INTRODUCTION

It is the basic postulate under the Indian Constitution the sovereign power has been distributed between the legislatures to make the law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the Constitution, one of the distinctive feature of our Constitution is that while legislature or executive cannot supervise or review the decisions of the court, the Apex courts can review the decisions of the executive and test the Constitutional validity of laws passed by the legislature, in exercise of their power of judicial review, the Constitution does not refer to the term judicial review or its limits. Thus an attempt will be made to discuss the meaning of judicial review and find out the parameters of judicial review under our Constitutional provisions.

Article 32 of the Constitution confers power on the Supreme Court for enforcement of any of the rights conferred by Part III of the Constitution beyond the same. That means if there is a violation of fundamental rights in state action, including legislative action, the same can be struck down under Article 32 of the Constitution and the touchstone could only be the Constitution and more specifically Part III of the same propounding the basic structure doctrine as touchstone to the legislative actions has led to a power imbalance between the judiciary and parliament and it raised issue whether Article 32 of the Constitution from where Supreme Court derives power of jurisdiction to enforce fundamental rights gives such power to profound binding doctrines and thereby introduce invisible amendments of the Constitution? An attempt has been made in the present work to find out the solution of problem as how to adjust the legalistic doctrine of judicial review to the needs of the day.

The responsibilities which a court carries in a country with a written Constitution are very onerous much more onerous than the responsibilities of a court without written Constitution. The courts in a country like Britain interpret the laws but not the Constitution, whereas the courts in a country like India, having a written Constitution, interpret the provisions of the Constitution and thus give meaning to its cold letters. In doing so, the courts act the supreme interpreter, protector

and the guardian of the supremacy of the Constitution. This being so, it can rightly be argued that in the capacity of the ultimate interpreter‘ of the Constitution, the Supreme Court inevitably becomes a sole judge of its own powers, which in turn, places the judiciary at a considerable position guarding the Constitution. This, in fact, is a power which ex-hypothesis is denied to every other organ functioning under the Constitution. In reality, such dicta when analysed are formulations for judicial primacy over all other organs under the Constitution.

The identification of the features which constitute the basic structure of our Constitution has been the subject-matter of great debate in India Constitutional law. In *Keshavananda Bharati v. State of Kerala*[1] , it has been held by the court that judicial review is the "basic feature" majority are not ever unanimously agreed on this aspect, and thus an issue has been often raise whether the power of judicial review vested in the High Court's and in the Supreme Court under Article 226 and 32 is part of the basic structure? An attempt has been be made in the present work to mention elaborately the aspect of Judicial Review on this issue.

In any democratic political framework what is necessary for the smooth functioning of the state is that every organ of the state works in harmony with the other without actually interfering in the province of the other organ. However one of the biggest problems that arise is of lack of any rigid formula that guides the executive, legislature or judiciary in their respective area of functioning.

It is in this context that the term judicial review connotes the check maintained by the judiciary upon the functioning of the executive and the legislature within the normative framework of the Constitution.

The doctrine of 'judicial review', in the modern world is said to have born in 1804 when Chief justice Marshall, decided *Marbury v. Madison*[2]case. He held that a law repugnant to the Constitution is void that the instrument of constitution

[1]AIR 1973 SC 1361

[2] 5 U.S. 137 1 Cranch 137

binds the courts as well as other departments. It was also held that if there was conflict between a law made by the Congress and the provisions in the Constitution, it was the duty of the court to enforce the Constitution and ignore the law. Twin concepts of judicial review and judicial activism were thus born mentioned case only traced the source of judicial review as being implied in a written constitution. But the concept of judicial review existed in America even before the ruling in the *Madison case*[3].

By asserting the fact that the Supreme Court has the power to invalidate acts of Congress that are contrary to the Constitution, though this power is not expressly mentioned in the constitution, Chief justice Marshall, created a controversy. The critics argued that it amounted to usurpation of power by an unelected court and may serve to censor legislation enacted by an elected legislature.

Unlike the United States Constitution, the Indian Constitution expressly provides for judicial review in Article 13 Clause (2) of the article says that the states shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, the extent of the contravention, be void as such doesn't poses ay problems in India as it is envisaged by the constitution itself.

