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CHAPTER IX

Conclusions And Suggestions

In a developing democratic society, the judiciary has to play an important role if the law is to keep pace with the social needs. Such an approach is very pertinent in the field of legislation and subordinate legislation. Law is not static, but dynamic and, therefore, the norms to control it cannot also be static. What is needed is a forward looking and creative judicial attitude. The complexion of American law and the Indian law has under gone a fundamental change. Moreover, there is much stronger reason for judicial creativity through judicial review in India, which is a largest democracy in the world.

The power of judicial review has made the Supreme Court of India and United states as one of the important organs in the governance of both the countries. The decisions of the Court have political, social and economic implications. They show not only good craftsmanship of the judges but statesmanship also. The decisions of Marbury v. Madison by Chef Justice Marshall and Keshavananda Bharati by chief justice Sikri and other six judges are the example of judicial craftsmanship. These decisions highlighted not only the constitutional supremacy but indirectly strengthen the concept of judicial review.

9.1 Judicial Review Establishes The Concept Of Constitutional Supremacy

According to the concept of supremacy of the Constitution, the supreme authority in both the countries is not the Parliament or the Congress, but the Constitution. In a democratic republican form of government, the elected representatives have to govern the nation in accordance with the written Constitution, therefore, it is the Constitution, which becomes supreme, and any law or decision, which is against the constitution, is void. The principle of Supremacy of the Constitution was declared as part of the basic structure of the Constitution by Sikri C.J. and Shelat and Grover JJ in Keshavananda Bharati and Marshall C.J. in Marbury v. Madison. In *State of Rajasthan v. Union of India*,[652] Beg J. said:

> "Neither of the three Constitutionally separate organs of the State can, according to the basic scheme of our Constitution today, keep outside its own Constitutionally assigned sphere or orbit of authority into that of the other. This is logical and natural meaning of the principles of supremacy of the Constitution."

In U.S.A. the Congress has not been denied the power given by the Constitution to the Congress and State legislatures. Therefore, in *Marbury v. Madison*, Chief Justice Marshall has declared that the Constitution is a superior paramount law, unchangeable by ordinary means. Any law contrary to the

[652] AIR 1977 SC 1361

Constitution is not a law and the judiciary has a power to control such a law.

The principle of Supremacy of the Constitution requires for its maintenance in full force and vigour:

Firstly, an executive which respects the judiciary and its verdicts and does not take away, by the exercise of its constitutional powers, judicial powers to deal with the rights of the citizens even against executive actions against State;

Secondly, the absence of any legislative interference with judicial functions in a manner characterized by Dean Roscoe Pound as "legislative lynching" or threats of any kind held out for particular conclusions however unpalatable they may be to anyone.[653]

Thus, Supremacy of the Constitution can only be maintained when there is spirit of law abidingness and discipline amongst citizens so that principles of law can be applied scientifically to facts by court of justice, which are the custodian of what has been described by political philosophers as the abiding or continuing "real will" of the whole nation embodied in the Constitution contrasted with the will or wishes of some or majority of citizens for the time being expressed in legislatures or elsewhere. Judges, who have taken oaths of allegiance to the Constitution, are bound to uphold it conscientiously "without

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[653] Mirza H. Beg, "The Supremacy of the Constitution", In Indian Constitution: Trends and issues, edited by Rajeev Dhavan and Alice Jacob, p. 121, N. M. Tripathi, Bombay, 1978

fear or favour, affection or ill will." They have to give their honest judgement without caring for popular approval or disapproval.

9.2 Supremacy Of The Constitution Leads To The Concept Of Judicial Review

In country where the Constitution is supreme and the Parliament or State legislatures have been given the power to frame laws, then such laws must be framed in accordance with the provisions of the constitution. There are two natures of law, the ordinary law, and the supreme law. The laws passed by the Parliament or State legislatures or the Congress are the ordinary laws and the Constitution is a supreme law. The supreme law is the foundation and source of all other legislative authorities. Any provision of the ordinary law, which contravenes the provisions of the supreme law, must be void and there must be some organ possessed with the power of ordinary law as void.

Thus if the provisions of the statute are found to be violative of any of the Articles of the Constitution, which is the touchstone of the validity of the laws, the judiciary has been empowered to strike down the said provisions. The Supreme law has thus given birth to the concept of judicial review, which is nothing but judicial probe into the validity or invalidity of the statutory law. Judicial review is the power of court to pronounce upon the constitutional validity of the statute, which falls under the normal jurisdiction of the Court. In *Marbury v. Madison* Chief Justice Marshall asserted that the Supreme Court of United States had the power to decide on the constitutionality of legislative acts on the anvil of the constitution. He said:

"The Constitution is either superior paramount law unchangeable by ordinary means or it is on a level with ordinary legislative acts, and like other acts are alterable when the legislature shall please to alter it. Certainly all those who framed written Constitution contemplate them as forming the fundamental and paramount law of the nation and, consequently the theory of every such government must be that an Act of legislature repugnant to the Constitution is void. And, further, it is emphatically the province and duty of the judicial department to say what law is."[654]

9.3 Parliamentary Sovereignty And Judicial Review

9.3.1 Pandit Nehru claimed Supremacy of Parliament

After independence, the idea of supremacy of the Indian Parliament was canvassed in his speech by Prime Minister Pandit Nehru who on the eve of the Constitution (Fourth Amendment) Bill posed a question:

"Why should eight Judges in the Supreme Court be permitted to outlaw the Acts passed by elected legislators or the actions of their Ministers' or of the officers controlled by the Ministers? Why should this undemocratic process be permitted in the name of judicial review? Why should one have more faith in the Court than in the Parliament?"[655]

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[654] (1803) Cranch 137, 2 L Ed. 60
[655] AIR 1955 (Journal Section) p. 79

Having adopted the literal, grammatical and positivist approach in the matter of interpretation of the Constitution in the beginning the Supreme Court of India in *Shankari Prasad case*[656] held that Article 368 gave ample power to Parliament to amend the Constitution irrespective of Art. 13 (2). However, the minority judges, namely, justice Madholakar and Justice Hidaytullah in *Sajjan Singh Case*[657] expressed doubt over the unanimous view held by the Supreme Court in *Shankari Prasad case.*

9.3.2 The seeds of the theory of implied limitations

The seeds of the theory of implied limitations, i.e. unamendability of the basic features of the Constitution were sown for the first time in the dissenting opinion by Mr. Justice Madhollkar in *Sajjan Singh case.* His lordship observed[658]:

> "....Ours is a written Constitution. The Constituent assembly which was the repository of sovereignty could well have created a sovereign Parliament on the British model. But instead it enacted written Constitution, created three organs of State, made the union executive responsible to Parliament and the State executive to the State Legislature; erected a federal structure and distributed legislative power between Parliament and the State Legislatures; recognized certain rights as Fundamental and provided for their enforcement;

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[656] AIR 1951 SC 345
[657] AIR 1965 SC 845
[658] AIR 1965 SC 845 at p. 864

pr3escribed forms of oath of office or affirmations which require those subscribe to them to owe true allegiance to the Constitution and further require the members of the union judiciary and the higher judiciary in the States to uphold the Constitution. Above all, it formulated a solemn and dignified Preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indicia of the intention of the Constituent-Assembly to give paramountcy to the basic features of the Constitution?"

In his dissenting opinion Justice Hidaytullah in *Sajjan Singh case opined*[659]:

"....the power to make amendments ought not ordinarily to be a means of escape from absolute constitutional restrictions"

9.3.3 Glaring conflict between parliament and the Supreme Court

In the land mark case of *Golak Nath v. State of Punjab*, the strong plea was taken that the Constituent power is limited by necessary implication. The plea was not accepted as it was not necessary for the disposal of that case. However, Justice Hidaytullah focused on this issue in these words:

"It is the duty of the Court to find out the limits which the Constitution has set on the amendatory power and to enforce these limits."[660]

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[659] AIR 1965 SC 845 at p. 868

[660] AIR 1967 SC 1618 at 1718

Though the above observation of Justice Hidaytullah does not clarify whether he has express or implied limitations in his mind, in any case, he opened the way for importing limitations.[661]

The *Golak Nath case* by a slender majority of 6:5 blocked the power of Parliament so as to take away or abridge any of the Fundamental Rights. As a counter-move, the union parliament enacted the Constitution (Twenty Fourth) Amendment Act and reasserted the supremacy of the parliament in the matter of constitutional amendments in respect of all parts including part III of the Constitution.

The argument of implied limitations on amendatory powers of parliament was impressively put before the 13 Judges Bench of the Supreme Court by the appellant in *Keshavananda Bharati case* and the seven judges asserted certain limitations too the Constituent power whereas six judges recognized no limitation to the Constituent power. The Supreme Court overruled the *Golak Nath* decision but it put another greater and higher limitation on the Parliament's power by making the Parliament incapable of alerting or destroying the "basic Feature" of the Constitution or the "essential features" of the Constitution. The decision in Keshavananda didn't put an end to the conflict between the parliament and the Supreme Court over the issue of "supremacy of parliament" but rather aggravated the same. Mr. H. R. Gokhle, the minister of law and justice, asserted before the West Bengal lawyers conference that

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[661] Vide, Dr. Hari Chand: "The implied limitations Theory-A Critique", Journal of the Bar Council of India, Vol. 4 (1-4) 1975

"Parliament was supreme and this has been recognized. If the people of India decided that certain change should be effected in the interest of the people for their social and economic advance, no court, howsoever high, could stand in the way."[662]

The Constitution (Forty Second) Amendment Act, 1976 made efforts to assert Parliamentary supremacy in India.

