

Sheoshankar Vs. State Govt. of Madhya Pradesh and ors.

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Court : Mumbai

Decided On : Apr-18-1951

Reported in : 1951CriLJ1140

Judge : Hidayatullah, ;Mangalmurti and ;Mudholkar, JJ.

Appellant : Sheoshankar

Respondent : State Govt. of Madhya Pradesh and ors.

Judgement :

Hidayatullah, J.

1. This is an application purporting to be under Article 226 of the Constitution for the following reliefs:

(i) A writ of Mandamus directing the respondents not to enforce against the petitioner the Central Provinces & Berar Prohibition Act VII (7) of 1938 or all such sections of the same as may be found inconsistent with the Constitution:

(ii) a writ of Mandamus directing the respondents to withdraw & cancel all such notifications rules & orders made by the respondents in exercise of the powers conferred on them by the provisions of the said Act as may be found inconsistent with the Constitution:

(iii) all the costs of the petition, &

(iv) Any other relief that this Honourable Court may deem proper to grant.

2. The petitioner states that he is a permanent resident of Nagpur and is earning Rs. 100 per month & has been accustomed for a number of years to take alcoholic drinks, generally country liquor, at an average of 4 ounces per day.

3. Since the enforcement of the Central Provinces & Berar Prohibition Act, 1938 (Act VII (7) of 1938), in the Nagpur District by Notification No. 652-800-VIII, dated 5-8-1946 the petitioner had to stop consumption of country liquor altogether inasmuch as a permit for bottled foreign liquor in forms F. L. XII & XII-A alone is available under Rules 7 & 7-A, Central Provinces & Berar Foreign Liquor Rules, 1938, issued by the Govt. under Sections 30, 32, 33 & 68(2)(f) & (i) of the said Act & under Notification No. 1271-1095-VIII dated 2-1-1938. Even this permit is subject to the condition that the licensing authority should be satisfied that the social & economic status of the petitioner warrant the grant of a permit & that the petitioner is not likely to abuse it.

4. The petitioner complains that he is prohibited by law from importing any country liquor & that he is eligible to import only foreign liquor from overseas or Indian made foreign liquor if a permit in form F. L. XII or P. L. XIII under Rules 18 & 10 respectively of the Central Provinces & Berar Foreign Liquor Rules, 1938, is granted to him.

5. The petitioner complains that neither he nor any licensed dealer in the Nagpur district can manufacture, store, or sell country liquor, inasmuch as no permit for the purpose can be granted under the Act or the Rules made thereunder.

6. The petitioner states that as a result, the petitioner is forced to apply for a permit for importing, purchasing or consuming foreign liquor only, whereas a citizen of Jabalpur or Gondia is free to purchase, hold, dispose of property in the shape of country liquor without any restrictions.

7. The petitioner submits that he is unable to apply for such a permit because (a) he is poor, & (b) he is afraid that the licensing authority might refuse him a permit on the ground that his social & economic status does not satisfy the authority. He

contends that the consumption of liquor in moderation is in no way injurious to the health of the petitioner, that on the other hand deprivation of liquor to him has seriously affected his health, requiring constant treatment, that he has been unable to concentrate on his work, & that he is suffering in his income as a result.

8. The petitioner contends that he was previously working as an excise contractor, which is his hereditary occupation, but that since the imposition of prohibition in the Nagpur district on 5-8-1946, the petitioner is denied the right to engage in his family trade in the Nagpur district, though the citizens of the Bhandara district are free to engage themselves freely in the same trade.

9. The petitioner contends that the Prohibition Act VII (7) of 1938 as a whole together with its permit system & all the notifications & rules, is void, because it takes away, or at any rate abridges, the Fundamental Rights guaranteed by Article 19, Sub-clauses (d), (e), (f) & (g) of the Constitution, & also because it denies equality before law of citizens, guaranteed under Article 14 of the Constitution & creates inequality between the citizens of one local area & those of another in the State of Madhya Pradesh.

10. The petitioner further contends that the Prohibition Act in so far as it prohibits the manufacture & sale of country liquor in prohibited areas & allows the sale of Indian-made foreign liquor, is void under Article 303 of the Constitution inasmuch as it gives to the brewery industry in other States a preference over the same industry in this state.

11. The petitioner contends that although Section 6 (3) of the Act, which exempts any person of non-Asiatic domicile or any member of the Defence Forces from any restraint in the matter of possession or consumption of any liquor, has now been repealed by the Central Provinces & Berar Prohibition (Second Amendment) Act, 1947, the Proviso to Rules 7 & 7 A of the Central Provinces & Berar Foreign Liquor Rules, 1938, make a discrimination against the petitioner in allowing free permits to consume liquor, to persons of such domicile. He challenges this discrimination as being repugnant to Article 14 of the Constitution.

12. The petition further contends that there is discrimination between a member of the Defence Forces of the country & other citizens, inasmuch as, under P. L. IV the former can have any quantity of the alcoholic beverage, without a permit from a military canteen &, this is repugnant to Article 14 of the Constitution.

13. The petitioner further contends, that the inhibition of advertisements & propoganda in favour of alcoholic drinks, by Section 8-'A' of the Act, offends against Article 19 (1)(a) & 303 of the Constitution inasmuch as it prevents him from expressing his opinion freely & restricts his right to convert others to his own view point & places the newspaper industry in Bengal & other States at an advantage over the newspapers of Madhya Pradesh.

14. The petitioner challenges the validity of Sections 28 & 37 of the Act on the ground that they empower a Deputy Commissioner in his discretion to compound an offence under Section 76 of the Act on payment of Rs. 500, thus denying equality before law to all the citizens. For the same reasons the petitioner also challenges Section 52 of the Act, which empowers the Deputy Commissioner or the Prohibition Officer to stop proceedings under the Act without reference to the Magistrate trying the case,

15. The petitioner challenges Section 29 of the Act, inasmuch as it amounts to a delegation of the legislative powers to the Govt.

16. The petitioner challenges Section 47 because, he avers, it offends against Article 23(3) of the Constitution.

17. The Act & the notifications which prohibit a citizen from acquiring, holding, or disposing of non-beverage, medicinal, & toilet preparations are challenged by the petitioner as being 'ultra vires*' of Article 19 (1)(f) of the Constitution.

