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Judicial Reflections of Justice Bhagwati (2008)

by

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The author's work may be appreciated for embarking on the contributions of an individual justice at the apex court of India, a field the law academics have yet to much exploit. Such an exercise projects the successes and failures of an individual judge and lessons to the other judges. The *Judicial Reflections* concentrates only on some of the important and controversial areas of the Constitution of India. The entire effort is to find out as to how justice Bhagwati has transformed and projected his philosophy through the cases on hand for the growth of the Constitution of India. A researcher will find the relevant informations in this regard in the present work.

Starting with the structure of the *Judicial Reflections*, it has been divided into sixteen Chapters. The first gives the general background of justice Bhagwati, followed by the Child Welfare Justice. Article wise discussion comes thereafter. Then comes the important sections on State action, freedom of speech and expression and public interest litigation. The Chapters on 'Judicial Review' and 'Judicial Activism' give justice Bhagwati's approach to the administration of justice. The important developments are included in 'Human Rights and Criminal Justice System' and the 'Death Penalty'.

The First Chapter, titled, 'A Judge is Born', has sixteen rubrics. The family background, the childhood reminiscence, the education platforms, the professional and judicial carriers are the discussion under this Chapter. The entire journey, it is submitted, has not given befitting treatment to the title. It is disposed of only in three pages. The information given is relevant but more could have been provided to further link with justice Bhagwati's philosophy, judicial behaviour and the basis of judgments in different fields. The rubrics from 6 to 13 have introduced in the introductory Chapter his



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roles in administering justice in different fields. It is too early to expose the readers with these discussions. It is submitted that this could have formed part of different chapters where the particular matter is discussed in detail. His different roles are already reflected in the Chapters concerned. Similarly, Chapter two, 'Law as an instrument of social justice', whose discussion also pervades in the subsequent Chapters and, therefore, it could have formed part of the relevant Chapters.

Coming to Chapter Three, dealing with, 'Child Welfare and inter-country adoptions' it largely concentrates on international position and legal regime in India. There is not much light thrown on justice Bhagwati's contribution. Moreover *Laxmi Kant Pandey's case*<sup>2</sup> could have been dealt in detail to find out justice Bhagwati's contribution in this area. 'India as a Nation-Evolution of the Concept' comes in Chapter Four running into five pages where one finds the bare provisions of the Preamble of the Constitution, Articles 1, 5, 14, 15, 19(1), 301, 353 and 356. No light is thrown on the concept and values propounded by Justice Bhagwati in *Dr. Pradeep Jain v. Union of India*.<sup>3</sup> A bare reference of the case leaves a reader ignorant about the facts and court's decision. The authors, while discussing Article 14, point out that the credit for the evolution of the

'New doctrine', in this article, goes to justice Bhagwati.<sup>4</sup> In the *Royappa case*<sup>5</sup> justice Bhagwati threw to the wind the traditional approach - 'reasonable classification' and replaced it by the test of 'arbitrariness'. The authors could have given the other side of the coin also. For example, Seervai, a great constitutional authority, opined that, 'the new doctrine was clearly wrong and the old doctrine was clearly right'<sup>6</sup> Such a treatment of the subject, it is submitted, develops a critical appraisal approach in the students and readers. Further while dealing with the *R.K. Garg case*<sup>7</sup>, the authors blindly support the learned judges view but the fact was that he was legalizing the offence for the sake of bringing out the black money or what Gupta J. said in that case, 'putting premium on dishonesty'. It may be further pointed out the authors mention the case of *Express New Papers*<sup>8</sup> and the *Maneka Gandhi case*<sup>9</sup> but they missed the hereditary link. The principle followed by



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his father Justice, N.H. Bhagwati, in the *Express News Paper case* of the 'direct and inevitable effect' in relation to the State action which was not adopted by Justice Shah in the *Bank Nationalization*<sup>10</sup> case, but was brought back by his son, Justice P.N. Bhagwati, in the *Maneka Gandhi case*, a tribute by a son to his father.

