CHAPTER II

The Meaning and nature of Judicial Review

In its modern form, especially since its adoption in the American constitutional system, 'Judicial Review' has been used to indicate the institutional arrangements by which the Courts of law pronounce judgement on the constitutional validity of disputed pieces of legislation enacted by the law-making organ, viz., the legislature. Considered as a mechanism for upholding the supremacy of the basic law in a country governed by the ideal of political constitutionalism, Judicial Review implies a comprehensive judicial enquiry into and examination of the actions of the legislative, executive and administrative branches of government, with the specific purpose of ensuring their conformity to the specified constitutional provisions. In an age of increased importance of administrative law, Judicial Review is not a 'term of art', but means "judicial scrutiny and determination of the legal validity of instruments, acts and decisions."[1] In this very broad sense, however, Judicial Review includes, for example, "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 but not invalid"[2]. Sometimes, too, the expression is loosely used to apply to such review when these actions are being

judged by statutory, rather than constitutional, standards. It in this loose sense that the mechanism of Judicial Review is practised and applied in countries like England, where, to all intents and purposes, the doctrine had its first seeding. For all practical purposes, however, Judicial Review has acquired a narrow usage to signify "the power of the Courts to pass upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce and the power to refuse to enforce such as they find to be unconstitutional and hence void"[3].

In the course of its development and evolution, Judicial Review has acquired a variety of meanings. First, 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 component units of the federation on the touchstone of their compatibility with national law, i.e., law passed by the national legislature (c.f., in Switzerland), the latter, which is more common and more comprehensive, implies the power to test 'national' laws themselves in regard to their conformity to the higher law, i.e., the constitution (c.f., in the U.S.A.). Second, 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 the law itself - a recent development. Third, within the broad meaning of

the constitutionality of laws, a fundamental distinction may be made between 'formal' Judicial Review, to indicate 'procedural' or 'extrinsic' examination of the validity of laws (c.f., in India), 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 (c.f., in U.S.A.).

If political constitutionalism or constitutional government is based upon a common belief in limited government and in the use of a constitution to impose these limitations and ensure a 'government by laws and not of men', and if the essence of constitutionalism lies in a certain diffusion of power, and if again, it is advanced by "a system of checks and balances involving either a formal separation of powers or at least some division of governmental powers between judiciary and executive-legislative authority",[4] the instrument of Judicial Review seems to be the most efficacious for its fulfilment, and is an essential condition for democratic government.

It is sometimes believed that the institution of Judicial Review is predicated upon the existence of a written constitution that is also rigid to some extent[5]. This opinion seems to get its emphatic assertion in the judgment of Marbury v. Madison[6] in which Marshall

Judicial Review and written constitutions

C.J., uttered: "Certainly all those who have formed 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. <u>This theory is essentially attached to a written constitution, and is consequently to be considered by the court, as one of the fundamental principles of our society."</u>

Confusion, understandably, has crept in, from an isolated reading of the last sentence. But expert opinion on this matter seems to be that what is of essence in Marshall's judgment is the emphasis, direct or indirect, on the supremacy of the constitution. In fact, Marshall's interpretation was not received favourably at that time and has been challenged since. The written nature of a constitution is, in the opinion of Prof. Dicey, one of the consequences of constitutional supremacy, and is supposed to no deeper than a political expediency"[7]. That 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 constitution do not allow their courts to exercise this extraordinary power. This claim, therefore, seems to be disproved by the experience of countries with written constitutions[8]. As Prof. Corwin puts it, "While the written constitution is now-a-days an almost universal feature of popular government, Judicial Review is encountered much less frequently[9]". Thus, Judicial Review, at

least in the sense in which it has developed[9] in the U.S.A., is an implied, not a substantive power. It is commonly implied, as in the U.S.A., from the Supreme Court's judicial power to interpret law and decide cases. But at the same time, it is to be borne in mind that this power, even in the country of its modern origin and development, is not necessarily related to or derived from the ordinary judicial function of law-enforcement. "That a court called upon to interpret and apply a statute is under no compulsion of logic to ask first whether the statute is valid in terms of some higher constitutional law must, of course be admitted in view of the fact that the courts in many countries possess no such additional power[10]". Under Chief Justice Marshall's theory, Judicial Review is less a necessary adjunct to the written constitution than

