTRODUCTION:

Late Justice Prafullachandra Natwarlal Bhagwati was born in Gujarat in 1921. He served as as the 17th Chief Justice of India (1985-1986) and is also known as the Father of the Public Interest Litigation Movement. His father Late Justice Natwarlal Bhagwati was also a judge of the Supreme Court and served as a role model to Justice Bhagwati. Justice Bhagwati pursued law in the Government Law College, Bombay. He also took part in the Indian Freedom Movement, especially the Quit India Movement of 1942. He was very patriotic, compassionate and was immensely inspired by the life of Gandhi. He started his career as a practicing advocate in the Bombay High Court. Then, at a very early age of 45, he was appointed as the Chief Justice of the Gujarat High Court in 1966. Meanwhie he also served as an acting Governor for the state of Gujarat on two occasions in the year 1967 and 1973 before his elevation to the Supreme Court of India. Subsequently. he was elevated as a judge in the Supreme Court under the Chief Justiceship of Late Justice Ray in 1973 and then he himself was appointed as the Chief Justice of the Supreme Court in the year 1985.

2.1.2. CONTROVERSIES:

Though Justice Bhagwati had pursued a glorious career throughout his life, however his initial days in the Supreme Court wasn't a desirable one. The emergency was invoked by the then Prime Minister of India, Smt. Indira Gandhi under Article 359 of the Constitution of India due to internal disturbances, social and political turmoil. Meanwhile during this period, the leaders of the opposition party were unlawfully detained and were ill treated, thereby violating their fundamental rights which were bestowed upon them by the virtue of Part three of the Indian Constitution. Subsequently, during the pendency of the emergency, the Indira Gandhi Government announced the suspension of fundamental rights during the emergency period. Aggrieved by the same, the leaders of the opposition of the party had filed a writ petition before the Supreme Court under Article 32 of the Indian Constitution.

The Constitutional Bench at that time comprised of Justice P.N. Bhagwati, Justice Hans Raj Khanna, Chief Justice A.N.Ray, Justice Y.V. Chandrachud and Justice M.H. Beg. The major issue before the Court was a whether a writ petition could be filed during emergency when the fundamental rights suspended? The Court in the ratio of 4:1 gave a verdict that no detention can be questioned on the violation of fundamental rights till the emergency was lifted. The only dissenting judge was Justice H.R. Khanna who also paid a cost by leaving his post which was the Highest office in the Indian Judiciary. However, he still amassed a lot of respect from the masses because f his brave an fearless dissent.

The above mentioned judgment is also infamously known as the "Habeas Corpus Case" (ADM Jabalpur Vs. Shivkant Shukla[2356]). This judgment had given birth to a lot of backlash in the general public especially post the emergency which resulted in the fall of the Indira Gandhi government. The emergency period was one of the darkest hours for the executive, legislature and the judiciary. This led to a lot of criticism to Justice Bhagwati and the other judges as well since the reasoning behind the judgement was seriously flawed and showed total disregard to human rights in India. Bhagwati openly praised Smt. Indira Gandhi during the pendency of the emergency and then criticized her during the regime of the Janta Party led government. Surprisingly, he again praised Smt. Indira Gandhi when she was re-elected

[2356] AIR 1976 SC 1207

in 1980. He was criticized for not taking a firm stand[2357], favouring the ruling government, which were deemed to have been taken to better his career prospects. To have been taken to better his career prospects. Though, he apologized for the same after 30 years,the same was overruled by the 9 judge Bench in the case of Justice K.S. Puttaswamy Vs. Union Of India[2358], which declared Right to Privacy as a fundamental right under Article 21 of the Constitution.

Another case, which sprung up a lot of controversy was in the case of S.P. Gupta Vs. Union of India[2359](First Judge case). It was a 7 judge Bench in which Justice Bhagwati delivered his opinion on behalf of all the judges. In this case, he bestowed all the powers to the government in the selection of judges to the Supreme Court and the High Court by the virtue of giving a literal interpretation to the world consultation with the Chief Justice of India under Article 124 and 217 of the Constitution. This judgment literally left the judiciary at the mercy of the executive and the same was delivered during the regime of the Indira Gandhi government as Justice Bhagwati's recommendations with regard to the promotion of judges was itself nt taken into account and the appointments were carried on as the will and wish of the Central Executive. Later, however this judgment was overruled by Supreme Court Advocates- On-Record Association Vs. Union of India[2360], also known as the Second Judge Case, stated that in the interest of constitutional philosophy and the independence of the judiciary, a collegium system should and the word of the Chief Justice would be final in the appointment of judges in the High and Supreme Court of India. In re Special Reference[2361] or third Judge case, merely an opinion was the Supreme Court of India upholding the Second Judge Case.