18. The petitioner further challenges the Sweet Toddy (Nira) Rules, 1939, & the Mahuwa Rules, 1939, issued under Sections 33 & 68 of the Act as offending against Article 14 being applicable not at the whole State but to certain areas including the district of Nagpur.

19. The petitioner, therefore, asks not only for the reliefs above-mentioned but also for a declaration that the entire Prohibition Act & all the Rules, Notifications, & Orders are void & of no effect. He filed an affidavit in support of his petition.

20. The State Govt. in their Return filed in answer to the Rule issued by this Court admitted certain facts relating to the petitioner but denied others. They admitted the effect of the Prohibition Act as detailed by the petitioner, but denied that any of the provisions challenged by the petitioner militates against Article 14, 19, or 303 of the Constitution. They stated that the petitioner had no right to challenge the Act in the manner done by him & the petition itself was untenable under Article 226 of the Constitution.

21. The matter came up for hearing before a Division Bench of Mangalmurti & Mudholkar JJ., but on their recommendation the learned Chief Justice has been pleased to constitute a Full Bench consisting of the same learned Judges & myself.

22. At the hearing the petitioner was represented by Shri R. V. S. Mani & the opposite party by Shri T. P. Naik, Additional Govt. Pleader. Shri Naik raised three preliminary objections. His first contention was that this Court had no jurisdiction to entertain a petition for a writ of mandamus except in the exercise of its general jurisdiction since there is no original jurisdiction beyond what is laid down in the Letters Patent of this Court According to the learned Additional Govt. Pleader, a distinction must be made between powers, authority, & jurisdiction, & though the Constitution has vested certain powers in High Courts their jurisdiction as heretofore has been preserved & the powers can only be used by them in the exercise of their ordinary jurisdiction but not beyond. His second objection was to the form of the petition & the 'locus standi' of the petitioner inasmuch as he had never applied for & permit or been refused one, & had never been prosecuted for the infringement of any of the provisions of the Act. His third contention was that the petition for mandamus was not only premature but misconceived because no specific legal duty has been challenged.

23. We heard the preliminary objections in detail but went on to hear the entire case as it was inconvenient to decide the matter of jurisdiction without having

before us the entire case of the applicant & the specific grievance or grievances which had given rise to the petition.

24. Before dealing with the arguments on the preliminary objection as well the merits of the case, it is necessary to examine, in brief, the Central Provinces & Berar Prohibition Act, 1938 (VII (7) of 1938) -- hereinafter called 'the Act' -- to see how it is constructed. It is also necessary to find out the provisions therein & the rules which are challenged.

25. The Act was passed to introduce & extend the prohibition of the manufacture, sale, & consumption of liquor in the Central Provinces & Berar. The preamble of the Act states the underlying policy of the enactment in these terms:

Whereas it is expedient, as early as possible, to bring about the prohibition, except for sacramental, medicinal, scientific, industrial & such like purpose, of the production, manufacture, possession, export, import, transport, purchase, sale & consumption of liquor in the Central Provinces & Berar, etc.

Though the Act is extended to the whole of the Central Provinces & Berar, it is to come into force only in certain districts from 1-4-1938 & the Provincial Govt, is given the power to extend it to other areas from time to time by notifications as also to withdraw it from areas to which it is extended. There is appended a schedule of those laws which were to stand repealed as a consequence of the application of the Act to any local area. The administration of the Act is placed in the hands of a Prohibition Commissioner, though there is also a provision for the appointment of prohibition officers & for the delegation of his powers by the Prohibition Commissioner to the Deputy Commissioner.

26. Under Section 5 Anti-drink Committees are to be set up. Chap. III deals with penalties, 'inter alia' for import, export, transport, possession, manufacture (including tapping, drawing & distilling) of liquor & for possession or use of distilling apparatus. Penalties are also to be imposed for consumption, purchase & bottling of liquor, & for being found in a state of drunkenness. Section 8 makes punishable a mere agreement without an overt act, of two or more persons to commit, cause to be committed any offence, or to evade or nullify the provisions of the Act.

Section 8 A provides for punishment in regard to advertisements relating to liquor & the remaining chapter deals with punishments of varying degrees, confiscation, & with compounding of certain offences.

27. Section 29 empowers the notification of exemptions. Section 30 empowers the grant of licences for 'bona fide' medicinal & other purposes; Section 31 empowers the grant of licences for tapping sweet todds -- (called Nira); Section 32 empowers making of rules by the Provincial Govt. empowering the Prohibition Commissioner or any officer empowered by him to grant permits authorising grant of licences; Section 33 provides for fees; Section 34 for execution of agreements with or without security; Section 35 enables the authority granting the licence also to suspend or cancel it; Section 36 provides for punishment for misconduct by licensees, & Section 37 provides for compounding of offences committed by licence & permit-holders.

28. Chap. V provides for powers, duties & procedure of Officers etc. Chap. VI for Rules & Notifications, & Chap. VII for bar of legal proceedings against the Crown, police, & prohibition officers.

29. Of these, Sections 1 (3), 1 A, 6, 8A, 29, 30, 31, 32 & 37 were particularly challenged. Of the notifications those called in question were the following:

No. 934-863-VII dated 14-9-1940: reducing duty for troops receiving supplies through military canteens. This is challenged as amounting to discriminations:

No. 728-483-VIII dated 21-6-1938: exempting 'bona fide' railway travellers in respect of certain qualities of liquor. This is also challenged as amounting to discrimination:

No. 1452-VIII dated 9-12-1947: granting certain exemption to military messes & canteens belonging to the Naval, Military, & Air Forces. This is also challenged as being discriminatory:

No. 1457-1861-VIII dated 11-12-1947: notifying the rules regulating the import, export or transport of country spirit, in transit from one part of India to another through Central Provinces & Berar. This is challenged as interfering with inter-

State trade:

No. 1271-1095-VIII dated 2-11-1938: notifying the Central Provinces & Berar Foreign Liquor Rules, 1938. Of these Rules 7, 7 A, 8 & 8 A (which will be notified later) are particularly challenged as also certain licences & permits connected with them, on the ground of discrimination:

No. 687-327-VIII dated 17-6-1939: notifying the Sweet Toddy (Nira) Rules 1939.

