CHAPTER 8
JUSTICE DELIVERY SYSTEM IN INDIA: UNCERTAINTY OF LAW

8.1 Introduction

8.1.1 Certainty of law: meaning, relevance, scope and its impact

"When people make moral or legal judgments in isolations, they produce a pattern of outcomes that they would themselves reject, if only they could see that pattern as a whole. A major reason is that human thinking is category-bound. When people see a case in isolation, they spontaneously compare it to other cases that are mainly drawn from the same category of harms. When people are required to compare cases that involve different kind of harms, judgments, which appear sensible when the problems are considered separately often, appear incoherent and arbitrary in the broader context. Another major source of incoherence is what we call the translation problem. The translation of moral judgment into the relevant metrics of dollars and years is not grounded in either principle or intuition, and produces large difference among people. The incoherence produced by category bound thinking is illustrated by experimental studies of punitive damages and contingent valuation. We also show how category bound thinking and the translation problem combined to produce anomalies in administrative penalties. The underline phenomena have large implications for many topics in law, including jury behavior, the valuation of public goods, punitive damages, criminal sentencing, and civil fines. We consider institutional forms that might overcome the problems of predictability incoherent judgments. Connections are also drawn to several issues in legal theory, including valuation of life,
incommensurability, and the aspiration to global coherence in adjudication.

Why did not the commission sit down and really go and rationalize this thing . . . ? The short answer to that is: We couldn't . . . . Try listing all the crimes that there are in rank order of punishable merit. . . . Then collect results from your friends and see if they all match. I will tell you they won't".¹

The very basis of a legal system is that it ensures that each legal wrong will be punished. However, there prevails uncertainty and unpredictability of law in its functional prospective i.e. uncertainty in decision making. The certainty of law is necessary so as to make the human beings to understand as to how they are to conduct themselves so as to avoid the sanction of law. Various developments in the post independence period in India show that uncertainty and unpredictability of law continue to exist in various spheres. This uncertainty and unpredictability also became the basis of realist school of jurisprudence, which is, by and large, studied as a part of sociological school of jurisprudence. Legal certainty is provided by the legal system to those subject to the law. As such the legal system needs to permit those subjects of the law to regulate their conduct with certainty and to protect those subject to the law from arbitrary use of state power. As such legal certainty entails a requirement for decisions to be made according to legal rules, i.e. be lawful. The concept of legal certainty may be strongly linked to that of individual autonomy in national jurisprudence. The degree to which the concept of legal certainty is incorporated into law varies depending on national jurisprudence. However, legal certainty frequently serves as the central principle for the development of legal methods by which law is

made, interpreted and applied. Legal certainty is an established legal concept both in the civil law legal systems and common law legal systems. In the civil law tradition, legal certainty is defined in terms of maximum predictability of officials’ behaviour. In the common law tradition, legal certainty is often explained in terms of citizens’ ability to organise their affairs in such a way that does not break the law. In both legal traditions, legal certainty is regarded as grounding value for the legality of legislative and administrative measures taken by public authorities.

The term ‘Predictability’ is the degree to which a correct prediction or forecast of the state of a system can be made either qualitatively or quantitatively. Causal determinism has a strong relationship with predictability. Perfect predictability implies strict determinism, but lack of predictability does not necessarily imply lack of determinism. Limitations on predictability could be caused by factors such as a lack of information or excessive complexity etc. Of course, predictability—that like cases are treated alike—is a fundamental component of the definition of justice. The social benefits of the rule of law are so obvious that it should hardly be necessary to list them, but, aside from issues of fundamental fairness enshrined in our Constitution in the ex post facto clause among other places, predictability has other advantages. If a result is predictable, settlement is easier: there’s little point in continuing to litigate on either side, because additional money spent on lawyers cannot change the result. If a result is predictable, one can more easily conform conduct to be law-abiding. The corporations aren’t incentivized to break contracts with one another to see whether they can get a better deal in the Courts; individuals and corporations know where the line is in dealing with the public and won’t step over it.
The table below contains essential disparities (and in some cases similarities) between the world’s four major legal systems.

<table>
<thead>
<tr>
<th></th>
<th>Common law</th>
<th>Civil law</th>
<th>Socialist law</th>
<th>Islamic law</th>
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<tbody>
<tr>
<td><strong>Other names</strong></td>
<td>Anglo-American, English, judge-made</td>
<td>Continental, Romano-Germanic</td>
<td>Social</td>
<td>Religious law, Sharia Law</td>
</tr>
<tr>
<td><strong>Source of law</strong></td>
<td>Case law legislation</td>
<td>Statutes/legislation</td>
<td>Statutes/legislation</td>
<td>Religious documents, case law</td>
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<tr>
<td><strong>Lawyers</strong></td>
<td>Control courtroom</td>
<td>Judges dominate trials</td>
<td>Judges dominate trials</td>
<td>Secondary role</td>
</tr>
<tr>
<td><strong>Judges’ qualifications</strong></td>
<td>Experienced lawyers</td>
<td>Career judges</td>
<td>Career bureaucrats, Party members</td>
<td>Religious as well as legal training</td>
</tr>
<tr>
<td><strong>Degree of judicial independence</strong></td>
<td>High</td>
<td>High; separate from the executive and the legislative branches of government</td>
<td>Very limited</td>
<td>Ranges from very limited to high</td>
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<td><strong>Juries</strong></td>
<td>Provided at trial level</td>
<td>May adjudicate in conjunction with judges in serious criminal matters</td>
<td>Often used at lowest level</td>
<td>Allowed in Maliki school, not allowed in other schools</td>
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<tr>
<td><strong>Policy-making role</strong></td>
<td>Courts share in balancing power</td>
<td>Courts have equal but separate power</td>
<td>Courts are subordinate to the legislature</td>
<td>Courts and other government branches are theoretically subordinate to the Shari’a. In practice, Courts historically made the Shari’a, while today,</td>
</tr>
<tr>
<td>Common law</td>
<td>Civil law</td>
<td>Socialist law</td>
<td>Islamic law</td>
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<tr>
<td>Australia, UK (except Scotland), India (except Goa), Ireland, Hong Kong, USA (except Louisiana), Canada (except Quebec), Pakistan, Malaysia, Norway (to some extent)</td>
<td>All European Union states except UK (excluding Scotland) and Ireland, Brazil, Canada (Quebec only), China, Japan, Mexico, Russia, Switzerland, Turkey, USA (Louisiana only), India (Goa only)</td>
<td>Soviet Union and other communist regimes</td>
<td>the religious Courts are generally subordinate to the executive.</td>
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The civil law is primarily contrasted with common law, which is the legal system developed among Anglophone people, especially in England. The aforesaid table provides an important outer view of the current of thought prevailing in these systems so as to understand the outcome of a legal problem at a particular point of time. In a comprehensive denunciation of the Denning ethos, Lord Hailsham of St. Marylebone said twenty years later—

‘... litigants would not have known where they stood. None could have reached finality short of the House of Lords, and, in the meantime, the task of their professional advisers of advising them as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in
legal matters, some degree of certainty is at least as valuable a part of justice as perfection'.

There are certain questions which needs to be kept in mind throughout the chapter as they constantly touch our thought process and we may not get a ‘definite’ or if we can call a ‘certain’ answer like Whether the predictability and certainty are contrary to flexibility. Whether certainty brings objectivity and stability, and reduces bias, arbitrariness. Whether complete Certainty is a hindrance to growth and innovation? Does complete certainty curbs or reduces discretion? The conflict in decisions confuses as it is not good for the growth of a human institution.

8.1.2 A vital facet of rule of law as it ensures equality also

Today, the concept of ‘legal certainty’ is internationally recognised as a central requirement for the rule of law. According to the Organisation for Economic Cooperation and Development (OECD) the concept of the rule of law “first and foremost seeks to emphasize the necessity of establishing a rule-based society in the interest of legal certainty and predictability”. At the G8 Foreign Ministers’ Meeting in Potsdam in 2007, the G8 committed to the rule of law as a core principle entailing adherence to the principle of legal certainty.

The principle of legal certainty, and as such the rule of law, requires that:

- laws and decisions must be made public;
- laws and decisions must be definite and clear;
- the decisions of Courts must be regarded as binding;
- the retroactivity of laws and decisions must be limited;

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The concept of certainty of law is an important facet of the rule of law. 'In the words of Richard Fallon, Jr.:

... Leading modern accounts generally emphasize five elements that constitute the rule of law. To the extent that these elements exist, the rule of law is realized:

1. The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.

2. The second element of the rule of law is efficacy. The law should actually guide people, at least for the most part. In Joseph Raz's phrase, "people should be ruled by the law and obey it".

3. The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time.

4. The fourth element of the rule of law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.

5. The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures'.

'Even though the judicial system is the main catalyst for cultivating adherence to the "rule of law", the responsibility must be

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shared by the entire web of public as well as private institutions that regulate our behaviour'.

8.1.3 The retrospective effect of legislation destroys certainty

Every enactment contains a recital as to what will be the date of its coming into effect i.e. whether immediately on its passing, from a back date, or from a future date. One of the main problems faced by the Courts in their creative effort was that any judgment declaring a legal principle was, by its very force, retrospective in operation inasmuch as the Court would be laying down what the law had always been. The questions were raised about the difficulties that the citizens may encounter if a new law became retrospective in operation and affected previous transactions. But this was not wholly true in regard to new developments in science and technology which require new legal principles to be laid down. In any case, retrospectivity inevitably created problems.

There is a bar in giving retrospectivity effect to the laws dealing with crime as Article 20 (2) of the Constitution makes

8.1.4 Option for appeal is a gamble or luck by chance!

The method of appeal is a legal device to seek redressal by the party aggrieved by the decision of a Court, addressed to a higher Court in the judicial hierarchy, which basically analyses the alleged mistakes, if any, committed by the Court lower in rank, on the touchstones of settled law as cited by the parties, aggrieved as well as the opposite party as well as the case law and understanding of law and its concept by the judge. First appeal against a final judgement, though a creature of law, is recognized almost in each case as a matter of right.

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The second appeal is permissible with certain limitations as laid down in respective enactment. The hierarchy of appeal is necessary for the following purposes:

(a) for correction of error;

(b) for settling the law in the ultimatum for guidance of the Courts below, as well as the litigants, present as well as the prospective.

However, the provisions of appeal are also fraught with inherent limitations i.e. the capacity of the litigant aggrieved by the judgement, the appreciative and understanding mind of the judge hearing the appeal etc. The experience has also shown that some times the judgement at each level has been reversed on each appeal by the each appellate Court! This sounds quite shocking and surprising. The question arises as to whether there is any certainty of law or the parties just play a game of cards where it is a kind of gamble or luck by chance. Nevertheless, it depends upon the ability of the lawyers from both sides also. In a civil appeal no. 1854 of 2003, titled as Sadhu Singh v. Gurdwara Sahib Narikan and others, decided on 08/09/2006 by a two-judge bench of the Apex Court, the case was reversed at each stage by the appellate Court. The judgement was written by Mr. K. Balasubramanyan, J. The brief facts, though unnecessary but are necessary to describe the nature of legal wrangles and what we can call a ‘judicial catastrophe’ as the party appealing gets a different answer each time it appeals, are as follows:

“One Ralla Singh held some self-acquired property. Isher Kaur was his wife. They had no children. On 7.10.1968, Ralla Singh executed a will, and died on 19.3.1977. On 21.1.1980, his widow Isher Kaur purported to gift the property in favour of a Gurdwara. The
appellant filed a suit challenging the deed of gift. He also prayed for recovery of possession after the death of Isher Kaur. The appellant claimed that under the will of Ralla Singh, Isher Kaur took only a life estate and the properties were to vest in the appellant and his brother. On the terms of the will under which she took the properties, Isher Kaur had no right to gift the property to the Gurdwara. She was bound by the terms of the bequest. Isher Kaur and the Gurdwara, contended that the property received by Isher Kaur on the death of her husband was as his heir and it was taken by her absolutely and she was competent to deal with the property. It was pleaded that in any event, Section 14(1) of the Hindu Succession Act entitled her to deal with the property as an absolute owner. The appellant countered that Isher Kaur having taken the property under the disposition of her husband, was bound by its terms and she had only a life estate and no competence to donate the property. It was a case to which Section 14(2) of the Hindu Succession Act applied and the limitation on rights imposed by the will was binding on Isher Kaur. Her estate could not get enlarged under Section 14(1) of the Act.