9.3.4 Concept of Sovereignty: Its origin and development

Let us examine the concept of sovereignty at the close of the middles ages, the doctrine of sovereignty grew to advance the cause of the secular state against the claim of the Church.[663] The idea of sovereignty was propounded by Jean Bodin. He put towards the idea that the sovereignty is the highest power over citizens and subjects, free from laws. Bentham was the founder of the science of legislation. Sovereignty was a postulate of the legislative reform movement in which Parliament was over hauling the law as relational society of Middle Ages to the industrial England in the early part of 19th centaury.[664] The concept of sovereignty as conceived by Bodin, Hobbs, Austin and Salmond is marked by three notable elements such as, Essentiality (i.e. Sovereignty within the State is essential), Indivisibility (i.e. Sovereignty is indivisible) and thirdly, illimitability (i.e. Sovereignty is illimitable)

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[662] Vide The Times of India, March 1, 1976, p. 5
[663] Vide Sir Ivor Jennings, "The Law and the Constitution", p. 147
[664] Vide Dean Rocoe Pound, "Jurisprundence" Vol. I, p. 308

9.3.5 Sovereignty is no longer indivisible or illimitable

There is unanimity amongst jurists on the point of essentiality of sovereignty in every state. However, the element of indivisibility of sovereignty has been negatived by the emergence of the concept of "Federal State" in which the power is divided between the National Government and the Constituent units. The element of the illimitability of sovereignty is curtailed by the adoption of written Constitutions by many States. The whole concept of unlimited sovereignty is yielding place to the new concept of "limited Government". In modern age, it has become difficult to ascertain as to where does the sovereignty reside? In the 18th century it was easy to point out the location of sovereignty because of uncontrolled law-making power in the British Parliament and legal unaccountability of the King or those who acted in his name. This tendency led to the conclusion that sovereignty resided in "Some persons or body of persons'. Accordingly, Blackstone pointed out that there is and must be in all governments a supreme, irresistible, absolute, uncontrolled authority.[665] However, this idea was determinate body for the location of sovereignty is negatived in modern times. For e.g., how one would reply to the question: Where does the sovereignty reside in Indian federal polity? Does it reside in Parliament? No, because Parliament itself is a creature of the Constitution, which is supreme. Whether it resides in the Constitution? No, because is enacted by the people of India. Then how to assert in sovereignty in the people of India? These are unending questions. In the present age, sovereignty is used in its dynamic sense, i.e. adjustable to the changing structure of

[665] Vide Balckstone, "Commentaries on the laws of the England", p. 41, 1765 and Cited by Pound in Jurisprudence, Vol. II, p. 381

the society. The concept of sovereignty or supremacy of the British Parliament was popular. The Queen, the House of Lords and the House of Commons, acting together, constituted the British Parliament and this body (i.e. the British Parliament) is embraced with the sovereign legislative power. In the words of Dicey[666]:

> "The principle of Parliamentary sovereignty mean, neither more nor less than this, namely, that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever, and further, that no person or body is recognized b y the law of England as having a right to override or set-aside the legislation of Parliament."

Similarly, Sir Ivor Jennings remarked[667]:

> "Parliament may remodel the British Constitution prolonged its own life; legislate override for individual cases, interfere with contract and authorize the seizure of property, give dictatorial powers to the Government, dissolve the United Kingdom or the British Umpire introduced communism or socialism or individualism or fascism, entirely without restrictions."

However, Dician concept of absoluter parliamentary supremacy does not hold good today. The idea of sovereignty developed by

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[666] Vide: Dicey, "An Introduction to the study of the Law of the Constitution", 10th Ed.
[667] Vide: Ivor Jennings, "The Law and the Constitution", 3rd Ed. PP. 137-38

Hobbes, Bentham and Austin has past into the current legal theory of England. According to Jennings:[668],

> "If Sovereignty is supreme power, Parliament is not sovereign. For there are many things as Dicey and Laski both point out, which Parliament cannot do."

Prof. Laski said:

> "No Parliament would dare to disfranchise the Roman Catholics or prohibit the existence of Trade Unions."

Dicey is also doubtful about the seat of sovereignty in England. He distinguishes between the legal and political sovereignty. According to him, a legal sovereignty is a mere conception and means simply the power of law-making unrestricted by any legal limit, whereas, that body is politically sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the States. Dicey thus distinguished between legal and political sovereignty. The Parliament being legal sovereign, where as the electorates the political sovereign. Sir Ivor Jennings said that if this is so, legal sovereignty is not sovereignty at all. Briefly started the idea of Parliamentary Sovereignty has been modified in England. This leads us to examine how far the plea of Parliamentary Supremacy has rational basis in federal India with a comprehensive written Constitution.

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[668] Vide: Jennings, "The Law and the Constitution", P. 149,

9.3.6 Two divergent approaches towards supremacy of Parliament in India

The Parliament of India regained its power to amend the Constitution, including Part III with the indicial pronouncement in *Keshavananda Bharti case*. However, the Keshavananda decision also provoked Parliament to ascertain its supremacy. But the question arises Parliamentary Supremacy over whom? Among the three organs of the State, there is no conflict between the Legislature and the Executive. There is no separation between the Executive and Legislature as regards personnel. The Executive plays an important role in making laws.[669] The revolution that has taken place in the British system of Government consisted in the fact that apparently either the executive government has merged into the legislative or the legislative has merged into the executive.[670]

Though the Cabinet is the creature of Parliament, it controls the creator. Such observation is applicable to India. The plea to reverse Keshavananda decision and to establish parliamentary supremacy indicated that the Executive wanted to make itself superior to both the Legislature and the Judiciary.

There have been two divergent approaches in respect of parliamentary supremacy in India. The First approach is headed by persons who wish to establish parliamentary supremacy over the judiciary. On April 2, 1976, the Union Law Minister, Mr. H. R. Gokhale, asserted in Lok Sabha that Parliament's Constituent power to make laws and amend the Constitution was supreme

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669 Vide: Ram Javaya v. State of Punjab, AIR 1955 SC 549

670 Cited in M. C. J., "Constitutionalism and the separation of powers", p. 219

and that it would not tolerate any erosion of its supremacy.[671] Dr. Gajendragadkar, the Chairman of Law Commission while delivering the first Motilal Nehru Memorial Lecture on "Law, Lawyers and Social Change" expressed the opinion that "No limitation can be inducted in the provisions of Article 368 on the ground of 'Basic Features' of the Constitution."[672] Thus, in his view, the constitutional amendment should not be reviewed by the judiciary.

On the other hand Mr. N. A. Palkhivala, an eminent jurist, said that abrogation or abridgement of the right of judicial review would be tantamount to banishing the rule of law in the country.[673] Hon'ble Justice Krishna Iyer of the Supreme Court of India pointed out that the Constitution amending process should not do away with "lasting constitutional values". He favoured the retention of supremacy of court in the assigned sphere. Hon'ble Justice K. K. Mathew, delivering the first Tej Bahadur Sapru Memorial Lecture on March 26, 1976 on "Democracy and judicial review" very aptly remarked that "it is over-simplification to contend that no society can be democratic unless the legislature has sovereign power."

9.3.7 Supremacy of Parliament claimed on the ground of Representation of people

After all, the above discussion leads us to one important question: On what basis the supremacy of the Parliament in India is claimed or advocated? There is a presumption that all

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[671] Vide: The Times of India, April 4, 1976, P. 1
[672] Vide: The Times of India, May 8, 1976, p. 1
[673] Vide: N. A. Palkhivala, "Constitution and its Amendments" in Times of India, April 8, 1976

powers spring from the people in a parliamentary democracy. The will of the people is expressed through their votes in the elections. This kind of reasoning was the basis for the Second All-India State Bar Council Convention held on March 28, 1976 wherein,

> "The preponderance of opinion was that the Constitution should always be in accordance with the will of the people and Parliament as representing the will of the people should have the final say as to what the Constitution had to achieve?"[674]

The modern constitutionalism ponders two different approaches in this respect. The British system of Government has tremendous faith in Parliamentary supremacy and in fact the secrecy of the well-functioning of the British Government lies in awakened public opinion and secondly the British system has been able to combine strong government and strong opposition. The two or three party system in England has made the Government uniquely state. There has always been a check on the arbiteriness of the representative majority in the British Parliament. In India the situation is quite reverse. Legislation is enacted in India at the will of the Executive only. Even the constitutional amendments are made in India without due deliberation by all and without providing sufficient time for discussion. The Constitution (Thirty-ninth Amendment) Act was passed hurriedly in both the Houses within two days only. And the Constitution (Fortieth Amendment) Act was passed hurriedly putting 64 enactments in the Ninth Schedule.

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[674] Vide, The Times of India, March 30, 1976, P.7

The American constitutional system puts balance over the representative supremacy. The founders of the American Constitution were no lovers of popular sovereignty and they sought to control it by the written Constitution; by the doctrine of separation of powers; by the federal principle; by the creation of a strong senate as a check upon the representatives and by the creation of powerful Supreme Court. The Constitution of India provides a peculiar balance between the British Parliamentary supremacy and the American supremacy of the judiciary. In India we have on the one hand Parliamentary Executive and on the other hand independent judiciary as the final arbiter and interpreter of the Constitution.

In India the plea of the supremacy of the Parliament is made on the basis that Parliament represents the will of the people. However, this assumption is subject to certain limitations. The defective elective system makes it doubtful whether the government by numerical majority represents even the majority of the whole population. It represents the nation by fiction only. Really speaking the party in power, sometimes, was voted by less than 40% of the whole population.

Further, the idea of representative supremacy rests on same fallacious notion that the electorate has approved of every measure which the legislature deem necessary so as to meet the unforeseeable twists and turns of events.[675] Such a presumption has been rebutted by the practices of the countries where the constitutional amendments require referendum. The

[675] Vide: The Observation of Justice Hegde in Keshavananda Bharti case, AIR 1973 SC 1461 at p. 1624

Commonwealth of Australia represents a glaring example. Out of 32 amendments proposed by the Australian Parliament and put to the People's referendum, as their Constitution required, 27 were voted out by the people. It was very aptly remarked by Hamilton that "the representatives of the people in a popular Assembly seem sometimes to fancy that they are the people themselves."[676]

It is not always true that the representatives of the people always act for the welfare of the people. The practice of overthrowing constitutionally established government in the State under Art. 356 is over known in India. In 1959 in Kerala and in 1976 in Tamil Nadu democratically elected government having the support of more than two-third majority of legislators was dislodged from power under Article 356 on the ground of maladministration. The dissolution of Legislative Assembly in Bihar in recent times was declared unconstitutional by the Supreme Court of India. The Bigger democracy (i.e. the Parliament) overthrows the smaller democracy (i.e. the State legislators) as if the bigger fish swallows the smaller fish. Such examples are illustrative of the fact that the representative government may act even against the will of the people, who have elected them. It may also abuse the power in the name of the people.

