

Judicial Review of Legislative actions: A study with reference to the principles formulated by the Indian Judiciary in the context of Judicial Review of Amending Power of the Parliament.

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“I am of the view that if there is one feature of our Constitution which, more than any other is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution”- Justice Bhagwati

Introduction

A legal interpretation of constitutions of countries implies the supreme law of a nation, an underlying normative document that is the source of all other secondary normative documents i.e., statutes, delegated legislation, and ordinances. When these secondary norms do not fit in with the constitution, the courts or constitutional tribunals are compelled to declare such laws unconstitutional. Judicial or constitutional review relates to this procedure.² Judicial Review, therefore, is one facet of the power conferred to the judicial bodies in a nation, which is applied by judicial bodies to establish the legitimacy of a law or an action of the state or any agency thereof. In the legal framework of modern democratic countries, it has very wide implications. The judiciary performs a critical role as guardian of the values enshrined in the constitution that the founding fathers have given to the people. They attempt to negate the harm that is caused through actions of the legislature or executive. They also make an effort to offer to every citizen whatever is guaranteed through the Constitution. All the aforesaid becomes possible due to the power vested in the judiciary in form of judicial review.

The Republic of India is blessed to receive a constitution which provides for fundamental rights and for the safeguarding which a judiciary has been established

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² The Blackwell Encyclopedia of Political Institutions, (1987), page 142.

which is independent and acts as custodian of the constitution and guardian of the liberties of the people and hence provides ammunition against any force of authoritarianism. In a pure form of democracy, provision for a courageous, objective, and impartial judiciary is vital and therefore its importance of it cannot be over-estimated. Judicial review is an outcome of two of the most basic aspects of the Constitution of India. The first, two-tier system of legislation mandated: the constitution which functions as the Supreme law of the land, and law as in ordinary legislation, the validity of which is dependent on conformity with the constitution. The other is the division of the legislative, executive, and judicial functions of the state. gaining powers from the constitution, the legislatures in India enact statutes. There is a two-prong limitation on the legitimacy of any statute, i.e., competency of the legislature and conformity of the constitution.

Meaning of Judicial Review:-

The term 'review' implies any action of inspecting or examining anything to correct or improve the same. This demonstrates that anything previously done by any person whose correction or improvement is envisaged in the meaning of 'review'. 'review' in 'judicial review' implies an action by a competent judicial body to assess the validity or accuracy of an action of an agency. Thus, the authority of the Judiciary to review and establish the validity of any normative law or any executive order may be defined as the power of "Judicial review". It implies that the constitution is the '*supreme law of the land*' and any law not in conformity therewith shall be void. 'Judicial Review' legislation or executive action can be defined as "Judicial review is the ultimate power of any court to declare any act of legislatures or executives as unconstitutional and hence unenforceable as a) any law. b) Any official action based upon the law and c) any other action by a public official that it deems to conflict with the constitution."

In *L. Chandra Kumar vs. Union of India*³, the Supreme Court of India held that "Henry J. Abraham's definition of judicial review in the American constitution is, subject to a few modifications, equally applicable to the concept as it is understood in Indian constitutional law. Broadly speaking judicial review in India comprises three

³ (AIR 1997 SC 1125)

aspects. Judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action.”

Thus, Judicial Review is defined as *‘the power of the court to hold unconstitutional any law or official action that it deems to conflict with the basic law or the Constitution.’*⁴ Professor Henry J Abraham describes Judicial Review as “the power of any court to hold unconstitutional and hence unenforceable any law, any official action based upon it, any illegal action by a public official that it deems to conflict with the Basic Law.”⁵

Theoretical perspectives of amending power and interpretation:-

In an ordinary sense word ‘amend’ means ‘to improve’. However, when it is used in the context of a constitutional amendment, its meaning becomes quite technical as well comprehensive. Thus studied, the phrase ‘constitutional amendment’ covers anything relating to modification, addition, or subtraction of any part that affects the body of the fundamental law of the land. The term ‘amendment of the constitution has both wider and narrower implications; it has technical as well as ordinary senses also. It is a different matter that its technical or particular meaning is invoked while dealing with the issue of changing a constitution. Thus, the constitutional amendment means making any improvement in or removing any defect of the fundamental law of the land, even if it amounts to the very abrogation of its real form, then a question arises as to whether there should be some limitations, express or implied, on the power of amending it or not.

