PART I

INTRODUCTORY
CHAPTER-I

INTRODUCTION

In the common law system judiciary plays a creative role by formulating, developing, re-modelling\(^1\) and at times breaking down\(^2\) legal concepts from among the ideas and views prevailing in the community and by adapting legal concepts to the changing times. Thus we find the emergence, through judicial process, of different principles, concepts, rules and standards\(^3\) (norms) in various branches of law.\(^4\) Though the self-imposed rule of \textit{stare decisis},\(^5\) which came into existence at a later stage of development of common law,\(^6\) imposed some restraint on judicial creativity, judicial decisions were considered a major source of law.\(^7\) It

\(^1\) "...common law is predominantly judge-made law. Under it the judge is the creator, interpreter, and modifier of laws. Even when he merely ‘interprets’ law, he may well be creating it." Henry J. Abraham, \textit{The Judicial Process} (1962), p. 13. (Emphasis supplied).

\(^2\) P.H. Levy, \textit{Introduction to Legal Reasoning} (1948), p. 9

\(^3\) "Modern juristic analysis shows that law operating through four distinct categories-principles, standards, concepts, and rules" G.W. Paton, \textit{A Textbook of Jurisprudence} (1972), p. 236.

\(^4\) Morris R. Cohen, "The Process of Judicial Legislation" in \textit{Law and the Social Order, Essays in Legal Philosophy} (1967), p. 112. He has rightly posed the question thus, "If judges never make law, how could the body of rules known as the common law ever have arisen or have undergone the changes which it has?"

\(^5\) "Adherence to precedent does not come naturally to every judge. Sometimes it is a discipline that he must impose upon himself." (Emphasis supplied) Patrick Devlin, \textit{Samples of Law Making} (1962), p. 20.

\(^6\) R.M. Jackson, \textit{The Machinery of Justice in England} (1972), pp. 12-13. He observes, "After printed reports became available during the sixteenth century there was more precision in citation; cases are cited by name and the court is expected to follow them. But the judge was not bound to follow earlier decisions: the older view was that ‘that precedent is evidence, the best possible evidence, of rules of law, but not more than that; and that if the law which precedent purports to embody is erroneous, unreasonable, or even intolerably inconvenient, the precedent may be disregarded.’ This attitude lasted until about the middle of the last century when a further hardening took place and our courts adopted a theory of ‘absolutely binding’ precedent." See also C.K. Allen, \textit{Law in the Making} (1964), p. 232.

is evident that there is high scope for play of judicial wisdom in the inductive process, which is the hallmark of common law. In other words, judiciary had played a very significant role in the making of law.

With elapse of time Parliament became the centre of law making. Accordingly, there was a corresponding change in the role of the judiciary. In the changed circumstance, judicial power was identified more with interpretation of statutes enacted by Parliament than with creation of legal concepts by heuristic judicial innovation. Judiciary had to function within the parameters of the words used in the statutes enacted by legislature, and the innovative role of the judiciary became considerably reduced.

Nevertheless, the scope for judicial creativity could not be totally abrogated by the ushering in of statutes For, it was not possible for statutes to meet all the demands of the legal system Even after the emergence of Parliament as the principal law-maker, there were areas in which no enacted law was there. In such instances, judiciary continued to create law. Thus, even in an age of statutes new legal rights and liabilities began to emerge solely due to the handiwork of judges.

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2 R.M.Jackson, *op.cit.* at p.14. "Statutes were construed to be in conformity with the common law whenever possible. The older statutes had been so construed, and had become surrounded with such a mass of case-law that lawyers usually thought of the case-law and not of the statute." See also, Abraham, *op.cit.* at p. 20.
3 "In the interpretation of statutes the judge is still more closely tied to his material." Patrick Devlin, *op.cit.* at p. 3.
Though statutes have got certain clear advantages in laying down the law, they may be replete with certain inherent defects. Legislature may not be able to pin point all the aspects and ramifications of a statute. And at times, words used in the statutes may be unclear in meaning either due to advancement of time or due to improper drafting. In such contexts, it becomes the bounden duty of the judiciary to interpret the words and expressions in statutes in such a manner as to infuse sense into them. For such meaningful interpretation, statutes will be treated by judges as manifestation of certain ideals, attitudes, standards or evaluations. Judges, in such cases, will be moved by certain operative conceptions, which direct towards a goal rather than by the words in the statutes.

Such lacunae in statutory law provided room for continuance of the active role of judiciary in diverse ways. Emergence of the rules of statutory interpretation itself is an instance of judicial creativity. Over and above that, while interpreting statutes, courts used to construe words, usages and expressions in them in the light of the common law concepts. The spirit and application of common law was thus retained by judiciary while interpreting statutes. Such

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13 Id. at p. 137.
14 "Then there are the older statutes which create new criminal or quasi criminal offences: but the judges make them submit to inquiries suggested by the common law, do they or do they not, for example, exclude the principle actus non reus nisi mens sit rea?" Devlin, op.cit. at p.3. See also R.M.Jackson, op.cit. at p.14. "Statutes were construed to be in conformity with the common law whenever possible. The older statutes had been so construed, and had become surrounded with such a mass of case-law that lawyers usually thought of the case-law and not of the statute." See also, Abraham, op.cit. at p. 20.
15 Abraham, op.cit. at p. 20.
attempts to construe statutes in accordance with common law concepts reveal the scope for judicial creativity in statutory construction. In short, in interpreting statutes also judges stole opportunities for exhibiting some amount of creativity.