2.1.3. STALWART OF INDIAN LEGAL FRATERNITY:

[2357] Jayan, Shanmugham D; Sudheesh, Raghul (16 September 2011). "A Chief Justice of India says "I am sorry" but 30 years too late". First Post. Retrieved 16 June 2017
[2358] (2017) 10 SCC 1
[2359] AIR 1982 SC 149
[2360] AIR 1994 SC 628
[2361] AIR 1999 SC 1

Despite countering a lot of criticisms, Late Justice V.N. Krishna Iyer, another gem of the Indian judiciary had stated that Justice Bhagwati was not a judge but a social activist who always wanted justice to be accessible to all the sections of the society and the same should not be tampered or hindered by mere procedural irregularities. He and Justice Iyer became flagbearer of human rights in India by the virtue of introducing public interest litigation in India which will be elaborated in much detail in the next section of the paper. Legal aid was very close to his heart and was appointed as the chairman of the Legal Aid Committee and the Gujarat Judicial Reforms Committee. He was a faculty member in the Universities of Bombay, Baroda and Gujarat as he was very keen in the widespread of legal education as well. Lastly, he was also a member of the United Nations Human Rights Committee. Thus during his death in 2017, he was given the title of the "Stalwart of the Indian Legal Fraternity" by Prime Minister Narendra Modi. The next section of this paper would specifically deal with the principles invoked by the judges especially Justice Bhagwati in interpreting the Constitution.

3. INCEPTION OF JUDICIAL ACTIVISM

3.1. PUBLIC INTEREST LITIGATION:

The word Public Interest Litigation was propounded by Late Justice P.N. Bhagwati, Late Justice

V.N. Krishna Iyer, though only Justice P.N. Bhagwati is conferred upon with the title of the father of the public interest litigation movement. A public interest litigation is a writ petition that can be filed either under Article 32 or Article 226 of the Indian Constitution. Earlier, especially before 1975, the Court would not allow a petition to be admitted unless the aggrieved, (or his legal representatives if the aggrieved is dead) himself or herself has filed the case. But public interest litigation relaxed the principle of locus standi (authority/ capacity/ interest in filing a case) and stated that any person can file public interest litigation only against the government in lieu of the injustice committed on a large section of the

society. These writs can also be in the form of letters, post cards, etc as well. The person filing this case (not necessarily the aggrieved) has to prove sufficient interest in the particular concern. For eg. Journalists, activists though the same has to be decided in the facts and circumstances of the case. Though the inception of public interest litigation promotes access to justice, but on the same hand, it is also misused by the virtue of people filing frivolous writs.

3.1.1. CASE LAWS:

The concept of PIL was initially introduced in the United States and in India, the same was initially addressed in the case of S.P. Gupta Vs. Union of India[2362]. Ths case was decided by a 7 judge Bench headed by Justice Bhagwati in the year 1982. In this case, a group of advocates in the Bombay High Court filed a collective writ challenging the circular issued by then Law Minster which stated that most of the judges would be appointed by the Central Executive and only a smaller portion by the judiciary themselves. As a result of this, the judiciary would then loose its significance and hence the writ. One of the issues that sprung up was whether this group of advocates possessed a sufficient interest in the filing of this particular writ. Justice Bhagwati had answered the same in the affirmative and stated that public interest litigation should be adopted by India as this would help even the unprivileged sections of the society to have an access to the legal system, thereby promoting the welfare of the people.

Another landmark judgment with regard to the conception of public interest litigation was in the case of Hussainara Khatoon Vs. State of Bihar[2363]. A petition was filed by an Indian lawyer named Pushpa Kapila Hingorani stating about the condition of the prisoners in the Bihar jail whose cases were pending before the Court since a long time. Hussainara was one among the six women prisoners and hence the name of the case. Justice Bhagwati admitted this petition and stated that the prisoners are entitled to free legal aid and fast hearing. Hence after this case and continuous efforts being put forth by Hingorani, as many as 40,000 prisoners were released and Hingorani was also given the title of Public Interest Litigations.

