CHAPTER EIGHT

CHAPTER VII

FUNCTIONING OF THE DOCTRINE OF JUDICIAL REVIEW IN INDIA AND U.S.A.- A COMPARATIVE CRITICAL ASSESSMENT

U.S.A.

8.4.1 Amending Provisions in the United States of America.

8.4.2 Attempt by the U.S. Supreme Court to exercise its Judicial Review power over Constitutional Amendment

CHAPTRE VIII

Functioning Of The Doctrine Of Judicial Review In India And U.S.A.- A Comparative Critical Assessment

India and U.S.A; both are sovereign and democratic republics. The Constitution of India was enforced from 1950, whereas the U.S. Constitution was enforced from 1787. Both the Constitutions have been enacted in the name of "We the people". The judiciary is independent in both the countries. Art. 13(1) and (2), 32, 136, 226, 227, 245(1) and 372(1) of the Constitution of India indirectly gave power of judicial review to the High Courts and the Supreme Court, whereas the U.S. Constitution is silent on this point. There is no specific provision in the Constitution of United states, conferring power of judicial review on the Constitutional courts.

The Constitution is supreme in both the countries. In *Keshavananda Bharati v. State of Kerala*[577], the Supreme Court accepted the constitutional supremacy and declared, "It is part of basic structure of the Constitution". The supremacy of the Constitution was also accepted by Chief Justice Marshal in *Marbury v. Madison.*[578] If the supremacy of the Constitution is to be protected, it is the duty of the judiciary to control such legislative or executive actions, which amount to attack on the supremacy. The need for such protection gave birth to the concept of judicial review in both the countries.

[577] AIR 1973 SC 1461
[578] Cranch 137, 2 L Ed 60 (1803)

8.1 Judicial Review Of Legislation: A Comparative Study of U.S.A. and India

The Supreme Court and High Courts in India and Constitutional courts in United States have power to determine the constitutionality of legislative Act and declare it unconstitutional, if it is repugnant to any provision of the Constitution. Legislation is declared unconstitutional only in a clear case of unconstitutionality and not in a doubtful case. In both the countries the Constitution is a living instrument adaptable to all the new conditions of life. The concept of equal protection of law is available in the Constitution of both the countries and a number of statutes or their provisions were declared invalid if they were against the concept of equal protection of laws. A number of laws dealing with the issue of child labour, rights of women or minimum wages were declared void in both the countries, when they were found discriminatory in character. The speed of declaring congressional statutes as unconstitutional, except in case of New Deal legislation was most normal which did not cause any concern in the American life. Same is the position in India. With this background, one may compare, under the following heads, the similarities and dissimilarities in the system of both the countries, which affect the judicial control of legislation:

1. Federal system
2. Reviewing the constitutionality of presidential action
3. Due process of law
4. Socio-economic legislation
5. Equal protection of law
6. Judicial review of essential features of the basic structure
7. Powers of Supreme Court of both the Countries

8. Laws protected under certain Articles of the Constitution cannot be challenged
9. Certain provisions of the Constitution prelude the courts from making judicial review
10. Judicial review of exclusionary clauses in statutes
11. Political equality
12. Commerce Clause

8.1.1 Federal system

The American system of federalism is a form of political organization in which the exercise of power is divided between the national and state governments, each having the right to view these powers as matter of right. The powers not delegated to national government, nor prohibited by the Constitution to the States, are reserved to the States or to people. The Constitution expressly views the powers of levying taxes or regulating commerce to the National Government, but it has not prohibited the States from exercising such authorities also within their own borders. According to the Tenth Amendment the National Government has no authority to exercise powers not authorized by the Constitution. The Federal Government was delegated powers; therefore, the powers not delegated to it remained with the Sates. The Tenth Amendment also provides that the powers not delegated to the Federal Court nor prohibited to the States, were reserved to the states or to the people. Under Article VI, the Constitution and laws of U.S. and the treaties made under the authority of U.S. have been declared Supreme Law of the land. It means the State had no power to control the operation of the Constitutional law enacted by the Congress. The framers of

original Constitution put express prohibition of Federal powers against the suspending of the writs of Habeas corpus. Article 1 Section 10 of the U.S. Constitution put ban on passing of Bills of attainder, passing of ex-post and granting of titles of nobility.

In the Constitution of India the Parliament has been given the power to frame laws in respect of all subjects included in the Union list or concurrent list and the State Legislatures have been given the power to frame laws in respect of all subjects included in the State list or concurrent list. As regards the residuary subjects the parliament has power to frame laws. As has been stated above, the residuary subjects have been given to the States in the United States. When the powers are divided between Center and the States, there must be a federal legitimator or arbiter to settle disputes between the Center and the States. The judiciary is acting as such an arbiter in both the countries. When the U.S. Constitution was framed, the legislature, executive, and the judiciary claimed an independent right to construe the situation. In fact none of these organs are superior to the other organs because they are the creatures of the Constitution. Each of these organs functions under the Constitution acting as check on the other. They are in fact, performing their own functions in the schemes of checks and balances rather than exercising powers as such against each other. In a democratic set up, the legislature or the executive cannot do justice. An independent judiciary will have to perform its functions in such a way that it may limit the act of legislature and the executive within the Constitutional frame work and may keep the Central and State Governments within the limits laid down by the Constitution.

Therefore, in both the countries this power is not available in its absolute terms to the Central or State Governments. There are certain limitations or prohibitions on such powers in India and U.S.A. Therefore in *Marbury v. Madison*;[579] Chief Justice Marshall established the power of judicial review of legislation and executive action. Like the U.S. Supreme Court, the Supreme Court of India and High Courts have considered the socio-economic and political questions with repercussions going beyond the individual disputes. The decision of the Supreme Court of India in *Keshavananda Bharati, Minerva Mills and L. Chandra Kumar*[580] and the decision of the U.S. Supreme Court in *Brown v. Board of Education, Baker v. Carr* and abortion cases of 1973-1986[581] have far reaching consequences on the social policy of both the countries and are termed as judicial usurpation of legislative powers.

8.1.2 Reviewing the constitutionality of Presidential action

Until 1951, the U.S. Supreme Court has maintained the tradition of not reviewing the Constitutionality of Presidential action mainly on the ground of avoidance of political question. In 1952, President Truman ordered the seizure of steel in order to save the national calamity prevailing at that time. According to the facts of the *steel seizure case*[582] On April 9, 1952, President Truman issued an executive order directing the Secretary of commerce to take possession of and operate the steel mills of the country. The President based his action on the

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[579] Cranch 137, 2 L Ed. 60 (1803)

[580] Keshavananda Bharati v. State of Kerala AIR 1973 SC 1461; Minerva Mills v. Union of India AIR 1980 SC 1789; L. Chandra Kumar v. Union of India 1997 SCC 261

[581] Brown v. Board of Education 347 US 483 (1954); Baker v. Carr 369 US 186 (1962); Roe v. Wade 410 US 113 (1973)

[582] Youngstown Sheer and Tube Company v. Sawyer, 343 US 579 (1952)

Contention that the work stoppage would jeopardize national defense, particularly in Korea. The next morning, he sent message to Congress reporting his action and a second message on April 21, 1952. The Steel Companies obeyed the Secretary's order under protest, and brought suit for injunction against him in the Columbia district court. On April 30, 1952 judge Pine granted a preliminary injunction restraining the secretary from continuing the seizure. The case went to the Supreme Court with almost unprecedented speed, and on June 2, 1952 the Court held by a six to three vote that the President had exceeded his constitutional powers. The Supreme Court considered the legislative encroachment by the executive illegal. This case had a great impact on the American Constitutional system. It established that the Supreme Court s the protector of the rights of the Congress and it can save it from encroachment at the hands of the executive.