After independence, zamindari abolition and land egalitarian efforts of social engineering faced several problems the land legislations were challenged in the courts. To ensure that agrarian reform legislation did not run into heavy weather, the legislature amended the Constitution in the year 1951 which inserted Ninth Schedule Article 31-B was inserted by the First Constitutional (Amendment) Act 1951 ensured that any law in the Ninth Schedule could not be challenged in courts. In other words laws under Ninth Schedule are beyond the purview of judicial review even though they violate fund.

Judicial review is an example of the separation of powers in a modern governmental system where the judiciary is one of three branches of government. The principle of Judicial Review is interpreted differently in different jurisdictions, which also have differing views on the different hierarchy of

[3]*Supra* n.2.

governmental norms. As a result the procedure and scope of judicial review differs from country to country and state to state. Thus an attempt will be made to discuss the scope of judicial review in India.

But buy propounding the basic structure doctrine as touchstone to the legislative actions has led to a power imbalance between the judiciary and parliament in respect of Constitution where Supreme Court derives power and jurisdiction to enforce fundamental rights gives such power to profound binding doctrines and thereby introduce invisible amendments to the Constitution? An attempt will be made in the present work to find out the solution of problem as how to adjust the legalistic doctrine of judicial review to the needs of the day.

Judicial review is generally defined as institutionalised process that provides for the strengthening and creative evolution of democracy and democratic process. Opponents of judicial review of legislation regard it as anti-democratic in nature. According to them in a democratic country, the people make the laws through their legislature. Thus, is not function of the court to supervise and to correct the laws passed by the legislature as an overriding authority? An attempt has been made in the present work to discuss the significance of judicial review in a democratic country.

The power of judicial review is an essential feature of our federal system. The scope and extent of judicial review under Constitution is not clear and thus while exercising the power of judicial review, judiciary must act with caution and proper restraint and base their decisions on recognised doctrine or principles of law. This power is an essential feature of our federal system. It is the duty of the Court to uphold the Constitution, thus expansion of judicial review power must be constitutionally justified.

Q1. What is the scope of Judicial Review under Indian Constitution and the reason behind expansion of scope of judicial review?

Q2. Whether the judiciary has exceeded its power of review by propounding the ‘Basic Structure Doctrine’ as touchstone to test the legislative action.

Q3. Is judiciary proving a road block to social and economic progress of our country by propounding various doctrines or theories while exercising the power of judicial review?

Q4. Is it encroaching upon the legislative fields of parliament or state legislature by using the Power of judicial review?

Q5. Whether 'the people' operating through a representative parliament are helpless to determine the structure and quality of governance & whether a small often divided set of appointed judges can replace democratic judgment on 'basic features'?

Q7. Can the activist nature of the judiciary be reconciled in the context of its detrimental effects on the rule of law?

Q8. What is the limit of the power of Judicial Review?

Q9. How far can the judiciary claim power under the given constitutional scheme?

Q10. Can the amending process bypass the role given by the Constitution to the federating states in amending the Constitution?

Q11. Is the Supreme Court's power to strike down a constitutional amendment drawn only from the Constitution or can it be drawn from the other sources too?

These are certain questions that the present chapter undertakes and attempts to investigate.

A number of studies have been made over the last two decades relating to the power of Judicial Review of judiciary and analysing the judicial decisions. That has been systematically analysed in the present research work methodology of the present research work is mainly doctrinaire where the researcher has follows the historical and analytical approach. It involves three dimensional areas viz. the study of relevant constitutional provisions, the study of relevant judicial review decisions and the study of academics opinions gathered from the books and article published in the referred journals.

The researcher has analysis acceptance of judicial review in various constitutional systems historically, with emphasis upon 21st century developments. Case-law study has been made with considerations of social value, social policy and social utility of decisions. Theories relating to judicial review and as to its practice under various modern constitutions has been analysed. Mainly secondary sources such as articles, books and electronic resources will be studied and analysed in order to evolve the conspectus of the whole study. The present study has mainly concentrate in relation to the Indian position. However a brief reference to important constitutional and judicial decisions of other relevant countries which have attracted the attention of the Indian judiciary has been referred to.