As in the case of ordinary legislation in the case of constitutional amendments also depends upon the view taken by the court in interpreting the legislation, and in interpreting the amendment the courts are guided by certain well-known principles. These principles are the principles of interpretation that are relevant not only to the exercise of judicial power in determining the rights and duties of individuals but also concerning the powers and procedures of public authorities in the matter of making the laws. Further, some principles are such that they have their origin in foreign jurisdictions and they are followed by the courts if they suit our conditions. In some cases, the courts have refused to follow the principles of the foreign jurisdiction.

⁴ Ferguson & McHenry: The American Federal Government, Ed. X., p. 12

⁵ Abraham: ‘The Judicial Process’, page 251

The Principles followed by the Courts in the United States of America and India regarding Judicial review of amending power

I. Principles formulated by the American Supreme Court:-

As described by Chief Justice Marshall, the founder of the Judicial Review in the United States, in the leading case of in *Marbury v. Madison*⁶, “It is emphatically the province and duty of the judicial department to say what the law is ... If then, the courts are to regard the Constitution, the Constitution is superior to any ordinary act of the legislature; the Constitution and not such ordinary act must govern the case to which they both apply.”

Thus, the Judicial Review is a creation of the American Supreme Court at the hands of Chief Justice Marshall. Ever since 1803, the ‘American judiciary has made use of this power in several leading cases that have gone to lay down the following principles of judicial review:

1. Before the court will glance at the particular issue or a dispute, a definite ‘case’ or ‘controversy’ of law or inequity between bona fide adversaries under the Constitution must exist involving the protection or enforcement of valuable legal rights, or the punishment, prevention, or redress of wrongs directly concerning the party or parties bringing the judicial suit.
2. The party or parties bringing a suit must have a ‘standing’.
3. The court does not render advisory opinions.
4. The court will not entertain generalities; it will deal with specific and particular issues;
5. The party bringing a suit must be a sufferer and not a gainer by the challenged statute;
6. All other remedies must have been exhausted before coming to the Supreme Court;
7. The question under study must be a substantial and not of a trivial nature;
8. The question of fact, as distinct from a question of law, is not normally accepted as a proper basis for the exercise of judicial review;
9. The Court may change its views from time to time;

⁶ 5 US(Cranch)137(1803)

10. The Court will not entertain political controversies; it will be concerned with legal aspects alone;
11. The Court will begin with the presumption that the statute under challenge is valid;
12. The Court will not ordinarily impute illegal motives to the lawmakers;
13. The Court may declare the whole law or its part as invalid;
14. The Court is not to be used as a check against inept, unwise and unrepresentative legislation;
15. If the court finds that it must hold a law unconstitutional; it will usually try hard to confine the holding to that particular section of the statute which is successfully challenged on constitutional grounds;

II. Principles formulated by the courts in India

A study of the cases decided by the Supreme Court and the High Courts of India shows that the following principles are inferable from the exercise of power by them in our country in the context of Judicial Review of the amending power. These principles have been invoked by the Courts even concerning matters of examining the ordinary legislation apart from the amendments made to the Constitution and this is because of the sound logic involved in the approach of the Court.

