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PREMATURITY AND OBITER DICTUM
IN INDIAN JUDICIAL THOUGHT
WILLIAM D. POPKIN

I. Introduction

The judicial doctrine of prematurity of a suit is designed to make sure that courts act efficiently.1 This is not as simple as it sounds. In order to know what is efficient, we need to know two things. We must have some idea of what we want the institution we call the judiciary to do, i.e. its goals. And we must further be aware of its inherent limitations. Within the boundaries of its limitations there is room for experimentation as to goals.

Indeed, this is true of all living things, be they viable institutions or human beings. The average person can walk or run at a limited speed, but given what nature has allotted to him, he may choose his direction. Notice that there can be heated argument on two subjects. The direction or goal of travel is the one that often catches the imagination. But just as important is the speed at which he can travel. This is equally open to debate and must be resolved in deciding what is the most efficient way to plan activity. A one mile walk to a restaurant may be worthwhile. But a five mile walk to such a place may result in a consideration of other ways to spend one's time. If told that a sick friend is five miles away, a walk in that direction may seem more desirable, while a distance of one hundred miles may appear totally beyond human endurance.

The limitations of speed and endurance play a double role. They set the outer limits of human endeavour and act as factors in deciding what to do within those limits. The more desirable the goal or direction, the more willing one will be to stretch the limitations of the actor to reach the goal.

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This doctrine, in the United States, is most often called "ripeness" for judicial decision: Jaffee, Administrative Law (1955) (Table of Contents) p. viii; Gellhorn & Byse, Administrative Law (1954) (Table of Contents) p. xiii.
The doctrine of prematurity is essentially concerned with the limitations of the judiciary. Much of the discussion of this doctrine describes as the outer limits of judicial capacity what are, in reality, the factors to be considered within the range of possible judicial approaches.\(^2\) This is especially important to remember in a comparative law study where one must acknowledge that the solution to a problem in one country is but one possible way to balance the factors involved rather than a definitive setting of the boundaries of human imagination.

It will be best at the outset to state our conception of the assumptions behind this doctrine. If a case is premature, there may be two basic reasons for feeling that the courts should withhold decision. (1) A court acts efficiently only when a concrete and non-hypothetical situation is presented to it. This enables the counsel to understand fully the implications of the case and thereby to present their position most forcibly. It also assures that judges will write opinions which are concrete in approach and useful as guides for private parties seeking to know what the law is. The more effective resolution of the actual case before the court and the most meaningful judicial pronouncements for future planning result from a fully matured and concrete case. (2) Courts are not necessarily the most effective means for settling disputes. Private compromise or political resolution may be more suitable. There are several reasons for this. A judicial solution is not the parties' solution. It may be best for the development of individual responsibility and initiative if private parties are given as much opportunity for working out their own problems as possible. Furthermore, such solutions may actually be better for the parties. It is also true that the court has limited time so that it must act only when it is most needed. This need may not arise at the earliest stages of a controversy. Lastly, the public good-will which the courts enjoy is not inexhaustible. The court may find it best to remain out of a heated controversy lest the dissatisfaction of the losing party vent itself against the judiciary. A fully matured case is one in which these problems are least likely to occur, for other avenues of solution will have been tried.

It is apparent from this introductory elaboration of the reasons behind the doctrine of prematurity that the limitations placed upon the judiciary are inextricably intertwined with its directions or goals.

The over-riding goal of a judicial system is the settlement of disputes by means of one person telling two or more other people what to do. Without a procedure for democratic representation, the judiciary must provide men with a reason for accepting these settlements. Courts, therefore, act with reference to some standard which reasonable men can accept as pre-existing in those sources upon which it is legitimate for the judges to draw in developing the law. Concrete facts situations assure a fuller understanding of the relationship of the present dispute to the legitimate authorities. And the reluctance of a court to intrude when other solutions are possible is primarily based on the potential dissatisfaction with a solution suggested by the judges; such dissatisfaction may ultimately impair the principal goal of the courts which is to settle disputes.

The purpose of this article is to ascertain the Indian approach to problems of prematurity. We want to know how concerned Indian courts have been with this limitation on the judiciary and with the reasons behind this limitation. We also want to know why Indian courts have reached their particular solution to these problems.

II. Cases and Critique on Prematurity.

(a) Declaratory Relief: Specific Relief Act, sec. 42

A convenient place to begin our analysis is with cases of declaratory judgments under Specific Relief Act, sec. 42. For in seeking a mere declaration of rights, parties often come to a court at an earlier stage of a controversy than they would if coercive relief were being sought.

The list of examples under this section is illuminating. Example (c) provides that a covenant to set up a trust if the prospective settlor becomes entitled to an amount of money may be examined to decide if it is void for uncertainty. Several problems arise in such a case. The development of facts may be useful since the issue of uncertainty may turn upon events subsequent to the time of covenanting which shed light upon the prior intention of the settlor. Furthermore, this situation presents a serious problem of wastage of judicial time for there is no assurance that the contingency of the receipt of money will occur. It also discourages the individual solution of the problem involved; because the settlor has the opportunity to use the court as his

lawyer for draftsmanship purposes, he may be discouraged from using his own counsel.⁴

The majority of examples under the Specific Relief Act, sec. 42, involve the question of property rights of a reversioner and related questions of status, such as adoption.⁵ There is a judicial requirement that the litigant must sue for the entire class of reversioners. A 1956 Madras case ⁶ explained that one reversioner could not assert his individual claim because of the anticipatory nature of the decision which might be rendered valueless by the passage of time. Presumably, the reversioner who is bringing the suit might die and never gain possession. The court here recognized the problem of wastage of judicial time, which has not been of concern under example (c).

However, even when the suit is for the entire class, the case could be considered anticipatory or premature since the entire class may fail to survive. It is clear that a mere hope or very contingent interest in the petitioner who seeks to represent the class will be insufficient grounds for granting relief.⁷ This rationale applies equally well to the entire class if the interest of the class itself is very remote or contingent.

In making sure that the petitioner representing his class is not himself a very doubtful beneficiary of the judgment delivered, the courts are also exhibiting an interest in that aspect of the doctrine of

⁴ Such a suit was premature at common law: Fyfe v. Arbuthnot (1857) 1 De G. & J. 406; 98 R.R. 151.
⁵ O. P. Aggarwala, The law èj Specific Relief (3d. Ed., Vol. II, 1961) pp. 808-09, Examples D, E, F & H; Examples A & G deal with clouds upon the title of the holder of a present possessory interest; Example B deals with both the present possessory interest and unborn reversioners.
⁷ Hari Kishen v. Hira A.I.R. 1957 Punj. 89, 90: "...courts should in the exercise of their discretion refuse to grant a declaratory decree......if the chance of the collaterals avoiding the transaction are very remote and the court considers the chances merely speculative." This statement may bar distant collaterals from suing even if it is a class action. In this case a distant collateral who was near when the suit began but who became distant due to subsequent legislation was allowed to sue.
Nagammai v. Agoramurthi A.I.R. 1956 Mad. 248, 249; (mere hope is not sufficient although the court has discretion where contingent interest are involved. It is always a question of the propriety and utility of the relief.)
D. Gopalarao v. T. Venkatadri A.I.R. 1957 A. P. 19, 21; (here the discretion of the Court was exercised against the petitioner because his interest depended upon a future contingency).
Razia Begum v. Anwar Begum A.I.R. 1958 S.C. 886, 895: (the court has discretion to assure that the proceedings are adversary.)
prematurity which seeks to assure that the petitioner is the person most interested in the litigation. One reason for awaiting the fullest possible development of the fact situation is to make sure that the litigating parties are the ones most concerned. This assures the adversary nature of the proceeding and decreases the risk of resentment at a later date when the stare decisis or res adjudicata effect of the judgment is felt by other people. In this respect, prematurity overlaps with the purposes of the doctrine of locus standi.

