CHAPTER TWO

CHAPTER II

DOCTRINE OF JUDICIAL REVIEW: ITS ORIGIN, GROWTH AND DEVELOMENT IN U.K., U.S.A. AND INDIA

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The responsibility of administering justice is laid upon judiciary in a free government. The judiciary assumes key position in the present era of constitutionalism. It interprets and applies law and adjudicates upon the controversies between citizens and citizens and between citizens and the state and between one state and another. Not only this, it is the guardian of the fundamental law. Viscount Bryce says:

> "There is no better test of the excellence of a government than the efficiency of its judicial system for nothing nearly touches the welfare and security of the average citizen than his sense that he can rely on the certain and prompt administration of justice. Law holds the community together. Law is respected and supported when it is trusted as the shield of innocence and the impartial guardian of every private civil right. But if law be dishonestly administered, the salt has lost its savour, if it be weakly or fitfully enforced, guarantees of order fails, for it is mere by certainty than by the security of punishment that offences are respected. If the lamp of justice goes out in darkness, how great is that darkness."[52]

Ours is a written constitution, which accords a dignified position to the judiciary. It carries onerous responsibilities in a country

[52] Bryce, 'Modern Democracies' Vol. II p. 421, 1929

with written constitution. The courts act as the supreme interpreter, protector and guardian of the Constitution. The Supremacy of the Constitution is both respected and protected by the apex court. Where the constitution operates as the supreme law, any act which transgresses the mandate of that supreme law becomes unconstitutional. Not only the executive but also legislative itself is limited by the supreme law. In the U.S.A. or India, a legislative act could be declared unconstitutional and invalid when it contravenes any provision of the constitution. Alexander Hamilton wrote in 'Federalist' "laws are a dead letter without courts to expand and define their true meaning and operation."

There is a little scope of litigation on the matter where the law is absolutely clear. Cases in which law is cloudy, litigation may reach up to the apex Court. These elastic provisions are to be interpreted by the court in the light of Constitutional provisions. Thus, the court performs the role of expounding the provisions of the Constitution and exercise power of declaring any law or administrative action as unconstitutional and void if it is not in the tune with the Constitution.

2.1 Meaning And Significance Of Judicial Review

The expression judicial review is used in a wide as well as a narrow sense. In the wide sense it means a final consideration and decision by a court of law.

In a technical narrow sense it "is essentially collateral and not vertical at all. It does not go into the merit of impugned decision but examine only the constitutionality or basic legality of it."[53]

Literally judicial review means the revision of the decree or sentence of an inferior curt by superior court. Judicial review in a country with written constitution means that courts of law have the power of testing the validity of legislative as well as other governmental actions with reference to the provisions of the Constitution, which is the paramount law of the country.

According to Justice Douglas, "judicial review is the process of tailoring an act to make it constitutional."[54] Judicial review is the power of the courts to pronounce upon the constitutionality of legislative act which fall within their ambit to enforce and the power to refuse to enforce such as they find it to be unconstitutional and hence void.[55] Judicial review is the assertion of the rule of law for controlling state action.

Judicial review is an institutional arrangement by which courts judge whether a disputed piece of legislation is constitutionally valid or void as being in the violation of the basic law of the

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[53] V. S. Deshpande, 'Judicial review of legislation' p. 13-14
[54] Douglas, 'Marshall to Mukheriea' p. 16
[55] A.I.R. 1999 Vol. 86 p. 227

country. Judicial review is the power to scrutinize and determine the legality and constitutional validity of instruments, acts and decisions of legislative, executive and administrative bodies of the government.

Judicial review is the procedural examination of validity of law which is an intrinsic aspect of it. Where as to sctunize power, content and spirit of law to ensure them to be in conformity with the letter and spirit of the constitution.

Judicial review in its broadest context is the self-assured right of the courts to pass upon the constitutionality of legislative acts.[56] It is a limitation on the popular government and is a fundamental part of the constitutional scheme of America.[57] The concept of judicial review has its foundation on the doctrine that the Constitution is the supreme law. It has been ordained by the people, and in American conception it is the ultimate source of all political authority.