[2362] Supra . 19
[2363] 1979 SCR (3) 532

The case of Bandhua Mukti Morcha Vs. Union Of India[2364], was a landmark decision with respect to child labour exploitation in India. Bandhua Mukti Morcha is a non governmental organisation headed by Swami Agnivesh with a view to eradicate bonded labour in the country. In the state of Uttar Pradesh, many children, even those below the age of 14 years were employed as laborers in the carpet industry. Thus they filed a public interest litigation and the same was presided over by a 3 judge Bench. Justice Bhagwati admitted the claim in this case, and that this practice violated Article 24 of the Indian Constitution, several Directive rinciples of State Policy and instructed that these child labourers below the age f of 14 years should be given proper nutrition, healthcare and education. This instruction then culminated as Article 21 A in the Indian Constitution which talks about the Right to Education to children below the age of 14 years.

3.2. ARTICLE 14 – INCLUSION OF ARBIRARINESS:

Article 14 provides for equality before the law and equal protection of laws. It ensures equal protection of laws subject to a reasonable classification. It states that only equals can be treated equally and not otherwise. So, in order to ensure equality, a reasonable classification has to be made to bring in all the equals at the same pedestal for application of laws on them. Initially, only these two dimensions were a part of article 14. However it evolved in the future and the same has been discussed below.

3.2.1. CASE LAWS:

A new dimension to article 14 was added by Justice Bhagwati in the case f E.P.Royappa Vs. State of Tamil Nadu[2365]. The petitioner in this case is a civil servant in a cadre in Tamil Nadu. He was initially appointed to the post of Chief Secretary to the state and had commenced working on that particular post. Later, he was appointed as the Deputy Chairman of the State

[2364] (1997) 10 SCC 549
[2365] 1974 SCR (2) 348

Planning Commission and the same was approved by the Chief Minister of the state. He, therefore left the post and started working for the Planning Commission. Later,he was transferred to another post in which he was appointed as the Special Duty Officer to the Slaes Tax Department. But he did not join the services. The other two posts also were on the same grade as the post of the Chief Secretary. The post of the Chief Secretary was then given to his junior and hence the petitioner filed a claim under Article 14 and Article 16 of the Constitution. The Court admitted the claim of the petitioner and Justice Bhagwati stated that arbitrariness is an antithesis to equality and the same should be taken into account under Article 14, apart from equality before the law and equal protection of laws. But since in this case, the petitioner was not able to prove a malafide intention on the part of the state, his petition was dismissed, however , a new dimension of arbitrariness was included by the judges whicle deciding this case.

3.3. ARTICLE 21-HUMAN DIGNITY:

Article 21 of the Indian Constitution guarantees personal liberty to the individuals not only the citizens of the country but also the foreigners. Article 21 has a broad connotation and it encompasses the rights to livelihood, healthcare, privacy etc and the same has been broadened by the virtue of judicial activism and public interest litigation. A good interpretation of Article 21 has also been laid down in the case of Maneka Gandhi.

3.3.1. CASE LAWS:

In the case of Francis Corallie Mullin Vs. The Administrator, Union Territory of Delhi[2366] and others, a British national was caught under section 3 of the COFEPOSA Act and detained in Tihar Jail. She had a daughter aged 5 years, other family members and her own lawyer was permitted to visit her only on rare occasions as per the Prison Authorities Act. Thus she challenged the same on the grounds of violation of Article 21 of the Indian Constitution. The writ petition was filed under Article 32 of the Constitution and was presided over by a 3

[2366] 1981 SCR (2) 516

judge Bench. Justice Bhagwati stated that even under detention, the fundamental rights of a person stays intact. He also stated that the right to life enshrined under Article 21 is not limited to mere animal existence but means much more than just physical survival. The Court then lays down certain guidelines with regards to the rights of the accused detained under preventive detention laws.