At present, Indian courts recognize that a future possessory interest may be the subject of a declaratory action, however clearly they have noted the danger of an anticipatory decree if the petitioner is not likely to become one of the full owners of the property. These cases become analogous, therefore, to an owner's suing to remove a cloud on his title to real estate.

The most doubtful aspect of the cases involving property rights does not arise from the problem we have discussed so far, i.e. the uncertainty of the petitioner's direct and immediate interest in the subject matter of the litigation. Rather there is no assurance that there will be a respondent who will question the petitioner's legal right or status. In Nagammal v. Agoramurthi it was sufficient that the respondent was interested in denying the petitioner's interest. In Bhoop Singh v. Tarif Singh the judge said that the petitioner's fear, not an actual challenge by the respondent, would be enough. And in Mankawar v. Mt. Bodhi the case was held mature when there was a claim by the respondent to a status which was adverse to the petitioner's interest. The respondent in Ramsunder Bhagat v. Rambharasi Bhagat had introduced a false recital in a will which indicated a future intention to cause difficulty for the widow after the petitioner's death. And, finally, in Jagat Ram v. Basanti the respondent made an assertion in a deed which could later serve as a basis for the imposition of paternal responsibilities on the petitioner.

9. In Rani Jagannath v. Bhawani Singh A.I.R. 1955 M.B. 99, 100 the court was very strict and insisted that the reversioner bringing the class action be the nearest collateral.
12. A.I.R. 1956 All. 392, 395 (dictum: here the respondent was actually denying petitioner's parentage).
In all these cases a serious problem of prematurity exists. These judgments present a gradation from the barest danger of damage to petitioner to more tangible evidence of interference with his rights. But people are always making claims out of court. It is no easy matter to be sure that they will cause trouble at some future time when the opportunity arises. Nor is it necessarily desirable to allow a petitioner to seek judicial aid in all matters. A private and more amicable solution of what are very often family squabbles might be more desirable than sending one litigant away disappointed.

Two reasons are often given for granting a hearing. There is a fear that evidence will be lost or that false evidence will be created. The assertion is that, far from being premature, there is a danger that the facts in the case will grow old and distorted with the passage of time. One Court did not find the danger of the creation of evidence sufficient justification for granting relief. In this Kerala case a surety sought to intervene where the principal debtor had conceded the case to the creditor. The surety alleged collusion but was barred from a hearing because all his contentions could be raised at a time when he was sued. The Court did not explicitly state that it was deciding a question of prematurity but the rationale was the same.

Nonetheless, the problem of staleness of facts may be a real one, despite the reluctance of the Kerala High Court. The danger is that the facts justifying relief on these grounds will be assumed to exist rather than demonstrated. The opinions in the cases indicate that any assertion of a claim in writing will amount to a genuine threat. No attention is paid to its possible inadmissibility in evidence or its weakness as a self-serving declaration or to the surrounding circumstances which may indicate that this incident is an isolated event, unsupported by any pattern of creation of evidence. The loss of evidence is even more readily assumed to be a concomitant of the passage of time. While witnesses die, records might be kept. Nor do the

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   Cf. *Razia Begum v. Anwar Begum* A.I.R. 1958 S.C. 886, 894 (declaratory judgments may "...clear up mists which may have gathered around title to property or to status.")
opinions indicate the extent to which oral testimony is really crucial in the case.

There may be another reason for giving judgment in the above type of case, despite the uncertainty of a mature dispute. We have earlier stated that the court's job is to settle disputes but that other means for settlement often existed. Although we have suggested that family disputes are best solved privately, it may be that the underlying attitude of the Indian courts is to the contrary. While it is impossible for a foreign observer to feel any certainty in matters concerning the Indian family, we would venture a guess that the emotional concern for the preservation of the family system is so great that the very hint of a developing dispute evokes the urge to settle it by all means available. It may further be that the potential bitterness is so great when a crack in the wall of family relations appears that private settlement is not very likely or satisfactory. Thus as the social value behind the goal of settling disputes increases, the tendency to disregard the limits based on the doctrine of prematurity increases.

(b) Declaratory Relief: Injunctions and Writ Petitions

The problem of prematurity is not limited to Specific Relief Act, sec. 42. Declarations are sought in many other situations along with pleas for injunctive relief and writ petitions and it is to those cases that we now turn. In State of Madras v. Champakam Dorairajah, a Brahmin sought to challenge a state rule which reserved places in educational institutions to backward classes. She claimed a violation of her rights under Article 29(2) of the Constitution, which guaranteed no bar to admission on account of caste. She had not yet applied for admission in the school. The need here was not the fuller development of facts in order to give a more complete understanding of the legal problem. Her status and the implications of the rejection of her application would not be made clearer by an actual rejection. In this respect, this case resembles the cases under Specific Relief Act, sec. 42 concerning property rights and status. However, judicial restraint was called for here for the other reason we have noted, namely to allow another resolution of this nascent dispute if it was at all possible. The court was injecting itself into an area of great social sensitivity. The issue was a purely legal one, but the emotions involved in this Communal Government order, designed to raise the status

of the depressed masses, must have been great. The Court was not unmindful of the problem. For it stated that normally it would not give judgments to those who had not yet indicated that they would so act as to call into play a piece of legislation which they sought to challenge. The Court, nonetheless, found that the “peculiar circumstances” of the case justified giving an opinion though what these circumstances were remained undisclosed.

The communal government order was struck down and the direct result was the First Amendment Act making constitutional any unequal treatment resulting from social legislation for backward classes or Scheduled Castes and Tribes. It is surely a debatable question whether courts can put themselves in a position where legislatures will be quick to reverse them, especially when the Court has reached the tender age of one year. The doctrine of “finality of a judicial judgment” has as one of its primary purposes the prevention of a loss of judicial prestige due to a non-judicial reversal of a judgment. Technically, a legislative abrogation of an opinion is not a violation of the doctrine of finality since the judgment itself is res adjudicata. However, when the specific rationale of a judgment is immediately rejected by a legislative pronouncement, much of the same downgrading of the judiciary may be produced in the public mind. In this case the Court could have made it clear whether the petitioner was in earnest about attending the educational institution or whether she was just a crusader for a legal principle which otherwise had no application to her. The adversary nature of the dispute would then be assured and the Court would not either waste time or prematurely involve itself in matters of great political import.

In Kochunni v. State of Madras the Court dismissed the objection based on grounds of prematurity. The objection here was that the

22. State of Madras v. Champakan Dorairajan A.I.R. 1951 S.C. 226, 227; the Court also considered it relevant that no objection had been taken though normally none is necessary to raise a jurisdictional question. This further indicates the Indian courts’ discretionary approach to prematurity (see fn. 7).


24. V. G. Ramachandran, The Role of the Judiciary in Independent India A.I.R. 1954 S.C.J. 95 (to set at naught a judicial verdict by an act of Parliament is not always healthy or wise; but see R. Sharma, The Supreme Court in the Indian Constitution (1959) (hereinafter referred to as Sharma) p. 278 (nullifying Supreme Court decisions is just resolving a natural conflict born of constitutional and social change).

