CHAPTER III

FUNDAMENTAL RIGHTS AND JUDICIAL REVIEW

Introduction

The Constitution of India has, at no place, used the term 'Secular State'. It has, however, incorporated all basic implications of the secular state through its charter on Fundamental Rights in Chapter III of the Constitution. The purpose of study in this chapter is to show how the judiciary has played its part in interpreting this freedom of religion as incorporated in the fundamental rights. Therefore, in the first part of this chapter will be studied the general nature of fundamental rights, their justiciability; the second part deals with the process of judicial review, its growth in general and its growth and position in India in particular; the third part deals with the approaches adopted by the judiciary in interpreting constitutional law.

Fundamental Rights

Every state is known by the rights that it maintains.1 Its character can be judged by the contribution that it makes to the substance of human happiness; and the degree of this contribution depends, to a large measure, on the grant of rights. Fundamental rights, in fact, are "those

1 Harold Laski, Grammar of Politics. (George Allen & Unwin, 1950), p. 89.
conditions of social life without which no man can seek, in general, to be himself at his best.  A fundamental right is a legally enforceable right governing the relation between the state and the individual. It has both a negative and a positive aspect. It must, as the words indicate, be fundamental. It does not mean merely a right of liberty permissible under the law, it also means a right of liberty in a positive sense which enables an individual to develop his personality and his faculties and to live his life in his own interest and in the interest of the community as a whole.

The subject of fundamental rights is one with a long history going back to the Magna Charta and perhaps earlier. England does not have a written constitution but the struggle of the British people to safeguard their basic freedoms from royal despotism is symbolised by the three great charters; the Magna Charta, the Petition of Rights, and the Bill of Rights which form part of the constitutional core. In its origin, the Magna Charta was in the form of stipulation between the king of England and his subjects, 'abridgement of prerogative in favour of privilege'.

2 Ibid., p. 91.
Lawyers, historians and politicians of every period of (British) history have interpreted it from the standpoint of every period of that history and its greatness lies not so much in what it was to its framers in 1215, as what it afterwards became to the political leaders, to the judges and the lawyers and to the entire mass of the people of England in later ages.

The Petition of Rights of 1628 conferred some rights such as protection from illegal arrests, abolishing of the billeting of soldiers and sailors, and it also provided that 'no man be compelled to pay any tax without common consent by act of Parliament'. The Bill of Rights of 1689, which summarised the results of the Bloodless Revolution of 1688 was the most significant constitutional document to check further incursions by royalty on the freedom of the people. The Bill was based on the basic principles of kingship based on consent, sovereignty of Parliament, the supremacy of law, and the right to personal liberty. It provided for parliamentary sanctions for imposts, liberty of speech and debate, free and frequent elections, etc.

It may be pointed out that besides these declarations, in England, there is nothing like a code of fundamental

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6 P. B. Gajendragadkar, supra n. 3, pp. 32-33.
7 Ibid.
9 Ibid., p. 40.
rights kept beyond the reach of legislative processes of parliament, which the citizen can invoke for protecting his basic rights. In England, the liberties of the individual rest on the principle that a person may do or say anything so long as what he does or says does not violate any rule of law, whether derived from a statute or recognized as forming a part of the common law.  

The result of the principle of parliamentary sovereignty in England has been that no court can question the legality of the act passed by Parliament, and the possibility of Parliament enacting an arbitrary law authorising the executive to deprive a person of his liberty cannot be ruled out altogether.

The success of the British system can mainly be attributed to the highly disciplined, fairminded legislative majority and ever-vigilant citizenry. Lord Wright observes:

"But in the Constitution of this country, there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved." 

When, in the 17th and 18th centuries, the British adventurers acquired new colonies in various theatres of

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the world, they carried with them their ideas and institutions. The Magna Charta, naturally, 'crossed oceans', and had its impact on the new political civilizations and though 'the British constitutional lawyer has never tried to express and does not think of expressing the fundamental ideas which are implicit in his constitution', the different circumstances of the new colonies required concrete assurances by defining the rights and liberties of the people.

The Constitution of the U.S.A., as originally adopted in 1789, did not contain any written declaration of fundamental rights. The chief architects who framed the constitution of the U.S.A. at the Philadelphia Convention in 1787 were, however, very badly divided on the issue of incorporating fundamental rights in the form of written charter of guarantees. Alexander Hamilton who represented the State of New York strongly opposed incorporation of rights in the constitution, maintaining that the Bills of Rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed constitution, but would

even be dangerous. Thomas Jefferson, on the other hand, made a very strong plea for a Bill of Rights, which according to him was "what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inferences."\(^{16}\) He observed:

"There is a remarkable difference between the characters of the inconveniences which attend a declaration of rights, and those which attend the want of it. The inconveniences of the declaration are, that it may cramp government in its useful exertions, but the evil of this is short-lived, moderate and reparable. The inconveniences of the want of a declaration are permanent, afflictive and irreparable... ... The tyranny of the legislatures is the most formidable dread at present, and will be for many years."\(^{17}\)

This view ultimately prevailed and, though fundamental rights were not included in the draft, which was adopted in March 1789, they were, nevertheless, accepted in the form of first ten amendments which were ultimately ratified by the states in December 1791. James Madison, who played a

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prominent part in the framing of the amendments, pointed out the distinction between the American and the British ways of securing 'the great and essential rights of the people' and observed "Here, they are secured not by law paramount to prerogative but by Constitutions paramount to laws."

Justice Story, in his commentaries has referred to various arguments regarding the incorporation of fundamental rights in a written form in the Constitution. He states that a Bill of Rights is 'neither unnecessary nor dangerous' in a constitution. According to him the question is not whether any bill of rights is necessary, but what such a bill should properly contain and it may be a matter of controversy. A bill of rights operates as a guard upon any extravagant or undue extension of power. ... It serves to guide and enlighten public opinion, and to render it more quick to detect, and more resolute to resist attempts to disturb private rights. ... Bills of rights are a part of the muniments of freemen, showing their title to protection, and they become of increased value when placed under the protection of an independent judiciary instituted as the appropriate guardian of the public and private rights of citizens. It is also urged by him that a bill of rights

Is an important protection against unjust and oppressive conduct on the part of the people themselves. Justice Story was so strongly in favor of the written Bill of rights in the constitution that he considered it a fatal defect of the framers of the constitution of the U.S.A. not to include these rights in the original constitution.

