CHAPTER ONE

CHAPTER I

INTRODUCTION

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1.1 Introduction

Law plays an important role in the Society. It reconciles the conflicting interest of individuals and those of individuals and society. In a democratic state, law functions as an instrument of justice. Law without justice becomes an instrument of oppression. The concept of justice changes from time to time and society to society. Law must be responsive to the needs of the society and an outdated law is never respected. Laws are enacted by the legislature and implemented by the executives where as the judicial wing of the government interprets them and applies them to decide disputes between citizens and citizens and the state. In a federal state the judiciary also settles controversies between federating units inter-se. The most important function of the judiciary under a written Constitution is to safeguard the Supremacy of the Constitution and to keep all authorities within constitutional limits.

The Concept Of Judicial Review

Judicial review, in its narrow usage, especially since its adoption in the American constitutional system, has been used to indicate the institutional arrangements by which courts of law pronounce judgment on the constitutional validity of the disputed piece of legislation enacted by the law-making organ viz., legislature and

the Parliament. Judicial review can be considered as mechanism for upholding the supremacy of the basic law in a country governed by ideal of political constitutionalism. Also, judicial review implies a comprehensive judicial enquiry into, and examinations of the action of the legislative, executive and administrative branches of government, with specific purposes of ensuring their conformity to the specified constitutional provisions.

The principle of judicial review became an essential feature of written Constitutions of many countries. In Australia, judicial review is regulated by the Australian Administrative Procedures (Judicial Review) Act, 1977. Seervai in his book Constitutional Law of India noted that the principle of judicial review is a familiar feature of the Constitutions of Canada, Australia and India. And it may be added here that the principle of judicial review has been held to be a basic feature of our Constitution. It is incorporated in Articles 226 and 227 of the Constitution in so far as the High Courts are concerned. In regard to the Supreme Court Articles 32 and 136 of the Constitution embody the principle of judicial review. Article 32 is included in Part III as a fundamental right for enforcement of any of the fundamental rights conferred under Part III. Under our Constitution, judicial review can conveniently be classified under three heads:

(1) Judicial Review: Constitutional Amendments.—This has been the subject-matter of consideration in various cases by the Supreme Court; of them worth mentioning are: *Shankari Prasad case*[1], *Sajjan Singh case*[2], *Golak Nath case*[3], *Keshavananda*

[1] Shankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458
[2] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845
[3] Golak Nath v. State of Punjab, AIR 1967 SC 1643

Bharati case[4], *Minerva Mills case*[5], *Sanjeev Coke case*[6] and *Indira Gandhi case*[7]; the test of validity of constitutional amendments is conforming to the basic features of the Constitution.

(2) Judicial Review: Legislation of Parliament, State Legislation and Subordinate Legislation. —Judicial review in this category is in respect of legislative competence and violation of fundamental rights or any other constitutional or legislative limitations;

(3) Judicial Review: Administrative Action

In the age of increased importance of administrative law, judicial review is not a 'term of art', but means "judicially scrutiny and determination of the legal validity of instruments, acts and decisions".[8]

In this very broad sense, judicial review includes, the "many sided jurisdiction exercised by the award of declaratory orders to and against administrative bodies, and the jurisdiction to scrutinize administrative determinations for errors of law and other defects which render them voidable not invalid."[9]

It is sometimes believed that the institution of judicial review is predicted upon the existence of a written constitution that is also rigid to some extent.[10] This opinion seems to get its emphatic

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[4] Keshavananda Bharati v. State of Kerala, (1973) 4 SCC 225
[5] Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625
[6] Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd., (1983) 1 SCC 147
[7] Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1
[8] S. A. deSmith, "Judicial Review of Administrative Actions", p. 16, 1959
[9] Ibid
[10] S. N. Ray, " Judicial Review and Fundamental Rights", p. 15. Eastern Law house, Calcutta, 1974

assertion in the judgment of *Marbury v. Madison*[11] in which Chief Justice Marshall uttered:

> "Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void."

In India, too, the Constitution is the supreme law. It was ordained by the people, the ultimate source of all political authority. It confers limited powers on the national government. The limitation can be inferred from certain express prohibition upon its power or upon the manner of their exercise. If the government oversteps these limitations there must be some authority competent to hold it in control, to thwart its unconstitutional attempt, and thus to vindicate and preserve the inviolate will of the people as expressed in the Constitution. This power is exercised by the judiciary. This is the beginning and end of Judicial Review.

However, written Constitutions with defined limitations do not inevitably require judicial review is apparent since a majority of the countries of the world which have written Constitutions do not allow their courts to exercise this extra ordinary power. The supremacy of the organic, constitutional law, and the fundamental distinctions between this law and 'ordinary' law, quite logically imply that any act of the ordinary law-making bodies, which contravenes the provisions of the paramount law,

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

must be void and that there must be some organ and some mechanism by through which this can be done. This may not be confined to a review of legislative acts. D. D. Basu opined:

> "Once the Constitution is regarded as the supreme Law and the powers of all the other organs of government are considered as limited by its provisions, it follows that only the legislature, but also the executive, and all administrative authorities, are equally limited by its provisions, so that any executive or administrative act which contravenes the provisions of the Constitution must, similarly, be void and the Courts must invalidate them."[12]

Judicial Review: Meaning

Literally judicial review means the revision of the decree or sentence of an inferior court by a superior court. However, in country like ours, which is having a written Constitution, it means that power of testing the validity of legislative as well as governmental actions.

Scope of Judicial review is in three specific areas.

1. Judicial review of legislative actions
2. Judicial review of administrative actions
3. Judicial review of judicial actions.

