EVOLUTION OF LEGAL PRINCIPLES THROUGH JUDICIAL PROCESS OF SUPREME COURT OF INDIA: BALANCING THE DOCTRINE OF STARE DECISIS AND OVERRULING

I. EVOLUTION OF THE PROBLEM:

Dependence on precedent and resorting to over ruling are two established practice and/or convention of the judicial process generally and in India specifically. The two principles belong to opposite poles, and have a conflicting role to play. Yet by using these methodologies in the judicial process new legal principles have evolved, thus preserving the dynamism of law.

The jurists of Supreme Court wrestle with the issue of precedent on a daily basis, knowing that their decisions will affect not just the people in a particular case, but potentially millions of other who could be in similar situations in the future. The term ***stare decisis*** is a Latin legal phrase, *"stare decisis et non quieta movere"* which means to stand by decisions and not to disturb settled matters. In other words, apply a precedent that is a settled principle of law.

Doctrine of *Stare decisis* is very important to English and Indian legal system. The landmark judgment like *Maneka Gandhi v. Union of India*[1] has cited 215 times by the apex court in other judgments,[2] and is likely to be referred to many more times in future. The decision of *State of Haryana v. Bhajan Lal*[3] is followed 165 times.[4] The longest judgment ever delivered by the Supreme Court is *Kesavananda Bharati v. State of Kerala*[5], which is the third-most cited case (with 155 citations) in the history of the apex court.[6] The judgment established the Supreme Court's authority over the Constitution and prevented Parliament from altering its 'basic structure.' The series of M.C Mehta

[1] AIR 1978 SC 597.
[2] Sriharsha Devulapalli, Vishnu Padmanabham, *The most influential judgments in Supreme Court's history*, LIVEMINT, September 18, 2018.
[3] AIR 1992 SC 604.
[4] *Supra 3.*
[5] AIR 1973 SC 1461.
[6] *Supra 3.*

cases including *M.C. Mehta v. Union of India*[7] has been cited in most of the environmental law cases for establishing 'absolute liability rule.'

The doctrine of binding precedent was firmly established after the 19th century when the judgments began to be reported.

The doctrine of *stare decisis* is a general policy of all the courts to adhere to. As long as the principle derived in the previous case is relevant to the case at hand, the ratio of the previous case remains binding.[8] The *ratio decidendi* of a case is the reason and the principle of law that led the court to arrive at a decision. The *ratio decidendi* is the principle of law used by the judges in deciding the legal problem and creating a precedent. The purpose of such binding-ness is to ensure stability, uniformity, equality, certainty, and avoidance of arbitrary decision making in future. The legal reasoning of a judicial decision of the Supreme Court of India has a binding effect on all courts in within the territory of India[9]

According to the opinion of **J. Baron Parke** given to the House of Lords in *Mirehouse v. Rennel*,[10] precedent is be considered in subsequent cases and the courts cannot reject and abandon all analogy of them. Understanding precedent establishes a connection between the past, the present and the future actions. In common law countries, precedents provide the evidence of law by giving us the glimpse how the law was made by judges, the analogy they applied for dealing with the then existed situation. In many cases, the judges' resort to interpretation, not of Maxwellian nature but beyond involving the mindset, education, jurisprudential inclinations, and beliefs of the judge(s) presiding over the matter. Often this process referred to as distinguishing one case from another. **Salmond** however is of the opinion that they are not conclusive because any previous decision of the court can be over ruled if it fails to solve the problem at hand.[11] Hence, precedents may be overruled if the court is able to distinguish between the two cases. However, there are no set principles or rules that are to be followed in this regard.

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[7] AIR 1987 SCR (1) 819.
[8] Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850,* Vol. 3, No. 1, *The American Journal of Legal History,* pp. 28-54, (Jan., 1959).
[9] Article 141, Constitution of India
[10] (1833) 1 Cl & Fin 527.
[11] P.J. FITZGERLD, SALMOND ON JURISPRUDENCE, P.88 (Universal Law Publishing Co., Pvt., Ltd., 12th Edn, Delhi, 2002).

In *Patterson v. McLean credit Union*[12], **J. Anthony Kennedy** in the majority decision opined that-

> "Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established… Nonetheless, we have held that any departure from the doctrine of *stare decisis* demands special justification."[13]

The term overruling means nullifying the previous judgment. In India, the Supreme Court and the High Court may over rule precedent laid down by it.[14] High Court of division bench can overrule the prior decision of single bench depending upon the number of judges hearing the case but a High Court cannot overrule the decision of Supreme Court. The decision of High Court of one state has only a persuasive value for the High Courts of other states.