The emerging pattern of constitutionalism after the Second World War is marked by the growth of written Constitutions and in countries following the American pattern, like India, the concept of "Limited Government" has come to mean that

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[676] Vide, Federalist No. 71

unlimited power should not be reposed in any body of men, not even in representative body.[677] Justice Miller of American Supreme Court pointed out in Citizen's Savings and *Loan Association v. Topken that*

> "In absence of any such limitations, even the most democratic depository of power becomes a despotism of the majority, if you choose to call it so, but it is none the less despotism."[678]

In fact, the concept of limited government replaces the supremacy of the Constitution in the place of the sovereignty of Parliament. In India, written Constitution, federal structure, judicial review, Fundamental Rights and implied limitations make it clear that parliament is not supreme and sovereign. The majority of seven judges in *Keshavananda Bharti case* held the view that Parliament cannot, in exercise of its constituent power, destroy or alter the basic structure of the Constitution. It was observed by Mr. Justice Shelat and Mr. Justice Grover in this case that-

> "There are necessary implications in federal Constitutions such as for example, that any law violating any provision of the Constitution is void, even in the absence of an express declaration to that effect."[679]

Chief Justice Sikri was of the opinion, in this case, that-

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[677] Vide, Where, "Modern Constitutions" p. 38
[678] Cited in D. D. Basu, "Limited Government and Judicial review', p. 69
[679] Vide, (1973) 4 SCC, 225 Para 570

"In a written Constitution, it is rarely that every thing is said expressly, powers and limitations are implied from necessity or scheme of the Constitution."[680]

Relying on advisory opinion of the Supreme Court in Delhi laws Act case, the C.J. Sikri observed:

"There is an implied limitation on legislative power; the legislature cannot delegate the essentials of the legislative function."[681]

Dealing with the relative supremacy of the Constituent power in the Constitution itself, Justice M. H. beg very aptly observed in *Indira Nehru Gandhi v. Raj Narain* that-

"....It is well established that it is the Constitution and not the constituent power which is supreme here, in the sense that the constitutionality of the Constitution cannot be called in question before us, but the exercise of the constituent power can be. We have to judge the validity of the exercise of constituent power by testing it on the anvil of constitutional provisions."[682]

It is here interesting to note that five judges bench in *Smt. Indira Nehru Gandhi v. Raj Narain case* consisted of all judges except Justice Khanna, who had held unlimited power of Parliament to amend the Constitution in Keshavananda case. However, the learned judges declared the Constitution (39th Amendment) Act ultra vires. This was done on the ground of the theory of implied

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680 Vide, *ibid*, Para 210
681 *ibid*, Para 348
682 Vide, AIR 1975 SC 2299, p. 2455

limitations on the power of Parliament to amend the Constitution.

9.3.8 Attempt to assert Supremacy of Parliament by the Forty Second Amendment Act, 1976

The Constitution (Forty-second) Amendment bill was introduced in Lok Sabha on Sept. 30, 1976. It contained 59 clauses. The object of this bill was to assert the Parliamentary supremacy beyond doubt.

The most striking provision was clause 55 of the said Bill. It was subsequently amended at discussion stage in Lok Sabha by the Union Law Minister Mr. H. R. Gokhale. The magnitude of the clause 55 can be realized by observing the original clause introduced and subsequent substitute clause which radically and drastically changed the character and contents of Article 368.

The Original clause:

> (4) "No amendment of this Constitution including the provision of Part III made or purporting to have been made under this article (whether before or after the commencement of Sec. 55 of the Constitution (44th Amendment) Act, 1976) shall be called in question in any court except upon the ground that it has not been made in accordance with the procedure laid down by this Article."

However, on October 29, 1976 a drastic change was made at the instance of the Law Minister Gokhale and the substituted clause was as follows:

(4) "No amendment of this Constitution including the provision of the Part III made or purporting to have been made under this Article (whether before or after the commencement of Section 55 of the (Forty-second Amendment) Act, 1976) shall be called in question in any court on any ground."

Thus, under the original clause, as mentioned above, the validity of the Constitutional Amendment was challengeable if the procedure under Article 368 was not complied with; but under the substituted clause, as mentioned above, the validity of Constitutional Amendment was not made challengeable on any ground whatsoever, not even on the ground of procedure infirmity.

The Law Minister H. R. Gokhale while introducing the Bill in Rajya Sabha on Nov. 4, 1976 said:

"The Bill asserts not only the supremacy of Parliament to amend the Constitution, but puts beyond any shadow of doubt that it is not the function of the court to determine the validity of any constitutional amendment. No court would have any jurisdiction over Parliament's right to amend the Constitutional the amendment could not be a subject-matter of review by a court."

Under Forty Second Amendment, 1976, Parliament made a significant attempt to curtail the judicial review powers of the higher judiciary by providing that the constitutional validity of the central law can be challenged before the Supreme Court only and the constitutional validity of the State Law can be

challenged before the High Court only, and further by providing that the unconstitutionality can be pronounced only by two-third majority of the Judges of the Supreme Court and High Court respectively.

The peculiar longing of Parliamentary supremacy is based on wrong presumption that Parliament cannot implement socio-economic programme without having omnipotent powers over other organs of the State. It is note-worthy that the Union Government's counsel, the Attorney General of India, failed to answer a question repeatedly asked by one of the judges before the 13 judges bench of the Supreme Court constituted to reconsider the decision in *Keshavananda Bharati case*:

> "Can you point out a single piece of social legislation which is or can be held up by reason of majority view in the Keshavananda case?"

If the socio-economic programmes can be very well implemented unimpeded by Keshavananda judgment, it is surprising why was Parliament over-enthusiastic for in effecting the "basic structure" doctrine and for declaring for itself as having unlimited, uncontrolled and unfettered powers? It has always been claimed that all amendments were made for the common good but the question is: What socio-economic purpose was served by the thirty-ninth amendment? The Constitution should not be made scapegoat for all governmental failures on the economic front.

The tendency of all round curtailment of judicial review power and tendency of putting illegal Acts in the Ninth Schedule cannot be appreciated. In the words of Justice Mukherjee-

> "The incorporation of void and illegal Acts into the Constitution make them constitutional is a striking proof of the failure of Indian legislation to conform to the Constitution under which it works."[683]

The plea of the Parliamentary supremacy is based on fallacious and misconceived assumptions that Parliament as representative of the people can enact any law. It is submitted that the people in India in exercise of sovereign power have distributed powers amongst all the three organs of government-the Legislature, the Executive and the Judiciary. The will of the people is not represented only through the members of Parliament, but through all the three organs of the Government. The power of judicial review is exercised by judges on behalf of the people of India. Justice Krishna Iyer has aptly remarked that-

> "The judicial power is exercised by courts on behalf of the people of India, as long as "WE THE PEOPLE" have appointed them to exercise such power."[684]

Our Constitution is a national heritage. It is a great work of eminent Statesmen and legal luminaries equipped with the knowledge of political and constitutional history of India as well as of important countries of the world and such scholarly work are not supposed to be mutilated so easily by the members of parliament simply because they have majority. People are not for the Constitution, but Constitution is for the people and it should

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[683] Vide, Justice Mukherjee, "Role of the judiciary in governmental process" in Patna Law College Journal, 1967, Vol. XLII, p. 41

[684] Vide, V. R. Krishna Iyer, "Law and the people", 1972 at p. 163

be amended sparingly after taking into confidence the public's opinion and views of the opposition.

Our constitution is well balanced and this balance should not be imperiled. The Parliament should adopt a pragmatic approach by conceding the idea that Parliament is empowered for the welfare of the people and not for claiming superiority over all the organs of the government.

It should claim only such powers which are essential to establish welfare state and an egalitarian society. Parliament should not assume itself as sole repository of people's welfare. All organs serve the people according to their ability and in the manner prescribed for them. The power lay indisputably in Parliament to amend the Constitution, but it was necessary that the power to amend the Constitution was used in a cautious and purposeful manner and only sparingly.

9.4 Fundamental Objectives Of Judicial Review

The following are the fundamental objectives of judicial review:

i. It enforces the Constitution by declaring legislative Acts, Constitutional Amendments violating the constitutional mandates null and void.
ii. It imparts social, economic, political and legal justice as assumed by the Constitution and also secures liberty, equality to the citizens.
iii. It safeguards fundamental rights guaranteed to the citizens.

iv. It establishes democratic and constitutional balance between
   - ✓ The Union and the States,
   - ✓ One State and another,
   - ✓ The authority and the citizen.

v. It upholds the supremacy of the Constitution.

vi. It adjusts the Constitution to new conditions and needs of the society resulting into social and economic justice.

vii. It evolves judicial legislation.

viii. It removes the misgiving of the people against the legislature by declaring the impugned legislative Act valid if it does not contravene the Constitution and thus creates confidence in favour of legislature.

ix. It saves legislature from its legislative power being encroached upon by the executive.

x. It checks legislature from delegating its essential legislative function to the executive and from infringing fundamental rights guaranteed to the citizens.

xi. It urges the legislatures to assess the political wisdom of each Statute and forces the legislature to follow other line of policy and in this way casts a negative influence on the policy-making of the government.

