CHAPTER V

CONCLUSION

All the political systems are embedded in their historical past, though they work differently in different political and social settings. Every system has its constitution which determines and defines the functional parameters of all three organs of government, i.e., legislative, executive and judiciary.

Democracy and representative institutions were, however, by no means entirely new to India. Existence of some deliberative representative bodies and democratic self-governing institutions could be traced back to as early as the Vedic age. Even in Ancient period, justice, religion and law were closely interconnected. The king, with the assistance of his ministers, carried on the administration of his kingdom. There was no separation of powers between legislative and judicial bodies of the state. They functioned with co-operation with each other under the authority of the king. After that in the Muslim period, powers of the Sultan (King) were supreme. Parliamentary government and its different organs in their modern connotation owe their origin and growth to India’s British connection for some two centuries. During this time, the main functions of the government were being performed by the Governor-in-General’s council.

The framers of Indian constitution adopted the British model of parliamentary representative democracy and parliamentary institutions have endured in India for six decades and more. The parliament in Indian polity is the supreme representative institution of the people. The makers of Indian constitution has adopted a middle course between the British concept of the sovereignty of parliament and the supremacy of judiciary in America with its power of judicial review of legislation. They were well aware of this fact that if unlimited
power had been vested in any of the organ of the government, it would lead to undermine the spirit of democracy. That’s why the theory of separation of powers has not been adopted in absolute form. They had adopted the concept of checks and balances in order to determine the functioning of each organ of the government. The Constitution of India lays down the structure and defines the limits and demarcates the role and functions of every organ of the state, and establishes the norms for their inter-relationship. The Supreme Court is the final authority for interpreting and pronouncing the provisions of a law. There is virtually no area of legislative or executive activity which is beyond the highest court’s scrutiny.

The nature of modern state is different than what it used to be in early times. It has evolved a great deal from a minimal, non-interventionist state to a welfare state, wherein it has multifarious roles to play, like that of a protector, controller and provider. Public well being is the ultimate object of a welfare state. Here judiciary plays the role of active sentinel. Courts are denoted to play more active role leaving unnecessary technicalities and traditions. It is a practical but untraditional mode of performance of constitutional liability adopted by judiciary in the arena of welfare concept.

Like all modern democratic constitutions, the Constitution of India entrenches judicial review as a paramount principle of public law and finally it is the Supreme Court which is the final arbitrator of issue of constitutional interpretation. Judicial review upholds the supremacy of the constitution, adjusting the constitution of new condition and needs of the time, resulting into social and economic benefits to the masses, evolving the consciousness of right and keenness to achieve redress against violation of human rights.

The necessity for judicial intervention arises when the citizen complain about unfair treatment or violation of their rights at the hands of the executive or the legislature. When the judiciary is
apprised of and is satisfied about gross violations of basic human rights, it cannot fold its hands. It must respond to the knock of the oppressed and the downtrodden for justice with a positive response by adopting certain operational principles within the parameters of the Constitution and pass necessary directions in order to render full and effective relief. The existence of a particular piece of legislature cannot solve the problems of society at large unless the judges interpret and apply the law to ensure its benefits to the right quarters.

The Constitution is the supreme law of the land. The method of amendment under Article 368 is neither too rigid nor too flexible. Under the provisions of the constitution, the parliament is not sovereign and the Supreme Court is not supreme except in its own domain. Their interface and interrelationship, therefore, assumes greater significance. In a democratic set up, parliament, no doubt, is the repository of the will of the people and it is the supreme representative institution in the country possessing great power.

The Supreme Court of India started of as a technocratic court in the 1950s but slowly started acquiring more power through constitutional interpretation.

In the first round of cases, parliament or the government could silence the Supreme Court through the device of constitutional amendment. The Nehru government was supported by a large majority in each house of Parliament. Therefore, Parliament could easily get the constitution amended by a special majority as prescribed by Article 368. During Nehru's tenure as Prime Minister, the constitution was amended for seventeen times.