In India, the Presidential action under Article 356 was considered outside the purview of judicial review until 1993. In *State of Rajsthan v. Union of India*[583] the Supreme Court observed that the satisfaction of the President was a subjective one, which could be guided by political factors, but it further said that the political colour of question would not cause the court to declare a "judicial hands off". In 1994, in *S. R. Bombai v. Union of India*[584], the nine-judge bench of the Supreme Court has unanimously held that the presidential action under article 356 was amenable to judicial review.

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[583] AIR 1977 SC 1361
[584] AIR 1994 SC 1918

The power under Article 356 though based on subjective satisfaction is only conditional and not absolute. The President can be satisfied only when a situation as laid down in the above mentioned article exists. The President is under the obligation to consider the advisability and necessity of the action. In recognition of the extraordinary nature of the power it should not be resorted tightly. Elaborating on the federal nature of political system the court opined that the Constitution has created a federation with a bias in favour of the Center. The predominance accorded to the Center did not mean that the States were mere administrative units. The states were constitutional units in their own right. The power under Article 356, the court felt, should be so interpreted that the delicately crafted constitutional scheme is not upset. Whilst the Court ha unanimously held the power of the President under Article 356 to be amenable to judicial review, differences, however, persist on the scope of such review. The majority opinion, on the other hand, is more expansive on the scope of judicial review. The proclamation could be struck down if found to be mala fide or based on wholly irrelevant or extraneous considerations.

8.1.3 Due Process of Law

The concept of "due process" was introduced in the U.S. Constitution in the Fifth Amendment as a limitation on the Congress, whereas this concept was introduced in the Fourteenth Amendment as a limitation on the State. In *Murray's case*[585] the Supreme Court observed that 'in America due process was a limitation on the legislature as well as on the

[585] Murray's Lessee v. Hoboken Land and Improvement Co. 18 HOL 272 (1856)

executive and the judiciary'. The effect of this decision was that the Congress was brought under the purview of the due process clause.

As regard application of due process clause in the judicial proceedings, in *Pennoyer v. Neff*[586], the Supreme Court held that the litigants were entitled for full and fair trial in various decisions the Supreme Court laid down the principles that the jurisdiction, notice and hearing were the important stages before final judgment is given. This includes the right to present such arguments, testimony, and evidence as may be pertinent to the case before a fair and impartial tribunal. The general due process requirements of jurisdiction, notice, and fair hearing made applicable to the civil proceedings in federal and state courts. As regards criminal proceedings, the Fifth Amendment made the indictment by grand jury mandatory for all capital or infamous crimes.

The principle of substantive due process was subsequently invented by the Supreme Court and made applicable on the substantive contents of legislation. The Supreme Court declared hundreds of state statutes unconstitutional on the ground of due process clause of the Fourteenth amendment, and on the representation that such statutes invaded the liberty and property rights of persons unreasonably.

The public welfare legislation was examined by the Supreme Court by applying the substantive due process clause. The public welfare, which was to be promoted by the states by the

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[586] 95 US 714 (1878)

use of police power, included the health welfare legislation. These were the areas in which the Supreme Court justifies its intervention. The substantive due process in the area of economic cases built in by the Supreme Court was probably the most original intellectual achievement during the first third of the twentieth century. After the new deal legislation the Supreme Court abandoned the economic due process. Some jurists were of the opinion that during the new deal legislation the Supreme Court was in fact exercising the power of judicial review as a "third chamber in the United States"[587], as it possessed an absolute veto power over the laws enacted by both Houses of the Congress.

The Constitution of India accepted the concept of 'procedure established by law'. Article 21 provides that "no person shall be deprived of his life and liberty except according to procedure established by law" As against this in the Fifth and Fourteenth Amendment of the U.S. Constitution it has been provided that no person shall be deprived of his life, liberty or property without due process of law. In *Munn v. Illinois*[588], Field J. explained the right to life as under:

> "By the term 'life' as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculty by which life is enjoyed. The provisions equally prohibits the mutilation of body by the amputation of an arm or leg, or the putting out of an eye, or the destructions of any other

[587] H. J. Laski, American democracy. II, 1948
[588] 94 U.S. 113 (1877)

organ of the body through which the soul communicates with the outer words."

The above statement was quoted by the Supreme Court of India in *Francis Coralie v. Union territory of Delhi*[589], in expanding the meaning of the term 'right to life'. It said "any Act which damages or injures or interferes with the use of any limb or faculty of any person, either permanently or even temporarily, would be within the inhabitation of Article 21."

In the above case, Justice Bhagwati observed as under:

> "We think that the right to life includes he right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and faculties for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."[590]

In *Bandhua Mukti Morcha v. Union of India*[591], the question of bondage and rehabilitation of some bonded labourers was invoked. Relying on the decision in *Francis Coralie*[592], Bhagwati J. observed as under:

> "It is the fundamental rights of every one in this country...to live with human dignity, free from exploitation. This right to, live with human dignity enshrined in article 21 derives its

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589 AIR 1981 SC 746
590 ibid
591 AIR 1984 SC 802
592 AIR 1981 SC 746

life breath from the Directives Principles of State policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at least, therefore, it must include protection of the health and strength of the workers men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State...has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

The expression 'procedure established by law' means procedure laid down in the statute or the procedure prescribed by the law. A law, which interferes with the person's life or personal liberty, must lay down a procedure for the same and it must be strictly followed. If the executive acts in violation of such procedure, it would be violation Article 21 of the Constitution. The ambit of due process clause of the U.S. Constitution in relation to personal liberty is wider than the ambit laid down in Article 21 of the Constitution of India. In America a person cannot be deprived his personal liberty "without due process of law" and such a law must be just, both as to procedure and substantive part therein.

In *Maneka Gandhi v. Union of India*[593], Bhagwati J. said that the law must be taken to be well settled that Article 21 does not

[593] AIR 1978 SC 597

exclude Article 19 and a law prescribing procedure for depriving a person of his personal liberty will have to meet the requirement of Article 21 read with Articles 14 and 19. He further said that the procedure must be 'right, just, and fair' and not 'arbitrary, fanciful, or oppressive'. In order that the procedure is 'right, just and fair', it should conform to the principle of natural justice, i.e., 'fair play in action'. In *Sunil Batra v. Delhi Administration*[594], Krishna Iyer J. said:

> "True our Constitution has no 'due process' clause...but...after Cooper[595] and Maneka Gandhi[596].... the consequences is the same."