It is said that the judiciary, out of three organs, legislative, executive and judiciary, is the guardian of constitution. Judicial

[12] D. D. Basu. "Commentaries on The Constitution of India", p. 165, Vol. I, 1955

decision gives effect to the legislative policy of the statute or any action taken by the executive in the light of the policy of the constitution.

However, in the course of its development and evolution, judicial review has acquired a variety of meanings. Firstly, from the point of view of the degree and extent of its operation, a distinction is made between 'federal' judicial review and 'national' judicial review. While the former means the right of the courts, in a federal state, to scrutinize the laws enacted by the competent units of the federations on the touchstone of their compatibility with national law, i.e., law passed by national legislature, the latter that is more common and more comprehensive in regard to their conformity to the higher law, i.e., the Constitution. Secondly, as stated earlier, judicial review implies an examination of the administrative decrees and orders passed under the authority of law, as distinguished from the review of law itself-a recent development. Thirdly, within the broad meaning of the constitutionality of laws, fundamental distinctions may be made between 'formal' judicial review to indicate 'procedural' or 'extrinsic' examination of validity of laws, and 'material' judicial review to denote the 'substantive' or 'intrinsic' examination of the content and spirit of the law on the touchstone of the letter and spirit of the Constitution.

The Rule of law is the basic feature of Indian constitution and the judicial Review is an essential component of it. The doctrine of judicial review is generally understood to emanate from the judgment of the Chief Justice Marshall in *Marbury v. Madison* in the year 1803. However, two centuries before Chief Justice

Marshall it was lord Coke who had said the same thing in Dr. Bonham's case.

The legislature is not the sole judge of its law-making. All legislative acts are liable to be tested on the touchstone of the Constitution. Judicial Review is a great weapon, not only for the enforcement of the rule of Law, but also for establishing and strengthening of the Reign of Law, upon which, a democratic Constitution is founded. The Constitution-makers of India very wisely incorporated in the Constitution itself, the provision of judicial review so as to maintain the balance of federalism, to protect the fundamental rights guaranteed to the citizens and to afford a useful weapon for equality, liberty and freedom. Accordingly, the Constitution of India expressly establishes the doctrine of judicial review in several articles like Article13, 32, 143, 226. Not only this, in the *Keshavananda Bharati v. State of Kerala*[13], it has been held that judicial review is the basic structure of the Indian Constitution.

Limitation of the powers is an important characteristic of the modern democratic written Constitution. The Constitution while granting powers to the different organs of the government imposes also limitations on the exercise of the powers in order to avoid usurpation or its tyrannous application. The Indian Constitution affirmatively authorizes the legislature to make laws bur prohibits it from making laws, which are not in conformity with its provisions. These affirmative and negative constitutional provisions are the mandates of the Constitution, implied, or express, indirect or direct. Thus, in the Constitution

[13] AIR 1973 SC p. 1461

of India, two main constitutional limits of the legislative powers are:

i. The laws should not be made in violation of the rule of the distribution of powers
ii. They should not be framed in violation of the Fundamental rights.

Apart from these, there are other constitutional limitations and restrictions, the infringement of which occasions judicial review and render legislative acts or constitutional amendment void.

However, the basic problem of judicial review in a modern democratic society inheres in the apparent possibility of an antithesis between a rigid and doctrinaire attitude in preserving the fundamental human liberties and the effective pursuit of a social welfare objective by the legislature in consonance with the interplay of the dominant socio-political forces.

Judicial review under the Constitution of India stands in a class by itself. Under the Government of India Act, 1935, the absence of a formal Bill of Rights in the Constitutional Document very effectively limited the scope of judicial review power to an interpretation of the Act in the light of the division of power between the center and the units. Under the present Constitution of India, the horizon of judicial review was, in the logic of events and things, extended appreciably beyond a 'formal' interpretation of 'federal' provisions; the Debates of the Constituent Assembly reveal, beyond any dispute, that the judiciary was contemplated 'as an extension of rights' and an

'arm of social revolution'.[14] Judicial review was, accordingly, desired to be an essential condition for the successful implementation and enforcement of Fundamental Rights.

The foundation of the Indian Supreme Court's review power was laid firmly in the case of *A. K. Gopalan v. State of Madras,*[15] Compared by some to the classic case of *Marbury v. Madison.*[16] This case not only elucidated the principle of Judicial Review and the basis on which it would rest in future, but at the same time evolved a set-off guidelines which would eventually set the pattern for the fundamentals of judicial approach to the Indian Constitution. From tome to time, the Indian Supreme Court has tried to assert its power of Judicial Review vigorously by relying on the scheme and pattern of the Indian Supreme Court. However, the Parliament of India has also from time to time tried to establish Supremacy over judiciary. The Constitution (Forty second Amendment) Act, 1976 has nullified the effect of the decision given in *Keshavananda Bharati v. state of Kerala*[17] by the Supreme Court adding clause (4) & (5) in Article 368. However, in the year 1980 in *Minerva mills v. Union of India,*[18] Clause (4) & (5) were struck down and it has been decided that the doctrine of judicial review is an essential feature of the Constitution. Therefore, no Parliament, no legislature, no constitutional authority can abrogate, abridge or take away this power from judicial organ of the State.