Chapter Five entitled, 'Constitution - A Living Organization' mainly deals with the Fundamental rights, the Directive Principles of State Policy and their relationship. This Chapter again attracts the same criticism as given in Chapter First. Chapter Seven deals with 19(1)(a) - freedom of speech and expression and Chapters 12, 14 and 15 deal with different fundamental rights. So one, finds repetition of discussion in Chapter Five, which could have been avoided and some aspects of the Hon'ble Judges' contributions is missing.<sup>11</sup>

Coming to Chapter Six, it deals with 'the State Action' in two ways : one, the meaning of 'the State' under Article 12; and, second, the State action and its determination. The leading opinion of justice Bhagwati in the important cases<sup>12</sup> along with the five criteria to identify the corporation or other organization as 'an agency or instrument of the State' have been clearly brought out. But unfortunately this Chapter like other Chapters has no conclusion. Moreover, once again the authors do not try to bring the other side of the coin. In the *M.C. Mehta case*<sup>13</sup>, Justice Bhagwati left the question undecided for the reasons best known to him whether the Sriram Fertilizer Company was an 'other' authority in Article 12. What was just required for him was to apply the criteria already laid down by him in the *Ajay Hasia case*.<sup>14</sup>

The freedom of speech and expression in Article 19(1)(a) forms part of the Chapter Seven. Firstly, Hon'ble Justice Bhagwati deals with the wider horizon of the freedom of speech and expression, which according to him, includes not only the inoffensive but also the irritating, the contentions, the eccentric, the heretical, the unwelcome and provocative speech. But it should not lead to public disorder or violence.<sup>15</sup> The concept of hate speech, which is already attracting attention of Article 19(1)(a), it is submitted,



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is missing in justice Bhagwati's expanding definition. Secondly, Justice Bhagwati, while reading Article 19(1)(a), elaborated the right of the people of this country to know everything that is done in a public way, by their public functionaries, every

public transactions in all its bearings.<sup>16</sup> The Hon'ble judge restrict the right only if it has repercussion on public security. The authors missed at this stage to point out that 'public security' has no specific place in Article 19(2) which specifically provides other eight distinct restrictions. Thirdly the *Judicial Reflections*<sup>17</sup> tries to evolve the right to information through the *Sakal Papers case*<sup>18</sup> and points out the contour of the freedom of press evolved by justice Bhagwati. But unfortunately, the judgment of this case was handed down in the year 1962 when justice Bhagwati was not even elevated to the judgeship of the apex court. Moreover, long back in the year 1960, in the *Hamdard Dawakhana case*<sup>19</sup> the Supreme Court came out with the right to receive and impart information reading Article 19(1)(a). Further, in this exercise, the *S.P. Gupta case*<sup>20</sup> missed the attention of the authors.

The concept of public interest litigation has received, as mentioned in the *Judicial Reflections*, many dimensional treatment at the humanist heart of justice Bhagwati. The work traces the case law from the *S.P. Gupta case*<sup>21</sup> down to the *Rural Litigation case*<sup>22</sup> and tries to bring out conditions as to who can be its beneficiaries and when such innovative process may be available for the have nots. The principles so evolved has been endorsed by the Supreme Court in the subsequent case law, a great support to justice Bhagwati's philosophy. However, the authors could have developed through the case law the changing dimension of PIL and also discussed, what is needed now?

The two parts 'Judicial Review' and 'Judicial Activism' are already discussed under different Chapters, and therefore, their discussion could have been included in the relevant parts instead of a separate specific treatment, a repetition of the informations. Further the 'Bonded Labour' and 'Human Rights in Modern Times' Chapters have been disposed off in few pages. Their discussion could have formed part of the discussion on Article 21 which unfortunately has not been given a specific treatment; whereas, each word of Article 21 has seen dissection at the hands of Justice Bhagwati.