The trial Court held that the will propounded by the appellant was not genuine. On that basis, it dismissed the suit holding that Isher Kaur had taken the property absolutely on the death of her husband as an heir and under the circumstances she was entitled to donate the property to the Gurdwara. The appellant filed an appeal. Pending the appeal, on 17.6.1996, Isher Kaur died. The lower appellate Court held that the will propounded by the appellant was proved to be the last will and testament of Ralla Singh. The appellant had proved its due and valid execution. The will was thus upheld. The Court held that on the terms of the Will, Isher Kaur had only a life estate or limited interest in the property and she had no right to transfer the property by
way of gift. Since Isher Kaur had taken the property under the will which placed a restriction on her right, Section 14(2) of the Hindu Succession Act applied. Consequently, the appellant as the legatee under the will was entitled to recover possession of the property on the termination of the life estate of Isher Kaur. Thus the trial Court decree was reversed and the suit decreed. On behalf of the donee Gurdwara, a Second Appeal was filed in the High Court. It applied the ratio of the decision of this Court in V. Tulasamma Vs. V. Shesha Reddi [(1977) 3 SCR 261] and Raghubar Singh Vs. Gulab Singh [AIR 1998 SC 2401] that Court held that Section 14(1) of the Act applied to the case. It did not refer to the decisions relied on, on behalf of the appellant herein. Though it accepted the finding of the appellate Court on the genuineness and due execution of the will by Ralla Singh, it did not specifically deal with the question whether Section 14(2) of the Act was attracted to the case. Thus, reversing the decision of the lower appellate Court, the High Court dismissed the suit. The appellant/plaintiff, challenged the decision in Second Appeal before the Apex Court.

The Apex Court allowed the appeal and extensively dealt with the precincts of Section 14 of the Hindu Succession Act, 1956”.

It is this concept of uncertainty which strikes at the root of our system in the sense as to whether the appellant was lucky enough to come to and financially capable to reach upto the highest level. If no appeal had been preferred, what would have been the fate i.e. gross injustice.

Though, it is difficult to capture all the contours of the issue in definite terms in the form of one chapter. However, I will make an attempt to provide a broad outline of the thoughts on the same.
8.2 Jurisprudential aspects

8.2.1 British legacy and the cumulative effect of developments till independence and the aftermath, legislative changes, and the Impact of agriculture

The common law was developed by the judges by identifying fundamental principles which should govern various legal relationships. The principles that were initially laid down were applied to new fact situations and therefrom new principles were engrafted on the old principles, resulting in a whole body of what became known as the “common law”. It was developed incrementally, from time to time.

In India, a reaction and protest against foreign rule, foreign language and foreign law developed in the 19th century under the aegis of the various social reforms movements like Arya Samaj, Brahma Samaj etc. These movements led by national reformers and revolutionaries advocated the revival of Vedic spirit. Swami Vivekananda stated:

“We must grow according to our nature. Vain is to attempt the lines of action that foreign societies have engrafted upon us. It is impossible . . . that we cannot be twisted and tortured into the shape of other nations. I do not condemn the institution of other races as they are good for them, but not for us. We with our traditions with thousands of years of Karma behind us, naturally we can only follow our own bent. run in our own grooves and that we shall have to do. We cannot become Westerners . . . .

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Swami Vivekananda, On India and Her Problems, 102-03 (1963).
Europeanise India is, therefore, and impossible or foolish task”.

The Gandhian revolt against Western domination and cultural discrimination awakened the suppressed and downtrodden Indians. No Indian jurist protested against the importation of British legal system which had been influenced on the indigenous and the traditional legal philosophy of India. The emergence of Britishers, firstly as traders, and then as a partner in power-sharing, and thereafter as our rulers, constitute their rise from bottom to the top. Thereafter, the great revolt of 1857 shook their foundations, and therefore, they began to involve Indians in the administration but to a limited extent. The entry of Britishers on the Indian canvas also brought various changes in all spheres of life of our nation. From the Regulation Act, 1773, to the Government of India Act, 1935, the Britishers brought in number of changes positive as well as negative from our point of view. Most of these legislative measures were to serve their interests. However, they also abolished sati system and the various social reforms with the help of some of the Indians having forward thinking. The long struggle brought Indians together and it nourished the missing spirit of nationhood. It not only influenced the social developments, but also the legal developments which were also taken care of by the lawyers like C.R. Das, Pt. Nehru, Mahatma Gandhi etc. The huge sacrifice coupled with partition of India, had great influence over the thought process of the Constituent Assembly. The freedom struggle which basically started from 1757, and finally, yielded the result after a constant struggle fought 190 years, had a considerable impact. This impact was fresh in the mind of the members of the Constituent Assembly, which tried to give due respect to the needs and aspirations of the people of the infant nation. The British rule, and its aftermath, also continued to have direct impact, and also in an indirect manner of the legal developments in England. Thus, the early years of legal
development in India in the form of legislative measures and also in the form of judgments of the Supreme Court, whose judges were brought up in English traditions, and therefore, the mind-sets of many of them, were hung up with the idea of analytical positivism. Consequently, a large number of legislative measures were, when challenged even on the grounds that they are violative of Part III of the Constitution of India, upheld in favor of the sovereign being its command.

After independence, a large number of measures were required to be taken by the government as our economy was and is based on agriculture and there were a large number of land-holdings in few hands, an offshoot of feudal system. The Dawn of freedom was also characterised by the existence of dictators in the form of being heads of princely states. These princely states could not be left alone as the entire country was to be given a shape of one nation. Therefore, a large number of legislations were undertaken in the form of ceiling of landholdings etc. Their challenge in the Court was the natural, necessary and a well anticipated outcome.

8.2.2 Nature of Indian State: A shift from traditionalism to modernism and the concept of Welfare State

The independence of India was a testimony of emergence as well as the recognition of India as a nation. Though, India began to exist as a state much before it’s actually independence as the Britishers had to allow the participation of Indians in the decision-making process, and thereby, the traditional structure of state was transformed into the then kind of modern structure. The independence necessitated the amelioration of different groups in the society like peasants, women, the backward classes and other downtrodden groups in particular. Our constitutional founding fathers intentionally adopted the concept of welfare state, which was strengthened by the various
judgments of the apex Court. The enactments like the Punjab Security of Land Tenure Act, brought a sea-change in the entire country.

The incorporation of directive principles of state policy in the form of Part IV of the Constitution of India, laid down a number of obligations upon the state, which epitomizes the concept of shift from modern to welfare state. Till date, a number of such directives have been enforced by the legislature as well as the judiciary.

### 8.2.3 Realist school of thought

'Professor Goodhart has enumerated the basic features of realistic jurisprudence in the following:

1. The realist school depends for its importance not upon any definition of law but upon the emphasis it places on certain features of law and its administration. The most striking feature of this school is the stress they place upon uncertainty of law as a series of single decision. Frank rightly remarks, 'The physicists, indeed have just announced the principle of Uncertainty or Indeterminacy (where a high degree of quantitative exactness is possible). If there can be nothing like complete definiteness in natural sciences, it is surely absurd to except to realise even appropriate certainty and predictability in law, dealing as it does with the vagaries of complicated human adjustments'.

2. The second feature of the realist school is its attack on the use of formal logic in law, which they term 'medieval scholasticism'. According to them the judge in deciding a case reaches his decision on ‘emotive’ rather than on logical grounds.
3. The third feature of the realist school is the great weight they place on modern psychology with strong leaning towards behaviorism.

4. The fourth feature of the realist school is the attack they have made on the value of legal terminology for according to them, these terms are a convenient method of hiding uncertainty of our law. Professor Green Protests, 10 against the part which sacred words, taboo words, continue to play in our law”.

5. Finally, the realists stress, an evaluation of any part of law in terms of its effects, and an insistence of the worthwhileness of trying to find these effects'.

Karl Llewellyn (1893-1962) Professor Karl Llewellyn has been a Professor of Jurisprudence at Columbia. He is an important thinker of realist movement and he speaks of ‘the realists’ as a group. There is no ‘school’ of realists. He says, ‘realists’ comprise a movement interstimulated but independent. ‘There are some points on which all realists seem to agree. He says a juristic inquiry must proceed on the basis of:

1. that the law is in constant state of flux;
2. that it is a means to achieve a social end;
3. that society to whose ends, the law is a means, is in a state of even faster flux than the law;
4. that for the purpose of these inquiries the jurists should look merely at what Courts and officials and citizens do without references to what they ought to do. There should

be a temporary divorce of the ‘is’ and the ‘ought’ for purpose of study;

5. that the juristic inquiry must regard with suspicion the assumption that legal rules as they are formally enunciated or inscribed in books represent what the Courts and people are actually doing;

6. that the realist must regard with equal suspicion the assumption that rules of law formally enunciated actually do produce the decisions which purports to be based on them; and

7. Finally, that every part of law is to be valued in terms of its actual effects rather than in terms of the symmetry of its traditional rules'.

John Austin defined law at the command of sovereign backed by a sentient. It is the awesome power behind it that distinguishes law from other species such as fashion habits or even custom. He does not make any distinction between a good or bad law. He provides that even a bad law is law so far as it fulfills the three characteristics of law namely, firstly it is a command; secondly, it is issued by the sovereign authority; and thirdly it is backed by a sanction i.e. an evil consequence will follow if disobeyed. H.L.A. Hart asks 'whether an order of the government asking the banker to hand over his cash is law'. The order of the government is also backed by sanction, i.e., fear of death. Is a gunman a sovereign? Austin defined sovereign as a person or authority who is subordinate to none and is obeyed by everyone. At a particular point of time when the gunman orders the banker to hand over the cash, is obeyed by everyone. However, the difference between a gunman and a political sovereign is that the

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1 Stone, Julius, Province and Function of Law, 415-416 (Sydney, 1946).
gunman cannot be considered to be a lawful authority and his command is obeyed due to fear death alone. According to Hart, the bank is ‘obliged’ to obey the gunman. He is not under an obligation to obey. In fact, there is no difference between ‘being obliged to obey’ and ‘having an obligation to obey’? Hart further says:

“It is, however, equally certain that we should misdescribe the situation, if we said, on these facts, that (banker) had an obligation or a duty to hand over the money. So from the start is clear that we need something else for an understanding over the idea of obligation. There is difference, yet to be explained, between the assertion that someone was obliged to do something and the assertion that he had an obligation to do it”.

A sovereign is considered to be in legitimate authority. One obeys a legitimate authority not only because one ‘is obliged to do so’ but also because one feels ‘under an obligation to do so’. Prof. Hart distinguished between ‘being obliged to act’ and ‘having an obligation to act’. He points out that there is a difference between compliance with an order because of fear and compliance because of being considered to be binding.

A gunman is obeyed only out of fear of death. A sovereign may also be obeyed out of fear of punishment considered prescribed by a legitimate authority. ‘Having an obligation to act’ arises from the legitimacy of an order. A sovereign appointed or elected by law is considered legitimate. Legal validity is a condition of legitimacy. Then we say that a law is valid. It means it isn’t made by a competent authority in accordance with the procedure prescribed. The difference
between power and authority is important. The gunman has power but no authority. A sovereign has both power and authority. Sometimes, there may be lack of power but authority may be there.

