CHAPTER - III

INTERPRETATION OF THE CONSTITUTION

(A) MEANING OF INTERPRETATION : INTERPRETATION AND CONSTRUCTION

Any new Constitution cannot be fully understood by reading alone but waits for 'performance through concerted action' says Charles Alexandrowicz.\(^1\) And the most suitable instruments of adopting a Constitutional charter to life without resorting to formal cumbersome process of amendment, are convention & principles of interpretation. In a loose & popular sense, both the terms 'Interpretation' & 'Construction' are used as identical terms referring to "The process by which the court seeks to ascertain the meaning of the legislation through the medium of the authoritative forms in which it is expressed".\(^2\) However, actually they are different in concept.

To quote Wynes "Interpretation is the process of ascertaining the actual meaning of the words used, while Construction denotes the art of discovering the meaning of the terms with reference to their application to a given case when such application is doubtful by reasons either of some apparent inconsistency in the document itself or of the fact that the particular case is not literally provided for. Construction is thus a synthetic process consisting in the 'building up' of the intentions sought to be conveyed from the consideration of many elements."\(^3\)

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3. Quoted by Basu, D.D. in "Interpreting the Constitution" S.C.J. Vol. (XXIII) (1950) PP 1 t 36 at 03. Though in practice it is difficult to separate interpretation and Construction, yet there is a subtle difference between the terms, Prof. Dias says that where the plain-meaning rule is followed while finding out real meaning of the word, used in a section, that amounts to "interpretation" of the words, but in case where the meaning is not plain, the decision whether the word was 'meant' to cover the situation before the court, which no one may even have contemplated at the time when the statute was passed, inevitably imports a measure of "construction" see. Jurisprudence by Dias (2nd Ed.) pp 104-105.
To quote cooley: "Interpretation differs from Construction in that the former is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey. Construction ---- is the drawing of conclusions, respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text; conclusions which are in the spirit though not within the letter of the law" (3-A).

This way, the term "interpretation" is used for the purpose of finding out the true meanings of the words used in the statute & "Construction" denotes the determination of what was intended by the framers, how the framers would have dealt with the text had they been gifted with far-sightedness.

Amongst various types of constitutional interpretation, the most popular and well-accepted type is the interpretation done by the Courts, in particular, by the apex court of the land through the process of judicial review and this has emerged as the most important & effective technique of judicial process.

(3-A) **Constitutional Limitations** by Cooley Vol. I p. 97; Also see **Statutory Construction** by Crawford pp 240-241 wherein Crawford says that the distinction between interpretation and construction "has been largely relegated to the realm of academic discussion"; Also see **The Nature And The Source Of The Law** by Gray, J.C. (2nd Ed) at p. 176 Gray States: "The process by which a judge constructs from the words of a statute book a meaning which he either believes to be that of the legislature, or which he proposes to attribute to it, is called by us 'Interpretation'". See Further **Corpus Juris Secundum** vol. 82 p 529 etc.


5. According to Pritchett "The process of constitutional adaptation is one which goes on at many levels and in many contexts. And for him, "The most highly rationalised type of constitutional interpretation is one done by the judges, in particular, of the U.S. Supreme Court See **The American Constitution** by Pritchett, C. Herman (1977) pp 30-31.
The courts perform this interpretative function of the Constitution through 'direct' and 'indirect' judicial review. In direct judicial review, the court overrides or annuls a legislative or an executive act on the ground that it is inconsistent with the Constitution, and in indirect judicial review, while considering Constitutionality of a statute, the Court so interprets the statutory language as to steer clear of the alleged element of unconstitutionality.

(B) **SCHOOLS OF INTERPRETATION**:

Due to the complexity of this subject of interpretation, various authors have propounded different philosophies of judicial interpretation of constitutional issues and briefly we classify these theories into two broad categories:

1. (I) **Literal and Grammatical Theory of Interpretation**

   It is the mechanical, narrow interpretation of the Constitution which does not look beyond the *littera legis* and its object is to consider solely the verbal expression of the law. Since the gist of the law lies in its spirit, not in its letter, for the letter is important only as being the external

6. **Indian Constitutional Law** by Jain, M.P. (1980) P 830. Since the Constitution is the paramount law of the land, its interpretation involves more than a passing interest concerning the real litigants and it has more general and for reaching consequences, This way it is difficult to discover and interpret the policy of Constitution than that of a particular statute, therefore, more farsightedness in the nature of judicial statesmanship is required in the Constitutions interpretation than in interpretation of a statute see **The New jurisprudence** by Mukharji PP 103-105.
manifestation of the intention that underlies it, it is the duty of the judiciary "to discover and to act upon the true intention of the legislature - the 'mens' or sententia legis ------ judges are not at liberty to add or take from or modify one letter of the law, simply because they have reason to believe that the true 'sententia legis' is not completely or correctly expressed by it". For this theory, the Constitution is a rigid, inflexible written instrument, whose meaning is fixed when it was drawn up, and so is not subject to any such interpretation at a subsiquent times which would modify its meaning. The Constitution does not change with the varying tides of public opinion and so if new circumstances require changes, these must be made by the amendment by the people themselves.

This 'Simple Theory', says Indian Rajeev Dhavan, is the product of a political arrangement and also consistent with the rise of democratic theory.

7. Supranote 02 PP 132-133, Justice Learned Hand has called the Literal School the "Dictionary" School : See The Spirit of the liberty, by Hand, Learned (ed) by Dilliard, Irying P 83.

8. "Interpretation of the Constitution" by Mathur, R.M. S.C.J. Vol. (XXI) (1958) at P 35; Also see Statute Law by Craies (7th Ed) pp 65-66;

9. Dhavan further says that judges being unaccountable could not be made the "repositories of uncontrolled power, their function is to interpret a statute literally, to interpret the words as they find them and must not go any further". See Justice on Trial, Dhavan, Rajeev P 122.
This approach to constitutional interpretation is also labelled as Textual or plain-meaning approach because it says that if one meaning of a section is plain, it should be applied accordingly. The courts ought not busy themselves with "supposed intentions."

This rule of expressed intention has been followed both in America & in India in the Constitutional interpretation. To quote Randolph Country Walden. "For this rule it is the function of the Courts to construe not re-write the Constitution." In accordance with this rule, in expounding the federal Constitution, the omission in one place of an adjective used in others cannot be regarded as accidental (rather) every word, while expounding the Constitution, must have its due force and appropriate meaning.

10. For words are the common signs that mankind make use of to declare their intentions to one another, and therefore, when the words of a man express his meaning plainly, distinctly, and perfectly, there is no occasion to have recourse to any other means of interpretation. See 16 AmJur 2d SS 70 PP 248-49 Maxwell says "where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise," see Maxwell on The Interpretation of statutes (12th ed) by Langan, P.St.J (1976) P 29.

11. Ibid 16 AmJur 2d p 249; To quote Maxwell; "The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning, and the second is that the phrases and sentences are to be construed according to the rules of grammar". Supranote 10 Maxwell p 28; Salmond also used the term "grammatical" in place of literal but the editor of the 12th Ed. of Salmond's Jurisprudence, Mr. Fitzgerald has replaced it by the term 'literal' believing that it, more clearly expresses the meaning.
Recently, this was also stated by Justice Sawant of the Indian Supreme Court in case of K.S. Paripoornan. To quote "Plain meaning of the word cannot be departed from by "either mutilating them or by attributing to them unnatural and unwarranted role such an exercise is against all canons of the interpretation of statutes"\(^{12}\)

Therefore, when a word is capable of being construed either in a popular sense or as a word of art, it is for those who assert that it is used in a technical sense to establish that fact. But if the words have acquired a technical meaning either by usage or judicial decisions they should be given the meaning which they had at the time the instrument was framed and adopted.\(^{13}\)

When the language is plain and admits of one meaning only, that meaning, and that meaning alone, must be given to it, however absurd, harsh, unjust, arbitrary or inconvenient the results may be. Reason is simple, that is, in interpreting a statute the court cannot assume the function of the legislator, and so it is not the province of a court to scan the wisdom or reasonableness or the policy behind a statute.\(^{14}\)


\(^{13}\) For example, terms in Constitutions like 'Due Process of Law' 'territory', 'Domicile' etc. Supranote 03 Basu, DD at p. 5. See Further Wilma E. Addison v. HollyHill Fruit Products 322 U.S. 607 where in Justice Frank furter very well justified the literal or plain meaning principle of interpretation by stating : "After all legislation when not expressed in technical terms is addressed to common run of men and is therefore to be understood according to sense of the thing, as the ordinary man has a right to rely on ordinary words addressed".

\(^{14}\) Ibid Basu D.D. p 08. In V.G. Row's case, the Indian apex court held "while the court naturally attaches great weight to the legislative judgement, it cannot desert its own duty to determine finally the constitutionality of an Impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new setup are out to seek clashes with the legislatures in the country" AIR 1952SC 196 at 194.
To quote Joseph Story, "the job of constitutional judges was to construe "the first and fundamental rule in the interpretation of all instruments is, to construe them according to the senses of the terms and the intention of the Parties". Criticising this plain-meaning rule, it is alleged that the difficulty with this rule is the ambiguity of English language "The typical word has a multiplicity of meanings. It is difficult enough for an individual to express himself precisely, absent the use of mathematical symbols. When decision making is a collective enterprise, as it is in a legislature or governmental bureaucracy, ambiguity increases prodigiously. Furthermore, most legislative enactments are a result of compromise, which means that clarity and precision are further obfuscated", says Rhode & Spade.

Original Intent & Literal School

One closely related approach to the literal school of interpretation is the original intent method of interpretation. According to the advocates of this approach, the meaning of the Constitution should be ascertained by reference to the intention of the men, who made it. This approach is often called 'interpretivism' as according to it, the court reaches decision by interpreting the textual provision that is the embodiment of the determinative value judgement. This approach, say, Meese, 'assumes that the Constitution is a document of fixed and legally binding meaning'.

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For Meese, the duty of the court is to enforce the Constitution which "is a document of our most fundamental law", beginning with the first words of the Preamble, "We the people ----", & ending "some 6,000 words later, with the 26th Amendment".

Thus, according to interpretivist, the effort is to ascertain, as accurately as available historical materials will permit, the character of a value judgement the founders constitutionalized at some point in the past.¹⁸

For originalists, all those judicial decisions on constitutional matters which are not based on original intent of the Framers, are infringement of the amending process of the constitution.¹⁹ To quote Gray:

"The Interpretive model - certainly contemplates that the courts may look through sometimes opaque text to the purposes behind it in determining constitutional norms - What distinguishes the exponent of the pure interpretive model is his insistence that the only norms used in constitutional adjudication must be those inferable from the text - That the Constitution must not be seen as licensing courts to articulate and apply contemporary norms not demonstrably expressed or implied by the framers" ²⁰

¹⁸ The Problem of Legitimacy by Perry pp 10 - 11; Also see The American Journal of Comparative Law Vol.34 (Supplement 1986) p. 400.

¹⁹ The term 'originalists' is chosen by Dean Benett to describe those who argue that constitutional language, understood in the light of the substantive intentions or values behind its enactment is the sole proper source for constitutional interpretation, as the word "better captures the static pretense of the approach that seems to me to be its principal defect".

²⁰ See "Do we have an Unwritten Constitution?" Gray 27 Stan L Rev 703 (1975). It is believed that this article of Grey perhaps gave birth to the use of terms 'Interpretivist and non-interpretivist' but he also has stated later on that these labels "distort the debate" and regretting his mistake, preferred to use less misleading labels "textualists" and "Supplementers" respectively for interpretivist and non-interpretivist; Also see "The Constitution as Scripture" by Grey 37 Stan L. Rev 1 (1984).
Therefore, the fundamental principle of interpretivist theory is that effect must be given to the intent of the framers of the constitutional law & of the people adopting it and this intent is to be gathered from both the letter & spirit of the document.21

This theory was enunciated openly by Chief Justice Roger Taney of the U.S. Supreme Court in the land mark case of Dred Scott V. Sanford when he observed.

"No one, we presume, supposes that any change in public opinion or feeling, in relation to the unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. it is not only the same in words, but the same in meaning, and delegates the same power to the government, and reserves and secures the same rights and privileges to the citizens and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day"22


22. Dred Scott V. Sanford 60 U.S. (19 How) 393 (1957) at 426. Held, that Negroes have no right to sue in the federal courts as at the time when the Constitution of the U.S. was adopted, Negroes were regarded as slaves not as citizens.
Justice Sutherland was also advocate of interpretivist theory of constitutional interpretation. To quote Mr. Justice Sutherland:

"The meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written -- is to rob that instrument of the essential element which continues it in force as the people have made it until they and not their official agents, have made it otherwise". 23

Justice Hugo Black has also been the great proponent of a "protestant and Constitution who denounced legitimacy of going beyond constitutional text & was unwilling to recognize the shifting needs of society as a warrant for supplementing or overriding the bare bones of a sacred text." 24

Christopher Wolfe, McDowell & John Agresto believe that the court should obey the Constitution to preserve the legitimacy of the legal & political system. To quote Wolfe:

23. West Coast Hotel Co. v. Parrish 300 U.S. 379 (1937) at 402-03 (Majority sustained state regulation relating to women’s wages & this protected their economic interests);

Home Building and Loan Association v. Balisdell 290 U.S. 398 (1934) at 453-55, Justice Sutherland in his dissent, took into account the views of the framers and pointed out that the contract clause was inserted into the Constitution at a time of emergency for the very purpose of preventing the type of legislation that was passed in Minnesota in 1933 i.e. Minnesota Mortgage Mortatorium Act, 1933; Also see Justice Brennan opinion in Newyork Times v. Sullivan 376 U.S. 254 (1964), wherein he also cited Jefferson and other founders views. See for detail of case Ch. V. Infra.

24. Justice Black’s textualism manifested itself in regard to the ‘Right to Privacy’ He rejected the existence of such a constitutional right in his dissent in Griswold v. Connecticut 381 U.S. 479 (1966). See for detail Ch. V infra; Also see Constitutional Faith by Levinson, Sanford (1988) pp 33-34.
"-- In the final analysis, I would rather reject the broad relativism itself, believing that the founders embodied sound political principles in the Constitution, which can be interpreted", and that what the Constitution does not provide rules for should be left to the workings of a democratic process soundly designed by those founders (trusting to amendment to rectify any serious infirmities). Adherence to these principles requires neither scholasticism -- nor linguistic naivete, but merely, in my view, fidelity to the political wisdom of the founders.25

Walter Berns also supports original intention of the founders & believes that "they formulated a correct substantive vision of republican government, one which it is suicidal to abandon."26

Robert Bork, Raoul Berger, Philip Kurland, Gary McDowell are other prominent preservatives.27 Justice Robert Bork argues that: "The court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has a valid theory, derived from the Constitution" & without such a theory, a court only imposes its own value choices. And this valid theory, says Bork, is only provided by the original intent which is

25. Mr. Wolfe regrets that we 'Americans' have lost "golden age" of Sound interpretive law making that existed before the civil war. Quoted in Contemporary Constitutional Law: The Supreme Court and the Art of Politics by Carter, Leigh (1985) p 45.


27. Carter has preferred to label 'originalists' or 'Interpretivists' as 'preservatives' as he believes that the object of this school is to preserve a past that it imagines whereas both the term 'interpretivism' or 'originalism' are misleading. Whereas 'Interpretivism' takes for granted the proposition that the justices could interpret if they wished. It criticizes them for failing to choose this option, which misleads because the justices do not have this choice in the first place and 'originalism' is misleading firstly it implies that constitutional clauses had original meanings with reference to contemporary constitutional issues and secondly, Carter wrongly associates originality with 'creativity' which he thinks is condemned by originalists. So, he feels it right to call this school as 'preservative' as it insists that preserving an imagined past is the only objective, the court can pursue. Ibid pp 41-42.
neutral in the derivation, definition, & applications of constitutional principle".  
This way for preservatives, the framers designed an ideal state in which the courts play a limited role. Judges must follow Constitution according to its terms which command that constitutional changes come by democratic means, & not through government by judiciary. Jefferson, also pledged to administer the Constitution "according to the safe & honest meaning contemplated by the plain understanding of the people at the time of its adoption --- a meaning to be found in the explanations of those who advocated it".  
Infact, in America, it has been the practice of the court since the beginning to take into account the intention of the Framers. To quote Justice Holmes: "an amendment should be read in "a sense most obvious to the common understanding at the time of its adoption".  