In *K. S. Puttaswamy v. Union of India*,[15]in a unanimous decision, a nine -Judge Constitution Bench overruled the judgments in *M.P. Sharma*[16] and *Kharak Singh*[17] cases which had decided that privacy is not a fundamental right. Similarly, in *Joseph Shine v. Union of India*[18] **Justice D. Y Chandrachud** struck down 158-year-old pre-colonial law of criminalization of adultery under Section 497 of IPC as unconstitutional by overruling *Sowmithri Vishnu v. Union of India*[19] which upheld the validity of this section. In the year of 2018, the apex court delivered its unanimous verdict in *Navtej Singh Johar v. Union of India,*[20] by decriminalizing portions of section 377 of IPC, relating to consensual sex among same sex adults in private. This decision overturns the 2013 ruling of *Suresh Kumar Koushal v. Naz Foundation*[21] in which the court upheld the validity of the law. In order to interpret the law in a broader way the Supreme Court in *National Legal Services Authority v. Union of India*,[22] declared transgender people to be a 'third gender', with equal right of reservation under the socially and economically backward class category for the purpose of education and jobs. The Court affirmed that the

[12] 491 U.S. 164 (1989).
[13] *Ibid*.
[14] Article 141 of the Constitution of India.
[15] WRIT PETITION (CIVIL) NO. 494 OF 2012.
[16] MP Sharma v. Satish Chandra, AIR 1954 SC 300.
[17] Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295.
[18] WRIT PETITION (CRIMINAL) NO. 194 of 2017.
[19] AIR 1985 SC 1618.
[20] W. P. (Crl.) No. 76 of 2016.
[21] CIVIL APPEAL 10972 OF 2013.
[22] WP (Civil) NO. 604 OF 2013.

fundamental rights granted under the Constitution of India equally applies to the transgender people, by giving them the right to self-identification. This judgment is a major step towards gender equality in India.

Stare decisis and overruling of judgments are two opposite poles; theoretically both cannot exist at the same time. If the judges are bound under the doctrine of *stare decisis* then the process of overruling would become a contradictory and conflicting process of law. Judges believe that the doctrine of *stare decisis* "promotes consistent development of legal principles, it fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[23] Yet, it is necessary to overrule a precedent only to preserve the dynamism in law.

Another most interesting problem concerning judicial law-making is whether the law established by a court decision must be given retrospective effect or only prospective effect. Doctrine of prospective overruling is of American origin. This means construing an earlier decision in such a manner that it would not have a binding effect to the parties of original suit but will change the law in future without disturbing the law of original suit. But the principle of retrospectivity implies that when a law is announced invalid or valid, then it is regarded to be invalid or valid from the date law had appear or the date on which it was established. **Blackstone** said it should be upon judges to decide which decision shall be applied retrospectively and which shall be applied prospectively.

The doctrine of prospective overruling is propounded by **J. Cardozo** in the case of *Northern Railway v. Sunburst Oil and Refining Co*.[24] in which he asserted not to give retrospective effect to judicial decisions. The basic objective of prospective overruling is to overrule a precedent without having a retrospective effect. Prospective overruling intends that the law should keep up with the changes occurring in the society and thus uphold the dynamic nature of law. Law is shaped by the demands of the contemporary society on one hand and the society changes, develops and progresses by the diktats of the law. This is a cyclic motion. Therefore, the doctrine of Prospective Overruling is an

[23] *Kimble v. Marvel Entertainment, LLC,* 576 U.S. (2015).
[24] 287 U.S. 358.

important tool in the hand of judiciary to give fair and timely justice to its citizens. In India, this doctrine has been used in *Golaknath's* Case.[25] In this case the court said, by the application of this doctrine the past may be preserved and the future protected. The Constitution of India does not expressly speak against the doctrine of prospective overruling. Its operation is left to the discretion of the judges.

Therefore, the evolution of newer principles of law may evolve in the following manner:

a. By distinguishing between the precedent and the case at hand,
b. By over ruling the existing precedent and formulating a new principle of law.

While deciding whether to overrule a precedent the courts must consider several prudent and pragmatic factors. The interpretation that leads the judge to conclude whether a case is to be over ruled or distinguished is beyond the precincts of the Maxwellian interpretation. The boundaries within which a precedent is justified to be overruled in response to the demands of the changing society or whether a precedent is to be over ruled due to the same reason, is a matter of judicial discretion. However, discretion cannot be arbitrary and must be substantiated by reasons. Such reasoning includes benefit of the society at large, workability of the decision, legitimacy, inconsistency with related decisions, inconsistence with enacted laws, changed understanding of relevant facts and ideologies of judges.[26] This process is evolutive and transformative.