The constitution confers only limited powers on the legislature. If the legislature consciously or unconsciously oversteps these limitations there must be some authority competent to hold it in control, to thwart its unconstitutional attempt, and thus to indicate and preserve inviolate will of the people as expressed in the Constitution. The judicial review is not the judicial supremacy but judicial nationalism to bring about all round progress of the country. This power of the courts to interpret and enforce constitutional clauses is not explicitly granted in the

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[56] Stephen K. Bailey, Howard D. Samuel, ' Government in America' p. 43, Holt Rinehart, new York, 1961

[57] Richard Hofstadfor, ' Great issues in American politics', p. 49

Constitution. It has been inferred by the courts from the existence of the constitutional restrictions.[58]

Study of the fundamental concept of constitution is necessary to examine various features of judicial review. The Constitution is the lifeblood of any nation by which the nation draws its sustenance. It is the progeny of democracy. In a democratic state Constitution defines, prescribes and limits the powers, duties and function of the chief organs of the state. The constitution is the fundamental law by which the sovereign powers of the government are established, distributed, limited, codified and regulated. So, the progress and prosperity of the nation depends upon the quality of the constitution the nation produces. The nation must produce a good constitution that produces good men, legislators, good administrators, and good judges and ultimately establishes good government.[59]

The essential function of the good government is:

- To maintain the distribution of power and the federal state relation;
- To maintain separation of powers with balance;
- To maintain constitutional limitation and restriction on the government to uphold individual liberty and freedom;
- To protect fundamental rights of the citizens; and
- To raise the moral standard of the people to produce good legislatures, good laws and good rulers.

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[58] Encyclopedia, Britannica, Vol. 66, printed in U.S.A., 1959

[59] George O. Confort, Royce H. Kheff, 'Your Government' p. 21, McGraw Hill Book Co., 2nd edition

Significance of constitution lies in and its credibility depends on:

- The character of the people engaged in governing the country and
- The functioning of the Doctrine of judicial review.

The growth of the nation and its governmental system, much or less, depends upon the adaptability of the constitution to the new conditions of an advanced society. So, "the constitution must be left elastic enough to meet from time to time the altering conditions of changing world with its shifting emphasis and different needs."[60]

The constitution to be a good one must have the element of elasticity and dynamism. Its natural and healthy growth depends upon its adaptiveness. The constitution must be fitted to the new developing conditions of life. For that amending process of a written constitution may not be always helpful. The judicial organ of the state, which is acquainted with the current trends and needs of the society, may strive to adopt the constitution to the changing conditions of life. However, it is the duty of the framers of the constitution to frame the constitution not in a static form but to give it the capacity of adaptability so that in appropriate cases the judiciary may apply it to the changing norms of the society. Thomas Jefferson, one of the architects of the federal constitution of the U.S.A. remarked:

> "some men looked at the constitution with sanctimonious reverence and deem them like that ark of covenant, too

[60] State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC p. 105

> scared to be touched, ------- but I know also that laws and institutions must go hand in hand with progress of the human mind."[61]

So, judicial review cannot be successful if the judges take a narrow stinted view of the constitution and fail to apply the Constitution to the changing situation and conditions of life.

To secure the fundamental object of the Constitution, judiciary is one of the important organs in a democratic state. To achieve the goals of the Constitution, the judiciary has to discharge two essential functions:

1. To see that the legislature and the executive functions within the constitutional limits and do not cross the boundaries of their powers and authorities laid down by the Constitution.
2. To protect the people from the dangers of democratic tyranny[62]

Paul Eidelberg describes the functions of the Supreme Court of U.S.A., which is also equally applicable to the Supreme Court of India:

> "the court was designed, not to represent the changing wants and wishes of the people but to be the paramount guardian of these ends and limitations of government without which the people would be nothing more than a

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[61] Edward Dumbauld, ' The political writings of Thomas Jefferson' p. 123-124, The liberal Arts press, New York, 1956

[62] Dr. Chakradhar Za, 'Judicial review of legislative Acts' p. 4, N. M. Tripathi, 1974

mere agreement of individuals. Hence, should the legislature, in subservience to the will of the people, enact laws repugnant to the Constitution, it would be incumbent upon the Supreme Court to resist the will of the people by declaring those laws null and void."[63]