When Mahatma Gandhi said to the judge trying him for an offense that he considered the law for which he has been charged, to be an unjust law and he would not obey the same irrespective of the punishment he may have suffered. In fact, he de-legitimated the colonial law. Though the law was valid but in the eyes of a large number of Indians, it was unjust. Similarly, the answer to a question as to whether the declaration of emergency in 1975 and the subsequent orders curbing the liberty, were valid or not, it all depended upon the current of thought prevailing at that time and also upon the ideology, development of personality and thought, the social-economic background of the judges etc., while deciding the validity of such declaration and the subsequent orders.

Similarly, was the significant contribution of Jerome Frank, Axel Hagerstorm, V. Lundsted, K. Olivecrona, Alf Ross.

There is a quest as to how far the judicial findings of fact accord with the realities of the situation? Judges, of course, have to give their findings upon the evidence adduced in the case. Sometimes witnesses do not tell the truth. On other occasions, the persons who could give true version are not willing to come forward and give evidence. Whatever might be the reason, the result is that a judicial finding of fact is sometimes entirely divorced from the realities of the situation. If this incongruity between the realities of the situation and the judicial finding of fact, is confined to a small number of cases, there may not much to pinch as it is nothing but a necessary evil. If, however, the incongruity between the realities of the situation and the judicial finding of fact becomes extensive and widespread, it is bound to shake the confidence of the people in the ability of the Courts to
find the truth of the matter and thus create a credibility gap for them. Although it is not possible in any judicial system to prevent such incongruities in a marginal number of cases, the efforts should be to ensure that our judicial system functions in such a manner that consistently with a fair procedure, such incongruities are reduced to the minimum. There is a deemed quest for truth in all judicial trials, an endeavour to find as to where the truth lies in the face of conflicting versions given by the opposite sides. It, therefore, becomes essential for the judicial officer to separate the grain from the chaff to arrive at the truth. Every judicial trial is, indeed, a trial of our judicial system. Every incongruity between those realities and the judicial findings is bound to bring down the judicial system in the estimation of the people and undermine their confidence in the capacity of the Courts to arrive at the truth. It is this understanding of the realities of life of law and law of life also, which differs from person to person. Therefore, the certainty of law is thereby adversely affected.

Another matter which engages our attention is as to how far the Courts are justified in adopting a passive role, leaving it to the parties or their counsel to bring such material on record as they consider necessary. What we have to consider is whether consistently with the above system, the Courts should not play a more active role in finding the truth with a view to make their findings more in accordance with the realities of the situation. The situation since 1980s has seen a vast change.

8.3 Constitution of India

8.3.1 Evolution of basic structure theory

There was a fear in the minds of makers of the Constitution of India that there would be large-scale invalidation of the laws by judiciary. The reason behind this fear was that the US Supreme Court had given many reactionary decisions. It had declared a law abolishing
slavery as unconstitutional on the ground that it violated the slave owner’s right to property. This inevitably meant that the Court regarded a slave as the property of his owner. A piece of legislation against child labour was struck down on the ground that it is against the doctrine of freedom of contract. The memories of such judicial decisions were fresh in the minds of the Constitution makers. After independence, the need of the hour was to bring a large-scale land reform and change in property-relations. Pandit Nehru wanted the acquisition of private property for public purpose on payment of compensation, a quantum of which would be decided by the Parliament. The Parliament wanted free hand in considering various factors like the neglect of the land, injustice of the absentee landlordism, the resources of the state and its beneficiaries etc. The members of the Constituent Assembly were apprehensive of the negative judicial attitude which could prevent the socio-economic reforms.

For the aforesaid reasons, the Constitution makers did not want the American model under which the Court could examine as to whether a law was just or fair and what dwarfs liberty and equality, but they wanted the British model of judicial review, which could ascertain whether the legislature acted within its limits according to law or not. Pandit Nehru said:

"Within limits no judge and no Supreme Court can make itself a third chamber of the legislature. No Supreme Court and no judiciary can stand in judgement over the sovereign will of Parliament representing the will of the entire community. If we go wrong

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9 Dred Scott v. Standford, 60 U.S. 393 (1856).
11 CAD Vol. 9, 1195.
here and here, it can point it out but in the ultimate analysis, where the future of community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament”.

While discussing the evolution of the basic structure doctrine, it is necessary to mention that Articles 13, 19, 14, 368 of the Constitution of India were primarily involved. In Shankari Prasad v. Union of India,12 it was argued that a constitutional amendment was ‘law’ on the touchstone of Article 13 and therefore, it had to be tested on that basis. Any law violating any of the fundamental rights should be declared void. In a unanimous decision of five judges, the Chief Justice Patanjali Sastri, speaking for the bench, rejected the argument and held that the world ‘law’ in Article 13 does not include a constitutional amendment. It means that the constitutional amendment carries a special status outside the purview of Article 13 and therefore, any amendment, even if violative of a fundamental right, is not void. The Parliament passed 17\textsuperscript{th} Amendment of the Constitution during Pandit Nehru regime. The 17\textsuperscript{th} Amendment was challenged only after the death of Pandit Nehru, and in Sajjan Singh v. State of Rajasthan,13 the question regarding the power of the Parliament to make constitutional amendment taking away a fundamental right, again emerged. At this time, the bench was divided. The majority opinion of three judges led by the Chief Justice Gajendragadkar held that the constitutional amendment is not covered within the purview of Article 30. The minority opinion was held by Justices Mudholkar and Hidayatullah (the latter became the Chief Justice three years later), expressed serious reservations about the majority opinion. Justice

12 AIR 1951 SC 458.
13 AIR 1965 SC 845.
Hidayatullah observed that if our fundamental rights bought to be really fundamental, they should not become 'the plaything of a special majority'. Thus the minority opinion paved the way for future attempts to scrutinize the power of the Parliament over the fundamental rights. Another thought that would have persuaded the majority to uphold the previous decision was that the 17th Amendment was enacted in pursuance of that decision, and any reversal would have jeopardised India's land reforms and other socio-economic programmes. However, the majority could have done so by adopting the concept of prospective over-ruling.

In *Golaknath v. State of Punjab*, the Supreme Court by a majority of six against five judges held that a constitutional amendment by virtue of Article 368 is nothing but 'law' within the meaning of Article 13 of the Constitution. The Parliament had no power to pass any amendment taking away or abridging any of the fundamental rights guaranteed by the Constitution. The petitioner had also challenged the first, fourth and 17th Amendment Acts, which had foreclosed the judicial review of the laws pertaining to property. K. Subba Rao, the Chief Justice speaking on behalf of five judges invoked the doctrine of prospective overruling so as to save the existing constitutional amendments and also mandated the Parliament not to pass any constitutional amendment taking away any of the fundamental rights in future. He also promised that the Court would interpret the fundamental rights liberally so as not to hinder the implementation of the directive principles of the state policy.

The Golaknath decision was an example of the judicial activism of the late 1960s. The legal fraternity which was brought up in the atmosphere of legal positivism, the decision was a crude and severe shock. It invited speaker reaction from various quarters. The judges

\[14\] AIR 1967 SC 1643.
gave various reasons including that the Article 368 of the Constitution does not confer any power, but merely prescribes the procedure. The decision upheld the finality of decisions of the Court over legislature. It was based on the theory that the Constitution by itself is a *grundnorm*, and it cannot be and should not be invalidated. Its validity is sui-juris. For the first time, the judges asserted that the Courts not only interpret the Constitution, but also consider the consequences of its interpretation. The Court asserted its role as the protector and the preserver of the Constitution. The decision was a bold example of evolution of the Supreme Court from a positivist Court to an activist Court. The judges held the fundamental rights to be inalienable rights of the people. Subsequent to this decision, the Chief Justice K. Subba Rao, resigned and became a candidate supported by the opposition for election to the office of President of India. He did not get success.

During this period, the Indira Gandhi government radicalised the politics, and nationalised 14 banks through an ordinance and through an executive order, abolished the privy purses given to Indian princes as consideration for the accession of the State. On challenge, the Supreme Court in *R.C. Cooper v. Union of India*,[15] *Madhavrao Sindia v. Union of India*,[16] respectively, invalidity the same. Both these decisions have come when the Congress party had suffered a split and Mrs. Indira Gandhi’s government had survived with the outside support of the Communist Party of India. These decisions supported the opponents. Thus, the Court came to be identified as an ally of the anti-Indira Gandhi lobby.

In the general elections held in 1971, the manifesto of the Congress party also provided that, if elected to the office, it would make basic changes in the Constitution. The Congress got a historical victory and secured more than two thirds of the seats in the Lok

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Sabha. The government introduced the Constitution (24th Amendment) Act, 1971, for the purpose of restoring the unqualified power for the constitutional amendment of the Parliament. The Parliament also passed 25th Amendment, which further restricted the right to property and the 26th Amendment abolishing the privy purses. All these amendments came to be challenged in the Supreme Court before a bench of 13 judges in Kesavananda Bharti v. State of Kerala. The arguments on behalf of the state, as summarised by Chief Justice Sikri are:

The respondents claimed that Parliament can abrogate fundamental rights such as freedom of speech and expression, freedom of religion etc. They claim that democracy can even be replaced and one-party rule established. Indeed short of total repeal of the Constitution, any form of government with freedom to the citizen can be setup by Parliament by exercising its powers under Article 368.

Justice Shetal also reproduced these arguments in his judgement as follows:

The respondents, on the other hand, claim an unlimited power for the amending body. It is claimed that democracy can be replaced by any other form of government which may be wholly undemocratic, the federal structure can be replaced by a unitary system
and the right to judicial review can be completely taken away.

This contention was in the spirit of Dicey's assertion that Parliament of England was so supreme that it could go to extent of declaring that all men were women or that all blue-eyed babies should be massacred. Though the argument is hypothetical and is made to convince that there could not be any legal restriction on the constituent power of the Parliament. The majority of 7 judges against six overruled the Golaknath and held that the constituent power of the Parliament under Article 368 is constrained by the inviolability of the basic structure of the Constitution.

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<th>Title of the Cases</th>
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The change in the interpretation of the law had never seen such a widespread overturning. The political atmosphere, the post-independence effects, the policy of the government, the need for establishment of a welfare state, the outlook as well as thinking of those judges etc. played a vital role in arriving at a particular decision at a particular point of time.

8.3.2 Shift from ‘procedure established by law’ to ‘due process of law’

The ‘due process’ clause found in the fifth and 14th amendments of the Constitution of the United States was intentionally
avoided and another phrase ‘procedure established by law’ was preferred by the Constitution makers. The clause was avoided on the advice of several persons including Justice Frankfurter of the US Supreme Court. The words ‘procedure established by law’ were specific and it was expected that they will not give any room for judicial intervention against legislation. Therefore, they made the valuable fundamental right to life and liberty entirely dependent on the goodwill of the legislature. In fact, Pandit Nehru was interested in opting for a restricted scope for judicial review, while Dr Ambedkar was sceptical about the wisdom of giving the Parliament freedom to lay down any procedure and any law restricting liberty. Pandit Nehru’s vision was shaped due to the fact that he had hoped that once the colonial rule was eliminated, there would no threat to the freedom of the individual because the democracy would take care of the same. However, Dr Ambedkar had not the only fought against the colonial rule but also against the tyranny of the majority. Therefore, Dr Ambedkar wanted to safeguard of the judicial review over legislative supremacy.

In *A.K. Gopalan v. State of Madras,* the Court held that the ‘procedure established by law’ means the procedure prescribed by the enacted law. It held that none had power to ask whether the law or the procedure was fair or just. The Supreme Court held that the words ‘personal liberty’ meant only freedom from arbitrary arrest. It further held that Articles 19 and 21 are mutually exclusive.