Judicial Review as a corollary to limited government and constitutional supremacy

a supplement to limited government and a paramount constitution. The supremacy of the organic, constitutional law, and the fundamental distinction between this law and the 'ordinary' law, quite logically imply that any act of the ordinary law-making bodies, which contravenes the provisions of the paramount law, must be void and that there must be some organ and some mechanism by and through which this can be done. This may not be confined to a review of the legislative acts. "Once the Constitution is regarded as the supreme law of the land and the powers of all the other organs of government are considered as limited by its provisions

it follows that not only the legislature, but also the exefutive, 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"[11].

It is generally assumed that the institution of Judicial Review originated only in the United States through the exercise of such power by the American Supreme Court. This notion is true in a very limited sense, but is otherwise disproved by the facts of history. "The ultimate origins of this institution are part of the seamless web of history which Maitland found when he came to deal with the earliest period of English legal history. The growth of the Common Law is an essential part of the picture"[12]. Judicial Review in England rests upon a mass of case-laws stretching from decisions on procedure long obsolete down to the present day, and illustrates the way in which common law adapts itself to new needs[13]. Historically speaking, the idea of a 'fundamental' or 'higher' law was, in the main, identified with the system of common law and with the recognised rights of the Englishmen. One is reminded, in this context, of Sir Edward Coke, the Lord Chief Justice of the Common

Origin of Judicial Review

Pleas in England, who declared, by way of dictum, in the famous 'Bonham's case', that "it appears in our books, that in many cases the common law will control acts of Parliament; and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right

and reason, and repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void"[14]. The basic idea underlying Judicial Review is generally considered to stem from these pronouncements[15] which show how deeply the American plan of Judicial Review was rooted in the English legal tradition[16]. For Coke, it was the common law which assigned to the King his powers, to each of the Courts of the realm its proper jurisdiction, and to Englishmen their rights and privileges. Common law was the fundamental law of the realm, and the embodiment of reason, and substantially unchangeable. Even Parliament itself was unable to change the underlying principles of justice embodied in the common law. However, the importance of Coke, undeniable though it was, should not be exaggerated. Coke's mighty efforts to establish the supremacy of common law were drowned into the oncoming tide of parliamentary supremacy which, though contrary to the erstwhile traditions of the English Constitution, ultimately prevailed and set the pattern of the English constitutional law. Henceforth, English judges were to be guided by the Blackstonian principle that "the power of Parliament is absolute and without control"[17]. As Erskine May, in his Parliamentary Practice, points out, "The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be unjust and contrary to the principles of sound government. But Parliament is not controlled in its discretion and when it errs, its errors can be corrected by itself".

The Cokean conception of the supremacy of common law and the belief that courts were peculiarly the defenders of the people's rights, were carried by some Englishmen who settled in America. The subsequent bitter experience of the repressive and tyrannical laws of the British Parliament relating to the American Colonies, the influence of the Blackstonian principles, the impact of Montesquieu's theory of the separation of powers on the framers of the Constitution, the political philosophy pervading the Constitution - all these dictated the need to institute safeguards against the executive as much as against the representative assembly, the legislature. Though no specific mention of the role of the Courts was found in the Constitution when it was drafted and enacted, this could be deduced from the 'supremacy' clause (article VI, cl. II) and the provision for the scope and extent of judicial power (art. III) which shall extend, inter alia, to all cases in law and equity arising under the Constitution, the laws of the U.S. and treaties made, or which shall be made, under its authority, and to controversies between two or more States. While the subsequent 5th. and 14th. Amendments adopting the 'Due Process Clause' gave the opportunities for the exercise of the power of Judicial Review by the Supreme Court, it was not until Chief Justice Marshall decided in 1803 in Marbury v. Madison[18] that this institution had been maintained as an integral and vital part of the American system of government.