The judgment of the Supreme Court of U.S.A. in West Virginia State Board of Education v. Barnett points out:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's rights to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

It was by 1789 that the French Assembly approved the Declaration of Rights incorporating the basic liberties for which the revolutionaries had struggled. This declaration did not purport to create any right which could be

19 Commentaries on the Constitution of the United States, 5th Edn., Sections 1863-66. For further analysis see D.N. Senarjee, supra n. 16, p. 33.
20 Ibid., Section 301.
21 319 U.S. 624 (1943).
enforced by law, it merely laid down general principles which should be applicable to the whole human race and should serve as a bulwark against the danger of restoration of absolute government and the rights of the privileged classes. It was natural that when Europe was constitutionaialised in the nineteenth century, the people of Europe were guided by these two models, the American and the French declarations. The new constitutions which were drafted by European states included safeguards against the wrongs and the hazards suffered by them and in selecting the fundamental rights they were guided by the nature of disabilities from which they suffered at the hands of their rulers.

The second half of the twentieth century witnessed the process of constitutionalisation of Asian and African nations which gradually became free from European colonialism. India, which perhaps had the longest history of nationalist struggle against colonial power had to set the example by incorporating a set of human rights in the constitution.

The early declarations had primarily concentrated on the protection of individual liberty while the post-war period articulated the principles of economic and social justice and increasing limitations were required to be placed on

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22 P. B. Gajendragadkar, supra n. 3, p. 35.
23 M.V. Pylee, Constitutional Government in India, p.194.
the liberty of the individual in the general interest of the community. The new constitutions framed after the two World Wars were formulated at a time when social questions could not be ignored and the social sense of law was no longer a theory but life itself. Hence, two simultaneous processes have taken place. On the one hand, protection of the social person had gradually begun to feature among fundamental rights. On the other hand, in the name of solidarity and public order, fresh limitations have been imposed on these rights.25

The nationalists, throughout the history of the nationalist freedom struggle in India, were in favour of granting fundamental rights. The Swaraj Bill of 1895, inspired by Lokmanya Tilak visualised a constitution guaranteeing to every citizen rights so basic as 'freedom of expression, inviolability of one's house, right to property and equality before the law'.26 The Commonwealth of India Bill, prepared by Mrs. Annie Besant, enumerated fundamental rights which were almost identical in scope and nature with those adopted by the Irish Free State in its constitution of 1921. The Indian National Congress in its resolution passed in the Madras session declared that 'the basis of the future constitution of India must be a declaration of fundamental rights.'27

25 D. K. Sen, supra n. 12, p. 126.
27 Ibid.
The first most authoritative statement regarding fundamental rights is found in observations of the Motilal Nehru Committee called by the Madras Congress resolution. It stated: "It is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances. 

... Another reason why great importance is attached to a Declaration of Rights is the unfortunate existence of communal differences in the country. Certain safeguards are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. We would not better secure the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the constitution." 26

The deliberations of the Round Table Conferences were incorporated in the Government of India Act, 1935. The Indian delegation made a strong plea for embodying fundamental rights in the constitution of India. Referring to this demand of the Indian delegation, the Joint Parliamentary Committee observed that 'abstract declarations are useless unless there exist the will and means to make them effective' and further stated that 'a cynic might find plausible arguments, in the history during the last ten

years of more than one country, for asserting that the most effective method of ensuring the destruction of a fundamental right is to include a declaration of existence in a constitutional instrument. The demand of the Indian delegation for fundamental rights, was thus rejected by the imperial power.

In 1945, the Sapru Committee reiterated the demand for fundamental rights. It argued that 'in the peculiar circumstances of India, fundamental rights are necessary, not only as assurances and guarantees to the minorities but also for prescribing a standard of conduct for the legislatures, the governments and the Courts'. The Cabinet Mission of 1946 recommended the creation of an Advisory Board to formulate, among other things, the rights of the people. Accordingly, an Advisory Committee was constituted. This Committee appointed a sub-committee under the chairmanship of Acharya J. B. Kripalani to report on fundamental rights. On the basis of the report of this committee, the Advisory Committee prepared an interim report on fundamental rights, which was submitted to the Constituent Assembly on the 23rd April, 1947.

30 Committee of Non-party intellectuals.
31 N. A. Palkhivale, supra n. 26, p. 5.
The proceedings of the Advisory Committee\(^{33}\) show that the members of the committee were sharply divided on various issues such as the distinction between justiciable rights and the non-justiciable rights, the nature of rights and their enforcement as well as the limitations on these rights. The Interim Report embodied a compromise between the different viewpoints. It gave to the masses of the country 'more democratic, more liberal, more comprehensive and more fundamental rights than are being enjoyed in any other country'.\(^{34}\)

The provisions concerning fundamental rights as they emerged in the constitution of India underwent different stages and at each stage various issues involved were thoroughly discussed. The framers of the Constitution were influenced by similar provisions of other constitutions but they did not borrow these rights blindly but made a cautious and intelligent selection. Though they were, by and large, agreed on the point of a written charter of liberties, they did take into account the peculiar conditions of the country, political, social as well as economic. Politically, the nation was an infant republic with people without mature experience of self-government, socially the nation was heterogenous, a multi-religious, multi-linguistic and


multi-racial community, and economically highly underdeveloped. The claims of individual liberty and social justice could, in such a society, be reconciled only by a wise selection of rights. This delicate task was performed by incorporating an elaborate and complex declaration of justiciable rights in chapter III entitled as 'Fundamental Rights' and by including non-justiciable fundamentals in chapter IV entitled as 'Directive Principles of State Policy'. The former includes 24 Articles guaranteeing right to equality, freedom, right against exploitation, freedom of religion, cultural and educational rights, right to property and right to constitutional remedies, while the latter refers to economic and social rights to education, work and employment, protection against social injustice etc. The rights included in the third chapter are justiciable in the sense that any citizen can approach the highest court of law in the country for getting his rights enforced. While the rights in the fourth chapter are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. But they are, nevertheless, expressly non-justiciable in view of the fact that they are not enforceable by the courts of law including the Supreme Court of India. The Constitution does not provide for judicial

35 Article 37.
remedy in the event of failure of the state to implement these fundamental principles in practice.

The content of liberty is 'Fundamental Rights' and liberty means 'the eager maintenance of that atmosphere in which men have the opportunity to be their best selves. Liberty is a positive thing, it does not merely mean absence of restraints. Regulation, obviously enough, is the consequence of gregariousness.36 Therefore, the rights embodied in the chapter on Fundamental Rights are not couched in absolute terms. The Constitution itself enumerates in each case the exceptions, limitations and qualifications37 under which these rights are to be exercised by the citizens.

Article 12 of the Constitution defines the term 'State' so as to include, unless the context otherwise requires, 'the Government and Parliament of India and the government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.' This is a sufficiently wide definition and was justified by Dr. Ambedkar stating that the fundamental rights 'must be binding upon every authority ... which has got either the power to make laws or the power to have discretion vested

36 Harold Laski, supra n. 1, pp. 142-43.
37 M. V. Pylee, supra n. 23, p. 197.
in it. ... Every authority which has been created by law and which has got certain power to make laws, to make rules or make by-laws. The implication of this Article is that the Constitution places limitations on every authority which is likely to restrict the fundamental rights.