1) Principle of Legislative Competence:

This principle is also called the Principle of Pith and Substance. This principle implies that there is in India a written constitution that defines in detail the powers of the Legislature; the Judiciary is therefore authorized to see whether the impugned legislation falls within the scope of the powers of the law-making body or not. It follows that the Courts in India have the power to pronounce upon the validity of a law on the ground of the excess of legislative powers. While interpreting the Constitution the Courts may look into the matter of whether such and such powers fall within the legislative competence of the Union or state legislature either by the express or even by that of an implied version of the Constitution.

In *Chaturbhai M. Patel v. Union of India*,⁷ the Supreme Court held that the power to legislate on any subject carries with it the power to legislate on an ancillary matter which can be said to be reasonably included in the power given. It is within the competence of the Parliament to provide for matters which may otherwise fall within

⁷ AIR 1970 SC 424

the competence of the State legislature if they are necessarily incidental to a subject of legislation, expressly within its powers.

2) **The Principle of Severability:**

While interpreting a law challenged before the Court, the Courts see whether the law as a whole or any of its parts is unconstitutional. If the Court finds that the impugned law, as a whole, is bad, it can declare it ultra vires of the Constitution; it can declare so in the case of a part only and allow the rest as an operative. The crux of the matter depends on whether a valid part can be separated from the invalid part. The Court will decide such a matter on the construction of the provisions of the law in question.

from the above-mentioned cases and other such cases decided by the Hon'ble Supreme Court of India When a law is partly valid, the valid part of the law will remain enforceable and the part which is declared to be invalid can be severed from the other. It is wouldn't matter here for the implications of such rule if the invalidity of the law is the result of the subject matter being outside legislative competence or for the reason of breach of fundamental rights.⁸

3) **The Principle of Progressive Interpretation:**

One of the important questions arising before the reviewing court is whether the provisions of the Constitution should be understood in the light of the conditions that existed at the time of the making of the Constitution or that they should be given a broader construction from time to time to include newer circumstances arising with the development of social and economic life of the people. Fortunately, the Judiciary in India has been guided by the principle of progressive interpretation and therefore the learned judges have as far as possible avoided, what Sir Maurice Gwyer said about his Federal Court, "the spirit of formal or barren legislation". It is due to this that the Supreme Court does not bother much about what the members said in the Constituent Assembly on this or that occasion.

Shortly after its creation, the Supreme Court in the case of the *State of Travancore Cochin and others v. The Bombay Company Ltd*⁹ observed that the speeches made in the Constituent Assembly 'cannot be used as aids for Constitution'. The same view

⁸ G. N. Joshi: Aspects of Indian Constitutional Law, p. 218

⁹ 1952 AIR 366,1952 SCR 1112

was reiterated in the *Bela Bennerji case*¹⁰. Similarly in the case of the *Senior Electric Inspector v. Laxmi Narayan Chopra*¹¹ the Supreme Court observed that unless a contrary intention appears, an interpretation shall be given to the words used taking into view facts and situations if the words are capable of comprehending them.

4. Principle of Dynamism

The principle above stated is supplemented by the principle of Dynamism, which has the meaning that the exercise of the power of judicial review in our country is not bound by the doctrine of stare decisis. That is, the courts are not bound by their earlier affirmations. They may change their views or precedents from time to time while making a dynamic interpretation of the provisions of the Constitution. In other words, they pay heed to the judicious warning of Justice Hughes of the American Supreme Court that one must not expect from this Court the icy stratosphere of uncertainty. The Supreme Court of India has taken this important view that the interpretation of law should be one in a dynamic way so that it may reconsider its previous rulings and also depart from them if so necessary as there is nothing in the Constitution binding it to the principle of stare decisis.¹²