9.5 Modern Trends Of Judicial Review

Judicial review has grown with the evolution of the Constitutional law. Evolution of Constitutional law in India, America, Canada and Australia reveal the enormous increase in the power of the Court to review the constitutionality of the legislative acts and constitutional amendments in the country like India. The reason is, that the concept of sovereignty of

people is the original concept of the constitutional jurisprudence and it has received a more strengthening force from various social end economical complexities. The individual liberty and freedom are generally eclipsed under the shadow of social needs and that is why judicial review is essential to save the personal rights of the individual. The Constitutional history of America reveals that though judicial review was not provided in the fundamental law of the United States of America the Court on the course of constitutional development adopted in judicial decisions and this attitude of the court had a great impact on the growth of the American Constitution. In India too, since the beginning of the British rule, the English Parliament incorporated restrictions in almost all the Constitutional documents of India and such constitutional restrictions and limitations gave rise to evolution of judicial review.

The growing heritage from the ancient Indian tradition was that the ruler was the representative of the people and he had to conform to the will of the people. This relic of ancient Indian legal thought provided great aspiration to the maker of the Constitution of India to embody the precept of judicial review in the Constitution itself. In India the constitutional agitation for the establishment of popular sovereignty and federalism created a great impact on the courts and it urged them to apply the doctrine of judicial review with great force. Judicial review has to go side by side with the constitutional evolution. Hence the study of constitutional evolution throws valuable light on the practical operation and working of judicial review especially in India where the political and socio-economic conflicts are on ascendancy.

Judicial review is an integral part of the Constitution of India. The scheme of the present Constitution in India is based on the structure of judicial review.

In India, the majority, which governs the country quickly, changes and the public opinion is also not very progressive and efficacious. In such circumstances it is not possible always for the majority in power to correctly fathom the needs and urgency of law, which is enacted, and another point is obtaining majority of seats in Lok Sabha doesn't mean that it represents the real will of the people. Our Constitution is founded on the promise that the executive shall be responsible to the legislature and Legislature shall be responsible to the electorate. But in reality the executive controls the legislature to day and the legislature has ceased to be responsible to the people. In such circumstances, judicial review has a great necessity. The legislature or Parliament cannot only act through majority. The majority goes on changing from time to time on the swing of the pendulum of public opinion. The changing majority cannot easily be expected to render a consistent interpretation of the Constitution.[685] This is why the people in India are in favour of strengthening the doctrine of judicial review in the Indian democracy to protect the rights, liberty and freedom of individual, to have socio-economic development in the right way and to avoid legislative tyranny.

The age through India is passing is the age of fluidity of life which is surrounded with extreme complexities and multitudinous diversities. India had developed an indigenous

[685] Shriram Sharma, "How India Is governed?" p. 146, Central Book Depot, Allahabad, 1954

system of constitutional polity, which had adopted judicial review of legislative Acts as well as Constitutional Amendments as a weapon of effective censor over constitutional lapses by the legislatures and Parliamentarians. India has to maintain federalism and has also to preserve inviolate the individual liberty and freedom. Toward such laudable aims Courts have to play the predominant role of the protector, guardian and sustainer of democracy.

Thus, judicial review is that effective remedy in India through which the Court by its awareness of socio-economic and political, condition of the country can maintain Indian federalism as well as Individual Liberty and freedom and relieve the people from legislative tyranny.

9.6 Judicial Review: Need Of The Hour

Modern Indian democratic system is a crucial mixture of combined British and U.S. models. is founded on the impact of English and American democracies. The cornerstone of our democracy is constitutional supremacy. Coke evolved the doctrine of judicial supremacy over the Crown and also over Parliament in Dr. Bonham's case. The doctrine of Coke echoed in the United States of America in the Federalist papers and Hamilton was the champion of the Constitution cum judicial supremacy on the spirit of Coke. But after Coke, John Locke became its greatest exponent, which instilled the spirit of judicial review.

Then the Supreme Court of America developed the cause of judicial review and the development of the American democracy largely hinges on it. India under its Constitution of 1950, evolved its democracy under the aspiration of English and American democracies, and judicial review has been an inseparable part of the Indian Constitutional jurisprudence. Indian Courts with patience and judiciousness decide the question of constitutional violation of legislative acts, and judicial review therefore, is the only safe and sure method to maintain Constitutional democracy. Therefore, if there been any defect in the system of judicial review, these have to be removed by rationale and prudent steps, but the institution of judicial review cannot be done away with or its role cannot be made less effective.

This is an age of great socio-economic and communal tensions. Political quarters want rapid and complete change in the social ideals. The notions of individual liberty and sanctity of private property have been receiving great onslaughts. Law must be in harmony with life and social and economic condition of the country, but any legislative enactment or any constitutional amendment under the pretence of social good, which in fact vitally affects the life and liberty of the people is directly against the spirit of the Constitution and cannot be a prudent political move.

The exercise of judicial review with such Constitutional tensions as in the present constitutional democracy is indeed a great challenge. Therefore, the judges and lawyers are required to be equipped with necessary knowledge of economic and social sciences so as to strengthen the arms of judicial review, for the protection of individual rights and liberties and for bringing

about social and economic justice. Thus, in the present Indian democracy, judicial review is far more necessary. However, what is urgently required is that the judges and lawyers must cultivate broad judicial outlook and also study social conditions, social ends, social economy and other alleged social sciences and politics in order to move abreast with rapid change in legislation so as to be able to scrutinize its disturbing or beneficial effects.

The Courts in India have larger problems to solve through judicial review. The Constitution of India is federal and court have to face the problem of scrutinizing various constitutional violations regarding federal power, such as distribution of power, federal finance and inter-state trade etc. The role of the higher judiciary in Indian federalism is also to maintain federal balance and, therefore, the constitutionality of legislative acts and of Constitutional Amendments have to be determined keeping in view the spirit of co-operative federalism, in order to create greater harmony in the federal democracy.

Another difficult problem is regarding fundamental rights. Rights guaranteed to the citizens of India by the Constitution cannot be violated by the legislature and when the legislative act in the form of any enactment or any Constitutional Amendment are violative of fundamental rights, the Court has to adopt a very firm attitude against it. The angel ion vision in the approaches of judicial review regarding violations of the principles of distribution of powers and that of fundamental rights is fundamentally different.

In the first case, the Court's spirit in federal democracy is to maintain federalism, but where the Constitutional violations

regarding distribution of powers are antagonistic to or violative of federalism itself, the legislative acts have to be declared void. But in case of violation of fundamental rights, there can be no tolerance and the court has to adopt a stronger attitude and such attitude of the court would lead to greater strengthening of democracy. In the matter of other violations of the Constitution also the Court has to scrutinize such violation with patience, since it holds the place of constitutional arbiter to safeguard the rights and strike balance between the authority and the citizen, the Union and the State and one State and the other. Further, the success of constitutional democracy depends much upon the skilful application of the power of judicial review with some elasticity and greater wisdom. There are so many constitutional silences that elucidation of these principles is very often necessary, and the Court has always to be alert that the legislature which is mere agent of sovereign people in the constitutional polity cannot enact any law which in effect may be subversive to the constitutional rights of the citizens of India.

Therefore the system of working of judicial review in India requires some elasticity and modifications. The Indian Court has to cultivate and evolve a more workable and adoptable method of judicial conduct and judicial restraint so as to achieve substantial and real solution to constitutional violations. The present system that the Court cannot raise any constitutional question suo moto in any legal process, when not raised by a party, even though the Court realizes that there are constitutional vices which require modifications is stale and against the policy and spirit of the Constitution.

9.7 Judicial Review: Justification

9.7.1 It maintains the system of check and balances

The Parliament or the State Legislatures make law in India. Similarly, the congress or State legislatures make law in the United States. If the law so made, is inconvenient with the Constitution, it is the judiciary, which can examine the validity of such law. The judiciary can declare it ultra vires the Constitution if it finds that that law is not in consonance with the Constitution. If the decision given by the judiciary is not acceptable to the legislature, it can amend the law so as to nullify the effect of such decision. The Legislature, the executive and the judiciary are the three organs of the state, which are bound by the Constitution. The members of the Parliament or the State legislatures, the President or the Governor and ministers represent the executive, and judges of the Supreme Court and High courts represent the judiciary in the country. All those who represent the executive, legislature or judiciary have to take oath prescribed by the third Schedule of the Constitution.

They swear that they will bear true faith and allegiance to the Constitution of India. It means all the members of the three organs of the state will act in accordance with the constitution. If they do not act so, there must be an arbiter to decide about the validity of their actions. The judiciary acts as such an arbiter. If the law passed by the legislature or the action taken by the executive is against the Constitution, the Supreme Court or the High courts have been authorized to declare the statute or subordinate legislation as unconstitutional. It is the system of

check and balances on legislature and executive on the one hand, and the judiciary on the other, by which mistakes committed by one, is corrected by the other and vice versa.

The study reveals that the other two organs of the State have accepted the authority of the Supreme Court to make a judicial review of their actions and the decisions of the Supreme Court are implemented by the executive. It may be possible that in any given case, the decision of the Supreme Court may be erroneous and may not be acceptable to the people. In such a case, either the Court itself may overrule its decision or the legislatures may amend the law or the Constitution so as to nullify its effect. The Supreme Court should not shrink from its duty to decide cases properly and it is no fault of the judges of the Supreme Court if other seeks to turn their decisions to political purposes.

9.7.2 Doctrine of Judicial Review as limitation on the democratic government

A Constitution of democratic Republican Government gives power to elected representatives to amend the Constitution. It also gives power to non-elected judiciary to review the law and the amendment in the Constitution made by the elected representatives. In other words judicial review has become a limitation on the democratically elected government. The duty of the judiciary is to implement the provisions of the Constitution while examining the validity of any law. In comparison to the legislatures and executives, the judiciary is in a better position to examine the constitutionality of the statute, and it is no reflection on the legislature or the government that their decisions are still to be reviewed by the judiciary. It is the

function of the judicial organs of the State to keep within constitutional limits the other two organs, namely, the legislature and executive.