Article 13 collectively nullifies all the laws which were in force in the territory of India immediately before the commencement of the Constitution and which were inconsistent with these fundamental rights. It also prevents the state from making any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void. These two articles i.e. 12 and 13 are general in character. They define the scope of the application of fundamental rights and confer on the Courts, the power of judicial review to the extent to which they have to find out the inconsistency of a law with the provisions of fundamental rights. This aspect will be analysed in detail later in this chapter.

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38 Cass D. VII, p. 610.
39 Clause 1 of Article 13.
40 Clause 2 of Article 13. The term void means 'null and void, ineffectual, nugatory, having no legal force or binding effect, unable in law to support the purpose for which it was intended, nugatory and ineffectual so that nothing can cure it; not valid' (in Keshavan Madhava Menon v. The State of Bombay). S.C.R. 1951 Vol. II, Part III, p. 241.
In concluding this preliminary discussion on fundamental rights it may be pointed out that the declaration of rights has assumed tremendous significance in the scheme of constitutional government in India. On both psychological and political grounds the demand for written rights—since rights would provide tangible safeguards against oppression—proved overwhelming. The core of the commitment to the social revolution lies in Part III and IV, in the fundamental rights and in the directive principles of state policy. These are the conscience of the Constitution. India has been a land of communities, of minorities, racial, religious, linguistic, social and caste. The minorities, therefore, naturally regard fundamental rights as the bedrock of their political existence and the majority considers them as a guarantee for their way of life. The problem of fundamental rights is not one of mere dialectics. The Constitution has given by its scheme a place of permanence to the fundamental freedoms. In giving themselves the Constitution, the people have reserved the fundamental freedoms to themselves. Pandit Jawaharlal Nehru, on 30th April, 1947, while proposing the adoption of the

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42 Ibid. Italics mine.
43 Ibid., pp. 498-99.
interim report on Fundamental Rights thus said:

"A Fundamental Right should be looked upon, not from the point of view of any particular difficulty of the moment, but as something that you want to make permanent in the Constitution."  

The Supreme Court, in many cases decided by it, has described fundamental rights as 'Paramount', 'Sacro-sanct', 'Transcendental', 'Inalienable and inviolable', rights reserved by the people. 

Judicial Review

Alexander Hamilton, one of the founders of the constitution of the U.S.A., while describing the role of the judiciary in relation to the constitution, observed:

"The interpretation of laws is the proper and peculiar province of the courts. A constitution is in fact and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as

the meaning of any particular act proceeding from the legislative body."50 This is the genesis of the system of judicial review as it operates in the U.S.A.

The constitution of a country is the supreme fundamental law of that country in the sense that it is an instrument to govern the government. The statute law, on the other hand, is supplementary because it organises institutions which regulate the exercise of public powers through organs which the constitution has established. The constitutional law is logically, morally and legally superior to the statute law because the former is the government of all, its powers are delegated by all, it represents all and acts for all.51 The statutory law must, therefore, be in conformity with the constitutional law. The function of the judiciary is to interpret both the constitutional and statutory law and to declare the latter as null and void if it conflicts with the former. The judiciary in this capacity assumes the role of the protector of the constitution.

In the states having written constitutions, where in consequence of the bill of rights, a large domain of individual liberty is expressly maintained and which the people intend to protect from governmental intrusion, the


51 K. C. Wheare, Modern Constitutions (Oxford University Press, Edn. 1951), p. 79.
judicial protection assumes even greater significance. If the judiciary possesses the power to enforce constitutional limitations against the legislature, it becomes the safeguard of the constitution, and where it does not possess such powers, the distinction between constitutional law and statutory law breaks down. In such cases the supremacy of the constitution has no meaning, because, the legislature becomes the judge of its powers and the enjoyment of fundamental rights, constitutionally conferred, becomes uncertain and precarious.

In England, the supremacy of Parliament is the keystone of the constitutional structure and, therefore, no court has ever claimed the right to declare an act of Parliament null and void. The English Parliament, if it intends, can pass laws making serious encroachments upon liberties of the individual and yet no judicial redress is provided against such arbitrary and unjust laws. In matters of basic liberties, the English Parliament has, so far, acted with a commendable sense of fairness and self-restraint and the English people, with their characteristic self-discipline, vigilance and love of liberty have paid the price for the preservation of basic liberties. There remains, nevertheless, the basic fact that there is no constitutional provision for adequate judicial protection of these liberties as has been done in the U.S.A.

The system of judicial review originated first in
the State Courts prior to the establishment of the United States in 1789. The doctrine, however, was perfected by the Supreme Court of the U.S.A. especially since its famous judgment in Marbury v. Madison. In this case, Justice Marshall declared the Act of Congress as unconstitutional, arguing that the constitution is the fundamental law and guiding force of the nation, and the legislature being a creation of the constitution, no law enacted by it could be superior to the constitution itself. If any such law is against the spirit of the constitution, it should be considered illegal and, therefore, null and void. Since this judgment, the Supreme Court of the U.S.A. has declared a host of congressional statutes as unconstitutional and, thus, through its power of judicial review has prevented hasty and radical legislation, has acted as an effective safeguard against the arbitrary exercise of power, and has championed the cause of liberty.

52 (1803) 5 U.S. - 137.

53 According to Justice Marshall, the Courts do not simply declare void instances of direct violations of the constitution but they become the guardians of the manifest tenor of the constitution the spokesmen for the intention of the people while the President and the Congress are reduced to the position of being always political enemies of the constitution and of the reserved rights of the people and are, therefore, to be protected by the judges. The judicial review conserves the Constitution and the judicial version of it is the authentic constitution.