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state, as the respondent, had not yet taken action to enforce the provisions of the statute. It is thus the opposite of the Champakam case, supra, where it was the action of the petitioner of which we were most unsure. The Court found that the statute involved changed the status of the petitioner's property interests upon its being passed, or purported to do so, and that no notification or other state action was necessary for this result. The Court said that a threat of action would normally be required if state action were necessary to affect a change in petitioner's rights.

However, Judge Wanchoo was not completely convinced that the petitioner's apprehension that he would be affected by the general words of the statute was justified. He was sure that if the challenge to the statute had been solely on the grounds of violation of the equal protection clause of the Constitution, Article 14, he would not allow the petitioner to "lead evidence" to show that he was the person whose status the statute intended to affect in a discriminatory manner. This objection is based on the inadequate development of the fact situation which leaves uncertain both the possibility of the law's application to the particular petitioner and the full implications of such an application. For these purposes a threat of state action would normally be very useful.

As to petitioner's additional challenge, grounded on Article 19(1)(f) (the right to acquire, hold and dispose of property), Judge Wanchoo had doubts which did not lead him to the point of dissent on the question of prematurity. Although not explaining why he made the distinction between Articles 14 and 19 in this respect, the learned Justice must have meant that the likelihood of petitioner's being protected by Article 19 from the effect of this statute was much clearer. Thus regarding Article 19(1)(f) the further development of the facts was not as crucial.

Indeed, there were facts in this case which made it much stronger on the point of prematurity than either the majority or Justice Wanchoo owned. On the assumption that the impugned statute covered the petitioner's property, other private persons had claimed ownership of the property, were soliciting payments of rents to themselves and had begun litigation to enforce their claims. The facts had, therefore, matured to indicate who were the proper parties despite the absence of a threat of action by the state. The actual threat to the

petitioners from private parties ensured that they could legitimately claim a grievance in a lawsuit. And, because these threats were grounded on a statute passed by the state, the state could properly be made a respondent in the case.

Furthermore, the imminent danger of substantial injury from the loss of rents guaranteed the existence of a dissatisfaction which the Court might well have felt worth its while to dispel. Normally the danger comes from a threat an immediate action by the respondent, who in this case was the state. But there is no reason why the threat of action may not come from a third party acting in reliance upon action taken by the respondent, here the passage of a statute.

However, there is a danger in relying upon individual threats springing from an assumption about the meaning of the law passed by the state. When this very case came up later on the merits as Kochunni v. Madras and Kerala, the Court held the statute unconstitutional.27 Whenever a threat comes elsewhere than from the respondent, the Court must make sure that there is a reasonable basis in the respondent’s action, i.e., the statute, for the threats. Otherwise the admitted burden of the threat cannot really be considered as imminent in so far as the state as respondent is concerned.

This may be readily seen if we look at a suit against the state based on threats by other private parties as, in reality, a suit aimed at those private parties with the state compulsorily joined as a necessary party. The procedure is not one of suit against the private parties and joinder of the state, but the purpose may be presumed to be the same. To allow a petitioner to accomplish what is, in effect, a compulsory joinder of the state in a case where the private threats are groundless would be to inconvenience the state at the whim of a scared petitioner. Furthermore, the state cannot be considered a necessary party if its statutes do not afford some reasonable basis for the threats made to the petitioner. A direct suit against the state should, therefore, be ruled premature if the injury springs from groundless threats and if the state, itself, has not threatened action.

Our analysis further indicates that the majority was too quick to seize upon the self-executing nature of the statute. That, in itself, is not an adequate basis for finding a case mature. In reality, no statute is self-executing in the sense that it may affect rights by a mere statement that those rights are changed. People must at least consider the

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statute unconstitutional. The real question is always the imminence of
danger to the petitioner from respondent's action, for it is then that
the pressure for judicial settlement may outweigh the risks involved.28 If this is the test, a "self-executing" statute may present no danger,
while a statute that does not purport to change rights at the moment
may be a serious danger if people begin taking steps in reliance upon
its eventual implementation.29

State of Bombay v. United Motors 30 presents another aspect of the
problem of prematurity. The Court noted that preliminary objections
had been made to petitioner's case on the grounds of prematurity
without going on to discuss the merits of the objections. Here a tax
was to be imposed and it was challenged as violating the limits of
Article 286 of the Constitution, which prohibits a state tax on sales or
purchases occurring outside the state. Reading the statute with the rules
promulgated under it, the Court held that the statute was constitutional.

The Court was required to interpret the statute to see if the reach
of its taxation provisions was beyond the scope of the taxing power. In
the lower court, it was urged that since no tax assessment had been
made on the petitioners, the case was premature. Justice Chagla,
below, 31 indicated that if the petitioners could show a likelihood that
the state would levy an assessment, that would be enough to establish
maturity; 32 but the learned Justice also rested his finding of maturity
on a further rationale and it is this holding which makes this case illus-
trative of a new facet of the doctrine of prematurity.

The statute in question also had a requirement that the petitioner
get a license.33 The factor in the balance which this alters is the immi-
nence and burdensome nature of the injury that the petitioner will
undergo. The need for more facts persists and the uncertainty that
the state will act continues. However, the petitioner may suffer imme-
diate injury in a way we have not yet observed. He is now being

(Harlan, J., dissenting in part at p. 1093 of L.Ed.).
32. Were this rationale alone conclusive, this case would be open to all our
prior objections based on the uncertainty of the respondent's action. Without a
threat of assessment we do not know if petitioner is a proper party. Furthermore,
administrative application to concrete situations is especially useful in giving meaning
to taxing statutes; the court here was willing to use the rules to interpret the statute,
but rejected the aid of future administrative practice.
placed on the horns of a dilemma. It is not that the state actually threatens action, but rather that the petitioner must either comply with the statute, waiving the chance to challenge it and incurring the burdens of compliance, or he must undergo the burdensome penalty for failing to apply for a license.34

There is a great irony in the fact that the dilemma and hence the injury is most acute when the statute is most vague; yet it is when there is the greatest vagueness that the development of facts is of the greatest importance in demonstrating the application of the statute to the petitioner.35 It is undeniable, however, that this dilemma may cause a burdensome and immediate injury, especially in modern society where the multiplication of state controls increases the pressures on private planning.36

Another case where a "dilemma" proved decisive was Bengal Immunity Co. v. State of Bihar.37 There the Supreme Court found that the requirements of registration, filing returns and inspection of documents, combined with the penalties for failure to comply with these requirements, provided a case ripe for decision. The High Court had found the case premature,38 urging that the facts of the case had not yet been investigated, no liability had been determined and no assessment had been made. The Supreme Court emphasized the magnitude of the petitioner's dilemma and the injury therefrom and disregarded the incompleteness of the factual development. The Supreme Court's citation of State of Bombay v. United Motors indicates that it was the dilemma in that case which proved decisive, rather than the mere likelihood of assessment.39

However, it should be noted that when the imminence of the injury is due to a dilemma and not an actual threat by the respondent, the analysis we have been making becomes more complicated. The injury must, of course, be burdensome; i.e., compliance must involve substantial loss and the penalty for non-compliance must be serious. But imminence is also required. This means that, in addition to some

35. In fact, the Bombay v. United Motors case was later over-ruled in Bengal Immunity Co. v. State of Bihar A.I.R. 1955 S.C. 661.
36. This appears to be the basis for the majority position in U.S.A. v. Storer Broadcasting Co. 100 L.Ed. 1081 (1955), 351 U.S. 192 (at p. 1092 of L.Ed.).
39. See paragraphs accompanying footnotes 30-36.
guarantee that the petitioner intends to act so as to incur a penalty, there must be some assurance that the statute applies to him. We lack a threat of either state or private action to aid us in arriving at this conclusion. It is especially important, therefore, that courts indicate wherein the petitioner's apprehension is reasonable, just as we earlier urged that the threats of third parties when based upon state legislation must be shown to have a reasonable basis in the statute. However proper it may be to relieve doubts in some cases, it remains a social value that individuals stand up to the problem of resolving many doubts themselves. When we remember that doubts often spring from vagueness, where the development of a concrete fact situation is most useful, this point takes on added force.