28. See "Neutral Principles And some First Amendment Problems" by Bork, Robert 47 Indian Law Journal (1971) p 3. To quote Bork "---The Judge must stick close to the text and the history, and their fair implications, and not construe new rights. -- Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the constitution --" Quoted by Carter Ibid p. 97 (emphasis added).  
30. Eisner v. Macomber 252 U.S. 189, 3220 (1920) (Mr. Homer's dissent); Chief Justice Marshall also spoke for 'original intention' through his various rulings. For instance, in Osborn v. Bank of the United States, he said that "Judicial Power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature" 22 U.S. (9 wheat) 738, 866 (1824); Also see Ogden v. Saunders 25 U.S. (12 Wheat) 213, 332 (1827) (Marshall's Dissent); Gibbons v. Ogden 22 U.S. (9 Wheat) 1, 190 (1824) wherein Justice Gray also said "All questions of Constitutional construction are largely a historical question".
Chief Justice Warren East Burger, who was appointed by President Nixon, was strict constructionist as desired by Nixon who wanted to fill the Court with conservative Justices and for this, he appointed three other conservative judges namely Blackman, Pound Jr & the present Chief Justice of the U.S. Supreme Court William H. Rehnquist. Mr. Justice Rehnquist was appointed by other former conservative President of America, Mr. Reagan, whose ultimate ambition was to pull the apex court away from its slight liberal inclination. And loyalty to the "original intent" of the founders, is the cornerstone of the present Chief Justice Mr. Rehnquist’s constitutional interpretation as it is reflected in his judicial decisions already on record.\textsuperscript{31}

The study of the history of the framing as well as working of the Constitution of India reflects that there have been supporters of Interpretivist or originalist theory of interpretation of constitutional provisions in this country.

The framers of the Constitution never intended that the Indian Supreme Court should take part in policy making for the governance of the country. It was not intended that this institution would ever be in the centre of national activity, or concerned with government function. To quote Dr. B.R. Ambedkar:

"The Judiciary decides cases in which the government has, if at all remotest interest, in fact no interest at all. The judiciary is engaged in deciding the issues between the citizens and very rarely between citizens and the Government".\textsuperscript{32}


Indian Constitution was not written on a "blank slate" rather it has its basis in the Government of India Act (G.O.I.) 1935 & our apex court has accepted this fact while invoking this Act of 1935 in interpreting the present constitutional provisions in the case of M.P.V. Sundaramier & Co. v. State of A.P. - 33

The decisions in relation to fundamental rights given by the Indian Supreme Court especially in the first two decades reflect the leaning of judges of the court towards literal or interpretivist theory of interpretation. 34

In Keshav Madhav Menon Case the apex court through Chief Justice Kania held "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" 35

In the landmark case of Keshavananda Bharati v. State of Kerala popularly known as Fundamental Rights case, the judges led by Chief Justice Sikri regarded the amending power as power within the Constitution & subject to limitations of basic structure of the Constitution. Chief Justice Sikri held that the preamble is an integral part of the Constitution & so "the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the preamble", as the preamble bore the mark of deep deliberation and that not only the

33. M.P.V. Sundramier & Co. v. A.P. AIR 1958 SC 408 (Per Justice Venkatarama Aiyar)

34. A.K. Gopalan v. State of Madras AIR 1950 SC 27; Shankar Prasad case AIR 1951 SC 458; Sajjan Singh’s case AIR 1965 SC 845; Golak Nath case AIR 1967 SC 1643 etc. See for detail infra Ch. VI also. See Supra Ch. II also.

Constitution was framed in the light of the preamble but the Preamble was ultimately settled in the light of the Constitution". 

In this case the majority of judges reaffirmed the correctness of the basic principle laid down by Privy council in 1878 in the case of **R.V. Burah**, by Lord Selborne who observed 

"The Indian legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers.---- If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any court of Justice to inquire further, or to enlarge constructively those conditions and restriction".

Another significant case where the apex court opted for literal approach is **Sankalchad's** case where the question involved was whether Article 222 should be so construed as to permit transfer of judge from one high court to another only with his consent. The issue was whether the word 'transfer' in Article 222 could be interpreted only to mean 'consensual' transfer and not compulsory transfer. Majority of Judges (3:2) including then Mr.Justice Mr. Chandrachud (later on C.J) applied the literal approach while construing Article 222 & even extolled this literal theory & upheld the validity of Article 222 (1) saying the judge of a High Court could be transferred to another High Court without his consent.

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36. **Keshavananda Bharati v. State of Kerala** AIR 1973 SC 1461 See Para 92, 102. For detail see infra & Supra Ch. II.


38. **U.O.I. v. SANKAL CHAND SETH** AIR 1977 SC 2328. In this case, the constitutionality of a Presidential notification whereby Justice Sankal Chand was transferred from Gujarat High Court to Andhra High Court without his consent, was challenged on the ground of being against public interest.
But in their dissent Justices Bhagwati & Untawalia said that a judge of a high court could not be transferred without his consent & Justice Bhagwati strongly decried the literal interpretation of the Constitution but did support the taking into account of intention of the framers while considering constitutional problem. To quote Justice Bhagwati:

"----The significance of a constitutional problem is vital, not formal: it has to be gathered not simply by taking the words and a dictionary, but by considering the purpose and intendment of the framers: as gathered from the context and the setting in which the words occur. -- The process of constitutional interpretation is in the ultimate analysis one of reading values into its clauses."

The interpretive theory has been subject to various criticism. One of the main charges against the strict construction approach is that it is very difficult to ascertain the true intentions of the framers that is whose intent should be taken into account. Since the Constitution is handiwork of number of people, intentions are highly subjective & decidedly personal so not clear. And that is why Pritchett calls "intentions of the framers" as rhetorical device employed by partisam to read their own policy preferences into the Constitution.40

39. Ibid at p 2362 (emphasis added) In this case another liberal judge justice Iyer also adopted a literal approach while interpreting Article 222.

But in 1993 in historic decision of S.C. Advocate on Record v. U.O.I. (1993) 4 S.C.C. 441, the apex court not only overruled the ruling of Judges Transfer case but also held that in case of transfer of High Court Judge the opinion of the C.J.I. is determinative factor but it did held that the consent of the transferred judge or Chief Justice of that concerned High Court is not required for either the fresh or any subsequent transfer from the High Court to another. Any transfer made on the recommendation of the C.J.I. is not deemed to be punitive, and is not justiciable on any ground.

40. Both Murphy and Pritchett say that out of 55 delegates who framed American Constitution, some took little or no part in the proceedings and some propositions on which they voted were carried by narrow majorities. What was said at convention, and the reasons of given for votes cast, is known almost entirely through James Madison’s writings. See Supranote 05 pp 31-41; Supranote 16 p 40.
Rajeev Dhavan, says that one of the drawbacks of literal theory is that it may cause hardships or absurdities. There are various types of hardships that can be viewed from an individual, social, political, economic point of view, and this, says Dhavan, gives judges a considerable leeway to use the hardship rule. 41

Another allegation against literal approach is that the framers intentions cannot be known because they could not foresee the changed circumstances of our time. And further, even if we could know the intention of the framers why should we be bound by it? Walton H. Hamilton has said "It is a little presumptions for one generation through a constitution, to impose its will on posterity. Posterity has its own problems, and to deal with them adequately, it need freedom of action, unhampered by the dead hand of the past." 42

But Justice Robert Bork of the U.S. Supreme Court, counters the allegation by saying that 'the argument proves too much. If it were true, the judge would be left without any law to apply, and there would be no basis for judicial review." 43

Despite the criticism the advocates of original intent feel that the criticism, the framers will always remain the best possible guides to discovering the ends and purposes of the today's constitutional order- Any evidence pertaining to what the

41. In support of this criticism, Dhavan quotes Justice J.L. Kapur in Empress Mills case wherein he observed that any construction which lead to absurdity is against the design of the legislature and is to be avoided. See Supranote 09 pp 123-124.

42. Carter says "If the preservatives seek a world in which the justices reason like expert historians and thus restore us to our past, they buy a product that does not exist. Supranote 25 at p 55.

43. See Supranote 15 p 07.
Framers sought to accomplish can only enhance our appreciation of what the Constitution means and what purposes it was designed to achieve and therefore ought to weigh heavily in our overall understanding of the Constitution. Another criticism levelled against Interpretivist theory is that to follow it is to negate a widely accepted understanding of common law reasoning. Speaking about that all legal interpretations of intent are speculative and inconclusive, William Anderson wrote in 1955:

"Everyman, being a different individual, unavoidably has intentions that are somewhat different from those of someone else. Such a thing as a solid, unified intention of all the members in any group would be hard if not impossible to find. I simply am unable to imagine what types and quantities of records would be needed to clinch and important point in the several major problems that arise. Neither can I imagine how any known method of psychoanalysis, content analysis, or plain crystal ball gazing applied to such records or to the people who left them could give thoroughly reliable and irrefutable answers concerning the intentions of these later framers. The transition that needs to be made from the enduring and objective facts of the written words used to the fleeting, largely unexpected, and subjective facts of the intentions of framers who passed away many years ago is beyond human capacity to make."44

Another drawback of strict construction theory is that "it assumes that judges can completely ignore and set aside their own predilections. Countering this, Rajeev Dhavan says that: "it is hardly necessary to emphasize that judges are a product of their own professional and social environment. Being judges, they cannot express their prejudices directly. The views of judges are introduced gradually over the years. They become part of a system of interpretation."45

45. Supranote 09 p 12.
It is also alleged that literal theory of which plain-meaning rule & originalism are parts is essentially backward in nature as it makes the society prisoner of its past by emphasising upon having fixed meaning that can be changed only by constitutional amendment & both, deny the possibility that evolution in moral standards or political ideology can be given effect in the constitution without changing its language.  

Similarly this approach can not be relied on while interpreting fundamental human rights in the present rapidly changing society.

The above discussion shows that the textualist theory of constitutional interpretation is full of drawbacks as it does not take into account the complexities, intricacies involved in the interpretation of Constitutional provisions.


46. Supranote 16, PP 41; Also see Supranote 5 pp 32-33. Pritchett in the Footnote mentions charles Black's Jr proposal that in place of textual method of constitutional interpretation, constitutional law should use "the method of reasoning from structure and relation". This will become more evident when we'll examine Right to freedom and its deviations in America and India. Ch. V & VI infra.

47. See The Bill of Rights And the Politics of Interpretation by Peck, Robert (1992) p 163.

48. Carter says if the preservatives seek a world in which the justices reason like expert historians and thus restore us to our past, they buy a product that does not exist. The position depends upon a philosophical system that would demonstrate that the Holy Bible could have only one meaning binding for all time those who profess commitment to it ---" Supranote 25 p 55.
To quote Justice Learned Hand:

"No judges have ever carried on literally in that spirit, and they would not be long tolerated if they did. Nobody would in fact condemn the surgeon who bled a man in the street to cure him, because there was a law against drawing blood in the streets. Everyone would say that the law was only meant to prevent street fighting, and was not intended to cover such a case, that is, that the government which passed that law, although literally it used words which covered the case, did not in fact forbid necessary assistance to sick people"—49

LOGICAL REASONING

This approach has been suggested by some as an alternative to literal theory of interpretation. This method is associated with Chief Justice Marshall who used it extensively in the landmark Marbury's case in 1803. It is exemplified in the syllogism, a formal argument comprising major premise, a minor premise, and a conclusion. For instance, the major premise proposes that "A law repugnant to the Constitution void" The minor premise contains an assertion that "This particular law is repugnant to the Constitution". From these two major and minor premises, the conclusion logically follows that "This particular law is void"—50

This example represents the gist of Chief Justice Marshall's reasoning, which formally established the Court's power of judicial review. He simply took help of logic and not relied upon existing evidence or opinion. To quote Marshall:

"It seems only necessary to recognize certain principles supposed to have been long and well-established to decide it"—51 So the major Principle is that the Constitution is the paramount law of the land. The Supreme Court is to uphold the Constitution. Hence, logically the conclusion follows that when an act of

49. Supranote 07 Hand, Learned p 83.
50. Marbury v. Madison 1 Cr 137 (1803); Also see Supranote 16 p 43.
51. Ibid.
Congress conflicts with the superior law, the apex court must declare such act unconstitutional & void.

This way, Rhode & Spade states, logical analysis exists independently of factual or empirical analysis. Almost any conclusion can be based on logic & there is no necessary correlation between logic and a reasonable decision. Logical reasoning may be unjust or even absurd, but so long as the argument conforms to the requirements of proper inference, a court's decision may not be impugned or illogical. This way, logical analysis helps judges to make decisions compatibly with their personal policy, preferences and at the same time causing their opinions and decisions to show a semblance of order and a quality of connectedness.52

But even logical analysis approach is not fool proof for interpreting constitutional provisions. Critics say that assuming the validity of the major premises, the soundness of the conclusion rests on whether the minor premise is factually true. And logic cannot determine whether a particular law is repugnant to the Constitution. That issue is subject to informed opinion about the purposes for which the Constitution was made, and to the judgement of whether the law in question is consistent with those ends or purposes. This way logical analysis is to be supplemented with clear understanding of great objects of the Constitution. To quote Justice Holmes: "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 unconcious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed"53

52. Supranote 16 p 43.
53. Supranote 05 p 34.
Even Chief Justice Marshall was quite aware of insufficiency of logical analysis approach, & finally he also based his Constitutional interpretation on his understanding of the ends/objects which Constitution was intended to serve.54

LIBERAL THEORY/NON-INTERPRETIVIST APPROACH/ADAPTIVE APPROACH

Though the literal theory or the so-called interpretivist approach or textualist or originalist theory and application of logical thinking method play a useful part in interpretation of the Constitution yet they solely or jointly do not supply the key to Constitutional construction. As Justice Holmes rightly calls 'the life of law as an experience;' it becomes necessary to consider Constitution as a flexible political document than a fixed legal document that has to be interpreted keeping in account the current necessities, changing conditions and the lesons of expereince. Toquote Holmes "It was enough for them to realize that they had created an organism; it has taken a century and cest their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago".55

54. McCulloch v. Maryland 4 Wheat 316 (1819). C.J. Marshall observed that,"the nature of the Constitution demands "that only its great outlines should be marked, its important objects designated". As for the "minor ingredients" that comprise these objects, he was convinced that they could be "deduced from the nature of the objects themselves".

55. Justice Holmes further observed: "The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions, transplanted from English soil --- when we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realise that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters" Missouri v. Holland 252 U.S. 416 (1920); Earlier in 1917 Justice Holmes held : "A word is not a crystal transparent and
In this way for liberalists, constitutional provisions should always receive a broader and more liberal interpretation as Constitution is a basic instrument that has been intended to last for all time. The extent and ambit of powers of the government should be so construed as to include new developments of particular matters as they arise from time to time. This theory recognises right of each generation to adapt the Constitution to its own needs, to the extent that such adaptation are reconciliable with the language of the Constitution.56

This theory is also called as non-interpretivism that shows that "Courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the documents", says Ely. 57

This way, Ely giving a new definition of interpretivism, says we interpret neither text nor history but rather what the document, taken as a whole would have to mean in order to be true to itself. He asserted that the text and the intent of the framers objectively interpreted logically required greater judicial activism in protection of individual rights and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used" Towne v. Eisner 245 U.S. 418 at p. 425 (245); Also see Keshvananda Bharati case Supra note 36; U.O.I. v. Sankal Chand Supranote 38 etc.

56. Supranote 05 pp 35-36; Supranote 16 pp 44. Rajeev Dhavan prefers to call the approach that judges make law as the 'Institutional Theory' Supranote 09 p 303.

57. See Democracy And Distrust by Ely, John Hart 1 (1980) He made the U.S. Supreme Court’s famous Carolene Products Footnote (1938) of Chief Justice Stone and his clerk Lusky, starting point of his analysis and made an attempt to justify non-interpretivism in American context in the limited areas of First Amendment (Freedom of expression) & Equal protection pp 74-87.
liberties than of commercial interests. Ely asserts that First
Amendment rights whether constitutionalised by the framers or not
"must nonetheless be protected (by the judiciary) strenuously so,
because they are critical to the functioning of an open and
effective democratic process".58

Ely calls non-interpretivist approach as "participational
review", that aimed at participation by persons in the political
processes - and it does thus by "clearing the channels of
political change on the one hand, and by correcting certain kinds
of discrimination against minorities on the other".59

Though Ely offends interpretivist by claiming that the
framers must have intended the Court to have power to expand or
balloon constitutional language yet he does insist on sticking to
some version of interpretivism.60

Like Ely, Jeese Choper argues that the court must
exercise its power to protect those rights "not adequately
represented in the political process" because "Custodianship---
should be assigned to a governing body that is insulated from
political responsibility" (i) and because "almost by definition

58. Ibid p 106.

59. Ibid p 94 Ely states that the courts act to ensure that
the persons belonging to certain minorities are not
denied, "the opportunity to participate in the
accommodation those (political processes have reached" and
"access to the --- bounty of representative government is
available to them".