5. The principle of primacy of the letter of the Constitution:

The principle had its special connection with Article 13 (2) saying that no law can prevail in the country that contravenes the provisions of Part III of the Constitution dealing with our Fundamental Rights. It is very clearly laid down in Article 13 (2) that such a law shall be void to the extent of being inconsistent with the Fundamental Rights of our Constitution. The Fundamental Rights guaranteed by the Constitution are not of an absolute character. They may be subjected to 'reasonable restrictions in the interest of morality, order, public health, national security and the like. The legislature is, therefore empowered to lay down restrictions on the enjoyment of fundamental rights. However, it is the function of the Courts to examine whether the restrictions imposed by law are inconsistent with the tenor of the provisions of Part III or not. It is under this special arrangement that the Supreme Court has invalidated several important laws made by the Union and State legislatures concerning Right to Property, in particular,

¹⁰ Smt. Bella Banerjee v. the State of West Bengal, 1954 SCR 558

¹¹ 1962AIR 159,1962 SCR (3) 146

¹² Bengal Immunity Company v. The State of Bihar, AIR 1955 SC 661.

and that has since become the main source of confrontation between the executive-cum-legislative and judicial departments.¹³

In India, it is the Constitution that is supreme and the Parliament, as well as State Legislature, must not only act within the limits of their respective legislative spheres as demarcated in three lists occurring in the Seventh Schedule of the Constitution, but Part III of the Constitution guarantees to the citizens' certain fundamental rights which the legislative authority can on no account transgress. A statute law to be a valid must in all cases conform with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not.

6. Principle of Primacy of Spirit of the Constitution

Since our Constitution is a written document it is expected that the courts will be guided by the words contained herein and generally not try to go into the spirit. In the Gopalan case,¹⁴ Chief Justice Kania observed that “the courts are not at liberty to declare an Act void because in their opinion it is opposed to the spirit supposed to pervade the Constitution but not expressed in words”. Though the view of Justice Kania has been sustained by the learned Judges in several cases it is seen that in several instances the courts have given significance to the spirit of the Constitution. It is for this reason that the courts have invalidated ‘colourable legislation’ they have held ‘ancillary legislation’ as good. The enunciation of the principle of the basic structure of the Constitution is a pointer here.

The principle of ‘the spirit of the Constitution’ finds its place in the efforts of the Court to read into and between the lines. The plausible conclusion in this regard should be that though the Courts cannot go against the letter of the Constitution, they can renounce this approach if the written rules of the Constitution are silent on a particular issue.

7. Principle of Prospective Over-ruling

The *Golak Nath vs. State of Punjab*¹⁵ holding has an importance of its own in laying down the principle of prospective over-ruling more or less on the lines of American constitutional jurisprudence. It envisages that a law declared invalid by the Court may

¹³ Smt. Bella Bannerji and others v. The State of West Bengal, 1954 SCR 558.

¹⁴ A.K. Gopalan v. State of Madras AIR 1950 SC 27

¹⁵ AIR 1967 SC 1461

not necessarily affect transactions and vested rights before but may operate only for transactions and rights arising after the judicial invalidation. It is based on the premise that rather than disturbing the past transactions, the new view of the interpretation of law adopted by the courts is to make the law effective as regards future transactions only. Thus, the Court ruled that while previous constitutional amendments amounting to the curtailment of fundamental rights were bad, they could not be made inoperative as much work had already been done by the State. But in the future no such amendment could be made.

*“While ordinarily a Court will be reluctant to reverse its previous decisions it is its duty in the constitutional field to correct itself as early as possible, for otherwise the future progress of the country and happiness of the people will be at stake. As it was clear that the decision in Shankari Prasad's case was wrong, it was pre-eminently a typical case where this Court should overrule it. The longer it held the field the greater the scope for erosion of fundamental rights. As it contained the seeds of destruction of the cherished rights of the people, the sooner it was overruled the better for the country.”*¹⁶

But the court also takes precaution in enforcing the judgment with retroactivity because of the implications involved in the case.¹⁷

