Chapter 7

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Observations and suggestions:

Judicial behaviour has always been regarded as a national autobiography of any nation’s civilization and culture. Therefore, the needs of a scientific study of the various determents which go into the shaping of judicial behaviour cannot be over emphasized. Unfortunately very little endeavour appears to have been made to undertake such a study. However, whatever little has been done does not suggest any empirical research technology without which such a study has always remained on theoretical plaint only.1

In the previous chapters I have made sincere attempt to consider the role of judiciary for safeguarding the fundamental rights. For that purpose I discussed the concept of fundamental rights, history of fundamental rights, the

provisions of the Indian Constitution, comparative position in other countries as well as I considered different decisions of the Apex Court for considering its approach. After perusal of different decisions of the Apex Court I observed changes in Judicial behaviour. I observed Judicial activism, Judicial inactivism and sometimes Judicial over activism.

Sir, Alladi Krishnaswami Ayyar had predicted with great vision way back in 1949 that, "The future evolution of the Constitution will to a large extent depend upon the work of the Supreme Court and the direction given to it by the court...From time to time in the interpretation of the constitution, the Supreme Court will be confronted with apparently contradictory forces at work in the society for the time being while its main function may be one of interpreting the Constitution as contained in the instrument of the government, it cannot in the discharge of its duties afford to ignore the social, economic and political tendencies of the times which must furnish the necessary background It
has to keep the poise between the seemingly contradictory forces”. ²

"Parliament is the supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the laid, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments.”³

Over the period of last four decades, the Apex Court has transformed from the role of ‘interpreter of law’ to the role of ‘maker of laws’. The Supreme Court has become increasingly people – oriented in its post emergency phase.

² The Supreme Court of India and Its Constitutional Importance, Alladi Krishna Swami Aiyar AIR 1949 Journal 36
³ Prof. Dicey AV, The law of the Constitution
The most striking feature of the post emergency Supreme Court is the degree to which it cut down even the pre-eminence of legislative and constituent power – by a direct attend to redress people’s miseries. As eminent jurist Upendra Baxi observes, there are traces of the middle class right wing radicalism in much of the Court’s recent work.⁴

In the old days, the courts had to discharge only traditional judicial functions like interpreting and applying the law made by the legislatures. However a wide variety of factors have prompted the judiciary in the modern world, to deviate from their traditional role. The days of the judiciary merely finding of declaring the law, have fast disappeared in most of the countries. The judicial law making has become an incontrovertible and undisputed reality. The judiciary in the modern constitutions, came to exercise a majority of the following functions either by exercising a power under an express grant of power or by an implicit sanction:

(i) Interpretation of the constitution.

⁴ Upendra Baxi: the Indian Supreme Court and Politics, Lucknow, 1980 at P.No. 248
(ii) Protection of the federal character of the state;

(iii) Guarding and protecting the fundamental rights of the citizens;

(iv) Testing the validity of legislative and executive action of the state.

(v) Interpretation of the Laws made by legislature and

(vi) Determination of the validity of amendments made to the constitution, the supreme law of the land.\(^5\)

Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and the executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercising the power of judicial review, the only check on the judiciary is self imposed discipline of judicial restrain.\(^6\)

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5 Judicial Activism in India, Dr. G.B. Reddy First Edition
6 (Asif Hameed Vs State of J & K, AIR 1989 S.C. 1899, para 17)