Constitutional limitation has been defined as "provisions and judicial interpretations of written constitution which, restrict the powers of the government, especially of the legislative branch."[64] While conferring various powers to the various organs of the government, Constitution also impose limitations on the exercise of these powers with a view to avoid tyrannous application. So, there is always a constitutional check on the illegal or malafide exercise of these powers by the judiciary. Ultimately a power of the government is the necessary political evil. The Magna Carta of 1215 A.D. for the first time gave the idea of limited government in England. It established that King could exercise his power only according to the established custom and law. The Petition of Rights of 1628 and the Bill of Rights of 1689 have also recognized the doctrine of "limitation of powers".

John Locke (17th century) was also of the opinion that limitations must be imposed on exercise of legislative and executive powers. The Bill of Rights of the American Constitution in the form of first ten amendments and the fourteenth amendment of 1868, regarding 'Due process' and the equal protection clauses are the instances of the evolution of the

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[63] Paul Eidelberg, ' The philosophy of the American constitution' p. 244, The Free press, New York, 1988

[64] Edward Conrad Smith & Arnold John, ' Diefienary of American politics' p. 93, Burnes and Noble Inc., New York, 1959

concept of limitation of powers. The framers of the Constitution of India were conscious of the doctrine of constitutional limitations and its impact on working of the Constitution. The union and state legislatures have to function under the limitations and restrictions imposed by the constitution. Any violation of these limitations in framing the laws would render such laws unconstitutional and void. Thus, in the Constitution of India, two main limitations on legislative powers are:

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

Apart from these, there are other expressed and implied limitations, violation of which would ultimately result in exercise of judicial review power by the court. Judicial review is possible only where a written Constitution exists, which affords objective standard to judge the constitutional violations. In India, as in America, the Constitution is written.

In order to make the Constitution a living organism, progressive judicial interpretations are inevitable. In England, the Constitution is unwritten and exercise of judicial review power by judiciary is not possible. The Magna Carta, the Petition of Rights and the Bill of Rights impose limitation on governmental power, but these documents alone cannot give objective standard of judicial review. However, some countries with written constitution have also not judicial review because either the country is not federal or there is no guarantee of fundamental rights.

The basic difference between the written and unwritten Constitution is that the written Constitution has supremacy over the legislative acts while unwritten constitution is on the level of ordinary legislative acts. One of the most distinctive features of written Constitution is that it grows and develops by judicial interpretations. No written Constitution ever works without requiring some measures of interpretations and adaptation.[65] Where there is no written constitution, question of supremacy of the Constitution will simply not arise, and the courts would not adjudge any law unconstitutional. For example, in England, in the absence of written constitution, the parliament is Supreme and the doctrine of judicial review has no place in England.

The doctrine of judicial review owes its origin to the doctrine of constitutional limitations. The relationship between the democratic written constitution and doctrine of judicial review is very close. Both of them peacefully co-exist with each other. In the democratic state, the nation may prosper because of an efficacious system of judicial review.

[65] Wilfred Harrison, ' the Government of Britain' p. 23, Edited by c. D. Cole, Hutchinson Uni. Library, London, 1960

2.2 Concept Of Judicial Review In The European Legal Philosophy

In the ancient and medieval western countries the legal philosophers propounded the theory that law should not be arbitrary and deleterious to the human interest and generator of tyranny. The Greek concept of law is that improper law was always a symbol of tyranny. From Plato to Rousseau the legal philosophy of Europe, one after another actively asserted that law must be generator of harmony and happiness and it must also be reasonable and begetter of justice. The original concept of law was that it must not be in conflict with the natural law. "Man-made law, whether made by king himself or by some legislative body, was primarily for the purpose of implementing the 'natural law' and was valid only so long as it did not come in conflict with 'natural law', whatever its origin. The individual was obliged to follow those laws which were valid by this standard; he was free to disobey others."[66] From this, it reveals that even in the ancient society the rudiments of judicial review were clearly perceptible.

