Government Of Andhra Pradesh & Ors vs Smt. P. Laxmi Devi on 25 February, 2008

Equivalent citations: AIR 2008 SUPREME COURT 1640, 2008 AIR SCW 1826, 2008 (3) SRJ 475, 2008 (3) SCALE 45, 2008 (4) SCC 720, (2009) 1 KCCR 54, (2008) 5 ALLMR 24 (SC), (2008) 70 ALLINDCAS 65 (SC), 2008 (5) ALL MR 24 NOC, (2008) 3 CIVILCOURTC 275, (2008) 3 SCALE 45, (2008) 105 REVDEC 619, (2008) 1 WLC(SC)CVL 608, (2008) 2 GUJ LH 167, (2008) 73 ALL LR 324, (2008) 2 ANDH LT 100

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Bench: H.K. Sema, Markandey Katju

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           CASE NO.:
Appeal (civil)  8270 of 2001

PETITIONER:
Government of Andhra Pradesh & Ors

RESPONDENT:
Smt. P. Laxmi Devi

DATE OF JUDGMENT: 25/02/2008

BENCH:
H.K. Sema & Markandey Katju

JUDGMENT:
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J U D G M E N T CIVIL APPEAL NO.8270 OF 2001 MARKANDEY KATJU, J.

1. This appeal by special leave has been filed against the impugned judgment of the Andhra Pradesh High Court dated 8.5.2001 in Writ Petition No.12649 of 2000.

2. Heard learned counsel for the parties and perused the record.

3. The writ petition was filed in the High Court praying for a declaration that Section 47A of the Indian Stamp Act as amended by A.P. Act 8 of 1998 which requires a party to deposit 50% deficit stamp duty as a condition precedent for a reference to the Collector under Section 47A is unconstitutional. By the impugned judgment the High Court has declared it unconstitutional. Hence, this appeal.

4. Under Section 3 of the Indian Stamp Act, 1899 certain instruments are chargeable with the duty mentioned in the Schedule to the Act. Item 23 in the Schedule to the Act mentions a `conveyance' as one of the documents requiring payment of stamp duty. A `conveyance' is defined in Section 2(10) of the Act and includes a sale deed. Since in the present case we are concerned with payment of stamp duty on a sale deed, we have referred to the above provisions.

5. Experience showed that there was large scale under valuation of the real value of the property in the sale deeds so as to defraud the Government's proper revenue. In the original Stamp Act there was no provision empowering the revenue authorities to make an enquiry about the value of the property conveyed for determining the correct stamp duty. Hence amendments were made to the Indian Stamp Act from time to time in several States including amendments by the Andhra Pradesh Legislature e.g. by the Indian Stamps (A.P. Amendment) Act 22 of 1971, Indian Stamps (A.P. Amendment) Act 17 of 1986 and ultimately by the AP Act 8 of 1998 (with effect from 1.5.1998). The scheme of Section 47A was to deal with such cases where parties clandestinely undervalued the property to evade payment of the correct stamp duty.

6. After the 1998 amendment, Section 47A(1) of the Indian Stamp Act as applicable in the State of Andhra Pradesh reads as under :

> "47A Instruments of conveyance, etc. how to be dealt with (1) Where the registering officer appointed under the Registration Act, 1908, while registering any instrument of conveyance, exchange, gift, partition, settlement, release, agreement relating to construction, development or sale of any immovable property or power of attorney given for sale, development of immovable property, has reason to believe that the market value of the property which is the subject matter of such instrument has not been truly set forth in the instrument, or that the value arrived at by him as per the guidelines prepared or caused to be prepared by the Government from time to time has not been adopted by the parties, he may keep pending such instrument and refer the matter to the Collector for determination of the market value of the property and the proper duty payable thereon.
>
> Provided that no reference shall be made by the registering officer unless an amount equal to fifty per cent of the deficit duty arrived at by him is deposited by the party concerned."

7. Under sub-clause (2) of Section 47A of the Stamp Act on receipt of a reference under sub-section(1), the Collector has to give opportunity of making a representation to the parties, and after holding such enquiry as prescribed by the Rules, shall determine the market value of the property which is the subject matter of the instrument, and the duty thereon.

8. The respondent herein, had agreed to purchase land bearing S.No.594/B situated at village Kapra of Keesara Mandal of Ranga Reddy District. The agreement of sale was entered into on 25.1.1989 and as there was breach of performance of the contract on the part of the prospective vendor, a suit being O.S. No.1416 of 1997 was filed before the II Additional Senior Civil Judge, Hyderabad and the

same was decreed. When the sale deed was not executed pursuant to the decree, Execution Petition No.5 of 2000 was filed. An officer of the Court was deputed to present the sale deed, which was stamped according to the directions of the Senior Civil Judge.

9. The registering authority raised objection with regard to the quantum of non-judicial stamp on which the sale deed was engrossed. By letter no.288/2000 dated 19.2.2000, the registering authority, the Sub-Registrar, Malkajigiri, Ranga Reddy District, conveyed to the Second Senior Civil Judge, City Civil Court, Hyderabad that the document has to be referred under Section 47A and as a condition precedent for such reference, called upon the party i.e. the respondent herein, to pay duty on 50% of the differential amount according to the estimate made by him. Against this demand the respondent filed a writ petition in the High Court.

10. In the writ petition filed by the respondent herein, it was inter-alia, contended that the estimate made by the registering authority was only provisional, and that will attain finality only after the Collector on a reference under Section 47A adjudicates the same, and for the reference for such adjudication no obligation can be imposed to deposit 50% of the deficit duty. Hence the said provision contained in the proviso to Section 47A is arbitrary and unreasonable violating the Fundamental Rights guaranteed in Articles 14 and 19(1)(g) of the Indian Constitution.