Pandit Nehru believed in the primacy of parliament in the Indian polity, and once said that no court can sit on judgment over the will of the parliament, representing the entire will of the community. In the initial years (1950-1964) when there was dominance of the congress party, both at the centre and in the
states, the supreme court had pursued harmonious construction and adopted the attitude of judicial restraint. It gave a strict and literal interpretation of the constitution. In 1950 the various high courts started invalidating the agriculture and land reform acts after independence in the name of violation of the fundamental right to property. So there was conflict between the executive and the judiciary. Consequently, the First Amendment was made in 1951, by which the Nineth Schedule was added and a provision was made that the laws given in this schedule will not be subjected to judicial review.

In A. K. Gopalan case by avoiding the confrontation between the legislature and judiciary, the Supreme Court accepted the principle of judicial subordination to legislative wisdom. In this case, the supreme court observed that the parliament and state legislators are supreme in their respective fields and the supreme court would not question the wisdom or policy or legislative authority in enacting the particular law, however unreasonable, the provisions of the law may be. The court also accepted the power of the legislature with regard to amending the constitution as supreme.

After 1965, a series of conflicts in the relationship of parliament and supreme court has been seen. In 1967 there was open conflict between the judiciary and the legislature. The parliament asserted its supremacy and the Supreme Court asserted its power of judicial review. It resulted in a series of constitutional amendments in which the parliament tried to limit the power of judicial review. In the famous Golak Nath case, the court declared that the parliament has no right to take away or abridge the fundamental rights. It cannot even do so by amendment of the constitution. The court further held the nationalisation of banks and the President's order derecognising the princes and abolishing
their privy purses as unconstitutional. These judgments were criticised by the parliament and the ruling elite as a check on the socio-economic progress of the country. The confrontation between the two was further witnessed in the Keshavanand Bharti, Maneka Gandhi and Minerva Mills cases.

The Parliament responding to Golak Nath judgment, introduced Twenty Fourth Amendment Act which gave the Parliament full powers to amend the Constitution including the provisions with regard to fundamental rights. Thus through the Twenty Fourth Amendment, the Parliament got back its right to amend the Constitution. The Twenty Fifth Amendment gave primacy to directive principles of state policy vis-a-vis fundamental rights. Besides, Twenty Six and Twenty Nineth Constitutional Amendments were also made. All these amendments were challenged in the Supreme Court in the famous Keshavanada case. The decision of the Supreme Court by a majority of seven judges against six in Kesavananda hold that Parliament could not use its constituent power under Article 368 to destroy the basic structure of the Constitution. It was therefore interpreted as a judicial manoeuvre to give finality to its decisions against those of the Parliament. The decision sounded unsustainable at that time in the context of the conflict between the Supreme Court and Parliament that had been going on for six years since Golaknath. The Supreme Court by evolving the doctrine of basic structure of the Constitution limited the power of the Parliament to amend the Constitution. It was an innovation which widened the court's power of judicial review to an unlimited extent. Thus, although the Supreme Court reversed the Golaknath judgement but in fact it extended its jurisdiction even beyond the Golaknath judgement. In the post Keshavananda scenario, the major parts of the Constitution have come into the ambit of basic structure of the Constitution which the Parliament
cannot change. The doctrine of basic structure was based on the limitations implied in the preamble which aims at justice-social, economic and political.

The doctrine of basic structure of the Constitution is a great constitutional concept that has been formally engrafted upon the Constitution by the judiciary through the interpretative processes. The doctrine is well formulated and it has maintained a balance between the rigidity and the flexibility of the Constitution. The basic structure prevents the parliament from having unconditional power and becoming the master of law itself.