Interpretation of Written Constitutions

It is in this background that interpretation of written constitutions becomes significant. Constitution is all the more a statute, whatever be its differences from other statutes. Just like any other law, constitution also is enacted. Constitution is considered as the basic law of the land. It contains the general norms of the legal system and it lays down the principles upon which the government is erected. It is the very framework of the body polity.

However, a constitution has significant differences from ordinary statutes. It is the basic law from which other statutes in a legal system derive their validity. Apart from being a legal document, a constitution is a political and social document as well. Unlike the ordinary statutes, constitutions come to stay for longer periods and the process of their amendment is cumbrous. Hence as in the case of any other statute, while interpreting a constitution, though the judiciary has

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16 The holding of Sir Edward Coke in the Bonhams Case, 8 Co. Rep. 113: LXXVII Eng. Rep. 638 is the best example of such a trend. He observed in that case that Acts of Parliament are controlled by common law and that Acts contrary to common law are void. (at p. 652) For this observation, see, infra, chapter VI, n. 84 and the accompanying text.
19 Salmond, op cit. at p. 84 He observes that a constitution has both de jure and de facto existence. It is pertinent to note that the Constitution of India has been characterized as a social document. See, Granville Austin, The Constitution of India-The Cornerstone of
to identify the legislative intent of its makers, the interpretation has to be made in such a manner as to avoid 'ruling by the dead hands.' The significance of constitutional interpretation is that it should enable the constitution to be a live document and to have its existence for long without being amended. All these imply that emergence of the era of written constitutions added a new perspective to statutory interpretation and to the very role of the judiciary in it. In other words, constitutional interpretation arranged the stage for a more creative and imaginative role for judges in statutory interpretation. Such creativity in constitutional interpretation has many dimensions. It may pertain to adoption of certain rules particular to the constitutional interpretation or in selecting the method of construing the words in the basic document. Courts are reluctant to construe provisions in constitutions in a narrow and pedantic manner. Words in the constitutions are given liberal content by courts enabling them to contain the changes of time without formal amendments. Spirit and nature of the Constitution are considered as important in its interpretation. As mentioned above, as the Constitution comes to stay for longer periods, it would be necessary that words and expressions in it are given a meaning in accordance with the advancement of time. Otherwise, the basic document will have to face frequent amendments.

*Nation.* (1966), p. 50. He says, "The Constitution of India is first and foremost a social document."

20 *Alf Ross, op.cit.* at p.144.
21 *Bindra, op.cit.* at p. 857.
23 Interpretations of the expressions like 'due process of law', in the Constitution of the United States and of equality and life in the Indian and U.S. Constitutions are some examples.
Judicial creativity in interpreting constitution has yet another dimension. There are occasions in which the court will have to interpret various provisions dealing with a common theme, where mere interpretation of the words and phrases used in those provisions may not be adequate for satisfying the object for which they are enacted. In such cases, the judiciary will have to identify, formulate and select certain concepts, norms or values relevant to all of those provisions and introduce them into the Constitution. All those provisions will then be interpreted with a view to upholding the concept or norm so judicially introduced. In other words, the criteria for construction as well as the content of provisions will be the outcome of judicial labour. In some instances, such creativity to figure out the expressions in constitutions has been influenced by the common law concepts like public policy or natural law. Introduction of such concepts or norms was justified on the ground that interpretation of the Constitution without them would defeat the very purpose of enacting the Constitution. They are instances in which judiciary can be considered as at the zenith of its creativity in constitutional interpretation. An early instance of such innovation in constitutional interpretation in the United States is seen in the famous case of *Marbury v. Madison*.

The multi-dimensional creativity in constitutional interpretation by the judiciary is discernible in India also. Though in the initial stages the Indian
Supreme Court had been traditional and strict, one finds a progressive outlook on the part of the Court in diverse lines subsequently. The decision in the *Bengal Immunity Company v. State of Bihar*, that the Supreme Court was not bound by its own earlier decisions could be considered as prognostic of the future judicial attitude. The Court accepted that the rules for interpretation of the Constitution were different from those of the ordinary statutes. By the latter half of the seventies, the Indian judiciary became very progressive in construing various constitutional provisions. One of the significant innovations of the judiciary is found in the interpretation of the fundamental rights enshrined in our Constitution.

