PART VII

CONSTITUTIONAL INTERPRETATION AND AMENDMENT

CHAPTER XL

CONSTITUTIONAL INTERPRETATION

SYNOPSIS

A. DOCTRINE OF JUDICIAL REVIEW

In democratic countries, the judiciary is given a place of great significance. Primarily, the courts constitute a dispute-resolving mechanism. The primary function of the courts is to settle disputes and dispense justice between one citi-

zen and another. But courts also resolve disputes between the citizen and the state and the various organs of the state itself.

In many countries with written constitutions, there prevails the doctrine of judicial review. It means that the constitution is the supreme law of the land and any law inconsistent therewith is void. The courts perform the role of expounding the provisions of the constitution and exercise power of declaring any law or administrative action which may be inconsistent with the constitution as unconstitutional and hence void. This judicial function stems from a feeling that a system based on a written constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also that it is necessary to restrain governmental organs from exercising powers which may not be sanctioned by the constitution.[1]

The responsibilities which a Court carries in a country with a written constitution are very onerous—much more onerous than the responsibilities of a Court without a written constitution. The courts in a country like Britain interpret the laws but not the Constitution, whereas the courts in a country with a written constitution interpret the provisions of the constitution and, thus, give meaning to the cold letter of the constitution. The courts thus act as the Supreme interpreter, protector and guardian of the supremacy of the constitution by keeping all authorities—legislative, executive, administrative, judicial or *quasi*-judicial—within legal bounds. The judiciary has the responsibility to scrutinize all governmental actions in order to assess whether or not they conform with the constitution and the valid laws made thereunder.

The Courts can declare any exercise of power invalid if it infringes any provision in the constitution. In a constitution having provisions guaranteeing Fundamental Rights of the people, the judiciary has the power as well as the obligation to protect the people's rights from any undue and unjustified encroachment by any organ of the State. Further, in a country having a federal system, the judiciary acts as the balance-wheel of federalism by settling disputes between the Centre and the States, or among the States *inter se*. Federalism is a legalistic form of government because of distribution of powers between the Centre and the States

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1. There is a wealth of material elucidating the contribution made by the U.S. Supreme Court to the development of the Constitution through its interpretative process : Douglas, *FROM MARSHALL TO MUKHERJEA* : STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW, (1956); RAMASWAMY, THE CREATIVE ROLE OF THE SUPREME COURT OF THE UNITED STATES (1956); SCHWARTZ, THE SUPREME COURT (1957); SWISHER, THE SUPREME COURT IN MODERN ROLE (1958); ZIEGLER, THE SUPREME COURT AND THE AMERCIAN ECONOMIC LIFE (1962); MCCLOSKEY, ESSAYS IN CONSTITUTIONAL LAW (1962); FREUND, ON UNDERSTANDING THE SUPREME COURT (1951); ROBERTS, THE COURT AND THE CONSTITUTION (1951); CHASE & DUCAT, CONSTITUTIONAL INTERPRETATION (1974). Also, IRANI, THE COURTS AND THE LEGISLATURE IN INDIA, 14 ICLQ., 950 (1965); CAPPELLETTI JUDICIAL REVIEW IN THE ONTEMPORARY WORLD; HILLER, The LAW-CREATIVE ROLE OF APPELLATE COURTS IN DEVELOPING COUNTRIES; An Emphasis on East Africa, 24 *Int. & Comp LQ* 205 (1975); SEERVAI, THE POSITION OF THE JUDICIARY UNDER THE CONSTITUTION OF INDIA (1970); V.S. DESHPANDE, JUDICIAL REVIEW OF LEGISLATION (1975) and author's review thereof in 16 *JILI* 727 (1974); DIPLOCK, *The Courts as Legislators* (1965); JAFFE, ENGLISH & AMERICAN JUDGES AS LAW MAKERS (1969); M.P. JAIN, Role of the Judiciary in a Democracy, (1979) *JMCL* 239; S.P. SATHE, JUDICIAL ACTIVISM IN INDIA *(2002);* T.R. ANDHYARUJINA, JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY IN INDIA (1992). Court only interprets the law and cannot legislate thereof, if a provision of law gives rise to misuse, it is for the legislature to amend, modify or repeal it, if deemed necessary. *Sushil Kumar Sharma v. Union of India*, (2005) 6 SCC 281.

by the constitution itself, and, therefore, an arbiter is needed to draw a balance between the Centre and the States.[2]

The task of interpreting the constitution is a highly creative judicial function. A democratic society lives and swears by certain values—individual liberty, human dignity, rule of law, constitutionalism, limited government, and it is the task of the judiciary to so interpret the constitution and the law as to constantly inculcate these values on which democracy thrives. Also, the courts must keep in mind that the society does not stand still; it is dynamic and not static; social and economic conditions change continually. Therefore, the courts must so interpret the constitution that it does not fall behind the changing, contemporary societal needs. The words of the constitution remain the same, but their significance changes from time to time through judicial interpretation.[3]

Judicial review has two prime functions: (1) Legitimizing Governmental action; (2) to protect the constitution against any undue encroachments by the Government. These two functions are inter-related.

In exercising the power of judicial review, the courts discharge a function which may be regarded as crucial to the entire governmental process in the country. The bare text of the constitution does not represent in itself the 'living' law of the country. For that purpose, one has to read the Fundamental text along with the gloss put thereon by the courts. As Dowling has stated while evaluating the role of the U.S. Supreme Court; "The study of constitutional law may be described in general terms as a study of the doctrine of judicial review in action."[4]

This characterisation is true of the U.S.A. To some lesser extent, it is true of other constitutions as well. To what extent the judicial interpretation supplements the written text of a constitution depends on how creative and activist role is played by the courts. The task of rendering an authoritative interpretation of the constitution converts the courts into vital instruments of government and policy-making. Here is a challenging and creative task for the courts to perform.

The interpretative function of the constitution is discharged by the courts through direct as well as indirect judicial review. In direct judicial review, the Court overrides or annuls an enactment or an executive act on the ground that it is inconsistent with the constitution. In indirect judicial review, while considering constitutionality of a statute, the Court so interprets the statutory language as to steer clear of the alleged element of unconstitutionality.

JUSTICE DOUGLAS characterises this practice as "tailoring an Act to make it constitutional" and explains it further thus: "If a construction of the Act is possible that will save it from being constitutionally infirm, the Court will adopt that construction. This practice of saving an Act by construing it to avoid the constitutional issue has sometimes been carried a long way."[5] But this is a part of judicial strategy in deciding constitutional controversies. When a judge faced with several alternative interpretations of a constitutional provision, chooses one of these, he necessarily performs a 'law-making' function.

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2. *Supra*, Chs. X-XV.
3. Also see, next Chapter.
4. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW, 19 (1965).
5. DOUGLAS, MARSHALL TO MUKHERJEA, 16; *infra*, See H, this Chapter.

Britain has no written constitution and, therefore, there is no direct judicial review there. But courts do resort to indirect judicial review at times. They interpret constitutional provisions restrictively to protect civil liberties.[6] Some rules of statutory interpretation have been developed with this aim in view, *e.g.*, a criminal law or a tax law should be strictly construed, or that judicial review of delegated legislation cannot be excluded unless there are clear words to that effect.[7]

The Constitution of Canada or Australia does not contain any express provision for judicial review, yet the process goes on and judicial review has become an integral part of the constitutional process. The historical origin of judicial review in these countries is traceable to the colonial era. The colonial legislatures were regarded as subordinate legislatures *vis-a-vis* the British Parliament[8] and they had to function within the parameters of the statutes enacted by the British Parliament. The colonial laws were, therefore, subject to judicial review, and this process continued long after the colonies ripened into self-governing dominions. The doctrine of judicial review was thus ingrained into the legal fabric of Canada and Australia and, therefore, no need was felt to include a specific constitutional provision in the basic laws of these countries.[9]

The doctrine of judicial review is an integral part of the American judicial and constitutional process although the U.S. Constitution does not explicitly mention the same in any provision. The Constitution merely says that it would be the supreme law of the land.

Before the Constitution, the legislation of the American colonies was subject to judicial review. But, after the Constitution, in 1803, in the famous case of *Marbury v. Madison*,[10] in one of its most creative opinions, the U.S. Supreme Court very clearly and specifically claimed that it had the power of judicial review and that it would review the constitutionality of the Acts passed by the Congress. The Court argued that the Constitution seeks to define and limit the powers of the legislature, and there would be no purpose in doing so if the legislature could overstep these limits at any time.

In the words of the Court: "Certainly all those who have framed the written constitutions contemplate them as forming the Fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature, repugnant to the constitution, is void." And, further, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the Court must either decide that case conformably to the law disregarding the constitution; or conformably to the constitution disregarding the law; the Court must determine which of these conflicting rules governs the case. This is the very essence of Judicial duty."

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6. *Infra*, footnote 18.
7. See, *supra*, Ch. I; Ch. II, Sec. N, *supra*.
8. *Supra*, Ch. II, Sec. M.
9. EDWARD MCWHINNEY, JUDICIAL REVIEW, 49-75 (1969); LEDERMAN, THE COURTS AND THE CANADIAN CONSTITUTION (1964).
10. 1 Cranch 137; 2 L Ed 60.

Thus, the theoretical foundation of the doctrine of judicial review in the U.S.A. is that in exercise of its judicial functions, the Supreme Court has the power to say what the law is, and in case of conflict between the constitution and a legislative statute, the Court will follow the former, which is the superior of the two laws, and declare the latter to be unconstitutional.

If a law inconsistent with the constitution were not to be declared void, then the written constitution loses all its value and significance. When a law is in opposition to the constitution, it is the duty of the courts to follow the constitution and not the law.

About the significance of judicial review in a written constitution, SCHWARTZ observes: "A constitution is naught but empty words if it cannot be enforced by the courts. It is judicial review that makes constitutional provisions more than mere maxims of political morality. In practice, there can be no constitution without judicial review. It provides the only adequate safeguard that has been invented against unconstitutional legislation. It is, in truth, the *sine qua non* of the constitutional structure."[11]

The doctrine of judicial review has made the U.S. Supreme Court a vital institution in the governmental process in the country.[12] In the U.S. Constitution the Fundamental Rights of the people are couched in very general phraseology, and the exceptions and restrictions thereon are worked out judicially from time to time in the context of contemporary socio-economic and political conditions.[13] For example, the phrase 'due process of law' used in the U.S. Constitution gives a good deal of leeway to the Supreme Court for creativity.[14]

Although the modern doctrine of judicial review is ascribed to *Marbury v. Madison,* as noted above, the idea underlying judicial review, namely, to test and invalidate 'state action' (legislative or executive) by reference to a higher organic instrument can be traced to the natural law doctrine according to which man-made law was susceptible to correction and invalidation by reference to a higher law.[15]

This natural law doctrine found expression in Britain in 1610 in *Dr. Bonham's* case,[16] where COKE, LCJ, asserted : "When an act of Parliament is against common law right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void." This doctrine did not, however, become fully operational in Britain. In course of time, this doctrine was jettisoned and its place was taken over by the theory of parliamentary sover-

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11. CONSTITUTIONAL LAW: A TEXTBOOK, 3 (1972).

12. See, RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977).

13. For example, in 1952, the U.S. Supreme Court in *Brown v. Board of Education,* 347 US 483, invalidated segregation between the Whites and the Blacks in educational institutions overruling its earlier decision in *Plessy v. Ferguson,* 163 US 527 (1896). In *Reynolds v. Sims,* 377 US 533, the Supreme Court translated the equality principle in to the principle of "one man-one vote". The Court thus held that the seats in a House of State Legislature must be apportioned on population basis.

14. In *Gideon v. Wainwright,* 372 US 335, the Court accepted the right of an accused to have a lawyer at state expense, if he could not afford one himself. In *Miranda v. Arizona,* 384 US 436, the Supreme Court granted certain rights to an accused at the time of police interrogation.

15. M.J. HARMON, POLITICAL THOUGHT FROM PLATO TO THE PRESENT; Grant, The Natural Law Background of Due Process, 31 *Col LR* 56; Corwin, The 'Higher Law' Background of American Constitutional Law, 42 *Harv LR* 149.

16. 8 Coke's Reports, 114 at 118.

eignty. Because of the conflict between the Crown and Parliament, judges sided with Parliament and, in the process, accepted the theory of parliamentary sovereignty. The doctrine of judicial review then became confined to the colonies overseas. Even prior to the U.S. Constitution, the Privy Council did exercise powers of judicial review over the American and other colonies.[17]

But even in Britain indirect judicial review does go on all the time. As Wade points out: "All law students are taught that Parliamentary sovereignty is absolute. But it is the judges who have the last word. If they interpret an Act to mean the opposite of what it says, it is their view which represents the law."[18]

There are many who argue against the very concept of judicial review of constitutional issues. They characterise it as anti-majoritarian. In the U.S.A., since *Marbury v. Madison*,[19] the institution of judicial review has been a subject of perennial and even passionate debate among the scholars and jurists.

Some scholars have asserted that it is a usurpation of power by the judiciary as the Constitution is silent on the point of judicial review.[20] Others assert that review of legislation is not a judicial function and is very different from the function usually discharged by the courts. But several scholars have argued that it is not so and that the framers of the Constitution did envisage and contemplate judicial review.[21] Some have asserted that judicial review is undemocratic as the judges who declare statutes unconstitutional are neither elected by, nor are responsible to, the people.[22]

But there are many scholars who do not agree with this view. They argue that a democracy need not have all officials elected, and that judicial review is democratic as it promotes democracy by safeguarding the rights of the people and cabining government organs within the confines of the constitution.[23] In a democracy, the majority may not always be right and there always lurks the danger of oppression of the minority by the majority. Judicial review can keep such a tendency in check by keeping the majority within the bounds of the constitution. In the words of Chief Justice WARREN : "The Court's essential function is to act as the final arbiter of minority rights."

A democracy needs a forum, other than the legislature and the executive, for redressing the legitimate grievances of the minorities-racial, religious, political or others. In India, at the present time, the Supreme Court is laying great emphasis on vindication of the rights of the poor and deprived people.[24] This sentiment has been expressed graphically by a Supreme Court Judge as follows: "Judicial

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17. As early as 1727, the Privy Council declared a Connecticut statute null and void: *Winthorp v. Lechmere in* Thayer, *Cases on Constitutional Law*, 34 (1895).

18. WADE, CONSTITUTIONAL FUNDAMENTALS, 65.
Also see, J.A.G. GRIFFITH, THE POLITICS OF JUDICIARY (1977).

19. *Supra*, footnote, 10.

20. BOUDIN, GOVERNMENT BY JUDICIARY (1932); HAND, THE BILL OF RIGHTS (1958).

21. BERGER, CONGRESS V. THE SUPREME COURT (1969).

22. THAYER, The Origin and Scope of the American Doctrine of Constitutional Law, 7 *Harv LR* 129 (1889); SCHWARTZ, A BASIC HISTORY OF THE US SUPREME COURT, 87 (1970).

23. ROSTOW, The Democratic Character of Judicial Review, 66 *Harv, LR* 193 (1952); BLACK JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960); ATIYAH, JUDGES AND POLICY, *supra*, at 362-5.
See generally on Judicial Review, LEONARD W. LEVY, JUDICIAL REVIEW AND SUPREME COURT (1967).

24. See, *supra*, Ch. XXXIV on "Directive Principles".
Also see, *supra*, Chs. VIII, Sec. D(k) and XXXIII, Sec. B, under "Public Interest Litigation".

activism gets its highest bonus when its order wipes some tears from some eyes."[25] Thus, there are supporters and detractors of judicial review.

In spite of this debate, the fact remains that judicial review is an integral part of the American constitutional process, a part of the living Constitution in the U.S.A., and the same is true of India. There are overwhelming reasons as to why the courts should act as authoritative expounder of the constitution and possess power of judicial review.

A written constitution is not a self-executing document, and meanings of several provisions may not always be self-evident. Such a constitution would be reduced to a mere paper document in the absence of an independent organ to interpret, expound and enforce the same. The power of constitutional review by some organ of government is implicit in the concept of a written constitution which seeks to confer limited powers. In the absence of an accepted authority to interpret the constitution, a written constitution would promote discord rather than order in society when different organs of government take conflicting action in the name of the constitution, or when government takes action against the individual.

The legislature and the executive are politically partisan bodies and are committed to certain policies and programmes which they wish to implement. Therefore, they cannot be trusted with the final power of constitutional interpretation. They would often seek to bend the constitution to their own views and accommodate their own policies. The constitution would thus become a plaything of the politicians.

The judiciary is by and large free from active political bias, is politically neutral, and so can be expected to bring to bear a somewhat detached and non-political outlook on constitutional interpretation. If there is any institution in the country which can do so it is the judiciary. It can be expected to expound the constitution dispassionately, apolitically, coolly and with some sense of detachment, to the extent it is humanly possible to achieve such a mental condition in human beings.

The Court gives a reasoned decision after hearing arguments for and against a particular alternative. It is, therefore, regarded as the most suited to act as an umpire in constitutional controversies. In the absence of any effective enforcement machinery, the Fundamental Rights in the constitution will be reduced to mere formal and empty platitudes with no restraint on the government or the legislature.

Federalism and Fundamental Rights add new dimensions to the significance of the judicial role of constitutional interpretation. In the absence of an effective enforcement machinery, the Fundamental Rights will be reduced to mere platitudes. Similarly, the balance of power between the Centre and the States will become untenable if either of them were to have the power to decide for itself where the limits for its functions were to lie. It is only the courts, away from contemporary partisan political controversies, which can with some detachment draw the line between the functions of the Centre and the States.

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25. *The Punjab Rickshaw Pullers'* case, *infra*.
Also see, *State of Haryana v. Darshana Devi,* AIR 1979 SC 857 : (1979) 2 SCC 236; *D.S. Nakara v. Union of India,* AIR 1983 SC 130 : (1983) 1 SCC 305.

The judicial review serves as a necessary check on the possible excesses by the legislature and the executive. Judicial review helps in channelizing the acute and extreme controversies of the day into legal channels.

In the U.S.A., judicial review has been characterised as "the principal process of enunciating and applying certain enduring values of" the American society. As Justice JACKSON observes: "The people have seemed to feel that the Supreme Court, whatever its defects, is still the most detached, dispassionate and trustworthy custodian that our system affords for the translation of abstract into concrete constitutional commands."[26]

There is another more abiding consideration in favour of judicial review. Modern political thought draws a distinction between 'constitution' and 'constitutionalism'[27]. A country may have a constitution but not necessarily constitutionalism. Constitutionalism denotes a constitution not only of powers but also restraints as well. A constitution envisages checks and balances and putting the powers of the legislature and the executive under some restraints and not making them uncontrolled and arbitrary. "Constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law....."[28] Judicial Review is the cornerstone of constitutionalism.

Even in Britain at present there is a growing demand that there should be a written constitution with judicial review. Judicial review plays a significant role in promoting constitutionalism, democratic values and rule of law in the country.[29]

In a parliamentary system, the majority automatically supports the government in office. This results in the powers of the legislature gravitating towards the executive. In such a context, in order to maintain personal rights and a balanced administration, some external restraint on government becomes an absolute necessity. Therefore, even if it slows down somewhat the implementation of socio-economic programmes, that is the price one has to pay for promoting constitutionalism, rule of law and democratic behaviour in the country.

It can also be argued that democracy should not be seen simply as the majority rule, it also includes a set of principles about the exercise of power. Also, a parliamentary majority on a particular issue may not reflect majority opinion in the society.

It is wrong to assume that a society is not democratic unless its legislature has unlimited powers. In a parliamentary system, the majority automatically supports the government of the day, and, thus, the powers of the legislature gravitate to the government and to maintain individual rights, some external restrictions on the government are absolutely necessary.

In any case, the controversy over the role of judicial review is merely academic at present as the people have come to accept it. They realize that the only

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26. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT, 23 (1965).
27. *Supra,* Ch. I.
28. MCLLLWAIN, CONSTITUTIONALISM, ANCIENT & MODERN, 21-22, 146 (1958). Also, *supra.*
29. SCARMAN, THE NEW DIMENSIONS OF ENGLISH LAW.
Also see, Lord Hailsham's Richard Dimbleby Lecture in the Times, Oct. 15, 1976. He has characterised the present-day government in Britain as "elective dictatorship".
Also, *supra,* Ch. 20, Sec. A.

way in which constitutional limitations can be enforced in practice is through the medium of the courts.

Finally, the following observations of Justice CARDOZO may be quoted in support of judicial review:[30]

> "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, the consecrating to the task of their protection a body of defenders. By conscious or sub-conscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith."[31]

Justice CARDOZO accepted that the judiciary only rarely declares a statute unconstitutional but he insisted:

> "The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise ..... The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them, if only the power is exercised with insight into social values, and with suppleness of adaptation to changing social needs."

But as CHARLES L. BLACK JUNIOR emphasizes judicial review has two aspects—that of imprinting governmental action with the stamp of legitimacy as well as that of checking political power when it encroaches on any ground forbidden by the constitution. Both these functions are interdependent; the legitimating and checking functions go hand in hand.[32]

It needs to be underlined that in spite of the avowed acceptance of the law creative role of the judges, they are not traditionally attuned to too much activism. The above statement of CHARLES EVANS HUGHES is really an over-statement and represents too drastic and too simplified an analysis of the complex position of the judiciary and the judicial review in the country's constitutional system. [33]

The judges are not absolutely free agents in rendering their decisions. They are bound *inter alia* by the taught tradition of the law, *stare decisis*, their own sense

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30. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 91-93.

31. A similar idea is expressed by *EDWARD MCWHINNEY* in COMPARATIVE FEDERALISM in the following words:

"The Court consists of elitist group of high talents, aspirations and ideals. Liberal democratic society rests, in the ultimate, on certain basic ideals such as, free speech, and discussion, freedom of association, freedom of conscience and when they are threatened by the Executive and Legislative authority, it is absurd to rest on any abstract academic conception of separation of powers and say that judges may not properly intervene in the protection of those interests. Thus, the maintenance of free society posits the existence of an independent judiciary and entrusting to the judiciary all the responsibilities in the ultimate for the preservation of the open society ideal."

32. THE PEOPLE AND THE COURT, 123.

33. *Infra*, footnote 51.

of self-restraint, the socio-economico-political setting in which they are deciding a controversy. The courts decide a matter only when it is brought before them and not otherwise. The Court's decisions may be reversed either by legislation or constitutional amendment and the Court may correct itself by overruling a previous decision.[34] The Judges have often reminded themselves of the restraints under which they function. In the pithy words of JUSTICE STONE of the U.S. Supreme Court:

> "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision.... One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts, but to the ballot and to the processes of democratic government."[35]

B. *LITERAL V. LIBERAL APPROACH*

How do the courts approach their task of interpreting the constitution. Judicial attitude to the constitution is linked with another basic question of jurisprudential nature: Do courts make law or do they only declare law?

The old orthodox theory was that a judge never creates law, but that he only declares law. This mechanistic view of the judicial function was prevalent in Britain in the early twentieth century. This typical attitude was expressed by BLACKSTONE thus: the duty of the Court is not to 'pronounce a new law but to maintain and expound the old one.'[36] Even as late as 1951, Lord Chancellor JOWITT expressed a similar attitude.[37]

But, in modern times, this time-honoured fiction of the declaratory role of the judge has been dissented from. Lord DENNING has openly preached that the task of common law is to act as an instrument of evolution in accordance with the changing needs of the society and the demands of justice.[38] This view is shared by many other eminent British Judges, such as, Lords DIPLOCK, DEVLIN and REID.[39]

The law-creative function of the judges is very well recognised now.[40] The American realist jurists greatly emphasize such a judicial role.[41] A judge is not an automaton. He has his own scale of values and makes choices accordingly. If one interpretation of the law leads to unjust results, and another interpretation to just results, what prevents a Court from adopting the latter interpretation.

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34. *Infra*, this Chapter, Sec. J.
35. *U.S. v. Butler*, 297 US 1 (1935).
36. BLACKSTONE, COMMENTARIES, 69 (1808).
37. *Australian Law Convention* (1951).
38. DENNING, FROM PRECEDENT TO PRECEDENT; KEETON, VENTURING TO DO JUSTICE.
39. LORD DIPLOCK, *Judicial Development of Law in the Commonwealth*, (1978) 1 *MLJ* cviii—cxiii; Reid, The Judge as Lawmaker, 12 *JSPTL* 22 (1972); LORD HAILSHAM, The Independence of the Judiciary in a Democratic Society, (1978) 2 *MLJ* cxv.
40. P.N. BHAGWATI, Judicial Activism and Public Interest Litigation, (1985) *Col JI. of Transnational Law, 561*; ATIYAH, Judges and Policy, (1980) 15 *Israel LR* 346; *BAXI*, THE INDIAN SUPREME COURT AND POLITICS, (1980).
41. GRAY, THE NATURE AND SOURCES OF THE LAW, 84 (1931).

Influenced by these judicial attitudes, there have been two approaches to the interpretation of a written constitution. One approach is literal, mechanical, narrow interpretation of the constitution where the judgment of the Court constitutes a mere exegesis of the Fundamental text. This approach envisages that the constitution is treated as any other statute passed by the legislature and the same canons of interpretation are applied thereto as are usually applied to the interpretation of ordinary legislative enactments. This is the positivist or the Austinian approach.

The other is the liberal, purposive, law-creative interpretation of the constitution "with insight into social values, and with suppleness of adaptation to changing needs."[42] The courts start with the premise that the constitution being the Fundamental law of the land should be given a somewhat different treatment and interpreted more liberally than an ordinary statute. Interpretation of a statute affects only a limited number of people, but interpretation of the constitution and declaring a statute constitutional or unconstitutional affects the entire governmental functioning, policy-making and even the constitutional process in the country.

Thus, a constitution is not just one of the ordinary statutes. Here the courts play a creative role and even make law while interpreting the constitution. In discharging this task, the courts may have to make implications within the written words of the constitution to bring the whole thing in accord with the more acceptable contemporary norms. Passage of time has been a factor in the interpretative process. Sec. 118 of the Succession Act, 1925 was enacted to prevent persons from making ill-considered deathbed bequests under religious influence. The object behind the said legislation was, therefore, to protect a section of illiterate or semi-literate persons who used to blindly follow the preachers of the religion. Such a purpose has lost all significance with the passage of time and, therefore, has to be declared *ultra vires*.[43]

The courts have to balance public interest and individual interest. It may be that in a given situation, the judge may be faced with several alternative approaches to interpreting a constitutional provision, and when he chooses one of these, he is influenced by his own predisposition, values and policies and these may not necessarily be the same as those of the constitution-makers, or of the legislators enacting the law impugned. Here the role of the courts may not be very much different from being 'constituent' or that of 'law-making.' It has been pointed out that whereas larger interest of the country must be perceived, the law makers cannot shut their eyes to the local needs also. Constitutional interpretation is a difficult task. Its concept varies from statute to statute, fact to fact situations. Mostly the backward suffer from disability either for belonging to an oppressed community or by way of economical, cultural or social imbalances. The courts shall all along strive hard for maintaining a balance.[44]

It may be noted that ultimately it is a matter of judicial attitudes and choices as to how the judges approach the task of constitutional interpretation. At one time, there may be one undercurrent, and at another time, there may be another undercurrent. At one time, a Court may indulge in judicial passivism and at other time

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42. CARDOZO, *supra*, footnote 30.
43. *John Vallamattom v. Union of India,* (2003) 6 SCC 611, 622 : AIR 2003 SC 2902.
44. *Saurabh Chaudri v. Union of India,* (2004) 1 SCC 369.

the same Court may show signs of judicial activism depending upon the predisposition of the judges as well as the type of legislation being considered by them. If at one time the majority of the judges on the Court takes one view, invariably there may be a minority taking the other view. The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach to interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges. This principle of interpretation is particularly apposite to the interpretation of Fundamental Rights.[45]

During the colonial days, the Privy Council would usually apply the canons of statutory interpretation to constitutional interpretation as well.[46] For example, the Privy Council said in *King-Emperor v. Benoari Lal Sharma*:[47] "The question whether the ordinance is *intra vires* or *ultra vires* does not depend on considerations of jurisprudence or policy. It depends simply on examining the language of the Government of India Act." In relation to Canada, the Privy Council said that it would apply to the British North America Act, 1867, the same methods of construction and exposition as were applied to other statutes.[48]

There were two main reasons for such an approach:

(1) the colonial constitutions, e.g., the Government of India Act, or the British North America Act, were only statutes of the British Parliament and so the British judges interpreted them as statutes;

(2) there was preponderant emphasis on the literal approach as the law creative role of the judges had not yet been fully recognised.