60. See for Ely's criticism of ROE case Ch. V infra. Also see
Supranote 25 pp 87-89.
Unequivocal non-interpretive constitutional lawmaking is endorsed by scholars like Miller and Michael Perry. Stressing the functional justification of non-interpretivist theory, Perry observes:

"Non-interpretive review has served an important, even indispensable function. It has enabled us, as a people, to keep faith with two of the most basic aspects of our collective self-understanding, our democrative understanding of ourselves as a people committed to policy making that is subject to control by electorally accountable persons, and our understanding of ourselves as a people committed to struggle incessantly to see beyond, and then to live beyond the imperfections of whatever happens at the moment to be the established moral convention" 62

This way non-interpretivist theory judges are required to shed passive or deferential approach and have to use their power actively, creatively for facilitating "the moral re-evaluation and possible moral growth" says Perry. 63

61. *Judicial Review And the National Political process* by Choper, Jesse (1980) pp 2, 68-69. Criticising these sentiments as false, Agresto calls, them nothing more than an undisguised brief for judicial oligarch. Being preservatist, Agresto says that 'to state categorically that "the Supreme Court is the most effective guarantor of interest of the unpopular and unrepresented precisely because it is the most politically isolated judicial body" is to have a rather playfal attitude not only toward all the standard canons of logic but also toward the historical record itself. He emphasises restoration of effective checks and balances through a constitutional doctrine in which judicial decisions bind only the parties to that decision and the judiciary itself. See *The Supreme Court And Constitutional Democracy* by Agresto, John (1986) (Preface 13-14).


63. Ibid, All three scholars Ely, Choper and Perry, despite their differences, have reached similar conclusions about the role of the court, that is, for all of them the court should protect roughly those liberties that have been advocated by Warren court. Supra note 25 p 95.
In brief, non-interpretivists concentrate on discovering the ‘fundamental values’, of the Constitution. In this the Court has to play policy-making role for which judges have to be active and dynamic under this method judges can have discretion and their role is not to make law but to see how & why they should make it and this way judges are rested with the responsibility of making, amending reforming law to suit the changing needs of the society. Hence, when in a given situation, judge faced with certain alternative approaches to interpret a Constitutional provision he can "exercise his own predisposition, values and policies which may be different from those of the framers and acting this may he plays the role of law-maker."

Non-Interpretivist view that the true object of constitutional interpretation is to give full, liberal constitution to the language, showing fidelity to the spirit and purpose of the provision has been found favor both in American as well as Indian Courts.

In America, Chief Justic Marshall advocated adaptive theory of interpretation in the celebrated case of *Mc Culloch V Maryland* wherein he declared that the American Constitution was "intended to endure for ages to come and, consequently, to be adapted to the various crisis of human affairs."

But the Courts have to balance public interest and individual interest. See supra Note 06 Jain, M.P. P 833.

"A constitutional provision should receive a fair and liberal construction both in letter and spirit, and its interpretation should not be too literal. Supranote 10 pp 249-250

Supranote 54.
This was followed by Chief Justice Hughes in *Home Building And Loan Association v. Blairdell*, where while repudiating Mr. Justice Sutherland’s theory of historical interpretation, he said:

"-------- If by the statement that what the provision of the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation in which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation".67

Normally judges of American Supreme Court, including Mr. Justice Sutherland have agreed that a constitutional clause, as interpreted inconsonance with its original understanding, must often be applied to new conditions and new fact situations which would have been unfamiliar to its framers. Chief Justice Hughes speaking in a libertarian tone said once. "we are under a Constitution but the Constitution is what the judges say it is".68

Speaking in the same tone President Roosevelt observed:

"----Chief Law makers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental they give direction to all law making".69

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68. See *The American Presidency* by Laski, Harold J pp 68. But Mr. Justice Hughes is not liberal judge in the right sense rather he was a "middle of the roader". Jethro Brown also says that real law, is not found anywhere except in the judgement of a court. Quoted in Cardozo, Benjamin in *The Nature of Judicial Process* (1921) p 126.

69. Supranote 31 p 218.
Warren Court adopted egalitarian goal of abolishing distinction of class & wealth in American Society. The well known School Desegregation Case is one of the instances that illustrates the trend. In this case, delivering the opinion of the Court Chief Justice Warren considered the effect of segregation on public education & called education as perhaps the most important function of state and local governments which should be made available to all on equal terms without distinction of race. To quote "---in the field of public education the doctrine of "Separate but equal has no place".73

But reforms in the field of criminal procedure undertaken by the Warren court benefitted lower-class people, in particular, blacks. Now the Court directed states to conduct criminal trials under the guarantees of fair procedure that applied in federal Courts. This involved the extension of the guarantees of the fourth, fifth and sixth Amendments as limitations upon the states through the 'due process' clause of the Fourteenth Amendment.74

By the end of Warren era, the Supreme Court had effectively nationalised the Bill of rights, effecting a major revolution in federal-state relations. All the criminal procedure decisions, though technically involved the due process clause of the fourteenth Amendment, were aimed at promoting equal protection of the law in a "substantive sense by removing

74. Amendment IV protects people against unreasonable searches & seizure.
   Amendment V provides protection against self incrimination, Double Jeopardy.
   Amendment VI guarantees right to Speedy and Public Trial, right to be informed of grounds of arrest, right to counsel etc.
distinction of class and wealth in the administration of Justice. Warren court's criminal law reforms considerably changed the Constitutional law, of the United States. 75

Similarly the Warren court's decisions in the field of Freedom of speech & expression as guaranted by the First Amendment right can be seen as part of its pursuit of libertarianism which, says Rhode & Spade, has protected the economic interests of a journalistic community, as well as strengthened the economic position of the great corporation that control the media. It also gave constitutional foundation to Right to Privacy through its libertarian sight.76

The Warren court also opened up state legislative apportionment practices to judicial review and control through decision of Baker V. Carr. & also stirred up a storm by declaring constitutional religious observances in the public schools in Engel's case77

In brief, it can be said that epitomizing modern Liberal activism, the Warren court stimulated a revival of judicial restraint theory among scholarly critics & public lawyers for defenders of the Warren Court, reforms undertaken in diverse areas like criminal procedure, racial discrimination, apportionment, free spech etc. could not have been possible by interpretivist

75. Important Decisions are MappvOhio; Gideon v. Wainwright; Miranda v. Arizona etc. See for detail Ch. V Infra.

76. See for detail Ch. V Infra.

approach but only by opting liberal attitude of extraordinary exercise of judicial power, making the Court responsive to the nation as a whole & not to a single particular entity.\textsuperscript{78}

The Warren Court also achieved a remarkable degree of success in decreeing affirmative action programmes for the benefit of minorities and other socially or economically disadvantaged people through the avenues of public law.

In can be said that ever since the Warren era, that U.S. Supreme Court has played a major and unprecedented role in the formulation of human rights. To quote Michael Perry:

"--- Most first amendment doctrine regarding political and religious liberty; most equal protection doctrine regarding social, sexual, and other forms of discrimination, all due process doctrine regarding rights pertaining to contraception, abortion, and sexual behaviour, and various constitutional doctrines the rights of inmates of prisons and mental health facilities -- this is far from exhaustive --- reflect not value judgements or interpretations or application of value judgements, made & embodied in the Constitution by the framers, but value, judgements made and enforced by the Courts against other, electorally accountable branches of government. Thus, in America the status of constitutional human rights is almost wholly a function, not of constitutional interpretation, but of constitutional policy making by the Supreme Court". \textsuperscript{79}

**INDIAN POSITION:**

In India, various judges of the apex court, jurist & legal scholars, have expressed their awareness and need for the functional role of the Courts in interpreting various Constitutional provisions. There has been all round expansions of the frontiers of judicial activism through adoption of non-interpretivist approach.

\textsuperscript{78} Warren court comprised of liberal justices Warren, Black, Brennan and Douglas. To quote Levy "under Chief Justice warren freedom of expression and association, and racial justice, criminal and political justice became the court's pre-occupation. Supranote 05 p 42; The American Constitution by Kelly & Belz (1965) pp 637, 648-662.

\textsuperscript{79} Supranote 62 p 02.
Ever since the days of Federal Court and Privy Council, there have been decisions reflecting tendency towards liberalist approach. As early as in 1938, Chief Justice Gwyer of Federal court of India observed that:

"... a broad and liberal spirit should inspire those whose duty it is to interpret (the constitution) --- a Constitution of government is a living and organizing thing, which of all instruments has the greatest claim to be construed Utres Magis valeat Qouam Pereat". 80

Though, during the first decade of its functioning, the apex court gradually and cautiously expanded its authority over the executive and legislative wings of the government particularly in matters relating to rights over property and in area of other fundamental freedom, yet it narrowly construed the constitutional provisions conceding power to the legislature & executive. 81

But in the second decade of its functioning, the Supreme Court sought to establish government by judiciary by liberally interpreting the constitutional provisions while pronouncing upon major political, economic and public policies of the government. The Court tried to protect freedom of all classes of people in political-economic matters, and matters concerning governmental activities and tried to prove that constitutional law is not found but made. 82

80. See Central Provinces and Berar Act case (1939) F.C.R. 18 quoted by Seervai, H.M. in Constitutional Law of India (Fourth Ed 1991) Vol. I pp 172 In this case Chief Justice Gwyer quoted Lord Wrights observation that a Constitution must not be construed in a narrow or pedantic manner, and, that "construction most beneficial to the widest possible amplitude of its powers, must be adopted".

81. A.K. Gopalan v. State of Madras AIR 1950 SC 27. Also see Ch. II Supra; Ch. VI infra.

Chief Justice Subba Rao became pioneer in this direction and particularly in the field of human rights, he wanted liberal interpretation. For this he wanted review of Gopalan's judgement where in the apex court had allowed limited scope for the exercise of fundamental rights & not accepted American due process clause of America which has wider scope to judicial review. Mr. Justice Subba Rao, through his decision of Kochuni & Bank Nationalisation case widened the scope of judicial review.

In Privy Purses Case, the Court held that Privy purses were property & could not be abolished without compensation. Justice Hegde observed:

"--- If the Constitution or any part of it has now become out of tune with the present day society of ours, appropriate steps may be taken to alter the Constitution. It is no virtue to uphold the Constitution when it suits us. What is important may necessary, is to uphold it even when it is inconvenient to do so". 

This way, the Court successfully assumed the role of judicial sovereignty in all political, economic and moral causes in the country.

R.C. Cooper v. U.O.I. A.I.R. 1970 SC 564 Here the court declared that "The Constitution guarantees a right to compensation --- an equivalent in money of property compulsorily acquired. This is the basic guarantee". Infact, efforts in the field of Right to adequate compensation started with Bela Banerjee case AIR 1953 SC 242.
85. Madhav Rao Scindia v. U.O.I. AIR 1971 SC 530. See Supra Ch. II also. (emphasis added)
By evolving broader tests of ultravires, public order, vagueness of ground, unreasonable delay in supply of grounds of detention, the Court intervened with a large no of detention orders and restored liberty to the citizens.86

The landmark decision of this decade wherein the apex Court became the law-maker of the country is of Golaknath case where in, Court headed by Chief Justice Subba Rao, by 6 to 5 majority, overruled its earlier decisions by saying that parliament has no power to amend fundamental rights of the people provided under the Constitution as power of Parliament to amend the Constitution is derived from Arts 245, 246 and 248 and not from Article 368 which only deals with procedure. Amendment is "law" within the meaning of Art 13 (2) and, therefore, if it takes away or abridges the fundamental rights, it is void. On this basis, the Court declared 17th Amend of the Constitution void.87

Giving reply to the submission that if the fundamental rights could not be amended, the only method of change of the Constitution would be by revolution, C.J. Subba Rao said:

86. See Rameshwar Case (1964); Ram Manohar Lohia Case (1966) P. Mukharjee (1970) etc. In this decade of 1960-1970; the Court allowed appeals or petition in about 35 out of 47 cases brought before it challenging orders of detention.

87. I.C. Golaknath v. State of Punjab AIR 1967 SC 1643. The apex court propounded political philosphy for the first time. It overruled its earlier decision of Shankari Prasad V. U.O.I. AIR 1951 SC 408, Sajjan Singh v. State of Rajasthan AIR 1965 SC 845. It is said that the reason which impelled the majority to oppose the power of amendment was their anxiety about the erosion of the right to property and the fear of a similar erosion of other fundamental rights. also see Ch. II Supra.
"----- Indeed a Constitution is only permanent and not eternal. There is nothing to choose between destruction by amendment or by revolution. The former is brought about by totalitarian rule which can not brook constitutional checks and the other by the discontentment brought about by misrule. Nor are we impressed by the argument that if the power of amendment is not all comprehensive there will be no way to change the structure of our Constitution if such a contingency arises, the residue power of the Parliament may be relied upon to call for a Constituent Assembly for making a new Constitution or radically changing it-----". 88

Another liberal judge of this period for whom law was a mean & tool for the fulfilment of the socio-economic needs of the society is, Mr. Justice Gajendragadkar, known for his ‘social engineering’. His reformist attitude is reflected in his opinion in the area of Agrarian reforms like his majority judgement in Purushotamdas case. 89 His judicial creativity is fully reflected in the historic decision of M.R. Balaji case dealing with reservation of seats in educational institution for the candidates of backward classes in the state of Mysore.90

88. Ibid Golak Nath. Even Justice Wanchoo in his leading minority judgement said "--- If there has to be a choice between giving an interpretation to Article 368, which would make our Constitution rigid and giving an interpretation which would make it flexible, we would prefer to make it flexible so that it may endure for a long period of time and may, if necessary, be amended from time to time in accordance with the progress in the ideas of people for whom it is meant.----".

89. Purushotham Das v. State of Kerala AIR 1962 SC 694 Here the Court had to interpret Article 31(1) (a) & (2) along with effect of presidential assent to Kerala Agrarian Relation Act 1960, after the dissolution of Kerala Assembly. This Act imposed a ceiling on lands held by individual proprietors, taking over the surplus, for compensation, to be distributed to actual tillers.

The Liberalist approach of Mr. Gajendragadkar becomes apparent from his following observation:

"The tack of construing important constitutional provisions -- cannot always be accomplished by treating the said problem as a mere exercise in grammar. In interpreting such a provision, it is essential to bear in mind the political or the economic philosophy underlying the provisions in question, and that would necessary involve the adoption of a liberal and not a literal and mechanical approach to the problem". 91

Third decade of the functioning of the Court witnessed several shaky judgements like decision in Fundamental Rights case, the case known as constitutional jurisprudence of the nation, where the largest ever bench of 13 judge propounded the much controversial and vague doctrine of Basic Structure. 92

The first Five years of the third decade also witnessed the supersession of Chief Justice of India, Mrs. Gandhi’s Election Case, and finally declaration of Internal Emergency in the country, in a way it was the most darkest period in politic legal history of country. 93 During this period, the apex Court of India produced several liberal judges committed to goal oriented socialism & reformism, out of whom, name of Justice P.N. Bhagwati and Justice Krishna Iyer are the prominentones. 94

91. Quoted by Dhavan, Rajeev Supranote 09 p 157.
92. Supra note 36 for details. See infra.
93. Mr. A.N. Ray was appointed C.J.I. in preference to his three senior colleagues and this act was denounced by everyone as it affected independence of Judiciary. Again in 1978, Mr. Justice Beg was appointed CJI superseeding Mr. Justice H.R. Khanna; Indira Nehru Gandhi V. Raj Narain AIR 1975 SC 299 See Ch. II.Supra.
94. Mr. Justice Y.V. Chandrachud who preceeded Justice Bhagwati as CJI (1978-85) the longest serving CJI, was known controversial for his political commitments. He along with Justice Bhagwati has been criticised for their emergency period bad judgement in popular Habeas Corpus case (A.D.M. Jabalpur V. Shukla AIR 1976 SC 1207) Still Justice Chandrachud can be categorised as a liberal judge as reflected from his various rulings like Fertiliser Corp. Kampar Union AIR 1981 SC 344; Bearer Bond Case AIR 1981 SC 2138; Frances Coralie Mullion V. U.T. Delhi AIR 1981 SC 746 etc. Ch.II Supra & ch. VI infra.
For Justice Bhagwati creativeness and activism are essential requirement of judicial law making. Disapproving ‘higher fieldily, to law’ or ‘bureauratic tradition of interpretation’, Justice Bhagwati speaks for goal - oriented social Justice approach, in which judges not only interpret and apply the law but also have the power to create and originate. Calling the process of judging a subjective process to some extent, Justice Bhagwati says:

"When a judge is called upon to interpret the law there are quite often competing values clamouring for acceptance by him and the choice of values is guided by the social philosophy of the judge. I have always regarded the process of judging as a subjective process to a limited extent, because the social philosophy of the judge, his attitude and approach, his in-built predictions and prejudices, his beliefs and convictions often influence his decision making process. And this is all the more so when the judge is interpreting an organic document like the Constitution"  

Like Michael Perry, Justice Bhagwati also believes that for moral development or growth of the society, judges must be assigned creative role to meet the demands & needs of poor masses that is, to achieve the goal of social justice. During his stay in the apex court, Justice Bhagwati, by taking recourse to this goal - oriented approach for achieving social justice, interpreted constitutional provisions in particular with regard to the most of the fundamental rights in such a way that he

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95. "Judicial Interpretation in Constitutional law" by Bhagwati, P.N. 8th Commonwealth Law Conference at p 03.