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The Constitution of India is a written Constitution and though it has adopted many of the principles of the English Parliamentary system, it has not accepted the English doctrine of absolute supremacy of Parliament in matters of legislation. In this respect it has followed the American constitution.

The question whether privileges of legislature are above the fundamental rights, we have already noted that the Supreme Court has held that privileges "until so defined shall be those of the House of Commons of the Parliament of the United Kingdom." Thus it has been held that freedom of speech and expression of Press are all subservient to the privilege of legislature. Let us examine whether it is necessary that a member of a legislature should be protected from libelous criticism, so that he may discharge his duties in the legislature without fear.

A member should be given full freedom of speech in a legislature and he should also be protected from danger of any legal action for anything said, even if it is defamatory of any one. All these immunities and rights are necessary to enable a member to discharge his duties in the legislature without fear or harassment or obstruction from any one. But is it also necessary for this purpose, that he should

be above criticism even strong libelous criticism for which he has, like any other citizen, a remedy under the ordinary law of the land.

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

Judicial review has its roots long back and it is a highly complex and developing subject. There have been a good number of cases before the American Supreme Court in respect of judicial review of legislative and executive action. The Constitution makers of India incorporated the provisions of judicial review in the Constitution itself, to maintain the balance of federalism to protect the fundamental rights, granted to the citizens and to afford a useful weapon for equality, liberty and freedom.

In India also, as in America, practical rules, procedures and various cautionary measures concerning Judicial Review, have evolved through constitutional decisions. India has not adopted the British doctrine of the supremacy of parliament and rights of Parliament are restricted by clear Constitutional mandates and the courts are competent to test the validity of legislative as well as other governmental actions. The function of judiciary is not to set itself in opposition to the policy and politics of the majority rule. On the contrary, the duty of the judiciary is to consider and decide whether a particular statue accords or conflicts with the Constitution and make a declaration accordingly. A good number of academic works in the form of articles and books has been done in this area, to mention few of them as follows:

> E.C.S. Wade, *Dicey*: *Introduction to the Study of the Constitution*, 10th edition, London, Macmillan, 1959; Prof. Dicey had the thought that Englishmen are ruled by the law and by the law alone a man may be

punished for a breach of law but he can be punished for nothing else no man's punishable or can be lawfully made to suffer in body or in goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. Further Dicey writes, "It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. Dicey continues that, "Not only that with us no man is above the law but (what is a different thing) that here everyman. Whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. This Book the author had represented the view of Dicey regarding need of the Rule of law in administrating justice.

Jain and Jain, *Principles of Administrative Law*, N.M. Tripathi, Bombay, 3rd Edition, 1979; There has been an outstanding development of administrative law in the current century. The credit for this development goes largely to the judiciary at least in the common law world. In India, in more recent years, the apex court has been responsible for the multi-dimensional growth of administrative law. The subject though ever growing, has come of age and is of abiding interest. The book is a brilliant, comprehensive and an authoritative work on administrative law. Though the authors have mainly confined themselves to Indian administrative law, they have incorporated, at relevant places, elements of the subject as developed in England, United States and in other countries. The reasons for this are not far to seek. Law persons in India have been trained to refer to English, U.S. and other foreign authorities while searching for solutions to Indian legal problems. Thus a work on Indian administrative law has to be comparative at places.

Mauro Cappelletti, *Judicial Review in the Contemporary World*, Princeton University Press, London, 1996;Professor Cappelletti's lucid and scholarly summary of judicial review in the western world is an excellent introduction to the subject. His use of the comparatist approach is an excellent illustration of the merits of this methodology, since it is replete with insights into contemporary judicial review which we would otherwise lack. The development of legal institutions, perhaps even more

than juridical concepts, can valuably be studied through a comparison of their evolution and development in other legal systems. The major part of Judicial Review in the Contemporary World is devoted to a straightforward comparative and historical analysis of judicial review. The author does, however, advance certain propositions which raise jurisprudential questions. The persuasiveness or non-persuasiveness of these propositions does not detract from the general validity and importance of the comparatist law aspects which comprise the major part of the book. At the same time, however, the jurisprudential propositions asserted are quite important in their own right and merit comment, subject of course to the recognition that Professor Cappelletti has offered in Judicial Review only a brief outline of these assertions without a full exposition of his thoughts.