After the colonial era gave way to the commonwealth era, the attitude of the Privy Council towards interpretation of the constitutions of the ex-overseas colonies underwent a sea change. For example, in *Hinds v. The Queen*,[49] the Privy Council said: "To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would ..... be misleading."

In *Minister of Home Affairs v. Fisher*,[50] the Privy Council posed the question: should a constitution be interpreted according to the same rules as a statute? There were two answers to this question, said the Privy Council. One, recognising the status of the constitution as, in effect an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts. Two, the more radical answer is: to treat a constitutional institutional instrument such as this as *sui generis*, calling for principles of interpretation of its own, suitable to

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45. *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71.
46. The high-water mark of this approach can be seen in *Kariapper v. Wijesinha*, (1968) AC 717.
47. (1945) 72 IA 57.
48. *Bank of Toronto v. Lambe*, 12 AC 575.
49. (1976) 1 All ER 356. Also see, *Liyanage v. Regina*, (1966) 1 All ER 650.
50. (1979) 3 All ER 21, 25. Also see, *Teh Cheng Poh v. Public Prosecutor*, (1979) 1 MLJ 50.

its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law. The Privy Council preferred the second option. The Privy Council was here interpreting the Fundamental Rights provisions of the Bermuda Constitution. The Privy Council concluded that these provisions "call for a generous interpretation avoiding the austerity of tabulated legalism, suitable to give to individuals the full measure of the Fundamental Rights and freedoms."

In the U.S.A., in the area of constitutional interpretation, judges have always accepted a law-creative role and from time to time have made statements putting emphasis on judicial activism in constitutional matters. For example, there is the famous dictum by CHARLES EVANS HUGHES to the following effect: "We are under a constitution, but the constitution is what the judges say it is."[51]

Voicing a similar approach, a scholar has said: "The texts of constitutional instruments.... seem merely to be the servants of ultimate judicial policies."[52] Thus, in the U.S.A., there has been a greater emphasis on law-creative function of the judiciary. The reason for this may be that the U.S. Constitution is a brief and compact document; it is couched in general language which can be interpreted and re-interpreted by the courts from time to time in the context of contemporary circumstances, *e.g.*, due process of law, interstate commerce, etc. The Supreme Court has thus evolved a number of doctrines which are not mentioned explicitly in the Constitution, *e.g.*, immunity of instrumentalities, separation of powers, police powers, etc.

Further, amendment of the U.S. Constitution has proved to be a very difficult process.[53] Therefore, by and large, it has fallen on the judiciary to re-orient the Constitution to new contemporary socio-economic situations by its interpretative process. In the absence of any such judicial effort, the U.S.A. would have been faced with a static Constitution and its social and economic progress would have been hampered. The Supreme Court has interpreted the U.S. Constitution in such a creative manner that an old document, of nearly 200 years in age, without many amendments, has been serving the needs of the present highly sophisticated technological era. In this way, the Court has not only played the role of an interpreter of the Constitution but even the role of a constitution-maker.

The truth was realised by the U.S. Judges quite early in the day that the interpretation of the Constitution was quite a different matter from interpretation of a statute. As MARSHALL, C.J., said in *McCulloch v. Maryland*:[54] "We must never forget that it is a constitution we are expounding" and that the Constitution is "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." BRANDEIS, J., has written :

> "Our Constitution is not a straight jacket. It is a living organism. As such it is capable of growth, of expansion and of adaptation to new conditions. Growth implies changes, political, economic and social. Growth which is significant manifests itself rather in intellectual and moral conceptions of material things."[55]

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51. ABRAHAM, THE JUDICIAL PROCESS, 326 (1968); ABRAHAM, THE JUDICIARY: THE SUPREME COURT IN THE GOVERNMENT PROCESS (1977).
52. EDWARD MCWHINNEY, *supra*, footnote 9, at 19.
53. See, *infra*, Ch. XLI.
54. 17 US 316.
55. HARVARD LAW SCHOOL, BRANDEIS PAPERS.

Courts must have regard to its "great outlines" and important objects. During the last 200 years, there have been quite a few famous law-creative judgments of the U.S. Supreme Court in relation to the U.S. Constitution.

It may be interesting to remember that exercise of the power of constitutional interpretation and judicial review of legislation may not always be smooth for the judiciary. At times, it involves the courts in controversies, and some of the judicial pronouncements may not be palatable to the government of the day, for example, in India, such controversies arose as a result of judicial approach to private property, especially on the question of compensation payable for compulsory acquisition of private property.[56] The Supreme Court's ruling in *Kesavananda* was not liked by the government which sought for an unrestricted power in Parliament to amend the Constitution.[57]

For example, in the U.S.A., in the 1930's, President Roosevelt, in order to fight the prevailing economic depression, initiated an ambitious economic programme, known as the New Deal, but the Supreme Court declared some parts of it unconstitutional. The President was so much annoyed at this that he proposed a plan of appointing a number of judges to pack the Court so as to tilt its decisions in favour of the New Deal programme.[58] But the plan was not pursued as it became very controversial and, with the resignation of one Judge, the President got an opportunity to appoint a Judge of his choice and, subsequently, most of the programme could be judicially upheld.

In Australia and Canada as well, judicial views expressed in relation to certain constitutional provisions have been criticised from time to time.[59]

But such controversies are inherent in any system of judicial review. Courts have no control over the cases which come to them for decision. When a case comes before it, the Court has to decide it one way or the other and, in a politically sensitive case, either way it will give rise to a controversy. Even if the courts were to refuse jurisdiction over a case, or refuse to give the relief asked for, it is still going to give rise to a controversy.

C. JUDICIAL REVIEW IN INDIA

Unlike the U.S.A., the Constitution of India explicitly establishes the doctrine of judicial review in several Articles, such as, 13, 32, 131-136, 143, 226 and 246.[60] The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the Constitution.

Article 13(2) even goes to the extent of saying that "The state shall not make any law which takes away or abridges the rights conferred by this Part [Part III containing Fundamental Rights] and any law made in contravention of this clause shall, to the extent of the contravention, be void."[61] The courts in India are thus

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56. *Supra*, Chs. XXXI and XXXII.
57. *Infra*, next Chapter.
58. CHARLES E. HUGHES, THE SUPREME COURT OF THE *US*, 84-7 (1936); JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY, 343 et seq.; COPE, ALFRED HAINES, FRANKLIN D. ROOSEVELT AND THE SUPREME COURT (1952).
59. MCWHINNEY, JUDICIAL REVIEW, 61-95 (1969).
60. *Supra*, Chs. IV, VIII, X, XX and XXXIII.
61. For discussion on Art. 13(2), see, *supra*, Ch. XX.

under a constitutional duty to interpret the Constitution and declare the law as unconstitutional if found to be contrary to any constitutional provision. The courts act as sentinel on the *qui vive* so far as the Constitution is concerned.

Underlining this aspect of the matter, the Supreme Court stated in *State of Madras v. Row* that the Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution and that the courts "face up to such important and none too easy task" not out of any desire "to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution."[62] The Court observed further: "While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute."

As the Supreme Court emphasized in *Gopalan*: "In India it is the Constitution that is supreme" and that a "statute law to be valid, must in all cases be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not" and if a legislature transgresses any constitutional limits, the Court has to declare the law unconsitutional "for the Court is bound by its oath to uphold the Constitution."[63]

The doctrines of supremacy of the constitution and judicial review has been expounded very lucidly but forcefully by BHAGWATI, J., as follows in *Rajasthan v. Union of India*:[64]

> "It is necessary to assert in the clearest terms particularly in the context of recent history, that the constitution is *supreme* lex, the permanent law of the land, and there is no department or branch of government above or beyond it. Every organ of government, *be it the executive or the legislature or the judiciary*, derives its authority from the constitution and it has to act within the limits of its authority. No one however highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the constitution or whether its action is within the confines of such power laid down by the constitution. This Court is the ultimate interpreter of the constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits".

Therefore, the courts in India cannot be accused of usurping the function of constitutional adjudication; it is a function which has been imposed on them by the Constitution itself. It is a delicate task; the courts may even find it embarrassing at times to discharge it, but they cannot shirk their constitutional responsibility.

Justifying judicial review, RAMASWAMI, J., has observed in *S.S. Bola v. B.D. Sharma*.[65]

> "The founding fathers very wisely, therefore, incorporated in the Constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the Fundamental Rights and Fundamental freedoms guaranteed to the citizens and to afford a useful weapon for availability, availment and enjoyment of equality, liberty and Fundamental freedoms and to help to create

62. AIR 1952 SC 196, 199 : 1952 SCR 597; Ch. XXIV, *supra*.
63. AIR 1950 SC 27; *supra*, Ch. XXVI, Sec. A.
64. AIR 1977 SC 1361 : (1977) 3 SCC 592.
65. AIR 1997 SC 3127, 3170.

> a healthy nationalism. The function of judicial review is a part of the constitutional interpretation itself. It adjusts the constitution to meet new conditions and needs of the time."

In a number of cases, the Supreme Court has emphasized upon the importance of judicial review in India. KHANNA, J., emphasized in *Kesavananda*:[66]

> "As long as some Fundamental Rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by these Rights are not contravened…… Judicial review has thus become an integral part of our Constitutional system……"

In *Minerva Mills*[67] CHANDRACHUD, C.J.. speaking on behalf of the majority, observed :

> "It is the function of the Judges, may their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the Fundamental Rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will then become uncontrolled."

In his minority judgement in *Minerva*,[68] BHAGWATI, J., observed :

> "It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which *inter alia* requires that 'the exercise of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law.' The power of judicial review is an integral part of our constitutional system…. the power of judicial review….. is unquestionably….. part of the basic structure of the Constitution."[69]

AHMADI, C.J., ……speaking on behalf of a bench of seven judges in *L. Chandra Kumar v. Union of India*,[70] has observed :

> "The judges of the Supreme Courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations……."

Thus, the jurisdiction conferred on the Supreme Court under Art. 32 and on the High Courts under Arts. 226/227 of the Constitution has been held to be part of the inviolable basic structure of the Constitution which cannot be ousted even by a Constitutional Amendment.[71]

The scope of judicial review in India is somewhat circumscribed as compared to that in the U.S.A. In India, the Fundamental Rights are not so broadly worded as in the U.S.A., and limitations thereon have been stated in the Constitution itself and this task has not been left to the courts. The constitution-makers adopted this strategy as they felt that the courts might find it difficult to work out the limitations on the Fundamental Rights and the same better be laiddown in the Consti-

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66. See, *infra*, Ch. XLI.
67. *Infra*, Ch. XLI.
68. *Ibid.*
69. For the doctrine of the "Basic Structure of the Constitution, see, *infra*, Ch. XLI.
70. AIR 1997 SC 1125, 1150 : (1997) 3 SCC 261; see, Ch. VIII, Sec. I, *supra*.
71. For discussion on Arts. 32, 226 and 227, see, *supra*, Chs. VIII and XXXIII.
See, next Chapter, for discussion on the theory of 'Basic Structure' of the Constitution.

tution itself. The constitution-makers also felt that the judiciary should not be raised to the level of the 'super-legislature'.[72]

Whatever the justification for the methodology adopted by the constitution-makers, the inevitable result of this has been to restrict the range of judicial review in India. The Indian Constitution does not afford the same scope of judicial creativity to the courts as does the U.S. Constitution.[73] Further, over the years, the scope of some of the Fundamental Rights has been curtailed by constitutional amendments, and, thus, the scope of judicial review has been further restricted.[74] This process can be seen very clearly in the context of the right to property.[75]

In spite of all this, the Supreme Court does play a significant role in the Indian constitutional process. Since the commencement of the Constitution, the Supreme Court has rendered hundreds of decisions expounding various provisions of the Constitution, and, thus, a distinct constitutional jurisprudence has come into existence. In many cases, the Supreme Court has displayed judicial creativity of a very high order, for example, in *Kesavananda*[76] and in expanding the scope of Art. 21.[77]

The bare text of the Indian Constitution does not by itself give a full picture of the Indian Constitutional Law. To have a full comprehension thereof, one must read the constitutional text along with the gloss put on it by the Judiciary from time to time and case to case.

There is no denying the fact that there have been occasions when judicial pronouncements have not been palatable to the governments and the Legislatures in India. The exercise of the power of judicial review has at times generated controversies and tensions between the courts, the executive and the legislature. For example, the judicial pronouncements in the area of property relations,[78] legislative privileges,[79] and constitutional amendments[80] have been controversial and have even led to several constitutional amendments which were undertaken to undo or dilute judicial rulings which the Central Government did not like.

Efforts have been made in India to curtail the scope of judicial review in some constitutional areas. Cases like *Golak Nath*,[81] *Bank Nationalisation*[82] or *Kesavananda Bharati*[83] have raised passionate controversies in India.

The Law Minister in the Central Government once stated in Parliament that the courts had, through their exercise of power of judicial review, retarded the process of socio-economic development of the country, and, therefore, he justified certain restrictions on the powers of the courts to declare laws unconstitu-

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72. VII *CAD* 1195; IX *CAD* 1195-6; G. AUSTIN, THE INDIAN CONSTITUTION, 164 *et seq.* Also, *supra,* Chs. XXXI and XXXII.
73. *Supra*. Sec. A; Ch. XX, Sec. A, *supra.*
74. *Infra*, Chs. XLI and XLII.
75. *Supra*, Chs. XXXI and XXXII.
76. For *Kesavananda*, see, *infra*, next Chapter.
77. For discussion on Art. 21, see, Ch. XXVI, *supra*.
For discussion on this theme generally, see below.
78. *Supra*, Ch XXXI.
79. *Supra*, Chs. II, Sec. L; Ch. VI, Sec. H.
80. *Infra*, next Chapter.
81. *Infra*, next Chapter.
82. *Supra*, Ch. XXXI.
83. *Infra*, next Chapter.

tional.[84] But, in spite of all these hurdles, the institution of judicial review has a vibrancy of its own and has even been declared as the basic feature of the Constitution.

D. JUDICIAL CREATIVITY IN INDIA

(a) LITERAL INTERPRETATION

To begin with, generally speaking, the predominant approach of the Indian Judiciary was positivist, i.e., to interpret the Constitution literally and to apply to it more or less the same restrictive canons of interpretation as are usually applied to the interpretation of ordinary statutes. This is also described as the positivist approach. The approach emanates from the basic traditional therory that a judge does not create law but merely declares the law. Such a view prevailed in Britain in the XIXth and the early XXth centuries. Judicially, the principle was laid down in these words: "In interpreting the provisions of our Constitution, we should go by the plain words used by the constitution-makers."[85]

To some extent, the Constitution itself incorporates the principle of statutory construction. Art. 367 provides that the General Clauses Act, 1897,[86] shall apply for the interpretation of the Constitution as it applies for the interpretation of legislative enactments. The courts have held that not only the 'general definitions' in the General Clauses Act, but also the "general rules of construction" in the Act, apply to the Constitution.[87] Accordingly, the power to appoint in Art. 229(1) has been held to include the power of dismissal by virtue of S. 16 of the General Clauses Act.[88] The words 'person' in Art. 226 and 'offence' in Art. 20 have been given the same meaning respectively as Ss. 3(42) and 3(37) of the Act give to these words.[89] The General Clauses Act can be amended by Parliament. Art. 367 thus means that interpretation of many words and phrases used in the Constitution can be modified by Parliamentary legislation without amending the Constitution.

In the same *genre* falls the interpretation given to the expression 'sale of goods' in entry 54 in List II. The Supreme Court has held that the expression bears the same meaning as in the Sale of Goods Act.[90]

The position appears to be somewhat anomalous in so far as the meaning attached to a provision in the Constitution depends to some extent on parliamentary pleasure, and because of Art. 367, the courts have to acquiesce in it.

The crowning example of the strict constitutional interpretation can be seen in *Gopalan* which denuded Art. 21 of much of its efficacy and effectiveness and

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84. Parl. Debates on the Constitution (Forty-fourth) Amendment Bill; see, *infra*, Chs. XLI and XLII.

85. MUKHERJEA, J., in *Chiranjit Lal's* case, AIR 1951 SC at 58.

86. This Act contains, as it were, a legislative dictionary for India.

87. *Jugmendar Das v. State of U.P.,* AIR 1951 All 703; In re *Keshavan Madhav Menon,* AIR 1951 Bom 188; *Anand Bihari v. Ram Sahay,* AIR 1952 MB 31.

88. *Pradyat Kumar v. Chief Justice, Calcutta High Court,* AIR 1956 SC 285 L (1955) 2 SCR 1331; *Bool Chand v. Chancellor, Kurukshetra Univ.,* AIR 1968 SC 292 : (1968) 1 SCR 434.

89. *Bijoy Ranjan v. B.C. Das Gupta,* AIR 1953 Cal 289; *Jawala Ram v. Pepsu,* AIR 1962 SC 1246 : (1962) 2 SCR 503.

90. *Supra*, Ch. XI, Sec. D.

made 'personal liberty' a matter of legislative discretion which it would have been even in the absence of Art. 21.[1]

In *Keshavan Madhava Menon*,[2] the Supreme Court applied to the Constitution the rule of statutory interpretation that every statute *prima facie* is prospective unless expressly or by necessary implication it is made to have retrospective operation. On this basis, the Court held that Art. 13(1) was wholly prospective in so far as any proceeding initiated before the commencement of the Constitution would not abate but continue even though the relevant law was hit by a Fundamental Right.

In *Saka Venkata Rao*,[3] the Court interpreted Art. 226 narrowly as regards the High Court's jurisdiction to issue writs. This position had to be rectified by an amendment of the Constitution. These cases illustrate the general trend of judicial approach to the Constitution as a statute. In the same category may also be placed the following :

(*i*) the application of the doctrine of *res judicata* to the interrelationship of Arts. 32 and 226, by which the scope of Art. 32 has been somewhat cut down by the Supreme Court even when the Constitution places no such restriction on it ;[4]

(*ii*) the application of the law of limitation to writ petitions although the Constitution is silent on this point;[5]

(*iii*) the Supreme Court decision in the *Habeas Corpus* case during the emergency.[6]

The *Habeas Corpus* case has been characterised as one of the worst decisions rendered by the Supreme Court in its entire career because it struck at the very foundations of constitutionalism and the rule of law in the country. The Court failed to provide any protection to the people when its protection was needed most. The case can be explained as the consequence of narrow, restrictive, literal interpretation of the Constitution by the Supreme Court.

(b) LIBERAL INTERPRETATION

But then things have changed and the judicial approach to the Constitution is no longer solely and exclusively one of statutory interpretation. The liberal interpretation emerges because of the change in theory of the role of the judge. In course of time, the fiction of the declaratory role of the judge has been abandoned. The law creative role of a judge is very well recognised in modern times.

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1. *Supra*, Ch. XXVI, Sec. B(a).
See, SEERVAI, THE POSITION OF THE JUDICIARY UNDER THE CONSTITUTION OF INDIA, 62, where the author supports *Gopalan*. He appears to be a votary of literal interpretation of the Constitution. He praises *Gopalan* as a "landmark of Judicial wisdom, Judicial detachment and judicial restraint." However, few scholars share the views of SEERVAI as regards *Gopalan*. Any way, time has proved him wrong as Art. 21 has been very liberally interpreted since 1978.

2. *Supra*, Ch. XX. Sec. C.

3. *Infra*, next Chapter.
Also see, Ch. VIII, Sec. D(b), *supra.*

4. *Supra*, Ch. VIII, Sec. D(f).

5. *Ibid*., M.P. Jain, Judicial Review of Administrative Action in India, *Proceedings of the Third Commonwealth and Empire Law Conference, Sydney* (1965).

6. *Supra*, Ch. XXXIII.

The American Realist Jurists greatly emphasize such a judicial role. A judge is not an automaton; he has to make choices out of several alternatives.

The liberal approach is designed to give a creative and purposive interpretation to the Constitution "with insight into social values, and with suppleness of adaptation to changing needs."[7]. Our Constitution is organic in nature and being a living organ, it is ongoing. Hence, with the passage of time, the law must change.[8] Modern scholars by and large now favour liberal judicial approach to the Constitution. The Constitution is a mechanism under which laws are made; it is not a mere statute which only declares what the law is to be. Therefore, it is advocated that the Constitution must not be construed in a narrow or pedantic manner. New situations arise in the country which may never have been visualised by the constitution-makers at the time of the constitution making. Therefore, a generic interpretation or flexible construction need to be given to the Constitutional provisions so as to make the constitution as a living organism so that it may meet the needs of the changing society at different times. Law which was at one point of time constitutional may be rendered unconstitutional later.[9]

A constitution is intended to serve the needs of the day when it was enacted and also to meet the needs of the changing conditions in new circumstances. Constitution has no fixed meaning and its interpretation must be based on the experience of the people in the course of working of the Constitution. However the same thing cannot be said in relation to interpreting the words and expressions in a statute.[10]

In relation to Part III of the Constitution, it has been held that certain unarticulated rights are implicit in the enumerated guarantees. For example, freedom of information has been held to be implicit in the guarantee of freedom of speech and expression.[11]

The liberal judicial interpretation of the written constitution emanates from the feeling that the function of interpreting a written constitution is very crucial to the governmental process in the country and, therefore, the judicial approach to this task has to be entirely different from that of interpreting a statute. While interpretation of a statute one way or other affects only a limited number of persons, interpreting the constitution and declaring a parliamentary statute unconstitutional affects the entire governmental functioning, policy-making and the constitutional process in the country. The Constitution is at the base of the whole governmental fabric, it guarantees Fundamental Rights of the people; it guarantees a democratic government and rule of law in the country; it distributes powers between the various organs of the state, *viz.*, executive, judiciary and the legislature. A federal constitution distributes powers between the Centre and the States. Thus, interpretation of a constitution is a different exercise qualitatively than interpreting a statute.

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7. CARDOZO, *op. cit.*, Sec. F.
Also see, DENNING, FROM FREEDOM TO PRECEDENT; REID, The Judges as a law maker, 12 *J.S.P.T.L.* 22 (1972).

8. *Saurabh Chaudri v. Union of India*, (2003) 11 SCC 146 : AIR 2004 SC 361 regarding reservation.

9. *Indian Handicrafts Emporium v. Union of India*, (2003) 7 SCC 589 : AIR 2003 SC 3240.

10. *Ashok Tanwar v. State of H.P.*, (2005) 2 SCC 104 : AIR 2005 SC 614.

11. *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71.

The liberal interpretation also has an ideological tinge to it, *viz.*, the courts cast themselves in the role of the protector and guardian of the Constitution, especially, of the Fundamental Rights of the people and the democratic values. The courts by adopting liberal approach constantly expand the frontiers of the people's Fundamental Rights so as to make the government more and more liberal and democratic. The courts seek to bring the static clauses in the constitutional document to life in conformity with the needs of a dynamic society. A creative interpretation of the Constitution would involve—

(i) interpreting the powers of the government affecting person or property somewhat restrictively rather than broadly; and

(ii) interpreting people's rights broadly and liberally rather than mechanically and literally.

Occasions are not wanting in India, when the Supreme Court has broken this self-imposed shackle and given a creative, purposive interpretation to constitutional provisions. At times, the consciousness that the Constitution is somewhat different from an ordinary statute—the essential difference being that it is the basic law of the country to which other statutes have to conform—has manifested itself and led the judiciary to interpret the Constitution liberally and broadly. The Supreme Court has recently declared, with a view to promote the highest democratic values in the country, that a popular mandate cannot override the Constitution. The Court has observed: "The constitution prevails over the will of the people as expressed through the majority party" in the Legislature. "The will of the people as expressed through the majority party prevails only if it is in accord with the Constitution," the Court has said.[12]

At times, the Supreme Court has emphasized that the Constitution must not be construed in any narrow and pedantic sense. To express this idea, KANIA, C.J. in *Gopalan* adopted the following quotation from an Australian case:[13] "Although we are to interpret words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act we are interpreting—to remember that it is a constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be". Many a time, the Supreme Court has stated the proposition that the Constitution should be interpreted liberally, as a constitution and not as a statute.[14]

In *Pathuma*,[15] the Supreme Court has emphasized that the judicial approach to the Constitution should be dynamic rather than static, pragmatic and not pedantic, elastic rather than rigid. Constitution is not to be interpreted as a mere statute but as a machinery by which laws are made.

The Supreme Court has observed in *India Cement.*[16] :

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12. *B.R. Kapur v. State of Tamil Nadu*, AIR 2001 SC 3435, at 3455 : (2001) 7 SCC 231. Also see, *supra*, Ch. I and Ch. VII.

13. HIGGINS J. In *Att. Gen., N.S.W. v. Brewery Employees Union*, 6 CLR 469, 611-12. Also, *James v. Commonwealth of Australia*, 1936 AC 578, 614.

14. *Pathumma v. State of Kerala*, AIR 1978 SC 771 : (1978) 2 SCC 1; *R.S. Joshi v. Ajit Mills*, AIR 1977 SC 2279 : (1977) 4 SCC 98.

15. *Pathumma v. State of Kerala, supra*, footnote 14.

16. *India Cement Ltd. v. State of Tamil Nadu*, AIR 1990 SC 85 : (1990) 1 SCC 12.

> "It has to be remembered that it is a constitution that requires interpretation. Constitution is the mechanism under which the laws are to be made and not merely an Act which declares what the law is to be."

In another case,[17] the Supreme Court has also observed :

> "A constitutional provision is never static, it is ever evolving and ever changing and, therefore, does not admit of a narrow, pedantic or syllogistic approach….. It seems well settled….. that constitutional provisions must receive a broad interpretation and the scope and ambit of such provisions, and in particular the Fundamental rights, should not be cut down by too astute or too restricted an approach."

The Supreme Court has emphasized in *Goodyear*[18] that the Constitution is to be construed not in a narrow or pedantic sense. It is to be construed not as mere law but as the machinery by which laws are to be made. The constitution is a living and organic thing and, therefore, it needs to be construed broadly and liberally.

Recently, in *S.R. Chaudhuri v. State of Punjab*,[19] the Supreme Court rejected the argument that Art. 164(4) [as well as Art. 75(5) which is in *pari materia* to Art. 164(4)][20] be interpreted in a literal manner on its "plain language". Instead, the Court argued in favour of a purposive interpretation of the provision. The Court observed in this connection:

> "Constitutional provisions are required to be understood and interpreted with an object oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve... We must remember that a Constitution is not just a document in solemn form, but a living framework for the Government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter and in spirit."[21]

At another place, the Supreme Court has emphasized that the Articles should be so construed as to "further the principles of a representative and responsible Government".[22]

A few examples of this approach may be cited here:

(*i*) The principle of broad and liberal interpretation has been consistently applied to construction of legislative entries in the three Lists. These entries are given a broad sense beneficial to the widest possible amplitude of powers and not a narrow or restricted sense. The entries include within their scope and ambit all ancillary matters which legitimately come within the topics mentioned therein.[23]

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17. *Life Insurance Corp. of India v. Manubhai D. Shah*, AIR 1993 SC 171, at 176-177 : (1992) 3 SCC 637.
18. *Goodyear India Ltd. v. State of Haryana*, AIR 1990 SC 781, at 791 : (1990) 2 SCC 71.
19. AIR 2001 SC 2707 : (2001) 7 SCC 126; *supra*, Ch. VII, Sec. B.
20. See, *supra*, Chs. III, Sec. B; Ch. VII, Sec. B.
21. AIR 2001 SC at 2717.
22. *Ibid*, at 2719.
23. *Supra*, Ch. X, Sec. G(i).
Also, *Vishnu Agencies v. Commercial Tax Officer*, AIR 1978 SC 449, 458 : (1978) 1 SCC 520.