96. To quote Michael Perry: "Over the time, the practice of non-interpretive review has evolved as a way of remedying what would otherwise be a serious defect in American Government --- The absence of any policy making institution that regularly deals with fundamental political moral problems other than by mechanical reference to established moral conventions" Supranote 62.
converted Right to Equality and Life and Personal liberty into a regime of positive human rights, unknown previously in the Constitutional Interpretation. And in furtherance of 'Social Welfare State' concept, Justice Bhagwati along with Justice Krishna Iyer have used the 'egalitarian' goals of the directive principles to interpret not only the Constitutional provisions but also other statutory and executive actions. For achieving the goal of social justice, Justice Bhagwati institutionalised the so called concept of Public Interest litigation (PIL) or social action, litigation (SAL) as preferred by Prof. Upendra Baxi.

And to achieve it effectively, Justice Bhagwati departed from the traditional rule of 'locus standi' which for him was

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97. **Maneka Gandhi v. U.O.I.** AIR 1978 SC 597 where by taking recourse to juristic activism, Justice Bhagwati innovated not only the idea of post-decisional hearing but also reconciled the concept of natural justice and the exigencies of the administration; **Minerva Mills Ltd.** case AIR 1979 SC 1789 where he included 'Judicial review as part of the basic structure of the constitution; **R.D. Shetty v. Int. Airport Authority of India** AIR 1979 SC 1628. This case tried to regulate government discretion in the conformance of government largess and benefits on the individuals by holding that where an administrative authority has laid down norms or principles on which it would act in its dealing with third parties, the administrative authority cannot be allowed to depart from such principles, **Khatri v. State of Bihar** AIR 1981 SC 928 Justice Bhagwati directed payment of compensation to undertrial prisoner; **Hussainare Khatoon v. State of Bihar** AIR 1979 SC 1360. Right to speedy trial part of Art 21; etc. See for detail Ch. VI infra.

98. **M.M. Pathak v. U.O.I.** AIR 1978 SC 803, 823. While deciding the issue of bonus due to workers, Justice Bhagwati assumed that concept of public purpose must be viewed from the point of view of a modern welfare state dedicated to a socialist pattern of society".

99. "Taking suffering seriously : SAL in the Supreme court of India" by Buxi, Upendra in **Judges And the Judicial Power** (ed) by Rajeev Dhavan, P. Sudarshan & Salamn Khurshid (1985); Also See Ch. II supra for PIL.
the main mode for the poor litigants to have easy access to justice, & within five years of relaxation of this rule the apex court was flooded with a large number of SAL petititons aimed at combating repression & exploitation of weaker section of the society & to ensure the realization of constitutional & legal rights of women, children in jail, bonded labourers, unorganised workers undertrails, convicted prisoners, slumdwellers etc.100

Though Justice Bhagwati’s goal- oriented approach of constitutional interpretation has been hailed generally yet, some criticise it by saying that this approach ‘advances theory not of the text but a theory of how to utilize the process of interpretation to change the law.101 But this criticism is not justified if one properly reads Justice Bhagwati’s philosophy which clearly suggests that judicial creativity must be inspired by social philosophy of the Constitution alone. To quote:

"----- The task and function of the judges is not just to mechanically follow the rules laid down by the legislature but to reconcile them to the wider objectives of Justice. Fortunately these wider objectives of justice have been encapsulated in the constitutions ---- Obviously, therefore, Constitutional interpretation play, a very vital role in the discharge of the judicial function --- constitutional expectations from the judges may vary from country to country though in my opinion there must always be a common denominator which must inspire the judicial function to correlate constitutional interpretation to the demands of social justice"102

100. See (Prof.) U. Buxi v. State of U.P. (1983) SCC 308. Case where Justice Bhagwati entertained a letter addressed by two law professors, Prof. Buxi & Prof. Lotika Sarkar) on behalf of the inmates of Agra Protective home which led to passing of orders requiring state to take various steps for improving conditions of the Home. For Prof. Buxi, Justice Bhagwati is the originater of this so-called epistolary jurisdiction. For Justice Bhagwati’s Judicial activism cases. See Ch. VI Infra.


102. Supranote 95.
Alike Justice Bhagwati, Justice Krishna Iyer's reformism particularly in the field of Prison jurisprudence brought a fresh breeze of extrovertive compassion & activism in the apex court, expanding the court's constituency. Speaking about the interpretation of statues, Justice Krishna Iyer said:

"By the process of interpretation of statutes, the Court enlivens the law and interstitially legislates. The Court can iron out the creases, fill in the gap, adopting a purposive approach without a naked usurpation of legilative function. Not the literal or grammatical but the functional or socially interpretation --- gives the judges a creative role---"104

Justice Krishna Iyer's unique humanism is reflected in his various judgements like his decision in Sunil Batra's & Charles Sobh Raj case, where condemning solitary confinement as obsolete made of punishment, Justice K. Iyer said that prison power has to bow before judge's Power.

To quote Justice Krishna Iyer:

"Law was not a formal label nor logomachy but a working technique of Justice. Functionally speaking, the Court has distinctive duty to reform prison practices and to inject constitutional consciousness into the system. The great problems of law were the grave crises of life and both could be solved not by literal instruction of printed enactments but by interpretative sensitisation of the heart to the still, sad music of humanity"106

103. Apart from Justices Bhagwati & Iyer, Justices Desai, Chinappa Reddy and Thakkar all five of these constituted a sort of fraternity in 1970s & 1980s with a goal to achieve socialistic society.


106. Supranote 32 p 94.
Justice Iyer seems to be making a plea for a new institutional response from the judiciary.\textsuperscript{107}

According to Rajeev Dhavan, Justice Krishna Iyer, despite having a wide ranging basic philosophy, continues to follow the 'interpretive role' theory due to certain reasons namely:— Firstly, this theory is much too firmly entrenched in the 'common law' world to be dislodged, secondly this theory itself represents a political status quo which judges do not wish to disturb, and finally this theory helps judges in formulating their own judicial philosophies by acting as a flexible guideline which in Justice Iyer's case the guide provided by it is very thin in nature & no one reading his judgement can really overlook the impact of his judicial philosophy.\textsuperscript{108}

For Justice Bhagwati, Justice K.Iyer and Justice Desai, Law was like a wax which they could mould to any form & they did make beautiful images by constructing broadly, liberally constitutional provisions in such a manner as to put life into the dead letters of the Constitutional document.\textsuperscript{107-A} Infact, the American judges of the Warren court, judges of Justice Bhagwati's Court (1985-1986) also practised progressive realism.

\textsuperscript{107} Justice Iyer, says Rajeev Dhavan, 'follow a very respectable line of theory that statutes are not just interpreted in their own context but have a time and social dimension. The literal theory does not in fact pay any attention to this time and social dimensions of statutes often take these dimensions into account while concealing, their underlying reasons and methods of doing so. Infact Justice Iyer believes in following "Life giving principles rooted in social sciences". Supranote 09 p 321, Supranote 99;

\textsuperscript{107-A} According to Justice K. Iyer, the interpretative effort "must be illumined by the goal, though guided by the work. See Smt. Kanta Goel v. B.D. Pathak AIR 1977 SC 1599 at 1661; State Bank of Travancore v. Mohammad Khan AIR 1981 SC 1744 at p 1749.

and through their liberalist approach adapted the Constitution according to the rapidly changing needs of the society.

To quote another liberal Judge Justice D.P. Madon of this period:

"The law must in a changing society march in tune with the changed ideas and ideologies. Legislatures are, however not best fitted for the role of adapting the law to the necessities of time, for the legislative process is too slow and the legislatures of-ten divided by politics, slowed down by periodic elections and over -burdened with myriad other legislature activities. A Constitutional document is even less suited to the task for the philosophy and the ideologies underlying it must of necessity be expressed in broad general terms and the process of amending a Constitution is too cumbersome and time -consuming to meet the immediate needs. This task must therefore, of necessity fall upon the Courts because the courts can by the process of judicial interpretation adapt the law to suit the needs of society".109

Justice who succeeded Justice Bhagwati as Chief Justices of India namely R.S. Pathak, Rangathan Mishra, K.N. Singh, M.H. kania, M.N. Venkatachaliah and the present Incumbent Mr. Justice A.M. Anmadi, can to some extent, be labelled as literal Judges as they have also been associated with judicial creativity through their decisions, but none of them can match the dynamism & liberalism of Justices Bhagwati & Krishna Iyer. Chief Justice M.N. Venkatachaliah in his terms of over a year and a half succeeded to a strong heritage of judicial activism. He showed to

109. Central Inland Water Transport Corporation v. Brija Nath Ganguly AIR 1986 SC 1571 (Service Rule empowering the Government Corporation to terminate services of permanent employees without giving reasons, violative of Art 14 & Principle of natural Justice); Also see "Judicial Activism --- an essential part of the judicial function" XI, Indian Bar Review 1984 246 at 253-254. Reiterating the activist role of the court, Justice Madon said: "To deny judicial activism to the courts is to nullify the judicial process and to negate justice --- If the law is to operate today so as to secure social justice to all, whoelse can do it but judges whose Constitutional task is to apply and interpret the law ---- Take away judicial activism and Tyranny will step into fill the vacant space"
the world that the Indian judiciary means business and can no
more be pushed around. The difference between the Venkatachaliiah
Court and those of his predecessors, was mainly its pace &
intensity with which it performed its job particularly in the
field of human rights. For him, judiciary is the true tribune of
the people & the best judge of policy, a conviction which was
widely acclaimed by the public. The most accomplished decision of
this Court was in 'Judges appointment case' where he literally
translated judicial independence into authority by appropriation
of the power of appointment and transfer of High Court and
Supreme Court Judges. After his retirement, Justice
Venkatachaliiah reasserted in one of his interview that "No body
can watch the watchman.110 In Ayodhya case ruling, the plurality
of apex court, through Justice J.S. Verma held :

"A construction which the language of the statute can
bear and promotes a larger national purpose must be preferred to
a strict literal construction tending to promote factionalism and
discord".

Speaking of the active role of the Court, Justice Pathak
observed:

"The Court is not an impassive umpire holding a neutral
balance between the rival claims of contending parties. Its role
extends to an active intervention in the determination of the
situation of fact and a close monitoring of the progress of
justice as it is fed from stage to stage into the process of
judicial redress --- In the shaping of reliefs the Court is not
bound by traditional forms or blinkered by orthodox perspectives.
It moves beyond them, and imposes orders which take need of the
realities of the existing situation"111

110. Land mark judgement of Ayodhya Case was delivered
during Mr. Justice Venkatachalliiah’s tenure. See for

111. See Justice R.S. Pathak’s Inaugural Address at the U.G.C.
sponsored National Seminar on "Judicial Activism and
Social change", organised by the faculty of Law, Jammu
University see Judicial Activism And Social Change (ed)
The present incumbent of the Indian apex court, Chief Justice Mr. A.M. Ahmadi, is also known for his progressive views in the field of development of human rights, as is evident from some of his recent judgement orders. His judgement in the TADA case wherein he rendered section 5 of TADA less severe & made the significant observation that an accused person could prove with the help of evidence that the reason for unauthorised possession of arms and ammunition was wholly unrelated to terrorist activity.  

In one case, His Lordship Ahmad directed the U.P. Govt. to immediately launch criminal prosecution against about 50 policemen who had been responsible for the killings of innocent Sikhs in fake encounters in the Pilibhit area, on the pretext they were militants.  

Again, sharply criticising the extra-constitutional activities of Punjab Police, the apex court through Justice Ahmadi ordered the suspension from service & prosecution of five of its officers for the cold blooded murder of a suspected militant couple in Calcutta on May 17, 1993. 

112. See The Tribune Sept. 1994  
113. The Tribune Oct. 1994  
114. The Tribune April 18, 1995; Also see landmark judgement delivered by division bench comprising of Mr. Justice A.S. Anand & Mr. Justice Faizuddin wherein the apex court in telling indictment of the politicisation of the Haryana Police, sentenced three Haryana Police Officers including two of IPS rank, to prison terms of two to three months on contempt charges for illegally detaining an employee of a business rival of a son-in-law of the State Chief Minister The Tribune May 3, 1995.
Further activism is shown by the apex court through Mr. Chief Justice Ahmadi & Mr. Justice A.S. Anand & S.P. Bharucha, when it directed expeditious prosecution of a DSP & eight other police officials for the kidnapping & killing of seven members of a family of a village in Amritsar & directed the Punjab Government to pay Rs. 1.5 lakh as compensation to the next of kin of each victim. 115

The foregoing discussion makes it clear that today Judicial creativity is part of judicial decision making both in America and in India, especially in the field of humanrights. Most constitutional decisions and doctrines of modern period concerning human rights cannot fairly be understood without the help of non-interpretive review. But non-interpretivist review theory has also been subject to criticism in both the democracies.

Criticism of Non-interpretivist theory

According to critics, we cannot blindly follow Chief Justice Hughes’ observation that "the Constitution is what the Court say it is’, as it is misleading in various respects. The major flaw in following Hughes’ observation suggests that the Constitution has no independent meaning of its own, all meaning in it should be poured by the Courts only. In another words we would be forgetting the contribution of the founding fathers who worked so hard to answer the basic dilemma & questions of democratic government.116

115. The Tribune May 11, 1995; in another significant ruling, the apex court has clipped the wings of Mr. Seshan, Chief Election Commissioner by upholding the validity of Presidential notification of Oct 1, 1993 whereby Election Commission has been made a multi-member body and where by two Election Commissioners were appointed. Also see Ch.II Supra.
116. See Supra note 5; Supranote 61 Agresto, John pp 1-3.
Mr. Hughes' observation is also defective as it ignores the contribution of other governmental department in the interpretation of the Constitution. Another drawback is that it encourages uncritical public acceptance of the apex court's decision which is not healthy trend as it might give rise to 'judicial autocracy'.

Another problem in following adaptive approach is that too much adaptation can render the Constitution and its various provisions so pliant that the original document is no longer able to provide guidance concerning what is to be done. To quote Madison "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 powers".117

Dhavan says that the adaptive theory raises serious questions of accountability of judges. He says 'very few judges can account' for themselves through the liberal democratic process."118

All this study shows that Constitutional law -making follows no consistent patterns of legal reasoning or method and that it is heavily influenced by immediate and relatively short-lived political and social beliefs, says Carter. Calling legal process as fundamentally political, Carter discusses normative alternatives to interpretivism.119

117. See The Writings of James Madison (Ed) by Hunt, Gaillard (1900-1910) Vol. 9 p 19.
118. Supranote 108 p 106.
Talking about pragmatism, Carter says that "Pragmatism offers a test to differentiate better from worse decision -- It has profoundly affected how we think about law -- It helps explain why Constitutional history yields so little theory and so much Constitutional change over time."  