Subsequent development of Judicial Review: in the U.S. constitution

Thus the foundation for this institution was laid truly and well, and the example afforded by the U.S. was followed very soon by other countries. The American judicial process served as a

- <u>in other constitutions of the world</u>

great inspiration for the South American Republics, and the Constitutions of Mexico, Argentina, Bolivia, Columbia, Venezuala and Cuba acknowledged the supremacy of the constitution on the typical U.S. pattern. For example, Article 133 of the United States of Mexico, as adopted on the 31st January, 1917, amending that of the 5th February, 1857, declares that "this Constitution and the laws of the United States of Mexico which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the President of the Republic, with the approval of the Congress, shall be the supreme law of the land. And the Judges in every state shall be bound by this Constitution and by these laws and treaties, anything in the Constitution or laws of any state to the contrary notwithstanding". The constitutions of Guatemala[19], Ecuador[20], and Eire[21] contain similar declarations. Article 22 of the Constitution of Argentina states that "this Constitution, the laws of the nation dictated by Congress in consequence thereof, and treaties with foreign powers are the supreme laws of the nation". The Constitution of Nicaragua, in Article 285 says that "the Constitution is supreme law of the Republic. No laws, decrees, regulations, orders, dispositions, pacts or treaties which are in conflict with it or which in any way alter its provisions have any validity." Article 98

of the New Constitution of Japan says almost the same thing. Such an express provision could be noted in the Constitutions of Brazil (1891), Haiti (1915)[21] Honduras (1925)[22]. Similar provisions are to be found in Articles 1 & 2 of the Constitution of Czechoslovakia (1920), Article 140 of the Austrian Constitution of 1020, Article 121 of the Spanish Constitution of 1932, and Article 103 of the Constitution of Rumania of 1923.

The nearest approximation to Judicial Review in the usual American sense is to be found in the Commonwealth of Australia, and to a far lesser extent in Canada. In both these countries, the practice of Judicial Review has not attained the same significance as in the U.S.A., but follows the same procedural forms. But in these two countries, the principle of supremacy of the Constitution and the right of the courts to declare ultra vires acts of the Federal Parliament repugnant to the constitution, have been well-established. "Neither the Canadian nor the Australian Constitution expressly provides for judicial review; but the courts in both these Dominions have clothed themselves with this power on the basis of the theory that it is a logical and necessary adjunct of the judicial function"[24]. It may be said that both in Canada and Australia Judicial Review has successfully provided for the dynamism of the written constitution to suit the requirements of changing

Judicial Review in the Constitutions of Canada & Australia

time and circumstances[25].

An increasing tendency to incorporate the power of Judicial Review in the Constitutions of Europe and Asian countries has been noticed since the Second World War. So far as Europe is concerned, while the Eastern European countries like Albania (1946),[26] Yugoslavia (1946),[27] Rumania (1948),[28] Bulgaria (1947)[29] & E. Germany (1949)[30] were based on the idea of an omnipotent legislature, precluding any scope for Judicial Review, the countries of Western Europe, though mainly adopting parliamentary government, incorporated provisions for Judicial Review as a check on the power of the legislature. This modern acceptance of Judicial Review can be attributed to two factors: (a) distrust of parliamentarism under which Mussolini, Hitler and Petain rose to power, and (b) the consequence of revival of natural law against the juridical positivism of the past generations[31]. In the Constitution of the Fourth French Republic (1946) a Constitutional Committee of mixed judicial-legislative character was introduced; but Judicial Review was very weak in its operation, because the Committee was more political than judicial in its working. The practice of Judicial Review is found in a much stronger form in Italy under the Constitution of 1947 in which the Constitutional Court appears to exercise an effective check on the legislature[32]. In West Germany, too, by the system under Bonn Basic Law of 1949, similar special Constitutional Court

Judicial Review in Europe and Asia since World War II

is created to protect the Constitution against infringement by ordinary legislation[33]. Among the major continental nations, Germany has gone farthest in accepting judicial review[34]. The unusual feature of Judicial Review in W. Germany is that the Courts even test the statutes on the touchstone of natural law and superior constitutional norms[35].