The Supreme Court in *ADM, Jabalpur v. Shivkant Shukla,* decided on 28/04/1976, by a Constitutional Bench of five Judges headed by Mr. Ray, A.N. (CJ), applied the judgement in *A.K. Gopalan*

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20 AIR 1950 SC 27.
and in the event invoking of emergency, the denial and suspension of fundamental rights were upheld. It was held:

1. A detenu has no *locus standi* to move habeas corpus petition under Article 226 due to the Presidential order dated June 27, 1975, invoking Maintenance of Internal Security Act, 1971. The Maintenance of Internal Security Act, 1971, is constitutionally valid and is not open to challenge on the ground of any violation of Part III of the Constitution in view of the provisions of Article 359(1A). A detenu has no *locus standi* to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by mala fides factual or legal or is based on extraneous considerations.

2. Section 18 of the Maintenance of Internal Security Act, 1971, applies to all orders of detention and is a valid piece of legislation and does not suffer from the vice of excessive delegation. It is not open to challenge on the ground of the theory of basic structure.

3. Section 16 of the Maintenance of Internal Security Act, 1971, leaves open a remedy by way of a suit for damages for wrongful confinement scope of Section.

4. The Emergency provisions themselves are to be regarded as the basic structure of the Constitution. The concept of ‘Rule of law’ is inapplicable to the emergency provisions since the emergency provisions themselves contain the rule of law for such situations.

5. The preventive detention has been placed exclusively within the control of the Executive authorities of the
State for the duration of the emergency does not violate any principle of separation of powers.

While following the *A.K. Gopalan v. State of Madras*;22 *P.D. Shamdasani & others v. Central Bank of India Ltd.*,23 *Smt. Vidya Verma through next friend R. V. S. Mani v. Dr. Shiv Narain Verma*,24 the Court observed:

"There is no difference between the expressions ‘except according to procedure established by law’ in Article 21 and ‘save by the authority of law’ in Article 31(1) or the expression ‘except by authority of law’ in Article 265. It is incorrect to suggest that when Article 21 was enacted, the founding fathers only enshrined the right to personal liberty according to procedure and did not frame the constitutional mandate that personal liberty could not be taken except according to law”.

The judgement further provides that:

1. In times of emergency the executive safeguards the life of the nation and, therefore, its actions either on the ground that these are arbitrary or unlawful cannot be challenged in view of the fact that considerations of security forbid proof of the evidence upon which the detention was ordered.

2. The Court followed the narrow canvass of the concept of ‘liberty’ as discussed in *Liversidge v. Sir John* 22 (1950) SCR 88. 23 (1952) SCR 391. 24 (1955) 2 SCR 983.
Anderson,\textsuperscript{25} Greene v. Secretary of State for Home Affairs,\textsuperscript{26} Mohan Chaudhary v. Chief Commissioner Union Territory of Tripura,\textsuperscript{27} and Makhan Singh v. State of Punjab.\textsuperscript{28} It referred to Queen v. Halliday Ex Parte Zadiq.\textsuperscript{29}

"Liberty is confined and controlled by law, whether common law or statute. The safeguard of liberty is in the good sense of the people and in the system of representative and responsible Government which has been evolved. If extra-ordinary powers are given, they are given because the emergency is extraordinary and are limited to the period of emergency. Liberty is itself the gift of the law and may by the law forfeited or abridged".

3. Law means law enacted by the State. Law means positive State made law. The phrase "procedure established by law" in Article 21 includes substantive and procedural law. A law providing for the procedure depriving a person of liberty must be a law made by statute.

4. The Presidential order does not alter or suspend any law. The rule of law is not a mere catchword or incantation. The certainty of law is one of the elements in the concept of the rule of law. The essential feature of rule of law is that the judicial power of the State is, to a large extent, separate from the Executive and the Legislature.

\textsuperscript{25} (1942) AC 206.
\textsuperscript{26} (1942) AC 284.
\textsuperscript{27} (1964) 3 SCR 442.
\textsuperscript{28} (1964) 4 SCR 797.
\textsuperscript{29} (1917) AC 210.
In *Maneka Gandhi* judgement, the passport of Maneka Gandhi had been impounded and she challenged the same on the ground that the action violated her personal liberty. No opportunity of hearing was given to her as to why her passport should not be impounded. The Court gave a wider meaning to the words ‘personal liberty’. It held that the earlier view that ‘personal liberty’ included all attributes of liberty except those mentioned in Article 19 stood rejected. The Court held that the procedure has to comply with the principles of natural justice. The word ‘established’ did not mean ‘prescribed’, it meant ‘institutionalised’. The rules of natural justice are the essential requisites of fair procedure. These rules are, firstly, no one should be judge in his own case; and secondly, no one should be condemned unheard. The Court also held that in some exceptional situations, a prior hearing may not be given. In that situation, the authorities must give a post-decisional hearing. On assurance by the government, the Court did not strike down the action of the government. Thus the Court clearly overruled the Gopalan judgement on the following issues:

1. The law authorising deprivation of personal liberty would have to valid not only under Article 21 but also on the Article 19(1)(d);

2. the words ‘life’ and ‘personal liberty’ had wider meanings that would be discovered from time to time; they were open textured expressions;

3. the words ‘procedure established by law’ means not only the procedure prescribed by law but the procedure must be just and fair.

The previous position before the 1978 judgement can be illustrated in the following manner: Suppose the procedure to summon

a person from any part of the mouth to mouth person will have to appear before a Court of law within two hours of the receipt of summons irrespective of the fact that he may be residing even at a distance of over 1000 km from the place where he is to eventually appear, failing which he will be liable to be arrested. This may seem to be almost impossible for a person to appear within two hours. However, in the pre-1978 era, the Courts of law were not going to question the validity of such procedural law so far as it is a procedure established by law and it is taking away or depriving a person his life or personal liberty. It was due to the fact that the procedure was established by law irrespective of the fact that the procedure by itself, was unreasonable, oppressive or even impossible. However, after the 1978 judgement in the Maneka Gandhi case, it was declared in explicit terms that such procedure even though established by law, has to conform to the requirements of reasonableness so as to exclude the possibility of the existence of arbitrariness, biasness, oppression etc. Thus the historic judgement made it clear that mere establishment of procedure by law is not sufficient in itself, but it must be a “due process of law”.

The Maneka Gandhi judgement came in the post-emergency period. It paved the way of judicial activism. It was the experience of the Court during the emergency regime that the Court realised that the common man had no stakes in the survival of the Court and the judicial review. The common man looked on it as a luxury which could be afforded by the rich alone. During the emergency, the Court could not stand up against the executive on its own. The fight of the Court with Parliament on the right to property appear to be a mock exercise between an elitist Court and a majoritarian legislature. This historic judgement was an attempt to refurbish the image of the Court tarnished by a few emergency decisions therefore the Court began to move closer to the people in two ways. Firstly, it began to reinterpret
the provisions of the fundamental rights more liberally, and secondly, it facilitated the access to the Courts by relaxing the technicality of having a locus standi.

If we go in the history, we can find that the seeds of a big upheaval are sown long ago and the ultimate consequence comes later on, in the form of concrete expression. In fact, Vivian Bose, J., also built the foundational blocks of our constitutional jurisprudence, through his dissent in the 1950s. In the field of constitutional law, Bose, J. through his opinion, introduced the concept of “due process” much before the same was introduced in our constitutional jurisprudence by the decision in *Maneka Gandhi*. In giving a concurrent opinion, but on different reasons, Bose, J. discussed the concept of Article 14 qua the validity of the West Bengal Special Courts Act in *State of West Bengal v. Anwar Ali Sarkar*, by giving the following example:

“82. . . . Let us take an imaginary case in which a State Legislature considers that all accused persons whose skull measurements are below a certain standard, or who cannot pass a given series of intelligence tests, shall be tried summarily whatever the offence on the ground that the less complicated the trial the fairer it is to their sub-standard of intelligence. Here is classification. It is scientific and systematic. The intention and motive are good. There is no question of favouritism, and yet I can hardly believe that such a law would be allowed to stand. But what would be the true basis of the decision?

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*AIR 1952 SC 75, 102-03, para 82.*
Surely simply this that *the judges would not consider that fair and proper*. However much the real ground of decision may be hidden behind a screen of words like “reasonable”, “substantial”, “rational” and “arbitrary” the fact would remain that judges are substituting their own judgment of what is right and proper and reasonable and just for that of the legislature; and up to a point that, I think, is inevitable when a Judge is called upon to crystallise a vague generality like Article 14 into a concrete concept”.

Commenting on such views of constitutional interpretation, Dr. Durga Das Basu in his *Tagore Law Lecture*, Justice Vivian Bose: A Pilgrim in Quest of Constitutional Values’ By Justice Asok Kumar Ganguly, the Judge Supreme Court, opined that in *A.K. Gopalan*, judges were still clinging on to “the Government of India Act mentality”.

Subsequently, the *Gopalan* doctrine was overruled by the Supreme Court, in *Bank Nationalisation* and again by *Maneka Gandhi* judgement, vindicating the liberty and justice-oriented approach of Bose, J. in *Anwar Ali Sarkar*. In *Bidi Supply Co. v. Union of India*, delivering a concurring opinion on different reasons, Bose, J. posed the most vital question. “[a]fter all, for whose benefit was the Constitution enacted? What was the point of making all this

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53 AIR 1950 SC 27.
55 AIR 1952 SC 75, 102-03, paras 73 & 85.
56 AIR 1956 SC 479, 487, para 23

- 434 -
pother about [the] fundamental rights?” The learned Judge answered this by saying:

“23. . . . I am clear that the Constitution is not for the exclusive benefit of Governments and States; it is not only for lawyers and politicians and officials and those highly placed. It also exists for the common man, for the poor and the humble, for those who have businesses at stake, for the “butcher, the baker and the candlestick maker”.

He also gave a very dynamic interpretation of Article 14 by saying:

“16. . . . Article 14 sets out, . . . an attitude of mind, a way of life, rather than a precise rule of law. It embodies a general awareness in the consciousness of the people at large of something that exists and which is very real but which cannot be pinned down to any precise analysis of fact save to say in a given case that it falls this side of the line or that, and because of that decisions on the same point will vary as conditions vary. one conclusion in one part of the country and another somewhere else; one decision today and another tomorrow when the basis of society has altered and the structure of current social thinking is different”.
When subsequently Bhagwati, J. gave a dynamic interpretation to Article 14 of the Constitution in *E.P. Royappa v. State of T.N.*, he borrowed the phrase used in *Bidi Supply* and said that Article 14 “is a way of life” and expanded its horizon by holding that anything which is arbitrary is violative of Article 14 and held that the dynamic concept of Article 14 cannot be “cribbed, cabined and confined” within narrow and pedantic limits. Thus the seeds of dynamic interpretation of Article 14 which were sown by Bose, J. in *Bidi Supply judgement* in 1956, were developed subsequently by the Supreme Court in 1974 in *E.P. Royappa* case.

### 8.3.3 The right to die or to commit to suicide.

Section 309 of the Indian Penal Code, 1860, punishes a person convicted of attempting to commit suicide. There had been difference of opinion on the justification of this provision to continue on the Statute book.

In *P. Rathinam v. Union of India*, the Supreme Court held Article 309 of the IPC to be violative of the Constitution of India, and strike it down.

Two years later, a five-Judge Constitution Bench of the Supreme Court in *Gian Kaur v. State of Punjab*, has put an end to the controversy and ruled that Section 309, Indian Penal Code was neither violative of Article 14. The Court held that the “right to life” under Article 21 did not include “the right to die”.

Overruling the decision of the Division Bench of the Supreme Court given in *P. Rathinam v. Union of India*, the Constitution Bench observed, “When a man commits suicide he has to undertake certain

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38 AIR 1994 SC 1844.
39 AIR 1996 SC 946.
40 AIR 1994 SC 1844.
positive overt acts and the genesis of those acts cannot be traced to, or be included within, the protection of the right to life under Article 21". The Court explained,

“The significant aspect of the sanctity of life is also not to be overlooked. Article 21 is a provision which guarantees the protection of life and personal liberty and by no stretch of imagination can extinction of life be read to be included in protection of life”.