In *Jolly George v. Bank of Cochin*, Krishna Iyer J. said:

> "The high value of human dignity and the worth of the human person enshrined in Article 21, read with article 14 and 19, obligates the State and not to incarcerate except under law which is fair, just and reasonable in its procedural essence."

In *Bachan Singh v. State of Punjab*[597], the majority in the Supreme Court observed, "no person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law." In *Mithu Singh v. State of Punjab*[598], a constitutional bench unanimously invalidated a

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[594] AIR 1978 SC 1675
[595] AIR 1970 SC 564
[596] AIR 1978 SC 597

[597]AIR 1980 SC 896
[598] AIR 1983 SC 473

substantive law i.e. Section 303 of IPC which provided for mandatory death sentence for murder committed by a life convict. Quoting its decision in *Maneka Gandhi*[599], *Sunil Batra*[600] *and Bachan Singh*[601] the Supreme Court held:

> "These decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the Courts to follow it; that it is for the legislature to provide the punishment and for the Courts to impose it...The last word on the question of justice and fairness does not rest with the legislature."

From the above decisions it would appear that the requirement of fair, just and reasonable clause has developed into a general principle of reasonable ness similar to the due process of law clause in the Fifth and Fourteenth Amendments of the US Constitution capable of application to any branch of law.

8.1.4 Socio-economic Legislation

In 1933, Roosevelt assumed his office as President of U.S.A. At that time the United States was in a grip of great depression. In order to control depression President Roosevelt introduced certain new Legislative measures, which were known as "New Deal Legislation". The new laws were designed to benefit the farmer, workers and businessmen. The New Deal laws tried to improve economic depression in agriculture, labour and industry sectors.

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[599] AIR 1978 SC 597
[600] AIR 1978 SC 1675
[601] AIR 1980 SC 898

The New Deal Laws were challenged in Supreme Court. Out of ten statutes, the Supreme Court declared eight unconstitutional. In other words, the Supreme Court destroyed the heart of New Deal Programme introduced by President Roosevelt towards the national prosperity. The Supreme Court opposed the legislation on the ground that the measures were unwarranted and had infringed the personal and economic liberty of the people and violated the states' rights. They involved an unwarrantable use of the taxing powers of the Federal Government and violated the rights of the individual States. According to them the new deal legislation affected the economic liberty of the people, which is against the spirit of the constitutional guarantee. In order to control the uncontrollable power of the Supreme Court, President Roosevelt declared the "Court packing plan" in 1937. There was a great public agitation against the court-packing plan, as people did not support the plan of President Roosevelt. Mean while the Supreme Court begin to find constitutional support for the later New Deal Legislation And between 1936 and 1952 the supreme Court did not declare any statute of Congress as unconstitutional.[602]

A remarkable change came in the attitude of the Supreme Court of United States when it has shown a great restraint in invalidating the laws passed by the Congress or any State Legislature. The Supreme Court did not abrogate their power of judicial review but restrained them from using this power. A marked change was noticed in the attitude of the Judges of the Supreme Court. The judicial review was no more a two-edged

[602]Raymond M. Lahr & J. William Theis, Congress, p. 221, Allyn & Bacon, Inc. U.S.A., 1967

sword for striking down the socio-economic legislation passed by the Congress or the states. From 1953 and onwards Chief Justice Earl Warren took the lead in using this power of judicial review in invalidating the segregation laws. In *Brown v. Board of Education*[603], the Supreme Court unanimously turned down the 'separate but equal' doctrine adopted by it in 1896 in *Plessy v. Ferguson.*[604] The Supreme Court declared that the separate educational facilities for white and blacks were inherently unequal and a law imposing such an inequality is against the Fourteenth Amendment of the Constitution.

In India also much a situation arose right from 1950 when the land reforms laws were passed by different states so as to abolish the Jagirdari, Zamindari and Biswedari systems prevalent in the country from the Moughal period. In 1950, the Bihar land Reforms Act was passed. It made provisions for the transference to the State of the interests of proprietors and tenure-holders in land and the mortgages and lessees of such interests, including interests in trees, forests, jalkars, ferries, hats, bazaars, mines and minerals, provided that compensation to the expropriated zamindars was to be paid in certain multiples.

In *Kameshwar Singh v. State of Bihar*[605] the Land Reforms act was challenged on the ground that the classification of the zamindars made for the purpose of giving compensation was discriminatory and denied the equal protection of the laws guaranteed under Article 14 of the constitution. The Bihar High

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[603] 347 US 483 (1954)
[604] 163 US 537 (1896)
[605] AIR 1951 Patna 91

Court held that the Act was invalid and was void as it contravened the provisions of art. 14. The validity of agrarian reform passed by all other State legislatures formed the subject matter of litigation in different High Courts, as a result of which the implementation of these socio-economic laws affecting large number of people was held up. Therefore, when the case of Kameshawar Singh was pending in the Supreme Court, Article 31 A and 31 B were inserted in the Constitution to secure the constitutional validity of Zamindari abolition Laws and other economic laws in general and certain statutes in particular. The device adopted was that 13 such laws were mentioned in the Ninth Schedule, which was to be read with Article 31 B. Neither these laws, nor any of the provisions thereof, shall be deemed to be void, or even to have become void on the ground that such law or any provision thereof is inconsistent with any of the fundamental rights conferred by part III of the Constitution. Article 31 B and the Ninth Schedule has cured the defect in the various statutes included in the Ninth Schedule. The curing of the defect took place retrospectively. After subsequent amendments a large number of statutes were placed in the Ninth schedule and at present more than 250 laws have been included in the Ninth Schedule. In *Venkta rao v. state of Bombay*[606] the Supreme Court held that the amendments included to an Act, prior to its inclusion in the Ninth Schedule were covered by Article 31 B and therefore, were protected thereunder.

If we compare the actions taken by the U.S. Supreme Court against the New Deal Legislation with the actions taken by the

[606] AIR 1970 SC p. 126

courts in India against the Land reforms legislation, we find that both were the economic laws affecting a large number of people and making historical changes in the socio-economic structure of the country. In the United States the Congress did not try to save the New Deal legislation by making appropriate amendments in the constitution, whereas, immediate steps were taken by in India by inserting article 31 A, 31 B and the Ninth Schedule in the Constitution. The President of U.S.A. simply gave threatening to the Supreme Court by declaring the court-packing plan, as a result whereof the Supreme Court restrained itself for about 15 years. But thereafter it again started invalidating the Laws passed by the Congress and the State Legislatures. In India the executive gave no such threatening to the Supreme Court nor any Court Packing plan was declared. The parliament made necessary changes in the Constitution by inserting all the economic laws I the Ninth Schedule and saved them from attack by the Supreme Court under its power of judicial review.