One can quote Roscoe Pound's warning that the law must be stable, yet it cannot stand still.[27] No black letter or thumb rules are available in this regard. **Roger J. Traynor** reminds us, "a bad precedent easier said than undone."[28] Thus, the decision whether to stand still often requires a balancing of hardships.[29] In the year 1954 an important case came before the Supreme Court of India namely, *Dwarkadas v. Sholapur Spinning & Weaving Co.*[30]. In this case **J. Das** expressed his view in the following words –

> "…..accepting that Supreme Court is not bound by its own decisions and may reverse a previous decision especially on constitutional questions the court will

[25] *Golak Nath v. State of Punjab,* AIR 1967 SC 1643.
[26] James F. Spriggs, II and Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent,* Vol. 63, No. 4, *The Journal of Politics,* p. 1091-1111(Nov., 2001).
[27] Roscoe Pound, *The Theory of Judicial Decision*" Vol. 802, no. II, *Harvard Law Review*, p. 36 (1923).
[28] *Ibid*.
[29] B. Cardozo, The Nature Of JudiciaL Process, p.10 (New Haven, Yale University Press, 1964).
[30] AIR 1954 SC 119.

be surely slow to do so unless such previous decision appears to be obviously erroneous".

Later in Bengal Immunity Case[31], the judges unanimously ruled that in constitutional matters it would not consider itself bound by the orthodox doctrine of precedent.

The Courts now look forward to balance between maintaining a stable body of consistent jurisprudence while at the same time preserving some "mechanism for error correction." **J. Lewis Powell** also observed that, "the elimination of *stare decisis* would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Judges say it is."[32]

Hence, both doctrines *i.e.*, *stare decisis* and overruling depends heavily on interpretation. Donald Davidson's theory of interpretation argues that only humans *i.e.,* the language-users can interpret because they have the propositional attitudes to language *via* concept of belief. According to **Ricoeur,** interpretation moves forward from naïve understanding to deeper understanding through hermeneutic.[33]

Such hermeneutics is evident in the interpretation of the Supreme Court over a period. *A. K. Gopalan v. State of Madras* was that of classical positivism. The expression "except according to the procedure established by law" as mentioned in the constitution of India, was understood as no one can be deprived of personal liberty by mere executive action unsupported by law. But in a later decisions of *Rustom Cavasjee Cooper v. Union of India*[34] and *Maneka Gandhi v. Union of India* the approach in Gopalan's case was disregarded and words- "procedure established by law" was interpreted to mean reasonably valid law which is right, just, fair, and reasonable and not arbitrary, fanciful, and oppressive. This is an example of a smooth change in the understanding of law without taking recourse to Maxwellian rules of interpretation of statutes.

Another important sequel of cases shows how interpretation can change the perspective. In 1965, in *Shankari Prasad v. Union of India*[35]and *Sajjan Singh v. State of Rajasthan*[36]

[31]Bengal Immunity Co. Ltd. v. State of Bihar, AIR 1955 SC 661.
[32]NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT, p. 58 (Cambridge University Press 2008).
[33]*Ibid.*
[34] AIR 1970 SC 1318.
[35] AIR 1951 SC 458.
[36] AIR 1965 SC 845.

the apex court interpreted Article 13 (2) and said the word "law" does not include Constitutional Amendments made by parliament under Article 368. Rather the word "law" in Article 13 (2) means rules, regulations made in exercise of ordinary legislative power and not amendments. But later in *Golak Nath v. State of Punjab*,[37] the Supreme Court overruled its decision in aforesaid cases, and reinterpreted the word 'law' in Article 13(2) included every branch of law, statutory, constitutional, etc., and hence, if an amendment to the constitution took away or abridged the fundamental right of the citizens, the amendment would be declared void. However, in *Keshavananda Bharti* case,[38] the court overruled *Golaknath* case and said that though the parliament can amend the entire constitution to form a new constitution, the amendment should survive the test of basic features (implied restrictions to amend the constitution).

In *Minerva Mills v. Union of India,*[39] the Supreme Court by 4:1 majority struck down clause (4) and (5) of Article 368 inserted by 42nd Constitutional Amendment to the Constitution of India, on the ground that these clauses destroyed the essential feature of basic structure. Therefore, the Supreme Court held it unconstitutional and it was settled that the constitution is supreme and parliament cannot exercise unlimited amending powers. A judge has discretion, certain amount of creativity and judicial activism at the time of interpretation. In the entire journey of overruling; the technique of interpretation plays a very important role. Hence, to understand *stare decisis* and overruling it is important to understand the hermeneutics of interpretation.