3.4. THE GOLDEN TRIANGLE:

Article 21 has been a topic of debate right from the inception. Though the Article expressly mentions only about the right to life and personal liberty but it encompasses the maximum number of other rights in comparison with other fundamental rights. Earlier, this Article was interpreted in a very strict and restrictive manner in the case of A.K. Gopalan Vs. State of Madras[2367]. In this case, Gopalan was detained under a preventive detention law. In lieu of the same, Gopalan had had filed a writ petition under Article 32 of the Indian Constitution. He challenged his detention on the grounds of violation of his fundamental rights under Article 21, 14 and 19 of the Indian Constitution. This matter was admitted in the Supreme Court and was headed by a six judge Bench.

The Court stated that since Article 21 only envisaged "procedure established by law" and not "due process of law", even if the procedure seems to be arbitrary, the preventive detention law would still hold as a valid piece of law under Article 21 of the Indian Constitution. The Court also stated that multiple fundamental rights cannot be invoked and connected to claim for violation of fundamental rights. Each and every fundamental right has an existence of its own and are mutualy exclusive of each other. However a dissent was given by Justice Faiz Ali who was of the view that even the procedure established by law has to be reasonable in nature. This case opened a doorway to a flurry of other cases and led to the inception of the principle of "Golden Triangle" which essentially comprises of Articles 14, 19 and 21.

3.4.1. CASE LAWS:

[2367] AIR 1950 SC 27

The concept of the Golden Triangle came into light one of the most landmark judgments given by Justice Bhagwati. Prior to this case, right to travel[2368] was considered to be a part of Article 21 of the Constitution. It was this case which led to the enactment of the Passports Act, 1967 as well. Now in the case of Maneka Gandhi Vs. Union of India[2369], the petitioner's passport was impounded and the reasons for such impoundment was also not mentioned by the Passport authorities in the interest of the general public. The petitioner then moved a writ petition before the Supreme Court under Article 21 of the Constitution. She stated that the act of impounding her passport without mentioning any valid reasons before doing so under section 10 of the Passport Act is violative of the principles of natural justice and has infringed her personal liberty, her right to travel under Article 21, arbitrariness on the part of the Passport authorities under Article 14 and infringement of right to freedom of movement under Article 19 (1)(g) of the Constitution.

The Court had admitted this case and the same was presided over by a 7 judge Bench and the majority opinion was given Justice P.N.Bhagwati. The Court firstly overruled the judgement of A.K. Gopalan Vs. State of Madras and stated that the "procedure established by law" under Article 21 has to be just, fair and reasonable in accordance with the principles of natural justice. It also stated that a Article 14,19 and 21 can be invoked together because the common thread which runs through all these three articles are the principles of natural justice and all the fundamental rights are not mutually exclusive or an isolated chapter in itself. They are all collectively dependant on each other However the Court did not set aside section 10 of the Passports Act and stated that as far as much as possible, the reasons for impounding a person's passport should be mentioned. Hence relief was granted to the petitioner and the concept of the golden triangle came into the picture.

3.5. SUBSTANTIVE DUE PROCESS IN LAW:

[2368] Satwant Singh Sawhney vs D. Ramarathnam,(1967) 3 S.C.R. 525
[2369] 1978 SCR (2) 621

While drafting Article 21 of the Indian Constitution, a lot of debate was going with regard to the inclusion of phrases "due process of law" or "procedure established by law". B.N. Rau, constitutional adviser to the Constituent Assembly also met American Justice Felix Frankfutter, with regard to the same dilemma. In America, "due process of law" was a part of their Constitution. However, subsequent to the visit to Justice Felix Frankfutter, not only, B.N. Rau, but the other Indian drafters were also of the view that "due process of law" seems to be a vague and ambiguous term which will bestow a lot of autonomy on the judiciary. Hence the phrase "procedure established by law " became a part of our Constitution. However, in the judgements given by Justice Bhagwati, he managed to trace the essence of fairness and justice within the procedure, thereby interpreting it as due process of law and the same has been discussed below.

3.5.1. CASE LAWS:

After the ruling in Maneka Gandhi Vs. Union of India[2370], the principles of fairness and justness was traced within the "procedure established by law". We all know that law can be of two types: procedural and substantive. Accordingly, due process also can be divided into two: procedural and substantive due process. Procedural due process means the deprivation of life, liberty and property should be in accordance with the procedure established by law. Substantive due process means that this deprivation should be in accordance with the principles of justness, fairness and reasonableness. With regard to the same, the case of Bachan Singh Vs. State of Punjab[2371] is relevant for our discussion. In this case, the constitutionality of death penalty as a punishment under section 302 of the Indian Penal Code was challenged under Article 19 and 21 of the Constitution.