11. A counter affidavit was filed by the State Government in the writ petition. The relevant paragraphs in the counter affidavit are quoted below :

> "In reply to the allegations made in the affidavit it is submitted that a sale deed was executed by II Senior Civil Judge, City Civil Court on 6.1.2000 and presented before me on 7.1.2000 through one of the staff members. The sale deed was admitted to registration and kept pending for want of clarification with regard to market value. The market value is arrived at Rs.6,17,80,500/- as per the market value guidelines for 33 acres 12 guntas whereas the sale deed executed was for a consideration of Rs.2,40,000/-. Thus there is huge loss to the Government Exchequer to a tune of Rs.70,77,160/- in stamp duty. Therefore, I sought clarification from the District Registrar, R.R. District (2nd Respondent). The 2nd respondent in his letter dated 473/G1/2003 dated 9.2.2000 ordered me to take action under Section 47A of Indian Stamp Act for determination of market value. Hence the action taken by the 3rd respondent i.e. Sub- Registrar, Malkajgiri is true and proper in the matter.
>
> In reply to the allegations made paras 6 to 8 of the petitioner's affidavit it is submitted that the petitioners are liable to pay 50% of the deficit amount as per the Indian Stamp (A.P. Amendment) Act, 1998. The appeal filed by the petitioner is without any merits and is liable to be dismissed with a direction to the petitioner that 50% of the deficit amount assessed by the Sub-Registrar concerned and as per the directions of the Hon'ble Chief Judge, City Civil Court, Hyderabad should be deposited before a reference could be made under Section 47A of the Indian Stamp Act, as amended through Act No.8 of 1998. It is submitted that the proviso under Section 47A(2) was amended and the amendment has come into force with effect

from 1.5.1998. Hence, it is necessary that the petitioner shall deposit the deficit duty as determined by the registering officer".

12. By the impugned judgment the High Court has declared Section 47A of the Indian Stamp Act as applicable to State Government to be unconstitutional.

13. In the impugned judgment the High Court has observed :

"The imposition of deposit of 50% of the differential stamp duty for referring the document to the Collector runs beyond the object and intendment of the above statutory provision. The object and intendment of the Stamp Act is to collect the proper stamp duty and such proper stamp duty is dependent upon the determination of the market value of the subject matter of the document and such determination is only made by the Collector and until such determination is made by the Collector, the document which is received for registration even after collection of whatever stamp duty deposited and the registration fee is paid by the party, is not released to the party, but is kept pending registration and such document kept pending registration is not having any evidentiary value and is not entered into the books of registration and no certified copy of the same can be granted and no rights flow from such document, be it sale, exchange, gift, mortgage, lease, etc. By keeping the document pending registration, there is enough safeguard for collecting the deficit stamp duty, as in the event of the Collector accepting the valuation suggested by the Registering Office and the party not paying the said stamp duty, the document remains under pending registration and even may be returned to the party for want of the payment of the differential stamp duty. This being the aim and intendment of the stamp duty protecting the public exchequer, there is absolutely no nexus for calling upon the party to deposit 50% of the differential stamp duty as a condition for making reference. It is not that a party seeks a reference on his own, but the Registering Officer is duty bound to refer the moment a party does not accept the valuation suggested by him. The party presenting a document is the master of his choice as to whether he should deposit the deficit stamp after determination of the Collector or not. If he feels that the market value determined by the Collector is exorbitant, then he may resile from going ahead with the registration of the document and may take return of the document. There is nothing to stop him from doing so. Stamp duty is not skin to a compulsory tax such as, property taxes levied upon the house properties, sales tax levied upon the turn-over, income- tax levied upon the income prescribed etc. If a party wants to have his document registered, he should pay stamp duty and should he feel that it is exorbitant and he cannot bear the same, he can resile from the same even after presenting the document. The authority under the Stamp Act cannot force upon the party to compulsorily pay the stamp duty. Such compulsion is imposed only upon the party's insistence for registration of the document and not otherwise. In such circumstances, the imposition of deposit of 50% of the amount towards the differential stamp duty as a condition for referring the matter to the Collector runs beyond the scope, intendment and object of the act and, thus, offends

> equal protection of laws guaranteed under Article 14 of Indian Constitution and thus, is arbitrary and the said proviso to Section 47A of Indian Stamp Act which reads :
>
> "Provided that no reference shall be made by the registering officer unless an amount equal to fifty per cent of the deficit duty arrived at by him is deposited by the party concerned."

is unconstitutional and is accordingly struck down."

14. We regret our inability to agree with the view taken by the High Court that the amended Section 47A is unconstitutional.

15. Section 33(1) of the Stamp Act states :

> "Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance in his functions shall, if it appears to him that such instrument is not duly stamped, impound the same".

16. A perusal of the said provision shows that when a document is produced (or comes in the performance of his functions) before a person who is authorized to receive evidence and a person who is in charge of a public office (except a police officer) before whom any instrument chargeable with duty is produced or comes in the performance of his functions, it is the duty of such person before whom the said instrument is produced to impound the document if it is not duly stamped. The use of the word 'shall' in Section 33(1) shows that there is no discretion in the authority mentioned in Section 33(1) to impound a document or not to do so. In our opinion, the word 'shall' in Section 33(1) does not mean 'may' but means `shall'. In other words, it is mandatory to impound a document produced before him or which comes before him in the performance of his functions. Hence the view taken by the High Court that the document can be returned if the party does not want to get it stamped is not correct.

17. In our opinion, a registering officer under the Registration Act (in this case the Sub-Registrar) is certainly a person who is in charge of a public office. Section 33(3) applies only when there is some doubt whether a person holds a public office or not. In our opinion, there can be no doubt that a Sub-Registrar holds a public office. Hence, he cannot return such a document to the party once he finds that it is not properly stamped, and he must impound it.

18. In our opinion, there is no violation of Articles 14, 19 or any other provision of the Constitution by the enactment of Section 47A as amended by the A.P Amendment Act 8 of 1998. This amendment was only for plugging the loopholes and for quick realization of the stamp duty. Hence it is well within the power of the State legislature vide Entry 63 of List II read with Entry 44 of List III of the Seventh Schedule to the Constitution.

19. It is well settled that stamp duty is a tax, and hardship is not relevant in construing taxing statutes which are to be construed strictly. As often said, there is no equity in a tax vide Commissioner of Income Tax vs. Firm Muar AIR 1965 SC 1216. If the words used in a taxing statute are clear, one cannot try to find out the intention and the object of the statute. Hence the High Court fell in error in trying to go by the supposed object and intendment of the Stamp Act, and by seeking to find out the hardship which will be caused to a party by the impugned amendment of 1998.