When a written judicial opinion is formulated, it contains two basic elements. One is *ratio decidendi as* explained above is a reason behind the judgment which is binding, if not overruled in subsequent case by larger bench. The other is *obiter dicta*, which are the additional observations, remarks and opinion made by the judge on the side. *Obiter dicta* has only persuasive value, which offers guidance in similar matters in future by way of illustrations or explanations.

Hence, bindingness of precedent is not absolute. If made absolute then law would be static, societal progression would be stalled. However, in the absence of the doctrine of

[37] AIR 1967 SC 1643.
[38] Keshavananda Bharti v. State of Kerala, AIR 1973 SC 1461.
[39] AIR 1980 SC 1789.

stare decisis there would be too much fluidity and flexibility leading to confusion and uncertainty. Therefore, absoluteness of precedent or its absence both creates problem. However, the reason for overruling a precedent requires objectivity of reasoning that distinguishes one set of fact from the other. Such distinction and reason are ingrained in the science of interpretation as an enabling mechanism, which provide an understanding of the precedent through interpretation.

II. STATEMENT OF THE PROBLEM:

Doctrine of precedent is the basic principle of judicial process in common law countries. In Common Law countries like cases are decided alike with the fact that judges in almost every common law jurisdiction tends to decide cases similarly as with the same facts and circumstances has been decided previously by another judge. The rule of precedent limits or restricts the power of judiciary from being over active. If the doctrine of *stare decisis* is an essential mechanism to ensure stability, certainty, and continuity of justice, then the mechanism of overruling is a potential mechanism of fluidity, flexibility, and change. Both these mechanisms are *sine qua non* of common law system yet their role is conflicting. There is no thumb rule or guidelines to state when one mechanism is to be applied or rejected. Interpretation plays an important role in choosing one over the other. Such interpretations do not strictly adhere to the rules of interpretation of the statute. Rather such interpretations are dependent on the mindset of the judge, his faith, belief, ideology, and socialization. Hence, whether a precedent will be upheld cannot be predicted. If one goes by the realist school of thought, law is either what the lawyers say or how the judges interpret the facts at hand. Since there is no express boundary drawn between the two mechanisms, question arises as to how and when a judge will choose one mechanism over the other appears to be that of interpretation. The process of interpretation, though can be a balancing factor, depends upon the mental, cultural, and social experience of judges. Thus, the challenge remains to balance the two doctrines with the fulcrum `of interpretation.

III. RESEARCH QUESTIONS:

1. If precedent is so important to the future cases, then overruling will be bad. If overruling is considered than, precedent loses its value. How is the balance achieved?
2. How constitutional overruling helps to protect and preserve the dynamism of law?

3. What is the true nature of the legal system in India and how the role of precedent and constitutional overruling is influencing Indian legal system in comparison with other countries explain with landmark cases.

IV. HYPOTHESIS:

The doctrine of *stare decisis* and the doctrine of overruling exists at two opposite poles yet both are essential in order to have a living society. The existence of these two completely opposing doctrines is only possible if there is an identifiable fulcrum upon which they can be balanced and if they operate within well delineated boundaries. The fulcrum of their balance is interpretationism imbued in the doctrine of equity. Each of the doctrines and hermeneutics of interpretation are bound by legal philosophies and evolve legal principles. Rational and objective understanding of legal principles are not devoid of the equitable principles of justness, fairness and righteousness which result in scientific law making. On the issues that have emerged with the changes in the dynamic society over a period of time, the judges have risen above the strict principles of interpretation and have used the fulcrum of just, equity and fairplay to arrive at newer principles of law.

V. LIMITATION OF THE STUDY:

The present study is limited to the study of landmark judgments pronounced by the Supreme Court of India and interpretationism existing therein. The study is not concerned with the balance of power through making and amending the laws by legislature and judiciary, rather it is restricted to the power of judiciary in making and re-making of laws through the doctrine of *stare decisis* and the doctrine of overruling. Also, the study limits itself in time line *i.e.*, from 1950-2021 in which the researcher has studied evolution of 12 legal principles which is not exhaustive rather illustrative.

VI. SCOPE OF THE STUDY:

The present study extends to study the role of interpretation and interpretationism which is a responsible factor in evolving legal principles. The present study focuses on landmark judgments of Supreme Court only and the factors involved therein. The study also aims to know the origin of the concept of precedent and validity of overruling in judicial

process. Moreover, it extends to highlight how completely two opposing doctrines fit into one legal system with the help of interpretation by balancing the beam of justice.