No. 111-1524-VIII dated 25-1-1939: notifying the Mahua Rules, 1939.

The Toddy & Mahua Rules are challenged on the ground of discrimination.

29A The main grounds of attack are that they negative fundamental rights, make discrimination between one place & another, between persons & persons, foreign liquor & country liquor, & affect inter-state trade & commerce. In particular Article 19, Clauses (a), (d), (e), (f) & (g) were invoked.

30. I shall first take up the preliminary objection of the learned Additional Govt. Pleader for consideration. The objection here is threefold. The first objection is that this Court is not possessed of original civil jurisdiction & hence such a petition cannot be entertained till Parliament passes the kind of legislation contemplated by Article 32 (3) of the Constitution. The second objection is that even if a petition by way of original motion can be entertained the petitioner has not shown what injury he has suffered, or what act or omission there is in respect of which he seeks a writ, direction or order. Lastly, it is contended that the petitioner seeks merely a declaratory opinion from this Court on the validity of the Prohibition Act & the rules & notifications made thereunder. I shall deal with these objections in the same order.

31. The powers & jurisdiction of this Court are created by the Constitution, the Letters Patent, & other statutes. Article 226 of the Constitution, which gives the power to issue writs etc. provides:

(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to

any person or authority, including in appropriate cases any Govt., within those territories directions, orders or writs, including writs in the nature of 'habeas corpus, mandamus, prohibition, 'quo warrants & certiorari, or any of them, for the enforcement of any of the rights conferred by Part in & for any other purpose. (2) The power conferred on a High Court by Clause (1) shall not be in derogation of the power conferred on the Supreme Court by Clause (2) of Article 32.

32. Reference is made in this connection to Articles 225 & 32, & it is stated that the jurisdiction of the High Courts is to remain unaltered except as stated in the proviso to the former article. It is then pointed out that the right to move the Supreme Court for the enforcement of Fundamental Rights is guaranteed by Article 32 (first clause), & the Supreme Court has been granted the power to issue writs, directions or orders (including writs in the nature of 'habeas corpus' etc.) for the enforcement of any of the rights conferred by Part III (second clause). It is argued that there is no such guarantee in Article 226 which is also not placed in Part III & further that Clause 3 of Article 32 states that

Without prejudice to the powers conferred on the Supreme Court by Clauses (1) & (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2).

33. It is contended that any exercise of such powers by the High Court must await legislation by Parliament in this behalf. This argument is clearly untenable.

34. The opening words of Article 226 'Notwithstanding anything in Article 32' read with the second clause of that article that

the power conferred on a High Court by Clause (1) shall not be in derogation of the power conferred on the Supreme Court by Clause (2) of Article 32.

show that the High Court's powers are not postponed & that the High Courts are excepted from the operation of the third clause of Article 32.

35. There is no force in the contention that we must make a distinction between 'jurisdiction' & 'power' & that Article 226 is merely enabling & provides an additional

arm to the High Courts to be used in the exercise of their established jurisdictions. I am aware that opinion in India is not uniform on this point. The Madhya Bharat High Court in spite of a Pull Bench decision is really equally divided, &, in the negation of such jurisdiction, is supported by the East Punjab High Court, while the Madras & Patna High Courts, expressly, & Bombay & Allahabad by implication, have recognized such jurisdiction. This Court has also exercised jurisdiction under Article 226 on previous occasions.

36. Shri T. P. Naik quoted to us the observations of Patanjali Sastri, J. in 'Romes Thappar v. State of Madras' : 1950 CriLJ1514 , in support of his contentions. His Lordship observed as follows:

We are of opinion that neither the instances mentioned by the learned Advocate General nor the American decisions referred to by him are really analogous to the remedy afforded by Article 32 of the Indian Constitution. That Article does not merely confer power on this Court, as Article 226 does on the High Courts, to issue certain writs for the enforcement of the rights conferred by Part III, or for any other purpose, as part of its general jurisdiction. In that case it would have been more appropriately placed among Articles 131 to 139 which define that jurisdiction. Article 32 provides a 'guaranteed' remedy for the enforcement of those rights, & this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted the protector & guarantor of fundamental rights, & it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights. No similar provision is to be found in the Constitution of the United States & we do not consider that the American decisions are in point.

37. Before discussing this observation, which really goes against Shri Naik's contention, I propose to state my own view. When power is unconditionally granted by the people to certain legislative & other bodies, in a solemn constitution, the power is to be used 'eo instanti', unless otherwise provided, for the purpose for which it is granted. Every grant of power carries with it a jurisdiction to exercise that power.'

As pointed out by Willis in his Constitutional Law (1936), page 683:

Questions of jurisdiction arise with reference to the agencies of the sovereign people. The question, therefore, simply is whether or not the sovereign people, as a principal, have given their agents power, either directly in the Constitution or indirectly through Congress & the Supreme Court. If they have given an agent power, that agent has jurisdiction. If the people have given the federal Govt. power, the federal Govt. has jurisdiction. If the people have given the states power, the states have jurisdiction. If the people have given a tax power to the federal Govt., or to the states, or to both, the Govts. to which that power has been given have tax jurisdiction as the case may be. In these cases the people have spoken...

38. It is true that the learned author goes on to say:

Where the jurisdiction has not been fixed by the terms of the power granted, expressly or impliedly, or by constitutional limitations, the common law bases of jurisdiction are implied. (ibid)

39. The latter observation cannot be invoked here because no limits are fixed by the Indian Constitution. Article 225, which is said to limit jurisdiction, is to the following effect:.

Subject to the provisions of this Constitution & to the provisions of any law of the appropriate legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, & the law administered in, any existing High Court, & the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court & to regulate the sittings of the Court & of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

'Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.

40. All that this article does is to preserve the original & appellate jurisdictions such as they were on the date of the inauguration of the Constitution. Article 226 must be read as an enlargement of that jurisdiction, & such an enlargement cannot be shut out either expressly or by implication, regard being had to the qualification 'subject to the provisions of this Constitution' by which Article 225 is prefaced.