In this case the Court over-ruled the *State of Bombay v. United Motors* case, supra. This poses a more serious problem. In a case where there is doubt that an assessment will be made, should the Court take it upon itself to re-examine a decision given two years before, and followed the year before by litigants who accepted it as the supreme law? A case of doubtful maturity is no time to take risks with the good will and prestige which the Court commands.

In some Supreme Court cases there is only a superficial analogy to the type of dilemma discussed above and yet the case was decided without even a notation of the problem of prematurity. In *Vinod Kumar v. State of H.P.*, a notification had issued bringing into effect a land reform bill. Landowners apprehended that the provisions would be unconstitutional if applied to them; but many of the provisions required further notification or some application by the tenants for their implementation. There was no evidence that private reliance on this statute was causing injury.

The analogy to a dilemma arises because there is a discretion in someone to enforce the statute. The official responsible for the notification had it within his power to make the law in issue apply to the petitioners. But, in addition to there being no indication of the imminence of any action by anyone, the burden of the erstwhile dilemma is essentially different from what we have seen earlier. For the dilemma to be burdensome, compliance with some rule that is challenged must

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41. Himatlal v. State of M.P. A.I.R. 1954 S.C. 4U*; lor a critical view of this reversal see Sharma, Ch. XIII.

42. A.I.R. 1959 S.C. 223, 224.
involve some loss and non-compliance a penalty. But here compliance meant only waiting for the land to be taken. Non-compliance meant not waiting, *i.e.*, continuing in the normal affairs of life. We lack the normal incidents of a dilemma which make a case mature for judgment because the governmental action which is challenged does not call upon the petitioner to do anything out of the ordinary or impose a penalty for his continuing in his normal ways. Nonetheless, the Court embraced difficult and potentially volatile questions involving basic reform of the old feudal land structure.

Section 633 of the Companies Act, 1956, seems to codify the doctrine that reasonable apprehension of a claim being made against a person is sufficient to allow a court to grant a declaration of liability or non-liability, even when the dilemma created by the apprehension is spurious, *i.e.*, not imminent or burdensome. The circumstances are parallel to the type of case just discussed. Reasonable apprehension of a claim being made against a person does not appear limited to cases of actual threats, however good proof they may provide of that reasonableness. No real dilemma exists for the petitioner; he is a worried man and nothing else, waiting to be sued or prosecuted for breach of his duty as a director of a corporation. It is true that these cases under section 633 are unlikely to contain difficult constitutional questions; so we need not fear premature decision on such issues. But, in a case where the claim feared is a private one, the chance of an out-of-court settlement may be lost; and, if the director of the corporation fears a public prosecution, the court's time may be wasted if the state fails to take the anticipated action.

The argument in favour of a judicial settlement under section 633 must be based on the theory that it is important to society that these doubts be removed and a further development of the dispute be avoided. There is no reason to withhold adjudication for the purpose

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43. In *Dunichand v. Deputy Commissioner* A.I.R. 1954 S.C. 150, 151 a tenant was in fear of eviction. Compliance with the law meant waiting for eviction while non-compliance meant continuing his normal life. Here the petitioner withdrew his petition since his allotment of land had not yet been cancelled.

44. False dilemmas existed also in *Hathising Mfg. Co. v. Union of India* A.I.R. 1960 S.C. 923, where factory owners sought an adjudication that they need not pay compensation upon the closing of their undertakings even though no one had yet demanded money from petitioners; and in *State of Rajastan v. Pratap Singh* A.I.R. 1960 S.C. 1208, where petitioners challenged a regulation exempting Muslims and Harijans from paying a tax for police protection even though extra police had not been hired and no tax had been threatened.
of concretizing facts since the alleged breach of duty must already have occurred. It may well be that in a developing economy doubts among the managers of a business concerning their liability might have a paralyzing effect which the society can ill afford.\(^{45}\) Even in the absence of an actual threat or a real dilemma, therefore, the harm to a director from his state of worry may be of such social importance as to be a legal injury. The importance of resolving these doubts would then outweigh the desirability of allowing a potentially more amicable private compromise or of saving judicial time. Such a rationale would not limit the operation of section 633 to petitioners who feared a private claim, \(^{46}\) but would extend to a fear of public prosecution as well.\(^ {47}\) However, the willingness to step in where doubts exist among directors of corporations does not mean that the courts must grasp at every legal issue where a petitioner has some fear of adverse legal consequences.

Several of the points examined in our previous analysis were recognized by the Supreme Court in *Dr. N. B. Khare v. Election Commission of India*.\(^ {48}\) A citizen and prospective member of the Lok Sabha sought to prevent the Election Commission from proceeding with the polling for the election of the President of India. Under the Constitution, Article 71(1), the Court is required to resolve doubts concerning the election. The Supreme Court first noted, without deciding, the "extreme contention" of the petitioner that the doubts need not be well founded before the Court is required to hear the petition. The existence of a well-founded doubt is analogous to the requirement of a threat of action by the respondent or an imminent and burdensome dilemma in our prior discussions.

\(^{45}\) Doubts are often required to be dispelled by the Companies Act before a concrete case arises. Reduction of share capital (sec. 100) and alteration of the Memorandum of Incorporation (sec. 17) require judicial approval despite the absence of a complaint.

A similar power of judicial review in advance of a complaint is shown by the Industrial Tribunal's approval of out-of-court compromises; *Krishnan Kutty Nair v. Industrial Tribunal* A.I.R. 1960 Ker. 31, 34 (prevent over-reaching by a strong employer).

\(^{46}\) It was so limited by *Dan Singh v. Registrar of Companies* A.I.R. 1960 All. 160, 161.

\(^{47}\) In *re Bank of Deccan Ltd.* A.I.R. 1960 Ker. 15, 16: that this case was the correct interpretation is made clear by the 1960 amendments to the Companies Act, 1956, sec. 633 (2), adopting this view.

However, the Court assumed the existence of a well-founded doubt and turned to the question of when such doubts are to be resolved. This question has its parallel in our former discussion of whether the injury, even though it is imminent and burdensome, should be the subject of a suit at the present time when it would cause the Court to interfere with other means of solution or endanger its prestige by involvement in politically heated controversy. The Court held that the election process must be completed first and it laid great stress upon the general interest of the people in not postponing the election, rather than on the grave doubts of the present petitioners.

There was at work here a consciousness of the extent to which an adjudication of a premature case may interfere with other processes of social experimentation equally as important socially as the resolution of doubts and dilemmas. The Court was also probably aware of the danger of involvement in a matter of great public concern. And yet in cases discussed earlier the Court showed no concern for the social value of experimentation with statutes, preferring to relieve doubts in advance of the application of those statutes. Adjudication of a premature controversy where state action is challenged deprives the normally inarticulate public of its right to political experimentation by granting the articulate petitioner the answers to questions about his future security.