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The judicial enthusiasm of the Supreme Court has also extended the meaning of life in Article 21, by giving a recondite meaning to it. "Life" today means "not merely animal existence or continued drudgery through life but the finer graces of human civilization which makes the life worth living". The court has widened the ambit of "personal liberty" under Article 21 and has extended the same to even the prisoners, convicts, bonded labour, juveniles and also to the prostitutes. As a result of the liberal interpretation of the Supreme Court, over a period of the last two decades, "law, under Article 21 now means a valid and reasonable law, "procedure" means just, fair and reasonable procedure and" right to life" means the right to live with basic human dignity. At present, as a result of the humanitarian interpretation of Article 21 by the Supreme Court, it guarantees almost 30 different kinds of implicit human rights, legal rights, social rights and also remedial rights......The Court’s progressive attitude in interpretation of the “life and ‘personal liberty’ has led to the establishment
of the principle that the right to equality including the right against arbitrariness and discrimination under Article 14, the right to freedoms under Article 19 and the right to life and personal liberty under Article 21 are interrelated, intertwined with each other and that they cannot be applied in isolation with other rights. This principle helps in testing the legislative or executive action of the State not only on the ground that it violates only one fundamental right but also all the aforementioned fundamental right. Thus all the express fundamental and human rights recognised by the American Constitution and the Canadian Constitution, have been read and interpreted as part and parcel of the right to life and personal liberty guaranteed under Article 21 of the Constitution. In a way such judicial behaviour of the Indian Supreme Court can be described as the judicial amendment of Article 21 in Part III of the Constitution of India.........The Supreme Court of India has made immense contribution through its activism, in transforming many of the directive principles into fundamental rights, thus making
them justiciable in a court of law. In a way, what the courts cannot do certain things directly, they have tried to get them done indirectly. While the court confined to the restatement of the equation between Part III and Part IV of the Constitution up to 1980, it has directly interpreted many of the directives like securing Equal pay for equal work, protection of rights of children, right to free legal aid, right to health care of citizens, right to education and right to pollution free environment, as apart and parcel of the judicially enforceable fundamental rights, after 1980. They have been read down as part of the right to life and personal liberty guaranteed under Article 21 of the Constitution. This judicial development can be described as the most conspicuous exercise of judicial activism. The court has also demonstrated its urge to see that there is a Uniform Civil Code, as contemplated under Article 44 of the Constitution.

For more effective protection of fundamental rights what is necessary is the independence of judiciary.

7 Judicial Activism in India, Dr.G.B. Reddy First Edition
Article 50 enjoins that the State should take steps to separate the judiciary from the executive. Article 214 provides that there shall be a High Court for each State or a group of States. Article 217 posits that every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, etc., who shall hold office until he attains the age of 62 years. A Judge one appointed can vacate office by tendering his resignation or on his elevation to the Supreme Court or transfer to another High Court or on being removed from office by the President in the manner provided by Article 124(4), i.e. after an address by each House of Parliament supported by a majority of the total membership of that House and by majority of not less than two thirds of the members and voting has been presented to the President. The removal can be on the ground of proved misbehaviour or incapacity. Article 219 expects every person appointed to be a Judge of the High Court to make and subscribe an oath of affirmation according to the form set out in the Third
Schedule. That form is Form VIII which inter alia requires the Judge to swear in the name of God or to solemnly affirm that he would truly and faithfully and to the best of his ability and judgment perform his duties without fear or favour, affection or ill will. These words clearly indicate that the judicial functions must be discharged without being influenced by extraneous considerations. Independence and impartiality are the two basic attributes essential for a proper discharge of judicial functions. A Judge of a High Court is, therefore, required to discharge his duties consistently with the conscience of the Constitution and the laws and according to the dictates of his own conscience and he is not expected to take orders from any one. Since a substantial volume of litigation involves Government interest, he is required to decide matters involving Government interest day in and day out. He has to decide such cases independently and impartially without in any manner being influenced by the fact that the Government is a litigant before him. In order to preserve his independence his salary
is specified in the Second Schedule, vide Article 221 of the Constitution. He, therefore, belongs to the third organ of the State which is independent of the other two organs, the Executive and the Legislature. It is, therefore, plain that a person belonging to the judicial wing of the State can never be subordinate to the other two wings of the State. A Judge of the High Court, therefore, occupies a unique position under the Constitution. He would not be able to discharge his duty without fear or favour, affection or ill will, unless he is totally independent of the executive, which he would not be if he is regarded as a Government servant. He is clearly a holder of a Constitutional office and is able to function independently and impartially because he is not a Government servant and does not take orders from anyone.\footnote{\textit{Union of India Vs. Pratibha Bonnerjee, AIR 1996 SC 693, para.6}}

The principle of independence of the judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values.
It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned national charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary, which is a separate but equal branch of the State, to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. The judiciary has therefore a socio-economic destination and a creative function. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective.

Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold
the core principles of the rule of law which says "Be you ever so high, the law is above you". This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution.\(^9\)

There is no need or justification, in order to uphold and protect the independence of the judiciary, for construing Article 222 (1) to mean that a Judge cannot be transferred from one High Court to another without his consent. The power to transfer a High Court Judge is conferred by the Constitution in public interest and not for the purpose of providing the executive with a weapon to punish a Judge who does not toe its line or who, for some reason or the

\(^9\) S.P. Gupta Vs. President of India, AIR 1982 SC 149
other, has fallen from its grace. The extraordinary power which the Constitution has conferred on the President by Art. 222 (1) cannot be exercised in a manner which is calculated to defeat or destroy in one stroke the object and purpose of the various provisions conceived with such care to insulate the judiciary from the influence and pressures of the executive.\(^\text{10}\)

The opinion of the Chief Justice of India in the process of constitutional consultation in the matter of selection and appointment of Judges to the Supreme Court and the High Courts as well as transfer of Judges from one High Court to another High Court is entitled to have the right of primacy. Like the Pope, enjoying supremacy in the ecclesiastical and temporal affairs, the CJI being the highest judicial authority, has a right of primacy, if not supremacy to be accorded, to his opinion on the affairs concerning the 'Temple of Justice'. It is a right step in the right direction and that step alone will

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\(^{10}\) Union of India Vs. Sankalchand Himmatlal Sheth, AIR 1977 SC 2328
ensure optimum benefits to the society. The judiciary may be the weakest among the constitutional functionaries, for the simple reason that it is not possessed of the long sword (that is the power of enforceability of its decisions) or the long purse (that is the financial resources), but if the opinion of the executive is to prevail over, the opinion of the CJI in matters, concerning judiciary on account of that reason, then the independent judiciary which is a power of strength for all - particularly for the poor, the downtrodden and the average person confronting the wrath of the Government, will be a misnomer.\textsuperscript{11}

To ensure an effective working of judicial review, it is necessary to keep in forefront the history of our Constitution itself, geographical conditions, social structure, economic development, social and religious composition of the people of India, the needs of the time, the history of the impugned legislation, necessity of its enactment, the ethical

\textsuperscript{11} Supreme Court Advocates on Record Association Vs. Union of India, AIR 1994 SC 268
background as well as its social effects, and as also its impact on individual citizens. All these combine to facilitate a right conclusion about the constitutionality of law in the process of judicial review. It is always to bear at the back of our mind that where the system of judicial review prevails, it contributes greatly to the constitutional development of the country, social stability and the progress. The Courts, however, adopt judicial self-restraint in discharging their functions of judicial review in order to maintain harmony between the Judiciary, the Legislature and the Execution. The power of judicial review of legislative Acts vested in the High Courts and Supreme Court, must be exercised with wisdom and self-restraint and not in a spirit of cold war between Parliament or State Legislatures and Courts. Non-interference with the view of the majority in Parliament with regard to what is reasonable and interference with what is prohibited by the Constitution may perhaps, be harmonious path for peaceful transition for glorious future. Of course, it cannot be denied that the harmonious working of the
Judiciary, the Legislature and Executive would always advance the cause of democracy. In any written Constitution, sovereignty vests in the people as represented by three wings - the Legislature, the Executive, and the Judiciary and no wing can claim supremacy over any other wing. Their spheres are well defined with balances and counter-balances. When we angulate the problem in this true spirit and perspective, there may be no occasion for conflict; on the other hand, it would develop mutual respect and harmony in otherwise grueling joints. The tradition of judicial self-restraint requires some workable change. Certain innovations in the scope of judicial review require attention, and as such, in India, the role of the Apex Court and of the High Courts is that of nation-builders. They have to evolve indigenous and more democratic system of judicial review, which may be helpful in lessening hyper sensitivity and resolve social tensions. The judicial review keeps the law on even keel, enables the citizens of this great democracy to live in a free and just society with pride and dignity of person; strengthens
respect for judicial review; creates salutary effect on social weal. Realistic and luminous efforts on the part of our judiciary articulates the correct perspective with glory would certainly elongate the aspirations of the people. The task of judicial review for constitutional judges is really heavy and onerous, but the working of judicial review with vigilant and searching mind would greatly lighten the burdens. Unconstitutionality of a statute or executive action may arise from violation of principle of distribution of powers or separation of powers; violation or suppression of fundamental rights or freedoms; or violation of some constitutional limitations/restrictions.12