41. The observations of Patanjali Sastri J., if I may say so with profound respect, do not indicate anything to the contrary. His Lordship was merely pointing out that while the High Court issues writs etc. as 'part of its general jurisdiction' the Supreme Court is invested with a 'guaranteed' remedy for the enforcement of fundamental rights. The matter is not one of the general jurisdiction of the Supreme Court but of a special & guaranteed constitutional jurisdiction to be exercised whenever Part III of the Constitution is infringed. This has nothing to do with the distinction between 'power' & 'jurisdiction' which has found favour with the East Punjab & the Madhya Bharat High Courts. I do not think that the fact that Article 226 is sandwiched between Articles 225 & 227 has much relevance. The collocation of articles in the Constitution is not decisive, though it has some relevance in the matter of amendment thereof, in any event the position of Article 226 has not the same quality as the placing of Article 32 in the chapter on fundamental rights. I, therefore, hold that the High Court is invested with a jurisdiction as well as a power to issue writs, directions or orders as laid down in Article 226 in appropriate cases. In what classes of cases such jurisdiction should be exercised will be considered at a later stage.

42. I shall concern myself at this stage only with the question whether an application for the examination at large of statutes with a view to considering their constitutionality can be entertained. The provisions of Article 226 are new, & it is, therefore, necessary to point out the limits of the remedy conferred by that article.

43. It is true that Article 226 gives the power not only for the enforcement of fundamental rights but also for 'any other purpose'. The words 'any other purpose' are of very wide significance, but it cannot be postulated that the High Courts were given unlimited power to do anything by their writs, orders or directions, some limitations must be placed by the High Court on its own powers. In the Bombay

Prohibition case, 'Fram Nusserwanji v. State' : AIR1951 Bom210 , (Chagla C.J.) & in 'Indian Sugar Mills Ltd. v. Secretary to Govt. of U.P.' 1950 ACJ 767, the same opinion was expressed.

44. While I do not pretend to lay down principles for all cases, I am quite clear that a petition for the examination of the constitutionality of an Act does not lie even under the wide powers conferred by Article 226. There is no need to go into the question whether original jurisdiction is conferred by Article 226. Even in those countries where original jurisdiction is possessed judgments are at rendered unless the petitioner can show some injury or some imminent injury to himself as a cause of action. But in no country is the constitutionality of a statute examined on a mere petition to a superior Court. In other words, advisory opinions or declaratory judgments on the constitutionality of legislation cannot be given apart from some concrete injury or controversy.

45. In England questions about the constitutionality of statutes can hardly arise, but the validity of Rules & Regulations & actions under statutes is frequently tested. There are only two modes of procedure. One is the petition of right, & the other an action against the Attorney-General as representing the Crown. In 'Dyson v. Attorney-General' (1911) 1KB 410, an action was brought against the Attorney-General to test the validity of the notices issued by the Commissioners of Inland Revenue under the Finance (1909-1910) Act, 1910, & commonly known as Form IV. The main question argued was whether the Attorney-General could properly be made a deft, to an action of this nature. It was held by the Court of Appeal that the Attorney-General could be sued. Cozens-Hardy M. R. said at p. 415:

It has been settled for centuries that in the Court of Chancery the Attorney-General might in some cases be sued as a deft, as representing the Crown, & that in such a suit relief could be given against the Crown. 'Pawlett v. Attorney-General' (1667) Hardress' Rep 465, is a very early authority on this point. 'Laragoity v. Attorney-General' (1816) 2 Pri 172, is a case where this matter was a good deal discussed. In 'Deare v. Attorney-General' (1835) 1 Y & C Ex 197, the Attorney-General lemurred to such a bill. Lord Abinger (ibid at p. 208), said: 'I apprehend that the Crown always appears by the Attorney-General in a Court of justice, especially in

a Court of Equity, where the interest of the Crown is threatened. Therefore a practice has arisen of filing a bill against the Attorney-General or of making him a party to a bill, where the interest of the Crown is concerned', & the demurrer was overruled. But it is said that these authorities have no application except in cases in which the Crown rights are only incidentally concerned, & that where the rights of the Crown are the immediate & sole object of the suit the application must be by petition of right; see Mitford on Pleading, P. 30. I do not think the distinction thus suggested is supported by authority, nor do I think the distinction would avail the Attorney-General in the present case.

It was further held in the same case that a declaratory decree could be granted in such an action. Farewell L. J's observations are instructive. The learned Lord Justice observed:

The next argument on the Attorney-General's behalf was 'ab inconvenienti'; it was said that if an action of this sort would lie there would be innumerable actions for declarations as to the meaning of numerous Acts, adding greatly to the labours of the law officers. But the Court is not bound to make declaratory orders & would refuse to do so unless in proper cases, & would punish with costs persons who might bring unnecessary actions: there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy & easy-access to the Courts for any of His Majesty's subjects who have any real cause of complaint against 'the exercise of statutory powers by Govt. departments & Govt. officials, having regard to their growing tendency to claim the right to act without regard to legal principles & without appeal to any Court.

46. The rule in 'Dyson's case' is used in Australia & Canada to obtain declarations about the constitutionality of statutes. In 'Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth' 15 CLR 182, an action was brought by the Company against the Attorney-General of the Commonwealth & members of a Royal Commission appointed under the Royal Commission Act, 1902-1912 to inquire into the sugar industry in the Commonwealth. The pltf.-Company claimed a declaration that that Act as it stood was invalid & an injunction against the

Commission, Dyson's case was invoked in this connexion. Griffith, C.J. observed as follows:

In my opinion the jurisdiction of the Court both to make a declaration of right & to grant an injunction is clearly established in any¹ of the following cases: (1) if the Act itself under which the alleged power is claimed is wholly invalid; (2) if the Govt. instrumentality is attempting to exert under cover of a valid Act powers which are not capable of being conferred on it by the Commonwealth Parliament; or (3) If it is attempting to exert under cover of the instrument creating it, powers which that instrument does not confer. I think it immaterial whether the instrument under which the power is asserted is an Act of Parliament, or letters patent purporting to be issued under an Act of Parliament, or letters patent validly so issued. As to the declaration, 'Dyson's case' 1911 1 K B 410, is conclusive. As to the injunction against the defts. other than the Attorney-General the case of 'Nireaha Tamak v. Baker' 1901 AC 561 , is equally conclusive.