20. In Partington vs. Attorney-General (1969) LR 4 HL 100, Lord Cairns observed as under:

> "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind. On the other hand if the court seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

The above observation has often been quoted with approval by this Court, and we endorse it again. In Bengal Immunity Co. Ltd. vs. State of Bihar AIR 1955 SC 661 (685) this Court held that if there is hardship in a statute it is for the legislature to amend the law, but the Court cannot be called upon to discard the cardinal rule of interpretation for mitigating a hardship.

21. It has been held by a Constitution Bench of this Court in Income Tax Officer vs. T.S Devinatha Nadar AIR 1968 SC 623 (vide paragraph 23 to

28) that where the language of a taxing provision is plain, the Court cannot concern itself with the intention of the legislature. Hence, in our opinion the High Court erred in its approach of trying to find out the intention of the legislature in enacting the impugned amendment to the Stamp Act.

22. In this connection we may also mention that just as the reference under Section 47A has been made subject to deposit of 50% of the deficit duty, similarly there are provisions in various statutes in which the right to appeal has been given subject to some conditions. The constitutional validity of these provisions has been upheld by this Court in various decisions which are noted below.

23. In Gujarat Agro Industries Co. Ltd. vs. Municipal Corporation of the city of Ahmedabad and Ors. 1999(4) SCC 468, this Court referred to its earlier decision in Vijay Prakash D. Mehta vs. Collector of Customs (Preventive) 1968(4) SCC 402 wherein this Court observed :

> "The right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant."

24. In Anant Mills Ltd. vs. State of Gujarat 1975(2) SCC 175 this Court held that the right of appeal is a creature of the statute and it is for the Legislature to decide whether the right of appeal should be unconditionally given to an aggrieved party or it should be conditionally given. The right to appeal

which is a statutory right can be conditional or qualified.

25. In M/s. Elora Construction Company vs. The Municipal Corporation of Gr. Bombay and Ors. AIR1980 Bombay 162, the question before the Bombay High Court was as to the validity of Section 217 of the Bombay Municipal Act which required pre-deposit of the disputed tax for the entertainment of the appeal. The Bombay High Court upheld the said provision and its judgment has been referred to with approval in the decision of this Court in Gujarat Agro Industries Co. Ltd. vs. Municipal Corporation of the city of Ahmedabad and Ors. (supra). This Court has also referred to its decision in Shyam Kishore and Ors. vs. Municipal Corporation of Delhi and Anr. 1993(1) SCC 22 in which a similar provision was upheld.

26. It may be noted that in Gujarat Agro Industries Co. Ltd. vs. Municipal Corporation of the city of Ahmedabad and Ors. (supra) the appellant had challenged the constitutional validity of Section 406(e) of the Bombay Municipal Corporation Act which required the deposit of the tax as a precondition for entertaining the appeal. The proviso to that provision permitted waiver of only 25% of the tax. In other words a minimum of 75% of the tax had to be deposited before the appeal could be entertained. The Supreme Court held that the provision did not violate Article 14 of the Constitution.

27. In view of the above, we are clearly of the opinion that Section 47A of the Indian Stamp Act as amended by A.P. Act 8 of 1998 is constitutionally valid and the judgment of the High Court declaring it unconstitutional is not correct.

28. We may, however, consider a hypothetical case. Supposing the correct value of a property is Rs. 10 lacs and that is the value stated in the sale deed, but the registering officer erroneously determines it to be, say, Rs. 2 crores. In that case while making a reference to the Collector under Section 47A, the registering officer will demand duty on 50% of Rs.2 crores i.e. duty on Rs.1 crore instead of demanding duty on Rs. 10 lacs. A party may not be able to pay this exorbitant duty demanded under the proviso to Section 47A by the registering officer in such a case. What can be done in this situation?

29. In our opinion in this situation it is always open to a party to file a writ petition challenging the exorbitant demand made by the registering officer under the proviso to Section 47A alleging that the determination made is arbitrary and/or based on extraneous considerations, and in that case it is always open to the High Court, if it is satisfied that the allegation is correct, to set aside such exorbitant demand under the proviso to Section 47A of the Indian Stamp Act by declaring the demand arbitrary. It is well settled that arbitrariness violates Article 14 of the Constitution vide Maneka Gandhi vs. Union of India AIR 1978 SC 597. Hence, the party is not remedy-less in this situation.

30. However, this would not mean that the proviso to Section 47A becomes unconstitutional. There is always a difference between a statute and the action taken under a statute. The statute may be valid and constitutional, but the action taken under it may not be valid. Hence, merely because it is possible that the order of the registering authority under the proviso to Section 47A is arbitrary and

illegal, that does not mean that the proviso to Section 47A is also unconstitutional. We must always keep this in mind when adjudicating on the constitutionality of a statute.

31. Since we have dealt with the question about constitutionality of Section 47A of the Stamp Act, we think it necessary to clarify the scope of judicial review of statutes, since Courts often are faced with a difficulty in determining whether a statute is constitutionally valid or not. We are, therefore, going a little deep into the theory of judicial review of statutes, as that will give some guidance to the High Courts in future.

A. Do Courts have the power to declare an Act of the Legislature to be invalid?

The answer to the above question is : Yes. The theoretical reasoning for this view can be derived from the theory in jurisprudence of the eminent jurist Kelsen (The Pure Theory of Law).

32. According to Kelsen, in every country there is a hierarchy of legal norms, headed by what he calls as the `Grundnorm' (The Basic Norm). If a legal norm in a higher layer of this hierarchy conflicts with a legal norm in a lower layer the former will prevail (see Kelsen's `The General Theory of Law and State').

33. In India the Grundnorm is the Indian Constitution, and the hierarchy is as follows :

(i) The Constitution of India;

(ii) Statutory law, which may be either law made by Parliament or by the State Legislature;

(iii) Delegated legislation, which may be in the form of Rules made under the Statute, Regulations made under the Statute, etc.;

(iv) Purely executive orders not made under any Statute.