In the early period, mainly before the Emergency (1975), the questions before the court were mostly related to the right to property under Article 31 of the Constitution and measures taken by the governments to dilute the right to property so as to implement a land reforms programme. The challenges to the early Constitution Amendment Acts, the First, Fourth, Seventeenth, Twenty Fourth, Twenty Fifth, Twenty Sixth and Twenty Ninth Amendment were all in the context of right to property and mainly concerned to legislation on land reforms, with few exceptions i.e. the Constitution (Twenty Fifth Amendment) Act raised the issue of judicial review when it sought to bar any court from examining the validity of a class of legislation to give effect to certain Directive Principles of State policy. All the above amendments, with one exception of the clause in the Twenty Fifth Amendment relating to judicial review, were held as valid in the Shankri Prasad, Sajjan Singh, Golak Nath and Keshavananda Bharti cases.

Soon after Keshavananda case, the government also moved to change the composition of the Supreme Court. Disregarding the practice of appointing the senior most judge of the court as the Chief Justice of India, on the retirement of the then Chief Justice, it appointed the judge at number four in seniority, superseding three
others senior to him. Because, the three superseded judges constituted the majority in Keshavananda case, which limited the power of amendment, while the fourth supported no limits on such power. This was admitted as a direct interference in the independence of the judiciary and became a matter of debate. Before any major decisions could come from the newly constituted court, the government imposed an Emergency in June 1975 on grounds of internal disturbance, while already an emergency on ground of external aggression was in force. The emergency lasted until March 1977.

During the Emergency period, the Constitution was extremely amended, curtailing among others, the courts' power of judicial review of legislation. The independence of the judiciary was also threatened by transferring the judges to inconvenient locations. The courts were unable to give any relief against these actions of the government, except that they invalidated an amendment concerning a pending election appeal about the then Prime Minister (Mrs. Indira Gandhi). But ultimately it decided the appeal in favour of the Prime Minister (Indira Nehru Gandhi vs Union the India). After the emergency, the Forty Fourth Amendment Act was passed which restored the judiciary's position as it had existed before the emergency. In Minerva Mills case, the Supreme Court declared judicial review as part of the basic structure.

A clear shift or change in relationship between Parliament and Supreme Court of India is visible in the post emergency period. This is also a period when issues like education, hunger, health, poverty, women empowerment and the rights of the child are no longer local in nature. The comity of nations is not only eager individually to tackle these problems, they are calling for collective and time bound efforts to deal with them. The changing scenario throughout the world naturally cannot leave the organs of the governments of
individual nations to redefine and reinvent their respective roles. The Government of India has initiated a number of legal and policy measures to meet the global challenges in the new economic order. Structural adjustment programmes, disinvestments policy in the public sector, corporatisation of the public sector, and liberalisation can be cited as some of them. Many of these measures have been challenged in the court of law. Crimes against women, questions of women empowerment, rights of the child and the issue of bonded labour and the response of the Executive to them have drawn judiciary into field of both law making and law implementation.

The 1980's saw the emergence of judicial activism as a powerful factor in Indian polity. The new role being played by the judiciary, which is known as judicial activism, has been supported by the evolution of a new practice known as public interest litigation in the country near the end of 20th century. PIL has come to mean a mode of enabling the marginalised to have access to justice and a method to save them from exploitation and discrimination. The coalition politics, that appears to have come to stay in India, has also made a difference to the role of judiciary or the Supreme Court and also the use of PIL even at the risk of being charged for usurping the functions of the legislature and the Executive and of running the country by its directives to the government and administration. The Supreme Court reinterpreted the provisions of the fundamental rights more liberally so as to maximize the rights of the people and particularly the disadvantaged sections of the society and it also facilitated access to the courts by relaxing its technical rules or locus standi, entertaining letter petitions and developing a public law, proactive technology for the enforcement of human rights. In 1978, in Menaka Gandhi case, the Supreme court held that right to move was part of personal liberty enshrined in Article-21 of the
Constitution and no one can be deprived of his right to personal liberty except by due procedure established by law and the said procedure must be reasonable, fair and just. In Wadhwa case the right to honest and efficient governance has been implied from the right to life and liberty guaranteed by Article 21 of the Constitution.

