INTRODUCTION

Constitution of a Country is a living document. It is said to be not only legal but also a socio-economic charter aimed at fulfilling the aspirations of its people and achieving its goals. The Constitutions of the two great democracies of the world, the United States and India were drafted by men of vision who were undisputed leaders and guide of the destiny of their respective nations and the people thereof. The basic documents for the governance of their respective countries and the rights and freedoms assured to their people were not expected to be short-lived. They were indeed for all times to come. While establishing different organs of the government, the power to interpret this basic document in each of these two countries was vested in the apex court of the land. These Summit Courts played their true role in fulfilling their responsibilities and in the beginning interpreted the text of the documents according to the situation and the desires of the people at relevant times. One thing which always remained topmost in the mind of every actor of the play was maintenance of rule of law. When people comprising the other two organs of the government either tried to usurp functions not vested in them or abridge the freedoms of the people, the judiciary unhesitatingly imposed its strong-arm control and chained them within their respective spheres. However, if the needs of the nation at any stage, required
limitations on individual rights, the interpretative tool had to be applied by it. Gradually, with the passage of time, following the rule-of-law tradition, judges started actively testing the legitimacy of governmental action by holding it against the standard of fundamental law of the land. This activism of the judiciary has become point of debate in recent times in both the United States and India. It is alleged by the traditionalists in both the democracies that the Supreme Court is transgressing its specified limits through the weapon of judicial review, and therefore, there is urgent need to stick to the original design of the Constitutional document.

In the United States, the propounder of this controversy in the present times has been Edward Meese, the ex-Attorney-General in the former U.S. President Reagan's administration who in the year 1985 called for the "Jurisprudence of original intention". While disapproving the major U.S. Supreme Court rulings of the past 60 years, he called for judges to look to "The original meaning of Constitutional Provisions" while deciding cases rather than to apply "Contemporary Social and Moral values". According to Meese: An activist jurisprudence, one which anchors the Constitution only in the consciences of jurists, is a chameleon jurisprudence, changing color and form in each era. 1

Drawing a sharp distinction between "the Constitution", and the "Constitutional law", Meese said that if the Constitution is the unadorned text, then Constitutional law is simply "what the Supreme Court says about the Constitution in its decisions resolving the case and controversies that come before it. And, for him, decision of the Court does not establish a paramount law of the land, "binding on all persons and parts of the government henceforth and forevermore". To substantiate his point, Meese gave an example of the U.S. Supreme Court's ruling of *Plessey v. Ferguson* in 1896 wherein the Court had upheld racial segregation, which finally and luckily was struck down by it, fifty-eight years later in the historic *Brown v. Board of Education* case. On the basis of this example, Meese holding that what is good for the Court should be good throughout the polity, said: Constitutional decisions need not be seen as the last words in Constitutional Construction", instead, it is "the business of all branches of government", and presumably the citizenry at large, to participate in giving meaning to the text".  

Soon, Mr. Meese's speech evoked sharp reactions particularly his statement that decisions of the apex Court have "no general applicability and that citizens may choose to ignore rulings at will". Commenting on it, The Washington Post in its editorial said that the implication of this argument of Meese would be, "an invitation to Constitutional chaos and an expression of contempt for the federal judiciary and the rule of law". Similary Prof. Lawrence Tribe stated that Meese's position, "represents a grave threat to the rule of law because it proposes a regime in which every law-maker and every government agency becomes a law unto itself, and the civilizing hand of a uniform interpretation of the Constitution Crumbles".

This conservative approach of Meese though supported to some extent by the present Rehnquist Court and by the former Bush administration, yet it has become not only a major moot point in America, which has the world's oldest and briefest written Constitution but also is relevant in the context of the present Indian democratic federation. Lately, particularly in the present year 1995, the Indian Supreme Court has become very


4. Ibid p 40. Criticising Meese, Eugene C. Thomas, the President of the American Bar Association, asserted that Supreme Court decisions are indeed the law of the land and that "Public Officials and Private Citizens are not free simply to disregard", their status as law. To imply the legitimacy of such disregard is to "Shake the foundation of our system". Ibid at p 41.
assertive, making the Indians feel its presence through various remarkable rulings particularly against governmental carelessness towards Socio-economic problems of the Common man, reminding the executive of its duty to the citizen. As a result, there is furore at various levels against this ever-growing activism of the Summit Court generating a fear, of its trespassing its originally designated role of interpreting the various Constitutional & legal provisions in the light of original text.

Infact, the main issue in the debate is: "Whether in the interpretation and implementation of the Constition, the 'original intention' should be made the basis by the Judiciary and the legislature or whethers judges and legislators can incorporate the absolute new ideas through interpretational techniques which might have surfaced in the course of time, and thus, deviate from the original intention of the framers of the Constitution? To put it other way, the question is whether the "original intention" of the framers should be made binding on the present generation i.e., we should see as to "What did the framers mean to achieve, what did the words they used mean to them, and not what we should like the words to mean in the light of current exigencies or changed ideals.