34. If a law (norm) in a higher layer in the above hierarchy clashes with a law in a lower layer, the former will prevail. Hence a constitutional provision will prevail over all other laws, whether in a statute or in delegated legislation or in an executive order. The Constitution is the highest law of the land, and no law which is in conflict with it can survive. Since the law made by the legislature is in the second layer of the hierarchy, obviously it will be invalid if it is in conflict with a provision in the Constitution (except the Directive Principles which, by Article 37, have been expressly made non enforceable).

35. The first decision laying down the principle that the Court has power to declare a Statute unconstitutional was the well-known decision of the US Supreme Court in Marbury vs. Madison 5 U.S. (1Cranch) 137 (1803). This principle has been followed thereafter in most countries, including India.

B. How and when should the power of the Court to declare the Statute unconstitutional be exercised?

Since, according to the above reasoning, the power in the Courts to declare a Statute unconstitutional has to be accepted, the question which then arises is how and when should such power be exercised.

36. This is a very important question because invalidating an Act of the Legislature is a grave step and should never be lightly taken. As observed by the American Jurist Alexander Bickel "judicial review is a counter majoritarian force in our system, since when the Supreme Court declares unconstitutional a legislative Act or the act of an elected executive, it thus thwarts the will of the representatives of the people; it exercises control, not on behalf of the prevailing majority, but against it." (See A. Bickel's `The Least Dangerous Branch')

37. The Court is, therefore, faced with a grave problem. On the one hand, it is well settled since Marbury vs. Madison (supra) that the Constitution is the fundamental law of the land and must prevail over the ordinary statute in case of conflict, on the other hand the Court must not seek an unnecessary confrontation with the legislature, particularly since the legislature consists of representatives democratically elected by the people.

38. The Court must always remember that invalidating a statute is a grave step, and must therefore be taken in very rare and exceptional circumstances.

39. We have observed above that while the Court has power to declare a statute to be unconstitutional, it should exercise great judicial restraint in this connection. This requires clarification, since, sometimes Courts are perplexed as to whether they should declare a statute to be constitutional or unconstitutional.

40. The solution to this problem was provided in the classic essay of Prof James Bradley Thayer, Professor of Law of Harvard University entitled 'The Origin and Scope of the American Doctrine of Constitutional Law' which was published in the Harvard Law Review in 1893. In this article, Professor Thayer wrote that judicial review is strictly judicial and thus quite different from the policy-making functions of the executive and legislative branches. In performing their duties, he said, judges must take care not to intrude upon the domain of the other branches of government. Full and free play must be permitted to that wide margin of considerations which address themselves only to the practical judgment of a legislative body. Thus, for Thayer, legislation could be held unconstitutional only when those who have the right to make laws have not merely made a mistake (in the sense of apparently breaching a constitutional provision) but have made a very clear one, so clear that it is not open to rational question. Above all, Thayer believed, the Constitution, as Chief Justice Marshall had observed, is not a tightly drawn legal document like a title deed to be technically construed; it is rather a matter of great outlines broadly drawn for an unknowable future. Often reasonable men may differ about its meaning and application. In short, a Constitution offers a wide range for legislative discretion and choice. The judicial veto is to be exercised only in cases that leave no room for reasonable doubt. This rule recognizes that, having regard to the great, complex

ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the Constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the Constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is not clearly in violation of a constitutional provision is valid even if the Court thinks it unwise or undesirable. Thayer traced these views far back in American history, finding, for example, that as early as 1811 the Chief Justice of Pennsylvania had concluded: "For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this Court, and every other Court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt" vide Commonwealth ex. Rel. O'Hara vs. Smith 4 Binn. 117 (Pg.1811).

41. Thus, according to Prof. Thayer, a Court can declare a statute to be unconstitutional not merely because it is possible to hold this view, but only when that is the only possible view not open to rational question. In other words, the Court can declare a statute to be unconstitutional only when there can be no manner of doubt that it is flagrantly unconstitutional, and there is no way of avoiding such decision. The philosophy behind this view is that there is broad separation of powers under the Constitution, and the three organs of the State the legislature, the executive and the judiciary, must respect each other and must not ordinarily encroach into each other's domain. Also the judiciary must realize that the legislature is a democratically elected body which expresses the will of the people, and in a democracy this will is not to be lightly frustrated or obstructed.

42. Apart from the above, Thayer also warned that exercise of the power of judicial review "is always attended with a serious evil", namely, that of depriving people of "the political experience and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors" and with the tendency "to dwarf the political capacity of the people and to deaden its sense of moral responsibility".

43. Justices Holmes, Brandeis and Frankfurter of the United States Supreme Court were the followers of Prof. Thayer's philosophy stated above. Justice Frankfurter referred to Prof Thayer as "the great master of constitutional law", and in a lecture at the Harvard Law School observed "if I were to name one piece of writing on American Constitutional Law, I would pick Thayer's once famous essay because it is the great guide for judges and therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions". (vide H. Phillip's `Felix Frankfurter Reminisces' 299-300, 1960).

44. In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways, e.g. if a State legislature makes a law which only the Parliament can make under List I to the Seventh Schedule, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the Court must be absolutely sure that there can be no manner of

doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the Court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope vide Mark Netto vs. Government of Kerala and others AIR 1979 SC 83 (para 6). Also, it is none of the concern of the Court whether the legislation in its opinion is wise or unwise.

45. In a dissenting judgment in Bartels vs. Iowa 262 US 404 412(1923), Justice Holmes while dealing with a state statute requiring the use of English as the medium of instruction in the public schools (which the majority of the Court held to invalid) observed "I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried".

46. The Court certainly has the power to decide about the constitutional validity of a statute. However, as observed by Justice Frankfurter in West Virginia vs. Barnette 319 U.S. 624 (1943), since this power prevents the full play of the democratic process it is vital that it should be exercised with rigorous self restraint.

47. In this connection we may quote from the article titled 'The Influence of James B Thayer Upon the Work of Holmes, Brandeis & Frankfurter' by Wallace Mendelson published in 31 Vanderbilt Law Review 71 (1978), which is as follows:

> "If, then, the Thayer tradition of judicial modesty is outmoded if judicial aggression is to be the rule in policy matters, as in the 1930's some basic issues remain. First, how legitimate is government by judges ? Is anything to be beyond the reach of their authority ? Will anything be left for ultimate resolution by the democratic processes for what Thayer called "that wide margin of considerations which address themselves only to the practical judgment of a legislative body"

representing (as courts do not) a wide range of mundane needs and aspirations ? The legislative process, after all, is a major ingredient of freedom under government.