Nor have Indian courts always been as concerned with the internal political process as the Supreme Court was in the N. B. Khare case, 49. The reluctance to interfere with other non-judicial processes of solution finds a parallel in the doctrine of exhaustion of administrative remedies. Like prematurity, the purposes are two-fold: there is hope that the administrative tribunal will, through its expertise and familiarity with the subject of litigation, better develop the fact situation so that all of its implications will be understood; and the courts may save time or avoid difficult issues by allowing the administrative tribunal to attempt its solution. See, e.g., N. S. Assurance Co. v. Mahal Singh A.I.R. 1960 Punj. 406 wherein the Court held that the Tribunal's findings were only a report to the Insurance Claims Board and were not final, i.e., they were subject to further administrative review and elucidation; but, even if they were final, the Court went on to say that the Board could dispose of the case as it liked, given the final conclusion as to the facts, and the High Court might never have to deal with the problem. 50. A similar reluctance to adjudicate where it would interfere with the political process was shown by the High Court in Bharabendra v. State of Assam A.I.R. 1953 Assam 162 (petitioner cannot challenge legislation still in the stages of a bill) and in Nirmal Bose v. Union of India A.I.R. 1959 Cal. 506, 518 (the Court refused to give judgment on complicated constitutional questions in advance of a firm decision by the Prime Minister to act in a way which raised those issues, i.e., to dispense with the approval of Parliament and order West Bengal to implement a mere executive order).

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supra. In *Bombay Municipal Corp. v. Ramchandra*, the Court held that the consideration by the municipality of a resolution was mature for an injunction. The Court was urged to wait until the resolution was passed but it rejected this contention on the grounds that the court need not wait until damage is done if there is a likelihood of damage. The Court did not analyze the voting structure in the municipality to explain this likelihood. Nor was any concern shown for the fact that they were injecting the judiciary into the middle of a heated political controversy, for the resolution dealt with the Communist government in the State of Kerala.

In *Allen Berry Co. v. Vivian Bose*, the Court was asked to review some aspects of a commission appointed to look into business practices. There was nothing in the case to indicate that the points examined had become relevant in any concrete case. It was admitted that no one had yet claimed the privilege against self-incrimination. Nor does it appear that the bias of the commission members, the justness of the procedures or the appointment of investigating officers had caused any danger to the petitioner. Yet the Court was willing to decide that bias was not a disqualification, that the procedures were just, that officers could be appointed to investigate, and that the privilege against self-incrimination could be claimed. Petitioner thus obtained a complete canvassing of the activities of a body assigned to do investigation for the purposes of suggesting legislation in advance of any threat or injury to himself.

### III. Cases and Critique on Obiter Dictum

Another method by which courts may anticipate questions not necessary for decision is by giving obiter dictum. Dictum may have all the dangers of a premature judgment. The facts and the arguments on the point on which the dictum is issued may be vague and undeveloped. Furthermore, the court may intrude upon sensitive areas where other solutions have yet to be tried and for which other solutions may be better. However, the primary arguments in favour of taking cases of doubtful maturity do not exist where dictum is concerned. Those arguments were based on the danger of the development of

52. A.I.R. 1960 Punj. 86.
53. *Ram Krishna Dalmia v. Justice Tendolkar* A.I.R. 1958 S.C. 538, 546-47 (investigative bodies with power to recommend, but not to enforce, are of great importance to the government in deciding how to legislate).
doubts into unmanageable disputes and the social cost to a developing economy of such doubts. But dictum, by definition, is beyond the holding in a case. The need for settling doubts and disputes in the particular case before the court has been fulfilled by that holding. On the other hand, dictum may serve a useful purpose in leading the law in the direction which it will take in the future. Unnecessary pronouncements, if not recklessly anticipatory of future questions or impinging upon sensitive political areas, may encourage the kind of judicial debate which is the stuff of creative judicial law-making.54

Two very different kinds of dictum must be noted at the outset: (1) the court may refuse to discuss a point of law applicable to the facts of the case, but unnecessary for decision of the case because another legal holding made it superfluous; 55 (2) or the court may refuse to make a statement of law broader than the actual facts of the case require.56

The use of the two types of dictum may have different risks. In the first case, it is likely that the relation of the law to the facts in the case has been thoroughly argued. The main reasons for withholding judicial pronouncement are the unwillingness to inject the court into difficult and far-reaching questions of law until necessary,57 the wastage of judicial time, and the risk that the judges will not really concern themselves with the legal reasoning behind their assertions.

Thus, in Delhi Cloth & Gen. Mills Co. v. Harnam Singh,58 the Court refused to decide a question which "bristled with difficulties" because it was unnecessary in view of the holding in the case. And in State of Madras v. Gurviah Naidu 59 the Supreme Court deftly avoided a difficult

56. State of Punjab v. Ajaib Singh A.I.R. 1953 S.C. 10, 15; an exhaustive analysis of Articles 21 (1) & (2) of the Constitution was withheld and decision limited to the application of that Fundamental Right to the facts of the particular case.
57. Two examples from High Court cases will demonstrate this involvement in difficult and important questions: Debi Soren v. The State A.I.R. 1954 Patna 254, 255-60 contained a long dictum supporting the constitutionality of a statute which did not apply to the defendants in the case; and in Nirmal Bose v. Union of India A.I.R. 1959 Cal. 506, the Justice said that the central government's action was not immune from judicial scrutiny as an Act of State, that relief could be given against West Bengal, and suggested that executive action might be unconstitutional without legislative approval—all this despite the fact that materials were inadequate for a final solution to be reached, p. 509, and governmental action was at too premature a stage for final decision to issue, p. 518.
issue concerning the propriety of the High Court's granting of a certificate of fitness for appeal to the higher Court.\textsuperscript{60} The need for that certificate was dispensed with by the granting of special leave to appeal. There are numerous other cases where the Supreme Court refused to discuss points of law because a decision on another legal issue made it unnecessary.\textsuperscript{61}

With the second kind of dictum, in addition to the above difficulties, we also have a grave risk that the application of the overly broad statement of law to fact situations not before the court will be inadequately understood and argued.\textsuperscript{62} Therefore, in \textit{The Supdt., Central Prison v. Dr. Lohia}\textsuperscript{63} the Court refused to say whether a statute, held to be an unreasonable restriction upon a Fundamental Right, could be redrafted to avoid a claim of unreasonableness in the absence of a particular case presenting this question. And in \textit{Basheshar Nath v. I. T. Commr.}\textsuperscript{64} two judges rigidly limited the issue of individual waiver of Fundamental Rights to Article 14 of the Constitution which alone was relevant in the case, refusing to become involved with the general question of waiver of Fundamental Rights.

However, the Court is not of one mind on this issue and has often yielded to the impulse to speak on a point of law. Even in the Delhi

\textsuperscript{60} A similar desire to avoid difficult constitutional questions was shown in \textit{Aswini Kumar v. Arabinda Bose} A.I.R. 1952 S.C. 369, 370 ("... we desire to guard ourselves against being taken to have decided that a proceeding under Article 32 would lie after an application under Article 226 for the same relief on the same facts had been rejected after due inquiry by a High Court. We express no opinion on that point."). See also \textit{Janardhan Reddy v. State of Hyderabad} A.I.R. 1950 S.C. 217, 226.