VII. SIGNIFICANCE OF THE PROBLEM:

The significance of the present research work is to study the conflicting paradigm of precedent and overruling and how interpretationism helps to maintain balance between the two doctrines and how it helps to avoid arbitrariness in the decision-making process.

VIII. METHODOLOGY:

The present work of the researcher aims at studying the role/ status of precedent along with the doctrine of *stare decisis* and how constitutional overruling affects in the countries following the common law legal system. The present research looks to the dynamic nature of justice delivery in addition to the constitutional overruling towards preserving the dynamism of law. The present area of research is a study to the effectiveness of precedent with the doctrine of *stare decisis* as a source of law along with overruling through interpretation.

In order to study the above, the researcher has opted for doctrinal method of study. The entire work was library based. The study is case law centric where the case laws, laws of interpretation and the constitution of India will be studied. The researcher will visit as many libraries as possible to collect data and gather opinion of experts.

IX. OBJECTIVE OF THE STUDY:

The objective of the study is to see how the judges use the two apparently conflicting doctrines of precedent and overruling in the delivery of justice. Whether there is a well-defined discernible criterion for doing so and the role of interpretationism in this regard. It is expected that the study will provide new direction in the justice delivery system in India.

X. LITERATURE REVIEW:

BOOKS REFERRED:

1. A. Lakshminath, *Judicial Process Precedent in Indian Law* (Eastern Book Company, Lucknow, Third Edition 2009).

   The book has immensely examined more than 300 cases from various angles by giving special reference to the landmark judgments pronounced in India in addition to U.S. and U.K but less emphasis has been given to U.S and U.K case laws. In progressive chapters, the author mentioned the cases which have been overruled and therefore the overruling is considered as a *sine qua non* for maintaining the dynamism in law. A conflict arises when a legal system recognizes precedent as well as the overruling. And existence of two rules in one legal system makes the rule of precedent a myth or a lie which theoretically is impossible to exist. The book is titled as Precedent in Indian Law where the author has confined the work in the territory of India which is a Common Law Country and it has given less emphasis to Civil Law countries.

2. Michael J. Gerhardt, *The Power of Precedent,* (Oxford University Press, New York 2008).

   The book reflects recent legal cases of U.S.A. The Power of Precedent clearly outlines the major issues in the continuing debates on the significance of precedent and evenly considers all angles of it from which it should be seen. For Supreme Court, precedents take many forms, like Court's past opinions, norms, historical practices, and traditions that the judges have deliberately chosen to follow. In these forms, precedent is commonly acknowledged by Gerhardt and he calls it the "golden rule of precedent". The rule calls upon justices and other public authorities to recognize that since they expect others to respect their own precedents; they must provide the same respect to others' precedents. Gerhardt's extensive exploration of precedent leads him to formulate a more expansive definition of it, one that encompasses not only the prior constitutional decisions of courts but also the constitutional judgments of other public authorities. Gerhardt concludes his study by looking at what the future holds for the concept as he examines the decisions and attitudes toward precedent exhibited by the shift from the Rehnquist court (based on the name of Chief Justice William Rehnquist during 1986-

2005) to the Roberts Court (based on the name of Chief Justice John Roberts during 2005 and present).

Basically, Gerhardt formulated a new rule of precedent by mainly focusing on the U.S.A. This book does not extend to other countries and their legal system. This book is mainly basic research which is devoid of applied research and comparative analysis. In order to understand the proper working of precedent we must see all its aspects in other countries as well.

3. Randy J. Kozel, *Settled Versus Right: A Theory of Precedent,* (Cambridge University Press, 2017).

Randy J. Kozel in his work develops a theory of precedent which is designed to enhance the stability and impersonality of constitutional law. Kozel contends that the prevailing approach to precedent in American law is undermined by principled disagreements among judges over the proper means and ends of constitutional interpretation. The doctrine of precedent carries huge weightage, the durability of precedent depends upon the individual judge's view about whether his decision is right or wrong, and if it has mistaken then is it harmful or benign. A single judge bench may commit mistake but if the same view is shared by two or more judges than there remains a chance of less mistake. This is a serious challenge, but it also reveals a path toward maintaining legal continuity even as judges come and go.

As a whole, the book enhances the role of judiciary and their process but it is dubious about the law making, continuing and overturning role of judgments when it is needed.

4. B. Cardozo, *The Nature of Judicial Process,* (Yale University Press, New Haven, 1964).

In this famous treatise, a Supreme Court Justice describes the conscious and unconscious processes by which a judge decides a case. J. Cardozo being a judge discusses upon the sources of information to which he appeals for guidance and analyzes the contribution that consideration of precedent, logical consistency, custom, social welfare, and standards of justice and morals have in shaping his decisions. The book is truly scientific in spirit and method, representing its subject with the balance, restraint and clarity which have marked the author's distinguished service as a judge.