Legislation is a process slow and cumbersome. It turns out a product laws that rarely are liked by everybody, and frequently little liked by anybody. When seen from the shining cliffs of perfection the legislative process of compromise appears shoddy indeed. But when seen from some concentration camp as the only alternative way of life, the compromises of legislation appear but another name for what we call civilization and even revere as Christian forbearance.

Let philosophy fret about ideal justice. Politics is our substitute for civil war in a constant struggle between different conceptions of good and bad. It is far too wise to gamble for Utopia or nothing to be fooled by its own romantic verbiage. Above all, it knows that none of the numerous clashing social forces is apt to be completely without both vice and virtue. By give and take, the legislative process seeks not final truth, but an acceptable balance of community interests. In this view the

harmonizing and educational function of the process itself counts for more than any of its legislative products. To intrude upon its pragmatic adjustments by judicial fiat is to frustrate our chief instrument of social peace and political stability.

Second, if the Supreme Court is to be the ultimate policy-making body without political accountability how is it to avoid the corrupting effects of raw power? Can the Court avoid the self-inflicted wounds that have marked other episodes of judicial imperialism? Can the Court indeed satisfy the expectations it has already aroused?

A third cluster of questions involves the competence of the Supreme Court as a legislative body. Can any nine men master the complexities of every phase of American life which, as the post 1961 cases suggest, is now the Court's province? Are any nine men wise enough and good enough to wield such power over the lives of millions? Are courts institutionally equipped for such burdens? Unlike legislatures, they are not representative bodies reflecting a wide range of social interest. Lacking a professional staff of trained investigators, they must rely for data almost exclusively upon the partisan advocates who appear before them. Inadequate or misleading information invites unsound decisions. If courts are to rely upon social science data as facts, they must recognize that such data are often tentative at best, subject to varying interpretations, and questionable on methodological grounds. Moreover, since social science findings and conclusions are likely to change with continuing research, they may require a system of ongoing policy reviews as new or better data become available. Is the judiciary capable of performing this function of supervision and adjustment traditionally provided by the legislative and administrative processes?

Finally, what kind of citizens will such a system of judicial activism produce a system that trains us to look not to ourselves for the solution of our problems, but to the most elite among elites: nine Judges governing our lives without political or judicial accountability? Surely this is neither democracy nor the rule of law. Such are the problems addressed by and at least in the minds of jurists like Holmes, Brandeis, and Frankfurter resolved by Thayer's doctrine of judicial restraint".

We respectfully agree with the views expressed above, and endorse Thayer's doctrine of self restraint.

48. In our opinion judges must maintain judicial self-restraint while exercising the power of judicial review of legislation.

> "In view of the complexities of modern society", wrote Justice Frankfurter, while Professor of Law at Harvard University, "and the restricted scope of any man's experience, tolerance and humility in passing judgment on the worth of the experience and beliefs of others become crucial faculties in the disposition of cases. The successful exercise of such judicial power calls for rare intellectual disinterestedness and penetration, lest limitation in personal experience and imagination operate as limitations of the Constitution. These insights Mr. Justice Holmes applied in hundreds of cases and expressed in memorable language:

> "It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong."

(See Frankfurter's 'Mr. Justice Holmes and the Supreme Court')

49. In our opinion the legislature must be given freedom to do experimentations in exercising its powers, provided of course it does not clearly and flagrantly violate its constitutional limits.

50. As observed by Mr. Justice Brandeis of the U.S. Supreme Court in his dissenting judgment in New State Ice Co. vs. Liebmann 285 U.S. 262 (310-11) :

> "The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation There must be power in the States and the Nation to re-mould, through experimentation, our economic practices and in situations to meet changing social and economic needs.
>
> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation."

51. In writing a biographical essay on the celebrated Justice Holmes of the U.S. Supreme Court in the dictionary of American Biography, Justice Frankfurter wrote:

> "It was not for him (Homes) to prescribe for society or to deny it the right of experimentation within very wide limits. That was to be left for contest by the political forces in the state. The duty of the Court was to keep the ring free. He reached the democratic result by the philosophic route of skepticism by his disbelief in ultimate answers to social questions. Thereby he exhibited the judicial function at its purest."

(see 'Essays on Legal History in Honour of Felix Frankfurter' edited by Morris D. Forkosch)

52. In this connection Justice Frankfurter while Professor of Law at Harvard University wrote in 'The Public and its Government' --

> "With the great men of the Supreme Court constitutional adjudication has always been statecraft. As a mere Judge, Marshall had his superiors among his colleagues. His supremacy lay in his recognition of the practical needs of government. The great judges are those to whom the Constitution is not primarily a text for interpretation but the means of ordering the life of a progressive people."

In the same book Justice Frankfurter also wrote "In simple truth, the difficulties that government encounters from law do not inhere in the Constitution. They are due to the judges who interpret. That document has ample resources for imaginative statesmanship, if judges have imagination for statesmanship."

53. In Keshvananda Bharati vs. State of Kerala AIR 1973 SC 1461 (vide para 1547) Khanna J. observed:

> "In exercising the power of judicial review, the Courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error."

54. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimization of the judges personal preferences. The Court must not invalidate a statute lightly, for, as observed above, invalidation of a statute made by the legislature elected by the people is a grave step. As observed by this Court in State of Bihar vs. Kameshwar Singh AIR 1952, SC 252(274) : "The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence".

55. In our opinion, the Court should, therefore, ordinarily defer to the wisdom of the legislature unless it enacts a law about which there can be no manner of doubt about its unconstitutionality.

56. As observed by the Constitution Bench decision of this Court in M.H. Quareshi vs. State of Bihar AIR 1958 SC 731 (vide para 15) :

> "The Court must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest, and finally that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, common report, the history of the times, and may assume every state of facts which can be conceived existing at the time of the legislation. (See also Moti Das vs. S.P. Sahi AIR 1959 SC 942(947).