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[14] Granville Austin, "Indian Constitution: Cornerstone of Nation", p. 164, Oxford University Press, 1966
[15] AIR 1950 Sc 27
[16] I Cranch 137, 2 L. Ed., 60 (1803)
[17] AIR 1973 SC 1461
[18] AIR 1980 SC 1789

One important aspect to be borne in mind is that in judicial review the courts are mainly concerned with the competence of the authority and the mode in which the authority takes the decision and not the decision taken by the authority. They are not concerned with the merits of the decision. The courts do not substitute their opinion or decision in place of the impugned decision of the authority but in appeal the appellate court does have the power to consider the merits of the case and substitute its own decision for that of the subordinate court or tribunal. It is profitable to be apprised of the words of Lord Hailsham L.C., in the case of *Chief Constable of N.W.*[19] All ER at p. 143:

> "Judicial review is concerned not with decision but with decision-making process. Unless that restriction on the power of court is observed, the court will under the guise of preventing the abuse of power, be itself guilty of usurping power."

Judicial review of administrative action may relate to either a non-statutory administrative action or a statutory administrative action. In both these cases violation of constitutional provisions like Articles 14, 19, 29, 30, 301, 304 etc., or any statutory provision will invalidate the administrative decision. We may in this connection be benefited by judgments of our Supreme Court in *Ajay Hasia case*[20], *Royappa case*[21] and *Maneka Gandhi*

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[19] Chief Constable of North Wales Police v. Evans, (1982) 3 All ER 141
[20] Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722
[21] E.P. Royappa v. State of T.N., (1974) 4 SCC 3

case[22]. Judicial review of administrative action, observed Lord Diplock in *Council of Civil Service Union*[23]:

> "... One can conveniently clarify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case-by-case basis may not in course of time add further grounds."

Going by this classification, insofar as the illegality is concerned, errors of law, which vitiate the ultimate decision, are open to judicial review.

The study tries to evaluate the working of the doctrine of judicial review in India in relation to some constitutional amendments. The power of judicial review may be exercised with regard to

1. Procedural infirmity
2. Extent of amending power
3. Constitutionality of Constitution amendment Acts

Here in this study, the focal point lies in the third point. This study tries to analyze various Constitution Amendments from 1951 to 2004 in which the judicial review power has been exercised. Constitution (Thirty Ninth) Amendment Act, Constitution (Forty Second) Amendment Act, Constitution (Forty Fourth) Amendment Act are some of the most debatable and

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[22] Maneka Gandhi v. Union of India, (1978) 1 SCC 248

[23] Council of Civil Service Unions v. Minister for the Civil Service, (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL)

controversial piece of amendment acts in which the doctrine of judicial review played an important role.

Justice K. Ramaswamy in S. S. *Bola v. Sardana*[24] while reiterating that judicial review is the basic feature upon which hinges the checks and balances blended with hind sight in the Constitution as people's sovereign power for their protection and establishment of egalitarian social order under the rule of law, emphasizes that judicial review is an integral part of the Constitution as its basic feature. Judicial review adjusts the Constitution to meet new conditions and needs. It is the Constitutional duty and responsibility of the Constitutional Courts, as assigned by the Constitution to maintain the balance of power between the legislature, executive and judiciary. The judicial review is a linkage between the individual liberties and social interest, political stability to counter balance the ultra vires Acts or actions by judicial decisions.

In a nutshell, this study aims to evaluate one of the important aspects i.e. the doctrine of judicial review, which played significant role in working of the democratic Constitution. In the Words of Justice Bhagwati:

> "The power of judicial review is an integral part of our constitutional system and without it there will be no government of law and the rule of law would become a teasing illusion and promise of unreality. If there is one feature of our Constitution, which more than another, is

[24] AIR 1997 SC 3127 at p. 3167

basic and fundamental to the maintenance of democracy and rule of law, is the power of 'judicial review'."

So, judicial review unshakably fosters balance between individual rights and liberties and legislative aspirations and actions, especially in consideration of the fact that the Republic of India consist of diverse political units And religions and various shades of people having conflicting linguistic and economic interests. S, in order to protect individual liberty and freedoms, the power of the court of judicial review must be allowed to remain unimpaired and uninterrupted. And this study analyses the functioning of the doctrine of judicial review of the court with respect some of the major Constitutional amendments.

So, the doctrine of judicial review has found its enemies as much as its supporters. The criticisms have come as consequences of the exercise of this power in a manner which did not appeal many as just or reasonable. It is commonly pointed out that judicial review is essentially negative, limiting an undemocratic concept. But this view is at best one- sided and partial. In making a fair, rationale and balanced assessment of the doctrine of judicial review, it has to be borne in mind that judicial review, like the Constitution itself, affirms as well as negates; it is both a power releasing and power breaking function.[25]

[25] S. N. Ray, "Judicial Review and Fundamental Rights" p. 37, Eastern Law House, Calcutta, 1974

1.2 A Bird's Eye View Of The Earlier Studies

Notion of judicial review is not new to Research studies and it always inspires and encourages Research works. Many research scholars contributed a lot to the subject of judicial review through their valuable research works and treaties. Research oriented studies deviate from their path of textual approach. Research work of Prof. V. S. Deshpande, "Judicial review of legislation" and of Shri Rajeev Dhavan, "Amendment: A conspiracy or revolution?" are magnum opus in the field of research work relating to judicial review of legislation and constitutional amendments and the said classic research work, inter alia, covers also the concept of judicial restraint.

The other monumental work, "limited government and judicial review" by D. D. Basu is also considered as a guiding polestar in the firmament of research pertaining to judicial review. The dominant role of textbook writers in the field of research on the aspects of judicial review is not minimal and in some of such textbooks one finds research guided thoughts and findings on self imposed limitation on the exercise of judicial review power. Hence, the researcher thought it proper to make further in-depth study on the most debatable area of judicial review of constitutional amendments and limits of judicial review in the light of the decisions and developments.