The book as it suggests only describes the judicial of judicial process which is silent on the interpretation of laws and how such interpretation moulds a decision.

5. Orlin Yalnazov, *Precedent and Statute*, (Gabler Verlag Pvt. Ltd., 2018).

The author circles around the question that whether the law-making power belongs to the judges or to the parliament? Towards this question he proposes a new approach to the problem. He conceptualizes law as an information product, and law-making as an exercise in production. Law-making has inputs and outputs, and technology is used to transform one into the other. Law may, depending on input and technology, take on different forms: it can be vague or it can be certain. The 'technologies' between which we may choose are precedent and statute. He stated a law is not possible until and unless it has a combination of both.

This work is limited to find out the superiority of power between legislature and a judge which is not concerned with precedent and a judge's power to interpret.

6. Saul Brenner, Harold J. Spaeth, Brenner Saul, Spaeth Harold J., *Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946–1992,* (Cambridge University Press, 1995).

The author mentioned the scientific study of the United States Supreme Court which had its genesis in the legal realism of the 1920s and 1930s which flowered with the behavioral revolution during 1950s.Thedecision making of U.S.A's Supreme Court as explained by behavioral scholars has extra-legal variables: the attitudes and ideologies of the justices, the fact patterns of the cases in various issues, the justices' social backgrounds, characteristics, their role perceptions, small group variables, game theoretic strategies, and the influence of interest groups, public opinion, Congress, and the solicitor general indirectly influences the judges' votes. But most legal realists or reformers criticized the conservative appellate court bench by arguing that these judges were not deciding cases based on law, but rather used legal arguments only to support their conservative values. The legal realists favored liberal values and the behaviorists favored conservative values.

This book partly tests whether legal variables are influential or opinions of behavioral scholars are influential? Or whether *stare decisis*, one of the elements of the legal model of decision making, influences the justices' votes in cases that alter precedent.

It also tests whether the attitudinal model, a model antithetical to the legal model, explains the votes.

7. Karl Llewellyn, *The Common Law Tradition: Deciding Appeals*, (Little, Brown &Co., Boston, 1960).

This is a book about legal craftsmanship. It states a modest purpose to investigate the charge that *stare decisis* is dead, and today there is no predictability of result in the work of appellate courts. The resulting investigation produces not just an answer to the charge, but a broad and penetrating study of the common law in operation. The author states that today's typical appellate judge is interested, in getting the case decided rightly within the authorities, and this goal gives a judge main drive and direction to his labors, wisdom and good conscience what Llewellyn calls "horse sense."

But in actual sense *stare decisis* is not dead there are certain decisions like *Ryland* v. *Fletcher, Maneka Gandhi's* case which cannot be overturned even in any progressive decisions.

8. Dr. Subhash C. Kashyap, *Constitutional Law of India, volume II*, (Universal Law Publishing, an imprint of lexis Nexis, 2nd edition, 2015)

This book is an exhaustive article-wise commentary of the constitution of India with comprehensive coverage of the Background, review and reforms of the lawmaking work. India's Constitution established the principles of democracy and republic and is a charter of the basic rights and responsibilities of its citizens. The founding fathers saw the Constitution as an accommodative instrument of nation building for India's multi-ethnic, multi-racial, multi-lingual and multi-religious society. The book has three volumes of exhaustive cases and arguments behind every article which gives an insight of sound principles governing the doctrine of precedent.

But it loosely describes how hermeneutics of interpretationism helps in deciding cases and overturning precedent.

9. B. Shiva Rao, *The framing of India's constitution- A study*, (N. M. Tripthi Pvt. Ltd., Bombay, 1968).

The above-mentioned book contains the groundwork through a volume containing the papers and memorandum written by the then constitutional advisor B. N.

Rau. The author B. Shiva Rao, during 1960 was the member of Constituent Assembly. The publication comprises a set of five volumes- a volume of study and four volumes of selected documents. The study volume seeks to present a lucid and straight forward account of the progress of the constituent assembly through clash of divergent views and interest that influenced the constituent makers at various stages. The book also depicts an exhaustive history of the courts in India including Supreme Court and also enlightens the powers of Supreme Court.

Though it is a constitutional book, it is silent on legal philosophies behind the rule of precedent, overruling and upon the basic hermeneutics of interpretationism. It only focuses on the Supreme Court not on the social, cultural background of judges which may affect the justice delivery mechanism and indirectly tampers with the existing landmark judgments.