Further, in India, the Supreme Court has followed a unique way of incorporating the international conventions signed and ratified by India, by corporating their provisions within the fundamental rights guaranteed in Part III of the Constitution through liberal interpretation of those rights. The most suitable example is the judgment of the Supreme Court in Visakha case, where the court laid down the guidelines to make laws for the protection of women’s rights as per international standards. This trend reached a new height when the Supreme court recently ordered the central government to distribute foodgrains, which were found rotting for want of storage facilities, to the poor and hungry. There was also a tug of war between the parliament and the Supreme Court regarding the Anti-Defection Act. The chairmen of Assemblies were given the power to decide the issue of defection of political parties. After the decisions of the Chairmen of Assemblies like those of Mizoram, Goa, Nagaland, Manipur and UP on the issue, these were challenged in the courts. As a result many kinds of disputes cropped up.

In Satish Sharma case, the Supreme Court heard a petition by a social action organisation known as common cause. The director of common cause filed a public interest litigation challenging the allotments of retail outlets for petroleum products made by the then minister of state for petroleum and natural gas, exercising the powers of the central government. The petrol pumps were to be given to poor or unemployed people. The court found that six of the allotters or beneficiaries were related to various officials working
with the minister. The court ruled that all those allotments should stand cancelled and that each of the petrol pumps should be disposed of by way of public auction. The earlier allottees could participate in the auction and the petrol pumps should be allotted to the highest bidder. The Court ordered Mr. Sharma to pay Rupees 50 Lakh as compensation.

Since the 1980s, the issues of rule of law and the environment have been the main concerns of PILs. The cases raising questions of environmental degradation were really speaking cases against inaction of the State or wrong action of the state. In 1996, the Supreme Court ordered that no construction of any type shall be permitted now onward within a radius of 5 kilometers of the Badhkal lake and Suraj Kund, (Faridabad, Haryana). All open areas shall be converted into green belts. In another judgment, the Supreme Court banned all non-forest activities including plywood mills, saw mills and mining in the forest area. At the same time, it also protected the workers from retrenchment or removal from service due to the closure order. In all environment cases, the Supreme Court has attempted to balance the competing claims of environment and development.

The Supreme court has been consistently building new linkages of an egalitarian democratic and free society in consonance with new universal socio-political and economic order by raising some rights to the status of fundamental rights under Part III of the Constitution. Some of them are worth mentioning, e.g., right to work, right to information, right to get minimum wages, right to speedy trial, right to privacy, right against inhuman treatment, etc. It is quite clear that the Indian Supreme Court has finally attained its maturity and gained sufficient self-confidence to correct the mistakes of executive and legislative wings of the government and to act as protector of fundamental values of Indian society.
Thus, it can be observed that in the pre-emergency period, the main focus or area of the tussle between the Supreme Court and Parliament of India was on the constitutional provisions relating to judicial review, amending power and fundamental rights. But in the post emergency period which is known as the era of judicial activism, the confrontation is on the constitutional and social issues like, reservations, Article 356, Nineth Schedule, election reforms and parliamentary privileges, etc. In earlier times, Supreme Court of India held that parliament has full power to amend the Constitution but while doing so, it cannot alter or destroy the basic structure or framework of the Constitution. But in the post emergency period in Waman Rao case, the Supreme Court again upheld the basic structure doctrine and specifically stated that though Ninth Schedule and Article 31-B in themselves were not violative of basic structure of the Constitution, any amendment or additions to the schedule after Kesavananda would have to be examined with respect to the alteration of the basic structure of the Constitution. But parliament continues to add acts to the Ninth schedule, to escape judicial review and many of these acts were unrelated to land reforms which formed the basis of creation of the Ninth schedule in 1951. Originally, when the Nineth schedule was inserted in the Constitution, 13 Acts were included in it. Now, Ninth schedule consists of near-about three hundred Acts.