The important area of activism of Justice Bhagwati is reflected in the 'Human Rights and Criminal Justice System'<sup>23</sup>, in Chapter Fourteen. The research scholars will find important materials in this Chapter to further develop the areas demarcated by the authors. In the entire exercise the authors focuss on Justice Bhagwati's philosophy to mould the law to meet justice according to the need of the time. His approach was to wipe each tear from each eye of those against whom injustice was done. But the million dollar question remains : has such dispensation of justice reached to the ground level? The answer can not be in positive. The authors could have also focussed on this important issue so as to put justice Bhagwati's judicial legislations in action.

The dissenting opinion of justice Bhagwati in the *Bachan Singh case*,<sup>24</sup> dealing with the constitutional validity of death penalty provided in Section 302 of the Penal Code, 1860, has been given a longest treatment in the *judicial Reflections*. The humanist heart of justice Bhagwati cries against the barbaric, brutal and inhuman imposition of death penalty. It is interesting to note that the Majority in this case has not supported whole heartedly the imposition of death penalty. The concept of 'rarest of rare case' impliedly shows that even majority judges were not ready to allow death penalty in each and every case of offence coming under Section 302 of the Penal Code, 1860. Moreover the present position is that in mass cases of murder and even heinous murder, the death penalty is not imposed, a tribute to justice Bhagwati's philosophy in

this regard.

Thus Chapter Fifteen, in itself, is like a thesis on the death penalty instead of narrating only the specific judicial reflections of justice Bhagwati, the authors ponder over international to comparative position, Royal Commissions Report down to statistical treatment. This part rather could have exclusively dealt with justice Bhagwati's contributions. Moreover, the present work hardly bring a critical overview of this opinion, so as to give a impartial assessment of the judicial reflections to the readers. H.M. Seervai has taken a stand that the dissenting judgment is 'wholly impermissible judgment' and therefore, according to him 'it is not a judgment' because justice Bhagwati has adopted 'first sentence then verdict'.<sup>25</sup> In this case justice Bhagwati, recorded his order along with the Majority judgment but his judgment came two years<sup>26</sup> thereafter. The two years period for judicial introspection of mass materials without scrutiny of the concerned lawyers and judges is like putting the cart before the horse.



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In the work undone in the *Judicial Reflections*, includes, the treatment regarding where justice Bhagwati is taking the Constitution of India to; who have been benefited out of the liberalism or activism; in spite of the judgments whose eyes have still tears; was justice Bhagwati different in the *Trimurti Court* (justice Pelekar, Bhagwati and Krishna Iyer) where unanimous opinions were handed down as compared to when he was sitting with other judges<sup>27</sup>; Was there any connectivity with his approach in the high court or that of his father, justice N.H. Bhagwati; where did justice Bhagwati failed in the administration of judicial justice, are some the questions which remains unanswered.

And finally, the authors have failed to connect the case law handed down by justice Bhagwati with his 'deep religious bondage', 'two months in jail' a mathematician background, his upbringing and last but not the least his father, Justice N.H. Bhagwati's influence. Secondly, the authors have elaborately discussed justice Bhagwati inside the Court but left to devolve on justice Bhagwati outside the Court.<sup>28</sup> And lastly the *Judicial Reflection* failed to give to its readers the final directions and conclusion of the entire research exercise undertaken by the authors.

So finally what comes out? The *Judicial Reflections* has portrait, an interesting picture of justice Bhagwati, a Judge with humane heart, caring for the have nots and a reformer in the administration of justice and the law. Further, it has disseminated useful informations on Justice Bhagwati's contributions. It is lucidly written and provides a continuous flow in reading the work. The getup is attractive and the font of letters are shortshighers' friendly. It is an incentive to the research scholars to embark upon such field of study. Further it is also an incentive for the Law Schools to evolve a curriculum on the contributions of select judges of the apex Court. And, therefore, the work is an useful literature which must find a place in the law libraries.

—Prof. C.M. Jariwala<sup>+</sup>

<sup>1</sup> Hereinafter referred to as *Judicial Reflections*.