This is what had happened in the Golak Nath case. The Constitution (Seventeenth Amendment) Act, 1964, since it took away or abridged fundamental rights was beyond the amending power of Parliament and void because of contravention of Art. 13(2). But having regard to the history of this and earlier amendments to the Constitution, their effect on the social and economic affairs of the country, and the chaotic situation that might be brought about by the sudden withdrawal at this stage of the amendments from the Constitution it was undesirable to give retroactivity to this decision. The Golak Nath case was therefore a fit case for the application of the doctrine of "prospective. Overruling, evolved by the courts in the United States of America."¹⁸

¹⁶ I. C. Golaknath & Ors vs State of Punjab & Anrs 1967 AIR 1643

¹⁷ The Superintendent and Legal Remembrancer State of West Bengal v. The Corporation at Calcutta, [1967] 2 S.C.R., 170

¹⁸ [805 E; 807 E, G; 808 C-D] Great Northern Railway v. Sunburst Oil & Ref. Co. (1932) 287 U.S. 358: 77 L. Ed. 360, Chicot County Drainage v. Baxter State Bank, (1940) 308 U.S. 371, Griffin v. Illionis,

The doctrine of "prospective overruling" is a modern doctrine suitable for a fast-moving society. It does not do away with the doctrine of *stare decisis* but confines it to past transactions. While in Strict theory it may be said that the doctrine 'involves the making of law, what the court does is to declare the law but refuses to give retroactivity to it. It is a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds the law and that it does make law. It finds law but restricts its operation to the future. It enables the court to bring about a smooth transition by correcting, its errors without disturbing the impact of those errors on past transactions. By the application of this doctrine, the past may be preserved and the future protected.

Our Constitution does not expressly or by necessary implication speak against the doctrine of prospective overruling. Articles 32, 141, and 142 are designedly made comprehensive to enable the Supreme Court to declare the law and to give such directions or pass such orders as are necessary to do complete justice. The expression 'declared' in Art. 141 are wider than the words 'found or made'. The law declared by the Supreme Court is the law of the land. If so, there is no acceptable reason why the Court, in declaring the law in supersession of the law declared by it earlier, could not restrict the operation of the law as declared to the future and save the transactions whether statutory or otherwise that were affected based on the earlier law.

8. Principle of Empirical Adjudication

This principle implies that while exercising the power of judicial review; the courts do not deal with hypothetical situations or cases. The matter brought before a court must be 'concrete' so that it may not be required to indulge in abstract principles. The Court seeks to confine its decision, as far as may be reasonably practical, within the narrow limits of the controversy between the concerned parties in a particular case.¹⁹

9. The Principle of Indirect Judicial Review

(1956) 351 U.S. 12, *Wolf v. Colorado*, 338 U.S. 25 : 193 L. Ed. 872, *Mapp v. Ohio*, 367 U.S. 643 : 6 L. Ed. (2nd Edn.) 1081 and *Link letter v. Walker*, (1965) 381 U.S. 618,

¹⁹ *Sukhdev v. Bhagatram* AIR 1975 SC 1231

Sometimes a peculiar situation may arise when an impugned provision of law is capable of two possible interpretations. In one case it may be taken as good, in another as bad. In such a situation, the Court will take a positive constructive and not a negative or destructive view. Here, the Court so tries to interpret the law that its validity is sustained in a way as far as possible. In a case, instead of holding the impugned law invalid under article 14 on the ground of lack of procedural safeguards the Supreme Court read natural justice into the law and sustained its validity. It quashed the order made thereunder because of the denial of natural justice for the petitioners.²⁰

10. The presumption in favour of the constitutionality

When the constitutional invalidity of any law is challenged, the Court will not hold it to be ultra vires unless the invalidity is clear beyond all doubts, for there is always a presumption in favour of its validity. The court will begin with this presumption that the legislature does not exceed its powers, nor does it make any law that is inconsistent with the letter and spirit of the Constitution. While examining the constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to the problems which are manifest by the experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted.

In various cases like those of *Chiranjitlal Chaudhary vs Union of India*²¹, *F. N. Bulsara v. the State of Bombay*²² and *Hamdard Dawakhana v. the Union of India*²³ the Supreme Court has reiterated its view that the presumption is always in favour of the constitutionality of an enactment.