(*ii*) A significant matter in which the Supreme Court has not interpreted the Constitution literally pertains to the permissible limits within which Parliament can delegate legislative power on the executive. There is no specific constitutional provision covering this matter, yet the Supreme Court has implied a restriction on delegation from the Constitution—an approach which differs from that of statutory interpretation.[24]

(*iii*) In the *Express Newspaper* case,[25] while interpreting Art. 19(1)(*g*), the Court expounded the socio-economic theories regarding the concepts of 'living', 'minimum' and 'fair' wages, and introduced the principle of 'capacity to pay' as an essential ingredient in fixing 'living' and 'fair' wages. For this purpose, the Court quoted extensively from the Report of the Committee of Fair Wages, the Report of the Press Commission, and a number of other publications dealing with fixation of wages.

(*iv*) While delimiting the concept of the freedom of the press in *Express Newspaper*, the Supreme Court made use of the Report of the Commission on Freedom of Press in the U.S.A. The case constitutes a very good illustration of judicial policy-making.

(*v*) In *Quareshi*,[26] the Court mentioned various considerations—religious, economic, agricultural, nutritive—to decide the extent to which the slaughter of cattle could be prohibited with reference to Art. 19(1)(*g*).

The Supreme Court quoted from various reports, such as, the Report on Marketing of Cattle in India, the Report of the Cattle Preservation and Development Committee, etc.

The Court's judgment forms a very good essay on improvement of cattle wealth in India. It constitutes another good example of judicial policy-making giving guidance to the State Governments which were being politically pressurized on the issue of banning animal slaughter especially cow slaughter.

(*vi*) In deciding what is a reasonable restriction on a Fundamental Right under Art. 19, the Supreme Court has at times embarked on a broad canvas.[27]

While considering reasonableness of a restriction on the right to hold property under Arts. 19(1)(*f*) and 19(5), the Court stated in *Jyoti Pd. v. Delhi*:[28] "The criteria for determining the degree of restriction on the right to hold property which would be considered reasonable, are by no means fixed or static, but must obviously vary from age to age and be related to the adjustments necessary to solve the problems which communities face from time to time.... If law failed to take account of unusual situations of pressing urgency arising in the country, and of the social urges generated by the patterns of thought evolution

24. *Supra*, Ch. II, Sec. N.
25. *Supra*, Ch. XXIV, Secs. I and J.
26. *Supra*, Ch. XXIV, Sec. J(g).
27. *Ibid*.
28. *Ibid*.

and of social consciousness which we witness in the second half of the century, it would have to be written down as having failed in the very purpose of its existence."

The Court has further emphasized that in judging the validity of social legislation the "courts have necessarily to approach it from the point of view of furthering the social interest which it is the purpose of the legislation to promote, for the courts are not, in these matters, functioning as it were in *vacuo*, but as parts of a society which is trying, by enacted law, to solve its problems and achieve social concord and peaceful adjustment and thus furthering the moral and material progress of the community as a whole."

(*vii*) In the *Golak Nath* case,[29] the majority of the Supreme Court while holding the Fundamental Rights as non-amendable emphasized the great value and significance of these rights and expressed the apprehension that if these rights were to be diluted or curtailed then it would usher in a totalitarian regime in the country.

In support of this thesis, the Court quoted extensively from the writings of the various political thinkers.

HIDAYATULLAH, J., criticised the 'doctrinaire conceptualism' based on an "arid textual approach."[30]

A similar approach is visible in *Kesavananda Bharati*[31] and *Indira Nehru Gandhi v. Rajnarain*[32]—the two cases dealing with Amendments of the Constitution.

(*viii*) *Kesavananda* may be regarded as the high water-mark of purposive interpretation of the Constitution. The judgment depicts an attempt on the part of the Supreme Court to protect some of the basic values of the Constitution from the onslaught of transient majority in Parliament.[33]

(*ix*) The Supreme Court consistently sought to give some protection to 'private property', particularly, on the question of compensation, and this may be regarded as an instance of judicial policy-making.[34]

(*x*) Barring the emergency period of 1975-1977, the Supreme Court has provided some protection to persons detained in preventive detention by creatively applying the principles of Administrative Law.[35]

(*xi*) In *B. Banerjee v. Anita Pan*,[36] while considering the *vires* of a social legislation, the Supreme Court has emphasized upon the need on the

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29. *Infra*, next Chapter.
30. *Golak Nath, infra*, next Chapter.
31. *Infra*, next Chapter.
32. *Infra*, next Chapter.
Also see, *infra*, Ch. XLII.
33. *Infra*, next Chapter.
34. *Supra*, Ch. XXXI.
35. *Supra*, Ch, XXVII, Sec. D.
Also, M.P. Jain, note, 1 on 1813.
36. AIR 1975 SC 1145, 1148 : (1975) 1 SCC 166; *supra*, Ch. XXIV.

part of the government to present to the Court relevant socio-economic data in support of the impugned legislation.

In the words of K. IYER, J.: "Welfare legislation calculated to benefit weaker classes, when their *vires* is challenged in Court, cast an obligation on the State ..... to support the law, if necessary by a Brandeis brief and supply of socio-economic circumstances and statistics inspiring the enactment. Courts cannot, on their own, adventure into social research outside the record and if Government lets down the legislature in Court by not illumining the provisions from the angle of the social mischief or economic menace sought to be countered, the victims will be the class of beneficiaries the State professed to protect."

(*xii*) In the post emergency era beginning 1978, with its pronouncement in *Maneka Gandhi*,[37] the Supreme Court has breathed new vigour and life into the concept of personal liberty[38] and given new dimensions to the right to equality.[39] The Supreme Court has thus contributed much to the cause of human rights in India.

Many a time, the Supreme Court has asserted that "the attempt of the Court should be to expand the reach and ambit of Fundamental Rights rather than attenuate their meaning and content by process of judicial construction….."[40]

The impact of the liberal judicial approach on Fundamental Rights has been remarkable over a period of time. This is demonstrated in many ways.

One, the Supreme Court has given an extended meaning to Art. 142 giving an extension to its own power to give relief.[41]

Two, the Supreme Court has been expanding the horizon of Art. 12 primarily to inject respect for human rights and social conscience in India's corporate structure.[42]

Three, many Fundamental Rights have been broadly interpreted thus expanding the range and scope of these rights. For example, the right to equality contained in Art. 14 has been given a new dimension by the Supreme Court ruling that an unreasonable and arbitrary law or administrative action infringes Art. 14.[43]

The Court has inferred the right to know from the guarantee of free speech contained in Art. 19(1)(a).[44]

Four, *Maneka Gandhi*[45] has infused new vigour in the moribund Art. 21 by giving an expansive interpretation to the word 'life' therein as meaning not only mere 'animal existence' but 'life with human dignity'; 'the right to life includes the right to live with human dignity and all that goes along with it.[46] The

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37. *Supra*, Ch. XXVI, Sec. C.
38. *Ibid.*
39. *Supra*, Ch. XXI.
40. *Pathuma*, *supra*, footnote 14.
41. *Supra*, Ch. IV, Sec. G.
42. *Supra*, Ch. XX, Sec. D.
43. *Supra*, Ch. XXI, Sec. D.
44. *Supra*, Ch. XXIV, Sec. C(c).
45. *Supra*, Ch. XXVI, Sec. C.
46. *Supra*, Ch. XXVI, Sec. E(a).

Supreme Court has thus infused a qualitative concept in Art. 21. From this hypothesis, a number of rights have been implied from Art. 21 and a whole lot of human rights jurisprudence has sprung up. Art. 21 has become a reservoir of Fundamental Rights.

By an expansive interpretation of Art. 21, the Court has spelled out several Fundamental Rights which are not specifically mentioned in the Constitution. Some of the rights implied from Art. 21 are : right to livelihood, right to education, right to privacy, right to clean and pollution-free environment, right to shelter, right against sexual harassment, right to legal aid and speedy trial. These and various other rights are held to emanate from Art. 21 and, thus, this provision has become the source of many human rights and the scope of this Article is still being expanded.[47]

Art. 21 has thus been placed on the high pedestal of one of the few most cherished, expansive and significant rights guaranteed by the Constitution. As compared to the narrow, static and mechanical interpretation put by the Supreme Court on Art. 21 in *Gopalan*,[48] there has been a remarkable transformation in the range and scope of Art. 21 over time.

Five, the Supreme Court has ruled that there is no rule that unless a right has been expressly stated in the Constitution as a Fundamental Right, it cannot be treated as one. This means that a Fundamental Right need not be explicitly stated in the Constitution; it can also be implied from an expressly stated Fundamental Right. In the words of the Court : "This Court has not followed the rule that unless a right is expressly stated as a Fundamental Right, it cannot be treated as one."[49]

In course of time, the Supreme Court has developed a number of Fundamental Rights by its creative interpretative process out of the ones already expressly mentioned. To name a few implied rights, freedom of press has been implied from freedom of speech;[50] a bundle of rights implied from Art. 21 have already been mentioned above.

Six, another creditable achievement of the Supreme Court is to read Fundamental Rights along with the Directive Principles so as to supplement each other.[51] The Supreme Court has thus been able to expand the scope and content of several Fundamental Rights, especially, right to equality, right to life and freedom of carrying on trade or business. On this point, the Court has ruled in *Unni Krishnan v. State of Andhra Pradesh*,[52] "This Court has also been consistently adopting the approach that Fundamental Rights and directive principles are supplementary and complementary to each other and that the provisions in Part III (Fundamental Rights) should be interpreted having regard to the Preamble and the Directive Principles of the state policy."

This approach has served two purposes, *viz.*, : (1) it has given depth to many Fundamental Rights, as for example, Arts. 14 and 21; (2) many directive princi-

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47. *Supra*, Ch. XXVI, Sec. J.
48. *Supra*, Ch. XXVI, Sec. B(a).
49. *Unni Krishnan v. State of Andhra Pradesh*, AIR 1993 SC 2178, 2226 : (1993) 1 SCC 645. Also see, Ch. XXVII, Sec. A, *supra.*
50. *Supra*, Ch. XXIV, Sec. C(e).
51. On Directive Principles, see, Ch. XXXIV, Sec. C, *supra.*
52. AIR 1993 SC 2178 : (1993) 1 SCC 645.

ples, which are inherently non-enforceable, have become enforceable. Thus, a number of socio-economic Fundamental economic rights have been created in the process. *e.g.*, the right to economic justice.[53], right to economic empowerment of women and weaker sections of the society,[54] right to social justice[55].

Seven, the high watermark of judicial creativity has been reached by the Court in such cases as *Golak Nath*[56] and *Kesavananda*[57] in connection with the question of amendability of the Constitution. In these cases, the role played by the Court can even be characterised as constituent or that of constitution-making.

In *Golak Nath*, SUBBA RAO, C.J., explicity claimed a law-making role for the Supreme Court in the following words :[58]

> "……Arts. 32, 141 and 142 are couched in such wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice. To deny this power to the Supreme Court on the basis of some outmoded theory that the Court only finds the law but does not make it is to make ineffective the powerful instrument of justice placed in the hands of the highest judiciary of this country."

With these words, the Supreme Court has openly asserted a law creative role for itself.

Recently, in *P. Ramachandra Rao v. State of Karnataka*,[59] RAJU, J., has expressed a liberal view of the powers of the Supreme Court in these pithy words:

> "Though this Court does not consider itself to be an *imperium in imperio* or would function as a despotic branch of "the state," the fact that the founding fathers of our Constitution designedly and deliberately, perhaps, did not envisage the imposition of any jurisdictional embargo on this Court, except in Article 363 of the Constitution of India is significant and sufficient enough, in my views, to identify the depth and width or extent of its powers. The other fetters devised or perceived on its exercise of powers or jurisdiction to entertain/deal with a matter were merely self-imposed for one or the other reason assigned therefor and they could not stand in the way of or deter this Court in any manner from rising up to respond in a given situation as and when necessitated and effectively play its role in accommodating the Constitution to changing circumstances and enduring values as a *sentinel on the qui vive* to preserve and safeguard the Constitution, protect and enforce the Fundamental Rights and other constitutional mandates—which constitute the inviolable rights of the people as well as those features, which formed its basic structure too and considered to be even beyond the reach of any subsequent constitutional amendment. In substance, this Court in my view, is the ultimate repository of all judicial powers at national level by virtue of it being the summit Court at the pyramidal height of administration of justice in the country and as the upholder and final interpreter of the Constitution of India and defender of the fundamentals of "rule of law."

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53. *Dalmia Cement v. Union of India*, (1996) 4 JT (SC) 555 : (1996) 10 SCC 104; *LIC v. Consumer Education and Research Centre*, AIR 1995 SC 1811; *E.S.C. Ltd. v. S.C. Bose*, AIR 1992 SC 573, *supra*, Ch. XXXIV, Sec. D.
54. *Ashok K. Gupta v. State of Uttar Pradesh*, (1997) 5 SCC 201, *supra*, Ch. XXXIV, Sec. D.
55. See, *supra*, Chapter XXXIV, Sec. D.
56. See, next Chapter.
57. For discussion on this case, see, next Chapter.
58. AIR 1967 SC at 1669 : (1967) 2 SCR 762.
59. (2002) 4 SCC 578, at 606.

A liberal approach is being followed by the courts in many common-law countries having written constitutions. It may be instructive to take note of some notable recent developments in the area of constitutional interpretation in some of these countries.

An outstanding example of the liberal approach is furnished by a recent case in Australia, *viz.*, *Nationwide News Pty Ltd. v. Wills.*[60] The Australian Constitution does not contain any Charter of Fundamental Rights. The significance of this case lies in the fact that the High Court has found the freedom of political discussion in the basic structure of the Constitution and declared a law enacted by the Australian Parliament unconstitutional on the ground of its unduly infringing such freedom.

The Court has argued that since the Constitution can thrive only when people have freedom of political discussion, therefore, this freedom ought to be regarded as a part of the Constitution. The case is the result of the belief that the Court has to play a major role in protecting the individual against both the legislature and the executive. The case creates the possibility of the High Court implying some basic rights of the people even though the Constitution is silent on the point. This is judicial creativity of a very high order.

The U.S. Supreme Court has never adopted a literal approach to the Constitution. It has always interpreted the U.S. Constitution as 'constitution' and not as a 'statute'. As early as 1810, Chief Justice Marshall of the US Supreme Court declared in *McCulloch v. Maryland* : "It is a Constitution we are expounding."

This statement underlines the difference between the static interpretation of a statute and the dynamic interpretation of a written constitution. It is because of such judicial approach that the U.S. Constitution drafted in 1787 has been able to keep abreast of the changing socio-economic needs of the dynamic American Society, especially when the process of constitutional amendment is exceptionally rigid. The Supreme Court has thus rendered a yeoman service to the cause of constitutionalism in the U.S.A.

The U.S. Supreme Court Judges frankly and avowedly take recourse to policy considerations and use socio-economic materials to interpret the Constitution.[61] The Court's approach is to canvass, directly and openly, the merits of alternative choices in arriving at a decision. Social and economic facts are directly incorporated into the briefs presented to the Supreme Court. Such briefs are known as the Brandeis Briefs.

Two main reasons for such an attitude on the part of the U.S. Supreme Court are: the brief and compact nature of the U.S. Constitution and use of very general and broad phrases therein which can be interpreted and re-interpreted by the courts, from time to time, in the context of contemporary circumstances, *e.g.*, such phrases as due process of law, interstate commerce, etc. The Court has therefore evolved a number of doctrines which are not mentioned explicitly in the

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60. (1992) 177 CLR 1.
Also see, *Australian Capital Television Pty. Ltd. v. Common-wealth,* (1992) 117 CLR 106. See for comments on this case, *Stephen Donaghue,* The Glamour of Silent Constitutional Principles, (1996) 24 *Fed. L.R.* 133.

61. Policy-making in a Democracy : "The Role of U.S. Supreme Court", (1957) *JI. Of Public Law,* 275-508.
Also, M.P. Jain, Role of the Judiciary in a Democracy, (1979) *JMCL* 239.

Constitution, *e.g.* immunity of instrumentalities, separation of powers, police powers, etc.

The U.S. Supreme Court has interpreted the U.S. Constitution in such a creative manner that an old document, of nearly 200 years of age, without many amendments, has been able to serve the needs of the present highly sophisticated and dynamic technological era. In this way, the Court has not only played the role of an interpreter of the Constitution but even the role of a constitution-maker.

Many outstanding decisions have been rendered by the Supreme Court on the Constitution; a few may be noted here. For example, while interpreting the due process clause, the Court has laid emphasis on the word 'due' which has been interpreted to mean 'just', 'proper' or 'reasonable'. Thus, the Supreme Court can pronounce whether a law affecting a person's life, liberty or property is reasonable or not. This had led the Court to create the doctrine of substantive due process as well as procedural due process.

The idea underlying procedural due process is that governmental action affecting the liberty of the subject, which violates natural justice without due procedure is void. Under this doctrine, the Court has endeavored to secure fair criminal trials. In *Miranda v. Arizona*,[62] the Supreme Court granted certain rights to an accused at the time of police interrogation. In *Gideon v. Wainwright*,[63] the Court accepted some rights of an accused at the time of police interrogation.

Under the substantive due process concept, the U.S. Supreme Court can strike down any arbitrary, unreasonable or capricious legislative or executive act as being volative of the Constitution. Thus, infliction of cruel and unusual punishment has been invalidated by the Court.[64]

The word 'liberty' in the due process clause has not been confined merely to 'personal liberty,' but has been given a much wider interpretation. It has been held to comprise economic rights and freedom of contract. Currently, the U.S. Supreme Court is endeavouring to derive from 'liberty' a constitutional protection for privacy, personal autonomy and some family relationship. As the Court has said in *Meyer v. Nebraska*,[65] the liberty protected by due process "denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen".

A law forbidding use of contraceptives has been invalidated as invading the right of privacy – a penumbral right emanating from the V and XIV Amendments.[66] The Court has also ruled that a pregnant woman has a right to abort within the first trimester for, according to the Court : 'The right of privacy… is

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62. 384 U.S. 436 (1966).
Also see, *Argersinger v. Hamlin,* 407 U.S. 25.
63. 372 U.S. 335.
Also see, *Massiah v. United States,* 377 U.S. 201.
64. *Robinson v. California,* 370 U.S. 660; *Furman v. Georgia,* 408 U.S. 238 (1972).
65. 262 U.S. 390 (1923).
66. *Griswold v. Connecticut,* 381 U.S. 479 (1965).

broad enough to encompass a woman's decision whether or not to terminate her pregnancy"[67] Thus, the state could not interfere with the decision of a woman to abort her pregnancy during the first trimester; in the second trimester, the state can regulate the abortion procedure and, in the third trimester, the state could forbid an abortion except when it is necessary to protect the life or health of the mother.

The concept of equality found in the XIV Amendment of the Constitution has been used by the Supreme Court to promote and preseve human freedom in several ways. In *Brown v. Board of Education,*[68] a monumental decision, the Court invalidated segregation between the whites and the blacks in educational institutions. The Court changed its old ruling regarding 'separate but equal'[69] to 'equal but not separation' so as to discourage racial segregation. "Separate educational facilities are inherently unequal" declared the Court. In *Reed v. Reed,*[70] distinction based on sex or *gender* has been held to be unconstitutional.

Generally, the Court has declared that classification cannot be made on the basis of criteria wholly unrelated to the objective of the statute. A classification must be reasonable, not arbitrary and must rest on some ground of difference having a fair and substantial relation with the objects of the legislation, so that all persons similarly circumstanced shall be treated alike.

In *Reynolds v. Sims,*[71] the Supreme Court translated the equality principle into the principle of "one man one vote". The Court thus held that the seats in a House of State Legislature must be apportioned on population basis.

The Supreme Court has broadly interpreted the First Amendment guaranteeing freedom of the press. Press is regarded not only as a "neutral conduct of information between the people and their elected leaders or as a neutral forum of debate", but also as a fourth institution outside the government as an additional check on the three official branches.[72]

In another case,[73] the First Amendment has been held to "support the view that the press must be free to publish news, whatever the source, without censorship, injunctions, or prior restraints".

These decisions by the U.S. Supreme Court have triggered revolutionary changes in social, economic and political structure of America's body politic. In the words of Chief Justice WARREN : "The Court's essential function is to act as the final arbiter of minority rights."[74]

The dynamic theory of constitutional interpretation of the constitution has been explained by Justice BRENNAM of the U.S. Supreme Court. For him, the

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67. *Roe v. Wade,* 410 U.S. 113 (1973).
68. 347 U.S. 483 (1953).
69. See, *Plessey v. Ferguson,* 163 U.S. 527 (1996).
70. 404 U.S. 71 (1971).
Also, *Frontiero v. Richardson,* 41 U.S. 677, holding discrimination based on sex as invalid.
71. 377 U.S. 553.
72. *New York Times v. Sullivan,* 376 U.S. 254 (1964).
73. *New York Times Co. v. U.S. (The Pentagon Papers case),* 403 U.S. 713 (1971).
74. Quoted in Abraham, THE JUDICIARY : THE SUPREME COURT IN THE GOVERNMENT PROCESS, 189 (1977).

ultimate question of constitutional interpretation is: "what do the words of the text mean in *our* time?" He says :

> "We current Justices read the Constitution in the only way that we can : as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not on any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time".

It is only because of such dynamic judicial approach that a constitution, nearly 200 years old, with only a few amendments made to it, has been able to endure and subsist. Had it been interpreted in a static manner, it would have failed to cope with the societal needs of the changing times.

The upshot of the above discussion is that interpretation of a constitution is a complicated exercise and cannot be looked upon merely as a matter of statutory interpretation. The constitution is not just an ordinary statute; it is the *ground-norm* and thus it conditions the entire legislative and executive process in the country. Its interpretation must of necessity proceed on lines somewhat different from interpreting, say, the Transfer of Property Act or the Indian Contract Act.

There is no doubt that the courts can with great advantage use socio-economic data to elucidate constitutional provisions and assess the constitutionality of controversial laws. At present, most of the legislation has economic overtones.

It is well to remember that, after all, judicial review of constitutional issues affects governmental policies in the ultimate analysis as the government has to keep itself within the bounds prescribed by the courts. Judicial review is not merely a sterile function of interpreting an "i" here and an "a" there, but it is a creative role which the courts discharge.

It may perhaps be mentioned here that even in Britian where the courts do not discharge the function of interpreting the constitution, the courts do not function in a mere mechanistic manner. The British courts also make policy choices and play a creative role in the development of law.[75] Constitutional interpretation is a more creative function than statutory interpretation.

E. NORMS OF CONSTITUTIONAL INTERPRETATION

(a) POLICY CONSIDERATIONS

In the U.S.A., the Supreme Court Judges avowedly take recourse to policy considerations in arriving at their conclusions on questions of constitutional interpretation. The judges freely use socio-economic materials in interpreting the Constitution and freely, directly and openly canvass the merits of alternative choices in arriving at a decision.[76]

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75. STEVENS, The Role of a Final Appeal Court in a Democracy: The House of Lords To-day, 28 *MLR* 509 (1965).

76. *Policy-making in a Democracy*: *The Role of US Supreme Court,* (1957) *JI. of Public Law*, 257-508.

This trend has become much more pronounced in the post-1937 era, i.e., after the Depression. This enables the judge to play an effective role in shaping, moulding, developing and creating constitutional law and is more meaningful than the traditional positivist literal approach which amounts to formalistic, mechanical approach of statutory interpretation of a constitutional document.

Even in Britain, where the doctrine of Supremacy of Parliament prevails,[77] and the function of the judges is to interpret statutes rather than the Constitution, scholars have asserted that judges have policies which they seek to implement through their decisions. As WADE says :

> "Today no apology is needed for talking openly about judicial policy. Twenty or thirty years ago judges questioned about administrative law were prone to say that their function was merely to give effect to the will of Parliament and that they were not concerned with policy. In reality they are up to their necks in policy....."[78]

At another place, he asserts that the judges are already immersed in 'politics' and 'have no hope of getting out of it", because they are "constantly having to decide cases which involve politics as well as law". Judges have to choose from "the wide range of alternative policies."[79]

By and large, until recently, the Indian Supreme Court Judges eschewed the policy approach as they treated the Indian Constitution as a statute and construed it according to the ordinary canons of statutory construction, except in one area, *viz.* the amendability of the Constitution.[80] One could usually come across such statements as the following strewn in the judicial pronouncements : "This Court is not concerned with policy or economic considerations."[81]

In *Cooper v. Union of India*,[82] the Supreme Court declared the economic considerations and policies underlying the Banks Nationalization Act "have little relevance in determining the legality of the measure." These statements mean that the Court is concerned with the law, as such, and not with the merits of the underlying policies. For example, whether nationalisation of banks is good or bad and whether it ought to be undertaken or not is a matter of legislative policy and the legislature is the best judge of the same and not the courts. To some extent, the same attitude prevails even to-day.

But, for some time now, the Judges seem to have become more forthcoming in adopting a 'policy' approach in interpreting constitutional provisions, as emphasis has come to be placed on a more creative law-making judicial role as regards constitutional interpretation.

This trend may be said to have become prominent with *Maneka Gandhi* where BHAGWATI, J., has openly declared that the role of the courts is to expand not to extenuate the Fundamental Rights.[83] This judicial policy has been translated into practical terms through a series of post-*Maneka* cases, particularly, in the area of

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77. *Supra*, Ch. II, Sec. M.
78. H.W.R WADE, CONSTITUTIONAL FUNDAMENTAL, 61-62.
79. *Ibid.*, 75-77. Also, GRIFFITH, THE POLITICS OF THE JUDICIARY, 211.
80. *Infra*, next Chapter.
81. *State of Bombay v. Bombay Education Society*, AIR 1954 SC 561, 567 : (1955) 1 SCR 568.
82. AIR 1970 SC 564, 601 : (1970) 1 SCC 248.
83. See, *Maneka Gandhi*, *supra*, Ch. XXVI, Sec. C; *Pathumma*, *supra*, footnote 14.

personal liberty and freedom of speech. Economic rights of the poor also now claim protection at the hands of the Supreme Court.[84]

Another notable trend is the emergence of 'public interest litigation' which is avowedly meant for the protection of basic rights of the poor and the deprived.[85]

Although the present judicial trend in India is towards liberal constitutional interpretation, it is not true to think that the literal approach is completely moribund. Such an approach does manifest itself from time to time. Also, one and the same judge may at one time resort to liberal approach but may at other time resort to literal approach.

A typical case-study in this connection is provided by the *Sankalchand* case[86], where the question was whether Art. 222 should be so interpreted as to permit transfer of a Judge from one High Court to another only with his consent, *i.e.*, consensual transfer. The question was whether the word 'transfer' in Art. 222 could be interpreted only to mean 'consensual' transfer and not compulsory transfer? The conflict in judicial approaches becomes obvious when the majority applying the literal approach interpreted Art. 222 on its own terms, but the minority (BHAGWATI and UNTWALIA, JJ.) applied liberal approach to interpreting Art. 222.

CHANDRACHUD, J., (a majority judge) treated the Constitution as a statute and applied to it the norms of statutory interpretation and even extolled the literal approach to the Constitution. On the other hand, BHAGWATI, J., imports into Art. 222, by necessary implication, the consent of the Judge to his transfer from one to another High Court and strongly decries the technique of literal interpretation of the Constitution in the following words:

> ".... when the Court interprets a constitutional provision, it breathes life into the inert words used in the founding document. The problem before the constitution Court is not a mere verbal problem... The Court cannot interpret a provision of the Constitution by making "a fortress out of the dictionary". The significance of a constitutional problem is vital, not formal: it has to be gathered not simply by taking the words and a dictionary, but by considering the purpose and intendment of the framers as gathered from the context and the setting in which the words occur .... (T)he process of constitutional interpretation is in the ultimate analysis one of reading values into its clauses".[87]

BHAGWATI, J., reads 'consent' into the provision to mean 'transfer' only as consensual transfer to give effect to the paramount intention of the constitution-makers to safeguard the independence of the superior judiciary by placing it out of the reach of the power of the executive. Another majority judge, K. IYER, J., who usually adopted a liberal approach in socio-economic matters adopted a literal approach in interpreting Art. 222.