The policy of avoidance of such issues is built into Article 228 of the Constitution where the High Court must decide a question of constitutional law only if it is necessary for the disposal of the case.


\textsuperscript{62} A possible exception to this is the unusual case where the more general proposition of law is treated as being raised by the specific facts of the case, to the explicit exclusion of narrower points of law. This occurred in \textit{Central Bank of India v. Their Workmen} A.I.R. 1960 S.C. 12, 28. This Court refused to answer two questions about specific types of salary bonuses involved in the case, because argument was presented only in terms relating to salary bonuses in general and no evidence had been presented on the more specific points.

\textsuperscript{63} A.I.R. 1960 S.C. 634, 642.

\textsuperscript{64} A.I.R. 1959 S.C. 149, 157.
Cloth & Gen. Mills v. Harnam Singh case,\textsuperscript{65} after noting the difficulties of the issue, the Court indicated in which direction it was leaning even though refusing to give a final opinion. And in Basheshar Nath v. I. T. Commr.,\textsuperscript{66} two justices did not limit their opinions to the question of waiver of Article 14 rights but specifically made their remarks applicable to other rights not at issue in the case.\textsuperscript{67}

The willingness to hint at broader holdings than necessary has led to constitutional amendments being passed. In Saghir Ahmad v. State of U.P.,\textsuperscript{68} the Court gave a gratuitous hint that state monopolies may violate Article 301,\textsuperscript{69} unless they impose reasonable restrictions on private enterprise. No decision on this point was necessary since the case was disposed of on other grounds. But the result was Clause 4 of the Fourth Amendment Act, assuring the continuation of state schemes of public ownership as against attack based on Article 301.\textsuperscript{70} The solemn step of a constitutional amendment was precipitated by a casual and unnecessary dictum. Indeed, it was not even dictum. It was an outlining of the arguments pro and con with an indication of possible solutions. Such is the danger of even the most explicitly non-authoritative pronouncements.

It has been suggested that these amendments following judicial statements do not cause damage to the Supreme Court.\textsuperscript{71} But it cannot help matters when the people tell the Court that it is wrong about the fundamental desires of a nation. It is, of course, true that the Court is expected to maintain strict impartiality and aloofness from politics. However, it is equally essential that the public does not consider the Court to reside in an ivory tower. Confidence in the judiciary depends on both extremes being avoided. Sensitivity to the broad social aims of the people is not concern with politics. When a court finds itself in continual disagreement with the country on its basic law, it runs a risk of losing the prestige and confidence on which its power to command respect for its decisions depends. It is certainly not inadvisable for a court to avoid such a clash by avoiding unnecessary dictum.

\textsuperscript{65} A.I.R. 1955 S.C. 590.
\textsuperscript{66} A.I.R. 1959 S.C. 149.
\textsuperscript{67} A.I.R. 1959 S.C. 149, 162 (Bhagwati, J.), 185 (K. Subba Rao, J.).
\textsuperscript{68} A.I.R. 1954 S.C. 728, 741-42.
\textsuperscript{69} This Article guarantees free trade, commerce and intercourse throughout India.
\textsuperscript{70} Amendment embodied in Article 305; see Sharma, p. 275.
\textsuperscript{71} Sharma, p. 278.
If we turn to the High Courts, we find a definite fondness for dictum, although there are many cases which reject such a practice. There is a variety of obiter ranging from a hint at possible solutions, to comments on possible solutions, to an elaborate discussion of the legal issues involved. Such an elaborate discussion may at times be difficult to distinguish from an alternative holding. An alternative holding is, by virtue of being a holding, dispositive of the case before the court; but it shares with dictum the characteristic of being unnecessary, because another holding is sufficient to dispose of the petitioner's plea. The dictum which may be confused with an alternative holding is not the statement of law too broad for the facts of the case. This could never be confused with an alternative holding, because a holding must refer to those facts. It is rather the dictum which is unnecessary because another statement of law disposes of the case. The difference between such dictum and an alternative holding must rest largely on the intention of the judges. Since the point is likely to have been thoroughly argued because of the kind of dictum involved, the real question is whether or not the judges have fully applied their minds to the question and given a considered judgment, rather than a casual or off-hand statement of law. If the statement is considered, the dictum rises to the level of being an alternative holding and the main arguments against such opinions remain the wastage of judicial time and premature involvement in difficult and far-reaching questions of law.

One High Court refused to give a legal opinion despite its specific notation that full arguments had been made before it. However, other courts have spoken when argument was presented for various reasons. Sometimes it is considered sufficient that counsel have fully


presented the issues.\footnote{Debabrata Ghose v. Jnanendra A.I.R. 1960 Cal. 381, 386.} Sometimes the possibility of reversal on other grounds prompts the court to comment on a point which the reversal would make relevant.\footnote{Sanyasi Raju v. Karnapadu A.I.R. 1960 A.P. 83, 89 (no definite holding, only comments).} When the court gives a reason for its dictum we may at least feel confident that full consideration has been given to the legal questions and that the opinion, therefore, is closer to an alternative holding than obiter dictum. When no reason is given it is open to serious doubt if the court has carefully considered its opinion. It will sometimes happen that a judge will acknowledge that an opinion is unnecessary but then state his conclusions anyway.\footnote{Damodaran v. State A.I.R. 1960 Ker. 58, 63 (for finality sake).}

Two reasons which are usually given are based on the theory that time and energy have gone into arguments of counsel and that these should not be wasted. In the case of a possible reversal this has some weight for it may avoid reargument on a certain issue.\footnote{cf. paragraphs accompanying footnotes 45-47 concerning the elimination of concern among directors of corporations; both situations present threats of economic wastage.} But where the parties to the suit do not stand to suffer by a reargument, the mere fact that the case has been fully argued is no reason to give an opinion. The parties have got what they wanted, a settlement of their dispute. The litigants' effort may purchase a settlement but not satisfaction of their curiosity as to some point of law.\footnote{Analogous to the problem of dictum is that of the mootness of a question. In both situations no opinion on a legal issue need be given because events have made it unnecessary. With dictum the event is the disposition of the case on another ground; with mootness it is the cessation of the dispute because of events outside the courtroom.}

In the case of a casual hint or comment,\footnote{Other cases where this type of dictum was given are: Sonar Bank v. Cal. Eng. College A.I.R. 1960 Cal. 409, 413; Bom. Municipal Corp. v. Ramchandra A.I.R. 1960 Bom. 58, 61; Bansidhar v. Ramchandra A.I.R. 1960 M.P. 313, 315.} it is even more likely that the judge has not thought through the full implications of his
statements. It might be thought that the absence of a definite judicial assertion would compensate for the lack of judicial deliberation. But we cannot assume that the weight given to casual comments decreases with the same rapidity as the judicial thought which went into the comment or hint. In fact, we have seen one case where a judicial hint was relied upon to the extent of passing a constitutional amendment.84 It is more likely that a judicial pronouncement, no matter how casual, will carry weight with private parties who are attempting to plan their activities or are contemplating litigation. It is no answer to say that no one should rely on dictum, especially the casual sort. The courts have spoken and the responsibility lies with them to a large extent.

Some High Courts have said that Supreme Court dictum is binding. The Bombay High Court has made it clear, however, that such dictum must be a “considered opinion,” rather than a “passing casual observation” and must be on a point which “arose for determination” in the case.85 This would normally exclude the type of dictum which is too broad for the facts of the case, for in that situation the point on which dictum was given would not have “arisen for determination.” It also excludes those statements of law on points arising for determination which are dictum because they fall short of being alternative holdings. As we have noted earlier, such pronouncements are dictum specifically because they are “casual.”