10. Jain. M.P, *Indian Constitutional law*, (LexisNexis Butterworth's Wadhwa, Nagpur, 7thEdn.).

The constitutional law by M.P. Jain is a thematic presentation of the complex and multi-dimensional subject of constitutional law in a lucid, comprehensive, and systematic manner. It contains in-depth insight that benefits research scholars, lawyers, judges, legal academics, policy makers and interested citizens who look for the latest constitutional jurisprudence.

Our constitution is a living document with day-to-day changes in our lawsuit sets out the framework of how a nation is governed. This book covers constitutional history of precedent, importance of *stare decisis*, independence of the Supreme Court, important constitutional changes, and the recent judgments. This book contains case illustrations but loosely describes the relation between precedent and overruling and how can they co-exist in a living and dynamic society by upholding the flames of justice.

11. Rupert Cross and J. W. Harris, *Precedent in English Law*, (Oxford: Clarendon Press, 4th ed. 1991, reprinted 2004).

This book is confined to the operation of precedent in English law. It may therefore be called a work of particular jurisprudence and the questions of general matter have also been raised. It presents a basic guide to the current doctrine of precedent in England, set in the wider context of the jurisprudential problems. Such problems include

the nature of *ratio decidendi* of a precedent in legal reasoning and of its binding force including the role of *obiter dicta*.

It takes less account on the possible implications of the doctrine of precedent and its impact on Statute Law Countries. As this work favours the development of common law through precedent it gives little emphasis on the role of overruling which is also in existence.

JOURNALS REFERRED:

12. Nicola Gennaioli, Andrei Shleifer, "Richard Posner's work on The Evolution of Precedent," *National Bureau of Economic Research Cambridge*, April (2005).

    Richard Posner has a famous hypothesis that common law converges to efficient legal rules by using a model of precedent set up by appellate judges. By following legal realists, he assumes that judicial decisions are subject to personal biases, and that changing precedent is costly to judges. He admits the evolution of precedent under judicial overruling of previous decisions, as well as under distinguishing cases based on new material dimensions. Richard Posner coined the term super precedent but this work does not extend to explain the role of interpretationism.

13. Steven J. Burton, "The Conflict Between *Stare Decisis* and Overruling In Constitutional Adjudication," *Cardozo Law Review*, Vol. 35:1687

    Stare decisis means a court's duty to follow precedents. It sometimes gives way to a court's power to overrule them. When this should happen, is considered as a mystery however. The author projected a sound theory of overruling to unravel the mystery. The challenge for such a theory is to resolve a conflict between *stare decisis* and overruling. Both are vital to the legal system. *Stare decisis* fosters unity, stability, and equality over time. Overruling enables supreme courts to correct their past errors and to adapt the law to changing circumstances. Without a sound theory of overruling, a paradox results: a supreme court must follow its precedents but, in any case, it can overrule them. This paradox enables supreme courts to pick and choose the law that "binds" them. It tolerates incoherent and unreliable law, result-oriented judging, and, at least at the U.S. Supreme Court, illegitimate constitutional adjudication. This Essay analyzes the conflict between

stare decisis and overruling in constitutional adjudication before the Supreme Court of U.S not of India. The Court should be bound to respect *stare decisis* by following its constitutional precedents, subject to a condition: *Stare decisis* should lapse when a precedent is incompatible with certain components of the Rule of Law, constitutionalized in the Due Process Clause. Hence, the Court should employ a two-step analysis. The first is governed by law: the Court may consider overruling only when *stare decisis* has lapsed. The second involves lawmaking: the Court may overrule only when a precedent is mistaken, *i.e., stare decisis* has lapsed, or in case of better alternative.

But this essay forgets to mention when a *stare decisis* is lapsed and how a case can validly be overruled because there are few precedents which can never be overruled. This essay does not outline the actual criteria how such situation can be balanced. Furthermore, it is only restricted to foreign judgments not of Indian judgments.

14. Muhammad Munir, "Are Judges the Makers or Discoverers of the Law: Theories of Adjudication and *Stare Decisis* withSpecial Reference to Case Law in Pakistan," *International Islamic University Islamabad*, 21st edn 1434 AH (2013)

The debate about whether judges make or create the law is the center of any discussion about *stare decisis*. This work focuses on some of the notable judges and jurists of the twentieth century, such as Lord Denning, Lord Reid, Lord Devlin, Bodenheimer, Hart, Dworkin, from the Anglo–American legal systems. The author focuses on the views of leading judges and Islamic jurists to know which theory of adjudication they support. This work analyses some of the prominent decisions given by some of the notable Pakistani judges such as Justice Munir, Justice Cornellius, Justice Hamoodur Rahman, Justice Saleem Akhtar and Justice Wajihuddin. Ahmad and others. Moreover, it discusses whether the declaratory theory or positivism can justify the binding effect of precedent. It is argued that judicial decisions may be accorded great weight in certain categories. However, granting them absolute authority is incompatible with both theories of adjudication.