8.1.5 Equal Protection of the Laws

The doctrine of "equal protect of the laws" was first introduced in the Fourteenth Amendment of the U.S. Constitution. In 1`868 when this amendment was made there were two problems concerning blacks. The first problem was political. They did not have the right to vote nor they have right of full political participation in the Southern States. The second problem was guaranteeing the civil rights to blacks i.e. rights of freedom to them. The equal protection clause was to remove discrimination enforced upon blacks by certain statues. There was wide spread assumption of a dichotomy between civil equality and social

equality. The segregation was prevalent not only in the education but in all the public places like Hotels, Theaters etc. The Civil rights Act of 1875 forbade racial separation or discrimination in public conveyances, hotels and theaters. This law was passed under the equal protection clause of the fourteenth Amendment. Separate accommodation for backs in public transportation was the rule in the Southern States at the time the Fourteenth Amendment was adopted. One of the civil rights cases arose out of exclusion of a black woman from the ladies car of an inter-state Train. On this point the Supreme Court held that the Fourteenth Amendment applicable only against state action and ruled that the actions of railroad or its employees did not fall into this category. But in *plessy v. Ferguson*[607] the Supreme Court did not declare invalid a Louisiana statute requiring segregation of two races on public carriers and gave new concept of "separate but equal" Justice Harlan dissented, protesting that "our Constitution is colour blind, and neither knows nor tolerates classes amongst citizens."

In 1946 an interesting case came before the Supreme Court.[608] It arose out of the prosecution of a black woman who was making an inter-state bus trip from Virginia to Baltimore and who refused to move to the back seat of the bus on the request of the driver so that her seat would be available for white passenger. The Supreme Court found the State law was a burden on Commerce in a matter where uniformity was necessity. In Brown v. Board of Education the Supreme Court unanimously rejected the "separate but equal' doctrine laid down in *Plessy v. Ferguson* and unexpectedly held that separate educational facilities were

[607] 163 US 537 (1896)
[608] Morgan v. Virginia, 328 US 373 (1946)

inherently unequal. In 1971 in *Swann v. Charlotte*[609] the Supreme Court held that where one-race schools existed in a system with a history of segregation, there was a presumption that this was the result of person or past discriminatory action and that the "neighborhood school" might have to be partially sacrificed to achieve desegregation.

In the last quarter of twentieth century the problem of segregation again arose in the form of school busing. Opposition to busings were very strong and emotionally charged, however as much so in the North as it had earlier been in the South of United States. The discrimination is also prevalent in many forms in employment, marriage, hotels, theaters, and public parks and in the area of voting rights.
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In India there was no discrimination on the basis of colour but it was prevalent for many centuries on the basis of untouchability. This untouchability was associated with the birth of a person inn the Sudra family. Persons belonging to Sudra castes were denied access to shops, public restaurants, hotels and places of worship and public entertainment or the use of wells, tanks, bathing ghats, roads and places of public resorts maintained wholly or partly out of private or state funds. These were the major instances or the form in which untouchability practiced in India. The framers of Constitution of India took this social problem seriously and abolished untouchability under Article 17 of the Constitution. Under Article 35 of the Constitution, the Parliament was given the power to make laws for prescribing punishments for all those acts coming under the offence of

[609] 402 US 1 (1971)
[610] Morgan v. Virginia, 328 US 373 (1946)

untouchability. The Parliament enacted the Untouchability (offences) Act, 1955, which prescribed punishment for the practice of untouchability and for the enforcement any disability arising there from. In 1976, this act as renamed as "Protection of civil Rights Act, 1955. The amended law made all offences under it as non-compoundable and machinery was provided for better administration and enforcement of its provisions. In *State of Karnataka v. Appa Balu Ingale* The Supreme Court upheld the provisions of the statute and confirmed the conviction of the accused person The schedule Caste and Scheduled tribes (Prevention of Atrocities) Act, 1989 was enacted in order to prevent the commission of atrocities against the members of Scheduled Caste or Scheduled Tribes and to provide for speedy for the relief and rehabilitation of victims of such offences. It also provides that enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. The constitution resolve to remove this discrimination between human being lock, stock and barrel at the earliest is unique in our country.

In the United States the problem of segregation continued during the 19th and 20th centauries, just because the Supreme Court gave conflicting decisions right from Dred Scott to Brown. There is no separate provision in the Constitution, which abolishes in all its form. However, in India the Supreme Court and High Courts have declared all those laws invalid, which were adversely affecting the constitutional provisions relating to abolition of untouchability.

8.1.6 Judicial review of essential features of the Constitution

To test the validity of Constitutional amendment, the Supreme Court of India evolved the doctrine of basic structure of the Constitution. In Keshavananda Bharati case,[611] the Supreme Court held that the "limited judicial review" is a part of basic structure of the Constitution, and the Court can declare any constitutional amendment as unconstitutional if it is against the essential features of the basic structure of the Constitution. Article 31 C, in its second part, precluded the court from going into the question whether the law enacted was really for the objects narrated therein.

The Supreme Court, therefore, held that the second part of Art. 31 C was unconstitutional, as it has taken away its power of limited judicial review. Likewise clauses (4) and (5) of Article 368 were declared unconstitutional as they transgressed the limits of the amending power and damaged the basic structure of the Constitution.[612] The Supreme Court also declared clause (5) of Article 371 D as unconstitutional on the ground of violation of the basic structure of the Constitution. In *Indira Gandhi v. Raj Narain*[613] the Supreme Court held that the insertion of Article 329 A was unconstitutional. The Supreme Court further said that the exclusion of judicial review in election disputes in such manner damaged the basic structure and was an outright negation of right of equality. Similarly in L. Chandra Kumar v. Union of India,[614] the Supreme Court held that clause (2) (d) of Article 323 A and clause (3) (d) of Article 323 B of the

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[611] AIR 1973 SC 1461
[612] AIR 1980 SC 567
[613] AIR 1975 SC 2299
[614] (1997) 4 SCC 261

Constitution, to the extent they excluded the jurisdiction of the Supreme Court and High Court under Articles 32 and 226, were unconstitutional.

In the United States, the concept of basic structure was not accepted by the Supreme Court. In *National Prohibition case*[615], the validity of the Eighteenth Amendment was challenged on the ground that there were certain implied limitations on the power of amendment. The U.S. Supreme court categorically rejected the argument and held that any attempt to change the fundamental basis of the Union was beyond the powers delegated to the amending body by *Article V. Further*, the U.S. Supreme court in the same case gave a very wide connotation to the word 'amendment'. McKenna J. held that, an argument that 'amendment' may merely alter but cannot add or repeal is a quibble on the definition of word 'amendment'. He said[616]:

> "The Constitution is an organic fundamental law but that law can be changed, added or repealed, if that is done by the States, and the people themselves in the way provided, their power is not hampered by mere rigidity of the definition of words."

Constitutional experts and American jurists have also refused to read in Article V any implied limitation. The framers of the Constitution did not intend to make an unalterable framework of government in which only the minor details could be changed by amendments.