As an illustration of his approach in socio-economic matters, note the following observation of the Court:

> "Our emphasis is on abandoning formal legalistics or sterile logomachy in assessing the vires of statutes regulating vital economic areas, and adopting instead a dynamic, goal-based approach to problems of constitutionality."[88]

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84. See, *supra*, Ch. XXXIV.
85. *Supra*, Chs. VIII, Sec. D(k) and XXXIII, Sec. B.
86. *Supra*, Ch. VIII, Sec. B(q).
87. AIR 1977 SC at 2362 : (1977) 4 SCC 193.
88. *State of Karnataka v. Ranganatha Reddy*, AIR 1978 SC 215 at 234 : (1977) 4 SCC 471.

(b) CONSTITUENT ASSEMBLY DEBATES

The debates of the Constituent Assembly running into hundreds of printed pages constitute a veritable source of information throwing a flood of light on the genesis of many provisions of the Constitution, and the ideas and reasons underlying their adopting. The courts do not rely very much on historical materials to interpret a provision of the Constitution. The report of the Drafting Committee on the Constitution, or the speeches of the members of the Constituent Assembly, the courts have emphasized, can be used only in case of ambiguity or for properly understanding the circumstances under which a provision of the Constitution was passed but not for the purpose of controlling its meaning.[89]

Where the language of a provision admits of two interpretations, the Court may resort to the historical materials.[90] The reason for not placing much reliance on the historical materials to interpret the Constitution has been explained in the following words: "A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the bill. Nor it is reasonable to assume that the minds of all those legislators were in accord.

The Court could only search for the objective intent of the legislature primarily in the words used in the enactment, aided by such historical material as reports of statutory committees, preambles, *etc.*".[91] This reluctance to use the debates of the Constituent Assembly or reports of the various Committees appointed by it to interpret constitutional provisions may be regarded as emanating from the judicial approach of applying canons of statutory interpretation to the Constitution. But cases are not entirely wanting when some judges have taken recourse to this historical material to elucidate the meaning of a constitutional provision.[92] For example, Justice V.R. KRISHNA IYER quoted copiously from the Constituent Assembly Debates, in *Samsher Singh v. State of Punjab*[93] to come to the conclusion that the President is only a constitutional head. Copious extracts from the Constituent Assembly Debates are to be found in *Kesavananda,*[94] but still the rule has been reiterated that while one may seek confirmation of one's interpretation in debates, it is quite a different thing to interpret constitutional provisions in the light of the debates.

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89. *Travancore-Cochin v. Bombay Co. Ltd.,* AIR 1952 SC 366; *Aswini Kumar v. Arabinda Bose,* AIR 1952 SC 369 : 1953 SCR; *State of West Bengal v. Bella Banerjee,* AIR 1954 SC 170; KANIA, C.J., and FAZL ALI, J., in *Gopalan,* AIR 1950 SC 27, 38; *Automobile Transport v. State of Rajasthan,* AIR 1962 SC 1406; *The Golak Nath* case, *op. cit.*, at 1682, 1728.

90. See FAZL ALI, J., in *S.P. Gupta v. Union of India,* AIR 1982 SC 304-14; *supra*, Ch. VIII, Sec. B(c).

91. *Gopalan's* case, per PATANJALI SASTRI, J., AIR 1950 SC 27 at 73.

92. Some reference is made to the debates of the Constituent Assembly in *Sankal Chand, supra*, footnote 86, to show that the constitution-makers put a great premium on the independence of the judiciary.

In *State of Karnataka v. Ranganatha Reddy,* AIR 1978 SC 215, K. IYER, J., refers to the historical materials on the questions of compensation and public purpose in Art. 31, *supra*, Ch XXXI, Sec. C.

93. AIR 1974 SC 2192 at 2212-2219 : (1974) 2 SCC 831; *supra*, Ch. III, Sec. B.; Ch. VII, Sec. B.

94. AIR 1973 SC 1516 : (1973) 4 SCC 225; *infra*, next chapter.

Recently, in *S.R. Chaudhuri v. State of Punjab*,[1] while interpreting Art. 164(4)[2] the Supreme Court referred to the debates of the Constituent Assembly to find out the intention of the framers of the Constitution. The Court went on to assert in the instant case: "It is a settled position that debates in the Constituent Assembly may be relied upon as an aid to interpret a constitutional provision because it is the function of the Court to find out the intention of the framers of the Constitution."

In the U.S.A., the rule of excluding the debates has not always been adhered to; sometimes distinction is drawn between using materials to ascertain the purpose of the constitutional provision and using it to ascertain its meaning.[3] In Australia, the individual opinion of members of the Convention expressed in the debates is not referred to for the purpose of construing the Constitution.[4]

There is, however, enough in these historical materials of use and interest to a constitutional lawyer. A commentator has observed: "Indian Legal scholars can contribute to an understanding of Indian Constitutional development by clarifying the intentions of the original framers and the departures which the responsible leaders have found desirable. Whether or not the material they find is of a kind that courts will take into account under their rules of constitutional construction, it will throw light on the growth of India's organic law".[5]

Further, in America, 'the rich mine of original constitutional materials, more than a century and half old' has been worked out completely, but in India 'the ore has scarcely been touched.' A study of these materials (mainly Constituent Assembly Debates) may contribute much to an understanding of the intentions of the original framers of the Constitution and, consequently, to an understanding of the Constitution itself.[6] In view, however, of the general judicial attitude towards the historical sources, this task has to be performed by academic lawyers.[7]

(c) PREAMBLE

By itself alone, the Preamble to the Constitution can afford no basis for a claim of either government power or a private right.[8] Nevertheless, the preamble serves two significant ends. First, it indicates the source from which the Constitution derives its claim to obedience and legitimacy, namely, the People of India. Secondly, it states the great objects which the Constitution and the government established by it are expected to promote.[9]

The Supreme Court has clarified the status of the Preamble to the Constitution in several cases.[10] The declaration made by the People of India in exercise of

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1. AIR 2001 SC 2707, at 2717 : (2001) 7 SCC 126.
2. See, *supra*, Ch. VII, Sec. B, for this provision.
3. *U.S. v. Wong Kim Ark*, 169 US 649.
4. *Municipal Council of Sydney v. Commonwealth*, 1904 CLR 208.
5. Historical Footnote to Bela Banerjee's case, 1 *JILI* 375 (1959).
6. ALEXANDROWICZ, CONST. DEVELOPMENT IN INDIA, 18.
7. Several books based on these historical materials have been published. See, for example: AUSTIN, THE INDIAN CONSTITUTION; CORNERSTONE OF A NATION (1966), *supra*, 2; TEWARY, THE MAKING OF THE INDIAN CONSTITUTION (1967); GHOSH, THE CONSTITUTION OF INDIA: HOW IT HAS BEEN FRAMED (1966); B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION, 4 Vols. (1966).
8. For Preamble, see, *supra*, Chs. I, Sec. E and XXXIV, Sec. A.
9. CORWIN, THE CONSTITUTION AND WHAT IT MEANS, 1 (1954).
10. See, *supra*, Ch. XXXIV, Sec. A, on this point.

their sovereign will in the Preamble to the Constitution is "a key to the mind of the constitution-makers",[11] which may show the general purposes for which they made the several provisions in the Constitution. But the Preamble is neither a part of the Constitution nor is it the source of any substantive power of the government. Such powers embrace only those powers which are either expressly granted by the Constitution or which may be implied from those granted. Nor can any prohibitions and limitations be implied on the government from the Preamble.

The Supreme Court has stated that "at the highest it may perhaps be arguable that if the terms used in any of the articles in the Constitution are ambiguous or are capable of two meanings, in interpreting them some assistance may be sought in the objectives enshrined in the Preamble."[12]

In *Kesavananda*, a view has been expressed that the Preamble to the Constitution is of extreme importance and the Constitution should be read and interpreted in "the light of the grand and noble vision expressed in the Preamble."[13] The view expressed in *Berubari*[14] that the Preamble was not a part of the Constitution was disputed by some Judges in *Kesavanda*.[15]

Recently, the Supreme Court has used the word 'socialist' in the Preamble to expound such principles as: "equal pay for equal work".[16] The concept has also been used to gain a liberal pension scheme for old retirees from government service,[17] as well as to seek economic empowerment of the weaker sections of the society.[18]

(d) SPIRIT OF THE CONSTITUTION

The Supreme Court has emphasized that it will confine itself to the written text of the Constitution for the purpose of judicial review and not take recourse to any abstract concept like the "spirit of the constitution."

Chief Justice KANIA observed in *Gopalan's* case that the courts "are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the Fundamental law has not limited, either in terms or by necessary implication, the general powers conferred on the Legislature, we cannot declare a limitation under the notion of having discovered something in the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority."[19]

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11. Ref. on *Berubari*, AIR 1960 SC 845 : (1960) 3 SCR 250; *supra*, Ch. V, Sec. C.
12. Also, *Golak Nath*, AIR 1967 SC 1643, 1682 : (1967) 2 SCR 762; see next Chapter.
13. AIR 1973 SC 1506, 1579, 1680.
Also see, *Behram Khurshid Pesikaka v. State of Bombay*, AIR 1955 SC 123 : (1955) 1 SCR 613; *In re Kerala Education Bill*, AIR 1958 SC 956 : 1959 SCR 995.
14. *Supra*, footnote 11.
15. SIKRI, C.J., AIR 1973 SC 1503; Ray, J., *Ibid.*, at 1680.
16. *Randhir Singh v. Union of India, supra,* Ch. XXIII, Sec. C.
Also see, *P. Savita v. Union of India,* AIR 1985 SC 1124; *supra*, Chs. XXI, XXIII, Sec. C and XXXIV, Sec. D.
17. *D.S. Nakara v. Union of India, supra*, Ch. XXI, Sec. C(c).
18. See, *supra*, Ch. XXXIV, Sec. D, under "Directive Principles of State Policy".
19. AIR 1950 SC 42, Sec. B(a).

This theme has been reiterated time and again by the Supreme Court. MAHAJAN, J., observed in *State of Bihar v. Kameshwar*:[20] "It is well settled that recourse cannot be had to the spirit of the Constitution when its provisions are explicit in respect of a certain right or matter. When the Fundamental law has not limited either in terms or by necessary implication the general power conferred on the Legislature, it is not possible to deduce a limitation from something supposed to be inherent in the spirit of the Constitution. This elusive spirit is no guide in this matter. The spirit of the Constitution cannot prevail as against its letter. The courts are not at liberty to declare an act void because in their opinion it is opposed to the spirit supposed to pervade the Constitution but not expressed in words."

These statements put emphasis basically on the statutory or literal interpretation of the Constitution.[21] But, then, in cases on the constitutional amendment, the Supreme Court did renounce this approach and adopted the doctrine of immutability of the "basic features" of the Constitution which is a judge-made concept.[22] Then, there are cases in which the Supreme Court has invoked the concepts of independence of the Judiciary and Rule of law to interpret constitutional provisions.

(e) POLITICAL QUESTIONS

A question is raised at times whether the courts should entertain a political question. Many constitutional law questions have political overtones. Should the courts refuse to take cognisance of such questions?

If the courts do so, then the scope of constitutional litigation will be very much reduced and no ready-made machinery may be available to solve such questions and this may raise tensions in the body politic.

The plea of non-justiciability of a political question was raised by the Central Government as early as 1971 in *Madhav Rao Scindia v. Union of India*.[23] In this case, the Supreme Court went into the question of the validity of a Presidential order derecognising the rulers of the erstwhile Princely States. The argument against judicial review of the order was that recognition of a ruler by the President was a political question and that the Court ought not to take cognisance of the matter raised in that case. But the Court rejected the argument saying that the power of the President to determine the status of the rulers by cancelling or withdrawing recognition to abolish the concept of rulership with a view to effectuate government policy was liable to be challenged.[24] The Court quashed the order.

HEDGE, J., said in the same case: "There is nothing like a political power under our Constitution in the matter of relationship between the executive and the citizens."[25]

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20. AIR 1952 SC 252 at 309 : 1952 SCR 889.
Also see, *Keshavan Madhava Menon v. State of Bombay,* AIR 1951 SC 128 : 1951 SCR 228; *supra,* Ch. XX, Sec. F.
21. See *supra,* Sec. D(b).
22. See, next Chapter.
23. AIR 1971 SC 530 : (1971) 1 SCC 85; *supra,* Ch. XXXVII, Sec. E.
24. SHAH, J., *ibid*., 565.
25. *Ibid.* 619.

Next time, the same question cropped up in *State of Rajasthan v. Union of India*,[26] in relation to the power of the President to dissolve State Assemblies under Art. 356. The Supreme Court answered the question by saying that it would not entertain a purely political question which does not involve determination of any legal or constitutional right or obligation. The Court is concerned only with adjudication of legal rights and liabilities. But merely because a question has a political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination.

A constitution is a matter of purest politics, a structure of power. Merely because a question has a political colour, the Court cannot fold its hands. So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed, it is its constitutional obligation to do so. The Constitution is the supreme *lex,* the paramount law of the land, and there is no department or branch of government above or beyond it.

In this connection, reference has been made to an American case, *Baker v. Carr*[27] where the U.S. Supreme Court held that it could entertain an action challenging a statute apportioning legislative districts as contrary to the equal protection clause. Justice BRENNAN expressed the view that "the mere fact that the suit seeks protection of a political right does not mean that it presents a political question". In this case, the U.S. Supreme Court decided that voting districts within a State should be of approximately equal proportion.[28]

The Court emphasized that the claim of the appellants that they were being denied equal protection was justiciable. If there is discrimination, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. "The non-justiciability of a political question is primarily a function of the separation of powers". "The courts cannot reject as 'no-law suit' a *bona fide* controversy as to whether some action denominated "political" exceeds constitutional authority". The *Baker* decision did reverse a uniform course of decisions established by a number of cases of judicial non-interference in demarcation of voting districts. An example of what the U.S. Supreme Court regards as a non-justiciable political question is furnished by *Coleman v. Miller*.[29]

In *Rajasthan,* the Supreme Court did however suggest that it may not entertain a matter in which it could not lay down 'judicially discoverable and manageable standards.'[30]

Reference was again made to the 'political question' doctrine in *A.K. Roy v. India.*[31] The question was whether the President's satisfaction to issue an ordinance was justiciable, or could it be characterised as a non-justiciable political

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26. *State of Rajasthan v. Union of India,* AIR 1977 SC 1361, 1412 : (1977) 3 SCC 592; *supra,* Ch. XIII, Sec. D.
27. (1962) 369 US 186.
28. Other cases in this area are: *White v. Register,* 412 US 755 (1973); *Hoff v. Buckley,* 379 US 359 (1965).
29. (1939) 307 US 433.
30. *State of Rajasthan v. Union of India,* AIR 1977 SC 1361, at 1413 : (1977) 3 SCC 592.
31. AIR 1982 SC 710; *supra,* Chs. III, Sec. D(ii)(d) and VII, Sec. D(ii)(c).

question? The Court pointed out certain differences between the Indian and the American constitutional systems implying that the doctrine could not be adopted in India. The doctrine is based in the U.S.A. on the principle of 'Separation of Powers'; in the U.S.A., the President exercises power in his own right but, in India, he acts on the advice of the Council of Ministers. Thus, in India, "the President's 'satisfaction' is, therefore, nothing but the satisfaction of his Council of Ministers in whom the real executive power resides".

It was pointed out in *Roy*[32] that the doctrine of the political question has come under adverse criticism even in the USA so much so that the phrase "political question" has become "a little more than a play of words".

The question has been elaborately discussed by the Supreme Court in *R.C. Poudyal v. Union of India*[33]. The XXXVI Amendment[34] introduced Art. 371F in the Constitution granting statehood to Sikkim but at the same time making some special provisions for the State.[35] Art. 371F(f) provides for reservation of seats in the State Legislature based on ethnic group. It was argued that the Court should not consider the matter as it raised a political question. The Court rejected the contention and did consider the question whether Art. 371F(f) was constitutionally invalid as it destroyed a basic feature of the Constitution.

On the question of non-judiciability of a political question, the Court has maintained that "Our Court has received and viewed this doctrine with a cautious reservation."

The doctrine of 'political question' is invoked by the government whenever it seeks non-reviewability of certain actions or decisions taken by it. While the doctrine may not be invoked liberally so as to adversely affect judicial review, it need not be rejected completely also as there may be an occasion when a question may arise to which no legally ascertainable standard may be applicable and may be regarded as non-justiciable on that account.

One such occasion arose before the Delhi High Court sometime back.[36] There were riots in Delhi following the assassination of Prime Minister Indira Gandhi in which a number of Sikhs were killed. The Government refused to appoint an inquiry commission to inquire into the riots. The Delhi High Court refused to intervene saying that the refusal by the Government to appoint a commission of inquiry was a "political decision".

(f) FOREIGN PRECEDENTS

While construing the provisions of the Indian Constitution, constitutional precedents from such countries as the U.S.A., Canada, Australia and Britain are often cited before the Indian courts. The Supreme Court has, however, warned from time to time that foreign precedents have persuasive value but they ought to be used with caution and not indiscriminately.[37]

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32. *Ibid.*
33. AIR 1993 SC 1804, at 1844-45 : 1994 Supp (1) SCC 324; *supra*, Chs. V, Sec. B and IX, Sec. D.
34. See, *supra*, Chs. V and IX; also *infra*, Chs. XLI and XLII.
35. *Ibid.*
36. *Peoples Union for Democratic Rights v. Ministry of Home Affairs*, AIR 1985 Del 268, 283.
37. MUKHERJEE, J., in the *Delhi Laws Act* case, *supra*, Ch. II.

Foreign precedents as such are not binding on the Indian courts and they are thus free to use or not to use them. The Supreme Court has ruled in *Chaturbhuj v. Moreshwar,*[38] that it is not bound by the dicta and authority of the English cases.

The matter has been put in the right perspective by the Supreme Court in *Sundaramier v. Union of India,*[39] where the Court observed: "The threads of our Constitution were no doubt taken from other Federal Constitutions but when they were woven into the fabric of our Constitution their reach and their complexion underwent changes. Therefore, valuable as the American decisions are as showing how the question is dealt with in a sister Federal Constitution, great care should be taken in applying them in the interpretation of our Constitution. We must not forget that it is our Constitution that we are to interpret, and that interpretation must depend on the context and setting of the particular provision which has to be interpreted."

The same words used in constitutional enactments of various nations may bear different connotations. The social conditions also differ from country to country.

This warning notwithstanding, cases from other constitutions are often cited and considered by the Indian judiciary. The reason for this approach was explained by the Supreme Court itself in the *Atiabari* case:[40] "When you are dealing with the problem of construing a constitutional provision which is none too clear or lucid you feel inclined to inquire how other judicial minds have responded to the challenge presented by similar provisions in other sister constitutions." The Indian Courts thus adopt a selective process in applying foreign precedents.

A large number of American cases were cited in the *Express Newspaper* case[41] on the freedom of speech and expression on the ground that the freedom as enshrined in Art. 19(1)(*a*) "is based on the provisions in Amendment I of the Constitution of the U.S.A., and it would be, therefore, legitimate and proper to refer to those decisions of the Supreme Court of the U.S.A. in order to appreciate the true nature, scope and extent of this right".

Again, in *Indian Express Newspapers v. Union of India,*[42] American cases on the I Amendment were cited. But the Supreme Court said that it could not "solely" be guided by the American decisions, for the pattern of Art. 19(1)(*a*) is different from the I Amendment "which is almost absolute in its terms." "But in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, we may take them into consideration."[43]

On a few points , foreign precedents have been helpful in giving guidance, while on many others, they have not been followed. On the whole, the value of foreign precedents in interpreting the provisions of the Indian Constitution has been only marginal. Thus, the American Constitutional precedents on the Com-

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38. AIR 1954 SC 236 : 1954 SCR 817.
39. *Supra*, Ch. XI.
Also see, *L. Jagannath v. Authorised Officer, Land Reforms, Madurai,* AIR 1972 SC 425 : (1971) 2 SCC 893.
40. *Supra*, Ch. XV, Sec. D.
41. *Supra*, Ch. XXIV, Sec. C, under Art. 19(1)(a).
42. (1985) 1 SCC 641 : AIR 1986 SC 515.
43. *Ibid.*

merce Clause have not been followed as guiding factors to interpret Art. 301,[44] as the American Constitution does not contain provisions like Arts. 19(1)(*g*)[45] and 301.[46] In the U.S.A., the word 'commerce' has been interpreted broadly so as to include even gambling, the reason being that if 'commerce' were not so interpreted, gambling would fall outside the purview of the Commerce Clause and the Centre would then be unable to regulate it on an interstate basis. This approach obviously did not suit India where the purpose of suppressing gambling could be achieved only by denying that gambling is commerce and thus keep it out of the protection of Arts. 19(1)(*g*) and 301.[47]

The Supreme Court has expressed reservations in following American cases to interpret the term 'reasonable restrictions' in Art. 19(6) because of the difference in social conditions.[48] In *Sundaramier's* case, the Supreme Court again refused to follow the American position of denying to the importing States power to levy sales tax on interstate commerce. It was argued that interstate commerce being with the Centre in India, the States should be denied the power to levy a sales tax on interstate sales on the American analogy. The Supreme Court refused to accept the argument and decided the question on an interpretation of Art. 286.[49]

In *Travancore-Cochin v. Bombay Co.*[50] while interpreting Art. 286, the Supreme Court refused to follow the American cases on the Commerce Clause regarding the 'export stream' of goods and their immunity from taxation by the States on the ground that the U.S. Commerce Clause and Art. 286 "are widely different in language, scope and purpose, and a varying body of doctrines and tests have grown around their interpretations extending or restricting, from time to time, their operation and application in the context of the expanding American commerce and industry".

Similarly, the Supreme Court in India has refused to apply such American concepts as police power and original package. As regards police powers, FAZL ALI, J., said in the *Chiranjit Lal* case[51] that the principles underlying the concept were not peculiar to the U.S.A., but were recognised in every modern civilized country. But, in later cases, the doctrine has been completely refused recognition in India.[52] MUKHERJEA, J., in the very same case refused to import the doctrine in India stating: "In interpreting the provisions of our Constitution, we should go by the plain words used by the Constitution-makers and the importing of expressions like 'police power' which is a term of variable and indefinite connotation in American Law can only make the task of interpretation more difficult".[53] The Court characterised the expression "police power" as alien to the scheme of the Indian Constitution.

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44. *Supra*, Ch. XV, Sec. D.
45. *Supra*, Ch. XXIV, Secs. I and J..
46. *Supra*, Ch. XV, Sec. D.
47. *Supra*, Chs. XV, Sec. D, and XXIV, Secs. I and J.
48. *Pathumma v. State of Kerala,* AIR 1971 SC 771 : (1978) 2 SCC 1.
49. *Supra*, Ch. XI, Sec. J.
50. *Ibid.*
51. AIR 1951 SC 41, Ch. XXXI, Sec. A.
52. *Supra*, Ch. XXXI under Art. 31. *K.K. Kochuni v. State of Madras*, AIR 1960 SC 1080 : (1960) 3 SCR 887.
53. *Synthetics & Chemicals Ltd. v. State of Uttar Pradesh*, AIR 1990 SC 1927 : (1990) 1 SCC 109; *supra*, Ch. XI.

The doctrine of original package has been discussed by the Indian Supreme Court in the *Balsara* case.[54] The doctrine applies in the U.S.A. to commodities imported from foreign countries and envisages that importation is not over till goods remain in original package[55] and so the constituent States of the U.S.A. have no power to tax imports till the original package is broken or there is at least one sale if the goods remain in original package.

The doctrine was cited in the *Balsara* case to interpret the word 'import' in entry 41, List I,[56] broadly and so to curtail the State power correspondingly. The Supreme Court refused to accept the doctrine in view of the scheme of legislation outlined in the Constitution in which the various entries in the legislative lists have been expressed in clear terms and precise language. In the U.S.A., widest meaning could be given to the Commerce Clause as it was not to be reconciled with any State power. In India, entry 41 in List I has to be limited in view of entry 8, List II,[57] dealing with intoxicating drugs.

The doctrine of immunity of instrumentality evolved in the U.S.A. has also not found acceptance in India.[58]

The Supreme Court has refused to apply in India the American doctrine of preferred Fundamental Rights. The doctrine envisages that any law restricting freedoms of speech, press, religion or assembly must be taken on its face to be invalid till it is proved to be valid.[59] The result of this doctrine is to shift the burden of proof on the shoulders of those defending the law, without raising in their favour the presumption of the validity of the legislation. In India, this doctrine has not found a foot-hold. As the Supreme Court has stated, it is not possible to say that any one Fundamental Right is superior to the other or that Art. 19 contains a hierarchy.[60]

The Supreme Court has refused to apply the American doctrine of substantive due process on the ground that "it seeks to set up the courts as arbiters of the wisdom of the Legislature in enacting the particular piece of Legislation."[61] To some extent, however, the doctrine has been incorporated in Art. 14 under which a statute can be declared unconstitutional if it is "arbitrary or unreasonable;"[62] as well as in Art. 19 in the concept of "reasonable restrictions".[63]

The following principles, *inter alia*, of the American Constitution have found acceptance at the hands of the Indian Supreme Court:

(1) No one whose right is not directly affected can question the constitutionality of law. But this rule of standing has been liberalized and is now subject to public interest litigation.[64]

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54. *State of Bombay v. Balsara,* AIR 1951 SC 318 : 1951 SCR 682.
55. *Brown v. Maryland,* 25 US 419; *Leisy v. Hardin,* 135 US 100.
56. *Supra*, Ch. X, Sec. D.
57. *Ibid*.
58. *Supra,* Ch. XI, Sec. J(ii).
59. *Kovacs v. Cooper,* 373 US 77 (1947).
60. *Madhu Limaye v. S.D.M., Monghyr,* AIR 1971 SC 2486 : (1970) 3 SCC 746; *supra,* Ch. XXIV.
61. *State of Andhra Pradesh v. McDowell & Co.,* AIR 1996 SC 1628 at 1641 : (1996) 3 SCC 309.
62. *State of Tamil Nadu v. Ananthi Ammal,* (1995) 1 SCC 519; *supra,* Ch. XXI, Sec. C(q).
63. *Supra*, Ch. XXIV, Sec. B.
64. *Supra*, Chs. VIII, Sec. D(j) and XXXIII, Sec. A(n).

(2) There is a presumption in favour of the constitutionality of a statute challenged under Art. 14.[65]

(3) The constitutionality of a statute is to be tested under Art. 14 by applying the principle of reasonable classification.[66]

Justifying the adoption of the American principle for interpreting Art. 14, the Supreme Court has observed as follows: Art. 14 is adopted from the last clause of S. 1 of the XIV Amendment of the U.S. Constitution. It may, therefore, be reasonably assumed that the Constitution-makers while enshrining the guarantee of equal protection of laws in the Constitution, were aware of its content as delimited by the judicial interpretation in the U.S.A. In adopting the views of the American courts, therefore, the courts in India would not "be incorporating principles foreign to our constitution, or be proceeding upon the slippery ground of apparent similarity of expressions or concepts in an alien jurisprudence developed by a society whose approach to similar problems on account of historical or other reasons differ from ours."[67]

But many a time, while interpreting Art. 14, the Supreme Court of India has refused to follow the American cases on the equality clause in the U.S. Constitution with the remark that while the American cases provide useful guidance, they cannot be followed as such.[68]

(4) The legislature should lay down the policy while delegating legislative power to the executive.[69]

(5) In the *Express Newspaper* case, the American principle that laws regulating payment of wages to the Press do not abridge freedom of speech and expression was made use of by the Supreme Court to hold that appointment of a wage board to fix minimum wages of the journalists does not infringe Art. 19(1)(*a*).[70]

(6) In the *Golak Nath* case, five Judges of the Supreme Court have adopted the doctrine of prospective overruling—a doctrine which has its origins in the U.S.A.[71]

(7) In *Govind v. State of Madhya Pradesh*, the Supreme Court referred to the concept of 'right to privacy' evolved in the U.S.A. and showed readiness to adopt the same in India to some extent while interpreting Arts. 19(1) and 21.[72]

(8) As regards the all important American doctrine of due process of law, the Supreme Court first refused to apply the same in India.