Speaking about the significance of the "Original Intention", James Madison said: If "the sense in which the Constitution was accepted and ratified by the nation - be not the
guide in expounding it, there can be no security for a Consistent and stable Government, more than for a faithful exercise of its power". 5

With the objective of finding answers of these questions, to ascertain the value of the 'original intent' theory in the fast-growing society, the present study has been taken up. The study is divided into seven chapters.

A country can have Constitution but it is not essential that it also has a Constitutionalism. As, to protect basic freedoms of individuals, to maintain their dignity and personality good Constitution ought to be permeated with Constitutionalism. This makes it necessary to study the meaning of the various terms like Constitution, 'Constitutional Law' and 'Constitutionalism'. 6 Moreover, history is a relentless tale of rise, decline and fall of nations. It is difficult to shed our historically located skin and so we take help of the past while resolving any present problem. Keeping the factor in account, the chapter I deals with the historical background and objectives of the founding fathers in view of which the American and the Indian Constitutions were framed respectively. The chapter studies the Conditions, social political, economic which paved the way for the Constitutions of both the democracies. The chapter also discusses in brief the essential features of both the American and Indian Constitutions.

The study of historical background throw light on the

6. See Hegel's Political Writings Translate by Knox, T (1964) p. 244
"original intention' of the framers and reveal that framers in both the democratic Constitutions knew that if the Constitution was to ensure, it must be a living Constitution, capable of flexibility and adaptability to cater to the expanding needs of the people and the country. Accordingly, they provided for the process of amendment of the Constitution. But question is: whether this amending power of the legislature is absolute or alike other provisions of the Constitution, is subject to judicial review? If judiciary also plays a role in keeping the Constitution alive, how far has it performed its role under both the Constitutions.

The next issue therefore is: what is judicial review? What is its proper extent and scope? The concept of 'Judicial Review', its history, limitations imposed on the review power of the Courts with the passage of time, has been discussed in Chapter II of this study. The study shows that this doctrine of judicial review is America's most distinctive contribution to Constitutionalism. The concept of judicial review is not expressly provided in the American Constitution because of the belief of the framers that the power was impliedly given in Articles III & VI and this was already in existence in the American States after their break with Britain in 1766 and subsequently it was evolved by Chief Justice Marshall in the well-known Marbury v. Madison case. In contrast to the U.S.

Constitution, the Indian Constitution expressly provided for judicial review. Since judicial review is essential in a government with limited powers, the scope of this power expands or contracts according to the political philosophy of the State within with the judicial power has to function. This power is the barometer which registers the rise and fall of independence and freedom in human society. This power is subject to various limitations which are both extrinsic and intrinsic. Infact, the study shows that judges has to keep in mind that the judicial power is not a political power and practical awareness of the difference between the two is a limitation on judicial power. In this regard, the next question that comes to our mind is: Does a judge legislate or just declare the law? What is his true function. Discussion in relation to two main theories on this point i.e. declaratory theory & original intent theory and theory that judges make law has also been covered in chapter II which suggest that judges do not make law in the same sense in which it is made by the legislators. As said by C.K. Allen that judge makes law in the sense in which "a man who chops a tree into a log has in a sense made the logs".

History of nations speak that the clashes between the subjects and the rulers have been mainly over the aggrandisement of power in the latter. Most of the nations after becoming independent have given primary importance to the fundamental rights of the individuals in their respective Constitution, have ensured them from the onslaught of executive tyranny and
invasion by giving the Courts power of judicial review. As rightly said by Mr. Gerald Gunther: "Whether Constitutional decision making by judges can continue to contribute to the flexibility and durability of the Constitution without deteriorating into merely politicized and personalized rulings that risk subverting the legitimacy of Constitutional government is the central and unresolved challenge confronting modern judicial review". 8

Since any Constitution, cannot be fully understood by reading alone but by its performance through concerted action, it becomes necessary to study the various principles, rules of the interpretation of the Constitution. 9 Interpretation in the process of judicial review is the most suitable instrument of adapting a Constitutional Charter to life without resorting to amendment process. In this regard, the next issue is: What is the meaning of the terms 'Interpretation' and 'Construction'. What are the various rules of Construction, various aids which are followed by the Supreme Court in the America and India respectively. All these points have been elaborated upon in Chapter III of this study. The intention of the framers of both the Constitution was that the judiciary should perform the task of interpreting the meaning of the ambiguous words and phrases of


9. To quote E.D. Hirsch: "With a numinous document like the Constitution or the Bible, the principles and methods of correct interpretation are as important as they are problematical", only if there is widespread agreement on "principles and methods of correct interpretation" can a written Constitution be said to be a source of stability. See The Aims of Interpretation by Hirsch, E.D. (1976) p. 20.
the Constitution in accordance with its experience as also said rightly by Justice Holmes that: "The life of the law has not been logic, it has been experience".