Among the countries of Asia which have adopted the practice of Judicial Review in their constitutional documents, Japan comes first, for, the Japanese Constitution contemplates full judicial review of constitutionality of laws by the ordinary courts. India and Pakistan set up Supreme Courts exercising Judicial Review on the general U.S. and Commonwealth pattern.

Three aspects of the working of the principle of judicial review

The exercise of the power of Judicial Review is normally an incidence of the type or character of a government or a constitution. In general, however, taking into account its actual operation through the years, it may be observed that Judicial Review as a preserving instrument of constitutionalism, extends to <u>three</u> principal areas: <u>first</u>, it preserves the constitutional balance of authority between the federal and state governments in a federal system; <u>second</u>, it maintains and preserves the balance between executive power and the legislative power on the same governmental level; and <u>third</u>, it defends the fundamental human freedoms and thus acts as the 'great sentinel' of

the cherished values of life. All these three aspects of the exercise of power of Judicial Review may be found in a single federal state, based on the principle of separation of powers and guaranteeing, constitutionally, certain 'basic' freedoms to the people. Some constitutions, however, might, as they sometimes do, in fact, exhibit only one of the three aspects of the exercise of this power, to the exclusion of the rest. But what is important to keep in mind is that, each of these three aspects assumes tremendous significance in the specific contexts to which they apply.

Indispensability or otherwise of judicial review in a federal constitution

The existence of an impartial and independent judicial organ, and the exercise of the power of judicial review by this authority, are considered to be the inevitable mechanisms of a federal constitution. Federation being a composite government with a division of powers entails inevitable conflicts. There is enough possibility that disputes will crop up between the central government and the federating units on the one hand, and among the federating units themselves as regards their respective rights and spheres of action. This is not a mere theoretical possibility, but, as the history of the major federations of the world, notably the national - State conflicts in the U.S.A. shows, a feature of common occurence. There must, therefore, be some organ independent both of the federal legislature and the executive and of the governments of the units, the basic function of which will be to interpret the constitution impartially and to adjudicate upon any disputes of the

nature described above, and thus to maintain the equilibrium between the contracting parties, According to Prof. K.C. Wheare, an eminent authority on federalism, "since a division of powers is an essential part of any federal government, since any such division must be expressed in words whether written down or not, and since language is ambiguous, it is certain that in a federation there will be disputes about the terms of the division of powers But since it is the criterion of a federal government not merely that there should be a division of powers, but also that this division should not be dependent upon the general government or the regional governments alone, it follows that the last word in settling disputes about the meaning of the division of powers must not rest either with the general government alone, or with the regional governments alone."[36] Political theory and political practice have vested this final authority on the judiciary. "A Federal Court is an essential element in a Federal Constitution. It is at once the interpreter and guardian of the constitution and tribunal for the determination of disputes between the constituent units of the Federation"[37]. Courts exercise this function in a federal government, because it is the duty of the courts, from the nature of their functions, to determine the limits within which the institutions are to move[38]. In this connection, we can cite the opinion of the Supreme Court of the U.S.A. in Hammer v. Dagenhart[39]: "This Court has no more important function than that which devolves upon it, the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to