So long as Constitutional democracy prevails, judicial democracy is sure to have a firm stand. The judiciary needs to be firm in its performance of duty and enforcement of the constitutional obligations; and the result of its decision must be towards the ultimate benefit of the nation. The Court

12 S.S.Bola Vs. B.D.Sardana, AIR 1997 SC 3127
should always be Sentinel on the qui vive as the guardian of the rights, liberties and fundamental freedoms of the citizens of India. The judiciary cannot forsake its constitutional duty to determine finally the constitutionality of an impugned statute/action. India owes its great heritage to America for the modern concept of judicial review. Indian statesman, founding fathers of the Constitution and the Judges of this Courts made the concept of judicial review a living reality to our nascent sovereign, secular, socialist democracy to help the plant of fundamental freedoms grow and blossom social, economic and political democracy with equal status and dignity of person to all, rich or poor alike to flourish and operate the law on even keel. The plant of judicial review has grown into a clear vision, more healthy plant by introducing several judicial principles like basic structure, and due process of law with protective discrimination in the Constitution itself as viable principles. Judicial review, thus, has a great impart on the social structure of India. It has helped to develop the personal rights of the individual, be it
rich or poor, treating them alike as per needs and has strengthened social, economic and political democracy as well... Besides protecting the individual's rights, the Court, by upholding the validity of the law, has advanced social and economic progress, agrarian reforms and social justice and economic empowerment. The judges, therefore, are per force judicial statesmen.\(^\text{13}\)

In discharging the functions of judicial review the Apex Court and the High Courts have constitutional duty and obligation to interpret the Constitution to enable all citizens enjoy the rights and fundamental freedoms and foster availment of facilities and opportunities for individual and collective excellence so that nation constantly rises to higher levels of endeavour and achievements; declare the law as unconstitutional if found to be contrary to the Constitution; to protect the fundamental rights and fundamental freedoms guaranteed by the Constitution, maintain and observe federal
structure built in by the Constitution and harmonious relationship between the Union of India and the States or the States inter se if they go against delegation of essential legislative powers by the Legislature to the Executive; maintain the balance between the Executive and the Legislature; relieve the people from legislative excesses or hibernation; maintain harmony between members of society to maintain social orders provide appropriate relief to the citizens by refusing to apply the unconstitutional acts, actions or orders.\(^\text{14}\)

The Judicial review, thus, alerts the legislature/executive to conform to the constitutional requirements and to avoid constitutional lapses; to act as a check, to balance the competing powers without being encroached upon by the other agencies of the State including the Court itself to generate and develop socio-economic structure and to help in the establishment of egalitarian social order; provide equality of opportunity and of status to all citizens on even

\(^{14}\) S.S.Bola Vs. B.D.Sardana, AIR 1997 SC 3127 Para.99
keel by developing appropriate principles of social engineering and at the same time maintain judicial discipline by self-imposed restriction and keep their own power of judicial review within the constitutional parameters.\textsuperscript{15}

Constitution confers powers on each organ of the Government, apart from constitutional compulsions, as moral obligation to obey the limitations and restrictions imposed by the Constitution. A good and virtuous Constitutionalism having moral foundation protects not only fundamental freedoms but also creates a bridge between conflicting interests and becomes a harbinger to the social needs and produces good legislators and good citizens. The constitutional Courts as sentinel on the qui vive, therefore, function objectively and dispassionately to correct imbalances and keep check on every wing of the State without trespassing upon the field assigned or powers

\textsuperscript{15} S.S.Bola Vs. B.D.Sardana, AIR 1997 SC 3127 Para.100
conferred upon the other wings and at the same time maintain delicate balance on even keel.\footnote{16 S.S.Bola Vs. B.D.Sardana, AIR 1997 SC 3127 Para.101}

It was held in Shah Bano's case, that the true position is that if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of \textit{iddat} but if she is unable to maintain herself after the period of \textit{iddat}, she is entitled to have recourse to Section 125 of the Code of Criminal Procedure.

