CHAPTER I

Introduction

"The Crisis of Judicial Review In India"

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. Experience in the U.S., and, even (within the limited period of its operation) in India, suggests, or rather conclusively establishes, that a narrow, headstrong and conservative insistence on the constitutional sanction of the liberties might easily frustrate the aspirations and ambitions of a representative, democratic legislature. In that event, Judicial Review becomes a nasty brake on social dynamics and social progress, and assumes a basically negative and undemocratic character.

Thanks to the famous 'Due Process Clause' of the 5th. and the 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 freedoms in a country dedicated to the ideal of constitutionalism. However, 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"[1]. 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 to set the United States on the path to social-welfare state. 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 the achievement 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"[2]. It has been pertinently observed that Judicial Review affirms as well as negates; it is both a power-releasing and a power-breaking function[3]. If the Constitution is the vehicle of national life and social revolution, as it indeed is, and must be, then Judicial Review ought to accelerate and

quicken its movement and expedite the realisation of the social conscience. To-day, the main question is not whether there should be Judicial Review in the constitution of a country, but to what extent and how it should remain and what purposes it should fulfil. The success or 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.

A bird's eye view of the operation of the doctrine of Judicial Review in the U.S.A. through the years will convince one that the role of the Supreme Court in the American scheme of government has been perceptibly changing, specially since the years following the ignominious judicial somersault of 1937, nicknamed by Prof. Corwin as 'Constitutional Revolution Ltd'. It was Prof. Corwin's fond expectation, shared by most right-thinking progressive men, that the Supreme Court of the U.S.A. would henceforth pay greater deference to the policy-framing organs of the government, and, by surrendering its self-acquired role as prot ector of economic privilege, would try to reflect and accelerate the social conscience of the nation. These hopes have, to a great extent, if not fully, come true in the recent decades. A growing tendency towards judicial self-restraint and deference to the legislative policy has become the corwning feature of the modern practice of Judicial Review in the U.S.A. as reflected in the decisional process. This has resulted in two major changes in American constitutional development: (a) an expanded

interpretation of Commerce Clause power in order to enlarge the range of federal government's legislative authority in dealing with the nation's economic problems, and (b) a reduced significance, if not complete elimination, of the Due Process Clause as a source of substantive rights in restricting the power of Congress and of the States to deal with economic affairs[4]. The erstwhile status of Judicial Review as an instrument of conservatism has steadily given way to an increasing deference to the democratic political process in the formation of social and economic policies. There is a growing conviction to-day that the present Court, headed by Chief Justice Earl Warren, has become a creative force in American life. As one commentator put it, "In 1935-36, a narrow, headstrong majority, flouting persistent pleas for judicial self-restraint, voiced by a highly esteemed minority, blocked regulation of the economy; in the hands of an obtuse majority, the Constitution became a strait-jacket, not a vehicle of life.......The Warren Court, on the other hand, in expanding the limits of freedom, in buttressing the moral foundations of society, in keeping open constitutional alternatives to violent change, brings us closer to the ideals we have long professed"[5]. Brown v. Board of Education, 347U.S. 484 (1954); Baker v. Carr, 369 U.S. 186 (1962); Lincoln Federal Labour Union v. North-Western Iron & Metal Co., 335 U.S. 525 (1949); American Communications Association v. Douds, 339 U.S. 382 (1950); Dennis v. U.S., 341 U.S. 494 (1951); Barenblatt v. U.S., 360 U.S. 109 (1959); Beauharnais v. Illinois, 343 U.S. 250 (1952).

Judicial Review under the Constitution of India stands in a class by itself. Enshrined in a Constitution which seeks to accommodate and compromise the constitutional principles of the foreign governments, notably the U.K. and the U.S.A., it reveals all the bewildering effects of a compromise. Under the Government of India Act of 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 centre and the units. Under the 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 the Rights' and an 'arm of the social revolution'[6]. Judicial Review was accordingly desired to be an essential condition for the successful implementation and enforcement of the Fundamental Rights. Members of the Constituent Assembly were agreed upon one fundamental point, that Judicial Review under the new Constitution of India was to have a more direct basis than in the Constitution of the U.S.A.[7] where the doctrine was more an 'inferred' than a 'conferred' power, and more 'implicit' than 'expressed' through constitutional provision. In the Report of the Ad hoc Committee of the Supreme Court, it was recommended that "a Supreme Court with jurisdiction to decide upon the constitutional validity of acts and laws can be regarded as a necessary

implication of any federal scheme".[8] This was eventually extended to an interpretation of the laws and executive orders on the touchstone of the Fundamental Rights. In the Draft Constitution of India, this power of Judicial Review in relation to Fundamental Rights found formal expression in Article 8(2) and Article 25(1) & (2) which, when adopted by the nation's representatives in the Constituent Assembly on November 26, 1949, became the new Articles 13(2) and 32(1) & (2) under the Constitution of India. However, there was a sharp controversy among the members of the Constituent Assembly over the perpetually vexed question of reconciling the conflicting concepts of the individuals' fundamental and basic rights and the socio-economic needs of the nation. These needs were concretely expressed in the Preamble and the Directive Principles of State Policy, and even though the Constitution became basically permeated with the philosophy of individualism, an undercurrent, however slow and halting, of socialist pattern was clearly discernible. A compromise had to be struck between the extreme viewpoints of the proponents of the two schools, and Judicial Review, which was recognised as the basic and indispensable precondition for safeguarding the rights and liberties of the individuals, was sought to be tempered by the urge for building up a new Indian society based on the concept of welfare and social righteousness. The consequences was a drastic curtailment of the power of Judicial Review of the Supreme Court of India. The overriding need for 'security of