the end that each may continue to discharge harmoniously with the other, the duties entrusted to it by the Constitution". Thus the judiciary is vested with a quasi-arbitral function between two centres of diverse, if not essentially equal powers. We have to take note of the fact that federalism, for better or worse, involves legalism, and that "the sheer fact of Federalism enters the purview of constitutional law, thatis, becomes a judicial concept, in consequence of the conflicts which have at times arisen between the idea of state autonomy ('state sovereignty') and the principle of National Supremacy"[40]. In the arresting language of Taney C.J., in Ableman v. Booth,[41]". This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the Unites States, but also to guard the States from any encroachment upon the reserved rights by the general government........so long....as this Constitution shall endure, the tribunal must exist with it, deciding in the peaceful forms of judicial proceeding, the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force".

It may be assumed, therefore, that, it is in the 'nice poise and balance of forces' that the need for a federal judiciary becomes manifest. Prof. Dicey thought that Judicial Review was a necessary accompaniment of federalism, that a federal system demanded some such power as that exercised by the federal Supreme Court in the U.S.A., and that "the glory of the founders of the U.S. is to have devised or adopted arrangements under which the Constitution became in reality as well as in name the supreme law of the land"[42]. However, Dicey's observation is only partially correct if we take into

account the federal constitutions of the world of the 20th century. In its American usage, the doctrine of judicial review operates most successfully in the Commonwealth of Australia. In different ways, it is to be found in the Constitutions of Canada, Mexico, Brazil, Argentina and Venezuela. But in Switzerland, Judicial Review does not extend to acts of the Federal Assembly. In Austria (constitutions of 1920 and 1929) and Weimar Constitution, 'national' Judicial Review existed, but not to the degree obtaining in the U.S.A. Although the Constitution of the U.S.S.R. of 1923 gave[43] the Supreme Court of the Union the power to render decisions, at the request of the Central Executive Committee of the Union, on the constitutionality of any regulations made by the Republics of the Union, no such powers have been conferred upon it by the Constitution of 1936, since, under this Constitution. All political and state power has been concentrated in the Proletariat which exercises this through the highest organ of State authority, namely the Supreme Soviet, whose laws are final and are not subject to review by the Supreme Court of the U.S.S.R. It is only the Presidium of the Supreme Soviet of the U.S.S.R. which can review the decrees and laws and regulations made by its parent body, the Supreme Soviet, and can also interpret the Constitution which has never been declared as the supreme law of the land as in the U.S.A. According to Soviet juristic thought, Judicial Review is typically associated with the class-structure in a capitalist society where the judges, representing

the ruling aristocracy, are bound, by their upbringing and tradition and temperament, to defend and protect the interest of the rulers, and thus belie the prevailing myth of judicial impartiality and independence; and that it ill-accords with the notion of the dictatorship of the proletariat.

other limitations

Several other qualifications require to be noted. First, it must not be taken for granted that this function of the judiciary is strictly confined to countries with a federal government. In the U.K., where a unitary form of government obtains, the courts have the power of saying what should be the limits of power of the governmental institutions, local in character. Second, it is generally assumed that the judiciary should have the last word in regard to the meaning of the division of powers in a federation. This is controverted by some who hold that what is essential for federal government is that some impartial body, independent of both the parties to a federation, should decide upon the matter. This qualification, however, is of mere theoretical importance, as in the U.S.A., practice has established the claim of the judiciary alone in this regard, and that the judicial organ is, to all intents and purposes, one of the central government. Third, in point of actual practice, in most of the countries having federal constitutions, especially in the U.S.A., the exercise of this power has borne little relation to the fact of the federal structure[44].