The problem arose as to what should happen to the cases under Section 309 IPC which were registered in between the period from 1994-1996 i.e. P. Rathinam to Gian Kaur.

8.3.4 The ever-widening cushion of Article 21

Over the years, the Supreme Court of India has culled out several un-enumerated rights as being implied within the enumerated fundamental rights in Part III of the Constitution. The freedom of press and right to privacy and a host of other rights belong to this category.

Then in a series of judgments, the Court went on to explore the true meaning of the word “life” in Article 21 and finally included within its meaning all those aspects of life which make a person live with human dignity, thus assuming jurisdiction to give judicial directives in the matter of protection of health, basic education, shelter, nutrition, workmen’s well-being, prevention of abuse of children, maternity relief and protecting environment, right to speedy trial, etc. Even though several of these aspects were covered by Part IV of the Constitution relating to directive principles of State policy and were, by force of Article 37, not amenable for judicial remedies, the Court assumed jurisdiction on these aspects via the route of Article 21.
In fact, the Article 21 put life into the Constitution. In essence, the wide amplitude of Article 21 can be better described in the following words

‘If Constitution is a flower, this Article emerged as its fragrance’.

‘If Constitution is a body, this Article emerged as its soul’.

8.3.5 The evolution of the right to information

With the passage of time, the description to inform was converted into the right to inform. From the dusk of the British rule in India to the ‘dawn of 21st century of internet, and from the secret corridors of the government to the public access to almost files of the government, the right to information evolved and became an instrument of great change in India. Even though, the right to information was recognized to some extent by the judiciary in the post-independence era. In explicit terms, the legislature recognized it in the form of the Freedom of Information Act, 2002, and thereafter, the Right to Information Act, 2005. This journey shows that what was not possible earlier, became possible in the modern time.

8.3.5.1 Modules of Secrecy

(i) The Official Secrets Act, 1923

The Official Secrets Act is a relic of the British Raj. It was designed to justify suppression of information by the British Government from its subjects and thereby anything against the Government. Its object was to “prevent the disclosure of official documents and information”. The First Act of 1889 was replaced by an Act of 1911 and thereafter an Act of 1923. The 1923 Act makes provisions against espionage as also against communication of official information to outsiders. The Act makes it a penal offence for any
person holding office under the Government to wilfully communicate any official information to anyone other than an authorised person. It is equally an offence for any person to receive such information. It is, however, significant that the grounds on which action may be taken under the Official Secrets Act are limited to those specified under Article 19(2).

(ii) The Central Civil Services (Conduct) Rules, 1964

The rule 11 provides:

“No government servant shall, except in accordance with any general or special order of the Government or in the performance in good faith of the duties assigned to him, communicate, directly or indirectly, any official document or any part thereof or information to any government servant or any other person to whom he is not authorized to communicate such document or information”.

(iii) The Evidence Act, 1872

Sections 123 and 124 of the Indian Evidence Act give blanket power to the Government to withhold documents.

8.3.5.2 Judicial recognition of the right to information

For many decades, despite the establishment of parliamentary democracy in India, there was no legally recognized right to information. It was only the creative umbrella of interpretation of Article 19(1) (a) of the Constitution that the fundamental right to information became implicit in the right to free speech and expression.

One of the earliest cases where the Supreme Court laid emphasis on the people’s right to know was Romesh Thappar v. State of Madras.41 There the petitioner had challenged an order issued by the then Government of Madras under Section 9(1-A) of the Madras

41 1950 SCR 594.
Maintenance of Public Order Act, 1949 imposing a ban on the circulation of the petitioner's journal Cross Roads was struck down as violative of the right to freedom of speech and expression under Article 19(1)(a). Again in *Indian Express Newspapers (Bom) (P) Ltd. v. Union of India*,\(^4\) the Court relied on the following decision (Per Lord Simon of Glaisdale in *Attorney General v. Times Newspapers Ltd.*,\(^3\) and observed:

"The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves".

"Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (i) it helps an individual to attain self-fulfilment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision-making, and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should,\(^4\)

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\(^4\) (1985) 1 SCC 641.
\(^3\) (1973) 3 All ER 54: (SCC pp. 685-86, para 68.)
therefore, receive generous support from all those who believe in the participation of people in the administration”.

In *State of U.P. v. Raj Narain*, which involved the question of government privilege under Section 123 of the Evidence Act, the Supreme Court observed:

“In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is

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45. *Id.* at 453.
the chief safeguard against oppression and corruption".

In *S.P. Gupta v. Union of India*, a seven-Judge Bench of the Supreme Court followed *Raj Narain* case and observed thus:

"Where a society has chosen to accept democracy as its credal faith, it is elementary that the citizens ought to know what their Government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Government. It is only if people know how Government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy. ‘Knowledge’ said James Madison, ‘will for ever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular Government without popular information or the means of obtaining it, is but a prologue to a force or tragedy or perhaps both’. The citizens’ right to know the facts, the true
facts, about the administration of the country is thus one of the pillars of a democratic State. And that is why the demand for openness in the Government is increasingly growing in different parts of the world”.

“The demand for openness in the Government is based principally on two reasons. It is now widely accepted that democracy does not consist merely in people exercising their franchise once in five years to choose their rules and, once the vote is cast, then retiring in passivity and not taking any interest in the Government. Today, it is common ground that democracy has a more positive content and its orchestration has to be continuous and pervasive. This means inter alia that people should not only cast intelligent and rational votes but should also exercise sound judgment on the conduct of the Government and the merits of public policies, so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of Government — an attitude and habit of mind. But this important role people can fulfil in a democracy only if it is an open Government where there is full access to information in regard to the functioning of the Government”.

paras 64 and 65, at p. 273.
"This is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception. The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest".\footnote{\textsuperscript{49}}

In \textit{Reliance Petrochemicals Ltd. v. Indian Express Newspapers Bombay (P) Ltd.},\footnote{\textsuperscript{50}} Justice Mukharji recognized the right to know as emanating from the right to life. The question which arose was whether Reliance Petrochemicals Ltd. was entitled to an injunction against Indian Express which had published an Article questioning the reliability of the former's debenture issue. The learned Judge observed:\footnote{\textsuperscript{51}}

"We must remember that the people at large have a right to know in order to be able to
take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age on our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform”.

In a later judgment, Tata Press Ltd. v. MTNL,™ the Supreme Court, while considering the scope of Article 19(1)(a) in the context of advertising or commercial speech, held that the public has a right to receive information.

In Secy., Ministry of Information and Broadcasting v. Cricket Assn. of Bengal,® the Supreme Court, quoted the Article 10 of the European Commission on Human Rights. The Court held that the right of the viewer to be entertained and informed is also, likewise, integral to the freedom of expression. The Court observed:™

“True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs to the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-

™ Id. at 229 (para 82).
information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolized either by a partisan central authority or by private individuals or oligarchic organizations. This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1½ per cent of the population has an access to the print media which is not subject to pre-censorship”.

In *Dinesh Trivedi v. Union of India*, which concerned the questions of the disclosure of the Vohra Committee Report, the Supreme Court once again acknowledged the importance of open Government in a participative democracy. The Court observed that:

“In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare”. It went on to observe that “democracy expects openness and openness is concomitant of a free society and the sunlight is a disinfectant”.

### 8.4 Certain questions for jurisprudential thoughts and the role of a judge

Will certainty of law bring staticism or stagnation? Is absolute uniformity/equality possible? Is the law or we can also call it ‘legal process’ a mechanical process, which gives absolutely certain results

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and thus is a scientific process based on certain mathematical formulas and experiments like physics, chemistry etc.? The answer is known to all of us. That is why computer technology can not pressed into service to provide decisions. The law needs to be an ever-evolving process. It must be dynamic and must address to the needs of time. It must provide solutions to the legal problems, and not each and every problem existing in a society. It must go hand in hand with society.

Absolute uniformity is against the law of nature. The law can not and must not keep itself away from the human factor which is paramount and which makes it a class apart. It is at this place that the role of judges or we may call it as 'judicial craftsmanship' takes over. The interpretation has to be changed, modified and moulded to answer the needs of the time.

Initially, the role of the judges was to settle disputes mostly of civil nature between private citizens. The judges also determined the question about the guilt of the persons charged with offences and punishment to be inflicted upon them. One essential function of the Courts which has come to the fore, more particularly in the twentieth century, is as the arbiter of disputes between the State and the citizen. A modern State has to arm itself with immense powers in order to bring about socio-economic changes and reforms and to further the interest of its subjects. The recognition of a state and its functioning requires acquisition of power. This acquisition of powers by any human institution, including a government which too operates through a human agency, is always fraught with the danger of abuse of power. It, therefore, has become essential that the vast powers of the government in a developing society should be subjected to and cushioned with safeguards for individual’s rights. Consequently, jurisdiction has to be vested in some authority to ensure the protection of those rights and to see that the powers which are possessed by the State are not abused and that those armed with such powers exercise them in accordance
with the laws enacted for this purpose and as per the supreme lex. In the very nature of things, such jurisdiction can be exercised only by an independent agency, not under the control of the executive. According to the scheme of our Constitution, such jurisdiction is exercised by the Courts. The function of the Courts as arbiter of disputes between the State and the citizen highlights the importance of the independence of the Courts. It is axiomatic that the person who is to decide such disputes can discharge his functions effectively only if he is not susceptible to pressures of the citizens and what is much more important of the State. The independence of the judges has now come to be accepted as an essential trait of free democratic society. The judges must inspire confidence among all those who enter the Court precincts that justice here is administered with an even hand in any legal combat between the State and the citizen, without fear or favour. Law, it has been said, knows of no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution.

Another function of the Courts in some of the countries, including India, relates to the power of judicial review. In exercising the power of judicial review, the Courts do not and cannot go into the question of wisdom behind a legislative measure. The policy decisions have essentially to be those of the legislatures. The task of the Courts is to interpret the laws and to adjudicate about their validity; they neither approve nor disapprove legislative policy. The office of the Courts is to ascertain and declare whether the impugned legislation is in consonance with or in violation of the provisions of the Constitution. Once the Courts have done that, their duty ends. The Courts do not act as super-legislatures to suppress what they deem to be unwise legislation for if they were to do so the Courts will divert criticism from the legislative door where it belongs and will thus dilute the responsibility of the elected representatives of the people.
Judicial review is not intended to create what is sometimes called Judicial Oligarchy, the Aristocracy of the Robe, Covert Legislation or Judge-made law. The proper forum to fight for the wise use of the legislative authority is that of public opinion and legislative assemblies. Such contest cannot be transferred to the judicial arena. That all constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the Court room, that judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. Their primary duty is to uphold the Constitution and the laws without fear or favour.

8.4.1 Judicial Interpretation: A Vital Function

One of the most important tasks of the judges is that relating to judicial interpretation. There can be no doubt that the judges by their interpretation can make law subserve a social purpose. So far as the judges of the higher Courts are concerned, their office demands that they be historian and prophet rolled into one, for law is not only as the past has shaped it in judgments already rendered but as the future ought to shape it in cases yet to come. Law necessarily has to carry within it the impress of the past tradition, the capacity to respond to the needs of the present and enough resilience to cope with demands of the future. A code of law, especially in the social fields, is not a document for fastidious dialectics; properly drafted and rightly implemented it can be the means of the ordering of the life of a people. While construing such law, we have to bear in mind that the law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must
alternately consult history and existing theories of legislation. A great judgment, it has been said, must take deep account of day before yesterday in order that yesterday may not paralyse today and it must take account of what it decrees for today in order that today may not paralyse tomorrow. Words in statutes are not unlike words in a foreign language in that they too have “associations, echoes, and overtones”. Judges must retain the associations, hear the echoes, and capture the overtones. To understand and construe the law, one must enter into its spirit, its setting and its history.