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65. *Supra*, Ch. XXI.
Also see, *infra*, Sec. H.
The relevant American cases are: *Middleton v. Texas Power and Light Co.*, 249 US 159; *Lindsley v. Natural Carbonic Gas Co.*, 220 US 61.
66. *Supra*, Ch. XXI.
67. *State of Uttar Pradesh v. Deoman*, AIR 1960 SC 1125 : (1961) 1 SCR 14; *supra*.
68. *Air India v. Nergesh Meerza*, AIR 1981 SC 1829, 1852 : (1981) 4 SCC 335.
69. *Supra*, Ch. II, Sec. N.
70. *Supra*, Ch. XXIV, Sec. J(e).
71. *Infra*, next Chapter.
72. *Supra*, Ch. XXVI, Sec. J(m).

In *Gopalan,*[73] the Supreme Court refused to read the American concept of "due process" in the words "procedure established by law" found in Art. 21, on the ground that ".... when the same words are not used it will be against the ordinary canons of construction to interpret a provision in our constitution in accordance with the interpretation put on a somewhat analogous provision in the constitution of another country, where not only the language is different, but the entire political conditions and constitutional set up are dissimilar."

But in *Maneka Gandhi*, the Supreme Court reversed this position and integrated the concept of procedural due process with procedure established by law in Art. 21. This matter has already been discussed earlier.[74]

(9) Following the American cases holding that commercial speech is protected under the First Amendment to the U.S. Constitution, the Supreme Court has also ruled in *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*[75] that commercial speech is also protected in India under Art. 19(1)(a).[76]

Cases from Australia on S. 92 of the Australian Constitution have been freely cited in connection with the interpretation of Art. 301, but the impact of these cases has not been much as there is nothing in Australia like Arts. 19(6) and 302-304.[77] Still, the Australian view has been adopted in India in certain respects, *e.g.*, gambling is not commerce;[78] Art. 301 outlaws only 'direct' restraints on trade, commerce and intercourse;[79] compensatory taxes were not hit by the concept of freedom of trade and commerce.[80]

The developments in the area of the doctrine of 'immunity of instrumentalities' in Australia have been noted by the Supreme Court in India while expounding the scope of Arts. 285 and 289.[81]

The major contribution of the Canadian Constitution to the interpretative process of the Indian Constitution has been the doctrine of 'pith and substance' which has been evolved in Canada to interpret the legislative lists contained in Ss. 91 and 92 of the British North America Act.[82] On the doctrine of 'immunity' also, the views of the Supreme Court in India have corresponded to those of the Canadian Courts.[83]

While interpreting the term 'excise' in the relevant legislative entries in India, the Supreme Court has not followed the judicial views expressed in any one of the other three Federal Constitutions. But the Supreme Court has taken its cue

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73. *Ibid*, Sec. B(a).
74. *Supra*, Ch. XXVI, Sec. C.
75. AIR 1995 SC 2438, 2442-2445 : (1995) 5 SCC 139.
76. See, *supra*, Ch. XXIV, Sec. C(k).
77. *Supra*, Ch. XV.
78. *Supra*, Chs. XV and XXIV. The relevant Australian case in *Mansell v. Beck*, 30 Aust. LJ 346.
79. *Supra*, Ch. XV.
80. *Ibid*.
81. *Supra*, Ch. XI, Sec. J(iii).
82. *Supra*, Ch. X, Sec. G(iv).
83. *Supra*, Ch. XI, Sec. J(ii).

from these constitutions in holding that the Central Government in India can levy duties of excise and customs on goods manufactured or imported by a State.[84]

The Indian Constitution borrows from Britain the basic feature of parliamentary form of government.[85] India very closely follows Britain in the area of legislative privileges.[86] In several cases, the Supreme Court has surveyed the developments in the area in Britain over time and taken note of several cases from there to interpret Arts. 105 and 194.[87]

Widest possible use of English precedents has been made in India under Arts. 32 and 226.[88] The courts have power to issue writs under these provisions and the conditions and circumstances under which writs may be issued in India have been determined by and large on the basis of the principles evolved in Britain, though the Supreme Court has emphasized that the courts in India should only follow broad and Fundamental principles of these writs and not all the procedural technicalities and nuances thereof in the English law.[89] For Arts. 32, 226 and 136, at times, differentiation is made between administrative and *quasi*-judicial functions for which purpose again cases from Britain are freely cited.[90] Again, on the concept of natural justice, the cases from Britain are freely cited.[91]

It is also of interest to note that some of the principles of the English Common law which emanate form the existence of the monarchy in Britain have been found not applicable to the republican form of government in India and have thus been specifically departed from, *e.g.*, the English Common law doctrine that the State is not bound by a statute unless specifically named therein is not followed in India.[92] Similarly, unlike Britain, a civil servant in India can sue for arrears of his salary.[93]

In *U.N.R. Rao v. Indira Gandhi*,[94] it was urged that the Supreme Court should interpret Art. 75(3) on its own terms regardless of the conventions that prevail in Britain. To this the Court's reply was that if the words of an article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. "But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary system of Government with a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed."[95]

F. PRINCIPLE OF HARMONIOUS INTERPRETATION

The Constitution should be so interpreted as to give effect to all its parts. The presumption is that no conflict or repugnancy was intended by the framers

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84. *Supra*, Ch. XI, Sec. J(ii).
85. *Supra*, Chs. I, II, III, VI and VII.
86. *Supra*, Chs. II, Sec. L and VI, Sec. H.
87. *Ibid*.
88. *Supra*, Chs. IV, VIII, Sec. D and XXXIII, Sec. A.
89. *Supra*, Ch. VIII, Sec. D.
90. *Supra*, Chs. IV, Sec. D, VIII, Sec. D and XXXIII, Sec. A.
91. See, *supra*, Ch. VIII, Sec. E(iv)(d).
92. *Supra*, Ch. XXXVII, Sec. G.
93. *Supra*, Ch. XXXVI, Sec. C(a).
94. AIR 1971 SC 1002, 1003 : (1971) 2 SCC 63.
95. *Supra*, Ch. III, Sec. B.

between the various provisions of the Constitution. Accordingly, it has been laid down that if certain provisions in the Constitution appear to be in conflict with each other, these provisions should be interpreted so as to effect a reconciliation between them so that, if possible, effect could be given to all.[1] This is, what is known as, the rule of harmonious interpretation.

The principle has been applied to resolve conflict between Arts. 25(2)(*b*) and 26(*b*),[2] and to delimit the mutual relationship between the Directive Principles and Fundamental Rights.[3] Art. 14 has been held to control Art. 310.[4]

The principle of harmonious construction has been applied to interpret the entries in the various legislative lists.[5] The Fundamental Rights and the legislative privileges have also been reconciled so as to give effect to both as far as possible.[6] Reconciliation has also been effected between Arts. 13 and 359.[7] The principle of harmonious interpretation has been applied to Fundamental Rights and Directive Principles so as to give effect to both as far as possible.[8]

In *Shankari Prasad*,[9] the Court reconciled the conflict between Art. 13 and Art. 368 by applying the principle of harmonious interpretation. According to Art. 13, no 'law' can abridge any Fundamental Right. According to Art. 368, on the other hand, Parliament can amend any constitutional provision by passing a law according to the procedure laid down in Art. 368. If both these Articles are given a broad interpretation, a conflict, arises between them. It can be argued that a 'law' passed under Art. 368 abrogating or restricting a Fundamental Right would fall foul of Art. 13. A Constitution Amendment Act is a 'law' and if it is abrogative of a Fundamental Right, it would be void under Art. 13. In *Shankari Prasad*, PATANJALI SASTRY, J., rejected this contention and sought to interpret both Articles harmoniously by ruling that Art. 13 would exclude a Constitution Amendment Act from its purview. He observed :

> "In short, we have two Articles (Arts. 13 and 368) each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. We are of the opinion that in the context of Article 13 'law' must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent powers, with the result that Article 13(2) does not affect amendments made under Article 368."

Later, in *Golak Nath*,[10] the Supreme Court disagreeing with the approach in *Shankari Prasad* held that Art. 13 controlled Art. 368. But, then, in *Kesavananda*[11] the Court again reverted to the *Shankari Prasad* view as regards the inter-relation of Arts. 13 and 368 and, thus, differed with the *Golak Nath* ruling.

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1. MUKHERJEA, J., in *Gopalan's* case, AIR 1950 SC 27, 93 : 1950 SCR 27.
2. *Moinuddin v. State of Uttar Pradesh*, AIR 1960 All 484; *Supra*, Ch XXIX.
3. *Venkataramana v. State of Mysore*, AIR 1958 SC 255 : 1958 SCR 895; *supra*, Ch XXXIV.
4. *Supra*, Chs. XXI and XXXVI, Sec. C.
5. *Supra*, Ch. X, Sec. G(ii).
6. *Supra*, Chs. II, Sec. L(iii) and VI, Sec. H.
7. *Supra*, Chs. XX, Sec. C and XXXIII, Sec. F. *Mohd. Yaqub v. State of Jammu and Kashmir*, AIR 1968 SC 765 : (1968) 2 SCR 227.
8. In re *Kerala Education Bill*, AIR 1958 SC 956 : 1959 SCR 995; *supra*, Ch. XXXIV, Sec. C.
9. See, next Chapter.
10. *Ibid.*
11. *Ibid.*

G. PROSPECTIVE OVERRULING

A proposition of some significance was enunciated by five Judges of the Supreme Court in *Galak Nath* in an attempt to soften somewhat the impact of declaring a law unconstitutional after it has remained on the statute book for sometime.[12]

Traditionally, a judicial declaration that a law is unconstitutional is deemed effective prospectively as well as retrospectively. An unconstitutional law is regarded to have been void from its very inception.[13] The theory is that the judge "does not make law but discovers or finds true law". Therefore, when a Court decision changes the earlier law, then this law should be regarded not as 'new', but as having been there all the time which the Court has now discovered. Accordingly, the law as now found by the Court must apply to the past as well as future transactions.

As against this view, the U.S. Supreme Court has developed the doctrine of 'prospective overruling'. The Court has in some cases taken the position that rather than disturb the past transactions, the new view of the law adopted by the Court might be made effective as regards future transactions only. The doctrine of 'prospective overruling' envisages that a well-established precedent may be overruled from a future date and not retrospectively. The U.S. Supreme Court asserts that it has power to decide on a balance of all relevant considerations whether a decision overruling a previous principle should be applied retroactively or not.[14] Thus, declaring a law invalid may not necessarily affect transactions and vested rights prior to, but may operate only with respect to transactions and rights arising after, the judicial invalidation of the law. The Court thus consciously modifies a rule and also makes it operative only as to the future transactions.

This doctrine overtly testifies to the law-making function of the judiciary. This doctrine implies a clear admission by the courts that they do make new law, and the posing of the question whether the new rule should be applied retrospectively or only prospectively indicates awareness of its law-making aspects. As Sawer points out, this view rests to some extent on acceptance of the modern view that law in general is not a fixed and durable set of rules, but something whose meaning and application varies from time to time and is actually established only in the act of judicial decision.[15]

Retrospective overruling may cause administrative inconvenience in some situations and, by disturbing vested rights, may cause hardship to those who may have acted on the basis of the old rule. The doctrine of prospective overruling seeks to avoid such harsh results.[16]

The application of the doctrine remains uncertain. In the words of the U.S. Supreme Court itself: ".... there is no inflexible rule requiring in all circumstances

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12. *Infra*, Ch. XLI, for discussion on *Golak Nath*.
13. See, *infra*, Sec. I.
14. *Linkletter v. Walker*, 381 US 618, 629 (1965).
15. MODERN FEDERALISM, 71.
16. *Great Northern Rly. v. Sunburst Oil & Ref. Co.*, 287 US 358 (1932); *Chicot County Drainage District v. Baxter State Bank*, 308 US 371 (1940); *Griffin v. Illinois*, 351 US 12 (1956); *Wolf v. Colorado*, 338 US 25; *Jenkins v. Delaware*, 395 US 213 (1969); *Williams v. U.S.*, 401 US 646 (1971); *Hill v. California*, 401 US 797.

either absolute retroactivity or complete prospectivity for decisions construing the broad language of the Bill of Rights ..... Rather we have proceeded to weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[17]

A scholar has thus explained the circumstances when the Court would resort to 'prospective' rather than 'retrospective' overruling:

> "In general, it may be said that to warrant prospectivity, there must be an awareness that the results of 'normal' retrospectivity would be, not merely inconvenient, but gravely unjust or would involve an extremely burdensome sorting out process for courts or administrators. Injustice to a single litigant will normally not suffice. What is required is that retrospectivity would disrupt the private lives of many citizens or would throw a substantial network of business arrangements or property transactions into doubt or confusion; or would destroy the validity of elaborate administrative arrangements or property transactions into doubt or confusion; or would destroy the validity of elaborate administrative arrangements which had already been worked out, and which as a practical matter could not possibly be reopened or, as in the recent American cases, the matter may need to be decided by reference to the particular social policy which the "new" rule is designed to implement. Given that this social policy is in any event being implemented for the future by the 'new' decision, will its implementation really be much enhanced by making it retrospective? And, whatever degree of enhancement such retrospectivity would bring, is it sufficient to outweigh the frustration which "normal" retrospection might bring to other social policies?"[18]

There have been dissentient voices from the bench against the doctrine. It has been asserted that the Court should faithfully enforce the safeguards guaranteed by the Bill of Rights.[19]

In *Golak Nath*, five out of 11 Judges took recourse to the doctrine of prospective overruling. While holding that Parliament could not amend Fundamental Rights, they declared that this norm would operate only in the future and not retrospectively. This meant that none of the amendments made to the Fundamental Rights up to the date of the *Golak Nath* decision would be invalidated. Thus, while all amendments made to the Fundamental Rights till *Golak Nath* were to remain effective, thereafter Parliament was not to be competent to modify Fundamental Rights.[20]

The Supreme Court took recourse to the doctrine of prospective overruling because of the fact that between the coming into force of the Constitution on January 26, 1950, and the date of the judgment in *Golaknath*, a number of constitution amendments amending the Fundamental Rights had been enacted and all these amendments were treated as valid by the Supreme Court in *Shankari Prasad* and *Sajjan Singh.* Based on these Amendments the State legislatures had en-

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17. *Williams v. U.S., ibid.*

18. A.R. Blackshield, Fundamental Rights and the Economic Viability of the Indian Nation, 10 *JILI* 183, 227 (1968). Also see, W.S. Hooker Jr., Prospective Overruling in India: *Golak Nath* and After, 9 *JILI* 596 (1967).

Andrew G.L. Nicol, Prospective Overruling: A New Device for English Courts, 39 *Mod. LR* 542 (1976).

19. Justice Black in *De Backer v. Brainard,* 396 US 28, 34.

Also, Justice Harlan in *Mackey v. US.*, 401 US 667, 676.

20. See, *infra*, next Chapter, on Constitutional Amendment.

acted agrarian legislation revolutionizing the agrarian social structure. If *Golak Nath* ruling were now given a retrospective ruling, all this wholesome legislation would fall to the ground. This would have resulted in a chaotic situation in the country, as a large number of laws enacted in pursuance of the pre-*Golak Nath* Amendments would have become void. To avoid such a situation, the Court ruled that the *Golak Nath* ruling would have only a prospective effect.

Justifying the application of the doctrine of prospective overruling the Court observed:

> "Should we now give retrospectivity to our decision, it would introduce chaos and unsettle the conditions in our country. Should we hold that because of the said consequence Parliament had power to take away Fundamental rights, a time might come when we would gradually and imperceptibly pass under a totalitarian rule… As the highest Court in the land we must evolve some reasonable principle to meet the extraordinary situation… To meet the present extraordinary situation that may be caused by our decision, we must evolve some doctrine which has roots in reason and precedents so that *the past may be preserved and the future protected.*[21]

It needs to be noted that the Judges put certain restrictions on the applicability of the doctrine of prospective overruling, namely:

(*i*) The doctrine of prospective overruling would for the time being be used only in constitutional matters;

(*ii*) this doctrine would be applied only by the Supreme Court itself and by no other Court as it has the constitutional jurisdiction to declare law binding on all courts in India.

(*iii*) the precise version of prospectivity to be imposed is to be a matter for the Court's discretion, "to be moulded in accordance with the justice of the cause or matter before it".

There is no gainsaying the fact that 'prospective overruling' doctrine avowedly recognises the law and policy-making role of the Supreme Court.[22]

It may also be pointed out here that in *Golak Nath*, 'prospective overruling' has been applied in an extremely narrow area, *viz.*, in the case of invalidity of constitutional amendments which had been in force for a long time and which had become the basis of a mass of legislation affecting agrarian economy. On the other hand, in the U.S.A., the rule of 'prospective overruling' has been applied in case of changes in judicial views as regards the scope and interpretation of constitutional provisions generally.

There is, however, one point to note in this connection. The Supreme Court Judges used the doctrine of prospective overruling in *Golak Nath* very differently from the way the doctrine has been made use of in the U.S.A. In the U.S.A., the theory of prospective overruling has been applied to hold the impugned law invalid from the date of the decision and not earlier. But in *Golak Nath*, all the constitution amendments were to remain valid for ever, even after the Supreme Court decision in *Golak Nath*, only the principle of non-amendability of the Fundamental Rights was to apply in future. If the American doctrine had been

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21. Emphasis added.
22. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW, 892-7 (1970).

applied, the amendments ought to have been held invalid from the date of the *Golak Nath* decision if not earlier. Therefore, the Supreme Court diluted the doctrine of prospective overruling still further in its application in India.

A very significant use of the doctrine of prospective overruling is to be found in the *Mandal* case.[23] In *Mandal* decided in the year 1992, the ratio of *Rangachari*,[24] decided in 1962, was overturned. Nevertheless, the Supreme Court ruled that the *Mandal* ruling would come into effect after 5 years. The Court thus postponed giving effect to the *Mandal* ruling for five years from the date of the judgment. This was not only extending the principle of prospective overruling but even further elongating the same for 5 more years by postponing the operation of the *Mandal* ruling.

The Supreme Court upheld the constitutional validity of the Court ruling in *Mandal vis-à-vis* Art. 13(2) of the Constitution[25] in *Ashok Kumar Gupta v. State of Uttar Pradesh*.[26] Under the *Rangachari* ruling, which had been in operation for three decades, a number of persons of the Scheduled Castes and Schedule Tribes had got promotion. The Supreme Court showed judicial creativity in *Ashok* so as to avoid any hiatus in the operation of the *Rangachari* ruling, and to bring about smooth transition of the operation of the law of promotions for S/Cs and S/Ts. It was necessary to do so to adjust the competing claims of both the disadvantaged and the advantaged sections of the society. The Court observed in *Ashok*: "The prospective overruling of *Rangachari* ratio in *Mandal* case is constitutional and fulfils the competing equality between sections of the society."[27]

There are examples of the Supreme Court applying the doctrine of prospective overruling in another area, *viz.*, when the Court declares a statute unconstitutional, it may make the ruling operational in future from the date of the decision without affecting the validity of the past transactions. In *Githa Hariharan*,[28] the Supreme Court gave a new interpretation to s. 6(a) of the Hindu Minority and Guardianship Act so as to protect it from being declared unconstitutional under Arts. 14 and 15, on the ground of gender discrimination. But the Court gave a prospective effect to the new interpretation. No past transaction was to be reopened or questioned on the basis of this judgment.

The High Court of Rajasthan declared a circular, giving preference on the basis of 'residence' in a district in the matter of Government appointments as unconstitutional *vis-à-vis* Arts. 16(2) and 16(3). On appeal, the Supreme Court affirmed the High Court ruling but held that the ruling would be effective from the date of the High Court judgment and that appointments made prior to that judgment would not be disturbed.[29]

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23. *Indra Sawhney v. Union of India*, AIR 1993 SC 477 : 1992 Supp (3) SCC 217; *Indra Sawhey v. Union of India*, AIR 2000 SC 498 : (2000) 1 SCC 168; *supra*, Ch. XXIII, Sec. G.
24. AIR 1962 SC 36 : (1962) 2 SCR 586; *supra*, Ch. XXIII, Sec. D(c) and G.
25. For Art. 13(2), see, *supra*, Ch. XX, Sec. C.
26. (1997) 5 SCC 201.
27. *Ibid*, at 222.
28. *Githa Hariharan v. Reserve Bank of India*, AIR 1999 SC 1149, at 1155 : (1999) 2 SCC 228.
29. *Kailash Chand Sharma v. State of Rajasthan*, (2002) 6 SCC 562.
Also see, *supra*, Ch. XXIII.

In *India Cement*,[30] while declaring the cess as unconstitutional, the Court ruled that the State would not be liable to refund the cess already collected by it.[31]

The Court applied the doctrine of prospective overruling in *Raymond*,[32] but this case did not raise a constitutional question. The Court gave a new interpretation to a statutory provision. Had this view been applied retrospectively, the Electricity Board would have been placed under a huge financial liability. To avoid such a contingency, the Court ruled that the new view of the law would be applied prospectively and not retrospectively.

The Court adopted a similar approach in *Union of India v. Mohd. Ramzan Khan*.[33]

In a way, the Supreme Court has applied the doctrine of prospective overruling in a different context in *Suman Gupta v. State of Jammu and Kashmir*.[34] The Court ruled that vesting of absolute power in the State Government to nominate candidates for admission to medical colleges outside the State infringed Art. 14 but refused to disturb the nominations already made as these candidates had already covered a substantial part of their course of studies. The Court suggested that a proper procedure for the purpose must be designed for the future by theMedical Council of India. In this way, the principle laid down by the Court was to be operative in future.[35]

H. CONSTITUTIONALITY OF A STATUTE

The doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent and in the fields provided by the Constitution. The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a republic and the democratic way of life by parliamentary institutions based on free and fair elections.[36]

A law to be valid must conform with the constitutional norms. The unconstitutionality of a statute arises from various constitutional violations, *e.g.*

(1) violation of the scheme of distribution of powers between the Centre and the States;

(2) infringement of a Fundamental Right;

(3) violation of other constitutional restrictions/limitations.

The power to legislate is a plenary power vested in the legislature and unless those who challenge the legislation clearly establish that their Fundamental

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30. *Orissa Cement Ltd. v. State of Orissa*, AIR 1991 SC 1676, at 1717.

31. Also see, *Orissa Cement Ltd. v. State of Orissa*, AIR 1991 SC 1676 : 1991 Supp (1) SCC 430; *Somaiya Organics (India) Ltd. v. State of Uttar Pradesh*, AIR 2001 SC 1723 : (2001) 5 SCC 519, *supra*, Ch. XI.

32. *Raymond Ltd. v. State of Madhya Pradesh Electricity Board*, AIR 2001 SC 238 : (2001) 1 SCC 534.

33. AIR 1991 SC 474, *supra*, Ch. XXXVI, Sec. G(a).
Also see, *Managing Director, ECIL, Hyderabad v. B. Karunakar*, AIR 1994 SC 1074 : (1993) 4 SCC 727, *supra*, Ch. XXXVI, Sec. G(a).

34. AIR 1983 SC 1235 : (1983) 4 SCC 339; *supra*, Ch XXI.

35. The Supreme Court has adopted a similar attitude in several other cases, e.g., *Janki Prasad v. State of Jammu & Kashmir*, AIR 1973 SC 930 : (1973) 1 SCC 420; *P. Rajendran v. State of Madras*, AIR 1968 SC 1012 : (1968) 2 SCR 786.

36. *People's Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399 : AIR 2003 SC 2363.

Rights under the Constitution are affected or that the legislature lacked legislative competence, they would not succeed in their challenge to the enactment bought forward in the wisdom of the legislature. Conferment of a right to claim the benefit of a statute, being not a vested right, the same could be withdrawn by the legislature which made the enactment. It is open to the legislature to bring in a law that has retrospective operation. When it affects vested rights or accrued rights, that question will have to be considered in that context. But the right to take advantage of a statute has been held to be not an accrued right.[37]

A statute which is not within the scope of legislative authority, or which offends some constitutional restriction or prohibition is unconstitutional and hence invalid. A statute to be valid ought to be with respect to a matter assigned to the particular legislature which has enacted it. This essentially refers to the question of distribution of powers between the Centre and the States.[38] Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I, notwithstanding anything contained in clauses (2) and (3) of Article 246. The *non obstante* clause under Article 246(1) indicates the predominance or supremacy of the law made by the Union Legislature in the event of an overlap of the law made by Parliament with respect to a matter enumerated in List I and a law made by the state legislature with respect to a matter enumerated in List II of the Seventh Schedule. However both Parliament and the State Legislatures are supreme in their respective assigned fields. It is the duty of the Court to interpret the legislations made by Parliament and the state legislature in such a manner as to avoid any conflict. But if the conflict is unavoidable, and the two enactments are irreconcilable then by the force of the *non obstante* clause in clause (1) of Article 246, the parliamentary legislation would prevail notwithstanding the exclusive power of the state legislature to make a law with respect to a matter enumerated in the State List. Repugnancy between the parliamentary legislation and the state legislation can arise in two ways. First, where the legislations, though enacted with respect to matters in their allotted sphere overlap and conflict. Second, where the two legislations are with respect to matters in the Concurrent List and there is a conflict. In both the situations, parliamentary legislation will predominate, in the first, by virtue of the *non obstante* clause in Article 246(1), in the second, by reason of Article 254(1).[39]

The norms to interpret the entries, and to assess whether a statute falls within an entry, have already been considered.[40] Any way, it may be mentioned here that these entries are to be interpreted broadly as these are not powers but fields of legislation. It is the judicial policy to give the widest amplitude to the language of these entries.[41]

A special mention may be made here of the rule of 'pith and substance' which means that to determine whether a statute is *ultra vires* the enacting legislature, its pith and substance, its true character, is to be ascertained. The advantage of

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37. *Mylapore Club v. State of T.N.*, (2005) 12 SCC 752 : AIR 2006 SC 523.
38. *Supra*, Ch. X.
39. *Govt. of A.P. v. J. B. Educational Society*, (2005) 3 SCC 212 : AIR 2005 SC 2014; For detailed discussion see Chapter X on "Legislature Relations"
40. *Ibid*, Sec. G.
41. *Ibid*, Sec. G(i).
Also see, *Jilubhai Nanbhai Khachar v. State of Gujarat*, AIR 1995 SC 142, 148 : 1995 Supp (1) SCC 596.

the rule is that it avoids a law being declared unconstitutional merely because it incidentally trenches into the prohibited legislative area. The rule thus adds a further dimension to the legislative power of a legislature.[42]

When a statute has been enacted by a State Legislature, its operation ought not to extend beyond the concerned State boundaries. For this purpose, the principle of territorial nexus is applied.[43]

In addition, the impugned statute should not infringe any other fetter, restriction or prohibition which may be imposed by the Constitution, *e.g.*, Fundamental Rights. Art. 13(2) specifically declares that a law taking away or abridging a Fundamental Right "shall, to the extent of contravention, be void."[44]

As stated earlier,[45] a statute cannot be struck down merely because the Court thinks it to be arbitrary or unreasonable. Any such ground of invalidity must be related to a constitutional provision, such as, Arts. 14, 19 or 21.[46] Challenge on ground of wisdom of legislation is not permissible as it is for the legislature to balance various interests.[47]

However, the Court has also pointed out that the principles on which constitutionality of a statute is judged is its reasonableness and that is to be judged having regard to the various factors including the effect thereof on the persons to whom it is applicable carrying on a business. If the state in exercise of its delegated power imposes condition the same has to be a reasonable condition. It had to be definite and not vague. When a statute provides for a condition which is impossible to be performed its unreasonableness shall be presumed and it would be for the State in such a situation to justify the reasonableness of such conditions.[48]

Although carrying on trade of liquor may not be a Fundamental right, but the contractual rights given to a licensee in terms of the provision of a statute are enforceable. The terms of the licence are governed by the statute and since the violation thereof could lead to penal consequences, interpretation principles requires the application of reasonableness, equity as well as good conscience.[49] Hence where a person may be held guilty even if the contents of ethyl alcohol exceeds 8.1% marginally in the liquor on which a person is trading in alcohol, the statute or the statutory conditions must show as to what extent he can go and to what

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42. *Supra*, Ch. X, Sec. G(iv); see also *State of Gujarat v. Akhil Gujarat Pravasi V.S. Mahamandal,* (2004) 5 SCC 155 : AIR 2004 SC 3894.