11. Non Application of Foreign Principles :

The Courts in our country are not bound to follow foreign precedents while exercising the power of judicial review. For instance, the functioning of the parliamentary government at the Centre cannot be bound by the principles of English constitutional law.²⁴

²⁰ State of Mysore v. Bhat AIR 1975 SC 596

²¹ AIR 1950 SC 41

²² 1951 AIR 318, 1951 SCR 682

²³ AIR 1960 SC 554.

²⁴ U. N. R. Rao v. Indira Gandhi, AIR 1971 SC 1002

In the Gopalan Case, the Supreme Court refused to read the American concept of 'Due Process of Law' into the 'procedure established by law' as given in Article 21 on the ground that when the same words are not used, it will be against the ordinary canons of construction to interpret a provision in our Constitution following the interpretation put on a somewhat analogous provision in the Constitution of another country where not only the language is different but the entire political conditions and constitutional set up are dissimilar."

12. The Principle of Locus Standi

This is a principle regarding which the law in India has made a lot of strides. In quite a good number of cases involving the administrative action as well as the legislative action of the State, the question of *locus-standi* has been debated in the cases and the general view taken by the Courts in this regard may be highlighted thus:

The principles and practices of the English, the American and the foreign courts have had their influence on the Indian Courts, which is an important feature of the system of Judicial Review as it exists in India.

In the famous Transfer of Judges Case certain Advocates had challenged the action of the Government of India in the matter of the appointment of Judges and Transfer of Judges. In this case, the question was whether the petitioners who are advocates can file these petitions for the reliefs mentioned therein under Article 226 or Article 32 of the Constitution has got to be considered. The contention is that members of the Bar who are not personally affected by the circular letter of the Law Minister, by the appointment of certain additional Judges for short-terms of three months or six months, by the non-appointment of any of the additional Judges after the expiry of the tenure fixed under Article 224(1) or by the non-appointment of sufficient number of Judges of the High Courts or by the transfer of some Judges have no *locus-standi* to file these petitions. It is contended that neither qualitatively nor quantitatively these petitioners have sufficient interest to prosecute these petitions the result of which would not affect them either directly or even indirectly.

The Supreme Court in its preliminary remarks observed that: "*the attitudes of the courts on the question of locus standi do not appear to be uniform. They vary from country to country, court to court, and case to case. Sometimes the tests applied by courts also vary depending upon the nature of the relief sought. In some cases, courts*

have taken a very narrow view on this question holding that unless an applicant has either personal or fiduciary interest in the result of the application, no relief can be granted on his application even though it may appear that the impugned action or omission of the administrative authority concerned is not in accordance with law. The other extreme view is that the courts may in their discretion Issue mandamus to an administrative authority at the instance of any member of the public. A close scrutiny of the authorities and texts cited before the Judges showed that neither of the two extreme views is accepted as correct in majority of the cases. It is also seen that in many of them the courts have found some sort of special interest in the applicant who distinguishes him from the general public before granting the relief prayed for by him. A person who has a genuine grievance on account of an action which affects him prejudicially is ordinarily considered to be eligible to move the Court.”

13 The Theory of Basic Structure

The constitutional validity of the Twenty Fourth and Twenty-Fifth amendments was challenged before a full bench of the Supreme Court (thirteen judges). The Apex Court overruled its previous decision given in *Golaknath* by a majority of 7:6 and agreed that Parliament can amend any part of the constitution including the fundamental rights. But it imposed a theory known as “Basic structure theory”. According to this theory, Parliament can amend any part of the constitution including the fundamental rights, but it cannot destroy the basic structure of the constitution, now what would constitute the basic structure was not defined by the Supreme Court. Nevertheless, the concept of 'basic structure' of the Constitution gained recognition in the majority verdict. All judges upheld the validity of the Twenty-fourth amendment saying that Parliament had the power to amend any or all provisions of the Constitution. All signatories to the summary held that the *Golak Nath* case had been decided wrongly and that Article 368 contained both the power and the procedure for amending the constitution.