The Court in 2007 reiterated the view expressed in Waman Rao case, wherein it has been held that even though an Act is put in the Nineth schedule by a constitutional amendment, but its provisions would be open to challenge if they destroy or damage the basic structure or if the fundamental rights which are taken away or abrogated pertain to the basic structure. All laws which are not placed in the Nineth schedule are prone to challenge. All laws which have been placed in the Nineth schedule after April 24, 1973 will
also be prone to challenge now. There remained constant changing equations between Indian parliament and Supreme Court in respect of reservation policy and law relating to creamy layers. Supreme Court stayed the implementation of 27% OBC quota in institutions of higher education. The Supreme Court also took its first important step towards judicial review of emergency powers under Article 356 of the Constitution. It ruled that there was no need for the president to give reasons for introducing president's rule. The court merely wanted the president to satisfy himself that the order was justified. The second and major step taken was in the Bommai case of 1994. Now, the court agreed that when conditions in a state were proclaimed to require emergency powers, it could approach the court and ask for judicial review of the proclamation. The court stated that this could be undertaken even if parliament had approved of the proclamation. The court now asserted, federalism is part of the basic structure and the states are sovereign within their own sphere.

Besides this, Supreme Court's recent pronouncements on election reforms and parliament privileges have not elicited positive responses from parliament. In fact, the former Lok Sabha speaker expressed his views against such an encroachment into the powers of the legislature by the judiciary, citing Article 122 and 212. The opined that the overactive role of supreme court, if not pondered over and corrective steps taken, will totally upset the fine constitutional balance and the democratic functioning of the state as whole. In Kihoto Hollohan case, the Supreme Court held that para 7 of the Tenth schedule to the Constitution, which excluded judicial review of the decision of the Speaker/Chairman of the House on the questions of disqualification of MLAs/MPs offended the basic structure of the Constitution. As a result, the decisions given by the presiding officers of the legislature are subject to
judicial review. This again is a salutary decision considering the inability of many presiding officers to decide the questions of disqualification dispassionately, uninfluenced by the party in power.

In the era of coalition government, the Supreme Court is becoming more and more active and assertive. It has expanded its area of jurisdiction so much that the decade of 1990’s, can easily be described as the period of judicial activism. There remained constant tension between the Supreme Court and Parliament in 2006 regarding some issues, i.e., reservation, sealing operations in Delhi, OBC quota, corruption, Article 356, judicial review, etc.

More recently, the Representation of the People Bill 2013 was rushed through in the Lok Sabha and passed within 15 minutes after a brief discussion. The Bill negates the Supreme Court’s order, which held that those in jail cannot vote as per the Representative of the peoples Act, and hence, do not qualify for contesting general or state assembly elections.

The Constitution of India is quite clear that the proceedings in parliament are not subject to judicial scrutiny. It described the powers and privileges of the members of Legislature. The Supreme Court of India has endorsed the constitutional position. Eleven members of parliament, ten from the Lok Sabha and one from the Rajya Sabha belonging to different political parties were shown in a sting operation of a private channel being paid for raising a question in parliament. The Supreme Court served a notice to the lok sabha speaker and referred the matter to a constitutional bench of five judges. After that the Supreme Court upheld the expulsion of Eleven MPs from parliament as valid.

In a democratic society, there are mainly two approaches to any judicial role, one is performance and the second is perception. The judiciary can adopt either a proactive approach or it can act
within the boundaries of self-restraint. Judicial activism in India refers to the first one. Mainly there are two types of situation in which the Supreme Court of India takes an activist posture and either assumes a legislative function or attempt to directly undertake governance. The first is where gaps exist in the law or where the full protection of human rights warrants enunciation of a new policy or extension of an existing policy in conformity with the constitutional scheme and the international (global) obligations of the state. The directions for child protection (M.C.Mehta), Women protection (visakha) are examples of this type of judicial activism in the legislative sphere. The expansion of fundamental rights especially of the right to life under Article 21 (Maneka Gandhi) invoking Directive Principles, is another example of activism in areas legitimately belonging to the parliament or the legislature.