1.3 Significance Of The Study

Perhaps India is unique democratic set up where Court has blocked the Parliament from amending certain essential provisions of the Constitution unknown to parliament.[26] Rajeev Dhavan rightly points out that *Keshavananda* had pushed judges into open politics.[27] Professor P. K. Tripathi has gone to the extent asking the Court; "will it also contest election?"[28] Justice Dwivedi has also very aptly remarked:[29]

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

So, time and again it has been tested that judiciary has not acted judicially but appeared to be a political institution and has acted politically for e.g. The Supreme Court's decision in *A. D. M. Jabalpur case*[30], *Indira Gandhi v. Raj Narain*[31] and so on. Not only has this, after the commencement of the Constitution the Supreme Court conceded plenary powers of the Parliament to

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[26] Anirudh Prasad, "Democracy, Politics, and Judiciary in India" p. 131, (1983)
[27]Rajeev Dhavan, "The Basic structure doctrine-A Footnote Comment", in 'Indian Constitution: Trends and Issues', p. 178

[28] P. K. Tripathi, "Rule of Law, democracy and the frontiers of Judicial Activism" (1975) JILI, p. 36
[29] AIR 1973 SC 1461
[30] AIR 1976 SC 1207
[31] AIR 1975 SC 2299

amend the Constitution. (For e.g. insertion of 9th Schedule) The Parliament of India also resorted to several amendments whenever the judicial decision was not found favourable. At times, the issue of committed judiciary has also arisen and this reflected in the appointment of members in the Supreme Court and High Court.

Moreover, the study of judicial review is illuminating and invigorative. It fosters constitutional insight, moderates political vision, evolves legislative balance, tones up judicial mind, and alters to avoid constitutional lapses. Harmonizes mutual governmental relationship, enlarges knowledge of constitutional jurisprudence, helps in practical application of the Constitution to life, creates confidence and self restraint, promotes liberty and freedom, bring about socio-economic uplifts and cherishes democracy. Thus, the study of judicial review is unavoidable in modern democracy when the concept of popular sovereignty predominates.

As Kautilya says-

> "Devotion of learning begets knowledge, from knowledge is achieved the capacity of its practical application to life, and from it is attained the virtue of self restraint. These are the blessings of learning."[32]

Thus, judicial review also having direct concern with life and liberty is a perennial source of learning and inspiration and is of manifest utility and necessity in the governance of the country.

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[32] Kautilya Arthashastra, I-V-16, text from R. p. Kangle's edition, University of Bombay, 1963

The present research work is a sincere endeavour to make critical evaluation of the attitude of the Supreme Court in fulfilling the goal of socialistic pattern society, secularism and welfare state in the light of exercise of judicial review power. Some of the historic decisions of the Supreme Court and High Courts in India would show hoe the Doctrine of judicial review worked in India Since the adoption of the Constitution of India.

1.4 Rationale Of The Study

If we look at the 50 years of working of the Indian Constitution, we find that the Parliament of India resorted frequently to the practice of enacting Constitution Amendment Act, whenever the judicial decision was not found favourable. This undermined the importance of judiciary and sanctity of the Constitution. As a result, our system of the 'Rule of law' suffered severe setbacks.

The Constitution (First Amendment) Act, 1951 nullified the effect of judicial decision in *Romesh Thapper v. State of Madras*[33].

The Constitution (Fourth Amendment) Act 1955 made ineffective the Supreme Court's decision in *West Bengal v. Bela Banerjee.*[34]

The Constitution (Seventeenth Amendment) Act, 1964 had made ineffective the decision given in *Karimbil Kunhikoman v. State of Kerala.* [35]

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[33] AIR 1950 SC 124
[34] AIR 1954 SC 170
[35] AIR 1962 SC 723

The Constitution (Twenty Fourth Amendment) Act, 1971 annihilated the most remarkable decision of the Supreme Court in *Golaknath v. State of Punjab.*[36]

The Constitution (Twenty Fifth Amendment) Act 1971 was enacted to make ineffective the judicial decision in *Bank Nationalization Case.*[37]

The Constitution (Twenty Sixth Amendment) Act 1971 made ineffective the decision of the Supreme Court in *Madhav Rao Scindia v. Union of India.*[38]

The Constitution (Twenty Ninth Amendment) Act, 1975 enacted to overrule the Allahabad High Court's decision in *Indira Gandhi v. Raj Narain.*[39]

The Constitution (Forty Second Amendment) Act, 1976 was enacted after the decision of *Keshavananda Bharati v. State of Kerala*[40] and is sought to curtail the power of judicial review by amending, inserting and substituting many provision of the Constitution.

Thus, from the analyses of constitutional development in India, it reveals that there are so many painfully disturbing features because of the lack of cordial relationship between the Parliament and the Supreme Court of India.

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[36] AIR 1967 SC 1643
[37] AIR 1970 SC 564
[38] AIR 1971 SC 530
[39] AIR 1975 SC 2299
[40] AIR 1973 SC 1461

The rationale of the study is to critically assess the working of this two functionaries viz. Parliament and judiciary so as to examine the conflicts arise between them. The study also emphasis to investigate upon the factors required to be brought about to construct the bridge of harmony between two.