54 For exhaustive and lucid exposition of the doctrine of judicial review, see M. V. Pyle's article on "Judicial Review," S.C.J., 1953, p. 67.
The system of judicial review has been the life-breath of the American Constitution. The original document of the Constitution is one of the smallest ones, but, today's Constitution is largely the opinion of the Supreme Court, the final arbiter, a group of men without power to enforce any decisions, a group whose power is only to pronounce a judgment. The original Constitution cannot be separated from the judgment of the Supreme Court which has defined, codified, and extended the meaning of the Constitution to solve the problems created by an ever-expanding and increasingly complex society of free men.55 Willis rightly points out:

"... United States' Constitution is the result of the judicial carpentry of the few quiet men who throughout the course of American history have sat upon the Supreme Bench. They are the ones who made the supernal postulates and the immortal discoveries found in the United States' constitutional law. The Constitution is their unique handiwork."56

The technique of judicial review, however, has been subjected to scorching criticism both in the U.S.A. and elsewhere. It is argued that judicial power of questioning the wisdom of legislature is likely to create the 'rule of robes' and would empower the undemocratic, non-representative

55 Jethpo K. Lieberman, supra n. 15, preface.
56 Constitutional Law, p. 100, quoted by M. V. Fylle, supra n. 54, p. 73. Italics mine.
judiciary to question the authority of the more numerous, representative democratic Parliament or Congress. The power of the Court to veto and nullify the legislation enacted by the popularly elected legislature makes it a 'super-legislature' or non-elective third chamber. 57

The Constituent Assembly which drafted the Constitution of India debated this issue when it discussed Article 15 of the Draft Constitution which corresponds to Article 21 of our present Constitution. While the former provision incorporated the 'due process' clause, the latter dropped a reference to it as a result of this debate. In the Assembly, those who wanted the judiciary to 'save us from the tyranny of the legislature and the executive and who wanted the judiciary to be exalted to its right position of palladium of justice and the people to be secure in their rights and liberties under its protective wings', 59 preferred the due process clause to the present expression. While those who defended the present phrase referred to the variability of judicial decision in the United States and maintained that 'the U.S. Supreme Court has not adopted a consistent view at all and the decisions are conflicting ...
one decision is very often reversed by another decision.¹⁶⁰

Justice Mukherjea, in A. K. Gopalan v. State of Madras asserts:

"The framers of the Indian Constitution did not desire to introduce into our system the elements of uncertainty, vagueness and changeability that have grown round the due process doctrine in America. ... The uncertainty and elasticity are in the doctrine itself which is a sort of hidden mine, the contents of which nobody knows, and is merely revealed from time to time to the judicial conscience of the judges."¹⁶¹

Judicial review is characterised by variability and uncertainty of decisions and this is likely to create disrespect for the law. Even good citizens with a fairly clear conscience may develop in themselves the tendency of evading obedience²⁶² to law unless the Supreme Court has certified the authenticity of that law through its judgment. What if a statute once considered as authentic is rendered unconstitutional by its successor?

One of the most weighty reasons that presents adequate resource for the adverse criticism is the dissenting

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¹⁶⁰ Ibid., pp. 833-34.
²⁶² M. V. Pylee, supra n. 54, p. 74.
opinions of the Supreme Court itself. What is considered as compatible by one judge is thought as incompatible by another judge on the same bench of the Supreme Court. Sometimes, the judgment is sharply divided and the majority judgment, with a simple marginal majority of one judge, becomes the verdict of the Supreme Court as a whole. Thus, the infallibility claim of the Court regarding its constitutional decisions becomes a myth that is assailed from too many quarters.

'The effect of confusion is produced not only by dissenting opinions but concurring ones too. Several judges arrive at the same place through different routes. The inconsistency and enormity of reasons adduced in support of each judgment are baffling and perplexing to the common man, and intelligent, educated and dispassionate people are sometimes forced to attribute motives to the decisions of the Court.'

Perhaps the most important argument against judicial review is that the judiciary, owing to the conservative and narrow nature of legal training, is not aware of the dynamics of social and political change. It is contended that the judges are concerned more with the protection of propertied interests rather than progressive and radical changes. Their decisions depend upon their own temperament,

63 Ibid., p. 75.
attitudes and views. They have their own strong, political and economic and social predilections and they are swayed, consciously or unconsciously by their social philosophies and general outlook. This is amply proved by the Court controversy of 1937 in the U.S.A., when the New Deal legislation of President Roosevelt was thwarted by judges with laissez faire inclinations. It was in this connection that President Roosevelt charged that the Supreme Court was living in 'horse and buggy days', and wanted to rejuvenate and liberalise the Bench by adding younger judges with progressive views. This battle of the most popular President with the Supreme Court in the thirties of this century on the New Deal policy was one of the hardest fought ones in American constitutional history. In this tussle, however, the President was defeated and the Supreme Court scored a remarkable victory.

The argument that the judiciary always reflects a conservative temper and is averse to the dynamics of socio-political change, does not hold ground. As the judiciary is also an important organ of government, it cannot remain independent of political influence. Even the judges are influenced by changing public opinion and by new social standards; they modify their interpretation of laws accordingly. This is amply proved by the attitude adopted by the Supreme Court of the U.S.A. after the New Deal controversy was over. Between 1935 and 1950, the Courts modernised significantly their methods of constitutional interpretation. Instead of traditional, legalistic, mechanistic methods of
deducing decisions from the facts in the case with little consideration of social and economic factors, they adopted a more pragmatic approach based on perception and understanding of social and economic conditions and thus their judgments reflected freshness and flexibility of attitude.

As pointed out by A. T. Thomas: "in 1935-36, a narrow, headstrong majority, flouting persistent pleas for judicial self-restraint, voiced by highly esteemed minority, blocked regulation of the economy; in the hands of an obtuse majority, the constitution became a strait-jacket, not a vehicle of life. ... The Warren Court on the other hand, in expanding the limits of freedom, in buttressing the foundations of society, in keeping open constitutional alternatives to violent change, brings us closer to the ideals we have long professed."64

It must be noted that every constitution is a product of the times and the changing times must be reflected in the constitution. 'The content of constitutional immunities is not constant but varies from age to age. ... A constitution states or ought to state not rules for the passing hour, but principles of an expanding future'. In this connection the judiciary naturally assumes an important role as an interpreter of the constitution. The protagonists of judicial review argue that not only is the

judiciary likely to be progressive in its interpretation, but that it is more likely to exercise this power with caution and restraint. This attitude of the judiciary will be more in the interests of democracy than the rashness of popular legislature can ever be. The basic problem in democracy is not simply the recognition of the supremacy or superiority of legislature or of judiciary but the protection of reasonable freedom which is the very essence of democratic society.

The debate on judicial review and its significance is an endless debate. The question whether a popularly elected legislature should be sovereign or a nominated judiciary be supreme can never be answered to the satisfaction of all. This dilemmatic position was very aptly described by the chairman of the Drafting Committee, Dr. B. R. Ambedkar when he said:

"It is very difficult to come to any definite conclusion. There are dangers on both sides. For myself, I cannot altogether omit the possibility of a legislature packed by party-men making laws which may abrogate or violate what we regard as certain fundamental rights, principles affecting the life and liberty of the individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the legislature and by dint of their own individual conscience or their bias or their prejudices be trusted to
determine which law is good and which law is bad. It is rather a case where a man has to sail between Charybdis and Scylla and therefore I would not say anything; I would leave it to House to decide in any way it likes.  