57. In the light of the above observations, the impugned amendment is clearly constitutional. The amendment was obviously made to plug a loophole in the Stamp Act so as to prevent evasion of stamp duty, and for quick collection of the duty. There are other statutes e.g. the Income Tax Act in which there are provisions for deduction at source, advance tax, etc. which aim at quick collection of tax, and the constitutional validity of these provisions have always been upheld.

C. Application of Thayer's Doctrine by the Courts :

> In America, after the activist period of the US Supreme Court which was at one time declaring Act after Act of the U.S. Congress to be invalid on the ground that it

violated the due process clause in the U.S. Constitution or the right to liberty of contract, there was a realization by the Judges of the U.S. Supreme Court that they were following a confrontationist path vis-`-vis the U.S. Congress which was causing all kinds of major problems. Hence in 1937 the U.S. Supreme Court accepted Thayer's doctrine of judicial restraint, and the same was followed thereafter (except for the period of the Warren Court).

58. The U.S. Supreme Court enunciated the principle that there is a presumption in favour of the constitutionality of Statute, and the burden is always upon the person who attacks it to show that there has been a clear transgression of a constitutional provision. This view was adopted by the Constitution Bench of this Court in Charanjit Lal Chowdhury vs. Union of India and others AIR 1951 SC 41 (para 10), which observed :

"Prima facie, the argument appears to be a plausible one, but it requires a careful examination, and while examining it, two principles have to be borne in mind :

(1) that a law may be constitutional even through it relates to a single individual, in those cases where on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself; (2) that it is the accepted doctrine of the American Courts, which I consider to be well-founded on principle, that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. A clear enunciation of this latter doctrine is to be found in Middleton vs. Texas Power and L. Company, (248 U.S. 152 and 157), in which the relevant passage runs as follows :

It must be presumed that a legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by expression and that its discriminations are based upon adequate grounds."

(emphasis supplied) and this view has been consistently followed thereafter.

59. Thus in M/s. B.R. Enterprises vs. State of U.P. and others AIR 1999 SC 1867 this Court observed :

"Another principle which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment, vide Charanjit Lal Chowdhury vs. Union of India 1950 SCR 869: AIR 1951 SC 41); State of Bombay vs. F.N. Bulsara, 1951 SCR 682: (AIR 1951 SC 318), Mahant Moti Das vs. S.P. Sahi (AIR 1959 SC 942)".

The following passage in Seervai, Constitutional Law of India (3rd Edn.) page 119 found approval in Delhi Transport Corporation vs. D.T.C. Mazdoor Congress, 1991 (Supp) 1 SCC 600 : (AIR 1991 SC 101). The Court held:

> "Seervai in his book Constitutional Law of India (3rd Edn) has stated at page 119 that:
>
> " the courts are guided by the following rules in discharging their solemn duty to declare laws passed by a legislature unconstitutional:
>
> 1) There is a presumption in favour of constitutionality and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; 'to doubt the constitutionality of a law is to resolve it in favour of its validity'.
>
> ****
>
> 2) A statute cannot be declared unconstitutional merely because in the opinion of the court it violates one or more of the principles of liberty, of the spirit of the Constitution, unless such principles and that spirit are found in the terms of the Constitution"

(emphasis supplied)

60. Similarly in Union of India vs. Elphinstone Spinning and Weaving Co. Ltd. and others AIR 2001 SC 724 (vide para 9) a Constitution Bench of this Court observed :

> "There is always a presumption that the legislature does not exceed its jurisdiction and the burden of establishing that the legislature has transgressed constitutional mandates such as, those relating to fundamental rights is always on the person who challenges its vires. Unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution it must be allowed to stand as the true expression of the national will Shell Company of Australia vs. Federal Commissioner of Taxation, 1931 AC 275(Privy Council). The aforesaid principle, however, is subject to one exception that if a citizen is able to establish that the legislation has invaded his fundamental rights then the State must justify that the law is saved. It is also a cardinal rule of construction that if one construction being given the statute will become ultra vires the powers of the legislature whereas on another construction which may be open, the statute remains effective and operative, then the Court will prefer the latter, on the ground that the legislature is presumed not to have intended an excess of jurisdiction".

(emphasis supplied)

61. In State of Bihar and others vs. Bihar Distillery Ltd. AIR 1997 SC 1511 (vide para 18) a Constitution Bench of this Court observed :

> "The approach of the Court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The Court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The Court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the Legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void."

62. The same view has been taken by the Constitution Bench of this Court in Hamdard Dawakhana and another vs. Union of India AIR 1960 SC 554 (vide para 9) which observed :

> "Another principle which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people, that the laws it enacts are directed to problems which are made manifest by experience, and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment. Charanjit Lal vs. Union of India, 1950 SCR 869: (AIR 1951 SC 41); State of Bombay vs. F.N. Baulsara, 1951 SCR 682 at p.708; (AIR 1951 SC 318 at p. 326); AIR 1959 SC 942."

63. As observed by the Privy Council in Shell Company of Australia vs. Federal Commissioner of Taxation (1931) AC 275 (298) :

> "Unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution it must be allowed to stand as the true expression of the national will."

64. Hence if two views are possible, one making the provision in the statute constitutional, and the other making it unconstitutional, the former should be preferred vide Kedarnath vs. State of Bihar AIR 1962 SC 955. Also, if it is necessary to uphold the constitutionality of a statute to construe its general words narrowly or widely, the Court should do so vide G.P. Singh's `Principles of Statutory Interpretation, 9th Edition, 2004 page 497'. Thus the word `Property' in the Hindu Women's Right to Property Act, 1937 was construed by the Federal Court in In re Hindu Women's Right to Property Act AIR 1941 FC 72 to mean `property other than agricultural land', otherwise the Act would have become unconstitutional.

65. The Court must, therefore, make every effort to uphold the constitutional validity of a Statute, even if that requires giving the statutory provision a strained meaning, or narrower or wider meaning, than what appears on the face of it. It is only when all efforts to do so fail should the Court declare a statute to be unconstitutional.