Aristotle said:

> "Laws must be constituted in accordance with the Constitution, and if this is the case it follows that laws which are in accordance with the right constitution must necessarily be just, and laws which are in accordance with wrong or prevented constitution must be unjust."[67]

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[66] Murray Clark Havens, ' The challenges to democracy' p. 5, Uni. Of Texas Press, 1965
[67] Ernest Buler, 'The politics of Aristotle' p. 127, Uni. Press, Oxford, 1946

The Roman legal philosopher Cicero also propounded the concept of reasonableness of law. He said, "A true law namely, right reason which is in accordance with nature, applies to all men, and is unchangeable and eternal"[68] Plato's concept of the republican government and democracy, Aristotle's dictum of just and fair law and coke's doctrine of natural right and reason, further expounded by Blackstone which afforded a healthy material for Locke's constitutional philosophy who gave stable and everlasting foundation of judicial review. Locke was the greatest exponent of constitutional democracy and constitutional control of legislation. He was really the generator of the modern concept of judicial review.

> "The American doctrine of judicial review embodies the Lockeian emphasis on the judicial function of state authority. The development of judicial review became the American tradition into institutional practice of Lockeian ideal."[69]

The constitutional concept of Locke as embodied in his two Treaties of government can be broadly summarized as follow

i. The end of government is the good of mankind and the people hold the Supreme power in the State.
ii. The legislative powers vest in the people. The legislature is a mere trustee of the people and the people are the trustees and beneficiaries both. If the legislature commits

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[68] Francis William Coker, 'Marques Tullius Cicero, The republic and the laws: From reading in political philosophy', p. 151, the Mac million Co., New York, 1959
[69] Thomas Cokes, 'Two Treaties of Government', p. XXXV, Harper Publication Co., 1964

breach of trust by acting arbitrarily it would forfeit its power and the power would again devolve on the people.

Thus, Locke established a system of constitutional philosophy which had its foundation in Plato and Aristotle. Locke's constitutional philosophy had a great impact on the evolution of judicial review in America.

Though in England judicial review of legislative acts became extinct on the evolution of the doctrine of parliamentary sovereignty, judicial law preceded to statutory law in England.[70]

2.3 Evolution Of The English Constitution And Judicial Review

2.3.1 Three stages of evolution

The English Constitution is a unique constitution of monarchy, aristocracy and democracy, in the shape of monarch, the lords and commons but above all, democratic element has excelled.[71] The philosophy of such mixed government was derived from Aristotle. According to English constitutional writers the evolution of English constitution can be described in three stages:

i. The government by Monarch

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[70] Edward Jenks, 'The book of English law', p. 3, John Marry, London, 1967

[71] Corinne Comstock Weston, ' The English constitutional theory and the House of Lords' p. 2, Routlege kegan Paul, London

ii. Rise of an assembly of members who challenge the hegemony of the king

iii. The assembly taking responsibility of government acting as Parliament, the monarch being deprived of most of his traditional powers.[72]

Originally all powers vested in the people, but the powers were subsequently taken away by Monarch. The Magna Carta came into existence in 1215 A.D. and it heralded the age of constitutional law in England. By this document, absolute and irresponsible monarchy ended giving birth to limited monarchy. Magna Carta enunciated and announced the rule of law; it proclaimed that the King was under the law. Sir Edward Coke was the greatest interpreter of Magna Carta. Through his book and judicial pronouncement he declared that a statute contrary to Magna Carta was void.[73] (Co. On the basis of the Magna Carta he held that the law of nature was part of the law of England[74] and that a statute contrary to natural law or equality was void.[75]

The subsequent stage of the constitutional development was the Petition of Rights of 1628, which established the supremacy of law and of people. It reiterated the constitutional principle enunciated by Magna Carta. Further the Bill of Rights of 1689 established the principle of parliamentary democracy and dependence of the Crown on Parliament. Bill of Rights contained the germ of law, which secured the independence of the judges and made them conscious of their rights.

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[72] Douglas v. Verney, ' The analysis of Political System', p.14, K & K Paul Ltd., London
[73] Co. Litt. 81 A; 2 Inst. Proem, 3 Inst. 111
[74] Calvin's case, 7 Rep. 1a at 4b, 1609
[75] Dr. Bonham's case, 8 Rep. 114a, 1610

Thus, the history of the English constitution is the history of evolution from autocracy to parliamentary democracy and from absolute monarchy to limited monarchy.[76]

The basic constitutional concept in England is that the people are the source of all powers and they are also sovereign power. Now, this power reposed in parliament and English parliament is supposed to act according to the will of the people. The analysis of the doctrine of parliamentary sovereignty discloses threefold principle:

i. Parliament can, without any limitation, legally enact legislation dealing with any matter.
ii. Parliament can legislate for all persons, all places and all things
iii. Parliament can delegate its power to other persons or bodies.