Carter has also discussed various normative alternatives models like economic, Natural law through the view points of John Rawls, Dworkin and Walter Murphy, in particular. Dworkin, in his two works *Taking Rights Seriously* (1977) & *No Right Answer* (1978a) asserts that judges do not make policy. They articulate principles, which differ from policy because they transcend pure distributional choices. According to Dworkin interpretation explains but cannot change the work: "The text provides one severe constraint in the name of identity, all the words must be taken account of and none may be changed to make it a putatively better work of art". He had originally proposed an "aesthetic hypothesis" of interpretation. To quote: "An interpretation of a piece of literature attempts to show which way of reading the text reveals it as the best work of art".  

120. Ibid p 108  
121. The Economic model is called normative because it proposes substantive solutions to disputes that a societal norm - efficiency - assertedly justifies. The goal of social pragmatism can be realised only through economic models because only the use of money permits building social policies from empirical observation. Ibid p 110.  
122. For Thomas Grey, Framers were, for the most part, natural law Philosophers. John Rawl's Theory of Justice is a blend of natural law and pragmatism. He proposes a unitary theory of the just Constitution. Ibid p 114.  
123. To quote Dworkin "Judges should apply the law that other institutions have made; they should not make new law". He is a proponent of a catholic notion of constitutional identity. He is especially critical of that branch of textualism that gives to the text the meaning allegedly desired by its drafters at pp 131-49. See *Taking Rights Seriously* by Dworkin, Ronald (1978) Sartorius also agrees with Dworkin see "Social Policy and Judicial Legislation" by Sartorious, R. 8 *American*  
Contd...
Criticising Dworkin Fish asserts that Dworkin’s views are incompatible with modern hermeneutic theory and his distinction between ‘explaining’ & ‘changing’ does not hold up:

"because organization, style & Figure are interpretive facts - facts which, rather than setting limits to the elaboration of a reading, emerge and become established in the course of that very elaboration. Inshort, that which is to be the measure of change is itself subject to change and is, therefore, not sufficiently stable to underwrite the distinction between changing and explaining" 124

Walter Murphy is supposed to build a natural law theory almost exclusively out of the historical materials of law and politics in action. He categorically accepts the court’s appeal to the "spirit" rather than the letter of the document in every era of constitutional history. Carter thinks Murphy’s reference to the art of interpretation - means, conveying that questions of interpretation are questions of fit and he does not recognise fit that excludes judicial protection of individual dignity.

In his "The Art of constitutional interpretation" (1978) Murphy concludes

"I--believe that the Constitution contains a hierarchy of values. First, substantive goals take precedence over process. Indeed, a strict positivist might note that the preamble lists only substantive not procedural goals ---

Second among the Constitution’s substantive values, I believe the most fundamental has become human dignity. Because I agree that the framers -- put national unity ahead of the dignity of blacks (at least), I do not rest my case an original intent, but on the internal logic of the polity as the framers built it and as it and its values have developed since 1787. The preamble’s goals of liberty and justice were not mere 'rhetorical flourishes, but meaningful articles of hope --

Philosophical quarterly 151 (1971). Ronald Dworkin, is an especially influential advocate of a "Catholic" notion of Constitution - Identity, in today’s world of contemporary jurisprudence. He is especially critical of that branch of textualism that gives to the text the meaning allegedly desired by its drafters.

The linkages with doctrines of natural & right are obvious. The "unassailable dignity of the individual" has been at the heart of natural law and right since the early Sophists debated Socrates -- In essence (dignity means that the individual, as a person, is the basic unit of legal -- and moral -- accounting; that government must respect all persons, in Kant's terms, as ends rather than treat them as means, and that each person has equal claim to that respect not because government so designs but because we share a common humanity. ----

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Allowing judges to interpret a Constitution is inherently risky, but so is an effort to maintain a polity based on both constitutionalism and democracy. The risks involved become attractive only when one considers the alternatives.124-A

Carter expresses his belief in critical scholarship due to being a direct extension of the pragmatic tradition.125 It insists on dealing as directly as possible with the raw experiences of political life. Critical scholars insist that if we merely describe the world around us we shall find gross 'misfits' between what we observe and "facts" on which conventional legal theories rest.126 Critical movements take into account significance of hermenutics in Constitutional jurisprudence which requires scholars to make effort to see the world independent from and liberated from any conventional framework. This movement asserts the positive value of fittedness as a criteria of goodness & insists on taking pragmatism seriously.

124A  Ibid Carter p 126.

125.  Critical approach, alike all radical positions in intellectual development, creates a new language and new values like other normative approaches. It is also associated with political system. Ibid pp 127-128.

126.  Ibid p 138.
This approach attends to the aesthetic Character of law. **Carter** advocates adherence to **aesthetic theory** by suggesting that by viewing constitutional law-making as an aesthetic process, one in which the author of an opinion has an opportunity to create a momentary vision of political goodness much like a musician, an actor or a visual artist, we can break out of the paradox.\(^\text{127}\)

Carter, in brief, believes that Court does not interpret the Constitution, it creates Constitutional meaning. The Court has not approached its task as one of "thick description" of the document. Rather a good constitutional performance for Carter, seeks, "a 'fit' among legal elements in the case (the facts on the record and the legal rules the lawyers raise) and the extra-legal elements (social experiences and normative values about which we converse seriously). And in performing this manner the court (or any other artist) does seek to interpret experience, to communicate the existence of a fit among elements that exist beyond his or her purely private experiences. \(^\text{128}\) In art there are many possibilities for different good fits or harmonies. I do not claim that the legal process should change its self-definition & operate "artistically" of argue that it always operates in this fashion. The aesthetic element in law allows it to function effectively despite the fact that each of its doctrines inevitably exposes paradoxes & antinomies.\(^\text{128}\)

\(^{127}\) Even Justice Learned Hand said "I like to think that work of a judge is an art -- a bit of craftsmanship --- It does what a poet does, it is what a sculptor does. He has some vague purpose and he has an indefinite number of what you might call of frames of reference among which he must choose, for choose he has to and he does ----" Supranote 32 p 192.

\(^{128}\) Supranote 25, Carter p 192.
Carter also believes that if the justices attended more seriously to defining and harmonizing in pragmatic fashion the basic elements in a case they would, merely by clarifying the topic of conversation, increase consistency across cases. He further states his belief in the view that a common commitment to good 'fit' exists. Our search for communal goodness depends on good conversations, & that good conversation in turn depend on well crafted visions of good communities.129

MIDDLE PATH APPROACH A RIGHT SOLUTION:

To sum up, it is submitted that neither interpretivist theory nor non-interpretivist approaches to the Constitutional interpretation are singularly complete in themselves. In the interpretation of Constitutional provisions, need is to follow ‘middle path’ in order to maintain balance in the society. Most of the judges both in America & India, follow this approach as also suggested as one of the modes of statutory interpretation by Roscoe Pound a sociological jurist of the present century.130

In the same spirit, Justice Cardozo, Joseph Kohler, Edgar, Bodenheimer, say that no injustice results to the founding fathers if the present courts, instead of ascertaining the intent which these framers voiced with respect to the meaning of a

129. Ibid p 194.

130. Roscoe Pound describes four methods in which courts may deal with an innovation in the law brought about by means of statute and he says that, the third mode whereby the court might refuse to receive statutory innovation in the law completely into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover, is the mode which the courts in the United States have tended to accept. See for details Jurisprudence by Bodenheimer, Edgar (1974) pp 413-418.
constitutional clause in their own days, try to determine the intent which these men would presumably would have held had they foreseen what our present conditions would be. But this view of constitutional interpretation is subject to restriction that is the Courts cannot interpret the Constitutional clauses in such a manner which extends to changes totally subverting the spirit of the document and transform its precepts into the opposite of what they were originally meant to be.\textsuperscript{131}

Moreover, we must not forget that the court's decision are meant for the people, & therefore, the Court cannot interpret law in such a manner that its enforcement divorces it from people.

To quote Justice Chinappa Reddy of the Indian Supreme Court:

"---Natural Justice, Public Policy or any other rule of interpretation must -- conform, grow and be tailored to serve the public interest and respond to the demand of an evolving society" \textsuperscript{132}

\textsuperscript{131} Ibid 409. To quote Bodenheimer "--The elasticity and pliability of a constitutional philosophy which permits the agents of interpretation to take account of the changing needs of the time and enables them to cope with new and unprecedented problems must find the ends of its bounds in the necessity for preserving the core and essential integrity of a Constitution. Truly fundamental changes must be effected by amending a Constitution, not by interpreting it".

\textsuperscript{132} See \textit{Swadeshi Cotton Mills v. U.O.I.}, A.I.R. 1981 SC 818; Also See \textit{Indian Supreme Court And Politics} by Buxi, Upendra (1980) pp 247-248. Prof. Buxi upholds the emerging role of the apex court as populist court and asserts that the interest of the people require the court to lead and the legislature to follow.; Justice Venktaramaniah has also proposed that law has not to be static but should grow within the precincts of the legislature. See Justice Venktaramaniah's dissent in \textit{National Textiles Workers} case A/I 1983 SC 75.
In other words alike, Pound's 'social engineering', there is need for judicial engineering with real judicial activism subject to self-imposed restraints.

Justice V.D. Tulzapurkar, Justice Chinappa Reddy, Justice Venkataramiah, Justice Desai even Justice K.Iyer all ought to keep the judicial vessel on an even keel due to their socialistic approach. Justice Tulzapurkar supported the view that the judge is allowed a small amount of concealed law making. To quote:

"-- I think that judges will serve the public interest better if they keep quiet about their legislative function. No doubt that they will discreetly contribute to change in the law because -- they cannot be otherwise, even if they would."

(C) RULES OF INTERPRETATION:

For interpreting various clauses of the Constitution, the court follows various common rules of interpretation in the light of above-discussed schools of interpretation. These are namely:

- GOLDEN RULE

This rule says that normally words should be given their plain, natural meaning. But if absurdity or manifest

133. Quoted by Dhavan, Rajeev Supranote 108 pp 320-321. Dhavan says that Justice Tulzapurkar seems to say to judges, "Make laws, but do not overdo it and cover your tracks".

134. This Rule is attributed to C.J. Jervis in Nattison v. Hart 14 Q.B. 357 Eng. Rep. 147 (1854); See "Statutory Interpretation and the Welfare State" by Elliott, Sheldon, D. S.C.J. (1960) (2) p 260; Also see Supranote 02 pp 135-138.
injustice results by this process, then liberal construction should be given to the words so that they may have effect in their widest amplitude. The rule has been recognised by Indian Supreme Court in Jugul Kishore & Nand Lal cases respectively. Justice Jagannath Shetty observed in Kehar Singh's case that: "During the last several years the golden rule has been given a go-bye".

(II) MISCHIEF RULE:

This rule was attributed to Sir Edward Coke who evolved it in the famous Heyden's Case, in 1584. It directs the interpretation of a statute in accordance with its general policy and the evil which it was intended to remedy. For doing so, the Court takes into account following four factors before arriving at decision, which will suppress the mischief & advance the remedy namely: - (a) What was the common law before the making of the Act? (b) What was the mischief and defect for which the common law did not provide? (c) What remedy the parliament both resolved and appointed to cure the disease & (d) What (was) the true reason for the remedy.

In other words, this rule lays down that the intent of the legislature behind the Act should be followed. The Indian apex court applied this rule in Bengal Immunity Co. Ltd. case and in number of subsequent cases.


136. See Maxwell, Supranote 10 p 40. This rule is followed when it is not possible to apply the 'Golden Rule' due to ambiguity in the words of a Constitution.

137. Bengal Immunity Co. Ltd. v. State of Bihar AIR 1955 SC 661, 674. Chief Justice S.R. Das quoted verbatim the rule in Heydon's case while construing Art. 286 of the Constitution...
Recently in K.S. Paripaoornan case, Justice Sahai reiterated the contents of Mischief Rule as laid down in Heyden’s case & held

"---Any legislation ------ enacted to mitigate social mischief is normally construed to serve public good. Principles of Interpretation are only the guide line, they are not conclusive. The sure and safe way is to interpret the provision on the necessity and requirement as appears from the objective of the Act and the words used by the Legislature."

This rule has also been frequently applied by the American Supreme Court. In one case it was held that "In order to obtain a just interpretation of constitutional provisions bearing on or affecting the fundamental guaranties of liberty, reference should be made to the historical causes to which they owe their origin, & the mischiefs which they were intended to remedy."

Normally this Rule is used wisely & largely by the courts as it affords the best & surest ways of reaching a result that accords with the true legislative intent.

Constitution; Also applied in R.M.D.C. v. U.O.I. AIR 1957 SC 628; M/s. Goodyear India Ltd. v. State of Haryana AIR 1990 SC 781. The apex Court applied this rule while construing the charges introduced by the Constitution 46th Amendment Act 1982, to overcome certain judgements of the Summit Court which has resulted in scope for avoidance of Sales Tax. Infact, mischief Rule is applied by the Court in various cases of Income Tax, Sales Tax etc.

140. Supranote 09 pp 122-123; For Elliott, Mischief Rule a "Social objective Policy" approach might make traditionalists ‘cavil’ that this is opening the door to "Judicial legislation" but to judges who conscientiously strive to carry out rather than to delay fulfillment of the legislative intent, no door should be closed. Supranote 134 p 261.
TO READ THE INSTRUMENT AS A WHOLE: -

As per this rule, in construing a constitutional provision, it is the duty of the Court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision. The Court should take into account all relevant sections while construing one particular section, so as to effectuate the whole purpose of the Constitution.¹⁴¹

Reason behind this rule is that all constitutional provisions are of equal importance & so none should suffer subordination or deletion.¹⁴² This rule has further various sub-rules which are in brief as follows:

1. **Firstly** - Unless there is some clear reason to the contrary, no part of the fundamental law should be treated as superfluous, void or insignificant & effect should be given to each word, clause of the Constitution.¹⁴³ But in case any word or phrase is such that no sensible meaning may possibly be given, then the Court should follow the maxim ("UT RES MAGIS VALEAT QUAM PERAT") which means that statute should be construed in such

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¹⁴¹ To quote Cooley "A Constitution does not mean one thing at one time and another subsequently. So no one provision of the Constitution is to be separated from all others, to be considered alone, and all provisions bearing upon a particular subject are to be brought into view and to be interpreted as to give effect to the great design of the instrument." See Constitutional Law by Cooley p 427.

¹⁴² Ullman v. U.S. 350 U.S. 422; Dick v. U.S. 200 U.S. 340; Golaknath Case Supranote 34 at p 1715, Justice Hidayatullah states that "In a matter of interpretation of the Constitution this court must look at the functioning of the Constitution as a whole"; Also see State of W.B. v. U.O.I. AIR 1963 SC 1241 at 1265 wherein then Chief Justice Sinha observed that: " The Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs".

¹⁴³ Marbury v. Madison See Supra Ch. II
manner that will give it validity rather than invalidity and the
Court starts with a presumption against absurdity or nullity.