43. *Supra*, Ch. X, Sec. A.

44. *Supra*, Ch. XX, Sec. C.

Whether arbitrariness and unreasonableness or manifest arbitrariness and unreasonableness, being facets of Art. 14 are available or not as grounds to invalidate legislation (both primary and subordinate has been referred to a larger Bench in view of the decision in *Mardia Chemicals*, (2004) 4 SCC 311; *Malpe Vishwanath Acharya,* (1998) 2 SCC 1 (both cases striking down primary legislation on ground of arbitrariness and unreasonableness and being decisions of three Judge Benches) and *S. G. Jaisinghani*, AIR 1967 SC 1427 and *Shrilekha Vidyarthi,* (1991) 1 SCC 212 (two Judge Bench)(both cases striking down subordinate legislation on ground of arbitrariness and unreasonableness), on the one hand, and *McDowell & Co*., (1996) 3 SCC 709, and *Khoday Distilleries,* (1996) 10 SCC 304 (both being decisions by three Judge Benches), on the other hand *Subramaniam Swamy v. Director, CBI,* (2005) 2 SCC 317 : (2005) 2 JT 382.

45. *Supra*, Ch. II, Sec. M.

46. *Supra*, Chs. XXI, XXIV and XXVI.

47. *Mylapore Club v. State of T.N.,* (2005) 12 SCC 752 : AIR 2006 SC 523.

48. *Hasham Abbas Sayyad v. Usman Abbas Sayyad* (2007) 2 SCC 355 : AIR 2007 SC 1077.

49. *Hasham Abbas Sayyad v. Usman Abbas Sayyad,* (2007) 2 SCC 355 : AIR 2007 SC 1077.

extent he cannot. The matter cannot, thus, be left to an act of nature. In the absence of such mode or machinery it will suffer from the vice of vagueness or unreasonableness.[50]

The judicial function of assessing the constitutional legitimacy of legislation is both delicate and responsible. To declare a statute unconstitutional places an onerous burden on the courts, for a statute is enacted by an elected legislature which is conversant with the needs and aspirations of the people. The courts, therefore, do not hold legislation unconstitutional in a light vein. They have to draw a fine balance between the 'felt necessities of the time' and 'constitutional fundamentals'.

India being a signatory to the Declaration on the Right to Development adopted by the World Conference on Human Rights and Article 18 of the United Nations Covenant on Civil and Political Rights, 1966, the impugned provision of a statute must, therefore, also be judged having regard to the aforementioned treaties and covenants.[51]

As has already been stated, the courts impose on themselves a good deal of self restraint in performing their task of judicial review of legislation. The courts will hold a statute unconstitutional only as a last resort. The courts do not cavel at legislation but go to great lengths to uphold legislation impugned before them. The truth is that the courts in India (like the courts elsewhere) have evolved certain canons, strategies, maxims and norms by which opportunities to assess the constitutionality of statutes and holding them invalid are minimised. The courts usually resort to these strategies either to make challenges to legislation difficult or to by-pass such challenges.

The first important principle is that only a person whose right is directly affected by a law can challenge its constitutionality. A person cannot impeach a law because someone else is hurt. It is the fact of injury to the complainant himself, and not to others, which justifies judicial interference. But this rule of *locus standi* is now subject to the growth of the concept of public interest litigation.[52]

In dealing with a constitutional controversy, a Court is slow to embark upon an unnecessarily wide or general inquiry. The courts adjudge only concrete cases and do not indulge in pronouncing abstract, theoretical principles. This is called the process of "empiric adjudication".[53] The Court seeks to confine its decision, as far as may be reasonably practicable, within the narrow limits of the controversy between the concerned parties in a particular case.[54] A Court does not embark upon larger or academic questions but confines itself to those questions which arise from the provisions of the impugned statute.

The judicial attempt is to narrow, not to broaden, the area of conflict and express its opinions only on specific issues in controversy. The courts have often emphasized that in constitutional matters, it is advisable to decide only those points which necessarily arise for determination on the facts of the case before the Court.[55] The Supreme Court has said in *A.K. Roy* : "The position is now

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50. *State of Kerala v. Unni,* (2007) 2 SCC 365 : (2006) 13 SCALE 208.
51. *John Vallamattom v. Union of India* (2003) 6 SCC 611 : AIR 2003 SC 2902.
52. *Supra,* Chs. IV, VIII and XXXIII.
53. *Sukhdev v. Bhagatram,* AIR 1975 SC 1331, 1349 : (1975) 1 SCC 421.
54. *Atiabari,* AIR 1961 SC 232, 251 : (1961) 1 SCR 809; *supra,* Ch. XV, Sec. D.
55. *U.N.R. Rao v. Indira Gandhi,* AIR 1971 SC 1002 : (1971) 2 SCC 63; *supra,* Ch. III, Sec. B.

firmly established that the Court will decide no more than needs to be decided in a particular case. Abstract questions present interesting challenges, but it is for scholars and text-book writers to unravel their mystique. It is not for the courts to decide questions which are but of academic importance."[56] Earlier the Court had observed in *Basheshar Nath*:[57] "This case should not make any pronouncement on any question which is not strictly necessary for the disposal of the particular case". Constitutional issues not directly arising for decision are not decided by the Court.[58]

The Courts do not adjudicate upon a constitutional question unless it is absolutely necessary to do so for disposal of the case in hand.[59] If a statute is challenged under several constitutional provisions, but if the question of its validity can be disposed of with reference to one constitutional provision only, the Court would not then usually go into the question of its unconstitutionality under the other constitutional provisions. For example, in *Saghir Ahmad*,[60] the Court found an impugned law bad under Arts. 19(1)(*g*) and 31(2) and so it refrained from going into the question whether or not the impugned law was bad under Art. 301 as well because it was no longer necessary to decide that question.

A Court would not cover the ground which is strictly not relevant for the purpose of deciding the matter before it. *Obiter* observations and discussion of problems not directly involved in a proceeding before them are generally avoided by the courts in constitutional matters.[61] Accordingly, a Court would go into the question of *vires* of a statute only when it is attracted by the facts of the case. If the issue is not so attracted, then the courts would not go into its constitutionality, because in that case, the decision would be purely academic and courts do not decide constitutional issues merely as an academic exercise.[62]

A statute cannot be declared invalid on the ground that it contains vague or uncertain or ambiguous or mutually inconsistent provisions.[63]

A legislation may not be amenable to challenge on ground of violation of Art. 14 when it is intended to give effect to principles specified under Art. 15 or 16 or when the differentiation is not unreasonable or arbitrary but when a classification is made which is per se violative of constitutional provisions, the same cannot be upheld.[64]

If there is a challenge to the legislative competence the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the

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56. *A.K. Roy v. Union of India*, AIR 1982 SC at 724; *D.C. Wadhwa v. State of Bihar*, AIR 1987 SC 579; *Gurudevdatta VKSSS Maryadit v. State of Maharashtra*, AIR 2001 SC at 1985 : (2001) 4 SCC 534.

57. *Basheshar Nath v. Commr., Income Tax*, AIR 1959 SC 149, 157 : 1959 Supp (1) SCR 578.

58. See, *Ashok K. Gupta v. State of Uttar Pradesh*, (1997) 5 SCC 201.

59. *H.M. Trivedi v. V.B. Raju*, AIR 1973 SC 2602 : (1974) 3 SCC 415.

60. *Supra*, Chs. XXIV, Secs. I and J and XXXI, Sec. C(ii).

61. *Naresh v. State of Maharashtra*, AIR 1967 SC 1 : (1966) 3 SCR 744; *supra*, Ch. XXIV, Secs. C and D.

62. *State of Bihar v. Hurdut R.M. Jute Mills*, AIR 1960 SC 378 : (1960) 2 SCR 331.

63. *Nand Lal v. State of Haryana*, AIR 1980 SC 2097, 2100 : 1980 Supp SCC 574, *A.K. Roy v. Union of India*, AIR 1982 SC 711, 737 : (1982) 1 SCC 271.

64. *E. V. Chinnaiah v. State of AP*, (2005) 1 SCC 394 : AIR 2005 SC 162.

enactment in question is genuinely referable to the field of legislation allotted to the State under the constitutional scheme.[65]

But in construing a statute, where a right is not explicitly taken away, a presumption must be raised that the legal right existing in favour of a person has not been taken away.[66]

While considering the constitutionality of a statute, the courts usually do not use such materials as the legislative debates, statements of objects and reasons annexed to the relevant bill in the legislature, except for the limited purpose of ascertaining the conditions prevailing at the time of its enactment and the extent and urgency of the evil sought to be remedied by it.[67]

In the U.S.A., it is an established practice to directly incorporate social and economic facts into the briefs presented to the Supreme Court by the parties. This kind of brief is known as the Brandies brief. It is generally recognised in the U.S.A. that underlying questions of fact—political, social and economic—do condition the constitutionality of legislation and constitute a social element in decision-making by the Court.[68]

In India, by and large, the courts still seek to ignore extra-legal materials pertaining to measures impugned before them and seek to derive their ratio of decisions largely from the language of the statute and the decided cases. The courts tend to ignore the fact that often problems presented in constitutional cases are not purely legal but have political, social and economic connotations as well. The courts go too much by the words of the statute maintaining a divorce between law and politics, economics or sociology. The courts do not recognise the fact that if materials from other social sciences are also taken into consideration, the dry statutory provisions may have an ampler meaning especially when their constitutional *validity* is being considered.

The Courts generally lean towards the constitutionality of a statute upon the premise that a legislature appreciates and understands the needs of the people, that it knows what is good or bad for them, that the laws it enacts are directed to problems which are made manifest by experience, that the elected representatives in a legislature enact laws which they consider to be reasonable for the purposes for which these laws are enacted and that a legislature would not deliberately flout a constitutional safeguard or right.[69] The legislature composed as it is of the elected representatives of the people is supposed to know and be aware of the needs of the people and what is good or bad for them and that a Court cannot sit in judgment over the wisdom of the Legislature.[70] Therefore, usually, the pre-

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65. *E. V. Chinnaiah v. State of A.P.* (2005) 1 SCC 394 : AIR 2005 SC 162.
66. *ICICI Bank Ltd. v. SIDCO Leathers Ltd.,* (2006) 10 SCC 452 : AIR 2006 SC 2088.
67. *J.R.G. Mfg. Ass. v. Union of India,* AIR 1970 SC 1589; *B. Banerjee v. Anita Pan,* AIR 1975 SC 1146 : (1975) 1 SCC 166, *supra,* Sec. D.
68. MCWHINNEY, JUDICIAL REVIEW, 17, 22, 175-89.
69. *Ram Krishna Dalmia v. S.R. Tendolkar,* AIR 1958 SC 538 : 1959 SCR 279; *Vrajlal Manilal and Co. v. State of Madhya Pradesh,* AIR 1970 SC 129; *B. Banerjee v. Anita Pan, supra,* note, 54; *Bachan Singh v. State of Punjab,* AIR 1982 SC 1325 : (1982) 3 SCC 24.
70. *State of Andhra Pradesh v. McDowell & Co*., AIR 1996 SC 1628, 1641.

sumption is in favour of the constitutionality of the statute, and the onus to prove that it is unconstitutional lies upon the person who challenges it.[71]

The Supreme Court has stated the principle as follows:[72]

> "A statute is construed so as to make it effective and operative. 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, that relating to Fundamental Rights is always on the person who challenges its *vires*."

This rule of presumption has been borrowed from the U.S.A.[73] Thus, the law in question is treated as valid unless the parties to litigation challenge it on constitutional grounds. FAZAL ALI, J., stated in *Charanjit Lal*[74] :

> "……..it is the accepted doctrine of the American Courts, which I consider it 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."

Recourse may not always be taken to the principles of presumption in favour of constitutionality of statute or reading down of statute to uphold validity of a statute.[75]

Since no particulars or material was placed on record to substantiate the contention that the Notification dated 20th August, 1991 bringing into force Maharashtra Act 15 of 1987 was issued due to pressure brought about by a section of lawyers and for extraneous consideration, the contention was rejected.[76]

To sustain the presumption of constitutionality, the Court may take into consideration matters of common knowledge and may assume every state of facts which can reasonably be conceived as existing at the time of the enactment of the legislation in question.[77]

The Supreme Court has stated in *Commr. of Sales Tax, Madhya Pradesh, Indore v. Radhakrishan*,[78] that for sustaining the presumption of constitutionality, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived and an even read down this section.

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71. *Charanjit Lal Chowdhuri v. Union of India*, AIR 1951 SC 41; *Bombay v. F.N. Balsara*, AIR 1951 SC 318 : 1951 SCR 682; *Ram Krishna Dalmia v. S.R. Tendolkar*, AIR 1958 SC 538 : 1959 SCR 279; *Mahant Moti Das v. S.P. Sahi*, AIR 1959 SC 942 : 1959 Supp (2) SCR 563; *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101 : 1991 Supp (1) SCC 600.

72. *Union of India v. Elphinstone Spinning and Weaving Co. Ltd.*, AIR 2001 SC 724, at 733 : (2001) 4 SCC 139.

73. *Middleton v. Texas Power and Light Co.*, 249 US 152, 157; *supra*, Sec.

74. AIR 1951 SC 41 : 1950 SCR 869.

75. *State of W. B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.

76. *Jamshed N. Guzdar v. State of Maharashtra*, (2005) 2 SCC 591 : AIR 2005 SC 862.

77. *Ramkrishna Dalmia v. Tendolkar*, AIR 1958 SC 538 : 1959 SCR 279; *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554, 560 : (1960) 2 SCR 671; *R.K. Garg v. Union of India*, AIR 1981 SC 2138, 2146; *Bank of Baroda v. Rednam*, AIR 1989 SC 2105 : (1989) 4 SCC 470; *Gauri Sahankar v. Union of India*, (1994) 6 SCC 349; *Amrit Banaspati Co. Ltd. v. Union of India*, AIR 1995 SC 1340 : (1995) 3 SCC 335; *New Delhi Municipal Committee v. State of Punjab*, AIR 1997 SC 2847. For presumption of constitutionality see also *Karnataka Bank Ltd. v. State of Andhra Pradesh*, (2008) 2 SCC 254 : (2008) 1 SCALE 660.

78. AIR 1979 SC 1588 : (1979) 2 SCC 249.

Affidavits may be filed to show reasons for the enactment of the law in question, the circumstances in which it was conceived and the evils it was to cure.[79] For example, in *Pannalal Binjraj v. Union of India*,[80] a challenge to the validity of classification was repelled by placing reliance on an affidavit filed on behalf of the Central Board of Revenue disclosing the true object of enacting the impugned provisions in the Income-tax Act.

In *Musaliar*,[81] the Court relied on an affidavit filed by the State to ascertain the circumstances which prevailed at the time when the law under consideration had been passed and which necessitated the passing of that law.

A statute cannot be challenged on the ground of *mala fides*.[82]

At times, the Supreme Court has used the Statement of Objects and Reasons accompanying the Bill, which later became the Act impugned, to ascertain the circumstances which prevailed at the time of the passage of the Act impugned to determine its purposes and object. "For the limited purpose of appreciating the background and the antecedent factual matrix leading to the legislation, it is permissible to look into the Statement of Objects and Reasons of the Bill which actuated the step to provide a remedy for the then existing malady."[83] For example in *Musaliar*,[84] the Statement of Objects and Reasons was used for judging the reasonableness of a classification made in an enactment to see if it infringed, or was contrary to, the Constitution. The Supreme Court reiterated in *State of West Bengal v. Union of India*,[85] that the Statement of Objects and Reasons accompanying a Bill when introduced in Parliament, can be used for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation."[86]

On behalf of the Constitution Bench, MUDHOLKAR, J., observed in *Burrakur Coal Co. v. Union of India*,[87]:

> "Where the validity of a law made by a competent legislature is challenged in a Court of law, that Court is bound to presume in favour of its validity. Further, while considering the validity of the law the Court will not consider itself restricted to the pleadings of the state and would be free to satisfy itself whether under any provision of the Constitution the law can be sustained."

To the same effect is the observation of the Constitution Bench in *Sanjeev Coke Manufacturing Co. v. Bharat Coking Ltd.*,[88]:

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79. Cases cited in Ch. XXXIII Also, *K.K. Kochunni v. State of Madras*, AIR 1959 SC 725 : 1959 Supp (2) SCR 316.

80. AIR 1957 SC 397 : 1957 SCR 397.

81. *Thangal Kunju Musaiar v. M. Venkitachalam Potti*, AIR 1956 SC 246 : (1955) 2 SCR 1196.

82. *General Manager, North West Railway v. Chanda Devi*, (2008) 2 SCC 108 : (2007) 14 SCALE 296, meaning obviously notice in fact.

83. *Gurudevdatta VKSSS Maryadit v. State of Maharashtra*, AIR 2001 SC 1980, at 1989 : (2001) 4 SCC 534.

84. *Supra*, footnote 81.

85. AIR 1963 SC 1241 : (1964) 1 SCR 371.

86. But see an earlier case, *Aswini Kumar Ghose v. Arabinda Bose*, AIR 1952 SC 369 : 1953 SCR 1, where the Supreme Court had ruled out the Statement of Objects and Reasons appended to the Bill "as an aid to the construction of a statute".

87. AIR 1961 SC 953 at 963 : (1962) 1 SCR 44.

88. AIR 1983 SC 239 : (1983) 1 SCC 147.
Also see, *New Delhi Municipality Committee v. State of Punjab*, AIR 1997 SC at 2903 : 91997) 7 SCC 339.

> "Validity of the legislation is not to be judged merely by affidavits filed on behalf of the state, but by all the relevant circumstances which the Court may ultimately find and more especially by what may be gathered from what the legislature has itself said."

In *Gauri Shankar*,[89] the Supreme Court has observed that "in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."

The burden is upon the person who attacks the constitutional validity of a law to show that there has been a transgression of the constitutional principles. The allegations regarding the violation of a constitutional provision should be specific, clear and unambiguous and it is for the person who impeaches the law as violative of a constitutional guarantee to show that the particular provision is infirm for the reasons stated by him.[90]

At times, the onus placed on the petitioner to establish the unconstitutionality of a statute may be very onerous. This happened in *Chiranjit Lal*[91] where the majority in the Supreme Court dismissed the petition as the petitioners could not discharge the onus satisfactorily. The minority, however, protested against casting such a burden on the petitioner.

At times, the judges have departed from the normal rule of presumption of constitutionality. When on the face of the impugned statute, there is no classification at all, and no attempt made to select any individual with reference to any differentiating attribute peculiar to it and not possessed by others, the courts may not let the state depend on the presumption in favour of the validity of the statute under Art. 14.[92]

If, however, the petitioner is able to establish that the legislation has invaded his Fundamental Rights then the Court may shift the onus on the state to justify the law. In some cases, under Art. 19, when a law has been found *prima facie* to violate a Fundamental Right, the Supreme Court has shifted the onus on the state to place materials before the Court to show that the impugned law comes within the permissible limits.[93] For example, the Court has argued that when an invasion of a right under Art. 19(1)(*g*) has been established, the state should then satisfy the Court that the legislation falls within the purview of Art. 19(6) which is in the nature of an exception to Art. 19(1)(*g*).[94]

A similar rule of onus has been applied in regard to Art. 304. When a law has been shown to invade the right to freedom of trade, the state ought to prove that the restrictions imposed are reasonable and in public interest within the meaning of Art. 304(*b*).[95] But this again is not a universal rule and in *Anita Pan*, while

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89. *Gauri Shankar v. Union of India*, (1994) 6 SCC 349.
90. *Amrit Banaspati Co. Ltd. v. Union of India*, AIR 1995 SC 1340, at 1343 : (1995) 3 SCC 335.
91. *Supra*, Ch. XXI, Sec. C(r).
92. *Supra*, Ch. XXI, Sec. B.
93. *Supra*, Ch. XXIV, Secs. B and J(a).
94. *Vrajlal Manilal and Co., supra*; *Saghir Ahmad, supra*; *Khyerbari Tea Co. v. Assam, supra*. Also, *supra*, Ch. XXIV, Sec. B and Sec. I.
95. *Khyerbari Tea Co., supra*, Ch. XV, Sec. E.

considering the validity of a law under Art. 19(1)(*f*), the Court presumed the validity of the law.[1]

In regard to constitutional validity of the pre-constitution laws, the Supreme Court has taken the position that all such laws remain operative till the Court declares any of them void. Therefore, it is not for the state to establish the validity of any such law as no such law is regarded as unconstitutional to start with. The burden is on him who contends that a particular law has become void after the commencement of the Constitution.[2] Pre-constitutional laws must also conform to provisions of Part III. Even the unamended Section 73 of the Stamp Act, 1899 must conform to the provisions of Part III of the Constitution.[3]

Under Art. 21, it is the state which has to establish the constitutional validity of a law depriving a person of his life or personal liberty.[4]

While assessing the validity of a law, the Court does not consider itself restricted to the pleadings of the state and is free to satisfy itself whether the law in question can be sustained under any constitutional provision which might not have been specifically pleaded in its support. When the government sought to sustain a law under Art. 31A(1)(*e*), but the Supreme Court found it sustainable under Art. 31(2) and not under Art. 31A(1)(*e*), the Court held it valid even though the government had not invoked Art. 31(2).[5]

The courts are very reluctant to declare a law to be unconstitutional and they do so only as a last resort. This can be shown by one or two examples.

The Punjab Cycle Rickshaw (Regulation of Licence) Act, 1976, was challenged under Art. 19(1)(*g*). The object of the Act was to provide that only the rickshaw-pullers who were owners of the rickshaws could get licence to pull the rickshaw. The Act was challenged on the ground that it contained no provisions to enable the rickshaw-pullers to become the rickshaw owners. The Supreme Court held that the purpose of the Act was to ameliorate the economic conditions of the rickshaw-pullers and to protect them from exploitation. The Court took into account an administrative scheme introduced by nationalised banks to enable the rickshaw-pullers to become the owners thereof. The Court referred to the principle that the validity of one statute should not be made to depend on another unconnected statute, but if two or more statutes form parts of one and the same legislative scheme, then both may be considered together.[6] In the instant case, the Court considered the Act and the scheme together on the ground that the scheme supplied the mechanics for the operation of the Act, and that the Act and the scheme were closely connected and constituted an integrated plan. Over and above this, the Court also formulated a set of guidelines of its own to make the Act and the scheme of the banks work more effectively.[7]

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1. *B. Banerjee v. Anita Pan*, AIR 1975 SC 1146 : (1975) 1 SCC 166.
2. *Madhu Limaye v. S.D.M., Monghyr*, AIR 1971 SC 2486 : (1970) 3 SCC 746.
3. *People's Union for Civil Liberties v. Union of India*, (2004) 2 SCC 476 : AIR 2004 SC 1442.
4. *Supra*, Ch. XXVI.
5. *Burrakur Coal Co. v. Union of India, supra*; also *supra*, Ch. XXXI, Sec. C(iii).
6. *Lord Krishna Sugar Mills v. Union of India, supra*, Ch. XXIV, Sec. I.
7. *Azad Rickshaw-Pullers' Union v. State of Punjab*, AIR 1981 SC 14 : 1980 Supp SCC 601; *Man Singh v. State of Punjab*, (1985) 4 SCC 146 : AIR 1985 SC 1737.

In *A.K. Roy v. Union of India*,[8] the National Security Act conferred power to detain a person if he was acting in any manner "prejudicial to the maintenance of supplies and services essential to the community". The Court found this phrase to be vague and imprecise as it was not made clear as to which 'supplies' or 'services' were regarded essential to the community. In the absence of any definition of 'supplies and services essential to the community', the detaining authority could extend the application of this clause to any commodities or services which it regarded essential to the community. The clause was, therefore, capable of wanton abuse as it enabled the authorities to detain a person in respect of any commodity or service. The clause violated Art. 21 as it was violative of "fairness and justness of procedure". Nevertheless, the Court did not strike down the clause but merely directed that no person was to be detained under the clause unless, "by a law, order or notification made or published fairly in advance, the supplies and services the maintenance of which is regarded as essential to the community and in respect of which the order of detention is proposed to be passed, are made known appropriately, to the public." Moreover, "people should be forewarned if new categories are to be added to the list".

The courts usually adopt a liberal attitude towards socio-economic legislation.

For example, in *B. Banerjee v. Anita Pan*,[9] a drastic law controlling accommodation and rents in urban areas, and imposing drastic restrictions on the right of the landlords to evict their tenants, was challenged under Art. 19(1)(*f*). The High Court declared the law to be invalid. But, on appeal, the Supreme Court held it valid by majority. The Court took the position that it was bascially a social legislation, a piece of social justice, and was designed to reduce the hardships of tenants in big towns where there was scarcity of accommodation. Therefore, it should not be invalidated if a reasonable interpretation can save it unless the violation of landlords' Fundamental right was manifest. Referring to the statement of Justice STONE, mentioned above, the Court stated that it "hesitates to strike a socially beneficial statute dead, leading to escalation of the mischief to suppress which the High House legislated—unless, of course a plain breach of Fundamental right of the citizen is manifest".

The Supreme Court has stated several times that in case of economic legislation, the Court feels more inclined to judicial deference to legislative judgment.[10]

In this connection, the Supreme Court has observed[11] :

> "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 straight 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 judi-

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8. AIR 1982 SC 710 : (1982) 1 SCC 271; *supra*, Ch. XXVII, Sec. C(i)(a).

9. Chs. XXXI, Sec. B and XXXIV.

10. *Delhi Cloth & Gen. Mills Co. Ltd. v. Union of India,* AIR 1983 SC 937; *R.K. Garg v. Union of India,* AIR 1981 SC 2138, 2147 : 91981) 4 SCC 675; *Union of India v. Elphinstone Spn. & Wvg. Co. Ltd*., AIR 2001 SC at 735 : (2001) 4 SCC 139; *Morey v. Doud*, (1957) 354 US 457.

11. *Amrit Banaspati Co. Ltd. v. Union of India,* AIR 1995 SC 1340, at 1343 : (1995) 3 SCC 335.

> cial deference to legislative judgement in the field of economic regulation than in other areas where Fundamental human rights are involved….."

Similarly, the courts adopt a liberal attitude towards tax legislation. Explaining its attitude towards such legislation, the Supreme Court said in *Hoechst Pharmaceuticals Ltd. v. State of Bihar*:[12]

> "On questions of economic regulations and related matters, the Court must defer to the legislative judgment. When the power to tax exists, the extent of the burden is a matter for the discretion of the law-makers. It is not the function of the Court to consider the propriety or justness of the tax, or enter upon the realm of legislative policy....".