<sup>2</sup> *Lakshmi Kant Pandey v. Union of India*, (1984) 2 SCC 244.

<sup>3</sup> (1984) 3 SCC 654.

<sup>4</sup> A similar view is taken in V.N. Shukla's *Constitution of India* by M.P. Singh (10th Ed.) 2001, 63; 'The new Approach of Equality' which in the subsequent Edition got replaced by 'Expanding horizon of equality', see the 11th Edi, 74, 2010.

<sup>5</sup> *E.P. Royappa v. State of T.N.*, (1974) 4 SCC 3 : AIR 1974 SC 555.

<sup>6</sup> H.M. Seervai, *Constitutional Law of India : A Critical Commentary*; 437, Vol. 1 (Reprint) 2006.

<sup>7</sup> *R.K. Garg v. Union of India*, (1981) 4 SCC 675, 705 : AIR 1981 SC 2138, 2156. One can also see the partitioned approach of Justice Bhagwati in *Banwasi Seva Ashram v. State of U.P.*, (1986) 4 SCC 753 : AIR 1987 SC 374 where in order to augment the electricity supply in Uttar Pradesh the learned judge overlooked to the environmental needs.

<sup>8</sup> *Express News papers (P) Ltd. v. Union of India*, AIR 1958 SC 578.

<sup>9</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597.

<sup>10</sup> *R.C. Cooper v. Union of India*, (1970) 1 SCC 248 : AIR 1970 SC 564.

<sup>11</sup> For example, the Preventive Detention and his microfine approach have contradictory stand. See for detail, C.M. Jariwala, Microfine Judicial Approach in Preventive Detention cases, Vol. 11 *Ban LJ*, 103-9, 1975.

<sup>12</sup> *R.D. Shethy v. International Airport Authority of India*, (1979) 3 SCC 489 : AIR 1979 SC 1628; *Som Prakash Rekhi v. Union of India*, (1981) 1 SCC 449 : AIR 1981 SC 212; *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : AIR 1981 SC 487.

<sup>13</sup> *M.C. Mehta v. Union of India*, (1986) 2 SCC 176 : AIR 1987 SC 965; see also *M.C. Mehta v. Union of India*, (1987) 1 SCC 395 : AIR 1987 SC 1086 wherein the learned, justice has advocated a 'creative' and 'innovative' approach in this regard, see *id* at 1098.

<sup>14</sup> *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : AIR 1981 SC 487.

<sup>15</sup> *Judicial Reflections*, 146.

<sup>16</sup> *State of U.P. v. Raj Narain*, (1975) 4 SCC 428 : AIR 1975 SC 865.

<sup>17</sup> *Id.* at 158.

<sup>18</sup> *Sakal Papers (P) Ltd. v. Union of India*, (1962) 3 SCR 842.

<sup>19</sup> *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554.

<sup>20</sup> *S.P. Gupta v. Union of India*, 1981 Supp SCC 87 : AIR 1982 SC 149.

<sup>21</sup> *S.P. Gupta v. Union of India*, 1981 Supp SCC 87 : AIR 1982 SC 149.

<sup>22</sup> *Rural Litigation and Entitlement Kendra v. State of U.P.*, 1986 Supp SCC 517 : AIR 1987 SC 359.

<sup>23</sup> See, for an extensive academic treatment, B.P. Dwivedi, *The Changing Dimension of Personal Liberty in India*, 1998.

<sup>24</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 : AIR 1980 SC 898.

<sup>25</sup> H.M. Seervai, *Constitutional Law of India* (Fourth Ed.) Vol. 2, 1197, 2006.

<sup>26</sup> A delayed judgment was also given by justice Bhagwati in *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 : AIR 1980 SC 1789.

<sup>27</sup> C.M. Jariwala, Justice Bhagwati and Personal Liberty, Vol. 16 *Ban.LJ* 81 (1980).

<sup>28</sup> His Writings and Speeches and other actions for example, his congratulation to Smt. Indira Gandhi for her victory in the then election which attracted lot of criticisms.

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