The minority view

The minority view delivered by Justice A.N. Ray (whose appointment to the position of Chief Justice over and above the heads of three senior judges, soon after the pronouncement of the *Kesavananda* verdict, was widely considered to be politically

motivated), Justice M.H. Beg, Justice K.K. Mathew and Justice S.N. Dwivedi also agreed that *Golaknath* had been decided wrongly. They upheld the validity of all three amendments challenged before the court. Ray, J. held that all parts of the Constitution were essential and no distinction could be made between its essential and non-essential parts. All of them agreed that Parliament could make fundamental changes in the Constitution by exercising its power under Article 368.

In summary, the majority verdict in *Kesavananda Bharati* recognized the power of Parliament to amend any or all provisions of the Constitution provided such an act did not destroy its basic structure. But there was no unanimity of opinion about what appoints to that basic structure. Though the Supreme Court very nearly returned to the position of *Sankari Prasad VS Union of India*²⁵ by restoring the supremacy of Parliament's amending power, in effect, it strengthened the power of judicial review much more.

Critical Evaluation of Judicial review

Judicial review since its development in the famous case of *Marbury v/s Marshal* is facing one or more challenges. Judicial review was considered undemocratic on the ground, that it is giving too much power to the judiciary to review and limits the Parliament from its amending power. Parliament is representing the will of the people and the judiciary is not so. Hence the will of the people cannot be curtailed at the cost of judicial review. Even in the wordings of Rajiv Dhawan “*Kesavananda* pushed the judges into open politics”. According to Sunder Raman, “the decisions in *Kesavananda* and *Golaknaths* cases were unfortunate, as they have greatly affected the contemporary constitutional history of India and have brought the judiciary in confrontation with the legislature”. But on the other hand, judicial review is protecting the supremacy of the constitution and thereby democracy. The article published in *Hindu* on 23rd April 2013 specified the *Kesavananda* case as “*the case that saved the Indian democracy*”.

Recommendations

My recommendations on the two themes of the research are as follows:-

²⁵ 1951 AIR 458,1952 SCR 89

- 1) The amending power should be used sparingly to formulate a new policy concerning the system of government. Where the amendment pertains to important matters of the State Administration the limitations as laid down in the Constitution and the Judgments of the Supreme Court must be observed. In no case, the Basic Structure of the Constitution should be disturbed. The theory of Basic Structure has received the approval of society; so much so the sanctity of the theory must be maintained. Of course, the elements of Basic Structure must be formulated by a proper discussion of the matter.
- 2) As far as the power of Judicial Review is concerned it may be stated that we may arrive at two balanced points of conclusion. First, no part of the constitution should be defined as unamendable and the job of discovering the area of limitations, express or implied, should not be performed by the courts as if done provocatively. It may be added that if the Parliament cannot alter or destroy the basic structure, so the courts cannot. Since power resides with the people it is they who should remain vigilance and see that the deputies elected by them in a fair and free manner work within the lines drawn by the Constitution. As Prof. P. K. Tripathi says, "It will be some irony if a Court so severely concerned with saving the 'essential elements of the basic structure of the Constitution should end up with destroying the most essential and basic principle of constitutional law, namely, that the restrictions, if any, on the power of the amendment of a sovereign constitution can be imposed only by the Constituent Assembly or its nominee, the amending authority, both of whom operate upon the Constitution and not by a court which operates under the Constitution and be subject to it."

It is necessary to pay respect to the theory that the Courts are there to declare the law and not to make the law. Judicial Legislation should be avoided to the extent it is possible; on the contrary, the judicial interpretation for the sake of giving a proper interpretation to the provisions of the law should be adopted.