47. In 'Welsbach Light Co. of Australasia Ltd. v. Commonwealth of Australia' 22 CLR 268, an action was brought in the High Court against the Commonwealth & the Attorney-General for the Commonwealth for a declaration that the Trading with the Enemy Act, 1914, Section 2 (2)(b), was 'ultra vires' the Parliament of the Commonwealth, a declaration that the Proclamation of His Excellency the Governor-General dated 7-7-1915 was unlawful as also a notice issued under the Act, & for an injunction. Though the demurrer was sustained, Isaacs, J. observed as follows at page 283:

The Crown in this case does not deny the propriety of the claim as a mere matter of procedure, but denies, &, in my opinion, successfully denies, that the law supports it. That is a very proper attitude, for otherwise the Crown would be substantially setting up a claim to what Farewell, L.J. called 'a superiority to the law which was denied by the Court to the King himself in Stuart times' ('Dyson v. Attorney-General' 1911 1 KB 410). Apart from the justice of the position so taken up by the Crown, having reference not merely to the Company but to all Australian citizens who desired without incurring possible penalties or acting unpatriotically, to know their position in regard to the matter, it seems to me that, after the

exposition of the corresponding English rule by Lord Davey in 'Barraclough v. Brown' 1897 A C 615 , & by the Privy Council regarding this very rule in the 'Attorney-General for the Commonwealth v. Colonial Sugar Refining Co.' (1914) AC 237 , where they adopted the reason given by the learned Chief Justice, any contention to the contrary would have been unsustainable. But I hold that the pltfs. wholly fail on the merits for the reasons I have given, & therefore the demurrer should be allowed, & judgment entered for the defts.

48. In 'Luna Park Ltd. v. The Commonwealth' 32 CLR 596, the attack was against the Entertainments Tax Assessment Act, 1916. The action was brought before the Act was enforced. The authority of 'Commonwealth v. Queensland' (1920) 29 CLR 1, was cited to show that proceedings as to the validity of a statute can be entertained even though there was no statement of facts beyond a mere apprehension that the statute would be enforced.

49. The High Court of Australia did not accept the contention. Knox C.J. observed as follows:

In this case I do not think it is necessary to consider whether the Court has jurisdiction to make a declaration, for even if it had, I do not think the case is one in which the application for a declaration should be entertained. The state of facts on which the claim is based is purely hypothetical 'If the company elects to carry on its business in a certain way, will it be liable to pay a certain tax?' 'It has always been the rule that the Court does not answer questions based on a hypothetical state of facts. If authority were needed for that, it will be found in the case of 'Glasgow Navigation Co. v. Iron Ore Co.' (1910) A C 293 , where Lord Loreburn L. C. stated that it was not the function of a Court of law to advise parties as to what would be their rights under a hypothetical state of facts. If this declaration were made, it would have no binding effect in the true sense at all. It would be no more than an abstract opinion in the nature of advice that, if the company did certain things it would or would not become liable to pay a certain tax. None of the cases we have been referred to, I think, goes as far as that, & in my opinion the questions should not be answered.

Higgins J. added the following judgment:

In concurring with the judgment of the Court I wish to add a few words; because in the previous cases on which Mr. Latham & Mr. Dixon rely I had the misfortune to differ from the majority of the Court. In the 'Mc Arther case' (1920) 28 CLR 530, & in the case of 'Commonwealth v. Queensland' (1920) 29 C LR 1, my personal opinion was, as stated in the reports, that the action did not lie. But I am bound by the decision of the majority, & I loyally accept it. However, I am glad to find that in this case a limit is being put upon this class of actions.

50. What I have said so far is also borne out by the observations of Williams J. in 'Attorney-General (Vict.) v. The Commonwealth' 71 CLR 237, where the learned Judge observes:

But counsel for the depts., after pointing out that the Parliament of the State of Victoria has not yet legislated in the field alleged to have been invaded by the Pharmaceutical Benefits Act, contended that, as there was no existing conflict between State & Commonwealth Legislation the declaration claimed involved a mere abstract question of law, so that there was no 'matter' within the meaning of Section 75 of the Constitution, it was, of course, held in 'In re Judiciary Act' (1921) 29 CLR 257, that there is no 'matter' within the meaning of this section unless there is some immediate right, duty, or liability to be established by the determination of the Court. But, as I have said in two recent cases, 'Whitney v. Vegetable Seeds Committee, (Unreported)' & 'French v. Mc Carthy', (Unreported), I do not understand this statement to mean that the jurisdiction of this Court under Order IV of the Rules of Court to make declarations in cases where it has original jurisdiction is less than the corresponding jurisdiction of the English Courts under Order XXV, Rule 5. In those cases the opinion was expressed that the words in Order IV 'in an action properly brought' mean in an action in which the Court has original jurisdiction. The present action, in my opinion, raises more than abstract questions. The Act has not yet been proclaimed, but we were informed by counsel for the depts. that it will be proclaimed at the beginning of next year, & that in the mean time the necessary preliminary steps are being taken so that it may then be brought into effective operation. The question will therefore arise in the immediate future whether the public in each of the states are entitled to the benefits & subject to the obligations imposed by the Act. The cause of action relied upon is not

founded upon any conflict between State & Federal legislation, but upon the right, in some instances of the individual, & in other instances of the public or a section of the public, to restrain a public body clothed with statutory powers exceeding those powers. The cause of action was discussed & explained by O' Connor J. in the 'Union Label case' 1908 6 CLR 469 & by my brothers Rich and Dixon in 'Tasmania v. Victoria' 1935 CLR 157 . In England no question can arise as to the validity or invalidity of an Act of the Imperial Parliament, but such questions can arise with respect to regulations or executive acts purported to be made or done under the authority of Imperial Acts, & in England a claim for a declaration that such regulations or executive acts are beyond power would clearly constitute a cause of action. Instances where individuals who could claim some special interest in themselves have litigated such causes of action are illustrated by such cases as 'Dyson v. Attorney-General' 1911 1 KB 410; 'Burghes v. Attorney-General' 1912 1 Ch 173; 'Wigg v. Attorney-General for the Irish Free State 1927 A C 674, 'Yoxford & Darsham Farmers' Association Ltd. v. Llewellyn' (1945) 173 LT 103; while instances where it would be necessary to join the Attorney-General are discussed by Viscount Maugham in 'Moscrop's case' 1942 AC 332. As the Chief Justice has said in 'Toowoomba Foundry Pty., Ltd. v. The Commonwealth' 1945 Arb L R 282 , 'it is now...too late to contend that a person who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause of action in this Court for a declaration that the legislation is invalid'.