1.5 Introduction To Some Basic Concepts

1.5.1 Limited Government

In the twentieth centaury, the bulk of the civilized world has embraced the faith that absolute power is not desirable, whatever good it may promise to deliver. But while England has sought to control power by making it responsible to the representatives of the people, in the United States or in India, it is realized that that is not enough inasmuch as a representative assembly may at times behave capriciously and therefore require to be controlled. Freedom of the individual is not secure unless institutional means to curb authority, wherever placed,-are devised. The institution of government is intended to serve and not to dominate the people. It must, of course, be endowed with all powers necessary for this purpose, but if anything is to be supreme, it should not be the representative assembly, but a Constitution, which embodies the will of the people, as the 'fundamental law' of the land. Limited government thus involves the supremacy of the Constitution in place of the sovereignty of Parliament. So, in United States and in countries, which have followed its steps in having written constitution, such as India, 'limited government' has come to mean that unlimited power

should not be reposed in any body of men, not even a representative body.[41]

1.5.2 Judicial Review

Judicial review is not an expression exclusively used in Constitutional Law. Literally, it means the revision of the decree or sentence of an inferior court by a superior court. Under the general law, it works through the remedies of appeal, revision and like, as prescribed by the procedural laws of the land, irrespective of the political system which prevails. Judicial review has, however more technical significance in public law, particularly in countries having written constitution, founded on the concept of 'limited government'. Judicial review, in the constitutional law of such countries, means that courts of law have the power of testing the validity of legislative as well as other governmental actions with reference to the provisions of the Constitution, which is the paramount law of the country.

The foundation of the doctrine of judicial review is

- That the Constitution is a legal instrument, and
- That this law is superior in status to the laws made by the Legislature, which is itself set up by the constitution.

So, where the Constitution operates as a higher law, any act which transgresses the mandates of that higher law becomes unconstitutional and since not only the executive but the Legislature itself is limited by that higher law, as in the U.S.A. or in India, a legislative act, too, would be unconstitutional and

[41] Where, "Modern constitution", p. 138, 1966

invalid when it contravenes the constitution. The peculiarity of judicial review in the Constitutional sphere is that this power is wielded by the judiciary, not over any inferior tribunal, but over co-ordinate authorities, namely, the Legislature and the Executive.

As soon as it established that the Constitution is the supreme law and that any law made by the Legislature which is repugnant to that supreme law must be unconstitutional and invalid, the next question which arises is to which organ or authority should belong this power of pronouncing such constitutionality. However the judges of U.S.A. viewed that such power must belong to the judiciary gave answer to this question. The constitution of India expressly provides this power of judicial review.

1.5.3 Separation of Powers

In a Constitutional set-up Separation of Powers has a great significance and practical utility. It creates democratic balance in the different branches of the government. The U. S. Supreme Court has held that Separation of Power is to save the people from autocracy.[42] Though in India theoretically there is no strict separation of governmental powers, in practical application three branches of the government have their separate sphere of work. The legislative branch cannot delegate its essential legislative power to executive and in the case of such delegation, the judiciary intervenes and judiciary has implied constitutional power to declare the excessive delegation of the legislative power

[42] Myers v. US 272 US 52 (1926)

unconstitutional. Such power the Court possesses as matter of constitutional mandate, express or implied, to maintain balance of the legislative power.

Thus, independency of judiciary is a predominant feature under Separation of powers. Judicial independence has been and is being cherished not only in India but also in England and America. Separation of powers, even in America, does not mean complete independence of three branches of the government. Judicial review renders a great check on the legislative and the executive branches of the government and maintain there by the democratic balance. This constitutional principle of checks and balances rest partly on the specific provision of judicial review incorporated in the Constitution of India and partly by implications.

Essence of constitutionalism rests in limitation as well as diffusion of powers between central and state government in a federal character of the Constitution. Formally constitutionalism means the principles which restraint the political powers by rules, which determine the validity of legislative and executive actions. Disregard of such rules imply violation of Constitution and therefore require the action to be pronounced as ineffectual by court whose main function is to strike balance and maintain spirit and sanctity of Constitution.

A French scholar Montesquieu conceived the principle of separation of Powers. He found that concentration of power in one person or a group of persons resulted in tyranny. He, therefore, felt that governmental powers should be vested in three different organs, the legislature, executive and judiciary. The principle can be stated as follows:

i. Each organ should be independent of the other;
ii. No one organ should perform functions that belong to the other.

1.5.4 Rule of Law

The modern terminology Rule of Law classically known as in the French term 'la principe de legalite' i.e. principle of legality, or in roman law it was called as 'jus naturale' or the mediaevalists called it 'the law of god', or Hobbes, Locke and Rousseau termed it as social contract or the natural law. In modern time credit goes to the rule of law to systematically develop the growth of administrative process and for that matter credit goes to dicey who expounded the rule of law. Dicey contemplated reasons while conceptualizing rule of law that there ought to be absence of wide powers in the hands of government officials because whenever there is discretion there is room for arbitrariness which is opponent of the concept of equality.

The Rule of law is a high tenet of constitutional jurisprudence. It is the very soul of constitutional law. According to Prof. Dicey, the rule of law meant "no man is punished or can be lawfully made to suffer in body or goods except for a breach of law established in the ordinary legal manner before ordinary courts of the land"[43] The 'Rule of Law', which forms a fundamental principle of the Constitution, according to Dicey, has three meanings, or may regarded from three different points of view.

[43] Dicey, A. V., Introduction to the Law of Constitution, 9th edition, 1952, p. 188

In the first place it means the absolute Supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, prerogative or wide discretionary authority on the part of the government. It means law is supreme and above all and no authority can claim supremacy over that of the law.

In the second place, it means equality before the law, or equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. The Rule of Law in this sense, excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens

Lastly, the ' Rule of law' may be used as a formula expressing the fact that the exercise of public power must find its ultimate source in some legal rule and the relationship between the State and individual must be regulated only by law.