Thus, it appears that the parliament has unlimited legal power. On the basis of the doctrine of parliamentary sovereignty, obviously judicial review does not appear to be permissible in England. The people of England are confident in the tradition of parliamentary justice by the method of parliamentary reforms. Therefore, the English people do not believe in the efficacy of judicial review in developing democracy. Looking to the present structure of constitutional setup, any drastic change to adopt judicial review seems impossible.

[76] Lord Morrison, 'British Parliamentary Democracy', p.2 Dorab Tata Memorial lectures, 1961, Asia Publishing House, Bombay, 1962

However, the doctrine of judicial review was prevalent for sometime in England also. Chief justice Coke gave a great impetus to this doctrine. The law, which was against the public sentiments and common morality and did not appeal to the common right and reason, was void. The relevant passage of Bonham's case pronounced by chief justice Coke reads as " 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 or repugnant or impossible to be performed, the common law will control it, adjudge such act to be void."[77] There are certain critiques according to whom it is absurdity to suppose that these words spell out, anything like judicial review. But the general view is that Dr. Bonham's case is precursor of judicial review, which forms a great heritage of American system of judicial review.

One of the clauses of the Bill of Rights, 1689 is:

> "That the pretended power of suspending of laws or execution of laws by regal authority without consent of Parliament is illegal."[78]

Implementation of these restrictions made the Parliament absolute regarding legislative affairs and gradually the system of judicial review propounded by Chief justice cocke in 1610 began to vanish. In England power is transferred to parliament and Parliament was made sole of arbiter of liberty and freedom of the people and Parliament was trusted with the power of correction

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[77] Dr. Bonham's case, 8 Coke's Reports 114 at 118 a. (1610)
[78] W. C. Costin & Steven Watson,' The Law and Working of the Constitution, Documents 1660-1914', Vol. I p.69, Adam & Charles Black, London, 1961

of the legislative tyrannies and judicial review was confined to the executive and administrative actions.[79]

2.3.2 Reasons for the non-existence of Judicial Review in England

Reasons for the absence of judicial review power in England may be briefly summarized as follows:

- Evolution of Parliamentary supremacy
- Absence of written Fundamental rights
- Having not written constitution
- Unitary form of government controlling all powers
- Members of Parliament taking part in judicial administration
- Political consciousness of English people to make Parliament to work in the spirit of national harmony
- Predominating influence of the public opinion on the parliamentary activities
- Growth of legislative idealism

[79] Dr. Chakradhar Za, 'Judicial Review of legislative Acts', p. 156, N.M. Tripathi, Bombay, 1974

2.4 Evolution Of The American Constitution And Judicial Review

2.4.1 Historical background

The American constitution is largely British in origin. It did not emerge suddenly but had a slow and steady growth. The English constitutional revolutions and the writings of Locke created democratic idealism in the minds of the American colonists to establish constitution of their own. On October 14, 1774, the first congress of the American people was held, wherein, they resolved that they were entitled to freedom of life, liberty and property and in the second congress they restricted their determination for the same. On July 4, 1776, the Declaration of Independence was made unanimously in congress by 13 colonies and it gave birth to a new Republic. This declaration was patterned upon the British bill of rights. The philosophy of declararation had a great impact on the evolution of judicial review in America. In March 1781, the first written constitution of America in the shape of Articles of confederation was proclaimed. However, it lacked the essential federal principle of confederation of power in center. In September 1786, the people of America recommended congress to hold a constitutional convention for framing a federal constitution.

On 14, May 1787, the national federal constitution of America was finally completed and signed. The preamble of the constitution predicted the constitutional supremacy and equality of all kinds of justice. On March 4, 1789, the federal constitution was inaugurated and Washington became the first President. It is the first federal written constitution in the history of the world.