D. Some difficulties in the practical application of Thayer's Doctrine:

> After laying down the above broad principles in relation to the Thayer doctrine of Judicial Review of Statutes (which we respectfully agree with) we may now consider some practical difficulties which arise in this connection.

66. As stated above, it is only when there is no manner of doubt that the Statute is unconstitutional that it should be declared to be so. However, even reasonable men can sometimes differ as to whether there is a doubt or not about the constitutional validity. In other words, sometimes there can be a doubt whether there is a doubt at all. About some statutes there can be no doubt that they are unconstitutional e.g. if discriminatory treatment is given to redheads, or if a statute excluded owners of a certain make of motor vehicle from voting in a general election. However, there are other statutes about which one cannot be absolutely sure about their constitutional validity, and difficulties would then arise in this connection.

67. Some broad principles to resolve these difficulties are given below.

68. As regards fiscal or tax measures greater latitude is given to such statutes than to other statutes. Thus in the Constitution Bench decision of this Court in R. K. Garg vs. Union of India and others 1981 (4) SCC 675 (vide para 8) this Court observed:

> "Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud where Frankfurter, J. said in his inimitable style:
>
> In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the

number of times the judges have been overruled by events self- limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

The court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaptation of remedy are not always possible" and that "judgment is largely a prophecy based on meagre and uninterrupted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what may one call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture v. Central Reig Refining Company, be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues".

(emphasis supplied)

69. All decisions in the economic and social spheres are essentially ad hoc and experimental. Since economic matters are extremely complicated, this inevitably entails special treatment for special situations. The State must therefore be left with wide latitude in devising ways and means of fiscal or regulatory measures, and the Court should not, unless compelled by the statute or by the Constitution, encroach into this field, or invalidate such law.

70. As Justice Frankfurter of the U.S. Supreme Court observed in American Federation of Labour vs. American Sash and Door Co. 335 U.S. 538 (1949):

"Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a Court debilitates popular democratic government. Most laws dealing with social and economic problems are matters of trial and error. That

> which before trial appears to be demonstrably bad may belie prophecy in actual operation. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed by the legislature than that the law should be aborted by judicial fiat. Such an assertion of judicial power defeats responsibility from those on whom in a democratic society it ultimately rests. Hence rather than exercise judicial review Courts should ordinarily allow legislatures to correct their own mistakes wherever possible".

71. Similarly, in his dissenting judgment in New State Ice Co. vs. Liebmann 285 U.S. 262 (1932) Mr. Justice Brandeis, the renowned Judge of the U.S. Supreme Court observed that the government must be left free to engage in social experiments. Progress in the social sciences, even as in the physical sciences, depends on a "process of trial and error" and Courts must not interfere with necessary experiments.

72. In Secretary of Agriculture vs. Central Reig Refining Co. (1949) 338 U.S. 604 (617): 94 Law Ed. 381-292, Mr. Justice Frankfurter of the U.S. Supreme Court observed:

> "Congress was ... confronted with the formulation of policy peculiarly within its wide swath of discretion. It would be a singular intrusion of the judiciary into the legislative process to extrapolate restrictions upon the formulation of such an economic policy from those deeply rooted notions of justice which the Due Process Clause expresses ."

73. However, though while considering economic or most other legislation the Court gives great latitude to the legislature when adjudging its constitutionality, a very different approach has to be adopted by the Court when the question of civil liberties and the fundamental rights under Part III of the Constitution arise.

74. In paragraph 8 of the Constitution Bench decision in R.K. Garg's case (supra) it was observed (as quoted above) that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, freedom of religion etc. Thus, the Constitution Bench decision in R.K Garg's case (supra) is an authority for the proposition which has been stated herein, namely, when a law of the legislature encroaches on the civil rights and civil liberties of the people mentioned in Part III of the Constitution (the fundamental rights), such as freedom of speech, freedom of movement, equality before law, liberty, freedom of religion etc, the Court will not grant such latitude to the legislature as in the case of economic measures, but will carefully scrutinize whether the legislation on these subjects is violative of the rights and liberties of the citizens, and its approach must be to uphold those rights and liberties, for which it may sometimes even have to declare a statute to be unconstitutional.

75. Some scholars regarded it a paradox in the judgments of Justice Holmes (who, as we have already stated above, was a disciple of Thayer) that while he urged tolerance and deference to legislative judgment in broad areas of lawmaking challenged as unconstitutional, he seemed willing to reverse the presumption of constitutionality when laws inhibiting civil liberties were before the

Court.

76. However, we find no paradox at all. As regards economic and other regulatory legislation judicial restraint must be observed by the Court and greater latitude must be given to the legislature while adjudging the constitutionality of the statute because the Court does not consist of economic or administrative experts. It has no expertise in these matters, and in this age of specialization when policies have to be laid down with great care after consulting the specialists in the field, it will be wholly unwise for the Court to encroach into the domain of the executive or legislative and try to enforce its own views and perceptions.

77. In this connection we may refer to the famous dissenting judgment of Mr. Justice Holmes in Lochner vs. York, 198 U.S. 45(1903). In that case, the validity of a law made by the New York Legislature providing for a maximum of 10 hour a day and 60 hour a week work in the bakery industry was challenged. While the majority, who believed in the laissez faire theory of economics, held that the law violated the liberty of contract, which they perceived as part of the Bill of Rights to the U.S. Constitution, Mr. Justice Holmes pointed out that the Constitution was not intended to embody any particular economic theory, whether of paternalism or of laissez faire. He further observed that reasonable men might think the impugned statute is a proper measure to ensure the health of the workers, and hence it was well within the power of the legislature to enact it. To use his own words in the judgment, "The Fourteenth Amendment (to the U.S. Constitution) does not enact Mr. Herbert Spencer's Social Statics".

78. However, when it came to civil liberties, Mr. Justice Holmes was an activist Judge. Thus, in Schenck vs. U.S. 249 U.S. 47 (1919) he laid down his famous "clear and present danger" test for deciding whether restriction on free speech was constitutionally valid. As Mr. Justice Holmes observed, the question in every case is "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent".