The second type of situation in which the Supreme Court proactively involved itself is, what is generally called the executive functions is where the laws were left unimplemented for whatever reasons and individual rights or public interest were adversely affected thereby. Many decisions on different PILs, environmental law, directing the legislature and executive action even where budgetary reallocation was required are illustrative of judicial intervention in the executive sphere. The PIL initiatives, which dispensed with many of the cumbersome formalities of court procedure, attempted to give citizens direct access to the Supreme Court. In these cases, judges gave even detailed policy prescriptions that they required the government to fulfill. For instance, the Supreme Court has required the closing down of business because of environmental concern, and building new housing for slum dwellers.

In the tussle between the Parliament and the Supreme Court of India the people are ultimately the final umpires. In the general
elections held in 1977 after the Forty Second Amendment to the Constitution and threats to the judiciary, the party which adopted such an attitude lost power. The principle of judicial review as asserted by courts got the approval of the people.

From the perspective of the Supreme Court, it is only attempting to achieve the constitutional purpose in the best way it feels appropriate in the situation. In the process, it has advanced the cause of justice and ensured proper implementation of rule of law. However, from the perspective of the parliament, it is usurpation of its powers and functions. The parliament argues that the court is in effect running the government the way it considers desirable. The parliament raises the issue of judicial accountability, the demise of the doctrine of separation of powers, and the negation of checks and balances in the constitutional scheme. The Supreme Court defends itself by saying that the court acts only in areas where there is legislative vacuum in the field of fundamental rights and its action only strengthens democracy and the common man’s faith in rule of law.

In a democratic polity, whenever the legislature or parliament behaves in an irresponsible manner and the executive becomes utterly unresponsive, then it becomes the duty of the courts to protect the human rights of the masses. The present role of Supreme Court should not be called the overreach of courts in the domains of parliament because the parliament has failed to perform the duties assigned to it by the Constitution. It has not been assertive in its own areas of competence. One finds that an average assemblies are sitting only for 30 days a year, and some only for a week or 10 days. Out of 365 days, the time lost in parliament on account of interruptions has risen from 5 percent to 45 percent, and the number of sittings has gone down from 138 to 75. So, neither parliament nor state legislatures are doing their duties.
Parliament is a platform for debate and discussion. It is necessary to make laws for making certain minimum number of sittings mandatory. Necessary electoral reforms should come into existence so that it can stop the impact of criminalisation in politics. Parliament should also give more time for debate and discussions. The opposition party should stop undermining the parliamentary politics and disrupting its proceedings. The members of Parliament should make attempts to maintain the dignity of the houses by their efficiency and regularity in their duties, punctuality in their presence, and the most important dedication towards the nation.

The parliamentarians claim that the Indian parliament is equals to the British parliament in the matter of authority, power and status. This claim does not hold valid because the Indian parliament and state legislatures differ from the British parliament, not merely as in regard to the general political status but also in the matter of legal powers. India is a federal polity. Its essential features are the division of powers between the centre and states and a written Constitution invested with supremacy over its institutions, the various organs of the polity, and providing for an independent judiciary not only with the power of judicial review, the scope of which is to be determined by the judiciary itself. Add to this the fact that the Indian Constitution is the most detailed document of its kind in the world, and ensures a variety of fundamental rights to citizens. It is necessary to understand all this in order to appreciate the judiciary’s role in the scheme of government given in the Constitution.

The crux of the problem relates to the principle of checks and balances, propounded in the Constitution, and the host of fundamental rights of the citizens. Checks irritate the Indian politician who, unfortunately is fond of power. But if the Constitution is amended to remove these irritants, the citizens will
suffer seriously. The alternate is self restraint and the adoption of a balanced approach both by the judiciary on the one hand and the legislature and the political executive on the other.

The success of every political system is based on the efficiency and coordination of its institutions and their functions. The law making, enforcing and adjudicating law are important in a governance but their balance and sense to give respect each other brings good governance. If institutional crisis comes up it can be managed by each other’s understanding. There is no need of very frequent amendments, no need of unnecessary interference in law making. But need and demand of this time is to maintain cooperation with each other and respect to other’s area of jurisdiction. Thus, it becomes obligatory for all institutions to abide by the Constitution, which is supreme.