In spite of criticism from high offices, the system of judicial review in America has been able to get firmly rooted in the constitutional structure of the country and has now become its unique and distinct contribution to constitutional jurisprudence. It has preserved the great ideals of liberty and equality against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, and has certainly provided a safety-valve for securing the state rights against wanton absolutism of the national government.

Following the American precept and practice, various countries of the world adopted the system of judicial review. Even the countries of the British Commonwealth, which were naturally under the influence of the British principle of parliamentary supremacy adopted the technique of judicial review. Canada and Australia were prominent among them, primarily, because they had adopted the written and federal


66 Such as Jefferson, Madison, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt etc.

constitutions. Nevertheless, in these countries judicial review could not assume the significance and supremacy which it did enjoy in the U.S.A. The reason for this limited scope being that the Supreme Courts could not give final verdicts and that they were bound by the ultimate decisions of the Privy Council which was bound by its own precedents. 68

So far as India is concerned the rudimentary beginnings towards the development of judicial review were made by the High Courts 69 when they declared as invalid certain legislative enactments made by the Governor-General in Council when these enactments exceeded the authority conferred on them by the Imperial Parliament. The Judicial Committee of the Privy Council was the highest judicial authority for India but it did not question the authority of the High Courts in India to question the validity of enactments made by the legislative bodies.

The Government of India Act, 1935, which proposed a federal set-up for the country recommended the establishment of the Federal Court which was empowered to interpret the Act in the light of the distribution of powers between the centre and the provinces. The first Chief Justice Sir Maurice Gwyer made a direct reference to the power of the Federal Court to interpret the constitution when he

68 For details see, M.V. Pylee, supra n. 54, pp. 77-79.
69 Empress V. Burra(, (1878) I.L.R. 3 Cal p. 61.
The Federal Court will declare and interpret law ... but it cannot under the colour of interpretation alter or amend the law, that must be left to other authorities'.

This implied that the scope of judicial review under the Act of 1935 was limited. The Judicial Committee of the Privy Council continued to be the final interpreter of the Constitution. As there were no precedents which the Federal Court could follow, it relied heavily on the decisions of the Courts in the U.S.A., Canada and Australia, when it adjudged cases involving similar issues. The Government of India Act, 1935, did not include a charter on fundamental rights and therefore the question of judicial review with reference to such rights did not arise but during the period of its ten years of operation, the Federal Court considered the constitutional validity of over fifty legislative enactments made by Central or Provincial legislatures and invalidated over a dozen of them including important measures like Emergency Ordinances of the Governor-General of India.70 The Court exhibited a fair degree of independence in its judgments, was liberal in protecting the rights of the federating provinces and did not hesitate to uphold legislation for social reforms.

The scope of judicial review under the Constitution of India adopted in 1950 is greater than that under the Government of India Act, 1935. This is so because the Constitution

70 Keshav Talpade V. King Emperor (1943) 2 M.L.J. 90 (F.C.)
Is an elaborate document which has accepted the system of a federal state and has outlined the jurisdictions of the central and state governments. The Supreme Court, which is the highest court of law for the country has to act as an arbiter in case of conflicts between the central and state governments. This, the court can do only when it is empowered to review statutory legislation in the context of the Constitution. Hence judicial review in some measure has become inevitable.

So far as fundamental rights are concerned, the authors of the Constitution of India have expressly provided for judicial review of legislation and executive action through Articles 13, 32 and 226. Article 13 prevents the abridgement of fundamental rights conferred by Chapter III of the Constitution and confers on the judiciary the power of declaring those actions and laws which are inconsistent with the fundamental rights as void. Article 32 enables any citizen to approach the Supreme Court of India for the enforcement of fundamental rights and it empowers the Supreme Court to issue directions or orders or writs including writs in the nature of Habeas Corpus, Mandamus, Prohibition, Writ of Mandamus, Writ of Prohibition, and Writ of Habeas Corpus, whichever may be appropriate, for the enforcement of any of the rights.

71 Supra n. 39 and 40.
72 Article 32(2).
conferred by the Constitution. Article 226 confers on High Courts similar power of protecting fundamental rights.

Though our Constitution has provided for judicial review, it has accepted neither the American practice of judicial supremacy nor the English principle of Parliamentary sovereignty. In the words of Justice Das:

"In India the position of the judiciary is somewhere in between the courts of England and the United States; while in the main, leaving our Parliament and State legislatures supreme in their respective fields, our Constitution has, by some of the Articles, put upon the legislatures certain specified limitations. ... But outside the limitations imposed on the legislative powers, our Parliament and state legislatures are supreme in their respective legislative fields and the Court has no authority to question the wisdom or the policy of the law duly made by the appropriate legislatures."

In this connection, one must note the decisions of the Supreme Court in the pattern setting cases, A.K. Gopalan

73 Limitations placed by Articles 13 and 246 which state that the laws must be within the legislative competence of Parliament and State legislatures as specified in the Seventh Schedule.

V. State of Madras, and Golak Nath v. State of Punjab, which are poles apart in regard to their content of judicial thinking and their effect on the scope of judicial review. Both are landmarks in the constitutional jurisprudence in this country, and particularly the decision in Golak Nath case is not only the most controversial episode in the whole history of the working of the Constitution of India, but it has created almost a crisis of constitution by bringing forth the most perplexing phenomenon which was so long lying dormant.  

“In this ease, the Supreme Court tried to answer various controversial issues, one such issue being whether the phrase ‘procedure established by law’ in Article 21, implied law in the abstract sense of principles of natural justice or ‘lex’ i.e. enacted law. It was admitted that Article 21 was an example of the curious fusion of substantive and procedural law and that ‘the word law has been used in the sense of state-made law and not an equivalent of law in the abstract or general sense embodying the

75 S.C.R. (1950) p. 143. In Gopalen case, the vires of the Preventive Detention Act of 1950 were challenged contending that the said Act violated Articles 13, 19, 21, 22 and 32 of the Constitution of India. The Supreme Court admitted the validity of the Act except Section 14 of the Act.


principles of natural justice ... and that the procedure established by law means procedure established by law made by the state, that is to say, the Union Parliament or the legislatures of the states. The Court was reluctant to attribute the due process meaning to the Article because according to it 'that would have the effect of introducing in our Constitution those subtle and elusive criteria implied in that phrase (i.e. Due Process phrase) which it was the deliberate purpose of the framers of our Constitution to avoid.'