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[615] Rhode Island v. Palmer, 253 US 350 (1920)
[616] ibid

8.1.7 Powers of Supreme Court of both countries

Under Article 32 of the Constitution of India, the power of Supreme Court is limited to the extent of enforcement of fundamental rights. They have also power to issue writs in the nature of those specified therein. The power also extends to the issuance of directions or orders for the enforcement of any of the Fundamental Rights. It can direct the state to pay compensation and exemplary costs. The validity of a law may be challenged, if it causes restrictions on the enjoyment of fundamental rights.

Under Article III, Section 1 of the United States Constitution, the judicial power of U.S. is vested in the Supreme Court and such inferior courts as the Congress may from time to time decide. The Supreme Court has exercised the power of judicial review in all cases of Law & equity arising under the Constitution in matters enumerated in Section 2 of Article III. It can issue prerogative writs and has appellate jurisdiction from all lower courts. The Supreme Court has exercised the power of Judicial review in about 1000 cases of state legislation and state constitutional provisions. It has also exercised this power is about 155 cases of federal enactment. Since the decision in *Marbury v. Madison*, the Supreme Court has declared about 90 statutes of Congress unconstitutional. As the arbiter between the state and the Federal legal systems, the Supreme Court has declared void many more State Statutes involving federal questions.

8.1.8 Laws protected under certain Articles of the Constitution cannot be challenged

Article 31 A of the Constitution of India provides that agrarian laws or ceiling laws shall not be open to challenge before the Supreme Court or High Courts on the ground of their conflict with Article 14 and 19 of the Constitution. Article 31 A cures certain possible in validities in the statute arising from their inconsistencies with Articles 14 or 19, while Article 31 B cures a wide range of infirmities in the statute arising out of a conflict with any of the Fundamental Rights by placing the statute in the Ninth Schedule of the Constitution. Article 31 C protects such statute, which has been passed to implement the directive principles enshrined in Article 39 (b) and (c). Thus complete immunity from judicial scrutiny has been granted to all laws covered under articles 31 A, 31 B and 31 C of the Constitution. However, judicial review is not excluded to examine the nexus between the impugned law and Article 39 (b) and (c). That being so, the impugned statute is immune from challenge on any ground based on Articles 14 or Art. 19 by virtue of Art. 31 C.

There is no corresponding in the Constitution of United States. They did not invent any schedule like Ninth Schedule of the Constitution of India. All the statutes are within the limits of challenge before the Constitutional Courts of United States. They are not beyond the judicial scrutiny.

8.1.9 Certain provisions of the Constitution preclude the court from making judicial review

Article 74 (2) and 163 (3) preclude the court from inquiring into the advice tendered by the council of Ministers to the president or Governor of State respectively. Articles 77 (2) and 166 (2) preclude the Court from examining the validity of the order or instrument made in the name of the President or Governor. Article 105 (2) and 194 92) preclude the Court from examining anything said or any vote given in the Parliament or State Legislature. Similarly articles 122 and 212 preclude the courts from inquiring into the proceedings of the Parliament or state Legislature on the ground of any irregularity of procedure. Article 361 precludes the Court from examining the immunities granted to the President or the Governor.

In the United States the senators and Representatives are privileged from arrest during their attendance at the session of the Congress and in going to or returning from the same and for any speech or debate in either House they shall not be questioned in any other place. However, Article 1 Section 6 (10 further provides that the privileges shall not be available in the case of treason, felony, and breach of the peace. In *Tenney v. Brand Hove*,[617] the legislative immunity was extended to the members of the State Legislatures. The purpose of such legislative immunity is to prevent intimidation of legislators by the executive or holding them accountable before a possible hostile judiciary.

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[617] 341 US 367 (1951)

In *Gravel v. United States*[618], Senator Gravel read portion of classified pentagon papers at a committee session of the Senate and then arranged with a private firm for their publications. A Federal grand jury sought to determine whether any violation of federal law had occured any demanded Gravel's testimony as to hoe he secured the papers, which the Senator resisted as an infringement of his legislative immunity. He lost in the Supreme Court. The Court held that private publication of the papers "was in no way essential to the deliberations of the House" and that Gravel's arrangements with the press "were not part and parcel of the legislative process."

In United States v. Johnson[619] a congressman had made a speech on the floor of the House in return for payment by private interests, and was convicted of conspiring with these interests to defraud the United States. The government contended that the "speech or debate" clause forbade only prosecution based on the content of a speech, such as libel actions, but not those founded on antecedent unlawful conduct of accepting bribe. However the Supreme Court held unanimously that the purpose of the clause was to protect legislators from "intimidation by executive and accountability before a possibly hostile judiciary", and that consequently a judicial inquiry into the motivation of a congressman's speech was in violation of the Constitution. But in *United States v. Brewster*[620], Brewster was charged with accepting a bribe to influence his vote on postal rate legislation. The Supreme Court concluded that taking a bribe "is not a legislative act" and broad policy statements about not

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[618] 408 US 606 (1972)
[619] 383 US 169 (1966)
[620] 408 US 501 (1972)

immunizing members of Congress from criminal prosecution supported the ruling. As regard the examination of the immunities granted to the President, in *United States v. Nixon*[621] the Supreme Court unanimously denied the President's right to make a final, unreviewable claim of executive privilege. The Court said:

> Neither the doctrine of Separation of powers, nor the need for confidentiality of high-level communications, without more, Can sustain an absolute, unqualified, presidential privilege of immunity from judicial process under all circumstances.

In1974, the Congress passed the Presidential Recording and Material Preservation Act, which required the general services administration to issue protective regulations for the Nixon materials. In *Nixon v. Sampson*, Administrator of General Service,[622] the Court of appeals for the District of Columbia upheld the statute on 1974 on the ground that the invasion of the privacy was not unreasonable since the Act severed the National interest of over riding importance.

8.1.10 Judicial review of exclusionary clauses in statutes

In many statutes, various types of exclusionary clauses have precluded judicial review of administrative actions. The inclusion of provisions that the decision of the administration authority "shall be final" could not prevent High Court or Supreme Court from making judicial review of such decision or to judge the vires

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[621] 418 US 683 (1974)
[622] 408 F. Supp. 321 (1976)

of such provisions of the statute. The jurisdiction conferred on Supreme Court under Article 32 and 136 and on High Court under article 226 cannot be taken way by legislative mechanism put into service for excluding powers of such courts. The legislative provisions should be read subject to the overriding provisions of the constitution. In the United States, in order to control the arbitrary or unreviewable actions of federal administrative agencies, the Congress had passed the Administrative Procedure Act, 1946 and provided that a person suffering from legal wrong on account of agency action, or adversely affective or aggrieved against the relevant statutes, is entitled to judicial review thereof. The Court in the case of class actions and individual suits of public importance has liberalized the rule of standing.