79. We respectfully endorse the view of Mr. Justice Holmes, as stated above.

80. In Abrams vs. U.S. 250 U.S. 616 624 (1919), Mr. Justice Holmes observed :

> "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at

> any rate, is the theory of our Constitution. It is an experiment as all life is an experiment."

(emphasis supplied)

81. In his famous 'Footnote Four' in United States vs. Carolene Products Co. 304 U.S. 144, Mr. Justice Stone of the United States Supreme Court observed :

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth".

In a letter to Stone in the first Flag Salute case, in which Stone was the lone dissenter, Justice Frankfurter said:

> "I am aware of the important distinction which you so skillfully adumbrated in your footnote 4 . In the Carolene Products Co. case. I agree with that distinction; I regard it as basic. I have taken over that distinction in its central aspect . in the present opinion by insisting on the importance of keeping open all those channels of free expression by which undesirable legislation may be removed, and keeping unobstructed all forms of protests against what are deemed invasions of conscience".

We respectfully agree with the above views.

82. For Justice Holmes, democracy was not hurt but strengthened whenever courts protected the individual freedoms which alone make the democratic process meaningful and valid. For the substance of decisions to be truly democratic, the process by which they are reached must give as much free play as possible for the transmutation of present minorities into future majorities by the unencumbered operation of freedom of thought, communication, and discussion. From this point of view, reasonably equal access to the political processes and reasonably uninhibited freedom to argue and discuss (limited only by imminently impending danger to the state itself) is in fact an integral part of, although antecedent to, the formal legislative processes of democracy. Hence to uphold the restrictions on freedom of thought and communication and access to the political processes which may be placed in effect by a temporary majority would be actually to reduce the integrity of the processes of transforming that transient majority into a minority - a processes essential to the very concept of democracy. Professor Chafee years ago remarked the fact that the Justices, including Holmes, who tended to uphold wide legislative control over business were often the very same men who tended to invalidate wide legislative control over discussion.

> "These Justices", said Chafee, "know that statutes, to be sound and effective, must be preceded by abundant printed and oral controversy. Discussion is really legislation in the soft. Drastic restrictions on free discussion are similar to rigid constitutional limits on lawmaking".

83. In our opinion, therefore, while Judges should practice great restraint while dealing with economic statutes, they should be activist in defending the civil liberties and fundamental rights of the citizens. This is necessary because though ordinarily the legislature represents the will of the people and works for their welfare, there can be exceptional situations where the legislature, though elected by the people may violate the civil liberties and rights of the people. It was because of this foresight that the Founding Fathers of the Constitution in their wisdom provided fundamental rights in Part III of the Constitution which were modeled on the lines of the U.S. Bill of Rights of 1791 and the Declaration of the Rights of Man during the Great French Revolution of 1789.

84. It may be mentioned that during feudal times citizens had no civil rights. There was no freedom of speech, no equality, no freedom to practice one's own religion, no liberty etc. The Great English Revolution of 1688 emphasized the importance of liberty and the Great French Revolution of 1789 underscored equality and freedom of religion. The Great American Revolution championed all these rights. Our founding fathers borrowed these lessons from history and provided for the fundamental rights in our Constitution to protect the citizens' liberties not only against the executive but even against the legislature, if need be.

85. It may be noted that there were no fundamental rights in the Government of India Act, 1935. The Founding Fathers of our Constitution, who were also freedom fighters for India's Independence, knew the value of these rights, and that is why they incorporated them in the Constitution.

86. It must be understood that while a statute is made by the peoples' elected representatives, the Constitution too is a document which has been created by the people (as is evident from the Preamble). The Courts are guardians of the rights and liberties of the citizens, and they will be failing in their responsibility if they abdicate this solemn duty towards the citizens. For this, they may sometimes have to declare the act of the executive or legislature as unconstitutional.

87. In Terminiello vs. Chicago 337 US 1 (1949), the U.S. Supreme Court observed that free speech may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, even stirs people to anger.

88. In Bridges vs. California 314 US 252 (1941) the U.S. Supreme Court observed that freedom of the press must be allowed the broadest scope compatible with the supremacy of order.

89. In Wood vs. Georgia 370 U.S. 375(1962), the U.S. Supreme Court observed that Judges may use their contempt power to punish disorder in the courtroom, but not to penalize any editor who assails the performance of the Court in print.

90. In Ghani vs. Jones (1970) 1 Q.B. 693 (709) Lord Denning observed:

> "A man's liberty of movement is regarded so highly by the law of England that it is not to be hindered or prevented except on the surest ground."

91. The above observation has been quoted with approval by a Constitution Bench decision of this Court in Maneka Gandhi vs. Union of India, AIR 1978 SC 597 (vide para 99).

92. Why is it that the Courts both in India and in America have taken an activist approach in upholding the civil liberties and rights of the citizens? In our opinion, this is because freedom and liberty is essential for progress, both economic and social. Without freedom to speak, freedom to write, freedom to think, freedom to experiment, freedom to criticize (including criticism of the Government) and freedom to dissent there can be no progress.

93. Scientific ideas initially were often condemned because they were regarded as opposed to religious dogma. For instance, Charles Darwin's theory or Copernicus' theory at one time were condemned because they were regarded as opposed to the Bible. It was only by freedom of speech, freedom to think and freedom to dissent that human progress was possible. And it is for this reason that our founding fathers in their wisdom provided for the fundamental rights in Part III of the Constitution. It is the solemn duty of the Courts to uphold the civil rights and liberties of the citizens against executive or legislative invasion, and the Court cannot sit quiet in this situation, but must play an activist role in upholding civil liberties and the fundamental rights in Part III, vide Maneka Gandhi vs. Union of India, AIR 1978 SC 597, Joginder Kumar vs. State of U.P., AIR 1994 SC 1349, D. K. Basu vs. State of West Bengal, AIR 1997 SC 610, etc.

94. In view of the fact that the impugned amendment is an economic measure, whose aim is to plug the loopholes and secure speedy realization of stamp duty, we are of the opinion that the said amendment, being an economic measure, cannot be said to be unconstitutional.

95. In view of the above observation, this appeal is allowed and the impugned judgment is set aside and the constitutional validity of the amended Section 47A of the Stamp Act is upheld. In the facts and circumstances of the case, there shall be no order as to costs.