In the Gopalan case, the judges of the Supreme Court were generally agreed on the basic principle of the Constitution as implied in Article 21 of the Constitution viz., the principle of Parliamentary supremacy. The Court maintained that though our Constitution has imposed some limitations on the legislative authorities, yet subject to and outside such limitations, our Constitution has left our Parliament and State legislatures supreme in their respective fields. Chief Justice Kania observed:

"It is difficult upon any general principle to limit the omnipotence of the sovereign legislative power by judicial interposition except in so far as the express words

78 For details see the article by the present author, "Judicial Interpretation of Article 21 of the Constitution of India," Indian Journal of Political Science, Conference Number, 1964, p. 231.

of a written constitution give that authority. Where the fundamental law has not limited either in terms or by necessary implication the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution, which is not even mentioned in the instrument. 80

The Court recognises its helplessness in determining the reasonableness or otherwise of the laws passed by the legislature in view of the constitutional recognition of legislative supremacy. This helplessness is explicit in the words of Justice Das when he says: "A procedure laid down by the legislature may offend against the Court's sense of penology ... but ... the Constitution is supreme. The Court must take the Constitution as it finds it, even if it does not accord with its preconceived notions of what an ideal constitution should be ... I may or may not like it, but that is the result of our Constitution as I understand it." 81

This judgment reflects the self-restraining, cautious and tradition-bound attitude of the judiciary in restricting its own freedom of action by sticking to the express phraseology of the Constitution, scrupulously avoiding the notions of Natural Justice and Due Process and construing

81 Ibid., pp. 320-23.
the law in favour of the legislature. This attitude of
strict interpretation is reflected in other judgments.\(^\text{82}\)
also. Through these judgments, the Supreme Court restricted
the ambit of the individual's right to freedom and personal
liberty, emphasised the social control of individual
liberties and clearly enunciated the principle of judicial
subordination to legislative wisdom by following the method
of strict interpretation of the wording of the Constitution.\(^\text{83}\)

The Judgment of the Supreme Court in the Golak Nath
Case,\(^\text{84}\) on the other hand, sets a new path by challenging
the supremacy of Parliament prohibiting the august body
from abridging fundamental rights. The main controversy
in the Golak Nath case centres round the interpretation of
Articles 368\(^\text{85}\) and 13(2).\(^\text{86}\) The majority judgment states
that 'the Parliament has no power under Article 368 to
amend part III of the Constitution so as to take away or
abridge the Fundamental rights'. The majority holds that


\[^{83}\text{Samirendranath Ray, supra n. 77.}\]

\[^{84}\text{For details see the article by the present author, "The Abridgement of Fundamental Rights," Research Journal - Fergusson College. 1968-69, p. 26.}\]

\[^{85}\text{Article 368 prescribes the procedure of amending the Constitution.}\]

\[^{86}\text{Supra n. 39 and 40.}\]
the power of the Parliament to amend the Constitution is derived from Articles 245, 246 and 248, which refer to the distribution of powers among the centre and the states, and not from 368 alone which only deals with procedure. Amendment is a legislative procedure and it is law within the meaning of Article 13(2) because the power to act under Article 368 is not contained in Article 368 alone but is derivable from the Articles that relate to the distribution of powers and also because the procedure prescribed under Article 368 is not different from ordinary legislative procedure, in so far as it relates to the amendment of fundamental rights.'

The Supreme Court applied the doctrine of prospective over-ruling and held that the amendments made in 1951, 1955, 1964 would continue to be valid but that 'the Parliament will have no power from the date of the decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein'.

The net result of this majority judgment is that the power of Parliament to abridge the fundamental rights in the Constitution is nullified by the Court. This power was, however, recognised by the Supreme Court in earlier

88  Ibid., p. 537.
cases namely, Sankari Prasad Sing Deo V. Union of India and Sajjan Singh V. State of Rajasthan.

If we consider the three judgments of the Supreme Court (i.e. Sankari Prasad, Sajjan Singh and Golak Nath cases), we find that 13 judges of the Court have supported the authority of Parliament to abridge the fundamental rights while 8 judges have denied this authority; Kania and Gajendragadkar, two former Chief Justices have supported the power of the Parliament in the earlier two cases while Subba Rao C.J. has opposed it in the third case. Justice Wanchoo, who later on became the Chief Justice, also supported the power of Parliament through the minority judgment and reiterated the same view while delivering Feroz Gandhi Memorial Lectures in 1967.

The judgment of the majority in Golak Nath case has not only questioned the wisdom of the legislature in enacting progressive social legislation for the country, but it has also asserted its own power of judicial review. The judgment in this case about the extent and scope of the amending power under the Constitution represents a significant phase in the post-independence dialogue between the

91 The Golak Nath judgment was a precariously balanced judgment of six to five.
legislature and the judiciary and has some very far-reaching implications for the entire legal, political and social process in India.

This brief review of the growth of Judicial Review shows that the Supreme Court of India was very sharply divided on the issue and has changed its stand considerably. Some judges have upheld the power of the Court to question legislation which amends the constitution so as to take away or abridge the fundamental rights and thus have enlarged the scope of judicial review; while others have accepted the limited scope of judicial review and have admitted the supremacy of Parliament in as much as they allow Parliament to amend the Constitution even including Part III referring to the Fundamental Rights. Recent judgments of the Supreme Court in cases like 'Bank Nationalisation' and 'Privy Purse' have further highlighted the power of the Supreme Court in nullifying legislation enacted by Parliament to curtail or abridge fundamental rights and the recent 24th Amendment of the Constitution is intended to override the effect of the Golak Nath Judgment.

So far has been considered the scope of judicial review with particular reference to its growth in India.

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93 Mr. Nath Pali's bill in the Parliament sought to do this and provoked unprecedented controversy in the country. With the enactment of 24th amendment, this controversy has subsided, at least temporarily.
The controversy regarding this issue is an unending and inconclusive one. The basic minimum acceptable is that the judiciary in India is empowered to interpret the Constitution, including the fundamental rights and decide the constitutionality or otherwise of the legislation enacted by Parliament and State legislatures in India. It also decides the reasonableness or otherwise of the executive actions at all levels of government, from national to local, judging the vires of these actions in the context of the law enacted by the legislatures. It will be better, now, to consider the approach adopted by the judiciary in interpreting the Constitution. Even in this connection, one does not find unanimity of opinion and the task now is to know the various approaches adopted so far and to understand the implications of the same from the point of view of the subject matter namely, the role of the Courts in protecting freedom of religion in India.

Prior to the adoption of the republican federal written Constitution with written guarantees of fundamental rights, the Indian legal system was very much under the influence of English legal and judicial system. Naturally, the judiciary in India accepted the position that its duty was to interpret the law and not make the law. It was not concerned with the policy of the law but was expected to interpret the letter of the law. The attitude of the English judiciary was the result of the common law doctrine
of the authority of judicial precedents and probably also
It was also based on the principle of the sovereignty of
Parliament.