(II) **Second** sub-rule is that when 'analogous' words are used,
each may be presumed to be susceptible of separate and distinct
meaning, for the legislature is not supposed to use words without
meaning. A change of language suggest a change intention.\(^\text{144}\)

(III) **Thirdly** When the same word or phrases are used in
different parts of the same statute, they would ordinarily
receive the same meaning unless the context or the object
requires otherwise. So, if the meaning of a word cannot be
ascertained from the section itself, other sections may be looked
into to fix the sense in which the word is used there. In other
words, the same word may convey a different legislative intention
in different circumstances according to the context.\(^\text{145}\)

(IV) **Fourthly** When a 'general' intention is expressed and also
a 'particular' intention which is incompatible with the general
one, the 'particular' intention is considered as an exception to
the general one, even when the general intention is expressed in
a negative language. Therefore, general provisions in a statute
are not to be taken as controlling or repeating the special
provisions.\(^\text{146}\)

The Indian Court has followed this rule of reading
instrument as whole in number of cases.\(^\text{147}\)

\(^\text{144. Supranote 10, Maxwell, p 278.}\)
\(^\text{145. A most conspicuous example of this is to be found in the}
\text{use of the word 'state' in the Indian Constitution.}\)
\(^\text{146. Supranote 03, Basu, D.D. pp 9-10.}\)
\(^\text{147. Aswini Kumar v. Arabinda Bose AIR 1952 SC 369 at p 382}
\text{Fundamental Rights case Supranote 36 at p. 1484; In Re}
\text{Presidential Election case AIR 1974 SC 1682 at p 1686;}
\text{U.O.I. v. Sankal Chand Sheth AIR 1977 SC 2328 at p 2372;}
\text{Singh v. The State AIR 1988 SC 1883 at p 1932 held the}
\text{Contd...}
(IV) RULE OF 'GENERIC' OR 'FLEXIBLE' INTERPRETATION:

According to this rule words should be interpreted keeping in view changing situations which could not have been foreseen by the founding fathers. To quote Dr. Wynes

"---- generic interpretation" asserts ---- that new developments of the same subject and new means of executing an unchanging power do arise from time to time and are capable of control and exercise by the appropriate organ to which the power has been committed. While the power remains the same, its extent and ambit may grow with the progress of history. --- and the question whether a novel development is or is not included in the terms of the Constitution finds its solution in the application of the ordinary principles of interpretation, namely what is the meaning of the terms in which the intention has been expressed."\(^{148}\)

In America, speaking about the significance of this principle, Justice Stone observed that:

"In determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For the setting up of an enduring framework of government, they undertook to carry out for the indefinite future and in all vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence, we read its words--- as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. If we remember that "it is a constitution we are expounding we cannot rightly prefer, of the possible meaning of its words, that which will defeat rather than effectuate the constitutional purpose."\(^ {149}\)

In India Justice Venkatarama Aiyar formulated this principle in Gamon Dunkerly case & called it "flexible construction" principle.\(^ {150}\) To quote Justice Aiyar "The principle of these decisions is that when, after the enactment of a legislation, new facts and situations arise which could not have been in its contemplation, the statutory provisions could properly be applied to them if the words thereof are in a broad sense capable of containing them --- the question then would be not what the framers understood by those words, but whether these words are broad enough to include the new facts."

\(^{148}\) Quoted by See rvai, H.M. Supranote 80 p 176.

\(^{149}\) U.S. v. Classic 313 U.S. 299 (1941)

PRINCIPLE OF HARMONIOUS CONSTRUCTION:

According to it, all the words must be construed harmoniously as to give effect to the whole document. In case of an apparent or real conflict between two Constitutional provisions, it is to be resolved by applying this principle which is based on the presumption that no conflict or repugnancy was intended by the framers between the various provisions of the Constitution. This principle has been followed by the Indian apex court several times to resolve conflicts in interpretation of constitutional provisions. In one significant case involving the conflict between fundamental Right to freedom of speech as guaranteed by Article 19(1)(a) of the Indian Constitution and the Privileges of the legislature as given in Art. 194 (3), the Summit Court applying this rule of harmonious construction held that Art. 19(1)(a) is to be read as subject to powers, privileges and immunities of a house of legislature as declared by Art. 194 (3) It has been applied quite often to resolve apparently conflicting legislative entries in Schedule VII of the Constitution.

151. Supranote 10, Maxwell p 52.

American courts have also followed this principle. In one case it was held that "A Constitutional amendment is not to be considered as an isolated bit of design and color, but must be seen as an integral part of the entire harmonious picture of the Constitution --- But if there is a real inconsistency between a constitutional amendment and an antecedent provisions, the amendment must prevail because it is the latest expression of the will of the people. In such a case there is no room for the application of the rule as to harmonizing inconsistent provisions.153

(VI) PRINCIPLE OF EJUSDEM GENERIS/NOSCITUR A SOCIIS

According to this, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. Before applying this rule, it is required that there must be a distinct genus which comprise more than one species.154

In Sirajuddin's case this rule was applied by the Indian apex court.155 The rule has to be applied cautiously & should not be taken too far, & be used in compelling situation. Hence it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider.156

The above-discussion reveals that words, howsoever clear they may appear to be, must be read in the "context", in which they appear. And this "Context" includes both Internal and external aids to construction which are as follows:157

These are different contents of the Constitution through which Constitution seeks to explain its own meaning. These are namely: (i) Title; (ii) Preamble; (iii) Headings; (iv) Provisos; (v) Interpretation/Definition Clauses; and (vi) Schedules.

(i) **Title**: Being part of the Act, to ascertain its scope and to interpret the ambiguous sections of the Act, Title is used as an aid of Construction.\

(ii) **Preamble**: It contains a recital of the facts or state of the land for which it is proposed to legislate by the statute, the object & policy of the legislation and the evils or inconveniences it seeks to remedy. In 1905, the U.S. Summit Court observed "Although the Preamble indicates the general purpose for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or any of its departments"—Jacobson v. Massachusetts 197 U.S. III (1905)

In India, the Preamble is considered as an integral part of the Constitution, is a document expressing the dreams & visions of the people. For instance, the title of both American and Indian Constitution being very simple, viz: "the Constitution of the United States" and "the Constitution of India", their use in interpreting the Constitutional provisions will not be much called for. But in India, it can be used for indicating that the Constitution will govern all the territory that will for the time being included in 'India' as defined in Art. 1 of the constitution see Kesavananda Bharti. In Re Berabari Union & Exchange of Enclaves (1960) 3 Supra note 36, S.C.R. 250, It was held that "Preamble is not a part of the constitution, and the apex court quoted Willoughby’s observation of Preamble to the American Constitution."
aspiration of founding fathers & assists many times in understanding the policy & legislative intent of the Constitution.161

In Fundamental Rights case, then Chief Justice Sikri said that we must attach all importance to the Preamble & the Constitution should be read & interpreted in its light.162 The addition of the word ‘socialist’ in the Preamble after ‘42nd Amend’ Act 1976, enables the Court to lean more in favour of nationalisation and economic equality.

Preamble is referred to as an aid of construction when the language of the constitutional text is not clear. In brief, the Preamble of both America & India pledges in the name of their people to promote political, social, economic, moral values.

(ii) **Headings**

Headings & sub-headings are prefixed to sections or group of Sections that show the general object of the provisions immediately following. There is no such Heading in American Constitution as contrast to her Indian counterpart where there are many.163 These are used only when the meaning of the works is

Constitution wherein he stated that "Preamble has never been regarded as the source of any substantive power conferred on the Government of the United States or any of its Departments".

162. Supranote 36; Supranote 34 In Golaknath Chief Justice Subba Rao held that 'The Preamble to an Act sets out the main objectives which the legislation is intended to achieve'.
163. For instance, Part III of Indian Constitution dealing with Fundamental rights is divided under several headings such as, right to equality, Right to Freedom etc.
ambiguous. In one case the apex court observed: "It is well-settled that the headings prefixed to sections or entries (of a Tariff Schedule) cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision" 164

(iv) **Marginal Notes**:

These can be used also when there is any doubt about the true meaning of the provisions but they cannot control the scope of the article itself. In the Indian Constitution these are recognised as part of the Constitution & 'prima facie' furnish some proof as to their meaning and purpose.165

(v) **Provisos**:

Its main function is to except and deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It can be used for guidance in the selection of one or other of two possible

164. **M/s Frick India Ltd. v. U.O.I.** AIR 1990 SC 689 at p.693; Also quote Justice Kapoor, "The Management of Sections into parts and their Headings, are substantive parts of the Act and "They are gradually winning recognition as a kind of Preamble to the enactments which they precede limiting or explaining their operation" **K.M. Nanavati v. Bombay** (1961) S.C.R. 561.

165. Supranote 80 Seervai, H.M pp 246; Also see **Bengal Immunity Co.**, case supranote 137; **Golaknath** case Supranote 34 p. 1658 where Marginal note to Art. 368 was referred.
constructions of the main section but not as an enacting provision in itself modifying the clear effect of the main section.\textsuperscript{166}

(vi) **Interpretation Clause:**

The Object of this clause is to simply declare what may be included within the meaning of the term when the circumstances require that it should bear that meaning or have that ambit. This clause enables the word as used in the Act, to be applied to some things to which it would not ordinarily be applicable and not meant to prevent the word receiving its ordinary, popular & natural sense meaning. Unlike American Constitution, in Indian Constitution there is interpretation clause & definition clause.\textsuperscript{167}

(vii) **Schedules:**

Schedules attached to the Constitutional document are very much part of it. Usually, they contain only matters of

\textsuperscript{166} Supranote 03 Basu, D.D. pp 21-22; To quote Justice Kapur: "The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment---" See CIT Mysore etc. v. Indo Merchantile Bank Ltd. AIR 1959 SC 713 at 717. Also see Dibya Singh Malana v. State of Orissa AIR 1989 SC 1737 pp 1739-40; Ram Narain Sons Ltd. v. Asstt. Comm. Sales Tax AIR 1955 SC 765-769 etc. for details see Principles of Statutory Interpretation Singh, G.P. (Justice) (1993 Reprint) pp 132-147.

\textsuperscript{167} Article 366 of the Indian Constitution defines various terms used in the Constitution. Article 367 is "Interpretation clause" These articles start as "unless the context otherwise require"---- This means that words take colour from the context and need not have the same meaning in every Article or clause. This clause is used only in case of any ambiguity in constitutional provision. For more detail see Singh G.P. Ibid.
form or examples as to the manner in which the enacting portion is to be carried out in practice. Hence, the rule as to such schedule is that if there is any conflict between the enacting part and the schedules, the former shall prevail. Indian Constitution has schedules attached to it, whereas that is not so in the case of American Constitution. 168

(II) EXTERNAL AIDS:

As compared to Internal aids, External aids to construction are more frequently used by the Courts to ascertain the legislative intent in case of any ambiguity in the Constitutional provision. These are namely (i) Historical background; (ii) Committee report, Debates and Legislative proceedings; (iii) Construction by reference to other statutes; (iv) Previous legislation; (v) Stare Decisis (vi) Foreign Decisions; (vii) Text Books & Books of Authority and Article of Illustration; (viii) Dictionaries; (ix) Statement of Objects and Reasons.

(1) HISTORICAL BACKGROUND:

Both in America & India, to enable the court to discuss clearly the particular defect in the statute or constitutional provision, help of its historical background is taken into account. For instance, in application of Mis-Chief rule of Interpretation the Court study the history of the provision in issue. 169

168. There are 12 schedules at present in the Indian Constitution. For more detail see Singh G.P. Supranote 166 p 149-156.

(II) COMMITTEE REPORTS, DEBATES & LEGISLATIVE PROCEEDINGS:

In case of any latent ambiguity in the constitutional terms, the court can take help of Debates, Reports etc. relating the enactments of that particular section or term of the Constitution, in order to ascertain the true intent of the legislators behind it. Where a particular construction is raised by the express words of the Constitution or by necessary implications, such construction cannot be rejected on the ground that a provision to the same effect was discarded by the Constituent Assembly which passed the Constitution. The most striking illustration of this is found in the case of *McCulloch*. Wherein the court through Chief Justice Marshall stated that, "the Constitution of the United States did not expressly include the power to establish corporations in the list of powers given to Congress. On the other hand, such a power had been included in the Draft but was rejected by the National convention. Nevertheless, the court held that there was nothing in the Constitution to exclude 'implied' powers. If the end be legitimate and within the ambit of the Constitution, all the means which are appropriate, and are plainly adopted to that end, may constitutionally be employed to carry it into effect its enumerated sovereign powers "to levy, collect taxes to borrow money, to regulate commerce --"170 Although it is accepted that "debates in Congress are not appropriate on even reliable guides to the meaning of the language of an enactment", yet it has been held that the said rule "is not violated by resorting to debates as a means of ascertaining the environment at the time of enactment of particular law, that is, the history of the period when it was adopted"170-A

170. Supranote 54; Also see Constitutional Limitations by Cooley (7th Ed) p 107.

170-A Quoted by Shri Singh G.P. Supranote 166 p 157.
In India, the apex court has initially shown reluctance on relying upon legislative debates, reports as an aid to interpret constitutional provisions. Reason for this, according to the Court, was that such speech in the Assembly can best indicate the subjective intent of the speaker but do not reflect the mental process lying behind the majority vote which carried the bill.\textsuperscript{171}

But the Court has not adopted a completely "closed door" policy on this issue & has cautiously agreed to take into account debates, speeches of members of legislative Assembly if latent ambiguities are involved.\textsuperscript{172}

The tradition of not following debates was broken by the court in well known \textbf{Privy-purses} \textsuperscript{172-A} case when Justice Shah

\begin{itemize}
  \item \textsuperscript{171} Gopalan Case Supranote 34; State of Trav - Cochin v. Bombay Co. Ltd, AIR 1952 SC 366, 369.
  \item \textsuperscript{172} In \textit{Gopalan}, Chief Justice Kania referred to the proceedings of the Constituent Assembly to show how the founders deliberately dropped the use of expression 'Due process of law' from the Constitution. See for detail Ch. VI infra; Also see \textit{Golaknath} case, where though the court made extensive reference to to Assembly Debates, Yet following \textit{Craies on Statutory Law}; and \textit{Maxwell on Interpretation of statutes} and \textit{Craw Fordon Statutory Construction}, the Court held that though historical background in which the legislation was passed can be taken into account, yet we cannot take resort to debates of the Assembly to interpret the scope and extent of constitutional provisions. Supranote 34 \textit{Golaknath case} p 1622.
  \item \textsuperscript{172-A} Madhav Rao Scindia v. U.O.I. Supranote 85 para 113, also see Supra Ch. II.
\end{itemize}
extensively quoted from the speech of Sardar Patel in the Constituent Assembly to hold that the constitutional provision guaranteeing Privy Purses to the princes was a solemn undertaking not to be trifled with by Parliament or the Executive. With the historic Fundamental rights case the Court has allowed a regular course to the legislative history of the Constitution. In this case almost all judges referred to and relied on the debates in the Constituent Assembly for deciding some of the controversial issues.173

After this case, there are various instances when judges have taken recourse to debates, reports to elucidate the meaning of constitutional provisions.174

173. Mr. Chief Justice Sikri, Justices Reddy, Palekar, Khanna relied on debates in the Assembly, but justices Shelat, Chandrachud, Grover, Hegde and Mukherjea showed apprehension on conclusively relying on debates as aids to construction. To quote Justice Khanna "---- The speeches can also shed light to show as to what was sought to be remedied and what was the object which was sought to be attained in drafting the provision. But, "the speeches cannot form the basis for construing the provisions of the Constitution" and that task has to be performed independently of the debates and proceedings--" Supranote 36 Paras 1378-79.

174. For instance in Judges Transfer case, Justice Fazal Ali observed that where the language of a provision admits of two interpretation, the court may resort to the historical materials. Supranote 304-14; In Shamsher Singh v. State of Punjab AIR 1974 SC 2192, Justice Krishna Iyer copiously quoted from Assembly debates to reach at conclusion that the President is only a constitutional head; State of Karnataka v. Ranganath Reddy AIR 1978 SC 215 where Justice Iyer referred to the historical materials on the questions of compensation and public purpose in Art 31 etc.; For further details see Supranote 166, Singh, G.P. 162-169.
(iii) CONSTRUCTION BY REFERENCE TO OTHER STATUTES

It means statutes in 'pari materia', that is, related statutes dealing with the same subject matter, may be resorted to as aids to the construction of a particular statute. But Acts not in 'parimateria' should not be construed with reference to each other.

(iv) PREVIOUS LEGISLATIONS:

Constitutions do not generally, arise without some pre-existing legal or constitutional foundations which must necessarily affect the framers in their creation. Therefore, a reference to the pre-existing system is permissible when a term is ambiguous but was used in the pre-existing law.

To quote from English case of Webb v. Outrim "when a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a large course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the legislature to bear the meaning which has been put upon them".

178. Supranote 10 Maxwell p 33. Craies says that in considering what light one statute may throw upon the meaning of another statute, it is necessary to ascertain what assistance may be derived firstly from statutes which are in parimateria with the statute under consideration, and secondly from earlier statutes not precisely in 'parimateria but in some way relating or affecting the same subject matter' Supranote 08 craies p 124; For more detail see Supranote 166, Singh, G.P. pp 178-201.


Again in *Casey'*s case, the present Chief Justice Rehnquist (Concurring in part in the Plurality judgement & dissenting in part) held; "stare decisis is not a universal, in exorable command", especially in cases involving the interpretation of the Federal Constitution. Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible. It is, therefore, our duty to reconsider constitutional interpretations that "depart from a proper understanding" of the Constitution ---- our constitutional watch does not cease merely because we have spoken before an issue; when it becomes clear that a prior Constitutional interpretation is unsound we are obliged to reexamine the question". 183-C

In India, through Article 141 of the Constitution, doctrine of precedent in respect of law declared by the Supreme Court has been given Constitutional status. An Indian apex court has also not rigidly adhered to this doctrine and has kept the law dynamic by overruling or modifying its earlier views many times. 184

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183-C. Emphasis added) Planned Parenthood of South Eastern Pennsylvania v. Casey 112 S.Ct 2791 (1992). See for detail Ch. V. infra. In this case the Court did not overrule Roe but reaffirmed the central holding of Roe on the ground of stare decisis. And this led Justice Scalia to observe in his dissent that "The court's reliance upon stare decisis can best be described as contrived. --- And I confess never to have heard of this new, keep-what you-want-and-throw away the rest version----".