51. The above, however, must be read in the light of powers conferred on the High Court in Australia by Sections 75 & 76 of the Constitution & Section 30 of the Judiciary Act, 1903. The original Jurisdiction of the High Court in Australia is much larger than that of this Court. In spite of these provisions it was held by the High Court that there is no power to consider abstract questions of law involving the interpretation of the Constitution: See 'In re Judiciary & Navigation Acts' (1921) 29 CLR 257 & 'Bruce v. The Commonwealth Trade Marks Label Association' 4 CLR 1569.

52. The position in Canada is the same, though the bases for the decision are different. All this goes to show that it is possible in England, Australia, & Canada to

bring an action against the Attorney-General for a declaration that a particular statute or action under it is 'ultra vires' or unconstitutional. This, however, depends on the fundamental fact that the declaration must not be sought on a hypothetical state of facts & at the cause of action must disclose a real injury already occasioned or about to be occasioned to the pltf.

53. Many cases from American Courts were cited at the Bar in support of the contention that we should enter into an examination of the constitutionality of the Act. It is, therefore, necessary to say a few words about American practice. Under Article III of the American Constitution the Judicial power of the United States is vested in one Supreme Court & in such inferior Courts as the Congress may from time to time ordain & establish. The judicial power extends to all cases in law & equity arising under the Constitution, the laws of the United States...(and) to controversies to which the United States is a party. The original jurisdiction of the Supreme Court includes cases in which a State is a party.

54. In respect of declaratory judgments the matter is governed by the Federal Declaratory Judgments Act, which provides:

In cases of actual controversy except with respect to Federal taxes the Courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights & other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, & such declaration shall have the force & effect of a final judgment or decree & be reviewable as such.

55. In spite of the very wide powers the Supreme Court has given a very restricted meaning to the words 'case', 'controversy', & 'actual controversy'. Frankfurter & Hart writing in (1935) 49 H L. R 68, summarize the position in these words:

The presence of an actual controversy is the condition precedent of the Court's power to act; it does not of itself, however, assure the appropriateness of its acting...plainly enough, narrow concrete issues are more wisely decided than broad conjectural ones. No tenuous chain of interest should suffice to call into question aspects of a considered legislative policy not of immediate &

demonstrable concern to the party invoking the Court's judgment.' (Quoted in Frankfurter & Shulman: cases on Federal Jurisdiction & Procedure (1937) p. 93.)

56. The awkward dilemma of subjects having to choose between complying with the law, to their unnecessary detriment if the law be unconstitutional, & violating it at their own peril if it should prove to be constitutional, has not induced the Supreme Court to examine at large the constitutionality of Acts of legislature. The American Courts always insist that there must be a 'case' or 'actual controversy' before them.

57. Opinions have been expressed on several occasions that the Declaratory Judgments Act should be taken to cover those cases in which adjudication is necessary before actual violations of rights. Prof. Borchard, who had a lot to do with the adoption of the Declaratory Judgments Act, has also given expression to this opinion in 'his book on Declaratory Judgments. Sometimes, it is taken to the device of making an allegation that the Attorney-General has threatened action, & a suit or petition is founded on this fictitious threat as a cause of action, reminding us of the fictitious suits under Roman Law. Sometimes this plea is accepted as sufficient, but all such cases are for an injunctive relief. Examples of such injunctive relief on the basis of potential law can be found in 'Euclid v. Ambler Realty Co.' (1925) 272 U S 365 & 'Pierce V. Society of Sisters' (1925) 268 US 510. But this principle has not been extended to pure declaratory reliefs.

58. As pointed out by Laurence M. Hyde (Commissioner Missouri Supreme Court) in an article on Declaratory Judgments in the Washington University (1941) 26 L Q 4:

One thing is certainly now settled, & that is that a declaratory judgment is neither an advisory opinion nor a decision of a moot question, because it must involve a real controversy in which the result would be 'res judicata' between the parties.As recently pointed out in the United States Supreme Court Frankfurter J. in 'Coleman v. Miller' (1939) 307 US 433 , it is not the exercise of judicial power 'to write legal essays or to give advisory legal opinions,' that properly 'a Judge never gives a decision until the facts necessary for that decision have arisen'; & that Courts should not do so because 'the imagination of Judges, like that of other

persons, is limited, & they are not able to put before their minds all the complex circumstances which they ought to have in their minds when giving a decision'.

59. The United States Federal Courts as well as the Supreme Court, therefore, in spite of the power to declare any law -- national or state -- invalid as a violation of the Constitution, impose on themselves some limitations. Gersternburg points out that out of 40,000 cases apporniximately, decided by the Supreme Court in 147 years of its existence, only 76 decisions involved the invalidation of federal statutes or parts thereof. The position of state laws under the 'due process' & 'equality clauses' is however different.

60. The learned author (American Constitutional Law, 1937, pages 84, 86) summarizes these self-imposed limitations thus:

Acceptance of the exercise of the power by the Courts is in part attributable to the caution with which these have wielded it. The following rules have been laid down to govern the exercise of the power:

1. Questions as to constitutionality will not be passed upon unless they are essential to the decision in the case.
2. One who relies on the invalidity of a statute has the burden of proving its unconstitutionality. If the burden is not sustained the Court will presume that the statute is constitutional. 'This rule applies especially where the issue is the reasonableness of the enactment in the light of existing conditions.
3. The unconstitutional character of the legislation must be clear regardless of the interpretation put upon it. Hence, where alternative constructions are possible, the law must be so construed as to preserve its validity.
4. The power cannot be extended to permit the Court to pass upon the question of the expediency or wisdom of particular legislation.
5. The motives of the legislature in passing particular statutes cannot be made the subject 01 judicial examination.

6. The power may be exercised only in actual litigation since under Article II of the Constitution the judicial power extends only to 'cases' & 'controversies'. This means that there must be a real controversy between parties having opposing interests, & that one who contests the validity of a statute must show that substantial interests of his own will be adversely affected by its enforcement. The federal courts will not decide moot cases (i.e. they will not decide what the law would be on a hypothetical state of facts) nor will they render advisory opinions in cases where an abstract determination of the constitutionality of a statute is sought.