8.1.11 Political equality

In U.S.A., a civil war took place for the political equality of Negroes. In 1920, the political equality was given to the women and in 1972; persons of 18 years were given right to vote. Until 1965, the political equality did not exist for most of the backs. In 1944 the Supreme Court declared the "White primacy" to be unconstitutional in Smith v. All Wright. Until 1982, it was a political reality, when liberal laws were passed. In 1962, in Backer v. Carr, the Supreme Court said that it can decide political questions, and one-man one vote system was accepted in 1963. In 1970, in *Oregon v. Mitchell* the Supreme Court decided that the Congress might regulate the age of voting in the Federal election, but it could not interfere in this way in the State elections under the Fifteenth Amendment.

On the other hand the Constitution of India provided in Article 325 that no person shall be ineligible for inclusion in Electoral roll for the election to the Parliament or State Legislature on the grounds of religion, race caste, sex, or any of them. Similarly for election to the House of the people and the Legislative Assembly of the States, Article 326 provides that it shall be on the basis of adult suffrage. From 1989, every citizen of India who was of 18 years of age, instead of 21 years, was given the right to vote at any such elections. Every citizen who is not less than 18 years of age has a right to be registered as a voter. When special provisions were made in the Constitution for the election to Parliament in the case of Prime Minister and Speaker by adding Article 329 A in 1987, the Supreme Court declared such provisions as unconstitutional on the ground of political inequality.[623]

After 1960, a racial problem broke up in U.S.A. in the form of "busing students". The discrimination in the form of segregation was prevalent in public buses, streetcars, waiting rooms, hotels, restaurants etc. The Supreme Court turned down in the *Plessy v. Furguson* doctrine in *Brown v. Board of Education.* In the decade between 1954 and 1964, about 200 segregation laws were enacted; all designed for frustrate the implementation of the hated judgment in Brown v. Board of examination. Between 1977 and 1986, many Constitutional amendments were proposed in both the Houses of the Congress to frustrate the busing principle, but no amendment was passed. The racial discrimination was prevalent in the employment also. In

[623] Indira Nehru Gandhi v. Raj narain AIR 1975 SC 2299

Washington v. Davis[624] the Supreme Court held that all discriminatory practices, which had a disparate impact on blacks, were unlawful unless the employer could show the business necessity.

In India Article 15 of the Constitution has prohibited discrimination on the grounds of religion, race, caste, sex, or place of birth. Similarly Article 16 clause (2) provided that for the purpose of employment under the state, no citizen shall be discriminated on the grounds of religion, race, and caste, Creed, sex, decent, place of birth, residence or any of them. In *Jagdish Saran v. Union of India*[625] the Supreme Court held that if the aspiring candidates are not of educationally backward class, institution-wise or race-wise segregation or reservation has no place in Article 15 and exceptional circumstances cannot justify making reservation as a matter of course in every University.

8.1.12 Commerce clause

Under Article 1 Section 8 of the US Constitution, the Congress has been given power to regulate commerce with foreign nations and among several States. In *Gibons v. Ogden*[626], the Supreme Court held that a State law affecting commerce is invalid, when it is in conflict with law of a Congress. The principle adopted in Cooley case was that the commerce power is exclusive with respect to some matters and concurrent with respect to others. The federal Child labour Act, 1916 prohibited transportation in inter-state commerce, such of the product of factories, mines, quarries where children under the age of 14 years had been

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[624] 96 S.Ct. 2040 (1976)
[625] AIR 1980 SC 820
[626] 9 Wheat 1 1824

permitted to work for more than eight years a day or six days a week or nights. The Act also provided that goods produced by child labour should be excluded from shipment in interstates or foreign commerce. In *Hammer v. Dagenhart*[627], the Supreme Court declared the said law invalid on the ground that the freedom of commerce of the local authority would come to an end. In 1941, the majority view in *Hammer v. Dagenhart* was reversed by the Supreme Court in *U.S. v. Darby*[628] when it held that regulations of commerce, which did not infringe some Constitutional prohibitions, were within the plenary power conferred on the Congress by the Commerce clause.

Article 301 of the Indian Constitution provides that trade and commerce through out the territory of India shall be free subject to other provisions of part XIII. Certain exceptions have been provided in Article 302-305 of the Constitution as under:

- Parliament is empowered to impose such restrictions on the freedom of trade and commerce between one state and another and within any part of the territory of India as may be necessary in public interest.
- The Parliament cannot make discrimination between one state and another except in the case of famine or scarcity of goods in any part of India.
- A State may by law impose tax on goods imported from another states. But a tax discriminating between imported goods, and those manufactured or produced within the state shall be invalid.

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[627] 247 US 151 (1918)
[628] 312 U.S. 100 (1941)

- A State may by law impose the reasonable restrictions on the freedom of trade and commerce within the States in the public interest subject to the condition that the state cannot make law which discriminate between the states and a bill imposing restrictions or trade or commerce shall not be introduced in the legislature of a State without the previous sanction of the President.
- The freedom of commerce is subject to the nationalization laws referred to in Article 19 (6) (ii).

In *Attiabari Tea Company v. State of Assam*[629] the appellants carried on the business growing tea and exporting in to Calcutta via Assam. In course of its passing through the State of Assam. The tea was liable to tax under the Assam Taxation Act, 1954 which imposed tax on goods carried by road or inland waterways in the State of Assam. The Supreme Court held that the tax imposed on the goods directly restricted their transport or movement and thus offended against Article 301. The Act was, therefore, held void and the State was restrained from levying the tax. The impugned Act was subsequently amended by the Assam Legislature following requirements of Article 304, and the validity of amendment Act was upheld by the Supreme Court in Khyebari Tea Company v. state of Assam.[630]

8.2 Comparative Study Of The Judicial Control Of Subordinate Legislation And Administrative Action

[629] AIR 1961 SC 232
[630] AIR 1964 SC 925

The U.S. Congress has indulged in extensive delegation of legislative power to the executive. In *Wayman v. Southard*[631] Chief Justice Marshall has suggested that 'important subjects' be entirely regulated by the legislature and in the case of 'unimportant subjects' powers be delegated to those who are to act under such general provisions to fill up the details. In *U.S. v. Grimand*[632] the Supreme Court held that it was 'impracticable' for the congress to frame rules and regulations covering the area of local condition. In Field v. Clark[633] the Supreme Court held:

> "The Legislature cannot delegate its power to make law, but it can make a law to declare a power to determine some facts or state of things upon which the law intends to make its own action depend."

The U.S. Supreme Court has rarely invalidated delegated legislation. In *Panema Refining Company v. Ryan*[634] the Supreme Court held that all delegated powers to President by congress in 1935 to fight the great American depression were void. In *Vakus v. United States*[635] the Supreme Court held that the Price control Administrative depression Act could authorize the Administrator to fix any rate which in its opinion fair and equitable. In *Carter v. Carter Coal Company*[636] the Supreme Court declared Guffey Coal Act invalid as it has delegated legislative powers to set up a code of mandatory regulation for the coal industry. In this case the delegation was made to the representatives of the coal industry instead of government, which was void. The Supreme Court did

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631 10 Wheat 1 (1825)
632 220 U.S. 506 (1911)
633 143 US 469 (1892)
634 293 US 388 (1935)
635 321 US 414 (1944)
636 298 US 238 (1936)

not declare invalid any statute on the ground of excessive delegation, although there were number of opportunities to do so. The Administrative procedure Act, 1946 made it compulsory to publish the rules before they were brought in operation. The courts in the United States control the administrative action by using Fourteenths Amendment. There is necessity of using the power of judicial review creatively in the area of subordinate legislation and administrative action.