184. See Bengal Immunity Co case overruled United Motors case - Supranote 152; Golaknath overruled Sajan Singh & Shankari Prasad cases; and Kesavanand Bharati overuled Golaknath. In the field of Right to freedom list is endless from Gopalan to Maneka, from Romesh Thappar to National Anthem's. See for detail Ch. VI infra.
But this does not mean that the court takes lightly its earlier decisions because it knows that doing so will devalue or undermine importance of its decisions & particularly in cases involving constitutional issues, it exceptionally resorts to reversals.\textsuperscript{185} But in Antualy’s case the Court ignored the binding value of its pronouncements.\textsuperscript{186}

(VI) FOREIGN DECISIONS:

In 1939, the Federal court cautioned the Court regarding the use of decisions of foreign courts as an extrinsic aid for interpreting the meaning of the constitutional words, on the ground of varied socio-political conditions of each nation.\textsuperscript{187} To quote the Indian apex court: "The threads of our Constitution were no doubt taken from the other Federal Constitutions but when they were woven into the fabric of our Constitution their reach and complexion underwent changes --- We must not forget that it is our Constitution that we are to interpret, and that interpretation must depend on the context and setting of the particular provision which has to be interpreted".\textsuperscript{188}

\begin{itemize}
\item \textsuperscript{185} 
\item \textsuperscript{186} 
A.R. Antualy v. R.S. Nayak AIR 1988 SC 1531. Justice Ranganath Misra observed that the decision may not be used as a precedent. It was stated that if precedent value is sought to be derived out of this decision, the Court which is asked to use this as an instrument would be alive to the peculiar facts and circumstances of the case at p 1571. Justice Venkatachaliah said : -- It would be an unattainable ideal to require the binding effect of a judgement to defend on its being correct in the absolute, for the test of correctness would be resort to another court the infallibility of which is, again subject to a similar further investigation. No self-respecting judge would wish to act if he did so at the risk of being called a usurper whenever he failed to anticipate and predict what another judge thought of his conclusions---" Also see infra Doctrine of Prospective overruling; Also see Supra Ch. II.
\item \textsuperscript{187} 
The Central Provinces Case (1939) F.C.R. 18,38 quoted by Mr Seervai, Supranote 80 p 236.
\item \textsuperscript{188} 
\end{itemize}
From time to time, Indian Supreme Court has warned regarding the persuasive value of foreign precedents & observed that they should be used with great care & not indiscriminately. Only in very selective way these are followed by the Indian Judiciary. \(^\text{189}\) Recently the Indian Supreme Court examined broadcasting laws & decisions of the various nations like U.S.A., U.K. Italy France, while deciding the validity of broadcasting media in dissemination of sports telecast as par of free speech under Art 19(1)(a) \(^\text{189-A}\) Earlier giving reason for need of this following selectively foreign rulings the Court held in Atiabari case that:

"When you are dealing with the problem of construing a Constitutional provision which is none too clear or lucid you feel inclined to inquire has other judicial minds have responded to the challenge presented by similar provisions in other sister constitutions"\(^\text{190}\)

But the Court does not make foreign precedent as its guide normally. For instance it has refused to follow American concepts of police power, doctrine of preferred fundamental rights or American constitutional precedents on the commerce clause.

\(^{189}\) For instance in Express Newspaper case, the Court held that Article 19 (1) (a) has its basis in the First Amendment of the American constitution. AIR 1958 SC 578. Recently, while convicting former U.P. Chief Minister Kalyan Singh for contempt of court in Ayodhya case, the Summit Court made reference to US and British Judgements on similar cases and held that the undertakings given by the former Chief Minister was also a personal undertaking and he could not escape the liability of allowing the construction in violation of the court orders. The Tribune Oct 24, 1994. M\&s email copy v. U.C. AIR 1995 SC 667

\(^{189-A}\) Secretary, Ministry of I&B v. Cricket Asscn. Bengal AIR 1995 SC 1236 see for detail Ch. VI infra.

\(^{190}\) Atiabari Tea v. State of Assam AIR 1951 SC 232.
(VII) TEXT BOOKS & BOOKS OF AUTHORITY & ARTICLE OF ILLUSTRATIONS

The opinion of well-known text book writers can be taken as an aid of Construction, if the statute contains no interpretation clause. According to Privy council, the Court cannot cite as an authority the text book whose authority is alive though it may take assistance from it. In Fundamental Rights case, while discussing the relevance of the text books of foreign writers in interpreting the Indian Constitution, the court uttered caution in their use by saying that it must be interpreted according to its own terms & history & the court should apply its own mind to the interpretation.191 Recently while disposing of a writ petition on the 'Ramjanambhoomi' issue, Lucknow Bench of the Allhabad High Court referred to the illumination (illustration) of the hand written Constitution & argued that in interpreting the Constitution, illumination could be referred to and treated as part of it.192

(VIII) DICTIONARIES:

The general rule is that in the absence of any judicial guidance, dictonaries can be consulted to find out the ordinary sense of the words used in the Constitution. This fact has been recognised by the Courts. But dictionary cannot be sole guide in construing the Constitutional Provision.193 To quote Justice K. Iyer "Dictionaries are not dictators of statutory construction where the benignant mood of the law, and more emphatically, the

191 Supranote 36 p 1461.
definition clause furnish a different denotation.  

**STATEMENT OF OBJECTS AND REASONS (SOR)**

Generally this is ruled out as an aid to the construction 
of constitutional provision as it reflects the subjectivity of 
the person who introduces the Bill relating to such 
statements.

But such statements can be used for limited purpose of 
understanding the background & the state of affairs leading to 
the legislation.

In Kochunni’s case, Chief Justice Subba Rao relied on SOR 
attached to the Fourth Amendment Act, 1955 for putting a 
restricted and not a literal meaning on the definition of an 
‘estate’ & rights in an estate contained in Article 31(A)(2) in 
order to bring about a change in the agricultural economy.

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196. *Kochuni* case Supranote 84; Also see *P. Vajravelu Mudaliar v. Special Dy. Collector, Madras* (1965) 1 S.C.R. pp 614. 620-21, Understanding the fact that a literal interpretation of Art 31 (2) would virtually make it a dead letter, the court discussed in detail circumstances under which SOR can be used as an aid to construction.
In brief it can be said that the assistance to be derived from the SOR will depend upon its contents. If contents do not lead to any clear conclusion as to the object of the law, no help can be derived from SOR, says Seervai. 197

In America, the help of SOR is taken to ascertain the meaning of constitutional Amendments & provisions. For instance, in Slaughter House case, majority of the U.S. Supreme Court construed 13th & 14th Amendments in the light of the known history of the times. 198

Mr. Seervai submits that though extrinsic aids to construction (which are becoming popular in the courts) must be used with caution & judgement where the words have a plain meaning, they are permissible aids and might in certain circumstances be decisive. Where the known object is against producing hardship and injustice it is open to the court to resort to extrinsic aids to construction, and put a construction which avoids hardship, injustice or absurdity. 199

After examining the principles, Rules & Aids to constitutional interpretation, to further understand judicial process, it becomes significant to study various doctrines which

197. Supranote 80 pp 243-44.
198. The Slaughter House cases 83 U.S. 36 (1873) For details See Ch. V Infra.
199. Supranote 80 p 243.
the court has developed while interpreting constitutional provisions. These are as follows:

(E) DOCTRINES OF CONSTITUTIONAL INTERPRETATION

(1) DOCTRINE OF ECLIPSE

This doctrine is based on the principle that all laws which violate fundamental rights are not void ab initio, rather such laws remain dormant, unenforceable for the time being. These laws keep existing for the past transactions, & for the enforcement of rights acquired & liabilities incurred before the present Constitution came into force. Such laws also exist for determination of rights of non-citizens. Only against citizens they remain in an eclipsed condition. This doctrine has been formulated by the Indian apex court in *Bhikaji Narayan Case* and was subsequently followed in *Sundaramier case*, *Deep chand & M.L. Jain* cases respectively.

But the court deviated from *Deep Chand* and *M.L. Jain* position in *Ambica Mills case*, when it held that a post constitutional law which is inconsistent with fundamental rights


The court held C.P. & Berar Motor Vehicle (Amendment) Act 1947 got eclipsed. It, restricting transport business, was valid when enacted, but became void after the Constitution came into force where under Freedom of trade, business, commerce was guaranteed under art 19 (1) (g).

201 *Sundaramier* case Supranote 188 (held sales tax can be imposed retrospectively; Also see *Shenoy v. Commr v. Tax Officer* AIR 1985 SC 621. *Deep Chand v. State of U.P.* AIR 1959 SC 648 (held that doctrine not applies to post constitutional laws) & was followed in *M.L. Jain v. State of U.P.* AIR 1963 SC 1019.
is not nullity in all cases & for all purposes. Rather it is subject to exception such as it remains operative in case of non-citizens to whom fundamental rights under Art. 19 are not guaranteed.202

The Ambica Mill decision has made it clear that doctrine of Eclipse must apply to both pre & post Constitutional laws, says Seervai.203

Further, the Court went to the extent of applying this doctrine to post constitutional laws even against citizen in Dulare Lodh case. 204

(II) DOCTRINE OF SEVERABILITY:

According to this doctrine if the constituent Act comprises of valid & invalid parts and it is possible to separate the latter from the former, then only offending part is to be declared void & not the whole Constitution Act. This fact of severability is as -certained by courts through knowing legislative intent.205 But if the valid & invalid parts are


204. Dulare Lodh V. IIIrd Add. Distt. Judge Kanpur AIR 1984 SC 1260 (Section 9 of U.P. Civil Laws (Amend) Act 1972 created a difficulty as under it decree passed for eviction of a tenant could not be executed. This flaw was rectified by an amendment in Section 9 in 1976 and it was given retrospective effect. The court held that retrospective effect of amendment of the section, removed the shadow of the eclipse and decree became executable.

205. Corpus Juris Secundum (Vol. 82) pp 156; Also see Sutherland on Statutory Construction (Vol. 2) pp 176-177.
so inextricably mixed up that it is difficult to separate them from one another, then the whole Act is struck down as unenforceable. Further even if the valid part is distinct & separate from the invalid one but they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. In brief, it is not the form of separability of the valid and invalid provisions of the Act that matters, but is the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein. If after the striking down of invalid part, the remaining part cannot be enforced without making alterations & modification in it, then the entire Act is to be struck down as void as otherwise it amount to judicial legislation.

The doctrine of severability in application was first adopted by the Indian apex court to taxing statutes. But it was considered in an elaborate manner in well-known Prize-money case. Again it was applied in Anti-defection case where the apex court held that S.10 of the Tenth schedule minus para seven remains valid & constitutional & thus struck down para seven of section 10 as unconstitutional. Further in Ayodhya case, the

207. Supranote 172 Crawford pp 218-219
208. United Motors India Case Supranote 178.
209. R.M.D.C. case supranote 137. Here, applying doctrine of severability, the court struck 137 down those provisions which related to competitions involving skills; Also see Gopalan, Ramesh Thapar cases supranote 34; State of Bombay v. F.N. Balsara AIR 1951 SC 318 etc.
five judge constitutional Bench by 5-2 majority applied doctrine of severability when it struck down sub-section 3 of Section (4) of Ayodhya Acquisition of Certain Areas Act as unconstitutional as it was an extinction of the judicial remedy for resolution of the dispute amounting to negation of rule of law. And held that the Act minus Section 4(3) was constitutional.211

Mr. Seervai has rightly submitted that "the acceptance of severability in application is clearly right. The time has long gone by when mere technicalities were permitted to defeat the ends of justice, there is no reason why a law should be invalidated as a whole when there are large parts of it which are valid."212

(III) DOCTRINE OF WAIVER:

This doctrine is based on the assumption that a man without legal disability is the best judge of his own interest and if, with knowledge of a right or privilege conferred on him by statute or otherwise for his benefit, he deliberately & knowingly gives up the right or privilege to its full extent, he has a right to do so but he cannot waive of such right or privilege which is principally for the benefit of not his individual self but of public at large & it would be against

211. Supranote M. Ismail Farqui case 110 at p 644.
In United States, the distinction is drawn between those fundamental rights which can be waived and those which cannot. And only those which are primarily enacted for the benefit of an Individual like equality clause of the U.S. Constitution, can be waived. In case of Snapp, the U.S. apex Court accepted implied waiver because of the fact of Snapp being a CIA agent had entered into a contract with the American Government regarding his work in Vietnam.

Unlike American Supreme Court, according to the Indian apex court, the doctrine of waiver not applies to the fundamental rights, means in India, the accused cannot waive of his Constitutional rights & get convicted. The question of waiver directly arose in the land-mark case of Basheshar Nath wherein Chief Justice Das held that right to equality cannot be waived.

214 Michael v. Louisiana 350 U.S. 9 (1955) (Case relating to affording reasonable opportunity to the Negro accused petitioner challenging the composition of grand jury); Also see earlier cases of Hale v. Kentucky 303 U.S. 613 (1937); Carter v Texas 177 U.S.442 (1899); Neal v. Delaware 103 U.S. 370 (1880) Also see Patton v. U.S. 281 U.S. 276, 298 (1929); Jordon v. Massachusetts 225 U.S. 167 (1911).
216 Basheshar Nath v. Income Tax, Commissioner AIR 1959 SC 149. Justices Bhagwati & Subba Rao even went to the extreme of stating that none of fundamental right can be waived under Indian Constitution as all are put in the Constitution as a matter of public policy for the benefit of the general public. Justice Bhagwati also observed that the founders of Indian Constitution followed the American view of the Bill of Rights as advocated by Jefferson.
But in his dissent Justice S.K. Das held that there was no difference between the U.S. & the Indian Constitution as would make the American doctrine of waiver inapplicable to Indian Constitution. The correct test to apply to each fundamental right was to inquire whether it conferred a right on a person primarily for his benefit. It it did, that right could be waived, provided such waiver is not forbidden by law & not contravenes public policy or public morals.  

(IV) DOCTRINE OF PROSPECTIVE OVERRULING:

This doctrine envisages that a well-settled precedent may be overruled from a future dates and not from the back date. It is based on the presumption that a Court should recognise a duty to announce a new and better rule for future transactions whenever that Court has reached the conviction that an old rule as established by precedents is unsound. Thus, the case before the court is determined under the old principle but caution is given that future cases will be decided according to the rule newly created. This modern doctrine suitable for a rapidly moving society, has been formulated by Justice Cardozo in the Sunburst Oil cases. Through number of cases till date, the U.S. Supreme Court has accepted the doctrine as the correct test to apply to each fundamental right.

217. Mr. Seervai has accepted Justice Das dissent as correct. See for details supranote pp 425-432; Also see Olga Tellis V. Bombay Municipal Corporation Case AIR 1986 SC 180 (Pavement Dwellers case. Again the court unanimously held that there cannot be any ‘estoppel’ against the constitution, and that ‘a person can not waive any of the fundamental rights conferred upon him by the Constitution in Part III or by any act of his. See Ch. VI infra.

218. Great Northern Railway v. Sunburst Oil 287 U.S. 358 (1932); Also See Supranote 06 Jain, M.P. p 854.
Court has asserted that it has power to decide on a balance of all relevant consideration whether a decision overruling a previous principle should be applied retroactively or not, & has discarded the Black-stonian doctrine that a new ruling merely sets forth the law as it always existed.219

In India since Golaknath220 case, judges are applying the existing law to the past transactions & the newly created formulation to future instances through the device of prospective overruling. Moreover Indian Constitution also does not expressly or implicitly speak against this doctrine.221 But this doctrine has been applied in an extremely narrow area, that is, in the case of invalidity of constitutional amendment which had been in force for a long time & which had become the basis of a mass


220. Supranote pp 1669. The Court quoted from Chief Justice Hughes dissent in Chicot Country Drainage District Case 308 U.S. 371 (1940) wherein he held that "the law prior to the determination of unconstitutionality is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration". Also see Kesavananda Bharati case Supranote 36.