9.7.3 Doctrine of Judicial review is the pre-requisite for the Federal system of Government

The federal system of Government is preferred in both the countries; i.e. India and U.S.A. The legislative powers of the federal government have always been divided between Center and States. In a federal system it is quiet possible at the time of framing laws the Center and the state legislatures may legislate outside the subject assigned to them, and in such a case the role of judiciary becomes important. The judiciary can declare that the law made by the union Parliament or the State legislature is not in consonance with the Constitution and therefore, may declare such law as unconstitutional. Therefore, in a federal system the power of judicial review is necessary for keeping the Center and the States within their respective jurisdiction.

9.8 Justification For Judicial Review Of Constitutional Amendments

The Constitutional Amendment in India can be classified into three categories:

1. Regarding Distribution of Powers'
2. Regarding Fundamental Rights, and
3. Regarding other matters.

Prof. K. C. Wheare has said about the safeguards in the constitutional Amendment as follows:

"Speaking generally it would seem that the amending process in most modern Constitution is aimed at safeguarding one or more of four objectives. The First is that the Constitution should be changed only with deliberation and not lightly and wantonly, the second is that the people should be given an opportunity of expressing their views before a change is made, the third is that in a Federal system, the power of the Units and of the Central Government is not alterable by either party acting alone, and the fourth is that individual or community rights for example, of minorities in language, religion or culture should be safeguarded. In some Constitutions one only of three considerations has operated, in others two or three or all four have had an effect."[686]

If the amendment be regarding division of powers between Union and the States, it requires the concurrence of the legislatures of at least half of the states. When the amendment is regarding fundamental rights, it also has to fulfill the test of Art. 13 (2) of the Constitution.

10 The Parliament and States Legislatures have limited amending power. The limited amending power is itself a basic feature of the Constitution and it can not be enlarged into an absolute power

[686] K. C. Wheare, "Modern Constitutions", p. 83, Oxford University Press, London, 1966

11 It is a cardinal principle of the Constitution that no one can claim to be sole judge of its power. It is the judiciary only which can decide about any violation of this principle.

12 All the three organs of the State have to remain within the limits determined by the Constitution. Any transgression of such limit would be violation of the Constitution and maintenance of democracy. Any amendment in the Constitution destroying this feature would be unconstitutional, as it would amount to a damage of the basic structure of the Constitution.

13 Limited judicial review is a part of basic structure of the Constitution and any exclusion of this power by Constitutional amendment would be against the basic structure of the Constitution.

14 The power of amendment of the Constitution should be coextensive with the judiciary's power of invalidation of laws made by the Parliament. Therefore, if the court declares any statute or part of such statutes invalid, the Constituent body must have power to invalidate the effect of the judgement of the judiciary. The judiciary has no power to invalidate to the constitutional amendment, but if such amendment is against the basic structure of the Constitution, the judiciary can declare such amendment as unconstitutional under its power of limited judicial review. It would not amount to robbing the power of Parliament as Parliament or the Constituent body has the limited power of amendment.

15 Article 368 of the Constitution cannot be used to abrogate the basic structure or framework of the Constitution or to damage or destroy the essential features of the Constitution.

16 Ultimate legal sovereignty resides in the people. The power to amend the Constitution is an application of the legal sovereignty. The concept of inherent and implied limitation stems from the basic structure.

17 If there is no limitation on the amending power of the Parliament, the consequences will be far reaching. It will be open to the Parliament to prolong its existence, to make India satellite of a foreign country, to do away with the Supreme Court and High Court, or to make the exercise of the power of amendment so difficult that no amendment would be possible.

18 The limited power of judicial review is an integral part of our Constitutional system, without it, there will be no government of laws, and the rule of law would become a teasing illusion and a promise of unreality.

9.9 Decisions Of U.S. Supreme Court Nullified By The Constitutional Amendments-Judicial Review Of Such Amendments Not Possible In U.S.A. But Possible In India

If any decision of the Supreme Court of India is not acceptable to the Parliament, it may nullify its effect either by making statutory amendment or by Constitutional Amendment. A question arises whether judicial review of such constitutional amendment is possible or not. If the amendment affects the basic structure of the Constitution, the Supreme Court can make judicial review and declare such amendments as invalid. As for example the following judgments of the Supreme Court and High Court were superseded by the Constitutional Amendment:

- ✓ In *Bela Banerjee case*[687], the Supreme Court decided that no law providing for compulsory acquisition or requisition of private property shall be called in question in any court on the ground that the compensation provided by law is not valid. This principle was superseded by Article 31(2) as amendment by the Fourth Amendment.

- ✓ In *Indira Nehru Gandhi v. Raj Narain*[688] the Allahabad High Court decided that election of Indira Gandhi for Lok Sabha was invalid, as she has adopted corrupt practices during her election. To undo the effect of this decision, Thirty-ninth Amendment was made in the Constitution, where under the jurisdiction of all courts over election involving the Prime Minister was withdrawn. The Supreme Court held that the free and fair election and judicial review were part of the basic structure of the Constitution, and, therefore, the Constitutional Amendment was unconstitutional. The effect of the above Constitutional Amendment was thus nullified by the Supreme Court.

- ✓ In *Northern India Caterers (India) Ltd. V. Lt. Governor of Delhi,*[689] the Supreme Court held that services of meals whether in Hotels or Restaurants does not Constitute a sale of food for the purpose of levy of sale tax and must be regarded as the rendering of service. In order to undo the effect of this decision the Constitution (Forty-sixth Amendment) Act, 1982 was passed by which the definition

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[687] State of West Bengal v. Bela Banerjee, AIR 1954 SC 170
[688] AIR 1975 SC 2299
[689] AIR 1967 SC 1581

of the term "tax on sale or purchase of goods" was inserted under clause 29 A of Article 366 of the Constitution. This definition has nullified all the previous interpretations given by the Supreme Court.

In United States, if Constitutional amendment is made to cure the effect of erroneous decision of the Supreme Court, no judicial review is possible to invalidate the constitutional Amendment. The U.S. Supreme Court has power to invalidate the statute. The Congress has the power to override the erroneous decision of the Supreme Court, if it is against the basic norms of the Constitution. The Eleventh Amendment was made to nullify the effect of Supreme Court's decision in Chisholm vb. Georgia.[690] Similarly the Sixteenth Amendment was made to reverse the Supreme Court decision in *Pollock v. Farmers Loan and Trust Company.*[691]

Researches have shown that the Constitutional Amendment to invalidate the Supreme Court decisions was never declared unconstitutional by the U.S. Supreme Court. On the other hand, 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 U.S. Supreme Court. The following justifications have become known after examining the relevant the decisions:

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[690] 2 Dall 419 (1793)
[691] 157 US 429 (1895)

- ❖ The constitution is supreme over the people of United States, aggregately and in their separate sovereignties because they have excluded themselves from any direct or immediate agency in making amendment to it, and have directed that amendments should be made representatively for them.
- ❖ There is no implied limitation on the amending power under the U.S. Constitution. The Supreme Court of the United States has no specifically pronounced on this question, although the implied limitation theory was rejected by the U.S. Supreme Court in the National Prohibition case.[692]
- ❖ The U.S. Supreme Court has rejected the implied limitation based on natural law, law of code, and spirit of Constitution or fear of abuse of unlimited power.[693]

9.10 Judicial Review: Pre-requisites

9.10.1 Popular Sovereignty and Constitutional Supremacy

The most essential pre-condition for judicial review is the concept of popular sovereignty and constitutional supremacy. Where Parliamentary Sovereignty prevails, as in England, there is no scope for judicial review. The Basic English Constitutional concept is that the people are the source of all powers, and they seized all essential constitutional powers from the monarch and reposed them in Parliament. But in India, as in America, the

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[692] 253 US 350 (1920)

[693] Renu Bhandari, "Judicial control of legislation" p. 378, University Book House Pvt. Ltd. Jaipur, 2003

concept of popular sovereignty prevails which means that the legislature is the mere agent of the sovereign people and as such any enactment by the agent of the people is liable to scrutiny in the court of law to ascertain which the impugned legislative enactment or constitutional amendment is against the mandate of the people incorporated in the Constitution. The popular sovereignty and constitutional supremacy are the fundamental features of the American democracy and India has adopted the same system in its republican Constitution of 1950.

9.10.2 Federalism

In a unitary state there is no division of sovereignty and as such there is no necessity of judicial review on this ground. In a federal state like India or America the sovereignty is divided between the Union and the States and legislative powers are separately allocated by the Constitution. The encroachment of legislative powers necessarily leads to confusion and dead-lock and as such there is a constitutional check on the encroachment of the topics of legislation specifically distributed between the Union and the States. The legislative enactment in violation of the arrangement made in lists I and II i.e., the Union and State lists renders law completely void.

9.10.3 Fundamental Rights

As in India and in the United States of America, if the fundamental rights are guaranteed in the Constitution, the legislature has no right to enact law violating such rights. Unlike India, American Constitution does not lay down specific

provision for judicial review, yet by judicial verdicts it has been established that the violation of individual rights by legislative enactments can be remedied by judicial review.

9.10.4 Delegation of Essential Legislative Power

Though there is no ear-marked separation of powers in India or America, yet it is very much clear that law-making function is assigned to the legislative alone. Therefore, the legislature has no jurisdiction and legal authority to delegate its essential legislative function to the executive or administrative body or even to other legislature. Such delegation makes the delegated legislation void. In growing complaxities of political life functions of the legislature have inordinately multiplied, as such to delegate certain non-essential legislative functions with adequate guidance is constitutionally permissible but excess in delegation of legislative powers becomes the matter of judicial review.

9.10.5 Other Constitutional Restrictions and Prohibitions

In the Constitution of India, as also in the Constitution of America, there are various other constitutional limitations, which the legislature has to obey in its law-making function and any violation of such constitutional mandates becomes a matter of judicial review.

9.10.6 Violation of the Principle of Natural Justice

It is manifestly clear that the violation of the principles of natural justice in the executive, administrative, quasi-judicial

and judicial acts becomes the subject matter of judicial review. Here the important aspect is whether the legislature has legal authority to enact laws that may be violative of the principle of natural justice.