B. N. Kripal, Ashok H. Desai, Gopal Subramanium, Rajeev Dhavan & Raju Ramachandran (Ed.) , *Supreme but not Infallible,* Oxford University Press,2000.

The essays in this volume are concerned with the work of the Court in areas relating to public law and the Constitution. Appreciative in their tone and, often, powerfully unsparing in their criticism, these essays, hopefully, constitute the beginning of a process to evaluate the on-going work of the Court in all areas of its many jurisdiction. It is through such efforts that the Court learns about itself. The title of the volume 'Supreme but not Infallible' – is taken from an oft quoted self-reflection of an American judge: 'We are not final because we are infallible; we are infallible only because we are final.' We would like to believe that the Supreme Court has gone about its task less conscious of its supremacy and more warily with the intuition that the Court, though final, is fallible. These essays are a reminder of what the Court is a does.

N.R.Madhava Menon, *Rule of Law in a Free Society*, Oxford University Press, 2008.

The key determinant in the continuance of Rule of Law is the provision of adequate safeguards against abuse of power, particularly by the Executive Government; equally important is the existence of an effective government capable of maintaining law and order and of ensuring proper

social and economic conditions for life with dignity for its citizens. The strategy by which abuse of power by the Executive is attempted to be prevented is twofold. First, by a scheme of limitations of power including guaranteed rights of citizens and separation of executive and judicial powers. Secondly, the existence of an independent Judiciary with powers of judicial review of executive action to ensure that power is exercised within the limits of law. Naturally, an independent Judiciary is an indispensable prerequisite of a free society under the Rule of Law. Such independence implies freedom from executive/legislative interference in the exercise of judicial functions.

P.B.Vijaya Kumar, *Dynamics of Justice a La Supreme Court of India,* Gogia Law Agency

In this Book the author deals with a paradigm shift and expansion in the role of judiciary in this country. The dynamics of judiciary travelled beyond the original perceived role of interpreting the law made by the legislature and extended its tentacles to examine the constitutionality of actions in administration, Implementation of laws, governance of the society and the life of an individual. Pre-Independence Judiciary in India was British in its perception and after independence it gained Independence and acted independently. It is infect, a great transformation. The administrative structure of India changed into the constitutional frame of federation with union and states. The judiciary has emerged into a single unified structure with the Supreme Court and the High Courts and the lower Courts as its components, working with Union and State laws and rights of the people in general.

S.P.Sathe, *Judicial Activism in India,* Oxford University Press, 2nd Edition;

In this work, Professor Sathe is not overly concerned with the tasks of construction of the meanings of judicial activism. Quite rightly, he remains concerned with more important issues of its 'efficacy' and 'legitimacy'. His principal message is that judicial activism must always remain just that: judicial activism is a form of state power inherently at odds with itself. Put another way, justices can be activists only within the confines of the traditions of administration of justice. They may expand

> and enhance that tradition (as they have done somewhat spectacularly) but their work remains tradition-constituted. Judicial activism makes sense only when its performers remain recognizable as judges. It is clear that Professor Sathe is in search of the Golden Mean. Too little activism is a dangerous portent signifying under enforcement of constitutional notions of good governance, rights, and justice. Too much activism results in over-enforcement of these ideals, imperiling the legitimacy and efficacy of judicial power.

To testify the hypothesis, the Researchers proceeded to discuss different issues under various Chapters. Apart from the Introduction, the whole work was divided into seven chapters.

The concept of Judicial Review has a long and chequered history. It originated in English legal system and became a very important principle in the systems of government based on rule of law. When India was a colony of the British Empire the concept of Judicial Review was followed by the Courts and has continued to be a part of the legal system of our country since then. In order to know more about its ambit and scope it is necessary to note the historical background of the concept in English legal system and its adoption in Indian Legal system. Thus, to trace the source and development of judicial review in India and its place under the Indian Constitution, Chapter 1 of the work traces the historical background and Constitutional foundation of judicial review in India.