221. Infact, Articles 32, 141 and 142 are couched in such wide and elastic terms as to enable the apex court to formulate legal doctrines to meet the ends of justice. The only limitation there on is reason, restraint and injustice.
of legislation affecting agrarian economy.\textsuperscript{222} Again, in Waman Rao's case, the Summit court deems to have accepted this doctrine of prospective overruling when it observed: "We hold that all amendments to the Constitution which were made before April 24, 1973 and by which the Ninth Schedule to the Constitution was amended from time to time by the inclusion of various Acts and Regulations therein are valid and constitutional. Amendments to the Constitution made on or after April 24, 1973, by which the Ninth Schedule to the Constitution was amended from time to time by the inclusion of various Acts and Regulations therein are open to challenge on the ground that they, or any one or more of them, are beyond the constituent power to Parliament since they damage the basic or essential features of the constitution or its basic structure". After \textit{Golak Nath}, the Court has not concretely invoked this doctrine in any other case.\textsuperscript{223} But there is no denial of the fact that this doctrine strongly recognises the judicial law & policy-making role of the apex court as not visualised by the founding-fathers.

\textsuperscript{222} In America, the doctrine has been applied in cases of changes in judicial views as regards the scope and interpretation of Constitutional provisions generally.

\textsuperscript{223} Only in \textit{Suman Gupta V. State of J&K} AIR 1983 SC 1235, the court applied this doctrine in somewhat different context. Here, the Court held that vesting of absolute power in the state government to nominate candidates for admission to medical colleges outside the state is violative of Article 14, but refused to disturb the already made nominations as these candidates had already covered a substantial part of their course of studies.
DOCTRINE OF BASIC STRUCTURE:

This unique doctrine is evolved by the Indian Supreme Court in the landmark case of Kesavananda Bharati while interpreting the constitutionality of amending power of parliament as guaranteed by Article 368 of the Constitution. Overruling its earlier decision of Golaknath whereby Parliament was denied the power to amend fundamental rights of citizens, in the Fundamental Right case, the majority laid down the rule that the power of Constitutional amendment in Article 388 had to be so exercised as not to damage the a "basic structure" of the Constitution. But none out of thirteen judges could exactly define the term 'basic structure' Different judges enumerated different essentials of the Constitution & labelled these as 'basic features' of the Constitution & made it clear that these features enumerated by them are only illustrative in nature & not exhaustive & will be determined in future on the basis of the facts in each case. In brief, as according to judges, basic structure comprised of following features namely:

(a) Supremacy of the Constitution, (b) Republican & Democratic Form of the Government, (c) Secular character of the Constitution (d) Separation of powers (e) Federal character (f) Directive

224. Supranote 36 In this case out of 13 judges constitutional bench, 11 judge delivered separate judgements. The court upheld validity of 24th (Amend) Act. Both Golaknath & Kesavananda arose out of constitutional amendments relating to right to property. The majority opinion in Kesavananda held that the amending power of the Parliament is subject to implied limitation and not includes the power to destroy or abrogate the basic features of the Constitution.
This doctrine of basic structure further gained legitimacy when it was followed by the court in the election case of *Smt. Indira Gandhi* \(^\text{226}\) & reasserted in *Minerva Mills* case.\(^\text{227}\)

As already seen in the previous chapter, the Court striking down Cl (4) & Art 329 A (inserted by 39th Amend Act 1975) for being beyond the amending Power of Parliament and held that it destroyed the 'basic features' of the Constitution, that is 'free & fair election' an essential postulate of democracies & part of the basic structure of the Constitution. In this case 3 more features were added in the list of 'basic features' namely (1) Rule of law; (ii) Judicial Review & (iii) Democracy, which implies 'free & fair elections'.

In *Minerva Mills* the court unanimously struck down Cl. (4) & (5) of Sec. 55 of the 42 not Amend Act 1976 as being violative of the basic structure & added few more 'basic feature' of the Constitution namely (1) Limited Power of Parliament to amend the Constitution (ii) Harmony & Balance between fundamental rights & Directive Principles; (iii) Fundamental Rights in certain cases & (iv) Power of Judicial Review in certain cases.

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225. This judgement has been till date remained a subject of debate and has been condemned for not defining clearly the vague term 'Basic Structure'.


Further in Waman Rao’s Chief Justice Chandrachud said:

"...The question as to whether the basic structure is damaged or destroyed in any given case would depend upon which particular Article of Part III is in issue and whether what is withdrawn is quintessential to the basic structure of the Constitution."

Recently the court held that independence of judiciary is part of the basic structure of the Constitution.

All the judgements since Kesavananda show that the only constitutional amendments & not ordinary statutes can be challenged on the ground of violation of the basic structure.

And this has kept in check the number of cases & made it clear that the Constitution is the paramount law in India as intended by the founding fathers.

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228. Waman Rao V U.O.I. AIR 1981 SC 27 at 279. The Court upheld Article 31-A & 31-B and held that date of decision of Kesavananda would be the cut off date for applying the basic structure doctrine; Also see Bhim Singh case AIR 1981 SC 234 (The court held that if an Act added to IX Schedule restructs fundamental right under Article 19, it is 'perse' violative of the basic structure of the constitution. See Ch. II supra.

229. Shri Kumar Padma Prasad V. U.O.I. (1992) 2 SCC 428; Again in Ayodhya case, the court reiterated that secularism is the part of the basic structure of the Constitution. Supranote. 110 at p. 630 para 40, earlier in S.R. Bommai Case (where in the central take over of the Karnataka and other BJP ruled governments were questioned) the 9 judges bench of Court established that secularism was a part of the basic structure of the Constitution. (1994) 3 SCC I.

230. Prof. Buxi has queried the correctness of this rule that why the basic structure limitations operating on the higher (constituent) power may not operate upon lesser (legislative) power. See supra note pp 62; Mr. Sathe submits that this rule of non-application of this doctrine to ordinary laws is based on the distinction between legislative power and constituent power. For details see "Basic structure Doctrine And Supreme Court" Sathe, S.P. in Constitutional Amendments (1950-1988) ed. by Diwan, Paras p 84.
(VI) DOCTRINE OF CONSTRUCTION BY IMPLICATION

This is the mode of determining the intents of the law not clearly outlined but implied in general terms. In America, this rule is established beyond 'Cavil' that in construing the constitutional provisions what is implied is as much a part of the instrument as what is expressed. The Court, in construing a provision of the Constitution, may imply a negative from affirmative words where the implication promotes, but not where it defeats the intention. This doctrine is limited to the extent of preventing judicial amendment of the fundamental law. In *Prigg's* case, the Court has declared that it has no right to insert any clause in the Constitution which is not expressed & cannot be fairly implied.

This doctrine is subject to certain consideration. First is that without such implication the Constitution will be either unreasonably hampered in its working or handicapped in its function to achieve its declared object. Secondly implication must be necessary & proper and Thirdly such implication must be auxiliary in aid of the declared purpose of the Constitution.

231. Supranote 9 S. 72 p 251; Also see *Cohen v. Virginia* 6 wheat U.S. 264 (1821); *South Carolina v. U.S.* 199 U.S. 437 (1905); *Dillon V. Glass* 256 U.S. 368 (1921).

232. *Prigg V. Pennsylvania* 16 pet U.S. 539 (1842). Generally it is required that the words used in a Constitution should be carefully weighted and examined to convey a certain and definite meaning, with as little as possible left to implication.
Such implication cannot extend beyond what is merely incidental. In India there is no dearth of cases on implied limitations.

In the landmark case of Kesavnanda Bharati the Court adverted to the concept of inherent & implied limitation & held that the powers given in the Constitution can be restricted by implied limitation & while interpreting constitutional provision, this doctrine can be invoked, to ascertain the legislative intent.

In this case Mr. Justice Ray was categorically against any limitation on power of amendment given in the Constitution. Quoting the U.S. apex Court authorities viz. Rhode Island, and les
er Mr. Justice Ray held that, "to introduce into our Constitution the doctrine of implied & inherent limitation on the meaning of the word 'amendment' by up holding the power to amend the essential features but not the core on the theory that only people, can change by referendum is to rewrite the Constitution".

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233. Supranote 06 Mukherjee pp 111-114.

234. R.V. Burah (1878) 3 A.C. 889 is the first case where Privy council considered the question of implied limitation of legislative power. The doctrine has been invoked in cases like Re Delhi Laws Act case AIR 1951 SC 332; H.S. Bagla v. State of M.P. AIR 1959 SC 465; D.S. Grewal v. State of Punjab AIR 1959 SC 512; Municipal Corp. of Delhi v. Birla Cotton Mills AIR 1968 SC1232 etc.


(VII) DOCTRINE OF PITH AND SUBSTANCE:

Also known as the doctrine of 'legislative competence', according to it, in order to ascertain the true province of legislation, the Court must look behind the names, forms and appearances to discover the true character & nature of the legislation. If the Act so viewed substantially falls within the powers of the legislature which enacted it, then it cannot be held to be invalid, merely because it incidentally encroaches on matters which have been assigned to another doctrine.237

In India, Courts firstly applied the doctrine in 1939 in Indian Central Provinces Case & again in Subrahmanyan Chettiar Case & Prafull Kumar Mukharjee Case.238 In Chettiar Case Chief Justice Sir Maurice Gwyer said:" --- it must inevitably happens from time that legislation, though "purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the judicial committee, whereby the impugned statute is examined to ascertain its "pith & substance or its true nature & character" for the propose of determining whether it is legislation with respect to matters in this list or in that".

237. The doctrine is evolved by the Canadian Constitution. See Supranote 06 Jain M.P. 852; Supranote 08 Mathur, R.M. pp 57.

This observation has been repeatedly approved by the Indian apex court as laying down the correct rule to be applied in resolving conflicts which arise overlapping powers in mutually exclusive lists. 239

(VIII) DOCTRINE OF COLOURABLE LEGISLATION:

This doctrine denotes that legislature cannot under the guise or colour of exercising its powers, carry out that object by making such legislation which is beyond its competence. In other words legislature cannot "do indirectly what it is not empowered to do so directly". The Indian apex court discussed in detail the meaning & scope of this doctrine in Gajapati Narayan Deo case wherein it held:

"--- The Idea conveyed by the expression (colourable legislation) is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretense or disguise -- In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject matter in substance is something what is beyond the powers of that legislature to legislature upon the form in which the law is clothed cannot save it from condemnation. The legislature cannot violate the constitutional prohibition by employing indirect methods---"240


Gajapatis case has been cited & followed by the Court in number of subsequent cases as laying down the correct principles for determining colourable legislation.\textsuperscript{241}

(IX) DOCTRINES OF POLICE POWER AND SOVEREIGN POWER

The doctrine of Police Power is based on the theory that the state is armed with an inherent authority to protect public health, safety and morals. To quote Justice Holmes "It be said in a general way that the police power extends to all the great public needs".\textsuperscript{242} It is said that the need for introduction of this doctrine was necessitated, in U.S.A. on account of the liberalist interpretation of the 'due process clause'.\textsuperscript{243} But this was not the only reason as it is rightly submitted by Mr. Tope that main reason for its evolution is perhaps the absence of limitations on the individual freedom in Bill of Rights, due to

\textsuperscript{241} See Kameshwar Singh Supranote 235; M.R. Balaji Supranote 90, G. Nageshwar v. A.P.S. R.T.C. AIR 1958 SC 308; The Doctrine can also be applied to taxation laws. K.T. Mooeit Nair v. State of Kerala AIR 1961 Sc 552 etc.

\textsuperscript{242} Federation of Hotel and Restaurant v. U.O.I. AIR 1990 S.C. 1637 the court held that entries in the 7th Schedule should be so construed as to avoid conflict. On applying this list, the expenditure tax Act is not colourable legislation. Hotel Balaji v. State of A.P. AIR 1993 S.C. 1048 held if a legislature uses its power to amend a provision during the pendency of a writ petition challenging the validity of that provision it does not amount to colourable act.

\textsuperscript{243} Noble State v. Haskell, 219 US 104; Also see Eubank v. Richmund 226 US 137 Quoted by Tope, T.K. Supranote 203.

See views of Justice Patanjali Sastri in Gopalan’s case Supranote 34. To Quote "when that power (legislative power) was threatened with prostration by the excesses of due process, the equally vague and expansive doctrine of "policy power"----- was evolved to counter act such excesses".
which there has always been apprehension of vagueness and uncertainties in the American Constitution & therefore to bring necessary reconciliation this doctrine was invented by the U.S. apex court.244

In America, the doctrine of Police power has been followed by the Summit Court in number of cases. In Adkins case, the Court observed, "The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good". 245

As compared to American position, the founding fathers of Indian Constitution by explicitly curbing down the absoluteness of fundamental rights, by providing limitations on individual freedoms, not in a way permitted the Supreme Court to invent the doctrine of "Police Power" for bringing about social control.246 This way, under the Indian constitution, there is place for the doctrine of ‘police power’.


246. To quote from Dr. Ambedkar’s speech in the Constituent Assembly: "What the draft Constitution has done is that instead of formulating fundamental rights in absolute terms and depending upon our Supreme Court to come to the rescue of Parliament by inventing the doctrine of police power, it permits the state directly to impose limitations upon the Fundamental rights. There is really no difference in the result. What one does directly the other does indirectly. In both the cases, the fundamental rights are not absolute" C.A.D. Vol. VII (Nov 4, 1948) p 41.
But, with a view to enable the smooth functioning of the Government so it can legislate for the promotion of social-economic welfare of the society, the Indian Supreme Court has introduced the doctrine of Sovereign Power in *Synthetics and Chemicals Ltd case*. To quote,: "The Indian State, between the Centre and the States has Sovereign power. The Sovereign power is plenary and inherent in every sovereign state to do all things which promote the health, peace, morals, education and good order of the people. This power, however, is subject to constitutional limitations ----".247

Calling this notion of 'Sovereign Power' as 'unsatisfactory', Mr. Tope has, submitted that by subjecting it to constitutional limitations it is hardly made convincing.248 It is submitted that Mr. Tope's submission is right because even in the absence of this doctrine of Sovereign power, the Indian State can make laws for the promotion of public health, morals, education etc. on the basis of the constitutional provisions as enumerated in the Preamble, fundamental rights and Directive principles of State policy and Fundamental Duties (which were inserted after independence by the 42nd Amend, 1976 in form of Article 51-A).

247.  *State of U.P. V. Synthetics and Chemicals Ltd.* (1990) ISCC 109, 144-45. In this case with regard to Article 265 the Supreme Court laid down a general rule that the power of regulation and Control is separate and distinct from the power of taxation.

248.  Supranote 203.
DOCTRINE OF PARENS PATRIA

This doctrine, having its roots in the common law concept of the "royal prerogative", includes the right or responsibility to take care of legally incapacitated persons, who on account of mental incapacity, can not take proper care of themselves and their property. Recently, the Indian Supreme Court invoked this doctrine in popularly known Bhopal Gas tragedy case, so to enable the Union government to represent the victims of the tragedy due to the negligence of a multinational Union Carbide company. Upholding the validity of the Bhopal Gas Leak Disaster (Processing of claims) Act 1985, the Court held that the state in a capacity of parens-patriae (parent of the country) for protecting the disabled victims of Bhopal Gas disaster is competent to represent the victims, who are unable to protect and fight for their rights as citizens.

It is submitted that this verdict is a positive step in the direction to the fulfillment of the dream of founding fathers who desired the state to perform the role of social-welfare and for this, they by inserting the Preamble and the chapter on Directive Principles enjoined upon the State to take up this responsibility of securing to all citizens, the rights guaranteed by the Constitution and to provide free legal aid to those citizens who cannot assert and fight for their rights.


CONCLUSION

The above-discussed principles and schools of Interpretation, the interpretivist and non-inter pretivist approach of the Court make it clear that today through various principles & rules of interpretation the Court does make law in order to make it workable. It is for the Court to decide 'whether the old bottles corked by the legislature can pour new wine, as said by Reynold.251 While interpreting any constitutional provision, the Courts both in America and India take assistance of internal and external aids to construction, apply different kinds of rules of interpretation, taking into account the requirement of the case in question, and this way after following due procedural process, give judgement in the case, laying down new doctrines and concepts of law, through this modus operandi.

This task for the court is tricky, especially in relation to interpretation of fundamental rights of citizens but the next few chapters will reveal that the court has not been reluctant to distribute new vintages whenever the need has arises both in America & in India.