Legitimacy for the law comes from Parliament alone. This finally led to the theory of parliamentary sovereignty. But, whenever the Parliament enacts laws and the laws are intended to cover new fact situations, the judges’ creativity and innovation is again revived by way of “filling in the gaps” in the legislation and in legislative interpretation. Apart from filling in the gaps in the legislation and interpreting the law, the judges revive their creativity in all other areas which were not covered by legislation. The judges subject the new legislation to their creative skills by introducing very many principles of “interpretation of the statutes” passed by the legislature even where there were no gaps to be filled.

While dealing with and interpreting provisions of a statute, the judges sometimes come across gaps, fissures or areas of uncertainty and ambiguity. It is in such situations wherein the constitution and the statute are silent or uncertain that a judge, ‘a living oracle of the law’ in Blackstone’s vivid phrase, gives us the judge-made law. The normal rule is that the constitution overrides a statute and a statute, if consistent with the constitution, overrides the law of judges. The judge as interpreter has to supply omissions, correct uncertainties and harmonise results with the demand of justice through a method of free decision.
Unlike some of the countries on the continent of Europe, in England, U.S. and India precedents play a very significant part in moulding judicial decision. This is so because ensuring continuity with the past is a matter of imperative necessity in the field of law. Back of precedents, it has been said, are the basic judicial conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn. Nonetheless, in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labour of the judge begins. Almost invariably, his first step is to examine and compare them.

No system of law can, however, be evolved by just matching shades of colours of decided cases with cases in hand. If that were all to our calling, then in the words of Cardozo, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colours do not match, when the references in the index fail, when there is no decisive precedent that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others.

Every judgment has a generative power, a power to reproduce in its own image. Once a judgment is pronounced, it becomes a new stock of descent. It then constitutes the source from which new principles or norms may spring to shape future decisions. Not, however, all the progeny of principles begotten of a judgment survive to maturity. Those that cannot prove their worth or withstand future scrutiny are thrown into the dustbin of judicial history. As put by Munroe Smith, in their effort to give to the social sense of justice articulate expression in rules and in principles, the method of law-finding experts has always been experimental. The rules and
principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the Courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.

The rendering of a judicial decision is not always an easy matter. Chief Justice Hughes once said that when we deal with questions relating to principles of law and their application, we do not suddenly rise into a stratosphere of icy certainty. It would not be difficult to decide a case if only a single principle were involved. The difficulty, however, arises when the facts of the case reveal that it is in the neighbourhood of different principles. It is then that the painful process begins through self-searching of making a choice or of accommodating two or more principles. This for any conscientious judge is the agony of his duty.

8.4.2 Are the Judges wholly free to decide as they want or is there any limitation?

The keystone of the rule of law is the idea of the government of laws rather than the government of men. The keystone of the government of laws is legal control over human discretion. The existence of widespread discretion is therefore directly inimical to the existence of a liberal order. Discretions need to be exercised on the basis of justice or some real justification or even of mere reason. An unfettered discretion is an opportunity for temptation and for
arbitrary, insolent, discriminatory, intrusive, socially engineering and corrupt, government. Where there are fixed laws there is (more or less) certainty, there is certainly impartiality (equality before the law) and consistency.

A question has sometimes been raised as to whether under the garb of rule of law are we not ushering in judicial oligarchy in place of executive supremacy. To put it in other words, if the executive supremacy results in elimination of fetters on executive fiats, does not rule of law result in vesting the Courts with immense powers of uncontrolled nature. The question thus turns on the point as to whether judges are absolutely free to decide the matters that come up before them in any way or are there any limitations subject to which the will of the judges masquerading as judicial discretion can be exercised. The answer to this was given by Justice Cardozo when he said that the Judge, even when he is free, is not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in social life. Wide enough in all conscience is the field of discretion that remains.

Undoubtedly, there is a limit up to which the Courts can go. They have to operate within the four corners of the language of the statute. There is also a danger in a situation wherein a judge brings in his own views of socio-economic reform and allows them to colour his opinion. If an independent judiciary were to take over the role of a crusader in the struggle and strife of socio-economic changes, it will cease to be independent. The bosom of the judiciary cannot provide a solution for each and every problem, and it would not be seduced by quixotic temptation to right every fancied wrong which was paraded
before it. For certain solutions we must necessarily look to the legislature. The independence of the judiciary, in the words of Learned Hand, will be lost, because the bosom of the judiciary is not ample enough for the hopes and fears of all sorts and conditions of men, nor will its answers be theirs; it must be content to stand aside from these fateful battles. There are two ways in which the judges may forfeit their independence, if they do not abstain. If they are intransigent but honest, they will be curbed; but a worse fate will befall them if they learn to trim their sails to the prevailing wind. A society whose judges have taught it to expect complaisance will exact complaisance, and complaisance under the pretence of interpretation is rottenness.

Judges, we should remember, are men, not disembodied spirits, they respond to human emotions. The great tides and currents which engulf the rest of mankind, in the words of Cardozo, do not turn aside in their course and pass the judges idly by. Yet, notwithstanding the human factor, the Courts operate in a setting that forces responsibility upon them. Judges are bound within walls, lines, and limits that are often unseen by the layman—walls, lines, and limits built from the heritage of the law; the impact of the cases as they have come down through the years; the regard for precedent. the self-imposed practice of judicial restraint, in brief, the tradition of the law. It is also an essential requisite for a judge to acquire a certain amount of detachment and discernment, so that he is not carried away by popular catch-words and shibboleths. We must always beware of the danger which underlines the disposition to take the immediate for the eternal, the transitory for the permanent and the ephemeral for the timeless. This necessarily calls for a determined resistance to the hypothecation of the thinking process. At the same time the members of the Bench and Bar must always remain on the guard against any attempt to erode the independence of the judiciary. Such independence must be
preserved and when the occasion demands, asserted. To repeat what I said on an earlier occasion, if there are three prime requisites for the rule of law, they are a strong Bar, an independent judiciary and an enlightened public opinion. There can, indeed, be no greater indication of the decay in the rule of law than a docile Bar, a subservient judiciary and a society with a choked or coarsened conscience. Fearlessness became a part of our heritage since the days of the struggle for independence when Mahatma Gandhi carried on a relentless campaign to banish fear out of our hearts. Fear dwarfs human personality, turns even heroes into men of clay and prevents efflorescence of higher values of life. Fear likewise stifles the conscience and dried up springs of idealism. When fear stalks the land its attendants are servile sycophancy, rank opportunism and nauseating charlatanism and the casualties are the noble impulses of the mind. Where fear is justice cannot be. Under the shadow of fear a Court becomes an instrument of power, a so-called trial is a punitive expedition or a ceremonial execution and its victims are a Joan of Arc or a Galileo.

Thoughts of great men of law are not windfalls of inspiration. They are the product of years of contemplation and brooding. It was said of a great judge that the anguish which preceded his decisions was apparent, for again and again, like Jacob, he had to wrestle with the angel all through the night; and he wrote his opinions with his very blood. But when once his mind came to rest, he was as inflexible as he had been uncertain before.

8.4.3 Difference of opinion among the judges

The instances are not rare and often arise when there is difference of opinion among the judges hearing a matter with regard to the final decision to be pronounced or with regard to the reasons in support of that decision. In the former case, there is a majority
judgment and there is also a minority or dissenting judgment. In the latter case, there are concurring judgments. The lack of unanimity upon difficult legal questions should cause no surprise. The history of scholarship is a record of disagreements. And when we deal with questions relating to principles of law and their application we cannot look for physical precision or arithmetical certainty. There have been different reactions with regard to dissenting judgment and the role of the dissenting judge. One view is that comparatively speaking at least, the dissenter is irresponsible. The spokesman of the Court is cautious, fearful of the vivid word, the heightened phrase. He dreams of an unworthy brood of scions, the spawn of careless dicta, disowned by the ratio decidendi, to which all legitimate offspring must be able to trace their lineage. The result is to cramp and paralyse. One fears to say anything when the peril of misunderstanding puts a warning finger to the lips. Not so, however, the dissenter . . . For the moment he is the gladiator making a last stand against the lions. The poor man must be forgiven a freedom of expression, tinged at rare moments with a touch of bitterness, which magnanimity as well as caution would reject for one triumphant". To complete the picture I feel it necessary to reproduce the concluding part of the dissent of Mr. H.R. Khanna, J. in the Habeas Corpus case.56

"I am aware of the desirability of unanimity, if possible. Unanimity obtained without sacrifice of conviction commends the decision to public confidence. Unanimity which is merely formal and which is recorded at the expense of strong conflicting views is not desirable in a Court of last resort. As observed by Chief Justice Hughes, judges are not there simply to decide cases.

56 (1979) 1 SCC (Jour) 17.
but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognised than that unanimity should be secured through its sacrifice. A dissent in a Court of last resort, to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the Court to have been betrayed”.

8.4.4 The creative role of judges: Lord Denning

The creative role of Lord Denning cannot be forgotten. He dissented in his first case as also the last in the apex Court before returning to the Court of Appeal in 1962. He could not slave himself to judicial precedents. He did not like the Judges leaving the task of moulding and shaping of laws to the Parliament or to the Law Commissions. While speaking of Judges, Lord Denning says:\footnote{(1982) 3 SCC (Jour) 31. Dr. Balram K. Gupta, “Lord Denning – The Matchless”}{57}

“They should develop the law, case by case... so that the litigants before them can have their differences decided by the law as it should be and is, and not by the law of the past”.

He emphasized that the precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches, else you will find yourself lost in thickets and brambles. My plea is to keep the path to justice clear of obstructions which could impede it. Throughout the two decades, the
endeavour of Lord Denning had been to shape up the laws according to the prevailing social necessities and opinions.

8.4.5 The creative role of judges: Justice Cardozo

One of the great creative judges, Justice Cardozo’s contribution particularly through his work should not be missed. Justice M. Jagannadha Rao very beautifully summarized the innovative contribution of Justice Cardozo in his Article ‘Judicial Creativity and Innovation’. He analysed the factors which he believed motivated judges in deciding common law issues. There are, according to Cardozo, various steps for a judge to go about the wonderful process of judging. Cardozo said:

“My analysis of the judicial process comes then to this, and little more: logic and history, and custom and utility and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of law”.

How does the judge know which of these forces shall dominate in any particular case? Cardozo said:

“Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of social interest that will be thereby promoted or imposed”.

How does the judge know what these social interests are? Cardozo’s reply was: 

59 (2009) 7 SCC (Jour) 8.
One of the most fundamental social interest is that law shall be uniform and impartial. . . . . Therefore in the main there shall be adherence to precedent . . . . But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. (112-113)

How does a judge know which of these social interests outweighs another? Cardozo’s answer was:

“I can only answer that the judge must get his knowledge ... from experience and study and reflection; in brief, from life itself”. (113)

Judge Shirley Abrahamson says (971):

Cardozo’s analysis obviously does not tell a judge how to decide a particular case. He gives no relative weights to the considerations that go into deciding each case. He provides no mathematical or scientific formula for decision-making. Just as a judge cannot learn from Cardozo how to decide a particular case, the law student, the lawyer, or the lay person cannot use Cardozo’s description to predict with certainty how a judge will respond to a particular fact situation.

Nevertheless, one may find Cardozo’s description of the nature of the judicial process “as good as any we have had since”. Cardozo’s
lectures were the first serious effort by a sitting judge to articulate the sources a judge uses and the reasoning process a judge follows, whether consciously or not, in deciding a case. They provide a realistic description of the process, although neither Cardozo nor any other judge or scholar can offer a coherent theory that frees a judge from the agony of judgment. Cardozo makes the judges and those judged more comfortable with the uncertainty inherent in the judicial process. Although stability is a social interest, so is progress. Cardozo saw that the law calls for the balancing of stability and progress; liberty and constraint; promotion of individual rights and protection of the public interest; and “adherence to general rules and dispensation of individualised equity”. The upshot of Cardozo’s analysis is an acknowledgment that fundamental requirements of justice and accepted principles of fairness are among the sources from which judges derive the law.