Only in one case 'Nashville v. Wallace,' (1933) 233 US 249, a declaratory judgment was given on the assumption, regardless of form that an 'actual' & 'justiciable' controversy existed.

61. I have no hesitation in adopting these limitations, & in my opinion, regardless of the question whether this Court possesses original jurisdiction, such limitations must control our judgments under Article 226 of our Constitution.

62. Judged from this test the application involves little but a declaratory opinion upon all the sections of the Act & the rules & notifications thereunder. The petitioner contends that such applications have been entertained before, & he relied upon 'Pram Nusserwanji v. State' : AIR1951 Bom210 to show that the application is competent. The petitioner before us urges that there is no point in making an application for a permit regarding 'toddy' as that beverage is completely banned under the Act, that for a permit for foreign liquor he has not the means to pay the requisite fee, & that he is also afraid his social status etc. might not be found sufficient to pass the test laid down in the rules. He, therefore, contends that he is a person injured by the Act.

63. Now in the Bombay case the learned Chief Justice felt some difficulty about entertaining the petition. As observed by the learned Chief justice:

The Advocate General did at the very outset raise a preliminary point that the petition was not maintainable & the petitioner was not entitled to any relief. But he did not insist on arguing that preliminary point 'in limine' & inviting our decision on

it. He stated that Govt. did not wish to avail itself of any technical defence, on the other hand, Govt. was most anxious to know the views of this Court on the various provisions of the law so that it should be guided in the enforcement of the prohibition law & should not do anything which in the opinion of this Court was illegal. We appreciate the very fair stand taken by Govt. & it is because of this that we have dealt with the various provisions of the prohibition law before we come to the question of the relief to which the petitioner is entitled....The Advocate General has argued that the petitioner is not entitled to any relief because he never made a specific demand of these rights against the Govt. to comply with any of his demand & therefore strictly there was no denial of his rights by Govt. at the date the petition was filed, To maintain in application under Section 45, Specific Relief Act. a demand of justice & its denial is essential before an order can be made under that section. It is true that the orders that the petitioner is now seeking are not confined to Section 45 but fall under Article 226 of the Constitution. But even so we have to consider whether It is open to a petitioner under Article 226, without making a specific demand of his right & without giving an opportunity to the Govt. to comply with that right, to file a petition. It was pointed out in 'Emperor v. Jeshingbhai Ishwar Lal' : AIR1950 Bom363 that the Court should of its own motion put limitations upon the wide powers conferred upon it under Article 226.

64. The Full Bench, in view of the arguments which had already taken place & in view of the desire of the State Govt. that the legality of the provisions challenged should be authoritatively examined, gave judgment. There are indications that, had the matter been objected to at an early stage & pressed unconditionally, the learned Judges might have reached a different conclusion. However, we are not concerned with a possible result, &, in view of the special circumstances present in that case, I cannot treat it as a precedent.

65. The petitioner has filed the petition for a mere declaratory opinion. He has done no act under the Act, nor has any action been taken under the Act to his detriment. He has not even made a demand for a permit, & thus there is no demand & refusal. The Prohibition Act has not been enforced against him as such. His only complaint is that as a result of the impugned Act he cannot do many things which he has in his mind. Mandamus cannot issue unless there is a

demand & a refusal or some act or omission is to be ordered. It is not to be expected that this Court will sit down to examine the constitutionality of all the sections of the Act & the rules & notifications with a view to finding out what is constitutional or what is not.

66. Strictly speaking the application ought to be dismissed on this short ground. However, as the matter has been argued at great length & a Full Bench as been constituted to consider the legality of the Act, I feel that I should express some opinion on at least those portions of the impugned legislation which in my opinion need consideration in the light of the present Constitution. I follow, in doing this, the precedent of Griffith C.J. in 'Australian Sugar Producers' Association Ltd. v. Australian Workers' Union 23 CLR 58, where the learned Chief Justice observed: as follows:

It is at any rate consonant with the practice of the Judicial Committee & of British Courts of Justice in general not to refrain from expressing an extra-judicial opinion In a case in which a formal error in procedure may prevent them from giving a formal judgment, but in which such an expression of opinion may avert a great public calamity. In my opinion, it would be a lamentable thing indeed if a Court should under such circumstances hold itself bound by any legal technicality to allow by its reticence the destruction of a great industry & great Imperial asset. In such a case legal technicalities have, to my mind, the same weight as rules of professional etiquette should have to the mind of a physician irregularly summoned to the bedside of an apparently dying man. For these reasons I not only feel at liberty but think that it is my imperative duty to express an opinion upon the merits of the case, & I venture to hope that some at least of my brothers on the bench will do likewise.

67. Before embarking upon the task of giving an opinion, I wish to indicate what are the exact points which I will take up for consideration. I shall confine my examination to the following points:

(a) Is the Prohibition Act rendered void being an unreasonable restraint upon the freedom of the citizens of India?

(b) Was the Prohibition Act an unconstitutional measure under the Govt of India Act, 1935?

(c) Is Section 29(2) of the Act, read with Rules 7 & 7-'A' of the Central Provinces & Berar Foreign Liquor Rules, affected by Article 14 of the Constitution inasmuch as there is a likelihood of unequal treatment of the citizens of India? While dealing with these matters I shall put forth the arguments of the petitioner as the occasion arises. On the rest of the case of the petitioner I do not intend pronouncing any opinion & must reserve my judgment for such cases in which the questions can be properly examined.

68. I have shown above that the petitioner objects to the entire prohibition policy & all the measures by which that policy is implemented. In so far as the policy underlying the Act is concerned it is no part of the duties of this Court to pronounce upon it unless it can be brought within any of the exceptions provided in the Constitution. What we are mainly concerned with is whether the Act, Rules, etc., in whole or in any part, are unconstitutional. If we were to substitute we would be usurping the functions of the latter. Judges are not in a position to know the effects of drinking upon the health of the nation & must not substitute their own judgment for that of the legislature on what is good for the people & what is not.