The essence of constitutionalism rests in the limitations which it imposes on the organs of government as well as in a certain amount of diffusion of power. In a very formal sense, constitution-

Judicial Review and Separation of powers

alism means the principle that the exercise of political power shall be restrained by rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content[45]. These rules and principles may either be based on usages and conventions as in the U.K., or may be inserted by prohibitions in a basic constitutional document, the implication being that a disregard of such rules by any of the organs of government will amount to a violation of the basic constitutional document, and consequently, may be pronounced as ineffectual by the court of law whose power of review will thus act as a significant balancing factor, and maintain the sanctity and spirit of the constitution. In the context of the U.S.A., Judicial Review is a corollary to the principle of separation of powers. A basic feature of the American constitutional system is a series of checks and balances by which the three organs of government serve as restraints one on the other. "That is to say, some processes of government are delegated exclusively to one branch; others are made dependent on the concurrence of the legislative and the executive; and the Judiciary serves at least a limited role in determining whether the other two branches comply with the mandates

of the constitution[46]. Although there are unmistakable signs that the Legislature has been growing in power, especially at the expense of the Executive, and to a lesser degree at the expense of the Judiciary, the principle of seperation of powers and its supplementary system of checks and balances still function as vital forces in American life. From the very beginning of the working of the American Constitution, the Supreme Court has exercised the power of Judicial Review relating to the action of the Legislature and the Executive. As Marshall, C.J., so emphatically laid down in Marbury v. Madison,[47] "if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." In the famous case of Youngstown Co. vs. Sawyer,[48] the Court asserted this power over executive action too, and struck down a Presidential order of seizure of steel mills on the ground that it was not authorised by Congress which alone was entrusted with the law-making power in both good and bad times.[49]

However, the plain fact that the principle of separation of powers is becoming largely outmoded by the ever-increasing functions of the modern state and a growing concentration of governmental authority, either in the Executive or in the Legislature, reduces

the significance of this aspect of the exercise of the power of Judicial Review to an appreciable extent. If the highest courts still nullify the Legislative enactments and Executive actions, this is done less in the exercise of the balancing function than in an attempt to protect and preserve the fundamental human freedoms; and it is in this latter area that Judicial Review assumes the greatest significance. The U.S. Constitution, as we have already seen, perhaps affords the lone striking example of the exercise of the power of Judicial Review as a balancing mechanism in Legislative-Executive relations. In contemporary European thought and practice, especially before World War II, Judicial Review was supposed to involve confusion, rather than separation, of powers, and was incompatible with separation of powers. Even in Italy, France and Germany, where Judicial Review was introduced after World War II, the basic motive was to preserve the tradition of constitutionalism and protect individual rights rather than to balance the organs of government.

Judicial Review and the fundamental human freedoms

Constitutional guarantee of the rights of man has generally been regarded as the indispensable basic condition of ordered human progress and political stability in a community governed by the doctrine of rule of law and the ideal of constitutionalism. It is an essential condition of the modern democratic constitutional government that the freedoms and liberties must be so embedded in the positive law of the country as superior to the powers of any govern-

ment that they become effective guarantees against the action of the state. It is now being increasingly felt that in order to make these rights secure and inviolable, adequate legal remedies should be provided in the constitutional document of a country. Judicial Review provides this protection of Fundamental Rights against possible abuse by the government. Judicial Review of legislative acts is a necessary requirement in order to preserve individual liberties against the rule of the majority and to protect individuals and groups against indidious attacks by public officers and departments of the government[50]. Daniel Webster and Francis Leiber praised Judicial Review as a bulwark of liberty. De Tocquville considered it as "most favourable to liberty and to public order",[51] and one of the most powerful barriers against the tyranny of political assemblies. In the U.K., there is no code of Fundamental Rights, nor any judicial review of parliamentary enactment transgressing these rights;[52] but, there, as in the U.S.A., civil liberties have been preserved by reason of (a) an independent judiciary and (b) the prerogative writs of Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo Warranto. In the U.K., prerogative writs have become parts of the positive law to such an extent that the Parliament would never dream of overriding or abrogating them. In the U.S.A., though there is no specific mention of the role of the courts as the protector of fundamental human freedoms, the 5th. and 14th Amendments, adopting the 'Due Process Clause' opened the way to the