A 5 judge Bench presided over this case and in majority upheld the constitutionality of section 302 of the Indian Penal Code with a prerogative that this punishment should be given only in the rarest of rare occasions. Justice Bhagwati dissented and stated that 'the concept of reasonableness runs through the entire fabric of the Constitution' , and also "every facet of

[2370] See supra 28
[2371] 1982 SC 1325

the law which deprives a person of life or personal liberty would therefore, have to stand the test of reasonableness, fairness and justice in order to be outside the inhibition of Article 21".[2372] This was one of the finest dissents in the history of the Supreme Court of India and continues to be so till date.

3.6. THE HARMONIOUS CONSTRUCTION:

The debate between the with regard to the enforceability of Directive Principles of State Policy (hereinafter DPSPs)over the Fundamental Rights was going on as a tussle between the executive and the judiciary. Initially, in the case of Champakam Dorarirajan Vs. State of Madras[2373], the Court stated that since the fundamental rights are sacrosanct rights to an individual and enforceable but the DPSPs are not, hence the fundamental rights would gain superiority over the DPSPs and the latter has to conform and run subsidiary to the chapter of fundamental rights. In the case of I.C.Golaknath Vs. State of Punjab[2374], the 11 judge Bench again stated the same thing which resulted in the 24th Amendment which amended Article 13 and 368 of the Constitution. By the virtue of this amendment, the parliament was bestowed with the power to amend any part of the Constitution including the fundamental rights and also the term law in section 13 does not encompass any amendment to the Constitution. The same dilemma was envisaged in the case of Keshavananda Bharti Vs. State of Kerala[2375], in which the 12 judge Bench laid down the doctrine of basic structure which was there in the Constitution in itself. Therefore, by laying down the basic structure, the Court protected the fundamental rights to be amended. The above mentioned trajectory lays down the tussle between the executive and the judiciary which culminated in the case mentioned below.

3.6.1. CASE LAWS:

[2372] See supra 30
[2373] AIR 1951 SC 226
[2374] (1967)2 S.C.R. 762
[2375] AIR 1973 SC 1461

The case on pint which solves the tussle between the executive and the judiciary with respect to DPSPs and fundamental rights was the case of Minerva Mills Vs. Union of India[2376]. Minerva Mills is the petitioner in this case and the same was occupied by the government as it was not performing well. They carried this out on the basis of The Sick Textile Industries Act, 1974 for the greater public interest. Aggrieved by the same, the petitioner filed a writ petition under Article 32 of the India Constitution stating that the state, by the virtue of implementing the DPSPs cannot disregard the violation of the fundamental rights as the people whose industries are occupied have no legal remedy as per the 42nd amendment of the Constitution which states that any enactment which is a part of the nineth schedule is outside the purview of judicial review. Thus Court with a majority of 4:1 stated that since the provisions of this Act violates basic structure doctrine, the same should be struck down.

In his dissent Justice Bhagwati did uphold the unconstitutionality of the provisions of the Act and also wrote a beautiful point with regard to the competitiveness of the DPSPs and the fundamental rights. He stated that the doctrine of harmonious construction should be applied and both the Fundamental Rights and the DPSPs should be balance as far as possible. He also draws an analogy that the DPSPs and the Fundamental Rights are the two wheels of a chariot and the snapping of one would lead to the destruction of the chariot. It is a twin formula which needs to go hand in hand for the betterment of the nation.

CONCLUSION

Throughout the course of the paper, the author has tried to establish the importance of judge made law and has utilized the trajectory of development of the judiciary in India and America to prove the same. All the three wings (legislature, executive and judiciary) should be bestowed with equal amount of powers in such a manner that neither of them overpowers the other. In this paper, special focus had been laid down on Late Justice P.N. Bhagwati and the various principles laid down by him in the wake of judicial activism. He also gained the reputation in India of being a great dissenter similar to Late Justice Oliver Wendell Holmes. Both these judges have provided a tonic of judicial activism vis-a-vis legal realism to the judiciary as a whole. The same can be utilized by the future judges to provide everyone with access to justice.

[2376] AIR 1980 SC 1789