Thus, the doctrine of 'Rule of Law' is that laws ought to be equal, general and known. It shall be administered by independent judges. The three organs of the State shall be separate. 'Rule of Law' envisages the pervasiveness of spirit of law throughout the whole range of government. It is the 'met-wand' for harmonizing individual liberty and public order.[44] 'Rule of Law' is the operating instrument of justice in a civilized society. Burian has rightly observed that constitutionalism may be equated to Rule of Law. Thus, where there exists a Constitution, the Rule of Law is manifested. However, these manifestations may not be always

[44] M. N. Venkatachaliah, 'A Rule of Law: Contemporary Challenges' p. 50 "Indian Judicial System" edited by S. K. Verma

specifically apparent. They may be implied. Though our Constitution does not make any direct or specific mention of Rule of Law, it does so indirectly through reference to its essential elements.

The preamble to the Indian Constitution declares that Indian is a Republican State. From the beginning to the last wording of the preamble, it is clear that sovereignty resides in the people and all government authority emanates from them, A republican State implies a representative democracy. Its essence is popular representation wherein there is a choice of principal agnates of government through elections and laws are enacted by these agents. Rule of Law is the spirit behind the concept of Republican State. The concept of Rule of Law epitomizes Republican government. The underlying idea is that the State and its government are creations of the people. That is to say, authority of the government is derived from the people and the government is the instrument for securing the aims oaf justice, liberty, equality and fraternity.[45]

1.5.5 Parliamentary Sovereignty

Parliamentary sovereignty, parliamentary supremacy, or legislative supremacy is a concept in constitutional law that applies to some parliamentary democracies. Under parliamentary sovereignty, a legislative body has absolute sovereignty, meaning it is supreme to all other government institutions (including any executive or judicial bodies as they

[45]S. N. Parikh, "Rule of Law, Judicial Review and the Indian Constitution", p. 196 'Constitutional law: A Miscellaneous', edited by S. P. Singh Makkar, ABS Publication, 1990

may exist). Furthermore, it implies that the legislative body may change or repeal any prior legislative acts. Parliamentary sovereignty contrasts with most notions of judicial review, where a court may overturn legislation deemed unconstitutional. Specific instances of parliamentary sovereignty exist in the United Kingdom and New Zealand.

So, the concept of parliamentary sovereignty means that Parliament is the supreme legal authority in the UK. In many countries, for example, the USA, the legislature is limited by the Constitution in the laws it can or cannot make. The U.S. Supreme Court can declare laws passed by the legislature to be unconstitutional and therefore invalid.

The traditional view in the UK is that Parliament is not subject to any legal limitation and that the UK courts have no power to declare laws duly passed by Parliament invalid.
According to A.V. Dicey[46], "In theory Parliament has total power. It is sovereign." Dicey's view of parliamentary sovereignty consisted of four factors:

1. Parliament is competent to pass laws on any subject;
2. Parliament's laws can regulate the activities of anyone, anywhere;
3. Parliament cannot bind its successors as to the content, manner and form of subsequent legislation; and
4. Laws passed by Parliament cannot be challenged by the courts.

[46] A. V. Dicey, Law of the constitution

1.5.6 Due Process of Law

The phrase 'due process' has come to mean judicial law making of an 'activist' nature.[47] The concept of 'due process' of law in 5th and 14th amendment to the Constitution of U.S.A. was derived from the expression 'save by the law of the land' used in Article 29 of the Magna Carta[48], which said:

"No man shall be taken or imprisoned, diseased or outlawed, or exiled, or in any way destroyed, save by the lawful judgment of his peers or by the law of the land."

However at same time it has been established that this clause of the Magna Carta has undergone a metamorphosis in the course of its being engrafted in the American Constitution. The aforesaid clause of the Magna Carta was intended as procedural safeguard against the arbitrary government of absolute monarch. In England the phrase 'Due process of law' implied conformity to the natural and inherent principle of justice and avoidance of arbitrary government but based on the whims of monarch.

At the root of the 'due process' concept, American theory of law lies, according to which law is not a mere 'command of sovereign' as Austin thought.
So far as procedural branch of 'due process' is concerned, the Americans imported the English common law principle of natural justice, as embodied in twin maxims.

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[47] William Swindler, Court and Constitution in the 20th Century, The New Legality, 1932-1968, 1970
[48] Vide Maitland, Constitutional history of England p. 52 Cambridge, 1965

- *Nemo debet esse judex in propria causa*
- *Audi alterm Partem*

But the difference between the English and the American attitude lies in the extent to which the judiciary would go in its crusade against a Legislature, which denies these principles of natural justice.[49]

1.5.7 Doctrine of Basic Structure

According to the Constitution, Parliament and the state legislatures in India have the power to make laws within their respective jurisdictions. This power is not absolute in nature. The Constitution vests in the judiciary, the power to adjudicate upon the constitutional validity of all laws. If a law made by Parliament or the state legislatures violates any provision of the Constitution, the Supreme Court has the power to declare such a law invalid or *ultra vires*. This check notwithstanding, the founding fathers wanted the Constitution to be an adaptable document rather than a rigid framework for governance. Hence Parliament was invested with the power to amend the Constitution. Article 368 of the Constitution gives the impression that Parliament's amending powers are absolute and encompasses all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence. With the intention of preserving the original ideals envisioned by the constitution-makers, the apex court pronounced that Parliament could not distort, damage or alter the basic features of the Constitution under the pretext of

[49] Hogan v. Reclamation District, (1884) 110 U.S. 516

amending it. The phrase 'basic structure' itself cannot be found in the Constitution. The Supreme Court recognized this concept for the first time in the historic *Keshavananda Bharati* case in 1973.1 Ever since the Supreme
Court has been the interpreter of the Constitution and the arbiter of all amendments made by Parliament.