9.10.7 Constitutional Amendments in Violation of the Constitution

It is the unique feature of the functioning of the doctrine of judicial review in India, in which, the Supreme Court of India has extended its judicial review power to the constitutional amendment made by the parliament. Constitutional Amendment has also been considered as law under Article 13 of the Constitution; it has also become the subject matter of judicial review in India. The Parliament has no authority to make constitutional amendments in violation of the constitutional mandates. Such amendments if made, become the subject matter of judicial review.

9.11 Dangers Of Democracy And Creative Functions Of Judicial Review

In democracy the tyranny by the majority is a great peril. Often the majority misuses its power. And the power often generated tyranny and the tyranny of majority is the great threat to freedom and liberty. In the modern system of democracy election is the predominant phase of choosing the rulers. The party system is its great adjunct. It often happens that in India many do not turn up at the polls due to paucity of political and constitutional awareness in the people. It also happens that the members who are elected by one party turn out defectors or

revolters and join another party and betray their electorate by such immorality. In such conditions of turmoil and power-hunger there is no possibility of a well-planned programme of legislation. Besides, even if there be no defection, generally whims and caprices of the majority in power dominate the legislation. The institution of judicial review comes to the rescue of such danger to liberty.

9.12 Creative Role Of Judicial Review

Liberty can be understood as the absence of human interference with the legal exercise of one's power. Legislative interference on individual liberty is also human interference and the Court is the proper authority to relieve the people from unauthorized legislative interference on liberty. In many countries, Constitution is not administered in accordance with the ideals, which they profess, and rights and liberties generally receive great jerks. If we take the case of India, in the Indian Constitution civil liberties and rights both are incorporated in the Chapter on Fundamental Rights, part of which are injunctions on the government not to do certain things and another part of injunctions to respect the rights of the citizens. In India, Fundamental Rights are the result of longstanding agitation of the people, since 1885. The protection of such right is secured and the perils of democracy and the tyranny of the majority are averted only by the system of judicial review. Therefore, adherence to the doctrine of judicial review is the only convenient and effective method of giving redress to the people. Real democracy therefore, lies in legislative action counter-balanced by the judicial verdict.

9.13 Enlargement Of The Scope Of Judicial Review In The Case Of Non -Guaranteed Fundamental Rights

In the case of non-guaranteed Fundamental Rights, the judiciary may have to tackle such problem and to solve it, not in the routine manner of rejecting, but by working with great patience, fertility of judicial interpretation, calm and judicial balance. The Court will have to hold today or tomorrow that even those rights, which are not guaranteed, but are natural and unavoidable, are fundamental and have to be protected by the court in judicial review. It is observed that the scope of judicial review will be widenining day to day so as to give genuine relief to the party in litigation and also thereby in protecting and upholding democracy to bring about socio-economic progress.

9.14 Supreme Court In The Process Of Rewriting The Constitution

It is well-established fact that from *Keshavananda*[694] to *Kihoto Hollohan*[695], the Supreme Court of India has added a long list of essential features in the ever-expanding catalogue of the basic structure. On a perusal of this catalogue we find that over half of the provisions of the Constitution have been covered. It is further expanding. The Supreme Court has refused to foreclose the list of essential features. It has reserved the right of expansion as and when situation demands. Supreme Court is very anxious to protect essential features of basic structure, to be evolved by it from time to time. It appears that the Constitution is not more

[694] AIR 1973 SC 1461
[695] (1992) 1 SCC 309

important but the essential features of the Constitution are more important. By evolving the theory of basic structure of the Constitution, the Supreme Court has added the following unwritten proviso below Article 368.

> "Nothing in the above amendment will be deemed to have authorized An amendment of the Constitution, which has the effect of damaging or destroying the essential features of the basic structure of the Constitution, as may be determined by Court from time to time."[696]

Research reveals that the Supreme Court has taken in hand the task of rewriting the Constitution, which is certainly not within its domain. It has tried to read what has not been written in it. By doing so it has defeated the intention of the founding fathers. The judges take their oaths to defend the Constitution, not as originally enacted but as it is in force having been amended from time to time.[697] No Court should, therefore, have power to declare a provision of the Constitution as unconstitutional and in fact, in no country of the world, Courts have power to strike down a constitutional amendment. Prof. Tope has rightly said that the theory of basic structure is nothing but judicial legislation.[698] Constitution should not be used to defeat the Constitution.

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[696] (1973) 4 SCC 225
[697] R. C. S. Sarkar, "Judicial Review", in the framework of Indian Politics, p. 112, 1983
[698] T. K. Tope, "Constitutional law of India", p. 440, 1982

9.15 Judiciary Is The Guardian Of The Constitution And Is Not The Third Chamber

The judiciary is sometimes called as the third chamber. The reason for such a misnomer is that a law passed by the two houses of the parliament or the Congress is declared invalid or contrary to the basic law of the land by the judiciary. The power of U.S. Supreme Court to declare the statutes of the Congress as unconstitutional is sometimes called as 'judicial supremacy' because the court has the authority to declare the actions of the other branches of the government as invalid. Section 25 of the Judiciary Act, 1789 has expressly provided that the Supreme Court could review the case decided by the State courts where the unconstitutionality of the state statue was at issue. Article VI clause (2) of the U.S. Constitution has also given power to the Supreme Court to exercise judicial control over the legislative actions. While exercising this power the Supreme Court can examine only the Constitutionality or legality of the statute, but it cannot go into the merits of the decision. On the other hand that legislature not only commands the purse, but also enacts statutes, rules, regulations by which the rights and duties of the people are regulated. On the contrary judiciary has no influence on the purse or sword or regulatory power of the legislature. It has only power to give judgement and that too depends on the executive for its execution.

In the Constitution of India, the Supreme Court or the High courts have been given power to examine validity of the statute. But the Court has not been given power to assume the legislative function a third chamber. During the course of debate in the constituent Assembly, Pandit Nehru said:

"Within limits no judge and no Supreme Court can make it self a Third Chamber. No Supreme Court and no judiciary can stand in judgments over sovereign will of the Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately, the whole Constitution is a creature of Parliament. But we must respect the judiciary, the Supreme Court and other High Courts in the land."[699]

9.16 Ill Effects Of Judicial Review

Judicial Review leads to some ill Consequences also. Sometimes judiciary also errs. Therefore, in judicial review there is a great responsibility on the judiciary to avert any palpable blunder, which may affect the nation. Some instances from American Constitutional history are noteworthy. Chief Justice Taney in Dred Scott case while declaring the Missourrie Compensation Act ultra vires. Held that slaves are chattels and there was no compensation provided in the Act and such Act was unconstitutional. Thus, Chief Justice Taney, without going into the importance of human liberty gave such decision, which is considered as a great judicial perversity. This was manifest lack of judicial vision and national outlook. It has also been noticed that sometimes he people develop the spirit of fault finding with

[699] IX Constituent Assembly Debates, p. 1195

regard to legislative action and also become suspicious about the legislation or any constitutional amendment only due to doctrine of judicial review in the Constitutional policy.

9.17 Judicial Review And Judicial Restraint

Avoidance of constitutional lapses and legislative tyranny is the fundamental object of judicial review. In the sphere of judicial review, court has to apply its mind with judicial vision and insight, sympathy, idealism and national spirit and is not to fell too much fettered by the doctrine of judicial restraint. The court is not to interpret the Constitution in a literal, dry and mechanical sense. The Constitution deserves to be interpreted with a dynamic outlook and broad vision of life and the judge as to go deep into the life of the nation and the spirit of the Constitution.

To adopt a narrow view in judicial review would cause great hardship to the nation and it is likely to create misery to the people under the pressure of legislative tyranny. From far going discussion of earlier chapters, we observe that in India the spirit of rational dynamism has been cultivated in the domain of judicial review to have a reasonable check on arbitrary legislation as well as on unworthy constitutional amendments. This culture of dynamism in judicial review is necessary not for judicial supremacy but for maintaining the balance of democracy and to harbinger peace and harmony in the country. After the New Deal period in the United States of America there developed an abnormal sterility in judicial review due to the growth of the idea of 'judicial restraint', but in the Warren era the Supreme

Court of the United States of America changed the outlook and retraced from giving undue weight to the concept of the 'judicial restraint' in the domain of Judicial Review of legislative Acts. In India rigid doctrine of Judicial Self-Restraint is not any way helpful in advancing the cause of democracy and innovation in the doctrine of Judicial Self-restraint is expedient and necessary.

9.18 'Unconstitutionality' and Judicial Self-Restraint

The simple meaning of the word 'unconstitutional' with reference to legislative enactment or constitutional amendment is a statute or constitutional amendment contrary to or repugnant to the Constitution. A statute is unconstitutional if it is enacted in the absence of legislative competence, in violation of fundamental rights guaranteed in the Constitution or in violation of other constitutional restrictions and limitations, while constitutional amendment is unconstitutional if it is violative of fundamental rights or not fulfilling requirement of Article 368 or in violation f any other constitutional mandates.

Unconstitutional Statute can be classified into two categories.

1. Statues which are stillborn i.e. which have no legal existence since their enactment or in other words since their birth.
2. Other kinds of unconstitutional Statutes were valid originally, that is at the time of their birth but subsequently become invalid due to some subsequent constitutional provisions.

The first kind of Statutes are of no legal effect from their birth as they were enacted in the absence of legislative competence. The second kind of Statues are not void from their birth, as they were enacted validly but they became subsequently unenforceable. The effect of unconstitutionality of a Statute id that it is void and is no law, it confers no right, it imposes no duties, it affords no protection, it creates no office, and in legal contemplation it is assumed it was never passé. However, the legislature has subsidiary legislative power to validate an invalid legislative law in certain circumstances. But if the law is still-born or void from its birth, it cannot be validated under the subsidiary powers of legislature. The validating Act can also be challenged as ultra vires and unconstitutional.