exercise of Judicial Review by the Supreme Court of the U.S.A. for safeguarding the Bill of Rights, and Chief Justice Marshall's famous judgment in Marbury v. Madison established the firm basis for future discharge of this role as an integral part of the American Constitutional structure. Jefferson and Madison anticipated with warm approval that the judiciary would participate creatively in the enforcement of the Bill of Rights. A Court of able and independent judges, empowered to enforce the Bill of Rights, Jefferson assured Madison, would not yield to a frenzied multitude demanding perverse things[53]. It is no exaggeration to say that in the U.S.A., as in many other countries, the doctrine of Judicial Review was brought into prominence more in consequence of its role in protecting the Fundamental Rights than as a concomitant to the federal features of the Constitution. It is admitted that there are not many countries which have fully adopted the system of judicial review enabling the courts to act in that capacity in the matter of the fundamental rights of the individual guaranteed by the constitution. It is equally true to say that for historical reasons in most countries persons of democratic tendency look upon the legislature rather than the courts as the more reliable protector of popular liberties. In Canada and Australia, Fundamental Rights find no place in the texts of the Constitution, nor is judicial enforcement provided for. In France, Belgium and Sweden, courts are to treat as valid all legislation that has been passed by the required

procedure. But inspite of all this, there is a growing conviction today that Judicial Review gains in real significance only in its defence of basic human freedoms. In fact, this feature of Judicial Review is most frequently emphasised as the one which more than any other justifies a judicial surveillance of legislative and executive acts[54]. To put it more categorically, the more Judicial Review is likely to protect the individual rights, the more it fulfils its purpose. Even in Great Britain, where there is not written constitution, and where the rights of individuals are not codified in a single document as in many other countries, the guiding principle is that there can be no real rights unless there is proper remedy. Rights without remedial measures become pious and vainglorious declaratious and glittering generalities, without any effective value. In Great Britain, the liberty of the subjects is "a liberty confined and controlled by law, whether common law or statute"[55]. Since the British Parliament is supreme, it follows as a logical corollary that the task of the judiciary, even in the field of the rights of the individual, is limited to the application of law as laid down by the Parliament. The British judiciary cannot question or challenge the validity of a law enacted by Parliament, even if that law is arbitrary or unreasonable and seeks to curtail the basic liberties of the subjects[56]. To quote Lord Wright again, "the safeguard of British liberty is in the good sense of te people and in the system of representative and responsible government which has been evolved"[57]. This British principle, evidently, did not find favour

with the framers of the U.S. Constitution who were highly cynical about the rule of an omnipotent legislature. The American approach about the safeguarding of Fundamental Rights finds expression in the opinion of Justice Jackson in Board of Education v. Barnette[58]: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right to life, liberty, and property, to free speech, and a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections". Opinions might differ; but one cannot honestly doubt that the American experiment of securing the fundamental decencies of human life by the incorporations of definite limitations on the powers of government capable of enforcement by the judiciary, has indeed been one of the most significant contributions to the science of government[59]. Judicial Review, which was implied rather than explicitly stated in the original constitution, but which subsequently became the cornerstone of American constitutional system, was intended to safeguard both federalism and the Bill of Rights; but its success has been more pronounced in the domain of personal liberties than in the sphere of federalism. Thanks to the famous 'due process clause' of the 5th and 14th Amendments, under the cover of which the Supreme Court of the U.S.A. has struck down Congressional laws as unjust,