Judicial restraint is another aspect which has to be kept in mind by the judge who wants to be creative. Justice Cardozo states that the judge must show restraint. He said:

... within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found but made. The process being legislative, demands the legislator’s wisdom.

In a famous passage in his lectures, Justice Cardozo said:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty.
or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life”. Wide enough in all conscience is the field of discretion that remains”.

8.5 Emergence of new concepts in Indian Legal System from time to time

8.5.1 Creativity and Developments in British system

The House of Lords in 1932 in *Donoghue v. Stevenson*[^51] which for the first time recognised or rather discovered the principle of “proximity and neighbourhood” in the law of “negligence”. Lord Atkin innovated and traced a new legal principle from a well-known moral principle that “you are to love your neighbour”. The neighbourhood theory was invoked for declaring that the negligent act was an infraction of the rights of the person who was the victim of negligence. Lord Atkin said:

“you must not hurt your neighbour. Who is my neighbour? . . . persons who are closely and directly affected by my Act. . .”.

The case led to the recognition that moral duties to one’s “Atkinian neighbour” could be converted into legal duties of care, comprehending cases of economic duress and not merely cases of

[^51]: 1932 AC 562; 1932 All ER Rep 1 (HL).
personal injury or property damage. Today, a vast jurisprudence has been developed by judges on the basis of the above principles brought into the law of “negligence”. Of course, it can be argued that all these new developments in the law must be presumed to have been there for years before Lord Atkin's innovation.

It was felt by several judges that even when new situations arose, the judge should always search in the shelves of the existing law to derive a new principle to suit new fact situations. Lord Scarman in *Gillick v. West Norfolk & Wisbech Area Health Authority*, agreed, while dealing with a case involving contraception, medical advice and treatment thereto and the independence of young girls aged about 16 years to take decisions for using pills (which are new developments in medicine) that that situation would require the judge. He further said in *Gillick case*.

“It is, of course, a judicial commonplace to proclaim the adaptability and flexibility of the judge-made common law. But this is more frequently proclaimed than acted upon. The mark of the great Judge from Coke through Mansfield to our day has been the capacity and the will to search out principle, to discard the detail appropriate (perhaps) to earlier times, and to apply principle in such a way as to satisfy the needs of their own time. If judge-made law is to survive as a living and relevant body of law, we must make the effort, however, inadequately, to

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63 (1969) 2 Ch 149 at p. 171; (1969) 2 WLR 337; (1969) 1 All ER 904 (CA).
64 *Central London Property Trust Ltd. v. High Trees House Ltd.*, 1947 KB 130; (1956) 1 All ER 256, AC p. 183 D-E.
follow the lead of the great masters of the judicial art”.

Some judges raised serious issues about the uncertainty of law if judges were given too much freedom to make innovations in the law. They went on to say that this freedom or philosophy could only lead to greater uncertainty in the law. Some said that, after all, all judges were not comparable to Lord Denning. On this line of thinking, Lord Ackner said:

“Justice is a variable quality. Lord Denning is a man of enormous personal confidence and his conviction of what is right and what is wrong is a very clear one. You may have people with less clear convictions; you may have judges with a different approach to what justice is. Is each judge to have his personal tree and sit under it and enunciate what justice is according to his own inspiration? It would make it impossible for the Bar to advise on the likely outcome of litigation”.

We all know how Lord Denning introduced the principle of “legitimate expectation” without citing any authority and introduced, in an extempore judgment, the principle of “promissory estoppel”.

It is true there is a boundary in the matter of innovation in every branch of law, but that boundary keeps on changing. Lord Goff rightly said that he only knew that a boundary existed, but did not know where it actually was or whether the goal posts were moving from time to time. He said, “although I am well aware of the existence

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65 Schmidt v. Secy. of State for Home Affairs. (1951) 2 KB 164; (1951) 1 All ER 426 (CA).
of the boundary, I am never quite sure where to find it. ... Much seems to depend upon the circumstances of the particular case".66

The English Courts are today entitled under the UK Human Rights Act, 1998 (which came into force on 2-10-2000) to declare that a legislation is not compatible with the European Human Rights Convention. The English Courts have evolved the Wednesbury principles of secondary review of legislation and also the primary review of all legislation which affects basic human rights. The Courts in US and India and some other countries, are indeed allowed to go further and strike down legislation. Undoubtedly, the creativity of the English Courts is achieving new heights. Indian system developed on the bed-lock of the British system and therefore, followed and adopted a huge number of uncodified principles. The journey is not yet over.

8.5.2 Various concepts in India: A brief look

There have been a number of creative and innovative techniques. We have had our great creative judges in the Supreme Court of India and they are, to mention a few names, Justice Subba Rao, Justice P.N. Bhagwati, Justice Krishna Iyer and Justice K.K. Mathew. The Supreme Court developed a vast jurisprudence of interpretation of constitutional provisions and other statutes. It laid down several principles of natural justice, fair play, promissory estoppel, legitimate expectation, etc., in the field of administrative law. The contractual laws and commercial laws and consumer law expanded and so did the law relating to tort liability of the State and individuals. There are equally phenomenal developments in every other branch of law both statutory (Central or State) or non-statutory. The High Courts have joined the Supreme Court in rediscovering, remaking and making law in all facets and in all the methods

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If Chief Justice John Marshall laid down the basic principle of judicial review of legislation in *Marbury v. Madison*, our Supreme Court went farther, on account of "the felt necessities of the time", in *Kesavananda Bharati v. State of Kerala*. Apart from other monumental principles, the Court went on to add a few more basic features over the years. But, while doing so, the Court was confronted with the problem of "retrospectivity" of such declarations of unconstitutionality and the Court rightly resorted to the well-known principle of "prospective overruling". It applied the above principles in full when it prospectively declared as to when certain provisions of the Ninth Schedule of the Constitution of India which granted immunity to legislations, both Central and State, which were indiscriminately put in that Schedule by periodic constitutional amendments, could be declared as being violative of the basic structure.

The public interest litigation has emerged as a tool not only to espouse the cause of persons who are not, for various reasons like poverty or disability, able to approach the Courts but in cases where the legislature and the executive have failed to provide relief. A vast jurisprudence has been developed and the principle of locus or standing has practically faded away. Today even cases of abuse of executive power or corruption in public life are brought before the High Court and the Supreme Court by citizens, to enable the rule of law to be strictly enforced.

Similarly, to name a few of the doctrines like of ‘legitimate expectation’, polluter’s pays principle, the emergence of Public

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67 2 L Ed 60: 5 US (1 Cr) 137 (1803).
68 (1973) 4 SCC 225.
Interest Litigations and its vast treasure, the emergence of victimology, compensatory jurisprudence etc. have defied the old orders of the certainty of decision-making in the small corridors of the written and codified laws, in order to subserve the felt needs of time.

8.6 Emphasis on Certainty by Supreme Court: A cause for constant concern

8.6.1 Imprints on the making of the Constitution

In interpreting the Constitution, the difference in judgements is due to the fact that the basic elements of its language, history, tradition, precedents in other jurisdiction are considered in the context of its purpose in our Constitution and its consequences. That is why the role of the Supreme Court being the final authority in judicial-decisions and the protector of its subject, is so seminally important to the unfolding of our constitutional principles.

Our Constitution is, therefore, not merely a set of laws nor is it merely a code of governance. A Constitution in a free democracy like ours cannot be hewn out of granite stone. It is deeply rooted in history and evolves through irreversible process of human struggle for freedom. Thus emerged, the Constitution reflects the collective conscience of the entire nation. Our Constitution is no exception, being the direct result of our freedom struggle. That is why we find that the Framers of our Constitution were also the prime participants in our national struggle.

The drafting of our Constitution was also plagued with troubled circumstances. The Britishers had left an unhappy legacy of partition and chaos with 572 odd princely States. At that juncture, the social fabric of this country was facing a great threat of being torn apart. On the other hand, at the international arena, the history the drafting of our Constitution coincided with a drafting of the Universal
Declaration of Human Rights when the conscience of the whole world was traumatised under the devastation of the Second World War and its aftermath. Therefore, under such uneasy situation both nationally and internationally our Constitution remarkably articulates its deep concern for human rights, basic freedoms and with a promise of justice to everyone. It also contained a special solicitude for traditional, religious, minority and disadvantaged group.

Our Constitution has, therefore, brought about a great social and cultural leap and sought to transform India from her feudal past to a democratic republic and an egalitarian society. After 5000 years of her multi-cultural past and after facing the burnt of internal and external battles, there emerged under the Constitution a free democracy for the first time in the history. This transformation is a matter of social evolution and cannot be achieved by stroke of a pen. But once the Constitution came and the Supreme Court was established as its guardian, it became the sacred duty of the Supreme Court to interpret the Constitution in its true spirit.

8.6.2 Early dissents and the guiding principles in the post-independence era

Whether the words in the Constitution present a printed finality? How the Judges are to read the words in the Constitution? These are the questions which confronted the Judges of the Apex Court while dealing with constitutional issues. Explaining these core issues of constitutional interpretation, Vivian Bose, J. as was also expressed by Holmes, J. of the US Supreme Court in *Samuel Gompers v. United States*,69 in *State of W.B. v. Anwar Ali Sarkar*,70 unlocked the key to a salient jurisprudential technique:

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69 58 L Ed 1115; 233 US 604 (1914).
70 AIR 1952 SC 75. 102-03. paras 79 & 85.
“79. . . . the provisions of [the] Constitution are not mathematical formulae which have their essence in mere form. They constitute a framework of Government written for men of fundamentally differing opinions and written as much for the future as the present”.

“85. . . . They are not just dull lifeless words static and hidebound as in some mummified manuscript, but living flames intended to give life to a great nation and order its being, tongues of dynamic fire potent to mould the future as well as guide the present”.

In one of the early dissents, in *Ram Singh v. State of Delhi*, Vivian Bose, J. while invalidating preventive detention order of the detenue found himself in minority in upholding the torch of liberty. His Lordship held that fundamental freedoms conferred by the Constitution may not be absolute, they may be limited and in some cases limitations are imposed by the Constitution and in some cases by Parliament. He observed that it is the duty of the Court, “to give the fullest effect to every syllable in the Articles dealing with these rights”. Thus he expressed the undying values of constitutionalism. But Bose, J. made a fine distinction by saying:

“22. ... in every case it is the rights which are fundamental, not the limitations; and it is the duty of this Court and of all Courts in the land to guard and defend these rights, zealously. It is our duty and privilege to see that rights which were intended to be

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71 AIR 1951 SC 270 at 276.
fundamental are kept fundamental and to see that neither Parliament nor the executive exceed the bounds within which they are confined by the Constitution when given the power to impose a restricted set of fetters on these freedoms”.

“25. ... I am not prepared to place any narrow or stilted construction either upon the Constitution or upon the decisions of this Court which have so far interpreted it”.

“25. ... If it were permissible to go behind the Constitution and enquire into the reason for the provisions dealing with the fundamental rights, one would find them bound up with the history of the fight for personal freedom in this land”.

In another dissenting judgment in *S. Krishnan v. State of Madras*, where the legality of the Preventive Detention (Amendment) Act, 1951 was questioned, Vivian Bose, J. again found himself in a minority by holding that Section 11(1) of the Amendment Act was ultra vires. In delivering his judgment, the learned Judge realised that, “[he was] ploughing a lonely furrow”. He referred to Articles 21 and 22 of the Constitution and held (at page 309):

“43. ... It is our duty to ensure that the right and the guarantee are not rendered illusory and meaningless. Therefore, wherever there is scope for difference of opinion on a matter of interpretation in this behalf, the interpretation which favours the

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72 AIR 1951 SC 301: (1951) 2 SCR 621.
subject must always be used because the right has been conferred upon him and it is the right which has been made fundamental, not the fetters and limitations with which it may be circumscribed by legislative action”.