The power of judicial review is exercised differently in different political systems. In countries like the United Kingdom where the constitution is largely unwritten and unitary in character and parliament is sovereign, the courts can declare an act of parliament to be incompatible with the constitution, but they cannot invalidate a law for being inconsistent with the constitution. In other words, the judiciary can only interpret the Constitution. The situation is different in countries where a written and federal constitution limits the powers of parliament. For instance, in USA, the Supreme Court can strike down legislation enacted by Congress if it finds the same to be incompatible with the constitution. The principle of judicial review became an essential feature of written

Constitutions of many countries. Chapter 2 of the work, focuses on the system of judicial review and its existence in different countries legal system.

The Indian Constitution affirmatively authorises the legislature to make laws but prohibits it from making laws which are not in conformity with its provisions. These affirmative and negative constitutional provisions are the mandates of the sovereign people. And all legislative activities are to be controlled and guided by the mandates of the Constitution, implied or express, indirect or direct. The Constitution of a State distributes the legislative powers among different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, question do arise as to whether the legislature in a particular case has or has not, in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of its constitutional power. But, apart from these, there are other constitutional limitations and restrictions, the infringement of which occasions judicial review and render the legislative Act void. Chapter 3 deals with the need of judicial review of legislative actions. Judicial review of legislation is a result of two of the most fundamental features of Indian constitution. The first is the two-tier system of law with the Constitution as the Supreme law and other legislation being the ordinary law which is valid only in so far as is consistent with the Constitution and secondly,the laws should not he made in violation of the rule of the fundamental rights.

Judicial review of administrative action is perhaps the most important development in the field of public law in the second half of this century. In India, the doctrine of judicial review is the basic feature of Indian Constitution. Judicial review is the most potent weapon in the hands of the judiciary for the maintenance of the rule of law. Judicial review is the touchstone of the Constitution. The Supreme Court and High Courts are the ultimate interpreters of the Constitution. It is, therefore, their duty to find out the extent and limits of the power of coordinate branches, viz. executive and legislature and to see that they do not transgress their limits. This is indeed a delicate task assigned to the judiciary by the Constitution. Judicial review is thus the touchstone and essence of the rule of law. It is in this context, Chapter 4 of the work focuses on the

function of administrative authorities in our country and the various means by which the judiciary in our country review the administrative action of executives to ensure good governance.

The Constitution makers gave the power to amend the Constitution in the hands of the Parliament by making it neither too rigid nor too flexible with a purpose that the Parliament will amend it as to cope up with the changing needs and demands of "we the people". The Parliament in exercise of its constituent power under Article 368 of the Indian Constitution can amend any of the provisions of the Constitution and this power empowers the Parliament to amend even Article 368 itself. On its plain terms Art.368 is plenary and is not subject to any limitations or exceptions. The Constituent Assembly debates indicate that the founding fathers did not envisage any limitation on the amending power. In the celebrated case of *Keshavanda Bharathi v. State of Kerala*[4], the Supreme Court of India the propounded the basic structure doctrine according to which it said the legislature can amend the Constitution, but it should not change the basic structure of the Constitution. The Judges made no attempt to define the basic structure of the Constitution in clear terms. The 'Doctrine of Basic Structure' is a judge- made doctrine to put a limitation on the amending powers of the Parliament so that the basic structure of the basic law of "the land" cannot be amended in exercise of its constituent power under the Constitution. Thus, Chapter 5 deals with the analysis of various judicial judgments regarding the impact of the doctrine in the legislative power of the legislature and power of judicial review in our country.

The activist Court in its new role handed down many opinions to make basic human rights meaningful to the deprived and vulnerable sections; of the community and assure them social, economic and political justice. By such expansive interpretation it recognized the rights of under trial prisoners, prison inmates, and children and re-examined the validity of the provisions of the penal law sanctioning death sentence, and recognized the right to a speeder trial, the right to an independent judiciary, and the right to efficient and honest governance etc. Thus, the rights given by the Constitution were therefore, given maximum

[4]*Supra n.1.*

expanse so as to make them real expressions of liberty, equality, and justice and the preamble of the Constitution no longer remained a mere decoration, but, became the source of the basic structure of the Constitution and the State actions could be scrutinised not merely in terms of their compatibility with specific provisions but in terms of; their compatibility with the broad principles of constitutionalism. Chapter 6 deals with this expanded role of judiciary.

Finally, the whole study was rounded off in Conclusion and Suggestions under Chapter 7 of the Research work.