But, in *Indian Express Newspapers v. Union of India,*[13] the Supreme Court expressed a different view. The Court was assessing the *vires* of the levy of customs duty on newsprint *vis-a-vis* the freedom of the press under Art. 19(1)(*a*). The Court was thus seeking to reconcile the levy of the customs duty on the newsprint with the freedom of the press. The Court expressed its approach in the matter in these words:

> "It is true that this Court has adopted a liberal approach while dealing with fiscal measures and has upheld different kinds of levies.... But in the cases before us the Court is called upon to reconcile the social interest involved in the freedom of speech and expression with the public interest involved in the fiscal levies imposed by the Government specially because newsprint constitutes the body, if expression happens to be the soul. In view of the intimate connection of newsprint with the freedom of the press, the tests for determining the vires of a statute taxing newsprint have, therefore, to be different from the tests usually adopted for testing vires of the taxing statutes. In the case of ordinary taxing statutes, the laws may be questioned only if they are either openly confiscatory or a colourable device to confiscate. On the other hand, in the case of a tax on newsprint, it may be sufficient to show a distinct and noticeable burdensomeness, clearly and directly attributable to the law."[14]

In assessing the constitutionality of a statute, the Court is not concerned with the motives, *bona fides* or *mala fides* of the legislature. No *mala fides* or motives are attributed to the legislature.[15] The Legislature, as a body, cannot be accused of having passed a law for an extraneous purpose. "Even assuming that the executive, in a given case, has an ulterior motive in moving a legislation, that motive cannot render the passing of the law *mala fide*. This kind of transferred malice is unknown in the field of legislation."[16]

If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant.[17] Similarly, the Court is not concerned with the wisdom of the legislature in enacting a particular law.[18] The 'constitutional-

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12. AIR 1983 SC 1019 : (1983) 4 SCC 45.
13. (1985) 1 SCC 641 : AIR 1986 SC 515.
14. *Ibid.*, at 686.
Also, *supra*, Ch. XXIV, Sec. C(h).
15. *G.C. Kanungo v. State of Orissa*, AIR 1995 SC 1655, at 1660-61 : (1995) 5 SCC 96.
16. *K. Nagaraj v. State of Andhra Pradesh*, AIR 1985 SC 551 at 556 : (1985) 1 SCC 523.
17. *K.C. Gajapati Narayan Deo v. State of Orissa*, AIR 1953 SC 375 : 1954 SCR 1; *Gullapalli N. Rao v. State of Andhra P.S.R.T. Corp.*, AIR 1959 SC 308 : 1959 Supp (1) SCR 319; *supra*, Ch. II, Sec. M.
18. *Y.V. Srinivasamurthy v. State of Mysore*, AIR 1959 SC 894.

ity' and not 'unwisdom' of a legislation is the narrow area of judicial review.[19] The Court cannot sit in judgment over the wisdom of the legislature. A law cannot be struck down merely because the Court thinks it to be unjustified or unwise. As the Supreme Court has stated:[20] "What form a regulatory measure must take is for the legislature to decide and the Court would not examine its wisdom or efficacy except to the extent that Article 13 of the Constitution is attracted." On this point, the Supreme Court has observed in *State of Andhra Pradesh v. McDowell & Co.* :[21]

> "No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that Court thinks it unjustified. The Parliament and the legislatures, composed as they are of the representatives of the people, and are supposed to know the needs of the people and what is good and bad for them. The Court cannot sit in judgment over their wisdom."

It is only a law which has to be tested with reference to Art. 13.[22] Flag Code containing the executive instructions of the Central Government is not "law" within the meaning of Art. 13 and for the purposes of Arts. 19(2) to (6) and therefore cannot impose restrictions on the rights enumerated under Arts. 19(1) (a) to (e) and (g). But the guidelines as laid down under the Flag Code deserve to be followed to the extent it provides for preservation of dignity and respect for the National Flag. The right to fly the National Flag is not an absolute right. The freedom of expression for the purpose of giving a feeling of nationalism is met by showing respect to the flag. The State may not tolerate even the slightest disrespect.[23]

The Courts also are not concerned with the need or propriety of laws. The judicial function is not to canvass the legislative judgment, or to hold the impugned statute to be ill-advised or unjustified or not justified by the facts on which it is based. The function of the courts is to see whether the law in question transgresses any constitutional restriction imposed on the legislature.[24]

The constitutionality of a statute passed by a competent legislature cannot also be challenged on the ground that it is not reasonable or just unless the Constitution expressly imposes such a stipulation as in Art. 19.[25] Mr. Justice Douglas has very forcefully reiterated this point thus: "Congress acting within its constitutional powers, has the final say on policy issues. If it acts unwisely the electorate can make a change."[26]

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19. Mr. Justice STONE in *U.S. v. Butler,* 297 US 1; *Murthy Match Works v. Asst. Collector of Central Excise,* AIR 1974 SC 497, 503 : (1974) 4 SCC 428; *B. Banerjee v. Anita Pan,* AIR 1975 SC 1146, 1153 : (1975) 1 SCC 166.

20. *Delhi Cloth & Gen. Mills Co. Ltd. v. Union of India,* AIR 1983 SC 937, 947, 950.

21. AIR 1996 SC 1628 at 1641 : (1996) 3 SCC 709.
See also *Legal Remembrancer's Manual not covered. State of U.P. v. Johri Mal,* (2004) 4 SCC 714 : AIR 2004 SC 3800.

22. *State of Kerala v. Chandramohanan* ,(2004) 3 SCC 429 : AIR 2004 SC 1155, Government circulars—Not law within the meaning of Art 13.

23. *Union of India v. Naveen Jindal,* (2004) 2 SCC 510 : AIR 2004 SC 1559.

24. *Chiranjit Lal v. Union of India, supra,* Ch. XXI, Sec. C.

25. *Supra,* Ch. XXIV, Sec. B.

26. *Railway Employees' Department v. Hansen,* 351 US 225 (1956).

The possibility of abuse of a statute otherwise valid does not impart to it any invalidity.[27] Conversely a statute which is invalid as being unreasonable cannot be saved because it is being administered in a reasonable manner.[28]

Reference may also be made in this connection to the doctrine of colourable legislation discussed earlier.[29]

For the purpose of determining whether a particular enactment curtails a Fundamental Right or not, the Supreme Court has expounded not one but several formulae and, speaking generally, the particular formula which happens to be favourable to the validity of the legislation impugned, is usually adopted by the Court.

One such formula is that a law is not questionable under a Fundamental Right unless the legislation is directly in respect of it. Thus, a law can be attacked under Art. 19(1)(*a*), if it is directly in respect of the subject covered by Art. 19(1)(*a*), but not if it touches that Article only incidentally or indirectly. If the law in question directly abridges the freedom of speech, it may be repugnant to Art. 19(1)(*a*), but it may not be invalid if it relates to some other right and affects the freedom of speech only incidentally or indirectly.[30]

This was the test applied in *Gopalan* to repudiate the argument that the validity of the Preventive Detention Act be judged under Art. 19(1)(*a*) as well. KANIA, C.J. held that such a question could arise only when the legislation directly attempted to control a citizen's freedom of speech and expression, but it was not directly in respect of Art. 19(1)(*a*), and the right guaranteed in that Article was abridged as a result of operation of other legislation, then the question of application of Art. 19(1)(*a*) would not arise. "The true approach", observed the Judge,"is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of detenu's life".[31]

The same test was applied again in *Ram Singh v. Delhi.*[32] Had the Court taken into consideration the effect of detention on the freedom of speech, and, thus, applied Art. 19(1)(*a*), the detention in *Ram Singh's* case might have been invalid. But, instead, the Court took the view that the order of preventive detention did not fall within the purview of Art. 19(1)(*a*) as its direct object was preventive detention and not the infringement of the freedom of speech and expression which was merely consequential to detention.

Another test applied in some cases, very much like the above test, is that of 'pith and substance', or true nature or character, or the subject-matter of the impugned statute. In *State of Bombay v. R.M.D.C.,*[33] while considering the validity

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27. *R.K. Garg v. Union of India*, *supra*, footnote 10; *Union of India v. Elphinstone Spn. & Wvg. Co. Ltd*., AIR 2001, at 735 : (2001) 4 SCC 139.

28. *Collector of Customs, Madras v. Nathella Sampathu Chetty,* AIR 1962 SC 316, at 332 : (1962) 3 SCR 786.

29. *Supra*, Ch. X, Sec. G(v).

30. *Naresh v. State of Maharashtra, supra*, Ch. XXIV, Sec. C.
The Supreme Court held that the High Court's order in the instant case was directly concerned with giving protection to the witness with a view to obtain true evidence from him in order to do justice between the parties. If incidentally it affected the right of the petitioner under Art. 19(1)(*a*), that would not affect the validity of the order.

31. *Supra*, Ch. XXVI, Sec. B(a).

32. AIR 1951 SC 270; *supra*, Ch. XXVI, Sec. C.

33. *Supra*, Ch. XXIV, Sec. I(c).
Also see, *Cooverji v. Excise Commr.*, Ch. XI, Sec. H.

of the Bombay Lotteries and Prize Competitions Control and Tax (Amendment) Act, 1952, *vis-a-vis* Arts. 19(1)(*g*) and 301, the Supreme Court pointed out that in pith and substance the impugned Act was in respect of betting and gambling and since betting and gambling did not constitute trade, commerce or business, the validity of the Act need not be decided upon by the yardstick of reasonableness and public interest laid down in Arts. 19(6) and 304.[34]

In the *Atiabari* case,[35] however, the Supreme Court doubted whether the doctrine of pith and substance could be applied to an area other than the legislative lists.[36]

In *Hamdard Dawakhana v. Union of India*,[37] the Court again expressed a doubt whether the doctrine was relevant to determining the constitutional validity of a statute with reference to a Fundamental Right. There the law was challenged as being unconstitutional under Art. 19(1)(*a*). Instead of the pith and substance doctrine, the Court preferred the doctrine of 'true character and nature' which meant that the subject-matter of the impugned legislation, the area in which it is intended to operate, its purport and intent should be determined to adjudicate upon its constitutionality.

To do so, it is legitimate to take into consideration all factors, such as, the history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which is intended to be suppressed, the remedy for the disease which the legislature resolved to cure and the reason for the remedy. The justification for the approach is that the Court should look to the substance, rather than the form, of the legislation impugned.

It is not, however, very clear as to what precisely is the difference between 'pith and substance' and 'true character and nature'. The two doctrines appear to be convergent except for verbal differentiation.[38]

The test of "true nature and character" was first proposed by MAHAJAN, J., in *Dwarkadas v. Sholapur Mills.*[39] In *Sundaramier's* case,[40] the test of true nature and scope was applied to adjudge the constitutionality of a statute with reference to Art. 286.

In some cases, the test of real effect and impact of the impugned legislation on the Fundamental Right has been applied. In the *Kerala* case, the Supreme Court took recourse to the test of 'effect and impact'.[41] This test was narrowed down to some extent in *Express Newspaper* where the Supreme Court considered the 'direct and inevitable consequences'[42] of the impugned Act as distinguished from its 'remote consequences'.

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34. *Supra*, Chs. XV, Sec. D(a) and XXIV, Secs. B and J(a).
35. *Supra*, Ch. XV, Secs. C and E.
36. Ch. X, Sec. G(iv)
37. *Supra*, Ch. XXIV, Secs. C (k).
38. Also see, *Mahant Moti Das v. S.P. Sahi*, AIR 1959 SC 942 : 1959 Supp (2) SCR 563.
39. AIR 1954 SC 119 : 1954 SCR 674; *supra*, Ch. XXIV, Sec. I; Ch. XXXI, Sec. C(ii).
40. AIR 1958 SC 468; *supra*, Ch. XI, Sec. J(i).
41. *Supra*, Ch. XXXIV, Sec. B.
Also see, *State of Bombay v. Bombay Education Society, supra*, Ch. XXX, Sec. A; *M.H. Quareshi v. State of Bihar, supra*, Ch. XXIV, Sec. J(g).
42. *Supra*, Ch. XXIV, Sec. C.

In the *Bank Nationalisation* case,[43] the Court advocated the test of the 'effect of the law' or its 'direct operation' upon the individual's right to assess the validity of a law with reference to a Fundamental Right. The Court emphasized that it was the substance of the legislation and its practical result which should be considered rather than the pure legal form. A similar test was applied in *Sakal Papers* where the validity of the order was adjudged under Art. 19(1)(*a*) and not under Art. 19(1)(*g*).[44]

The Supreme Court has stated in *Man Singh v. State of Punjab*[45] "that the true test of the validity of a statute must be the 'effect and consequence' of its operation on the citizen's Fundamental Right. The object underlying the legislation embodies the intent of the Legislature in enacting it, but the Court has to consider the question whether its impact on the Fundamental Right can be regarded as a reasonable restriction on the exercise of the right. "The focal point during such examination is the Fundamental right, and the duty of the Court must be to consider the quality and degree of the encroachment made by the operation of the statute on the citizen's exercise of that right."

A good deal of discussion on the applicability of these various tests is to be found in *Express Newspapers*. There the Working Journalists Act, 1955, was challenged on the ground that, in substance, in its 'true nature and character' and in 'effect and operation', it regulated employment in the newspaper industry and thus fell within the prohibition of Art. 19(1)(*a*) as affecting the freedom of the press. The Court, however, thought that the true nature of the Act was to regulate the service conditions of working journalists. It might result in certain disadvantages to the newspaper industry but these were only 'incidental' and 'extraneous' to the Act.

The Court formulated the proposition thus: unless the disadvantages accruing to the newspaper industry under the Act were the 'direct and inevitable' consequences of the Act, it could not be struck down. There was an interesting argument in the case on whether Art. 19(1)(*a*) would operate only when legislation "directly" dealt with the "freedom of speech and expression", or also when the statute in 'effect' affects that right. The Court did not give a definitive ruling on the 'subject-matter' v. 'effect' controversy.

The 'subject-matter' test is narrower in the sense that it would permit indirect encroachments on a Fundamental Right. It appears that the Court did not favour any of these tests but favoured instead an intermediate position, viz., the test of 'true nature' of the legislation in question. This test is narrower than the 'effect' test for it permits incidental encroachments on the Fundamental Right in question but it is broader than the 'subject-matter' test because, even though a legislation does not deal with a Fundamental Right, yet it may become bad if it imposes restrictions on the right which are not inconsequential or incidental.[46]

In *Bennett Coleman*,[47] the Supreme Court applied the 'effect' test. There the constitutional validity of a legislation not directly in respect of Art. 19(1)(*a*), nevertheless, affecting freedom of speech was assessed with reference to Art.

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43. AIR 1970 SC 564, 597; *supra*, Ch. XXXI, Sec. C(iii).
44. *Supra*, Ch. XXIV, Sec. C(f).
45. (1985) 4 SCC 146 : AIR 1985 SC 1737.
46. M.P. JAIN, Justice Bhagwati and Indian Constitutional Law, 2 *JILI* 31, 37.
47. *Supra*, Ch. XXIV, Sec. C(g).

19(1)(*a*). It had been argued in *Bennett Coleman* that the subject-matter of the newsprint policy (the validity of which was challenged in the case) was not freedom of speech but rationing of imported commodity. The government also invoked the rule of pith the substance for the purpose. The Court ruled that the tests of "pith and substance" or the "subject-matter", and of "direct and incidental effect" of legislation were relevant to the question of legislative competence but were irrelevant to the question of Fundamental Rights. The test to be applied in such a case was whether the "effect" of the impugned action was to take away or abridge Fundamental Rights. A legislation may have a 'direct' effect on a Fundamental Right although its direct subject-matter might be different. The object of the law was irrelevant when it infringed a Fundamental Right. A difficulty in this test is to assess whether the 'consequence' of a provision on a Fundamental Right is 'direct' or 'indirect'. This may give rise to a difference of opinion. But this test helps better in preservation of the Fundamental Rights than the 'subject-matter' test.[48]

In *Maneka Gandhi*, BHAGWATI, J., used the test of "direct and inevitable effect" as "in the absence of operational criteria for judging 'directness' it would give the Court an unquantifiable discretion to decide whether in a given case a consequence or effect is direct or not". According to him, the test of 'direct and inevitable effect' would quantify the extent of directness necessary to constitute infringement of a Fundamental Right. He applied the test to see whether the impugned section violated freedom of speech and/or freedom of occupation.[49]

The above discussion shows that the judiciary keeps a number of options open to itself. This gives to the judicial review some flexibility and elasticity, and to the courts a good deal of maneuverability in discharging their function of adjudicating upon the constitutionality of legislation. This also creates uncertainty as to the judicial response to a particular problem because what test will the Court apply in a particular situation cannot be predicated with definiteness or with certainty.

A reference has already been made to the technique of indirect judicial review.[50] Here the Court so interprets the law as to sustain its validity. If a statutory provision is capable of two possible interpretations, so that by one it is rendered unconstitutional, and by the other it becomes constitutional, the Court will prefer the interpretation which saves and preserves the provision in preference to the one which destroys it. The principle is that if certain provisions of law construed in one way will be consistent with the Constitution, and if another interpretation would render them unconstitutional, the Court would bear in favour of the former construction.[51] This strategy is adopted because of the concern of the Court to salvage a legislation to achieve its objective and not to let it fall merely because of a possible ingenious interpretation. Words are not static but dynamic. As the Supreme Court has observed:[52]

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48. *Supra*, Ch. XXIV, Sec. B.
Also, *supra*, Ch. XXVI, Sec. C.

49. *Supra*, Ch. XXVI, Sec. D.

50. *Supra*.

51. *The Mysore State Electricity Board v. Bangalore Woollen, Cotton and Silk Mills Ltd.*, AIR 1963 SC 1128 : 1963 Supp (2) SCR 127; *Delhi Transport Corpon. v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101, 167-170, 175-180, 201-205 : 1991 Supp (1) SCC 600.

52. *B.R. Enterprises v. State of Uttar Pradesh*, AIR 1999 SC 1867, at 1906 : (1999) 9 SCC 700.

> "It is also well settled, first attempt should be made by the Courts to uphold the charged provision and not to invalidate it merely because one of the possible interpretations leads to such a result, howsoever attractive it may be. Thus, when there are two possible interpretations, one invalidating the law and the another upholding, the latter should be adopted. For this, the courts have been endeavoring, sometimes to give restrictive or expansive meaning keeping in view the nature of legislation, may be beneficial, penal or fiscal etc….. Yet in spite of this, if the impugned legislation cannot be saved, the courts shall not hesitate to strike it down."

In another case,[53] the Supreme Court has observed: "Words are not static but dynamic and courts must adopt that dynamic meaning which upholds the validity of any provision."

In *Githa Hariharan v. Reserve Bank of India*,[54] the Supreme Court reinterpreted s. 6(a) of the Hindu Minority and Guardianship Act, 1956, so as to "retain it within constitutional limits."

The courts have evolved the technique known as 'reading down' a statute and the courts often resort to this strategy to ensure constitutionality of the statute in question.[55] This technique involves interpreting general words in a statute narrowly. As the Supreme Court has observed : "… for upholding any provision, if it could be saved by reading it down, it should be done, unless plain words are so clear to be in defiance of the Constitution."[56]

A few examples of the application of the technique of 'reading down' may be cited here. The Central Legislature enacted the Hindu Women's Rights to Property Act conferring certain rights on Hindu women in 'property'. The Central Legislature had jurisdiction only on 'non-agricultural property, and not 'agricultural' property. Accordingly, to save the Act from unconstitutionality, the Federal Court interpreted the word 'property' used in the Act as referring to "property other than agricultural land". The Court observed :[57]

> "When a Legislature with limited and restricted powers makes use in an Act of a word of such wide and general import as "property", the presumption must be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other."

Parliament enacted the Prize Competitions Act to provide for the control and regulation of prize competitions. The expression "prize competitions" was defined very broadly. To save the Act from unconstitutionality, the Supreme Court in *RMDC*[58] restricted its meaning to such competitions as are of a gambling nature.

In *Kedar Nath v. State of Bihar*, s. 124A I.P.C., was interpreted in the narrower sense and was thus sustained against a challenge under Art. 19(2). Sedition

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53. *Quarry Owners Association v. State of Bihar*, AIR 2000 SC 2870, 2886 : (2000) 8 SCC 655.
54. AIR 1999 SC 1149, 1153.
Also see, *Union of India v. Elphinstone Spinning and Weaving Co. Ltd.*, AIR 2001 SC at 733 : (2001) 4 SCC 139.
55. *DTC v. DTC Mazdoor Congress, supra; B.R. Enterprises v. State of Uttar Pradesh, supra.*
56. *B.R. Enterprises, supra.*
57. In Re, *The Hindu Women's Rights to Property Act, 1937*, AIR 1941 FC 72
58. *RMD Chamiarbaugwalla v. Union of India*, AIR 1957 SC 628 : 1957 SCR 930; *supra*, Ch. XXIV, Sec. I(e).
Also, *BR. Enterprises v. State of Uttar Pradesh*, AIR 1999 SC 1867 : (1999) 9 SCC 700.

was defined as meaning words, deeds or writings having a tendency or intention to disturb public tranquility, to create public disturbance or to promote disorder. The Supreme Court rejected the broader view of S. 124A that incitement to public order was not an essential element of the offence of sedition under this section. This broad view would have made s. 124A unconstitutional *vis-a-vis* Art. 19(1)(*a*) read with Art. 19(2).[59]

When an interpretation of a clause makes it vulnerable to attack under Art. 14, it should be avoided. If there is obvious anomaly in applying the law, the Court could shape the law to remove the anomaly and give effect to the purpose of the legislature. That could be done, if necessary, even by modification of the language used.[60]

A good example of application of the strategy of reading down is provided by *Rt. Rev. Magr. Mark Netto v. Govt. of Kerala.*[61] The State Government made a rule which was challenged as violative of the right conferred upon the minorities by Art. 30. If the rule were to be interpreted broadly it could fall foul of Art. 30. So, the rule was interpreted restrictively so as to be inapplicable to a minority educational institution. The Court observed :[62]

> "We do not think it necessary or advisable to strike down the Rule as a whole but to restrict its operation and make it inapplicable to a minority educational institution in a situation like the one which arose in this case."

The Supreme Court has explained the scope of the doctrine of reading down as follows :[63]

> "It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible one rendering it constitutional and the other making it unconstitutional, the former should be preferred….. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made."

It is not be proper to read down the provisions of a statute in relation to the period during which the statute was subsisting as it would then affect persons who never went to Court, because during the period it existed it did not apply to them.[64]

When adherence to statutory language leads to unjust or illogical results, and, thus, makes the law vulnerable to attack under Art. 14, the Court may take recourse to indirect judicial review. The Supreme Court has observed in this con-

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59. *Supra*, Ch. XXIV, Sec. D(b).

60. *Union of India v. Filip Tiago De Gama,* AIR 1990 SC 981 at 985 : (1990) 1 SCC 277.
Also, *Mahadeolal Kanodia v. The Administrator-General of West Bengal,* AIR 1960 SC 936 : (1960) 3 SCR 578.

61. AIR 1979 SC 83 : (1979) 1 SCC 23; *supra*, Ch. XXX, Sec. B; Sec. C(h).

62. The Court applied the same strategy in *New Delhi Municipal Committee v. State of Punjab,* AIR 1997 SC 2847 at 2903, 2904 : (1997) 7 SCC 339.

63. *Delhi Transport Corporation v. D.T.C. Mazdoor Congress,* AIR 1991 SC 101, at 180; see also reading down statute to save arbitrariness and exercise of discretionary power. *Salem Advocate Bar Association v. Union of India,* (2005) 6 SCC 344 : AIR 2005 SC 3353.

64. *Punjab Dairy Development Board v. Cepham Milk Specialities Ltd.,* (2004) 8 SCC 621 : AIR 2004 SC 4466.

nection that if there is obvious anomaly in the application of the law, the Court could shape the law to remove the anomaly. If the strict grammatical interpretation gives rise to absurdity or inconsistency, the Court could discard such interpretation and adopt an interpretation which will give effect to the purpose of the legislature. That could be done, if necessary, even by modification of the language used. A law does not deal with specific controversies which the courts decide. A law incorporates general purpose behind the statutory words, the Court decides specific cases. If a given case falls well within the general purpose of the legislature, but not within the literal meaning of the statute, then the Court must strike the balance.[65]

A similar approach is to be seen in *Govind v. State of Madhya Pradesh*[66] where police regulations were restrictively read by the Court and thus held valid under Art. 19(1)(*d*).

Thus, reading down a statute to ensure its constitutionality is a common judicial strategy. As KRISHNA IYER, J., has said in *Bhim Singhji v. Union of India*:[67] "…. reading down meanings of words with loose lexical amplitude is permissible as part of the judicial process. To sustain a law by interpretation is the rule."

But it is not in every case that the Court would resort to the technique of 'reading down' the statute. When the provision in question is cast in a definite and unambiguous language, and its intention is clear, the Court will not mend or bend it but declare it unconstitutional leaving it to the legislature to amend it if it so desires. One example of the Court refusing to apply the doctrine of reading down is furnished by *Minerva Mills Ltd. v. Union of India*,[68] The Court refused to read down Art. 31C to save it from the challenge of unconstitutionality. The Court ruled that "if the Parliament has manifested a clear intention to exercise an unlimited power, it is impermissible to read down the amplitude of that power so as to make it limited. The principle of reading down cannot be invoked or applied in opposition to the clear intention of the legislature."

The Supreme Court also refused to apply the doctrine of reading down in *DTC*.[69] A service regulation was made conferring power on the authority to terminate the services of a permanent and confirmed employee without assigning any reason by giving one month's notice. The regulation was characterised as arbitrary, discriminatory and violative of Art. 14. The Court ruled : "The language of the regulation is so crystal clear that no two interpretations are possible to be placed on it and hence it is not permissible to read in it any meaning other than what is clearly sought to be conveyed by it."[70]

There are instances where instead of reading down the impugned law, the Court may read something therein to uphold its validity. A few examples of such judicial approach may be cited here.

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65. *Mahadeolal Kanodia v. The Administrator General of West Bengal*, AIR 1960 SC 936 : (1960) 3 SCR 578; *Union of India v. Filip Tiago De Gama*, AIR 1990 SC 981, 955 : (1990) 1 SCC 277.
66. AIR 1975 SC 1378; *supra*, Ch. XXIV, Sec. G.
67. AIR 1981 SC at 242 : (1981) 1 SCC 166.
68. See, *infra*, next Chapter.
69. *DTC v. DTC Mazdoor Congress, supra.*
70. AIR 1991 SC at 181.

In *State of Mysore v. Bhat,*[71] instead of holding the law invalid under Art. 14 on the ground of lack of procedural safeguards, the Supreme Court read natural justice into the law and sustained its validity, but quashed the orders made thereunder because of denial of natural justice.

In *Express Newspaper,*[72] the Supreme Court read the ingredient 'capacity to pay' into the law enacted for fixing wages even though the law had failed to specify the same and held it valid. Instead, the Court quashed the decision of the wage board as it had not taken this ingredient into consideration while fixing the wages. This technique avoided a re-enactment of the law in question but only required a revision of the wage board's decision keeping in view the capacity of the industry to pay.[73]

Just because the constitution validity of a statutory provision is pending in appeal before the Supreme Court, it does not bar the High Court from deciding an issue relating to such a provision.[74]

I. EFFECT OF UNCONSTITUTIONALITY

If an Act is initially unconstitutional being violative of a Fundamental Right, its invalidity cannot be cured by framing rules for removing the infirmities from which the Act was suffering. Thus, the Maharashtra Vacant lands (Prohibition of Unauthorised Occupation and Summary Eviction) was held to be violative of Art. 14 and 19(1)(f). The unconstitutionality of the Act was not cured by framing the Rules thereunder.[75]

What is the effect of a judicial declaration that a legislative enactment is unconstitutional?

In an American case, the answer to the question was given as follows: "An unconstitutional Act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it has never been passed."[76]

A similar theme is present in certain observations of MAHAJAN, J., in the *Keshavan Madhava Menon* case.[77]

When the Supreme Court declares a law unconstitutional, the decision is binding on all courts in India under Art. 141.[78] The virtual effect thereof is that the decision operates as a judgment *in rem* against all persons who may seek relief subsequenlty and it is not necessary for them to establish the unconstitutionality of the statute again. The courts are bound to ignore an unconstitutional law.