He made it clear that after giving due weight to the provisions if there is any doubt, the doubt, “must . . . be resolved in favour of the subject and not of the State”. In his glowing dissent, he said:

“44. ... Is not the sanctity of the individual recognised and emphasised again and again? Is not our Constitution in violent contrast to those of States where the State is everything and the individual but a slave or a serf to serve the will of those who for the time being wield almost absolute power? I have no doubts on this score. I hold it, therefore, to be our duty, when there is ambiguity or doubt about the construction of any clause in this chapter on fundamental rights, to resolve it in favour of the freedoms which have been so solemnly stressed. Read the magnificent sweep of the Preamble:

We, the People of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens: Justice, Liberty, Equality, Fraternity”.

In very eloquent terms, the learned Judge described the essential spirit of our constitutional liberties by saying:

“47. ... They did not bestow on the people of India a cold, lifeless, inert mass of malleable
clay but created a living organism, breathed life into it and endowed it with purpose and vigour so that it should grow healthily and sturdily in the democratic way of life, which is the free way. In the circumstances, I prefer to decide in favour of the freedom of the subject”.

About such incisive dissents, we may remember what was said by Hughes, C.J.:

“594. ... Judges are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognised than that unanimity should be secured through its sacrifice. A dissent in a Court of last resort, to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the Court to have been betrayed” and also referred to by Justice Asok Kumar Ganguly, the Judge of the Supreme Court of India in ‘Justice Vivian Bose: A Pilgrim in Quest of Constitutional Values’.

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74 (2011) 6 SCC 49 (Journal).
8.6.3 ADM Jabalpur Judgement and the concern of the Apex Court

In as much as in the landmark *ADM Jabalpur* Case of 1976, the Apex Court stressed for the efforts of the Constitution-makers for the prevention of elements of vagueness, uncertainty and changeability.

"Freedom of speech may be limited by conception as clear present danger, "attack on the free democratic order". The institutions and procedures by which the fundamental regard for the status and dignity of the human person can be effected is that rights and remedies are complimentary to the other. The phrases such as "equality before law" or "equal protection of the laws" are in themselves equivocal.

The supremacy of the law means that the faith of civil Liberty depends on the man who has to administer civil liberty much more than on any legal formula. Aristotle pointed out that the rigid certainty of law is not applicable to all circumstances. This plea would be echoed by the modern administrator called upon to deal with the ever-changing circumstances of economic and social life of the nation". (vide page 113)

"At the time the Constitution was being drafted, the Constitutional Adviser Mr. B. N. Rau had discussions with US Constitutional experts some of whom expressed the opinion that power of review implied in due process clause was not only undemocratic because it gave the power of vetoing legislation to the judges, but also threw an unfair burden on the judiciary. This view was communicated by Mr. Rau to the Drafting Committee which thereupon substituted the words “except according to procedure established by law” for words “due process of law”. In dropping the words "due process of law", the framers of our Constitution prevented the introduction of elements of vagueness, uncertainty and changeability which had grown round the due process doctrine in the United States. The words 'except
according to procedure established by law” were taken from Article 31 of the Japanese Constitution, according to which “no person shall be deprived of life or liberty nor shall any criminal liability be imposed, except according to procedure established by law”. The Article is also somewhat similar to Article 40(4) (1) of Irish Constitution, according to which “no person shall be deprived of his personal liberty save in accordance with law”. It was laid down in Gopalan’s case by the majority that the word “law” has been used in Article 21 in the sense of State-made law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice. “The procedure established by law” was held to mean the procedure established by law made by the State, that is to say, the Union Parliament or the legislatures of the States. Law, it was also observed by Mukherjea J., meant a valid and binding law under the provisions of the Constitution and not one infringing fundamental rights”. (vide page 153)

“If the concepts of natural law are too conflicting to make them a secure foundation for any alleged “right”, sought to be derived from it, until it is accepted and recognised by a positive laws notions of what Common Law is and what it means, if anything, in this country, are not less hazy and unsettled.

Mr. Setalvad, in his Harnlyn Memorial Lectures on “Common Law in India”, treated the whole body of general or common statute law and Constitutional Law of this country as though they represented a codification of the Common Law of England. If this view is correct. Common Law could not be found outside the written constitution and statute law although English Common Law could perhaps be used to explain and interpret our statutory provisions where it was possible to do so due to some uncertainty”. (vide page 239)
8.6.4 Emphasis on certainty by the Supreme Court in the 21st century

In Dr. Vijay Laxmi Sadho v. Jagdish, the Supreme Court, while dealing with an election petition, observed:

"It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs. Before parting with this aspect of the case, we wish to recall what was opined in Mahadeolal Kanodia v. Administrator-General of W.B., ""if one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if judges of co-ordinate jurisdiction in a High Court start overruling one another's decision. If one division bench of a High Court is unable to distinguish a previous decision of another division bench, and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all Courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court..."".

In State of U.P. v. Janki Devi Pal, the Supreme Court, while dismissing the appeal, held the state government responsible for keeping a legal rule uncertain despite High Court order and expressed its anguish,

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75 (2001) 2 SCC 247
76 [1960] 3 SCR 578.
“... lot of confusion and uncertainty must have prevailed in the State of U.P. on account of the legal issue having been entrusted by the State Government for decision by this Court where a minor amendment in the rule would have served the purpose and clarified the law. Instead of putting its own house in order, the State Government has indulged into the luxury of litigation by adding to the number of pendency of cases. It is careless and clumsy drafting of Rule 4 which is responsible for the situation. . . .”

“... once the flaw was pointed by the High Court, the State of U.P. should have promptly removed the flaw in the rule by amending the same instead of filing special leave petition and keeping the certainty of law in suspension. The State is one of the largest litigants and such tendency on the part of the State of adding to the bulk of pending cases when it can be avoided by taking a quick and convenient step of amending its own rule has to be deprecated”.

In *State of Punjab and Anr. v. Devans Modern Breweries Ltd. and Anr.* 78 decided on 20/11/2003, the Constitutional bench of five judges headed by Mr. V.N. Khare, CJI of the Supreme Court observed:

“344. The Court having regard to globalisation should take notice of the

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futuristic thought in developed countries for interpretation of the Constitution in the ascertainment of meaning of the relevant provisions thereof with reference to everything which is logically relevant”.

“355. Doctrine of precedent is a well-accepted principle. A ruling is generally considered to be binding on lower Courts and Courts having a smaller Bench structure.

“A precedent influences future decisions. Every decision is pronounced on a specific set of past facts and from the decision on those facts a rule has to be extracted and projected into the future. No one can foresee the precise situation that will arise, so the rule has to be capable of applying to a range of broadly similar situations against a background of changing conditions. It has therefore to be in general terms and ‘malleable’… No word has one proper meaning, nor can anyone seek to fix the meaning of words for others, so the interpretation of the rule remains flexible and open-ended. (See Dias ‘Jurisprudence’, 5th Edition, page 136)”

356. However, although a decision has neither been reversed nor overruled, it may cease to be ‘law’ owing to changed conditions and changed law. This is reflected by the principle ‘cessante ratione cessat ipsa
lex'. ‘... it is not easy to detect when such situations occur, for as long as the traditional theory prevails that judges never make law, but only declare it, two situations need to be carefully distinguished. One is where a case is rejected as being no longer law on the ground that it is now thought never to have represented the law; the other is where a case, which is acknowledged to have been the law at the time, has ceased to have that character owing to altered circumstances’.79

357. It is the latter situation which is often of relevance. With changes that are bound to occur in an evolving society, the judiciary must also keep abreast of these changes in order that the law is considered to be good law. This is extremely pertinent especially in the current era of globalization when the entire philosophy of society, on the economic front, is undergoing vast changes”.

358. In M.A. Murthy v. State of Karnataka and Ors., this Court held:

‘... the doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the

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consequences of transactions forming part of the daily affairs”.

In Md. Ashif & Ors v. State of Bihar & Ors., the Supreme Court, while dealing the regularisation of services of employee cited its decision in State of Karnataka and Ors. v. G.V. Chandrashekar, and laid emphasis on certainty of law,

“90. We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm

to the system inasmuch as the Courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed”.

8.7 Conclusion

Judicial creativity and innovation, whether it is called activist or conservative have come to stay and they shall remain forever with our judiciary if practised within limits and with judicial restraint. Lord Denning said:82

“What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both”.

The Supreme Court in a judgement Indirect Tax Practitioners’ Association v. R.K. Jain,83 authored by a bench headed by Sh. G.S. Singhi, J., while dealing with a contempt petition on the efficacy of whistleblower, observed:

“63. . . . to cite vintage rulings off English Courts and to bow to the decisions of British Indian days as absolutes is to ignore the law of all laws that the rule of law must keep pace with the rule of life. To make our point,

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we cannot resist quoting Mcwhinney, who wrote:

“The dominant theme in American philosophy of law today must be the concept of change-or revolution-in law. In Mr. Justice Oliver Wendell Holmes own aphorism, it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. The prestige argument, from age alone, that because a claimed legal rule has lasted a certain length of time it must automatically be valid and binding at the present day, regardless of changes in basic societal conditions and expectations, is no longer very persuasive. According to the basic teachings of the Legal Realist and policy schools of law, society itself is in a continuing state of flux at the present day; and the positive law, therefore, if it is to continue to be useful in the resolution of contemporary major social conflicts and social problems, must change in measure with the society. What we have, therefore, concomitantly with our conception of society in revolution is a conception of law itself, as being in a condition of flux, of movement. On this view, law is not a frozen, static body of rules but rules in a continuous process of change and adaptation; and the judge, at the final appellate level anyway, is a part-a determinant part-of this dynamic process of legal evolution.’

This approach must inform Indian law, including contempt law”.

It is very necessary to remember the legal transformation in our value system on the inauguration of the Constitution, and the dogmas of the quiet must change with the challenges of the stormy present. The great words of Justice Holmes uttered in a different context bear repetition in this context:

‘But when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very
foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be it eternally vigilant against attempts to check the expression of opinions that we loathe and believed to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that and immediate check is required to save the country.

The realist school of jurisprudence is loaded the myth that the judges merely declared the pre-existing law or interpreted it and asserted that the judges make laws. It provides that the law is what the Courts says it is. This is known as legal scepticism and is a reaction to Austin’s definition of law as a command of political sovereign. According to analytical jurisprudence the Court merely finds the law or merely interprets the same. The American realists namely Jerome Frank, Justice Holmes, Cardozo, and Llewellyn were the chief exponents of the school. The Indian Supreme Court not only makes law but also started legislating exactly in a manner in which the legislature legislates. A country which is basically governed by a written law, must understand that each and every situation cannot be visualized by the legislature, and therefore, it cannot be expected that no new situation will arise before the Court while adjudicating. Undoubtedly, the Court cannot either turn a blind eye or ask the claimant/litigant to wait for the legislature to realize and recognize his right which emerged due to a new fact situation, lest it should make the system reduced to a mockery. There are a large number of
instances wherein the Court lays down the guidelines for inter-country adoption, against sexual harassment of working women at workplace, for abolition of child labour etc.

In essence, we need to argue about legal certainty and not to discuss much about legal indeterminacy. Absolute certainty will reduce the system to be a mechanical process only, which could produce a finished product like results. Undoubtedly and admittedly, there is always either a minimum certainty of law or adherence to the main law like the Constitution. For a moment stop conversing about controlling judicial decisions and take the perspective of ordinary people seeking to abide by law. We should redirect the conversation and try to find ways how judicial decisions can be made more accurate, definite and binding. Let us raise questions about how Courts should limit retroactivity of laws and how they should protect the legitimate expectations. From there you can go on to talk about how to draft better laws that can be more easily applied.

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