In India the rules, regulations, bye laws, schemes, orders come under the category "subordinate legislation" and action taken by the executive under them is known as administration action. The subordinate legislation is reviewable like ordinary legislation i.e. on the ground of ultra vires and unconstitutionality. Article 53, 73, 154, 162 and 298 of the Constitution of India enable the Government to act executively. In Delhi Laws Act case the Supreme Court took the view that power can be delegated to the executive authority, to apply without modification the whole of any central Act already in existence in any part of India. Under the Legislative sway of the center to the new area, but power cannot be delegated to repeal a law existing in the area and either to make no law in its place, or to substitute some other law therefore. It means an essential power of determination of legislative policy cannot be delegated. Similarly power to lay down limits of standard are laid down by statute, no unconstitutional delegation of legislative power is involved in leaving to the executive the making of such subordinate legislation within the prescribed limits.

In State of *Maharashtra v. M. H. George* the Supreme Court framed the guidelines for the publication of delegated legislation.

It said that failure to comply with the statutory requirement might result in that there was no effective order. In absence of any such statutory requirement, it should be published in the usual form, and publication in the official gazette is the ordinary method of bringing a rule or subordinate legislation to the notice of the people. The retrospective operation of rules is violative and ultra vires. In *Vishwa Bharati H. B. Co-operative Society Ltd. V. Bangalore Development Authority,*[637] the Karnataka High court held that the power to lease, sell or transfer movable or immovable property did not authorize the prescribing of the registration fees as a restriction for the allotment of house sites. The State Government has no power to authorize the levy of tax by way of registration fees. The rule was declared ultra vires of the Act.

The use of Article 14 of the Constitution of India to strike down administrative actions, which were against rules of natural justice or involved malafide exercise of power of arbitrary, have not become very common. However, the Supreme Court has declared many actions of the administrative nature as violative of Art. 14.

8.3 Comparative Study Of Unconstitutionality Of Legislation, And Its Cure: India And U.S.A.

Under Article 13 (1) of the Constitution of India a pre-constitution law may be declared void from the date of

[637] AIR 1991 Kant. 133

commencement of the Constitution, whereas a post-constitution law declared void under Article 13 (2) becomes nullify from its inception. According to Cooley when a statute is declared unconstitutional, its effect would be as if it had never been passed and it is considered as if it had nom legal force. If the Court declares a part of a statute void, that part is notionally taken to be obliterated from the section for all intents and purpose, although it may remain on the statute book. Article 13 does not invalidate the inconsistent law in Toto, but it invalidates those provisions of law, which are inconsistent with the fundamental rights, the remaining part remains valid and operative.

The laws not void under Article 13 (1) for all purposes, it is void to the extent it is inconsistent with the fundamental rights. The law is not made inconsistent retrospectively and it would not obliterate the whole statutes from the statute book. If in one case, the law has been proved unconstitutional, the accused person did not prove its unconstitutionality in another case. The meaning of the word "void" in Article 13 (1) is something less than that of repeal under General Clauses Act. A law declared void under Article 13 (2), is void ab initio, i.e. to the same extent as it s understood in U.S.A.

In *keshav Madhav Menon v. State of Bombay*[638] the Supreme Court held that post-Constitution law offending Art. 19 remain operative as against non-citizens as it was not in contravention of their rights. The non-citizen cannot plead the law is void for all persons.

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[638] AIR 1951 SC 128

It remains operative as regards non-citizens, because the law can be void to the extent of inconsistency only. Similarly, a particular invalid statute remains valid for all other class of persons in respect of its valid part, whether it is pre or post constitutional law. Again a law may be unconstitutional in respect of the rights of the minorities guaranteed under Article 30, but may be valid in respect of majority community. Similarly if a statute is particularly invalid, because some of its provisions are contrary to the union law, it may be regards as partially unconstitutional to the extent it is contrary to the Union Law.

In U.S.A. a Constitutional Courts can declare a statute as unconstitutional, if the statute is in conflict with the Constitution, but it does not strike the statute from the statute book. In the U.S. Constitution, there is no difference between pre-constitution law and post-constitution law. In *Marbury v. Madison*[639], the Supreme Court established a principle that a law repugnant to the Constitution may be declared void by the judiciary. A legislation may be declared unconstitutional in clear case of unconstitutionality and not in any doubtful case.

If a part of the statute is declared invalid and impugned part cannot be severed from the rest of the statute, then the doctrine of Severability would be applicable, which says that in such a situation, the whole statute would be invalid. The real question in all such cases is whether what remains are so inextricably bound up with the part declared invalid that what remains

[639] Cranch 137, 2 L Ed. 60 (1803)

cannot independently survive.[640] The doctrine of Severability is also applicable to the constitutional amendment.[641]

If a statute is declared partially or wholly invalid, its cure would be to amend the statute and remove the invalidity in it or to amend the invalid portion prospectively or retrospectively. In India, the revival of then statute is also possible by placing the statute in the ninth Schedule of the Constitution. Similarly, the void rules or regulations cannot be given life by the legislature. The effect of the judgment of the Supreme Court could be cured by making amendment in the Constitution. If a statute is void because of legislative incompetence, it ca be revived by the Constitution amendment. If a state law is valid when made, but it could not operate on certain transactions relating to inter-state trade, law validly made would be effective when the obstruction is removed by the Center.

8.4 Judicial Review Of Constitutional Amendments In U.S.A.

8.4.1 Amending Provisions in the United States of America.

The United States of America claims the reputation of being the pioneer in the field of providing an amending clause in the body of the constitutional document. The Constitution provides two definite methods for amending it. The methods are extremely elaborate and rigid and account for only twenty-nine amendments during the last more than 200 years. Yet, in spite of its rigidity, it is the remarkable adaptability of the

[640] Gaya Pratap Singh v. Allahabad Bank, AIR 1952 SC 293
[641] Keshvananda Bharati v. State of Kerala, AIR 1973 SC 1461

Constitution that has enabled it to survive the rigorous of democratic and industrial revolutions, the turmoil of the civil war, the tension of a major depression, and the dislocation of the two global wars. Amendment in the American constitution can be made in accordance with the provisions of Article V, which runs as under:

Article V

" The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislature of two-thirds of several States, shall call a convention for proposing amendments, which in either case, shall be void to all intents and purposes, as part of this Constitution when ratified by legislatures of the three-fourth of the several states, or by convention in three-fourths thereof, as the one or other mode of ratification may be proposed by the Congress. Provided that no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent shall be deprived of its equal suffrage in the senate."