Hence, to perform this task, the Courts in both the countries have followed different rules of Construction in the light of two principal schools of Interpretation namely literal or Interpretivist School of Interpretation. The views of the advocates of these schools are supplemented briefly by the study how the Courts have taken fluctuating stand with regard to the following of these two schools of interpretation at different interval of time, under the stewardship of different judges. In this chapter, also are examined internal and external aids of interpretation adopting which the Courts have also given birth to various doctrines like Doctrine of Eclipse, Prospective-overruling, waiver, Theory of Basic Structure, Police Power etc.

After studying the principles and aids of interpretation, the next step is to find out how the Courts have used these in the Construction of 'Right to Freedom' ? Whether Courts have taken care of the design of the architects or have they deviated from it, and if so, whether deviations can be termed as violation of the original pattern?

Before discussing this, it is appropriate to examine the meaning & evolution of concept of Right, legal Right, Constitutional or fundamental Right in general. Chapter IV begins with this followed by the detailed examination of the
history, objective and purpose of both Bill of Rights and so-called Fundamental Rights in America and India. In the context of India, a brief survey of non-justiceable right in the form of Directive Principles of State Policy is also done as in the present times the Court through interpretation, has brought various directives in the ambit of Right to Life and Personal Liberty such as Right to Education, Right to Health.

Out of all the guaranteed fundamental human rights, the most important have been freedom of speech and expression and Right to Life and Personal Liberty.

Chapter V discusses Right to Freedom of Speech and expression and Right to Life and Liberty in the United States of America. Firstly, it discusses Right to Freedom in general, followed by meaning, background and purpose of Freedom of speech clause. After this, the detailed analysis of the freedom is done in the Light of its interpretation by the U.S. Supreme Court. This is succeeded by elaborate examination of Right to Life and Liberty in the light of substantive and procedural 'Due Process' clause as evolved by the framers and the Supreme Court. The Court's Interpretation has given birth to various debatable verdicts such as Flag burning, narrowing of obscenity clause, on birth of Hate Speech and creation of neo-substantive due process clause as part of Right to Life and Liberty etc. The Chapter concludes by saying that the U.S. Supreme Court in the name of libertarianism and protection of human rights has opened new
vistas in the field of free speech and 'right to life & liberty', which proves that the determination of Constitutionality through judicial decision is very important in American System of government.

Alike, American framers, the founding-fathers of the Indian Constitution also recognising the paramount place of the individual in society, guaranteed different Rights to Freedom to the Indian People in part III of the Constitution. But unlike its American Counter Parts the freedoms were guaranteed to the Indian People subject to various limitations in order to maintain the delicate balance of power in the infant Indian democracy. The framers did not leave it to the Supreme Court to evolve limitations on Fundamental Rights through doctrine like doctrine of Police Power as has been in the case of the United States. Chapter VI of this work deals with the background, meaning and purpose of freedom of speech and expression, followed by comprehensive examination of its limitations in the light of various judicial interpretations. This is succeeded by the detailed study of the basic freedom of Life and Personal Liberty. It is discussed that how & why the framers deliberately avoided the inclusion of "due process of law" and substituted it with the expression "Procedure established by law". Even the framers qualified the word "Liberty" with the 'Personal' unlike the American Constitution. This is supplemented further by the detailed survey of judicial decisions of the apex Court regarding interpretation of the expressions "Life" & "Personal Liberty",

resulting in the present times in so many positive deviations in the Article 21 that its volume is getting increased leaps and bounds everyday, not perhaps ever visualised by the founding fathers. Infact, the liberal judicial attitude in the Post-Maneka period has made the apex Court the Messiah of the voiceless, common Indian.

Chapter VII deals with the conclusion wherein after doing the appraisal of the whole study, two things are inferred. First, what in reality the Court is doing is the judicious use of Power of judicial review within the limits of the original framework of the Constitutional document. The alleged judicial trespassing particularly into the domains of executive department can not exactly be called usurpation of its powers as it, only through its forceful positive opinions, is reminding the government of its duties.

Secondly, as law, as visualised by the founding fathers in both the democracies, was supposed to be dynamic in nature, in today's constant top-down declining of values scenario, the only recourse for the common man is the judiciary which he can look upto for getting justice, for getting constructive, healthy interpretation of law. While interpreting law, judges cannot ignore that they ultimately are also accountable to "the People of the nation and so have to act cautiously, within the periphery of self-imposed restraints.

To sumup, it is submitted that there is an urgent need for each one of us to adopt balancing approach, to findout solution
of the present problems not outwardly but inwardly, by strenously constantly aspiring for the ultimate Divine Truth as the True Freedom has to be experienced in the whole of life and in all sensations, as said by the great Sage & Visionary Sri Aurobindo.

To quote:

"To observe the law we have imposed on ourselves rather than the law of others is what is meant by liberty in our un-regenerate Condition. Only in God and by the Supremacy of the Spirit can we enjoy a perfect freedom". 10