69. It is to be remembered that one of the directive principles in Article 47 is to the effect that:

the State shall endeavour to bring about prohibition of the consumption for medicinal purposes of intoxicating drinks & of drugs which are injurious to health,

It must also be borne in mind that under Article 37, though this principle is not enforceable by any Court, the principle itself is fundamental in the governance of the country, & it is the duty of the State to apply this principle in making laws. It would appear that the matter is not one of moral persuasion merely. I am not concerned with the policy underlying the law. For that the petitioner must 'resort to the polls & not to the Court'. All that I am concerned with is whether the petitioner is injured by any act or omission under the impugned Act etc., & whether he can in a proceeding such as this challenge the constitutionality of the impugned Act & the

rules & notifications thereunder.

70. The specific injury which the petitioner claims has been occasioned to him is that 'toddy' which according to him is a refreshing beverage, has been completely banned, & this amounts to a violation of his fundamental rights.

71. He says there is discrimination between the place & another, one kind of intoxicating liquor & another, & between persons & persons & this is against the letter & spirit of Article 14 of the Constitution. He complains of deprivation of freedom of speech, & of his inability to get country liquor from other States, & says that the Act thus offends against Sub-clause (e) of Article 19(1) & against Part XIII of the Constitution.

72. The last argument can be disposed of easily. Articles 301 & 303, on which reliance is placed, are subject to Article 305, which provides:

Nothing in Articles 301 & 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise provide.' It is clear that unless the Prohibition Act etc, were unconstitutional measures under the Govt. of India Act, 1935, Article 305 saves them from the operation of Articles 301 & 303.

73. Similarly, Sub-clause (e) of Article 19(1) is subject to an exception, which is to the following effect:

Nothing in Sub-clauses (d), (e) & (f) of the said clause shall affect the' operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights 'conferred by the said Sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

74. As regards reasonableness of the measure many cases of the Supreme Court of America illustrative of the exercise of 'Police Power' by the States were cited before us to show under what circumstances legislation by the States was considered unreasonable & was declared void. The other side cited cases to the contrary. I do not consider it profitable to discuss those cases for the reasons which I give below.

75. Among the governmental functions it is usual in America to include a power to regulate the life & habits 'of people in the interests of public safety, health or morals. This power is known, for want of a better designation, as 'police power'. Legislation in the exercise of 'police power' is subject to 'judicial review' under the twin 'due process' & 'equality' clauses of the 14th Amendment to find out whether the law curtailing rights to liberty & property is within such power.

76. The phrase 'police power' itself has no precise definition, though several have been attempted. Prof. Thomas Reed Powell of Columbia University described it in these words:

The only safe answer is that the 'police power' is the name given to the functions of Govt. not otherwise named. Learned American writers have called it 'a fiction', 'the dark continent of our jurisprudence', 'the convenient repository for which our juristic classification can find no other 'place,' the indefinite supremacy of the State, 'the power to govern'. Such remarks are helpful to readers already familiar with the toil & turmoil, which controversies over the police power have engendered. They may solace those, who have sought in vain to evolve some definition more precise. But they do not chart the way for explorers, to whom the police power is still an unknown land'. 1919 j CL 160.

77. In America such a power is deduced from the residuary legislative powers vested in the States, & the exercise of 'police powers' is correlated to health, safety, morals, & welfare of the public. The notion of 'federal police powers' is of recent growth & has sprung up after the first world War, the power being exercised under the garb of 'necessary & proper' legislation ancillary to the enumerated powers.

78. Dealing with 'police power' Holmes J. observed that:

It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong & preponderant opinion, to be greatly & immediately necessary to the public welfare. Legislation, however, is valid only if it can be correlated to public morals, safety or health. When it is not so related, it ceases to be good law as it lacks 'due process'.

79. Thus, in so far as State Legislation of this kind is concerned the fight is between the 'due process' & 'equality' clauses on the one hand, & 'police power' on the other. The 'due process' clause overlaps the 'equality' clause & goes beyond it. The Fourteenth Amendment, which had as one of its primary purposes the elevation of Negroes & their protection from State discrimination contains the following provision:

.nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

80. Taking up 'due process' first it is to be noticed that the term has no definition. The Supreme Court in one of its early decisions 'Munn v. Illinois' (1876) 94 US 113, declared that it would ascertain:

the intent & application of such, an important phrase in the Federal Constitution by the general policy of judicial exclusion & inclusion as the cases presented for decision shall require.

81. As already stated above, any law which is restrictive of freedom etc. is either justified as 'police power' or is declared bad as offending the 'due process' clause. Vague criteria are deducible, but mostly the policy of 'judicial exclusion or inclusion' is followed. An unending confusion has thus resulted, & it is difficult to say, in essence, 'whether, when statutes fail to be regarded as within 'police power,' they lack 'due process' or they lack 'due process because they are not truly within 'police power'. So far as I am aware, nobody has attempted to solve this riddle.

82. In England Parliament is so transcendently supreme that it can make any law, & questions akin to 'due process' can hardly arise. Thus, if Parliament made a law that all persons working in collieries shall travel free on buses & trains, it shall have to be given effect to, irrespective of any question of 'due process' or 'inequality'. In America, on the other hand, when a State made a law that the upper berths of sleeping cars should not be lowered when unsold, the Supreme Court held the law to be benevolent but unconstitutional because it gave to the

'purchaser of the lower Berth the luxury of more air space than he had paid for.'

83. The exercise of the functions of 'judicial review' of State Legislation, which began with 'Marbury v. Madison,' 1 Cra 137, was but the logical result of the Constitution. Hamilton, Federalist No. 78, said agreeing with Montesquieu that:

there is no liberty, if the power of judging be not separated from the legislative & executive powers.

The above Federalist was an answer to Brutus No. XI, in which the power of 'judicial review' was belittled. Hamilton gives a classic analysis of the functions of the judiciary in relation to legislation. His statement is long & would not bear quotation here. According to him the Constitution is 'law' & 'fundamental law', & there is identity between law (including the Constitution) & the 'judicial version' thereof. The interpretation of law being the peculiar province of Judges, according to him, it is 'natural to suppose that the Courts were designed to be in an intermediate body between the people & the legislature, in order to keep the latter within the limits of 'their' assigned authority'.

84. All this has proved true in America in practice. Though the Constitution should speak for itself, it is the Court's version of the Constitution which has value in judicial review,

85. Though Hamilton & others warned that Courts must exercise

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