While interpreting constitutional provisions dealing with fundamental rights, the Court was influenced by various schools of law like imperative theory, natural law theory and sociological jurisprudence. Through progressive interpretation, the contents of the concepts of equality, life, personal liberty, reasonableness, minority rights, inter-relationship between various constitutional provisions, and so on, were interpreted progressively. This led to a more just and equitable interpretation of the Constitution.
fundamental rights\textsuperscript{36} and the scope of the right to approach the judiciary against the violation of fundamental rights\textsuperscript{37} have been substantially widened\textsuperscript{38}

Over and above these, there have been instances in which the Indian judiciary evolved and introduced into the Constitution certain values and norms not specifically mentioned anywhere in the Constitution and applied them for the purpose of interpreting its provisions. Though the Constitution contains elaborate provisions on different aspects, there are certain silent postulates upon which it rests. Many provisions in the Constitution are incorporated on the basis of certain presumptions. For instance, unlike the Constitution of the United States,\textsuperscript{39} the Constitution of India does not explicitly provide that legislative, executive and judicial powers are vested with Parliament, Executive and the Judiciary respectively. Nor does it provide whether the conventions of parliamentary form of government are applicable in India. These indicate that for properly interpreting certain provisions judiciary will have to imply some postulates in the Constitution and construe the words in accordance with them. It means that the Constitution of India leaves scope for creation and introduction of norms by the judiciary. Has the judiciary appropriately selected the values, concepts and norms for interpretation of the Constitution? Can the Indian judiciary be said to be successful in construing the provisions in accordance with such judicially created concepts or norms?

\textsuperscript{36} Maneka Gandhi v. Union of India, A. I. R 1978 S.C. 597.
\textsuperscript{38} The scope of judicial innovations in constitutional interpretation is so wide that Justice Hughes, Chief Justice of the U.S Supreme Court once observed, "We are under a Constitution, but the constitution is what the judges say it is." For the observation see Edward S. Corwin, The Constitution and What It Means Today (1958), p. xv
\textsuperscript{39} Article, I section 1, Article II section I, para 1 and Article III section I para 1.
For answering these questions, an examination of the instances in which such judicial creativity is visible becomes necessary. Three such areas are selected for the present study, viz., (i) interpretation of the provisions dealing with the judiciary, (ii) judicial review of constitutional amendments and (iii) reading in of directive principles into the fundamental rights for explaining them.

The Constitution contains elaborate provisions dealing with judiciary. There are provisions establishing various courts regulating appointment and conditions of service of judges. Is there any principle the Court has to keep in mind while construing those provisions? While interpreting those provisions, the Court could not ignore the concept of independence of the judiciary. How far has the Court kept in mind the concept of independence of judiciary while construing the provisions? What is the scope of the concept of independence of the judiciary so developed by the judiciary? Could the Court figure out and maintain a meaningful concept by the interpretation of those provisions? These are some of the questions that arise in relation to the judicial creativity in the constitutional interpretation in this area.

Interpretation of the provision dealing with amendment of the Constitution is another aspect in which the Court was forced to look out for a norm outside the Constitution for construing scope of the constituent power. By introducing into the

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[40] For the concept of independence of the judiciary as developed by the Court, see infra, chapter, II.

[41] The concept of independence of judiciary is very wide. It includes many things like regulation of appointment, service conditions, removal, freedom of a judge from his colleagues and higher judiciary, appointment as members of various commissions and
Constitution, a norm judicially developed namely, the basic structure, the Court sought to construe the scope of the amending power. How far was the Court successful and justified in selecting and developing the norm and construing the provisions relating to amendment in the light of such judicial norms is an aspect which needs examination in relation to the judicial creativity in construing the scope of the constituent power.

Interpretation of fundamental rights has ever been a moot issue in India. An examination of judicial response right from 1950s will show that the Supreme Court was experimenting with different kinds of interpretation of those rights. During the early stages, the Court was inclined to construe them in a pedantic style. Of late, the Court realized that a strict legal interpretation of fundamental rights might not satisfy the purpose for which they are enacted. On the other hand, for a proper enjoyment, they should be given content in the light of principles of social justice. Examination of the recent interpretations of the right to equality and right to life in Part III reveals the attempt of the Court to make them socially relevant. In this venture, the Court began to read similar concepts contained in directive principles into those fundamental rights. The extent of creativity involved in interpreting the fundamental rights with a view to achieve social justice is undoubtedly a question that requires scrutiny.

These areas are related to the civil liberties, the kingpin of modern democracy. Independence of judiciary is a *sine qua non* for the protection of civil executive posts after retirement and so on. However, aspects, which do not directly affect any of the provisions of the Constitution do not fall within the purview of the study.
liberties. Unbridled constituent power is likely to restrict the scope of those rights. And to make enjoyment of fundamental rights a reality, it is highly necessary that they should be explained in the light of social justice. What has been the extent of judicial creativity of the Apex Court in the above areas? This thesis makes an excursus into the response of the Apex Court in the above three areas of constitutional interpretation by the Apex Court.