In declaring the Statute or Constitutional Amendment unconstitutional, the Court generally adopts some judicial self-restraint in this matter.

i. The Court does not anticipate a question of constitutionality in advance.
ii. The Court does not decide the question of constitutionality unless absolutely necessary.
iii. The Court does not declare a statute void in doubtful case.
iv. The Court decides constitutionality only when the party raising the question of unconstitutionality has some tangible interest to be safeguarded.
v. The Court does not express constitutional opinion suo moto.
vi. The Court des not entertain constitutional question at the instance of a volunteer.

vii. The Court does not entertain constitutional question at the instance of a person who has derived some benefit from the statute impugned.

viii. Court does not declare a Statute or Constitutional Amendment unconstitutional merely on sentiment or on a personal view.

ix. The Court respects the legislative view as far as possible but cannot shirk from its duty of determining constitutionality imposed upon it by the Constitution.

x. The Court is not to be enslaved by its past constitutional decisions if the circumstances and conditions require reconsideration of the previous constitutional decision.

xi. The Court does not involve itself in unnecessary political thicket, but this does not mean that the Court would avoid giving its decision on constitutional matter under the shelter of political question.

The foregoing discussion has attempted to analyze the most conspicuous among the various types of limitations on the functioning of the doctrine of judicial review. In this regard the inquiry was mainly concerned with the questions whether:

- The judiciary has confined itself within the limitations imposed by the legal system; and
- It has adopted a consistent and wise policy in relation to auto-limitation in the working of the area of judicial review.

If we start discussing the functioning of the doctrine of judicial review in the area of constitutional amendments, it starts from the very First Amendment. The dangers of over-enthusiastic assertion of jurisdiction, despite exclusion, are revealed in relation to Article 31 is discussed in Chapter 5. Here the persistent refusal of the judiciary to respect the legislative intention has resulted in the deletion of the Fundamental right to property. The failure of the judiciary to evolve a social concept of property relevant to the Indian context may be said to be the main reason for the deletion. It remains to b seen whether the judiciary will resume its attempt to revitalize the right to property by ingenious interpersonal techniques.

Article 31 A was originally intended to afford protection to certain laws connected with land reforms, though its scope was later expanded to cover laws relating to other matters of social welfare. The early attitude of the judiciary was to restrict interpretation of the terms like 'modification' and 'estate'. The test of agrarian reforms, which does not find any place in the Constitution, was also used as device to assert judicial power. But in late years, though the test is not found to be totally abandoned, the judiciary has been imaginative enough to expand the content of 'agrarian reforms' to limit judicial incursions into the area. Such a wholesome approach in the area of Article 31 A has averted confrontation on several occasions.

Moreover, Article 31 B along with Schedule IX has been used by Parliament as a convenient device to avoid the inconvenience of judicial review. The contents of the Schedule have swelled into enormous proportions over a period of years, as statutes are

included in the Schedule without any rhyme or reason. BY making the basic structure theory, propounded in Keshavananda Bharati, applicable to test the validity of legislation included in the Schedule, the judiciary has asserted the power to impose a qualitative check on the contents of Schedule IX. The present position is such that in certain situations the inclusion of a statute in the Schedule becomes a futile legislative exercise if such statute is not protected either by Article 31 A or Article 31 C.

The failure of judiciary to give the Directive Principles the role it deserved in the constitutional scheme has led to the insertion of Article 31 C, which was originally intended to protect any laws giving effect to the Directive Principles in clause 9 (b) or (c) of article 39 from challenges based on Articles 14, 19 and 31. While the policy underlying Article 31 C was upheld the attempt to oust judicial review was not accepted.

Moreover, Article 368, which confers on Parliament the power to amend the Constitution, produced the battle royal between Parliament and the Court. In early phase, the court adopted an attitude of restraint and conceded unlimited power to Parliament to amend the Constitution. The controversial decision in *Golaknath* marked a volte-face. Parliament's reaction to *Golaknath* found expression in the Twenty Fourth Amendment which declared that "Parliament may in exercise of its Constituent power amend by way of addition, variation or repeal any provision of the Constitution in accordance with the procedure laid down in this Article." But the theory of limited amending power advanced by the Court in *Golaknath* was revived in the modified form in *Keshavananda*, which held that

Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution. By sustaining the power of Parliament to amend Fundamental rights, the rigidity of *Golaknath* sought to be reduced; by introducing the concept of 'basic structure' the scope for judicial review of amendment was also retained. The flexible concept of 'basic structure' was intended to provide ample leeway to the judiciary to check the abuse of amending power. Parliament was not satisfied with limited amending power and enacted the Forty-second Amendment, which sought to remove the limitations on amending power and to place it beyond the reach of judicial review. Ironically, the Amendment, which sought to nullify the basic structure test was it, self nullified by an application of the test. The discussion in Chapter 6 clearly points out to the need for leaving the power of amending the Constitution entirely to the legislators, uninhibited by any limitations other than procedural. This is an area where the Court should have no say.

Three specific areas where the judiciary professedly adopts an attitude of self-restraint have been examined in Chapter 7. The attitude in relation to political questions has been ambivalent. The interpersonal device of presumption of constitutionality, a manifestation of judicial self restraint, has been adopted by the Courts, but its application in some cases has been in such a manner as to defeat the very purpose of the rule. The outlook and value judgments of the individual often become decisive. In reviewing discretionary powers of the administration the courts have rightly adopted an activistic stance when the right to personal liberty or the rights of workers have been involved. But extension of such activism to other areas, especially rights affecting property, cannot be justified at least when it is opposed

to the policy and scheme of the statute, object and scope of the discretionary power and the nature of the rights or interests affected by the decision. Judicial activism being an exception rather than a rule in relation to the control of discretionary powers, need strong reasons the interventionist strategy may provoke the other branches of government to retaliate and impose further limitations on the scope of judicial review.

In the end, one may not be able to provide conclusive answers to the questions broached at the outset. This is because the court has been inconsistent in its attitude to limitation, whether external or self imposed. This inconsistency may the product of the lack of a clear perception of the judicial role, or due to the ever-changing personnel of the highest court of the land and frequent changes in the composition of the Benches. The brief tenure of the Supreme Court judge is another impediment to laying down and maintaining uniform policies and attitude. It is also possible that the bewildering array of complex problems confronting the highest judiciary in quick succession may not have left enough repose and tranquility for it to shape such a consistent policy. Apart from this, there seems to be no other plausible explanation for the enthusiastic assertion of jurisdiction in some cases, despite clear legislative intention to the contrary, and a total surrender of jurisdiction in situations not warranting it.

9.19 Suggestions

9.20 Judicial Review: Rules of Conduct

9.20.1 Necessity of Establishing Well-defined Rules of Conduct

In India, when judicial review is a constitutionally recognized institution, it is necessary that the rules of conduct of judicial review should be properly formulated and defined. There should be some crystallized process for judicial restraint and for the conduct of judicial review. The rules of judicial review are all scattered in the reported cases based mostly on foreign decisions. But it is expedient that the rules of conduct be prepared on the basis of the Indian and foreign decisions and be published by the Supreme Court on the suggestions of a judicial commission consisting of the Judges of the Supreme Court, Attorney General of India, Chief Justices of the High Courts, Advocates General of the States and prominent members of the Bar, who after a thorough consideration of the matter would evolve and formulate rules of conduct for the use of the Supreme Court and with slight variations for the use of the High Court proceedings. If such steps are taken and all the relevant cases of Supreme Court of India and the important cases of Indian High Courts and also relevant foreign decisions are surveyed, they may afford a good guide in evolving the rules of procedure of judicial review. This action may be of tremendous assistance to the Bench and the Bar in India and also to the legislators and the general public and it is expected that the Supreme Court of India may take initiative action in this matter.

9.20.2 Suo moto action by Court

Indian Courts follow the pattern of American systems in which judge cannot decide the constitutionality of legislative acts or constitutional amendments Suo moto but only when a party raises this question and if it is necessary to decide of the case. Therefore it is purely a matter of chance that unconstitutionality of a statute or of constitutional amendment can be a subject matter of judicial scrutiny. Much depends upon the adaptability and caliber of the lawyers who handle the case. Even if a law n a particular case be unconstitutional and determination of the case be necessary it may escape scrutiny under the present rules of conduct, if it does not strike the lawyer to raise the question of constitutionality.

In the United States of America, judicial review was not specifically provided in the Constitution and unconstitutionality was declared only through the decision of the case, even prior to Marshall and also predominantly in the regime of Marshall and so the convention grew in America of deciding constitutionality of a legislative Acts only through the law suit. But, in India, since the Constitution provides judicial review and Article 32 itself is a fundamental right, there is no reason why the American tradition should not be broken? In India to challenge the constitutionality of any legislative Act on the ground of violation of fundamental rights is itself a fundamental right. It follows therefore, that any citizen of India should be able to challenge a legislative Act on mere apprehension, without being actually aggrieved by it. So. Court should take Suo moto action in any lawsuit, during the hearing of a case.

When the judicial review is the recognized institution, it appears most reasonable that in India the system of challenging it must undergo some reasonable modifications which will not diminish the cause of democracy, but rather considerably enhance it, and if such step is taken by the Indian judiciary, it may be a matter of emulation also in other parts of the world. It is desirable that India should take necessary lead in this matter. We should not copy the vices of others, but should benefit from the beneficial workings in other countries. It has been rightly said-"All countries like India, which is latecomers in the field of Constitution-making, should not copy the faults of other countries. They should profit by the experience of their predecessors."[700]

Indian Courts should consider the elasticity in the scope of working of judicial review and it should be most expedient if some innovations are made in the scope and the method of judicial review.

9.20.3 Individualism and Judicial Review

It should always be fruitful to have group behaviour inn the constitutional decisions. But if the matter be repugnant to the conscience of any individual judge, he has to work in isolation, as his responsibility and oath of office is individual.

Judicial decision on constitutionality has its foundation on mental outlook, social, intellectual and moral environments of the individual judge, but often the individuality of judge, merges

[700] B. Shiva Rao, "The Framing of India's Constitution", p. 102, Select Documents, Vol. II, 1967

into group considerations and in view of the broader outlook of the matter the cumulative thinking and considerations generally predominate over that personal idiosyncrasies of the individual judge.