the State', consequent on the Partition of India and its aftermath, and the growing fissiparous and subversive tendencies, merely provided further impetus to the process and made it a 'fait accomplii'. The result:- the much-debated 'due process clause', which was previously inserted in the original Draft Constitution, became the "first casualty"[9] and was eliminated from the purview of the rights to personal liberty and property. In Article 21 of the new Constitution (Article 15 of the Draft Constitution), it was replaced by 'except according to procedure established by law', and in Article 31(I) (Article 24, cl. I of the Draft Constitution), it was substituted by 'save by authority of law'. In the Note to Article 15, of the Draft Constitution, the Drafting Committee justified the new insertion as being 'more specific', and referred to Article XXXI of the Japanese Constitution of 1946. But the real reason lay in the profound feeling of distrust in the Judiciary and an apprehension, based mainly on American experience, that an unbridled power of judicial policy-making could usher in a series of 'judicial vagaries'[10], offset the governmental balance of power, thwart the cherished ambitions of the framers (of the Constitution) and prevent the representative legislature from fulfilling its mission of assuming the leadership in the task of realisation of the national aspirations. Simultaneously with this 'new Awakening', a cluster of provisos was incorporated into the constitutional document so as to restrict the rights envisaged in Articles 19, 21 and 31, and

reduce the Supreme Court's power of Judicial Review to one of 'formal' review. Lest Judicial Review stood in the way of social or economic progress, the door was kept wide open, through a comparatively flexible amending procedure, to impose the ultimate will of the popular representatives in the matter of removing constitutional limitations. Thus, for all practical purposes, a poor effort at compromise between the twin principles of legislative omnipotence and judicial supremacy resulted in a crippled and truncated power of Judicial Review being pitted against a hyper-sensitive political leadership bent on exercising supreme power within the framework of a written constitution with defined action-areas. To all intents and purposes, therefore, the seed of discord between the legislators and the judges in India was sown by the fathers of the Constitution, who were themselves not very clear about their own task. True, as D. Basu points out, "the factors which fostered the growth of judicial supremacy in the U.S. are either absent or are not so much prominent in our constitutional system"[11]. It is doubly certain, too, that for a nascent Republic dedicated to a social-welfare objective, an overzealous indulgence in judicial activism would have been not merely dangerous, but positively suicidal, too. But the fact remains that, the compromise solution, ultimately arrived at, was neither happy nor effective. The history of the working of the Constitution during the last eighteen years has indeed revealed a yawning gap between national aspirations and judicial pronounce-

ments. However, the unfortunate but continued friction between the legislature and the judiciary has affected both, to a greater or less extent. While it has dwarfed and curbed the ardent zeal of the popular assembly for social reform and economic welfare, this 'war of attrition' has spelt far greater doom for the judiciary, the weakest limb in the body-politic, in as much as it has brought the whole doctrine of Judicial Review to the brink of a total crisis-the crisis not only of adjustment to the demands of the age, but of its very existence and survival in the constitutional and political system of the country. It cannot be gainsaid that, for all its good work in safeguarding and protecting the Fundamental Rights of the individuals, Judicial Review is severely on trial. The 'Golaknath' case,[12] which has become the most controversial episode in the whole history of the Indian Constitutional working, highlights and brings to surface the most perplexing phenomenon which was so long lying dormant.

It is indeed very difficult to make a correct appraisal of the course and development of Judicial Review, and its directions and tendencies, in the field we have chosen for our study, during the eighteen years of the working of the Constitution in India. Any evaluation, keeping in mind the short time-factor involved, will be at best sketchy and tentative, and might become misleading generalization destined to do more harm than good to the highest judiciary

and its power of reviewing legislative and administrative acts in relation to the Fundamental Rights.

The foundation of the Indian Supreme Court's Review-power was laid truly and well in the case of A.K. Gopalan v. State of Madras,[13] compared by some to the classic case of Marbury v. Madison[14]. 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 of guide-lines which would eventually set the pattern for the fundamentals of judicial approach to the Indian Constitution. From 'Gopalan' to 'Golaknath' is indeed a long march, not only in respect of the nature and scope of Judicial Review itself, but in regard to the impact and consequences of such review on the attainment of the social objectives, too. These two cases constitute, so to say, an interesting study in contrast; both are landmarks in the history of constitutional jurisprudence in this country. In a way, they may be said to represent two distinct lines of judicial thinking, two distinct tendencies, and, also, two separate sets of social philosophy. One represents a halting, over-cautious and tradition-bound attitude of the judiciary in restricting its own freedom of action by sticking to the express phraseology of the Constitution, scrupulously avoiding the notions of 'natural justice' and 'due process', and construing the law in favour of the legislature; the other represents a big, bold, and almost revolutionary effort to resurrect Judicial Review by