1.6 Scope Of The Study

In India in view of the highly complex conditions of the society the enlargement of the scope of judicial review is unavoidably necessary. The present political atmosphere in India is not very congenial and the party in power may, in order to fulfill its own whims, frame objectionable laws and as such a limited scope allowed to judicial review would not be helpful in developing the Indian democracy. However, it must depend upon the judicial reasonableness and prudent judicial vision in each case to ascertain as to what extent elasticity in judicial review is expedient. Elaboration is necessary not only in the fundamental principles of judicial review, but also in the method and rules of conduct of judicial review. The basis of judicial review is that the Constitution is a legal instrument and that this law is basic, superior and overwhelming in status to the laws made by the legislature which is it set-up by the Constitution. Judicial review is used not only for the enforcement of Rule of Law but also for establishing the reign of law.

However, at some point, judicial review assumes the characteristics of law making. Constitutional interpretations are more than a technical exercise or display of judicial erudition.

The power to interpret the law is the power to make the law. Judicial review can be another name for judicial legislation.

So, the purpose of this study is to trace the conflict between the Parliament and the Supreme Court of India. History is the witness that there is lack of cordial relationship between the Parliament and the Supreme Court of India. The Constitution of India has sufficiently demarcated the function of each of the three organs namely, executive, legislative and judiciary. It is expected that no organ shall encroach upon or assume the function belonging to others. It would be considered as breach of 'Constitutional Trust' if any organ oversteps its limits and interferes with the field belonging to the other.

The study tries to analyze critically the crossing of the boundaries by the legislative and judiciary in total disregard of the well-established limitations on each of the two.

The study further tries to examine, in particular, the exercise of the power by the legislature and thereby nullifying the effect of judicial decisions by changing the basis of such decision retrospectively.

It is also one of the core issues of the study that how such practice undermined the importance of the judiciary and the sanctity of the Constitution.

1.7 Objectives Of The Study

At this preceding backdrop, the salient objectives of the present research study are:

A. To inquire into the nature and scope of the judicial review.
B. To consider the accountability of the judiciary and legislature.
C. To find out the rational of the controversies between the Parliament and the Supreme Court of India.
D. To what extent the doctrine of 'Basic Structure' as propounded by the Supreme Court in *Keshavananda Bharti's*[50] case in exercise of its judicial review power is constitutionally appropriate?
E. To examine the functioning of the doctrine of judicial review so as to help in the growth of Parliamentary democracy in India.

1.8 Hypothesis Of The Study

In the light of what is briefly discussed about the topic, hypothesis is formulated for the research study. They are:

- From various Supreme Court's decision and Constitutional Amendments one finds a bit difficult to identify the factors responsible for the conflict between the Parliament and the judiciary from 1951 onwards.

[50] AIR 1973 SC p. 1642

- The nature of the 'judicial review' power of the Supreme Court and High court appears to be vague and ambiguous. Exercise of such power may be political, judicial or constituent.
- It is widely felt that the concept of 'Supremacy of the Constitution' has degenerated into the concept of 'Supremacy of the Supreme court'. Inquiry into the judicial decision is required to prove the veracity or otherwise of the statement.
- The doctrine of 'Basic Structure' is not supported by any specific provision of the Constitution of India. It is yet to be decided whether this doctrine is consistent with the spirit and philosophy of the Constitution of India. Also, there appears to be ample scope for reconsideration and change in this doctrine.

1.9 Research Questions

1. What is the nature of the judicial review power of the Supreme Court and High Court- Is it 'judicial', 'political' or 'constituent'?
2. How can the judiciary in the exercise of judicial review power declare constitutional amendments unconstitutional, passed by both the houses of Parliament and assented by the President under Article 368?
3. Should not the exercise of judicial review power be continued to adjudge the Constitutional validity of any Parliamentary legislation, State legislation and executive ordinances?

4. Is the insertion of 'Due process of Law' in Article 21 by judicial craftsmanship in Maneka Gandhi's case[51] consistent with the principle of interpretation of the Constitution? Is the construction put on Articles 14, 19, 21 proper and valid?

1.10 Limitation Of The Present Research Study

The researcher submits that this research study is having its limitations. The present research study covers wide areas of study. The researcher utilized only limited case laws pertaining to this research work among the catena of cases decided by the Supreme Court and High Courts. The present research study as a matter of fact also touches various social sciences, like, political science and public administration, but the researcher confined his study to the field of law alone. Though there are number of cases relating to the present research study decided by the U.S. Supreme Court, the research has covered few of them and relied mainly more upon the cases decided by the courts in India for giving full orient touch.

1.11 Research Methodology

The present research study is mainly a doctrinal and analytical. Keeping this in view, the researcher utilized the conventional method of using libraries consisting of primary sources like Judgment of the Supreme Court and High courts published in various Law Journals.

[51] AIR 1978 SC 597

As the study is political-legal in nature, historical and doctrinal methods are adopted because it is not possible to study purely by experimental method.

The relevant material is collected from the secondary sources. Materials and information are collected both legal and political sources like books on Constitutional law by eminent authors like D. D. Basu, H. M. Seervai, Subhash Kashayap, A. G. Noorani, Granville Austin, Rajeev Dhavan, Subhash Jain etc. Journals like Journal of Constitutional Law and Parliamentary Affairs, Journal of Indian Law Institute, Supreme Court Cases, Indian Bar review, Lawyer's collective, Law teller etc. are also referred. Material is also collected from print and electronic media.

From the collected material and information, researcher proposes to critically analyze the topic of the study and tries to reach the core aspects of the study.

1.12 Scheme Of The Study

The entire study is divided into nine chapters with different dimensions of the problem.