The Constitution of the United states contains one of the most complex procedures for amendments."[642] The process by which the Constitution can be amended is divided into two parts- proposing an amendment and ratifying an amendment.
There are two ways in which amendment may be proposed:

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[642] D. George, " Government and Politics", p. 75

- BY a two-thirds vote of both Houses of Congress; or
- By a national constitutional convention called by Congress upon request of the legislatures of two-thirds of the states.

It is to be noted that the Congress is bound to call the convention if the application is made by invoking second alternative. It cannot refuse to do so. Article V further provides the two methods of ratification of amendments proposed and framed through either of the above two cases. It has been left to the Congress to prescribe one or other method as it may think fit as under:

- The legislatures of three-fourths of the states may ratify the amendment submitted to them,
- Convention may be called in several states and three-fourths of these stats may ratify.

It has been observed that "although two methods of initiating amendments and two methods of ratifying them are provided all thus far adopted have been proposed in the same way: by joint resolution of the two branches of Congress."[643] It is interesting to note that that President has no role to play in the amending process. Amendments not being legislative acts "are not officially submitted to him at all" Nor do the State Governors need to sign instruments of ratification.

Congress in which case it may be introduced in either House as a joint resolution, and must pass in both Houses separately by majority of two-thirds vote may propose an amendment.

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[643] Ogg and Ray, "Essentials of American Government", p.31

8.4.2 Attempt by the U.S. Supreme Court to exercise its judicial review power over Constitutional Amendment

There were two occasions in the history of the U.S. Constitution, when amendments in the Constitution were made merely to override the erroneous decisions of the Supreme Court. The judiciary has the power of judicial review of the statute and to declare the statute as invalid if the statute is found to be unconstitutional. On the other hand the Congress has the power to override the erroneous decision of the Supreme Court if the decision is against the basic norms of the Constitution. The two occasions, when the Congress took such decisions were as follows:

(c) In *Chisholm v. Georgia*[644] the Supreme Court allowed the federal Courts to accept jurisdiction of a suit against a state by a citizen of another state. In this case the Supreme Court asserted that citizens of other States could sue states in Federal court. The State of Georgia refused the permit the decree of the court to be enforced. This point was bitterly resented by the States. As a result whereof the Eleventh Amendment to the Constitution was quickly adopted to nullify the effect of above decision. The purpose of Eleventh Amendment adopted in 1765 was to override the Supreme Court's decision in *Chisholm v. Georgia*. Later in Hans v.

[644] vide Renu Bahndari, "Judicial control of Legislation in India & U.S.A." 2 Dall 419 (1973)

Louisiana[645] the Supreme Court itself admitted that the Chisholm was an erroneous decision. But if the State officials were working in excess of their authority or under an unconstitutional statute suits were maintainable.[646] The federal Legislation can create rights enforceable against states or state officials, in spite of the eleventh Amendment. In *Scheuer v. Rhodes*[647], the Supreme Court held that the parents or students killed by the Ohio National Guard on the Kent State Campus in 1970 could bring suit for damages against the governor of Ohio and other officials under the civil rights Act of 1871 for depriving their children of a federal right under colour of state law. If a plaintiff sues citizens of another state, a state may act to protect its own legal rights, as parent partie concept will justify suits brought to protect the welfare of the people as a whole but not to protect the private interests of individual citizens, thought this distinction is often difficult to make. The power of states under this concept is limited to the civil proceedings. It cannot be enforced in the criminal proceedings against citizens of other state in the federal courts.[648]

(d) In *Pollock v. Farmers Loan and Trust Co.*[649] the Supreme Court authorized the Federal government to levy taxes on income. The Supreme Court held that tax on real estate was direct, and went on to hold in another case of same parties

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[645] vide Renu Bhandari, "Judicial control of Legislation in India & U.S.A." 134 US 1, (1980)

[646] vide Renu Bhandari, "Judicial control of Legislation in India & U.S.A." Osborn v. Bank of United States 9 Wheat 728 (1824)

[647] vide Renu Bhandari, "Judicial control of Legislation in India & U.S.A." 416 US 232 (1974)

[648] vide Renu Bhandari, "Judicial control of Legislation in India & U.S.A." Wisconsin v. Pelican Insurance Company 127 US 265 (1888)

[649] vide Renu Bhandari, "Judicial control of Legislation in India & U.S.A." 57 US 429, 158 US 601 (1895)

that the entire tax was invalid. To reverse the Supreme Court's decision in the above case, the Sixteenth Amendment was made in the constitution. The Congress quickly took advantage of this Constitutional Amendment by enacting an Income Tax Law, which now provides the principal revenue source for the federal government.

Researches have shown that the Constitutional Amendment to invalidate the Supreme Court decisions were never declared unconstitutional by the U.S. Supreme court. The Supreme Court of India has invalidated many such constitutional Amendments. A question arises as to what is the justification for adopting a different line of thinking by the Supreme Court.

Though the U.S. and the Indian Constitution provide for a Bill of rights and judicial review of the same, their history indicate an avowed acceptance of the rights as well as the institution of judicial review in U.S.A.

But varying attitude ranging from ambivalence to hostility to them is prevalent in India. Even in the U.S.A., acute controversies have occasionally arisen over the role of judicial review in the country's polity; there is general acceptance of the necessity of such review and as Blackshield points out, "Supreme Court justices tend to be projected as ultimate arbiters of every aspect of the "American way of life" and this has deep historical linkage with the origins of the whole polity in people's rebellious choice of its own destiny, based on a natural law ideology." And Archibald Cox has also noted two important sources of "the American People's attachment to constitutionalism-an attachment now so strong that it forced a

popularly elected President Mr. Nixon to reverse his field and comply with the order of even an inferior court." These are according to him,

1. The necessity for an umpire to resolve the conflicts engenerated by an extraordinary complex system of government;
2. A deep and continuing American belief in natural law.[650]

To sum up, with a fair measure of accuracy, therefore, one may conclude that in the United States of America, the power of judicial review, i.e. the power to veto legislation. Somewhat in use in the pre-constitutional colonial period, and positively favoured by some of the prominent delegated to Philadelphia convention, could not be given specific, formal expression in the brief constitutional document, perhaps for fear of antagonistic reaction on the part of the ratifying States; nevertheless, it remained latent and dormant in at least three clauses of the Constitution, namely, Art. VI, Sections II and III, and Article III, Section II, until it was resurrected by implication and inference by the impeccable constitutional logic and reasoning of Chief Justice Marshall in Marbury v. Madison which, in spite of its political overtones of the constitutional structure, but at the same time the most significant of the American contributions to the art of government.

Through a continuous process of controversy and confusion, in which it was threatened with either total extinction or substantial modification, it became embedded in the life of the

[650] Archibald Cox, "The Role of the Supreme Court in American government", p. 9

people and the soil of its birth, so much so that it is today considered the very symbol and manifestation of the American approach to constitutionalism.[651]

[651] S. N. Ray, Judicial Review and Fundamental Rights, p. 43, Eastern Law House, Calcutta , 1974