unreasonable and violative of the spirit of the supreme law of the land, Judicial Review has emerged as one of the most effective instruments for preserving and protecting the cherished human freedoms in a country dedicated to the ideal of constitutionalism. As pointed out by Justice Mattews in Hurtado v. California[60]- "....the limitations imposed by our constitutional law upon the actions of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority even when acting in the name and wielding the force of the government." Needless to say, the experience of the U.S. served as a tremendous inspiration to the new constitutions in Asia and Europe, notably Japan, Burma, India and West Germany. In India, as we shall see later, the Constitution has assigned to the Supreme Court the role of a sentinel on the "qui vive"[61], in relation to the Fundamental Rights, and Article 32 empowers the Supreme Court to issue the writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari, for the proper and effective enforcement of Fundamental Rights. The writs are not novel incorporations in India, but have been essentially borrowed from English common law which provides for the 'prerogative writs', regarded by Dicey as the 'bulwark

of English liberty'. The American Constitution also assumed that the common law writs would be available in the U.S. The Judiciary Act of 1789 (s.14) empowered all Courts of the U.S. "to issue writs of '*scire facias*', *habeas corpus*, and all other writs not sepcially provided for statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law". What is notable in the case of India is that the remedial right provided by Article 32 is itself a fundamental right, being included in Part III of the Constitution, and that the Supreme Court, as the protector of the Fundamental Rights, cannot refuse to entertain applications seeking protection against the infringement of these rights[62] and any law which takes away or even renders nugatory or illusory the exercise of the Supreme Court's power under article 32, is void[63]. It is pertinent, in this connection, to mention what Sri M.C. Setalvad said during the proceedings at the inaugural sitting of the Supreme Court of India on January 28, 1950[64]: and the provisions which enable them to be reasonably restricted will need wise and discriminating decisions. On the Court will fall the delicate and difficult task of ensuring to the citizen the enjoyment of his guaranteed rights consistent with the rights of society and the state. No less onerous, though far less spectacular, will be the task of adjudging the private rights of citizens and interpreting and administering them the law of the land".

The doctrine of Judicial Review has found its enemies as much as its supporters. The criticisms have come as a consequence of the exercise of this power in a manner which did not appeal to many as just or reasonable. It is commonly pointed out that Judicial Review is essentially a negative, limiting and undemocratic concept. But this view is at best one-sided and partial. In making a fair, rational 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 powerbreaking function[65]. The great task of Judicial Review is not, and cannot indeed, be, confined to the "annulment of legislative discretion, or to fixing the outside border of reasonable legislative action"[66]. That, indeed, is a negative function, very often destructive in its consequence, as the history of the U.S. Supreme Court during the New Deal era of the 1930's amply bears out. On that historic occasion, the U.S. Supreme Court, impelled by an irresistible impulse for judicial activism, struck down as many as eleven Congressional statutes intended to counter the effects of the Great Depression and set the U.S. on the path to social welfare state. The sharp debate that this judicial action generated need not be recounted, but there can be no doubt that this was essentially a distorted, miscalculated and faulty application of a doctrine which gains in significance only by being a positive and creative force intended to facilitate

<u>Conclusion:</u> Judicial Review as a positive & creative force

the achievements of the great objectives enshrined in the supreme law of the land. The chief worth of Judicial Review rather lies in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges[67]. If the Constitution is the vehicle of national life and social revolution, as it indeed is, in a country like India, then Judicial Review ought to acclerate and quicken its movement and expedite the realisation of the social conscience. This requires a tremendous effort on the part of those who administer the doctrine and demands the supreme qualities of head and heart which go to make the office of the judiciary one of great dignity, authority and adoration.

The main question today is not whether there should be Judicial Review in the constitution of a country, but to what extent it should remain and what purposes it should fulfil. Experience indicates that Judicial Review fulfils its purposes best when it seeks to protect and preserve the individual liberties. But this in itself involves a tremendous problem in the present era. How best to adjust the legalistic doctrine of Judicial Review to the needs of the day and the philosophy of the prevailing generation will ever remain a constant theme for constitutionalists, jurists and the politicians. The success or

Basic problem of Judicial Review in a modern democratic society

failure of a scheme of Judicial Review depends very much on how and to what extent it is attuned to the lofty ideal of constitutionalism as well as to the spirit and temper of a dynamic society.