The First Chapter covers the introduction of the topic, consists significance of the problem including the methodology followed, hypothesis formulated, literature reviewed, significance and scope of the study and plan of the study. It also covers the primary introduction to some basic concepts of the study.

The Second Chapter deals with the origin, growth and development of the doctrine of judicial review in India and U.S.A. Reference is made to various Indian American decisions with respect to functioning of the doctrine of judicial review. In this chapter procedure and practice followed by Courts in both countries viz. India and U.S.A. in exercising of the judicial review power is also highlighted. Also, this chapter highlights evolution of judicial review in India and U.S.A. Also, it discusses the reasons for non-existence of judicial review in England.

The Third Chapter tries to explain their interconnection among the doctrine of 'Judicial Review', 'Rule of Law', 'Separation of Power' and 'Due Process of Law'. How these doctrines are interlinked and supplementary-complementary to one another is discussed in this chapter. With the help of these three doctrines, i.e. Rule of Law, Separation of powers and Due Process of Law, an attempt is made to establish in this chapter that, democracy aims at establishing a just society and the judiciary is logically and inevitably associated with it. Both are complimentary to each other. If democracy prepares the ground to realize lofty ideals of life, the Court acts as a sentinel on the 'qui vive'. Judicial review is a watchword when democracy-especially in India-a land of religion and philosophy- aims at providing people all good conditions, which make life work living. To prevent and to redress abuse of power judicial review is indispensable in democracy; judicial review becomes more logical and necessary for the safe existence of democracy and for survival of the Constitution.

The Fourth Chapter emphasizes on the constitutional provisions concerning judicial review power of the courts. How

the courts have exercised this power, which has resulted into the controversy between Parliament and the Supreme Court. In this chapter basic constitutional principle for the exercise of judicial review power is also discussed. It also includes causes for exercise of judicial review power by the courts, namely,

1. Absence of legislative competence to enact a particular statute;
2. Statute against the particular provision of the Constitution or contradict with the basic philosophy of the Constitution.
3. Constitutional amendment contradicts with the basic philosophy of the Constitution
4. Misuse of the executive power
5. Delegation of essential legislative policy
6. Revival of void statutes
7. Giving extra-territorial operation to the state legislation

The Fifth Chapter deals with the Parliament's attempt to take away judicial review powers of the courts. Constitution (Forty second Amendment) Act, 1976 is essential to explain this concept, which is discussed in detail in this chapter. Apart from 42nd Amendment, 17th Amendment, 39th Amendment, as well as Parliament's attempt to restrict judicial review power of the courts in other areas like, powers of the President, Socio-economic policy of State, Fundamental Rights etc. have also discussed in detail.

The Sixth Chapter elucidates the role of the Supreme Court in exercise of judicial review power in the area of Constitutional Amendments. The Supreme Court of India is probably the only

court in the world, which has extended its power of judicial review in the area of constitutional amendment, on the ground of violation of the basic structure of the Constitution. In this process the Supreme Court of India had propounded the doctrine of 'Prospective Overruling', and doctrine of 'Basic structure'. However, once again it was the turn of Parliament and Constitution (Forty Second Amendment) Act, 1976 curtailing the power was introduced. This chapter critically examines the cold war, tussle between the Parliament and Judiciary to establish supremacy over the other.

The Seventh Chapter touches the core issue of the study and that is 'Judicial review' and 'Judicial Activism'. There are cases in which the Supreme Court has utilized the power of judicial review in the name of active judiciary. The chapter also focuses on the limitations of the doctrine of judicial review.

The Eighth Chapter illuminates the comparative critical study of the functioning of the doctrine of 'Judicial Review' in America and India. The chapter also focuses on the pattern in which this doctrine developed and has worked as an essential component for running of democratic state. The chapter tries to differentiate the points, which make difference in working of this doctrine in both U.S.A. and India.

The Ninth Chapter gives the conclusions of the research study and highlights the main points of research findings. In the light of research findings, this chapter also gives some suggestions for the effective functioning of the doctrine of judicial review in India that may help to preserve the real zeal of Indian democracy.

1.13 Utility Of The Study

Constitution is the fundamental document of the land and research concerning such document also possesses its usefulness. The concept of judicial review is not of recent origin but always attracted bench, bar as well as academicians. Now a days due to the advent of judicial activism, study of the doctrine of judicial review has become the heart and soul of the present day Constitutional law.

The present research work serves several purposes and got its utility. The research submits that the content and findings in this research work are useful in multiple ways. This research work is useful for the Administrators, the Bench & bar, the Legal and non-legal academicians.

The research portrays that most important function of the judiciary under a written constitution is to keep all authorities within the constitutional limits. This function is performed by way of judicial review. Judicial review has more technical significance in public law in countries having a written Constitution. It means the Courts have the power of testing the validity of legislative as well as governmental actions on the touchstone of the Constitution. Thus, the Courts determine the legislative Acts by considering them against requirements within the parameters of a written Constitution.

The research also seeks to answer the question that whether there should be judicial review in the Constitution of a country,

but to what extent it should remain and what purposes it should fulfill. Experiences indicate that Judicial Review fulfills its purposes best when it seeks to protect and preserve the individual liberties. And also highlight that this area itself involves a tremendous problem in the present era. How best to adjust the legalistic doctrines of judicial review to the needs of the day and the philosophy of the prevailing generations will ever remains a constant theme for constitutionalist, jurists, and politicians.

The research work is useful for much to the Bench and Member of Parliament who are the two wheels of the chariot of the welfare state, who can use this research work for the better appreciation of the disputes before them and they can lay their fingers at the correct case law. Lat but not the least, this research work is useful to researchers who are burning their energies to find ways and means for justification of exercise of judicial review power in relation to constitutional amendments.