According to Dr. Friedmann, legal theories assume
one of the three attitudes: Either to subordinate the
individual to the community, or they subordinate the
community to the individual, or they attempt to blend the
two rival claims. English legal philosophy in the
nineteenth century attached the greatest importance to indi-
vidual freedom. But later on with the growth of the concept
of the welfare state, the English judiciary also had to
modify its approach. The Courts in England now vacillate
between a desire to take active share in social evolution,
through an elastic interpretation of precedent, a socially
conscious and helpful interpretation of statutes or the
use of general principles of equity and public policy.

The judges in England were, however, divided on the
issue of the role of the judges in interpreting the law.
While Lord Denning observed:

"We do not sit here to pull the language of Parliament
and of ministers to pieces and make nonsense of it. That is

94 Legal Theory, p. 35, quoted by T.K. Tope in "Natural
Law Theory, Positivism and Indian Legal Thought,"
95 Ibid., p. 49.
an easy thing to do and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis. 96

This view was rejected by Lord Simmonds who observed that 'The duty of the Court is to interpret the word that the legislature has used; these words may be ambiguous but even if they are, the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited.' 97

The framers of the American Constitution were very much under the influence of Blackstone who transplanted the doctrine of Jus Naturae from the sphere of political philosophy to the sphere of jurisprudence. 98 Following Blackstonian logic, they believed that the principal aim of society is to protect individuals in the enjoyment of absolute rights which are vested in them as immutable and that the primary end of human laws is to maintain and regulate these absolute rights of individuals. Civil liberty was considered by them as 'no other than natural liberty so far restrained by human laws, and no further,'

96 Magor and St. Mellons R.D.C. V. Newport Corpn. (1952) 2 All E.R. 1236.
98 P. B. Gajendragadkar, supra n. 3, p. 23.
as is necessary and expedient for the general advantage of the public. 99

This natural law thinking inspired both the framers and the early interpreters of the Constitution of the U.S.A. Justice John Marshall, who was the Chief Justice of the Supreme Court of the U.S.A. for thirty-five years, and who asserted the right of judicial review, was a product of this school of natural right philosophy. He and his followers relied upon the due process clause in the Constitution to uphold the right to private property and sacredness of contract. With Justice Holmes, however, a new era began in the constitutional history of the U.S.A. His approach is known as the 'American realism' or 'Holmes positivism'. It is this approach which influenced legal thinking in India in case of most of the judges of the Supreme Court of India and, therefore, one must try to understand its implications.

The approach adopted by a judge in interpreting a law very much depends on his conception of the nature and function of law. The concern of law is not merely to lay down rules for others to obey; it must be seen as an instrument of social order and direction, a technique and method rather than as mere doctrine. Law must as well promote viable institutions within which human beings living in society can achieve their individual and social purposes

Justice Holmes who considered law as an 'anthropological document' observed:

"The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices the judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of Mathematics."

Cardoso, following Holmes' reasoning maintained that the 'statutes are to be viewed, not in isolation or in vacuo, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and framework of present day conditions as revealed by the labours of economists and students of the social sciences in our own country and abroad.'

So far as judicial thinking in India is concerned, one finds the influence of English as well as the American legal systems and consequently different approaches are

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101 Quoted by T.K. Tope, supra n. 94, p. 51.
102 Ibid., p. 52.
adopted by judges in interpreting the law, the constitutional as well as the ordinary law. On many issues, it is reasonably possible for a reasonable judicial mind to reach either of the two conclusions, one on technical grounds, the other on broader, deeper and more human considerations. The technically minded judge will decide the narrow way, but a judge with a broader vision and wider experience of life will decide the other way, his decision being much more in accord with the common man’s view of justice and right.103

Almost all judges have insisted upon the independence of the judicial mind. It has always been felt that the interpretation of any law has to be judicial and not political. The highest Court has to keep itself aloof and detached all the time and scrupulously avoid stepping into controversial matters whatever the predilections of the individual judges may be.104 "A judge should never allow his personal, economic, political or social views to trespass in his judgments".105 In his speech at the inauguration of the Supreme Court of India in January 1950, Chief Justice Kanji categorically referred to judicial independence when he observed:


105 Justice Gajendragadkar in his reply to the felicitations on his appointment as a judge of the Supreme Court 59 Bom L.R. (Journal), pp. 5-6.
"The Supreme Court, an all-India Court, will stand firm and aloof from party politics and political theories. It is unconcerned with the changes in the government."^{106}

The Court, it can be asserted, has maintained that position throughout the last two decades. Recently, Justice Hidayatullah observed,^{107} that a judge is not competent to change the law to suit any particular ideology and that if a judge tried to derive inference from an ideological angle, he would have just failed as a judge. He affirmed that if the law and the provisions of the Constitution spoke in a certain way, a judge should say so and not try to interpret it according to any ideology and that if a particular law was not liked, it was for the legislature to change it. He also made it clear that the judge should certainly consider what is happening around him but his interpretation should be strictly judicial.^{108}

Even though, the independence of the judicial mind was a common concern, the approach adopted by the judges differed from person to person. Broadly speaking, it may be noted that two approaches are being adopted in interpreting the law. Some of the judges have accepted the English notion of judicial aloofness and have interpreted the Constitution

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107 In his television interview on 17th December 1970, reported in Hindu, 18th December 1970.
108 Ibid.
and the statutes in the traditional manner. They have felt that a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view. 109

This approach emphasised the letter rather than the spirit of the law. It placed a premium on the legal rather than the social content of law. Justice Das observed:

"If the language of the Article is plain and unambiguous and admits of only one meaning, then the duty of the Court is to adopt that meaning irrespective of the inconvenience that such a construction may produce." 110

The approach adopted by other judges, on the other hand, is not one of formal legalism but of positive liberalism. The first authoritative statement exhibiting enlightened liberalism in interpreting the law came from Sir Maurice Gwyer, Chief Justice of the Federal Court of India.

"It will always be our endeavour to look at the Constitution of India ... not with the cold eye of an anatomist, but as a living and breathing organism which

109 Chiranjitlal Chowdhari V. Union of India (1951) S.C.J. 29.

contains within itself, as all life must, the seeds of future growth and development, and let me add that I hope that no canons of interpretation which we may adopt will ever hamper the evolution of those constitutional usages and conventions for which, when the opportunity is given, the political genius of a people can find its most fruitful and effective expression. The Federal Court will declare and interpret law . . . in no spirit of formal or barren legalism. But I do not wish to be misunderstood. This Court can and I hope will secure those political forces and currents which alone can give vitality to a Constitution. have free play within the limits to law, but it cannot under the colour of interpretation alter or amend the law, that must be left to other authorities. Nevertheless, within the limits I have indicated, the Federal Court can make a unique and even perhaps decisive contribution towards the evolution of India into a great and ordered nation, a link between the east and the west, but with a policy and civilisation of its own."