expanding its horizon beyond a literal interpretation of the Constitution, introducing novel concepts like 'prospective overruling' and convening a Constituent Assembly to amend the Fundamental Rights, and by prohibiting any legislative amendment of Fundamental Rights in future. The '*Gopalan*' decision, while restricting the ambit of the individuals' right to freedom and personal liberty, paved the way to the realisation of the social objectives by its clear enunciation of the principle of judicial subordination to legislative wisdom and discretion, and by its emphasis on social control of individual liberties. The '*Golaknath*' case, while trumpeting the individuals' basic liberties as sacrosanct and transcendental, has indeed made it almost impossible to enact social welfare legislation.

In between these two episodes of judicial self-restraint and judicial activism, one can notice a mixed course of development[15]. The period of strict interpretation, ushered in by the '*Gopalan*' case, and followed by *Romesh Thappar v. State of Madras*,[16] *State of Madras v. Champakam Dorairajan*,[17] *Keshav Madhav Menon v. The State of Bombay*,[18] and *Chiranjitlal v. Union of India*[19] gave way to the subsequent period of widening and expansion of the power of Judicial Review as manifested in *In re Delhi Laws Act (1951)*,[20] *Dwarka Prasad v. State of U.P.*,[21] *State of West Bengal v. Subodh Gopal*,[22] *Dwarkadas v. Sholapur Spinning and Weaving Co.*[23] and *State of West Bengal v. Bella Bannerjee*[24]. However, since the Supreme

Court's interpretation of Article 31 resulted in a severe setback for legislative enactments in the field of agrarian reform, the Constitution (Fourth Amendment) Act, 1954 struck the sledge-hammer on the possibility of judicial defiance of legislative policy, leaving a bitter trail of frustration for the judiciary. Next followed a long period of "alternate rays of hope and despair"[25] between the years 1956-60, as reflected in various judgments, notable among them being Basheshernath v. Commissioner of Income Tax,[26] Sharma v. SriKrishna,[27] Kochunni v. State of Kerala,[28] Attiabari Tea Co. Ltd. & ors. v. State of Assam,[29] Nanavati v. State of Bombay[30] and Daryo & ors. v. State of U.P.[31]. One notices, during this period, an increasing, though unconscious, bias in favour of legislative wisdom and policy-making[32]. In Hamdard Dawakhana v. Union of India, the Supreme Court came to the conclusion that when the constitutionality of an enachment is challenged on the ground of violation of any of the Articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary, i.e., its subject-matter, the area in which it is intended to operate, its purpose and intent have to be determined. In order to do so, it is legitimate to take into consideration all the factors, such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it is intended to suppress, the remedy for the

disease which the Legislature resolved to cure, and the true reason for the remedy.

Another principle which, the Court observed, has to be borne in mind in examining the constitutionality of a statute, is that it must be assumed that the Legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a Legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. The presumption is, therefore, in favour of the constitutionality of an enactment. In order to sustain the presumption of constitutionality, the Court may take into consideration matters of common knowledge, history of the times and may assume every state of facts which can be conceived existing at the time of legislation. This is all to the good. But if this implies, as it has so often done, a judicial abnegation of responsibility, the tendency leages room for criticism. The Fundamental Rights under the constitution of India seek to achieve a harmonious compromise between the achievement & enjoyment of fundamental human freedoms of life, liberty and property, and the pursuit of the delicate goal of social control as a means for furthering social welfare and economic betterment. This is, without doubt, India's most important constitutional question today, and it will remain so for a long time to come. Much will depend on the nature and working of Judicial

Review of the Supreme Court of India in relation to this question. In this dissertation, special attention has been sought to be devoted to the dichotomy in the rigid adherence to constitutional sanction in the case of articles 19,21 & 31, and a stringent restriction and limitation on these rights as means of realising the interest and purpose of the Society and the State. The object is to find out how far, if at all, the Indian Supreme Court has been able, by exercising its power of Judicial Review, in resolving the dichotomy that still persists and in achieving the intended compromise in keeping with the spirit and structure of the Constitution, and the needs and demands of the age. Since articles 19, 21 & 31 form the cornerstone of the Indian Bill of Rights, the discussion has been strictly confined to these provisions.

It remains to be observed that even after seventeen years of its operation, Judicial Review in India has failed to strike a happy compromise between the two extremes of legislative impatience for social reform and judicial insistence on constitutional protection of individual liberties. The Indian Supreme Court's power of Judicial Review has generally failed to indicate new directions of policy in a changing, developing society. A certain amount of pessimism, interspersed with occasional thrusts of desperate arrogance born of frustration in the face of a defiant, outmanouvering legislature, has characterised the general tenor of the Supreme

Court's activities and achievements. In a world pulsating with new ideas in an age of planning,[33] Judicial Review has failed to keep pace with the march of times. But there is no gainsaying the fact that the need for a new judicial outlook, consistent with the changing social philosophy, has never been more apparent.

44466
1 5 JAN 1975