There was a big uproar thereafter and Parliament enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986 perhaps, with the intention of making the decision in Shah Bano's case (AIR 1985 S.C. 945) ineffective. In Daniel Latifi Vs. Union of India, AIR 2001 S.C.3958, the constitutional validity of the Muslim Women (Protection of Rights on
Divorce) Act, 1986 (hereinafter referred to as 'the Act') was under challenge before the Supreme Court. The Supreme Court while upholding the validity of the Act, held that -

1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her
death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

The Legislature can only be corrected by a court of law. But when courts do correct them, if Legislatures bypass it and repeat the same by a new law, it is clearly a colorable exercise of their legislative power. After considering Shah Bano’s case as well as different cases under Article 368 of the Constitution, particularly, Golaknath’s case, Keshavanand Bharati’s case and 24th Amendment of the Constitution of India, question arises; whether Parliament can nullify or make ineffective the order of the Court by way of another legislation?
American Jurisprudence (2nd Edition) Section 9 at page 318, deals with the principle of Legislative interference with the judgments of the Courts. It is stated that the general rule is that the legislature may not destroy, annul, set aside, vacate, reverse modify, or impair the final judgment of a Court of competent jurisdiction, so as to take away private rights which have become vested by the judgment. A statute attempting to do so has been held unconstitutional as an attempt on the part of the legislature to exercise judicial power, and as a violation of the constitutional guarantee of due process of law. The legislature is not only prohibited from reopening cases previously decided by the Courts, but is also forbidden to affect the inherent attributes of a judgment. In Section 10 at page 319, dealing with "judgment as to public right", it is further elaborated that "with respect to legislative interference with a judgment, a distinction has been made between public and private rights under which distinction a statute may be valid even though it renders ineffective a judgment concerning a public right. Even after
a public right has been established by the judgment of the Court, it may be annulled by subsequent legislation".

The question of power of annulment of judgment or order of the Supreme Court or of the High Courts by the legislature was considered in extensor by a two Judge Bench of the Apex Court (K. Ramaswamy and G.B. Pattanaik, JJ.) in Indian Aluminium Ltd. v. State of Kerala, (1996) 7 SCC 537 : (1996 AIR SCW 1051). The Court reviewed the entire case law on the validity of validating Act and laid down nine principles, culled out from various judgments of the Apex Court, obviating the need to review those cases afresh. The principles as laid down, were set down at pages 662-63 (of SCC): (at pp. 1067-68 of AIR) thus:

1. The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transactions and require the Court to give effect to them;
2. The Constitution delineated delicate balance in the exercise of the sovereign power by the Legislature, Executive and Judiciary;

3. In a democracy governed by rule of law, the Legislature exercises the power under Articles 245 and 246 and other companion Articles read with the entries in the respective Lists in the Seventh Schedule to make the law which includes power to amend the law.

4. Courts in their concern and endeavour to preserve judicial power equally must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free-play in their joints so that the march of social
progress and order remain unimpeded. The smooth balance built with delicacy must always be maintained;

5. In its anxiety to safeguard judicial power, it is unnecessary to be over jealous and conjure up incursion into the judicial preserve invalidating the valid law competently made;

6. The Court, therefore, need to carefully scan the law to find out;
(a) whether the vice pointed out by the Court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements;
(b) Whether the Legislature has competence to validate the law;
(c) Whether such validation is consistent with the rights guaranteed in Part III of the Constitution.

7. The Court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the Legislature. Therefore, they are not the encroachment on judicial power.

8. In exercising legislative power, the Legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering of changing its character retrospectively. The changed or altered conditions are such that the previous
decision would not have been rendered by the Court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The Legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the Legislature is competent to recover the invalid tax validating such a tax or removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the Legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the Court of the direction given for recovery thereof.
(9) The consistent thread that runs through all the decisions of the Apex Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same.