The dictum which can be binding will, therefore, normally be of the type relating to the facts of the case, i.e., arising for determination in the case, but made unnecessary for decision because of another statement of law.86 An example from a High Court case will serve to explain this kind of dictum. In Debi Soren v. State87 the High Court found the defendants innocent of sedition; but they also said that the sedition law was constitutional in several pages of obviously “considered” opinion. This discussion was not a link in the chain of reasoning.

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84. See text accompanying footnotes 68-70.
85. K. P. Doctor v. State of Bombay (FB) A.I.R. 1955 Bom. 220, 224 (held, Supreme Court dictum was casual so not binding); Mohandas Issardas v. A. N. Sattanathan A.I.R. 1955 Bom. 113, 115-17 (Supreme Court dictum was on a point not arising for determination so not binding, p. 118).
86. The one exception to this is the unusual case, noted in footnote 62, where the broader proposition of law “arises for determination” and is “considered” to the explicit exclusion of the narrower issue.
necessary for the holding of the case, for constitutionality would have been pertinent to the judgment only if the defendants were guilty under the sedition law. Nor could it stand independently as an alternative holding since it was not dispositive of the case. Nonetheless, this issue "arose for determination" since at the outset counsel could not be sure his clients would be found innocent of acting seditiously.

To consider such dictum, if given by the Supreme Court, as binding is to show an especial fondness for obiter which is not in keeping with the usual rule that only legal statements which resolve a dispute are binding. It is an example of the Indian courts' refusal to engage in expounding law only when they are required to settle a dispute, a tendency which also finds expression in taking cases of doubtful maturity. However, the Bombay High Court is far from endorsing all types of Supreme Court dictum, as the Allahabad High Court has apparently done. The latter Court's position is extreme in its inclusion of casual judicial assertions among that dictum which is binding.

However, we do not wish to imply that casual dictum of whatever kind is to be totally ignored, even if it is not to be binding. We have already noted its creative utility in the dialogue of higher and lower courts, a dialogue which is expressly dependent upon dictum not being binding. The Madhya Pradesh High Court has, in fact, asserted its right to use Supreme Court statements which go beyond the ratio decidendi of the case if it finds them useful, even if it refuses to be bound by them.

IV. Conclusion

We have seen a tendency on the part of Indian courts to adjudicate in many situations where a case was of doubtful maturity and to issue obiter dictum. The reasons for this willingness may become more apparent from a brief comparison with the attitude of the United States federal courts. The U.S. federal courts have usually approached the issue of prematurity, more often called ripeness, as a constitutional

88. In fact, the Bombay High Court decision to follow Supreme Court dictum is itself dictum; for in both cases where it asserted the binding nature of Supreme Court dictum (see fn. 85), it refused to follow the highest Court's statements, because they were either casual or on a point not arising for determination.
question based on the terms "case or controversy" in Article III of
the U.S. Constitution.91 The Indian courts have treated the matter
as one of discretion, considering the advantages and disadvantages of
judicial review.92 This difference in approach has meant a greater
unwillingness in U.S. federal courts to take cases of doubtful maturity.

That is not to say that there are no U.S. federal cases which advo-
cate a more flexible approach. The dissent in the Boyd case 93 and the
majority in the Storer and CBS cases 94 show a concern for the doubts of
citizens and for the dilemmas in which they can be placed by legislation
or other governmental action. The passage and upholding of the
constitutional validity of the Declaratory Judgment Act and the dis-
cretionary approach to this form of relief also indicate that the U.S.
federal courts are growing more flexible.95 However, this develop-
ment is comparatively recent. There is still a large body of judicial
opinion resisting this development. In India the main trend is in
favour of flexibility and towards giving judgment in cases of doubtful
maturity or issuing obiter dictum. There is no significant body of
opinion against this approach and, in fact, there is little sentiment
that this is even a problem.

The fact that the U.S. federal courts' trend away from rigidity in
this matter is recent may give us a clue to the reasons for Indian
leniency. The Indian Constitution is a 20th century product. It is
now a commonplace generalization that the spread of governmental
activity into many spheres of life has vastly complicated modern liv-
ing.96 The sense of oppression and uncertainty that comes from the
intrusion of the government is a potentially disruptive factor in con-
temporary life. General dissatisfaction, if allowed to fester, could grow

91. Davis, "Ripeness for Judicial Review," 68 Harv. L. Rev. 1122, 1133 (1955);
and see fn. 2.
92. See fn. 7.
94. See footnotes 29 & 36.
95. For a while it was expected that a Declaratory Judgment Act would be un-
constitutional due to Willing v. Chicago Auditorium Ass'n. 72 L. Ed. 880 (1928), 277 U.S.
274; but such an act was held constitutional in Aetna Life Ins. Co. v. Haworth 81 L.Ed.
617 (1937); 300 U.S. 227 (declaratory judgment not the same as advisory opinion, at
p. 622 of L. Ed.). However, the power to give declaratory judgments is discretionary
within the constitutional limits of the power of the judiciary to decide cases and
controversies; Developments in the Law, Declaratory Judgments 194-1-1949, 62 Harv.
L. Rev. 787, 805-17 (1949).
of modern life urges a quick settlement of disputes, here involving labour trouble).
out of hand. This is especially true when the government is attempting democratic revolutions involving deep inroads into ancient vested interests.97

The dangers of allowing a dispute to develop are, therefore, much greater than in earlier days. The social value in preventing disputes and of resolving doubts which are nascent disputes increases.98 In terms of our original analysis, other channels of settlement seem fraught with danger and so courts are more often resorted to. It is, of course, true that the 20th century has come to the United States also, bringing with it governmental impingement upon private affairs. But the Indian experience is different. We have already mentioned the degree of change which is being brought about in India. It is also true that the latent forces of division due to great varieties of linguistic, cultural, religious and social groups are continually near the surface. The goal of settling disputes by means other than private or political channels seems sufficiently urgent so that the limits of judicial competence may be stretched further than in the U.S. federal courts.99

Indian conditions provide another reason for stretching the capacity of the courts to handle cases of doubtful maturity to the limit. The paralysis of private planning and the wastage of human energy arising from doubts and mistakes concerning the law are major social evils in a country emerging from centuries of economic standstill.100 It may be worthwhile to gamble with the courts' prestige in a premature grappling with large social issues rather than run the risk of time-consuming political solution or a period of paralysis of activity due to doubts and dilemmas. This statement of the reasons behind the Indian willingness to overlook some of the risks of prematurity is in no way meant to detract from the serious risks which we have earlier pointed out. But it does indicate that the role allotted to the judicial system

97. See e.g. land reform cases in footnotes 25 & 42.
98. See M.V. Pylee, Constitutional Government in India (1960) p. 439 (courts prevent conflicts just as preventive medicine is administered by doctors); A. T. Markose, Judicial Control of Administrative Action in India (1956) p. 605 (complexity of modern age changes concept of the court from a provider of remedies for violated rights to legal experts telling litigants about the law which they are willing to obey as gentlemen).
99. Sheoshanker v. M.P. State Gov't. A.I.R. 1951 Nag. 58, 59 adopted the stricter U.S. federal rule as the Indian approach. However, the flexibility we have so far noted (see fn. 7) indicates that this is not the Indian rule.
100. cf. discussion of Companies Act, 1936, at footnotes 45-47 and accompanying text.
must be considered not only in the light of these risks and limitations, but also with the needs of the society for judicial settlement in mind. These needs indicate that the goal of judicial resolution of disputes is especially important in India.