But this work is limited to Islamic Judiciary and its role only but the behavioral aspect or judicial process of Indian judges, English judges or the judges of civil law countries are bound to differ which has not been discussed.

15. William Baude & Stephen E. Sachs, “Law of interpretation,” vol 130 *Harvard L. Rew*, (February 2017).

Everybody knows that in legal interpretation we start with written words and somehow end up with law. The question is what happens in between. Interpretation, we think, has been too obsessed with the first and last stages of this process by figuring out the possible linguistic meanings of words, and figuring out what judges should do. Not enough effort has been focused on an important stage in the middle: processing written texts through law. Once we recognize the importance and ubiquity of the law of interpretation, we can be clearer with ourselves and with each other about what we’re doing in any given case- linguistic interpretation, legal reasoning, or judicial invention.

The article mainly focuses on law of interpretation on constitution and constitutional cases not on the process of interpretationism and its role on balancing between precedents and overruling.

16. Hardisty, James, “Reflections on Stare Decisis”, Vol 55*Indiana Law Journal*: Iss. 1, Article 3 (1979).

The author states that the law draws a discrete line between *stare decisis* and non-*stare decisis* precedents; but underneath the surface, the law presents a continuum of degrees of influence along which precedents and parts of precedents are arrayed. Legal words, concepts and theories join in furnishing this surface appearance of stability while allowing subterranean change. What the law presents as black and white resolves on analysis into shades of grey. The author states a precedent is a doctrine set by apex court which must be followed and can be overruled as per the ratio but the gray area remains in the law of interpretation for balancing stability and innovation.

17. Randy J. Kozel, “*Stare Decisis* as Judicial Doctrine”, 67 *wash. & lee l. Rev*. 411 (2010).

Stare decisis has been called many things, like "a principle of policy," "a series of prudential and pragmatic considerations," or simply "the preferred course." Often overlooked is the fact that *stare decisis* is also a judicial doctrine or an analytical system used to guide the rules of decision for resolving concrete disputes that comes before the courts. This Article examines *stare decisis* as applied by the U.S. Supreme Court. A review of the Court’s jurisprudence yields two principal lessons about the modern doctrine of *stare decisis*. First, the doctrine is comprised largely of malleable factors that

carry neither independent meaning nor predictive force. Second, most of the factors that populate the doctrine are best understood as evincing, either explicitly or implicitly, a driving concern with the reliance interests that could be upset by the decision to overrule a given precedent.

The essay is devoid of much case laws and chronological cases which leads to the development of new laws and its overruling. It has not properly mentioned the role of obiter dicta and dissenting opinion which may lead to a majority decision in subsequent cases.

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    This article focused on advantages and disadvantages of precedent.

XI. CHAPETER SUMMARY

INTRODUCTION

Chapter 1- Conceptual and Theoretical Understanding of Interpretation in Decision Making. This chapter thoroughly examines and analysis the concept of Interpretation in the judicial process. It also attempts to answer whether judges make law or create law.

Chapter 2- Evolution and Approaches of Interpretation of Law in India. This chapter begins to trace the evolution of interpretationism with the help of various thinkers and philosophers around the world. It also explains the approaches and types of interpretation in Common parlance and Constitutional framework.

Chapter 3- Precedent under Common Law, Civil Law and Mixed Law System. This chapter analyse the working of precedent and the role of judges in different legal systems of the world.

Chapter 4- The doctrine of Stare Decisis and Overruling in the Evolution of Legal principles in India: a study from 1950-1990. This chapter focuses on 6 evolved legal principles during the phase of 1950-1990 which depicts a picture of orthodox interpretation along with a shift of structural and philosophical interpretationism.

Chapter 5- The doctrine of Stare Decisis and Overruling in the Evolution of Legal principles in India: a study from 1991- 2021. This chapter tends to anayse the legal principles which evolved during the period of 1991-2021 i.e., post-Globalised era. Which further analyse and examines the shift towards evolutive and transformative jurisprudence.

Chapter 6- Stare Decisis and Overruling in SAARC Countries. This chapter deeply and elaborately traces the development of precedent in the SAARC countries with the help of respective Constitutions and case laws.

Chapter 7- CONCLUSION. This chapter gives the overall conclusion of all the chapter of the thesis and the current scenario of our legal system.