9.21 Judicial Review, Judicial Activism And Policy-Making

According to Charles Black, "Once it is recognized that judicial decisions are not the mechanical expressions they were once thought to be, it is clear that all judges, in all cases, make policy to some degree, and that the Court, so long as it performs the task of judicial review, must function to some extent and in some ways as one of the policy-making organs of the nation."[701] Now, judicial activism means that the judges should have a collusive, deliberative function, showing broad scope of judicial review, which tends to judicial policy making. This is taking of progressive view in judicial review. Judicial activism is holding a more progressive view in favour of declaring a statute unconstitutional and by such decision the court rather functions as if formulating a policy.

By being activist, the court's philosophy is that the legislature should function strictly and truly as an agent of the sovereign people in order to establish democratic balance. It should not create legislative imbalance and it should be cautious in avoiding constitutional violations. They hold the view that undue tolerance in unconstitutionality would create disharmony and annoyance and instead of preserving the democratic balance, it would lead the country to a great catastrophe. Wallace

[701] Charles Black, "The People and the Court" p. 167, The Macmillan Co., New York, 1967

Mendelson has given good picture of judicial activism in the domain of judicial review:

> "A judicial activist, for example does not deny the orthodox duty of respect for community values when the meaning of the Constitution is less than clear. He seems, however, to have a special gift for dissipating doubt. Where others are uncertain, he is apt to find unmistakable guidance in the plain words "or the" clear intention of the Founding fathers, or in history itself, or in some 'higher law'. So too, when his preferred values are at stake, he is apt to ignore or even reverse the presumption of constitutionality. Since all this is done in the service of justice he apparently feels no qualms in ignoring 'legal; technicalities' i.e. what in other context, we call the Rule of Law."[702]

9.22 Judicial Review Of Constitutional Amendments Leads To The Judicial Supremacy

The doctrine of basic structure has taken birth only because the Supreme Court has presumed that the Parliament's power of amendment is limited whereas the power of judicial review is unlimited. According to the Court its power is not confined to the judicial review of legislative acts only but also extends to the constitutional amendments. The Indian Supreme Court is the only Court in the world to have acquired the power of judicial

[702] Wallace Mendelson, "The Supreme Court Law and Discretion", p. 15, The Bobbs-Merrill Co. Inc., U.S.A., 1967

review of constitutional amendments on the ground of inherent and implied limitation.

Researches have shown that the U.S. Supreme Court, which innovated the doctrine of judicial review in *Marbury v. Madison*[703], has also restrained itself from declaring the constitutional amendments as unconstitutional, on the ground of implied and inherent limitations.

However, the Supreme Court of India has gone to the extent of applying the doctrine to the constitutional Amendment though amendment is essentially a policy matter, which a Parliament alone is competent to decide. Again, the amendment is essentially a political question, which cannot be the subject matter of value judgment by the Court.[704]

Perhaps India is a unique democratic set-up where Court has blocked the Parliament from amending the certain essential provisions of the Constitution unknown to the parliament.[705] Rajeev Dhavan has rightly points out that Keshavananda had pushed judges into open politics.[706] Prof. P. K. Tripathi has gone to the extent of asking the Court; "Will it also contest election?"[707] Justice Dwivedi has very aptly remarked:

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[703] (1803) 1 Cranch 137; 2 L. Ed. 60

[704] M. K. Bhandari, "Basic Structure of the Indian Constitution", p. 353, Deep and Deep Publication, 1993

[705] Anirudhh Prasad, "Democracy, Politics and Judiciary in India" p. 131 1983

[706] Rajeev Dhavan "The Basic Structure Doctrine-A Footnote Comment" in Indian Constitution-Trends and Issues p. 178

[707] P. K. Tripathi, "Rule of Law, Democracy and frontiers of Judicial Activism" p. 36, JILI; 1975

"Judicial review of constitutional amendments will blunt the people's vigilance, articulateness and effectiveness. True democracy and true republicanism postulates the settlement of social, economic and political issues by public discussion and by vote of people's elected representatives, and not by judicial opinion. The Constitution is not intended to be an arena of legal quibbling for men with long purses. It is madder for common people."[708]

Hence, the judicial review of constitutional amendment, no matter how we may gloss over it, is basically undemocratic concept.[709]

9.23 Concluding Suggestions

From the forgoing discussion, researcher humbly submits the following suggestions:

- In India, whenever the Parliament amends the Constitution to implement socio-economic policy, the amendment is challenged in the Supreme Court on the ground that the essential feature of the basic structure of the Constitution is damaged. So, from case to case the Supreme Court creates new essential feature and declares that the amendment has damaged an essential feature of the basic structure and, therefore, is invalid.

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[708] (1973) 4 SCC 225

[709] M. K. Bhandari, "Basic Structure of the Indian Constitution", p. 354, Deep and Deep Publication, 1993

This amount to judicial paralysation of the Parliamentary functions. The U.S. Supreme Court has not extended its power of judicial review to the constitutional amendments, whereas in India, the Supreme Court has expanded its power to the constitutional amendments. Now the question is if an amendment, which has become the part of the Constitution, is liable to be struck down because it had struck down the basic structure of the Constitution, then every amendment made for the welfare of the down trodden would necessarily come under the pruning knife of the Supreme Court. Therefore, it is suggested that in the areas of welfare legislation, the Supreme Court should not paralyse the Parliamentary functions, and must accept the constitutional amendment made for the welfare of the people.

- It would be erroneous to hold the view that the any Constitution lacks any basic structure. In fact, every Constitution is based on certain philosophical foundations, which runs through the entire fabric of the Constitution. The study on the concept of basic structure reveled that the constitution cannot be divided into basic and non-basic features. The entire constitution constitutes the basic structure at any point of time or to put it differently, the basic structure is contained in each and every provision of the Constitution and is spread over in the Constitution as a whole. The fact that the framers of our Constitution did not provide for certain unalterable does not constitute deficiency or weakness of our Constitution. The essential features of the Basic

structure should not be regarded as the stumbling block in the progress to reform.

- Whenever the Constitutional amendments were made so as to limit their power of Supreme Court, the Supreme Court has always declared such amendments as invalid on the ground that the Parliament has no absolute power of amendment and within its limited power, the Parliament cannot take away its judicial review power. However, the Supreme Court had not defined the periphery of its limited power of judicial review. And Judiciary should not convert its limited power into an absolute power of judicial review and should not work as a third chamber.

- In the United States, after the New Deal period, there developed an abnormal restraint in the area of judicial review, but latter on in Warren period the Supreme Court changed its outlook and refused to give undue importance to the concept of judicial restraint. Now the U.S. courts believe that they have responsibility to make their responsibility to make their influence felt in other branches of government. In India, the doctrine of judicial restraint was not given importance by the Supreme Court and instead has adopted the view that it can determine the constitutionality of statutes and constitutional amendments. The legislatures make law, the executive enforces them, the judiciary interprets them, and each organ should restraint its power. In India, it has become necessary because the Supreme Court itself has accepted that separation of powers and limited power of judicial

review as essential features of the basic structure of the constitution.

- The Constitutions of United States and India have been framed in the name of "we the people". The system of referendum as a process of constitutional amendment has been wholly excluded in United States and India. In both the countries the Constitution is supreme over the people, because the people have excluded themselves from any direct or immediate agency in making amendment to the constitution and have directed that amendment should be made representatively for them in the constitution. The amendments made by the representative of the people are therefore, respected by the judiciary in the United States on the ground that the people of United States participate in the process of amendment representatively. Based on this analogy, the U.S. Supreme Court has held that the Constitutional amendment is not subject to judicial review. The Parliament and State legislature in India are no less representative of the will of the people when they participate in the process of the amendment of the Constitution of India. It is therefore, suggested that the Supreme Court of India should reconsider its earlier decisions and declare that the Constitutional amendment are no within the scope of judicial review as the amendments are made representatively by the people of India. It is even more necessary when the concept Parliamentary democracy has been declared a part of the basic structure of the Constitution in Keshavananda Bharati case. Our democracy is based on faith in the

elected representatives. The theory of inherent and implied limitations is, therefore, a repudiation of the democratic process.

Constitution is road to progress. It is, therefore, necessary to keep the road well maintained so that the vehicle of progress may undertake smooth journey. If Parliament and judiciary both adopt the path of self-restraint, we hope the occasion for invalidation of constitutional amendments would not arise and retention of the basic structure doctrine would no more be justified. We must either learn to trust the amending process or repose our faith in non-elected judges who will monitor every exercise of the plenary power of amendment with a yardstick of basic structure, which is, in the ultimate analysis, of their own choice.

Judiciary is the only branch of the government in which still the people have faith and confidence. Politicians and civil servants have, largely speaking, forfeited the trust of the people. Morality of the judges is higher than the morality of the politicians. Through judicial review power of judiciary has earned greater credit, but it has also increases its responsibility to the people.

Having considered all these pros and cons, one may conclude that while the Courts must be progressive in their outlook, they have a definite function to perform in a democratic society. The judiciary as an institution is indispensable in a democracy. However, at this juncture, one thing is to be remembered judiciary may be citadel of democracy; they are not substitute of it. We need extremely capable, honest and independent

judges, may statesman, to handle this enormous power of judicial review in the interests the people of India.

Song of the Supreme Court

"We are nine judicial gentlemen who shun the common herd;
Nine official mental men who speak the final word;
Like oysters in our cloisters, we avoid the storm and strife;
Some President appoint us, and we'e put away for life;
When congress passes laws that lack historical foundations;
We hasten from hurdle and reverse the legislation;
The sainted Constitution, that great document for students;
Provides an airtight for all our jurisprudence;
So don't blame us if now and then we seem to act like bounders;
Blame Hamilton and Franklin and patriotic founders."[710]

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[710] Vide M. K. Bhandari, Basic Structure of the Indan constituion, p. 356 Arthur, L. Lippmaan, in the Former Life Magazine, Vol. 102, p. 7 Quoted from Anirudh Prasad, "Democracy, Politicas and Judiciary in India" p. 134