It is also necessary for us to examine more closely the reality of these major risks which the Indian courts must face in deciding cases of doubtful maturity and in issuing obiter dictum. The U.S. Supreme Court, in its inception, tread a very careful course for the very reason that it lacked a sense of security that its word would be obeyed.\textsuperscript{101} It had a keen sense of awarenness of the reservoir of public goodwill which it could command. However, the Indian Supreme Court was born secure in the assurance that it had the power of judicial review of statutes.\textsuperscript{102} This is both important in itself and symptomatic of a basic attitude of confidence in the Supreme Court that is more pervading than in the United States. This basic attitude makes the element of risk less of a danger than would originally appear.

In India, courts are considered absolutely impartial. They are the one place and the judges are the one group of people in whom the public can repose complete confidence when the vast administrative machinery appears arbitrary and capricious. They are unequivocally styled the protectors of Fundamental Rights and guardians of the Constitution.\textsuperscript{103} One author has contrasted the strict impartiality and freedom from politics of Indian courts with the situation in the United States where there may be a suspicion that the courts are not always free from political influence.\textsuperscript{104} Whether the appraisal of the U.S. or Indian courts is accurate or not is immaterial. The crucial point is the sense of confidence in Indian courts which this author's attitude reflects. The way in which Indian courts are looked upon as repositories

\textsuperscript{101} Hudson, "Advisory Opinions of National and International Court", 37 Harv L. Rev. 970, 976 (1924).

\textsuperscript{102} Article 32 gives the power to the Supreme Court to enforce Fundamental Rights; a similar power is given to High Courts by Article 226. Article 13 (2) makes it clear that laws abridging such rights are void. A similar result in the United States was reached only by judicial interpretation; Marbury v. Madison 2 L. Ed. 60 (1803).


\textsuperscript{104} By contrast, only a minority of the justices of the U.S. Supreme Court characterize themselves as protectors of fundamental liberties: see e.g. Barenblatt v. U.S. 3 L. Ed. 2d 1115, 11159 (1959), 360 U.S. 109 (Black, J., dissenting) (courts are guardians of the Bill of Rights).

\textsuperscript{105} Sharma, p. 307.
of impartiality and legal wisdom may explain why they are inclined to
give obiter dictum when there is no urgency for the settlement of a
dispute at all. For the very bestowal of great respect upon courts may
courage them to view their function of expounding law as independent
of their role as settlers of disputes.\textsuperscript{105}

There are other signs of this exalted position of the courts. When
a constitutional issue is involved in a case it may be removed to the
High Court.\textsuperscript{106} When there is a substantial question of constitutional
law involved there is a right of appeal to the Supreme Court.\textsuperscript{107} This
must be reflection of the great prestige and weight which higher court
judgments carry and of a feeling that such important questions belong
in those courts. Significantly, in the U.S. federal system, there is no
right of appeal to the Supreme Court merely by virtue of a constitu-
tional question being involved,\textsuperscript{108} and the Court of Appeals (roughly
comparable to the High Courts) does not get a case until the lower
court is finished with it regardless of its constitutional content.

The attitude towards contempt of court from newspaper articles
reflects the ready willingness to punish attacks on this judicial prestige.
There is an obvious sense of the need to guard this prestige which
springs from a sense of the importance of the public image.\textsuperscript{109}
Similarly, Article 211 of the Constitution forbids legislative discussion
of the activity of the High Courts or the Supreme Court in the
discharge of their duties.

Furthermore, there is no feeling in the Indian tradition of high
regard for the litigious minded person anxious to pursue his self-
interest. Either self-effacement or resort to the advice of wiser
and elder personages might often be preferred in comparison with
the pressing of an adverse claim. The Supreme Court itself may
derive some of its special prestige from an unconscious association
with such a distinguished body of elders. And the tendency to

\begin{footnotes}
\item[105] Sharma, at p. 305 and Ch. X notes approvingly the practice of making
asides and off-hand comments by the Indian Supreme Court while stating that it is
not normal for courts of high status and is disliked by “professional” lawyers.
\item[106] Article 228 of the Constitution of India.
\item[107] Substantiality in Article 132(3) means only that a difference of opinion
exists, not that the issue is of general importance; \textit{Jang Bahudin v. Mohindra College}
\item[108] The Court's discretion must be appealed to; 28 U.S.C.A. 1254 (1) (from
Courts of Appeal in federal system) and 1257 (3) (from state courts).
\item[109] \textit{Aswini Kumar v. Arabinda Bose} A.I.R. 1953 S.C. 75, 76 (apology for impugning
Court's motives).
\end{footnotes}
accept the courts' role in cases of doubtful maturity could be based on a tradition of respect for the body of elders who would bring relief from the pressures of a nascent dispute in an uncontentious proceeding.\(^{110}\)

A further factor which contributes to a sympathy with the courts' tendency to deal with more abstract cases is the teaching system in law colleges throughout most of India. Students are not confronted with the case-method of study or the Socratic (question-answer) method of teaching except in a few isolated cases. This fosters an attitude which views the law less as concrete applications of social policy and more as abstract general propositions. This helps to explain why the Allahabad High Court could base its opinion that Supreme Court obiter is binding upon Article 141 of the Constitution which says that "law declared by the Supreme Court" is binding.\(^{111}\) For it is only a conception of law as generalizations which can include obiter dictum within its definition.

The foregoing analysis indicates that the capital of good will and respect upon which the courts may draw when deciding cases of doubtful maturity or issuing obiter dictum is much greater than might at first be apparent. This respect for the courts suggests that the power to settle disputes which are volatile or which would otherwise receive political attention is fairly secure since the social pressure and individual inclination to accept the courts' decision is great. Whatever risks there may be of loss of prestige from interference in private and political matters may, therefore, be worth taking.

The truth of this assertion cannot be fully tested, however, until the ruling party in India loses its present overwhelming majority, capable of easily amending the Constitution. Until now governments disapproval of a judicial pronouncement has led to easy revision of the basic law. The full clash can only occur in the future and the courts' prestige will then be fully tried. It must also be remembered that the courts' prestige is no remedy for undeveloped facts and an excessive judicial workload.

Moreover, the danger of judicial over-confidence remains. Social upheavals unleash energies which the most respected of courts may not


\(^{111}\) *Union of India v. Firm Ram Gopal* A.I.R. 1960 All. 672, 680.
be able to settle. Erosion is a slow process. The extent to which it has occurred can only be known when put to the test. If it is true that the reservoir of respect for the judiciary is limited, however great it may be, the courts must consider that someday they may need all of their prestige to meet a particular challenge. At that time it will matter if the court has judicially conserved its strength. The giving of decisions in cases of doubtful maturity and of obiter dictum is one potential source of exhausting that strength.

112. One possible source of erosion already exists in the compulsory retirement age for judges. Suspicions may grow that the appointments of judges after retirement to various positions will gradually lead them to temper opinions which are anti-government.

113. In another Article "Advisory Opinions in India" (to be published in Vol. IV No. 3 of this Journal) the author tests some of the hypotheses developed above. The problems of maturity of facts for an accurate and effective decision and the risk attendant upon a court's unnecessarily intruding into private and political affairs are further examined. [Ed.]