It is one of the briefest constitutions. On September 25, 1789, the first 10 amendments, which are called the Bill of Rights, were adopted and they came into operation as the part of the federal constitution of America. The Bill of Rights contains the essential principles of the constitution upon which the whole constitutional structure is based.

The real development of the Constitution of America had been by judicial interpretations as the founding fathers left many questions open to be handled by the judiciary. Alpleus Tomas and William Beaney have remarked, " the founding fathers left open the question who was to sustain this supremacy, who was to keep governmental machinery from buckling, - the men who make the law or those who execute it or the judges who interpret it- the constitution does not answer this."[80] The answer came subsequently from the mouth of the judiciary, which in the process of constitutional interpretation and judicial review finally laid down that nation's destiny was to be guided by the impartial and self-restricted judicial machinery.[81]

As observed by James Bryce:

> "No aspect of government in the United States has caused so much discussion received so much admiration and been more frequently misunderstood than the doctrine of judicial review in constitutional cases."[82]

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[80] Alpheus Thomas & William Beaney, ' American Constitutional Law', p.6, 1954
[81] Dr. Chakradhar Jha, 'Judicial Review of Legislative Act', p. 69, N. M. Tripath, Bombay
[82] Noel T. Dowling, 'Constitutional Law- Case' p. 19, 6th edition, Uni. Case book series

Judicial review was neither a sudden innovation nor the work of one man, but rather the culmination of a long development and many factors. Some acquaintance with its historical background is essential to an understanding of the doctrine. There are complex factors giving rise to judicial review, amongst which two are important.

i. The practice of reducing important materials to writing, culminating in written constitution
ii. English and colonial experiences in having courts to interpret such materials, culminating in exercise of review it.

Other influential elements are notions of fundamental law or natural law and rights and the struggle for limited government.

Even before the Norman Conquest of England in1066 the writing down of some types of material or transactions was established practice in England. After the conquest because of the spread of the revival of the learning, there was great accelerating increase of private and official documents. Three kinds of writings are relevant for the study of origin of judicial review. The judicial commission, the original writ and the borough charter.

The judicial commission was a writing serving as the warrant of authority for a crown judicial officer sent into the counties. The original writ used to initiate litigation served as lawsuit as a kind of basic instrument conferring authority on the court. As to both commission and writ the document was a source of authority to do something and at the same time limited the things authorized to be done. So that where action under such a paper was to be

challenged or justified a kind of interpretation like judicial review was called for.[83]

With the charter of liberties of 1100, there began a line of great national instruments-having some of the characteristics of national constitutions. These include, inter alia, Magna Carta (1215) and the confirmatio carturum (1297). Moreover, under Edward I (1272-1307) the interpretative skills of the courts were confronted for the first time with a sizable body of important national legislation.

Fundamental laws are laws of "supreme obligation and validity" as against other laws, whether judge made, enacted or statutory. The borough charter when used to test whether borough acts or ordinances were ultra virus clearly fitted these specifications on a local scale. On a national scale, the significant constitutional forerunners- the coronation oath, charter of liberties, Magna Carta the confirmatio cartarum did not fit so clearly. The concept of natural law is the other contributing factor to the origin of judicial review.

Natural law presupposes a body of higher laws, basic and unchangeable, which direct human conduct and to which human laws should conform. This concept of superior law as the doctrine of natural law is much debated and it has, throughout the history of civilization till today, served as an appeal to something higher than the prescribed law by a human sovereign or for the time being, and it is that ideal which has led to

[83] Noel T. Dowling, 'Constitutional Law- Case' p. 20, 6th edition, Uni. Case book series

evolution of a written constitution.[84] Since natural law is the embodiment of pure reason and is supposed to be derived from nature or god, it follows that natural law is superior to all men made laws. It is this concept of a supreme or higher law standing above all laws which is enacted by a human sovereign whether monarch or representative legislature- which constitutes the foundation of superiority of the constitution to laws made by the legislatures which itself is created by fundamental law.[85]

At the early stages of the history of the natural law, attention was not devoted to the question as to the authority that could defend the natural law. Many thinkers were of the view that the law of nature was self-executing and that any human law that contravened it, was void ab initio.