All the judgments, except M. M. Pathak v. Union of India, (1978) 8 SCR 334 : (AIR 1978 SC 803) declared by the Court were found to be either valid or invalid in accordance with law under consideration but the revalidation Act came to be made to remove by employing appropriate language like the doctrine of non obstante clause, the base upon which the validity of the statute or invalidity of the Act was pointed out in the judgment by way of removal of the defect. The invalidity pointed out in the judgment was suitably removed and law was made revalidating the Act which was made
consistent with the law declared by the Court. By that process it nullified the effect of the judgment removing the base or foundation upon which the judgment was rendered. In that altered situation, the Court could not have rendered the previous judgment. There is no decision of any court having upheld the power of the legislature to enact a law making previous decision of the declaration of the law, as was found consistent with the Constitution and the statutory rule as invalid. The Act is a class by itself and it finds no companion to its tally to seek as precedent by any other legislature to enact the law directly overruling the judgment of the Court. 17

Thus no Act can be passed by the Legislature directly overruling the judgment of the court. As far as power of the Parliament to amend the Constitution is concerned, the law is well settled from the case of Keshavananda Bharati, that the power of amendment is plenary and it includes within

17 S.S.Bola Vs. B.D.Sardana, AIR 1967 SC 3127,Para.102-104
itself the power to add alter or repeal the various Articles of the Constitution including those relating to fundamental rights, but the power to amend does not include the power to alter the basic structure or framework of the Constitution so as to change its identity. If an amendment transgresses its limits and impairs or alters the basic structure or essential features of the Constitution then the Court has power to undo that amendment.

Here it is material to consider that, in Waman Rao’s case Hon’ble Apex Court held that the various constitutional amendments by which additions were made to the Ninth Schedule on or after April 24, 1973 will be valid only if they do not damage or destroy the basic structure of the Constitution

Thus the Hon’ble Supreme Court has taken sufficient care to see that the Fundamental rights are protected and has corrected the legislature whenever transgressions over the
Fundamental rights are made either by any legislation or even by any Constitutional Amendment.

But I have observed during my study that on many occasions tussle arose between the Legislature and Judiciary for supremacy.

I think that if the Parliament passes a legislation making the judgment and order of the Supreme Court ineffective, passing of such legislations may affect the independence of judiciary and weaken the judicial system as its judgments will be at the mercy of legislature and it needs to be avoided so as to protect our judicial system and consequently the fundamental rights of the citizens. Overruling of judgment of the Supreme Court by the Legislature is not expected. In fact ours is a system of checks and balances, but the working of these organs should be consistent and harmonious and with a common objective i.e. goals enshrined in the Preamble to the Constitution of India. They should work together for
achieving it and system of checks and balances is there for the proper working and not for initiating a conflict between the Legislature and the Judiciary for supremacy. Our constitution has become a compromise between the parliamentary sovereignty and supremacy of the judiciary. But the factual position is that in a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign. In any written Constitution, sovereignty vests in the people as represented by three wings - the Legislature, the Executive, and the Judiciary and no wing can claim supremacy over another wing. Their spheres are well defined with balances and counter-balances. If it is considered in this true spirit and perspective, there may be no occasion for conflict. It is necessary that for the Courts to adopt judicial self-restraint in discharging their functions of judicial review in order to maintain harmony between the Judiciary, the Legislature and the Executive. The very purpose of a written constitution is the demarcation of the powers of different departments of Government so
that the exercise of their powers may be limited to their particular fields. For the protection of fundamental rights in real sense, it is necessary to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. The power of judicial review of legislative Acts vested in the High Courts and Supreme Court, must be exercised with wisdom and self-restraint and not in a spirit of cold war between Parliament or State Legislatures and Courts. But at the same time it should always be remembered that as pointed out by the Apex Court in the case of S. S. Bola, so long as Constitutional democracy prevails, judicial democracy is sure to have a firm stand and the judiciary needs to be firm in its performance of duty and enforcement of the constitutional obligations; and the result of its decision must be towards the ultimate benefit of the nation. The Court should always be Sentinel on the qui vive as the guardian of the rights, liberties and fundamental freedoms of the citizens of India.