This liberal dynamism is reflected in the approach adopted by some judges of the Supreme Court of India. Justice Bose was of the view that a better approach to the problems facing the Courts would be 'to adopt flexible

Ill Chief Justice Maurice Gwyer in his inaugural address delivered while inaugurating the Federal Court of India. 1 F.L.J. pp. 35-36; 1 F.C.R. 1. Italics mine.
interpretation leaving the Constitution elastic to meet the altering conditions of a changing world' and 'to test each question from the point of view of collective conscience of a sovereign democratic republic.'

Justice Bose in a very eloquent passage outlines his approach to the interpretation of the Constitution, when he says:

"The provisions of the Constitution are not mathematical formulae which have their essence in mere forms. They constitute a framework of government written for men of fundamentally differing opinions and written as much for the future as the present. ... There is consequently grave danger in endeavouring to confine them in watertight compartments made up of ready made generalisations. ... I find it impossible to read those portions of the Constitution, without regard to the background out of which they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull lifeless words, static and hidebound as is some mummified manuscript, but flames intended to give life to a great nation and order its being, tongues of dynamic fire potent to mould the future as well as guide the present. I feel therefore, that in each case judges must look straight into the heart of things and regard the facts of each case.

concretely. ... The question with which I charge myself is: can fair-minded, reasonable, unbiased and resolute men who are not swayed by emotion or prejudice, regard this with equanimity and call it reasonable, just and fair, regard it as that equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which obtain in India today.\textsuperscript{113}

Justice Chagla was of the view that when the Court is dealing with a legislation that seriously interferes with the rights of the citizens, the Court must scrupulously consider every safeguard that the legislature has provided in favour of the citizens and the Court must give effect to every such safeguard.\textsuperscript{114} He also realized that it is for the legislature to lay down the policy and it for the judges to interpret that policy. But the outlook and the approach of the judge must to a large extent help him to mould the law, to interpret it one way or the other.

Justice Chagla was very much under the influence of Holmes positivism when he observed:

"I do believe that a judge to a large extent must be isolated. But I refuse to believe that a judge must so cut himself off from society that he should not know what is

\textsuperscript{113} Ibid. Italics mine.
\textsuperscript{114} Maneklal v. Collector of Ahmedabad 55 Bom. L.R. 992.
happening around him, and again to quote Mr. Justice Holmes, 'a judge should always be conscious of the felt necessities of the time.' What are the felt necessities of our time? We want to remove social and economic equality, we wish to progress, we wish to make our country a great country. I feel a judge would be unworthy of being a judge if sitting on the Bench, he was not conscious of the felt necessities of our time. 

Justice Gajendragadkar follows the same liberal tradition of Holmes. He believes that both lawyers and judges are and ought to be conscious of the radical change that is taking place in the fundamental aspects of law in a modern democratic state. Just as the doctrine of laissez faire in economics is obsolete so is the static view of law with which most of us were familiar in early days. He maintains:

"A democratic welfare state is naturally impatient to attain the goal of social and economic equality, and the journey towards this goal has to be assisted by legislative regulation. If economic inequalities have to be removed, if social equality has to be established, and equal opportunities provided to all citizens in this country, the law may have to regulate major socio-economic relations of

115 Justice Chagla, on the eve of his retirement from Bombay High Court - 60 Bom. L.R. (Journal) 153.
citizens; and when democratic legislature enacts laws for this purpose, the philosophy of social life on which such legislation is based must be understood and appreciated by all citizens in general, but by lawyers and judges in particular. Judges do not make law and never attempt to make law by process of judicial interpretation. But in administering socio-economic laws and interpreting them judges should not be oblivious to what Mr. Justice Holmes so appropriately and so eloquently described as 'the felt necessities of the time'.

Justice Gajendragadkar admits the difficulty involved in the task of interpreting the law. On assuming the office of the Chief Justice of India, he cautions the judges about this difficulty, when he says:

"We, the judges of the Supreme Court, do not function individually, but institutionally. In the discharge of its duties, the Court has, on many occasions, to face difficult and delicate problems, the solution of which is not always easy to find. The choice sometimes is between good and better, and faced with such a choice, the process of reaching the ultimate decision is agonising."

116 Justice Gajendragadkar in his reply to the felicitations on his appointment as a judge of the Supreme Court. 59 Bom. L.R. (Journal) 5 and 6. Italics mine.

During his tenure as the Chief Justice of the Supreme Court he consistently adopted a positive and liberal approach in interpreting the Constitution and the statute law. He thought that "in dealing with constitutional questions, courts should be slow to embark upon an unnecessarily wide or general enquiry and should confine their decision so far as it may be reasonably practicable within the narrow limits of the controversy arising between the parties in the particular case. ... In interpreting the provisions of the Constitution, we must always bear in mind that the relevant provision has to be read not in a vacuum but as occurring in a single complex instrument in which one part may throw light on another." 118

He conceived the Constitution not as a detached document involving scholastic dialectics, but as a means of ordering society so that it does not become an unsurmountable barrier to the accomplishment of valid and essential national goals. Judicial decision-making was considered by Mr. Justice Gajendragadkar as an opportunity to perform a creative role in shaping law to fulfil the felt necessities of a changing social order and to adjust the periodic crises of human affairs. The Court would be fulfilling its obligation only if it disclosed a continuing

awareness of the great social and economic issues of the day and evolves a progressive, constructive and forward looking philosophy of constitutional law, designed to assist the forces working for the socio-economic regeneration of the country. 119

To Conclude

The content of liberty is expressed through the fundamental rights. Modern constitutions, following the American practice, prefer to include the fundamental rights in written form. But, mere enumeration of fundamental rights is not a sufficient guarantee for their successful enforcement. The constitution should also contain the provisions for safeguarding these rights when they are encroached upon by other individuals and more particularly, by public bodies. It is in this connection that the judiciary assumes the role of interpreter of the constitution and the protector of fundamental freedoms. The separation and supremacy of the judiciary is integral to the maintenance of fundamental rights. Judicial review of constitutional provisions regarding fundamental rights is, therefore, an inevitable concomitant of a healthy democracy. The courts, as the guardians of the constitution, therefore, assume an important function and the amplitude

of freedom depends upon the approach adopted by the courts. The interests of individual freedom on the one hand, and those of social justice and reform on the other, often come into conflict. It is during such controversies that the mettle of the judiciary is tested and it very much depends upon the courts how they try to strike a balance between the conflicting claims of individual liberty and social justice.

The Constitution of India, in its attempt to create a secular state has granted fundamental rights embodying freedom of religion and has empowered the courts with the authority of judicial review. The concern of the following chapters is to understand how the judiciary in India has performed the difficult task of protecting religious freedom and thus strengthening the trends of secularism in the country.