If a person is prosecuted for contravening a section, a part of which has been declared unconstitutional, no onus is cast on the accused to prove that his case

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71. AIR 1975 SC 596 : (1975) 1 SCC 110; *supra*, Ch. XXI, Sec. D.
72. *Supra*, Ch. XXIV, Sec. J(e).
73. M.P. JAIN, Justice Bhagwati and the *Indian Constitutional Law*, 2 JILI, 31, 38.
74. *Carona Ltd. v. Parvathy Swaminathan & Sons,* (2007) 8 SCC 559 : AIR 2008 SC 187.
75. *State of Maharashtra v. Kamal S. Durgule,* AIR 1985 SC 119 : (1985) 1 SCC 234 for Art. 14, see, Ch. XXI, *supra;* for Art. 19(1)(f), see, Ch. XXXI, Sec. B.
76. *Norton v. Shelby County,* 118 US 425, 442 (1886).
77. AIR 1951 SC 128 : 1951 SCR 228; *supra*, Ch. XX, Sec. F.
78. *Supra*, Ch. IV, Sec. I(e); Sec. J.

falls under the unconstitutional portion. To succeed, the prosecution must establish that the accused has contravened the constitutional, and, thus, the enforceable, portion of the section.[79]

An unconstitutional statute is void since its inception; it is regarded as *non-est*.[80] Anything done under it is void and illegal; even convictions made under it are set aside; anything done under it, whether closed, completed, or inchoate, is wholly illegal and the person affected is entitled to relief in one shape or another.[81]

What is stated above is the general effect of the declaration of a statute as unconstitutional. But there may be cases where the Court may tone down the drastic effect in exercise of its power to "mould relief."[82] As stated earlier, the Court may apply the doctrine of prospective overruling.[83] As the Supreme Court has observed in *Orissa Cement Ltd. v. State of Orissa*:[84]

> "… The declaration regarding the invalidity of a provision and the determination of the relief that should be granted in consequence thereof are two different things and, in the latter sphere, the Court has, and must be held to have, a certain amount of discretion. It is a well settled proposition that it is open to the Court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice. It will be appreciated that it is not always possible in all situations to give a logical and complete effect to a finding…"

Thus, there have been cases where a tax levied by a State has been declared to be unconstitutional but while the Court has barred the State from collecting the tax in future, it has freed the state from the obligation of refunding the tax already collected. Ordinarily, once the tax is held unconstitutional, the tax ought to be held bad *ab initio* from the date of its origin. But, the Supreme Court exercising its power to mould relief under Art. 142, has modified the position by ruling that the past collection of the tax would not be regarded as invalid. This has been done to protect the financial position of the concerned State.[85]

Viewed in this light, the doctrine of Prospective Overruling, discussed earlier, may be regarded as an aspect of the Supreme Court's power to mould relief. The principle is that the Court "moulds the reliefs claimed to meet the justice of the case—Justice not in its logical but in its equitable sense."[86] The Supreme Court has been specifically given this power under Art. 142 of the Constitution. Under Art. 142, the Court has power to do 'complete justice'.[87]

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79. *Behram v. State of Bombay*, AIR 1955 SC 133; *supra*, Ch XX, Sec. F.
80. See, *Behram Khurshed Pesikaka v. State of Bombay*, AIR 1955 SC 123, 145 : (1955) 1 SCR 613; *R.M.D.C. v. Union of India*, AIR 1957 SC 628, 633; *M.P.V. Sundararamier & Co. v. State of Andhra Pradesh*, AIR 1958 SC 468, 489 : 1958 SCR 1422; *Mahendra Lal Jaini v. State of Uttar Pradesh*, AIR 1963 SC 1019, 1029-1031 : 1963 Supp (1) SCR 912.
81. *Supra*, Ch. XX, Sec. F.
82. See, *supra*, Chs. XXXIII, Sec. A(o) and VIII, Sec. D(q).
83. See, *supra*, Sec. G under "Prospective Overruling".
84. AIR 1991 SC 1676, at 1717 : 1991 Supp (1) SCC 430.
85. For Art. 142, see, *supra*, Ch. IV, Sec. G.
86. *Somaiya Organics (India) Ltd. v. State of Uttar Pradesh*, AIR 2001 SC 1723, 1731 : (2001) 5 SCC 519.
87. See, footnote 85, *supra*.

In *Ashok Kumar Gupta v. State of Uttar Pradesh*,[88] the Supreme Court has characterised the doctrine of Prospective Overruling as a method evolved by the courts to adjust competing rights of parties so as to save transactions "whether statutory or otherwise, that were effected by the earlier law". The Court has further observed that it was a "rule of judicial craftsmanship with pragmatism and judicial statesmanship as a useful outline to bring about smooth transition of the operation of law without unduly affecting the rights of the people who acted upon the law as it operated prior to the date of the judgment overruling the previous law." Ultimately, it is a matter of the discretion of the Supreme Court and is relatable directly to the grant of relief by the Court.

What is the effect on an unconstitutional statute of a constitutional amendment which removes the constitutional objection due to which the statute was declared invalid? The matter has already been discussed earlier.[89] In the *Sundaramier* case,[90] the Supreme Court applying the Doctrine of Eclipse held that the portions of a statute declared bad under Art. 286 were revived when the Article was amended so as to remove the constitutional quencher.

But this principle is not applied to a statute which may be invalid because of excessive delegation.[91] A law was challenged before the Supreme Court on this ground. Pending the Court's decision, an amending Act was enacted to remove the defect. The Supreme Court ruled by a majority that when an Act is bad on the ground of excessive delegation, it is void *ab initio* and still-born and it cannot be revived by an amending Act seeking to remove the vice. It means that the whole Act has to be re-enacted in the modified form.[92]

(a) SEVERABILITY

Reference may be made to the doctrine of severability which has already been discussed earlier.[93] The doctrine is invoked to protect the valid parts of the law and to eliminate only the invalid parts thereof. [94]

If the unconstitutional portion is severable from the constitutional portion, then only the former is affected; the statute is not regarded unconstitutional as a whole; the statute minus the unconstitutional portion stands.[95] For example, since the State has no legislative competence to enact provisions relating to natural gas and liquefied natural gas it is to that extent that the State Act would be *ultra vires* the Constitution.[96]

The doctrine makes it possible that not the entire statute, but only the invalid part thereof, has to go provided the good and the bad parts thereof can be separated.

Severing is thus an attempt on the part of the judiciary to minimize the destructive effect of judicial declaration of constitutional invalidity of some por-

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88. (1997) 5 SCC 201, see, *supra*.
89. *Supra*, Ch. XX, Sec. G, under '*Doctrine of Eclipse*'.
90. AIR 1958 SC 468 : 1958 SCR 1422; *supra*, Ch. XI.
91. *Supra*, Ch. II, Sec. N.
92. *B. Shama Rao v. Union Territory*, AIR 1967 SC 1480 : (1967) 2 SCR 650; *supra*, Ch. XX, Sec. G.
93. *Supra*, Ch. XX, Sec. H.
94. *Ibid.*
95. *D.S. Nakara v. Union of India*, AIR 1983 SC 130, 147 : (1983) 1 SCC 305.
96. Special Reference No. 1 of 2001 In re (2004) 4 SCC 489 : AIR 2004 SC 2647.

tions of a statute. If, however, the constitutional part cannot be separated from the unconstitutional part, then the whole statute is held to be invalid.[1]

(b) LEGISLATIVE VALIDATION OF AN INVALID STATUTE

It is possible that a statute held invalid by the Court may later be sought to be validated by the legislature by passing suitable legislation retrospectively removing the defects and deficiencies in the law which resulted in its being declared invalid. The Legislature cannot directly overrule a Court decision. The legislature cannot seek to override a Court decision by a mere declaration or even by making a statutory provision.[2]

The Supreme Court has enunciated the principle as follows:[3]

> "On the words used in the Act, it is plain that the Legislature attempted to overrule or set-aside the decision of this Court. That, in our judgment, is not open to the Legislature to do under our constitutional scheme. It is open to the legislature within certain limits to amend the provisions of an Act retrospectively and to declare what the law shall be deemed to have been, but it is not open to the legislature to say that a judgment of a Court properly constituted and rendered in exercise of its powers in matters brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court. That judgment was binding between the parties and also by virtue of Article 141 binding on all courts in the territory of India. The legislature could not say that the declaration of the law was either erroneous, invalid or ineffective either as precedent or between the parties."[4]

Accordingly, in *S.R. Bhagwat v. State of Mysore*,[5] a statutory provision was declared *ultra vires* the powers of the State Legislature "as it encroaches upon the judicial field and tries to overrule the judicial decision…"

What the Legislature can do however is to remove the defect which led to the invalidation of the law in question if the Legislature can do so under the Constitution.[6] What the Legislature can do is to enact a new law, amending the old law so as to remove the base on which the Court decision was founded.

The Court has explained the position thus in *Bola*:[7]

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1. *State of Gujarat v. Raman Lal Keshav Lal Soni*, AIR 1984 SC 161 : (1983) 2 SCC 33; *Motor General Traders v. State of Andhra Pradesh*, AIR 1984 SC 121 : (1984) 1 SCC 222.

2. *I.N. Saxena v. State of Madhya Pradesh*, AIR 1976 SC 2250; *Sundar Dass v. Ram Prakash*, AIR 1977 SC 1201 : (1977) 2 SCC 662; *Madan Mohan Pathak v. Union of India*, AIR 1979 SC 803; *Indra Sawhney v. Union of India*, AIR 2000 SC 498, at 516 : (2000) 1 SCC 168.

3. *Janapada Sabha v. C.P. Syndicate Ltd.*, AIR 1971 SC 57 : (1970) 1 SCC 509.
Also see, *Comorin Match Industries (Pvt.) Ltd. v. State of Tamil Nadu*, AIR 1996 SC 1916 : (1996) 4 SCC 281; *B. Krishna Bhat v. State of Karnataka*, AIR 2001 SC 1885, at 1890.

4. For Art. 141, see, *supra*, Ch. IV, Sec. I(e).

5. AIR 1996 SC 188 : (1995) 6 SCC 16.
Also see, *In re Caurvery Water Disputes Tribunal*, 1992 AIR SCW 1286; *G.C. Kanungo v. Mysore*, 1995 AIR SCW 2596 : (1995) 5 SCC 96; *State of Maharashtra v. Tanuja*, AIR 1999 SC 791 : (1999) 2 SCC 462; *State of Haryana v. Karnal Coop. F.S. Ltd.*, AIR 1994 SC 1 : (1993) 2 SCC 363.

6. *Supra*, Ch. X, Sec. I.
Also see, *Indian Aluminium Ltd. v. State of Kerala*, (1996) 7 SCC 537.
The matter has been discussed in *S.S. Bola v. B.D. Sardana*, AIR 1997 SC 3127, 3172-3173 : (1997) 8 SCC 522, Ch. XXXIV.

7. *Supra*, footnote 6.

> "The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same".

Hence there is no interference with a "judicial Order" passed by a competent Court or a tribunal where a "policy decision" is taken by the State Government to abolish the State Administrative Tribunal allowing aggrieved litigants to approach appropriate authority or forum for ventilating their grievances.[8]

A statute will not be valid unless the defects pointed out are removed. Such removal of the defects must be done keeping in view the principle of legislative competence. Even Parliament could not validate an Act which was enacted without proper legislative competence. As the measure of tax levied led to the declaration of the law as invalid, being in truth and substance to be beyond the competency of the State Legislature by reason of the impugned Acts, the levy cannot be said to have been revalidated. They were required to be re-enacted but suchre-enactment must also be in tune with any or other entries made in List II of the Constitution.[9]

The Supreme Court has pointed out[10] that before the Legislature can validate a tax declared illegal by the Court, the Legislature must remove, if it can, the cause for ineffectiveness or illegality. It is not sufficient to merely declare that the decision of the Court shall not bind for that is tantamount to reversing the decision given in exercise of judicial power which the Legislature does not possess. "Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax is thus made legal".[11] The legislature can change the basis on which a decision of the Court was rendered. Legislative power could also be exercised even with retrospective effect to render that decision ineffective. Thus the enactment of H.P. Taxation (on Certain Goods Carried by Road) Act, 1991 specifically stating that the levy of tax was compensatory and pointing out the facts relevant thereto in the Statement of Objects and Reasons was held to be within the competence of the State legislature and did not amount to overruling of the decision in which High Court had held the previous Act to be unconstitutional.[12]

If an ordinance invalidated by a Court is reenacted into an Act the same would be liable to be annulled once again. The Supreme Court cannot strike down a legislation which it has on an independent scrutiny held to be within the legislative competence of the enacting legislature merely because the legislature has reenacted the same legal provisions into an Act which, ten years earlier, were incorporated in an Ordinance and were found to be unconstitutional in an errone-

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8. *M.P. High Court Bar Association v. Union of India*, (2004) SCC 11 SCC 766 : AIR 2005 SC 4114.

9. *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.

10. *Shri P.C. Mills v. Broach Municipality*, AIR 1970 SC 192 : (1969) 2 SCC 283; *State of Andhra Pradesh v. Hindustan Machine Tools Ltd.*, AIR 1975 SC 2037 : (1975) 2 SCC 274; *Indira Gandhi Nehru v. Raj Narain*, AIR 1975 SC 2299 : 1975 Supp SCC 1; *Misrilal Jain v. State of Orissa*, AIR 1977 SC 1686 : (1977) 3 SCC 212; See also *P Venugopal v. Union of India*, (2008) 5 SCC 1 : (2008) 7 SCALE 255.

11. *Ibid*., at 195. Also see, *Ahmedabad Corporation v. New S.S. & Wvg. Co.*, AIR 1970 SC 1292 : (1970) 2 SCC 280.

12. *State of H.P. v. Yash Pal Garg*, (2003) 9 SCC 92 : (2003) 4 JT 413.

ous judgment of the High Court, and, before the error could be corrected in appeal, the Ordinance itself had lapsed. The Court pointed out by the impugned Act Parliament has not overruled the judgment of the High Court nor has it declared the same law to be valid which has been pronounced to be void by the Court and that the impugned Act was not liable to be annulled on the ground of violation of the doctrine of separation of powers.[13]

J. SUPREME COURT NOT BOUND BY ITS OWN DECISIONS

A principle of great significance which avoids stultification of the constitutional law, and helps in its continuous development through the process of judicial interpretation, is that the Supreme Court does not regard itself bound by its own previous decisions and feels free to overrule them if it thinks that to be necessary.

As early as 1955, in *Bengal Immunity Co. v. State of Bihar*,[14] the Court expressed the opinion that it was not bound by its earlier judgments; it could reconsider its own previous decisions; it possessed the freedom to depart from them, or even overrule them whenever it thought fit to do so to keep pace with the needs of changing times. There was nothing in the Constitution against such a course of action. Judicial opinions on constitutional questions are not immutable.

This is the first recorded instance of the Supreme Court considering the question whether it could overrule an earlier decision rendered by it. DAS, ACTING C.J., speaking for the majority on the Bench observed : "There is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public."

The main reason for taking this view is that while errors of ordinary law could be corrected by ordinary legislative process, an error of constitutional law could be set right only by the difficult, dilatory and cumbersome process of constitutional amendment. A perpetuation of mistakes in constitutional matters would be harmful to public interests.

The Court has, however, emphasized that it would exercise its power to reconsider previous decisions with due care and caution and only to advance the public well-being. If on a re-examination of the question, the Court concludes that its previous decision was wrong and erroneous then it would be its duty to say so and not to perpetuate the mistake.

In *Sajjan Singh*,[15] the Court again expressed itself on this point thus: The Court would be prepared to review its earlier decision in the interest of public good; the doctrine of *stare decisis* should not be permitted to perpetuate erroneous decisions pronounced by it to the detriment of the general welfare; but it would depart from its previous decisions only when considerations of a substantial and compelling character make it necessary to do so.

The Supreme Court has several times overruled or modified its earlier views. In *Bengal Immunity*, the Court reconsidered, and departed from its ruling in, the

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13. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
14. AIR 1955 SC 661 : (1955) 2 SCR 603; *Supra*, Ch. XI, Sec. J(i).
15. *Infra*, Ch XLI.

United Motors case,[16] since this case was having an adverse effect on the consuming public by imposing a tax burden erroneously on the people, giving rise to a consequence "manifestly and wholly unauthorised". The Chief Justice observed further referring to *United Motors*:

> "It is not an ordinary pronouncement declaring the rights of two private individuals *inter se*. It involves an adjudication on the taxing powers of the States as against the consuming public generally. If the decision is erroneous, as indeed we conceive it to be, we owe it to the public to protect them against the illegal tax burdens which the States are seeking to impose on the strength of the erroneous recent decision."

The Court cautioned that "we should not lightly dissent from a previous pronouncement." But if the previous decision was plainly erroneous, the Court is duty-bound to say so and not perpetuate the mistake.

In *Supdt. and Remembrancer of Legal Affairs, West Bengal v. Corp. of Calcutta*,[17] the Court overruled *Director of Rationing v. Calcutta Corp.*,[18] because the proposition laid down therein was inconsistent with the legal philosophy of the Constitution, inconsistent with the republican Indian polity and bristled with anomalies.

In *Kalu Oghad*,[19] the Court modified its view expressed in *Sharma v. Satish*.[20]

In *Golak Nath*,[21] the Court by a majority of 6 : 5 overruled its previous decisions in the *Sajjan Singh* and *Shankari Pd.* cases and, again, in *Kesavananda Bharati* overruled certain aspects of *Golak Nath*.[22]

A shift in judicial view can also be seen in the area of legislative privileges when reference is made to the *Blitz*, the *Searchlight* and the *Keshav Singh* cases.[23]

In *Sambhu Sarkar*, the Court overruled *Gopalan* as regards the interpretation of Art. 22(7)(*a*) saying that in a matter involving the right of personal liberty, the fact that a decision has held the field for long should not be a deterrent against its reconsideration.[24]

In the *Bank Nationalization* case, the Supreme Court changed its views on the inter-relation of Arts. 19(1)(*f*) and 31 and on justiciability of compensation as compared to its previously expressed views.[25]

In *S.N. Sarkar v. State of West Bengal*,[26] the Supreme Court overruled *Gopalan*[27] as regards the interpretation of Art. 22(7).[28] It was argued before the Court

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16. *Bombay v. United Motors (India) Ltd.*, AIR 1953 SC 252 : 1953 SCR 1069; *Supra*, Ch. XI, Sec. J(i).
17. *Supra*, Ch. XXXVII, Sec. G.
18. *Ibid*.
19. *Supra*, Ch. XXV, Sec. C.
20. *Supra*, Ch. XXV, Sec. C.
21. *Infra*, Ch. XLI
22. *Ibid.*
23. *Supra*, Chs. II, Sec. L and VI, Sec. H.
24. *Supra*, Ch. XXVII, Sec. C(i)(a).
25. *Supra*, Ch. XXXI, Sec. C(iii).
26. AIR 1973 SC 1425, at 1435 : (1973) 1 SCC 856.
27. *Supra*, Ch. XXVI, Sec. C.
28. *Supra*, Ch. XXVII, Secs. B(d) and (f).

that "the majority-decision in *Gopalan* has stood for such a long time that it should not be disturbed unless there are strong and manifest reasons to do so." Brushing aside the argument, the Court observed that "this Court would review its earlier decisions if it is satisfied of its error or of the baneful effect such a decision would have on the general interest of the public", or if it "is inconsistent with the legal philosophy of our Constitution", and that in constitutional matters, "this Court would do so more readily than in other branches of law as perpetuation of an error would be harmful to public interests."

More importantly, the Supreme Court overruled *Gopalan* in *Maneka Gandhi* as regards the interpretation of Art. 21.[29] This proved to be a significant turning point in the development of constitutional law as, thereafter, Art. 21 has assumed a totally new complexion and witnessed a great expansion in its range and scope.[30]

The Supreme Court thus acts as a self-correcting agency. The Court does not rigidly bind itself by the doctrine of *stare decisis* in constitutional matters because it recognises that the task of interpretation of the Constitution is not static but dynamic. The Constitution is an organic document and as the shape of problems continuously goes on changing in a progressive and developing society, the Constitution must keep pace with the newly emerging problems. The Court thus has scope for judicial creativity and can adapt the constitutional law to the changing needs of the society.

In the Constituent Assembly, the view was expressed that in order to ensure elasticity, to enable mistakes to be rectified, and to leave room for growth, the Supreme Court should not be bound by its own decisions and that it should be able to amend its own interpretations of law made by it previously to rectify the errors it might have committed earlier.[31]

The Supreme Court does not, however, lightly reconsider its earlier decisions. The Court feels that it is necessary that the nation's Constitution is not kept in constant uncertainty by judicial review every season because it paralyses, by perennial suspense, all legislative and administrative action on vital issues.[32] The Supreme Court has expressed its views on this question as follows:[33]

> "Enlightened litigative policy in the country must accept as final the pronouncements of this Court by a Constitution Bench unless the subject be of such Fundamental importance to national life or the reasoning is so plainly erroneous in the light of later thought that it is wiser to be ultimately right rather than to be consistently wrong. *Stare decisis* is not a ritual convenience but a rule with limited exceptions. Pronouncements by the Constitution Benches should not be treated so cavalierly as to be revised frequently. We cannot devalue the decisions of this Court to brief ephemerality."

The Court realises that, on the one hand, too frequent overruling by it of its past decisions will introduce uncertainty and confusion in the law. On the other

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29. *Supra*, Ch. XXVI, Sec. C.
30. *Supra*, Ch. XVI, Sec. J.
31. VIII CAD 386.
Also see, *Union of India v. Raghubir Singh*, AIR 1989 SC 1933 : (1989) 2 SCC 754.
32. *Ambika Prasad v. State of Uttar Pradesh*, AIR 1980 SC 1762 : (1980) 3 SCC 719.
But see, SEERVAI, THE POSITION OF JUDICIARY, *supra*, at 69-76, where the author says that the Court has changed its views too often on some questions.
33. *Ganga Sugar Corp. v. State of Uttar Pradesh*, AIR 1980 SC 286, 294 : (1980) 1 SCC 223.

hand, the Court feels that it should not hesitate to correct the error by overruling its decision if it is satisfied that it was clearly erroneous.[34]

Some of the circumstances when the Supreme Court can reconsider and overrule its own previous decision are:

(1) When the contextual values giving birth to the earlier view had altered substantially. The Supreme Court has observed in *Maganlal* :[35]

> "Some new aspects may come to light and it may become essential to cover fresh grounds to meet the new situations or to overcome difficulties which did not manifest themselves or were not taken into account, when the earlier view was propounded."

(2) When there were compelling and substantial reasons to do so.[36]

(3) When an earlier relevant statutory provision had not been brought to the notice of the Court.

The Court has stated the relevant considerations to be borne in mind by it when the Court can change its views expressed in an earlier case in *Keshav Mills*:[37]

> "What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief ?"

The Supreme Court has again considered the question in *S.C. Advocates-on-Record Ass. v. Union of India.*[38] The question before the Court was whether the earlier case *S.P. Gupta v. Union of India*[39] should be overruled on the question of appointment of Judges in the Supreme Court and the High Courts. While the Court realised that frequent overruling of its decisions was not desirable as it would make law uncertain and unpredictable, yet the Court felt that:

> "it is emphatically the province and essential duty of the superior Courts to review or reconsider its earlier decisions, if so warranted under compelling circumstances and even to overrule any questionable decision, either fully or

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34. *Keshav Mill Co. Ltd. v. CIT*, AIR 1965 SC 1636 : (1965) 2 SCR 908; *Maganlal Chhaganlal (P.) Ltd. v. Municipal Corp. of Greater Bombay*, (1974) 2 SCC 402 : AIR 1974 SC 2009; *S. Nagaraj v. State of Karnataka*, (1993) Supp. (4) SCC 595; *Cauvery Water Disputes Tribunal, In re*, (1993) Supp (1) SCC 96 (II); AIR 1992 SC 522; *Union of India v. Raghubir Singh*, (1989) 2 SCC 754 : AIR 1989 SC 1933.
Also see, *supra*, Ch. IV; *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388.

35. *Maganlal Chagganlal (P.) Ltd. v. Municipal Corporation of Greater Bombay*, AIR 1974 SC 2009 at 2042 : (1974) 2 SCC 402.

36. *Keshav Mills Co. v. Commissioner of Income-tax*, AIR 1965 SC 1636 at 1644 : (1965) 2 SCR 908; *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845; see, *infra*, next Chapter : (1965) 1 SCR 933.

37. *Ibid.*

38. AIR 1994 SC 268 : (1993) 4 SCC 441.

39. AIR 1982 SC 149.
Also see, *S. Nagaraj v. State of Karnataka*, (1993) 5 JT (SC) 27 : 1993 Supp (4) SCC 595.

> partly, if it had been erroneously held and that no decision enjoys absolute immunity from judicial review or reconsideration on a fresh outlook of the constitutional or legal interpretation and in the light of the development of innovative ideas, principles and perception along with the passage of time."[40]

The view of the Supreme Court that it has power to reconsider its own previous decisions is in line with the modern judicial thinking in other countries where courts discharge the function of judicial review.

In the U.S.A., a mechanical attitude to *stare decisis* is decried.[41] As Chief Justice HUGHES has warned, one must not expect from the Court "the icy stratosphere of certainty". The reason for this flexibility is that the Supreme Court is primarily a constitutional Court, and amendment of the U.S. Constitution being a very difficult process,[42] the Court reserves to itself the power to correct its own errors. For example, BRANDEIS, J.,[43] has stated : "*Stare decisis* is ordinarily, a wise rule of action. But it is not a universal, inexorable command".

In another case,[44] BRANDEIS, J., has stated :

> "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning recognising that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."

The High Court of Australia reserves to itself the power to reconsider its own decisions. As BARTON, J., has observed in *Inthe Tramways* case:[45]

> "But the Court can always listen to argument as to whether it ought to review a particular decision, and the strongest reason for an overruling is that a decision is manifestly wrong and its continuance is injurious to the public interest."

Even in Britain, the House of Lords, which until recently regarded itself bound by its own previous decisions, has now changed its views in this matter. The House has now come to recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. Accordingly, while treating its former decisions as normally binding, the House would depart from a previous decision when it appears right to do so.[46]

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40. AIR 1994 SC at 303.

41. MCWHINNEY, JUDICIAL REVIEW, *passim*.
Prof. FREUND states that movement in constitutional law is not to be foreclosed or made difficult by an absolute doctrine of *stare decisis* : A Supreme Court in a Federation, 53. *Col. LR* 614. Schwartz states that the American Supreme Court has now gone to the other extreme: AMERICAN CONST. LAW, 160.

42. *Infra*, next Chapter.

43. *State of Washington v. Dawson and Co.,* (1923) 264 US 646.

44. *David Burnet v. Coronado Oil and Gas Co.,* (1931) 285 US 393.

45. (1914) 18 CLR 54.

46. Practice Statement (Judicial Precedent) issued by the House of Lords, (1966) 1 WLR 1234.
Taking advantage of this newly assumed power, the House of Lords in *Conway v. Rimmer*, (1968) 1 All ER 874, modified the law relating to, and restricted the ambit of, Crown Privilege regarding production of documents before the courts as laid down in *Duncan v. Cammel Laird & Co.*, (1942) AC 624.
Also See, DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, 600-6 (1968).

In the practice statement issued on July 26, 1966, LORD GARDINER, L.C., stated:

> "Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

The House of Lords has thus assumed a more creative and active role in the development of law. The High Court of Australia also reserves to itself the right to reconsider its own decisions.

It may be appreciated that the proposition that the Supreme Court is not bound by its previous decisions enables the Court to play a more creative and dynamic role in shaping and moulding constitutional law. This aspect becomes very evident from a study of the post 1978 constitutional cases.[47]

47. See, *Ex p. Pinochet Ugarte (No. 2),* [1999] 1 All ER 577.