According to Cicero, the sanction of natural law was not a legal penalty or judicial pronouncement, but the divine will which was at once the promulgator acting through the human conscience. This natural law doctrine found expression in Britain in 1610 in *Dr. Bonham's case.*[86] Wherein Coke CJI asserted, "when an act of Parliament is against the common law, right and reason or repugnant or impossible to be performed the common law, such act would be adjudged as void."

After Coke, Hobart, C.J. in *Day v. Savadge*[87] observed that an act of Parliament made against 'natural equity' was void in itself. Later on in 1695, Halt, C.J. observed that courts could not

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[84] D. D. Basu, 'Limited Government and Judicial Review', p. 7, S. C. Sarkar & Sons (Pvt.) Ltd. 1972
[85] *ibid*
[86] 8 Coke's Reports 114 at 118
[87](1614) Hob. 85 (87)

only "construe and expound Acts of Parliament but also adjudge them to be void."[88] This doctrine did not however, become fully operational in Britain. In course of time, this doctrine was jettisoned and its place was taken over by the theory of the Parliamentary sovereignty. The doctrine of judicial review then confined to the colonies overseas.[89]

Many people of the opinion that the proposition asserted by coke did not correctly represent the law obtaining in England at any point of time.

But the importance of the view of coke in constitutional history is not for its correctness as a statement of English law but for furnishing the foundation of the mighty doctrine of judicial review, namely that the law made by representative legislature could be annulled by a court of law if it was repugnant to a higher law. It failed to create any permanent impression in England but it served as a spark in the development of constitutionalism in the American colonies, by furnishing the concept that instead of looking above for a divine sanction against the breach of higher law, the judiciary itself is an organ of political machinery to be relied upon.

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[88] R. V. Earld Banbury (1695) K. B. (skinner) 517
[89] M. P. Jain, 'Constitutional Law of India', p. 1823, Wadhawa & wadhawa Co. Nagpur

2.4.2 Nature and objects of judicial review power in U.S.A.

The state Supreme Courts also have the power of judicial review, which relates to the power of the state courts to determine the constitutionality of the statute laws. The Federal Supreme Court is the final authority and arbiter regarding the cases involving judicial review of federal laws as well as state laws, but so far the state law is concerned, if the matter does not go to the federal Supreme Court, the verdict of the state Supreme court is final regarding the constitutionality of a legislative act enacted by the state legislature.

American constitution can be divided into two parts. The written Constitution and the unwritten constitution. The written constitution is founded on judicial interpretations of the constitution. Chief justice Marshall made the first memorable constitutional interpretation in the process of judicial review in 1803, in *Marbury v. Madison*, which laid down the foundation of doctrine of judicial review and it established Supremacy of the Constitution. Chief justice Marshall by judicial review made the U.S.A. a splendid sovereign power.[90]

The United States of America gave to the world a new gleam of judicial review. The concept of judicial review as evolved in America was the result of continuous thinking and growth. It had the heritage of Plato and Aristotle, inklings of Magna Carta, and Cocken theory of common right and reason and the assimilation of practical philosophy of Locke and other legal thinkers of Europe. Magna Carta yielded a great influence of

[90]Louis Wright; 'Democratic Experience-A Short American History', p. 90, Scott Foresman & Co. Illinois 1968

Coke and Locke and it gave a great heritage to America for judicial review.

Judicial review is a limitation on a popular government and is an integral part of the constitution scheme of America.[91] The concept of judicial review has its foundation on the doctrine that the constitution is the supreme law. It has been so ordained by the people, which is the ultimate source of all political authority. Judicial review is the last word, logically and historically speaking, in the attempt of a free people to establish and maintain non-autocratic government.[92]

The main objects for which the doctrine of judicial review operated in U.S.A. are:

- To declare the law unconstitutional which are not in conformity with the Constitution of the U.S.A.
- To defend the valid laws which are challenged to be unconstitutional and void.
- To protect and uphold the Constitution by so interpreting its provisions as to apply to the changing needs of the society.
- To save the legislative function of Congress from being encroached upon by other departments of the government.[93]

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[91] Richard Hofstadter, 'Great issues in American Politics' p. 49, Justice Frankfurter in Gobi's case.

[92] Andrew McLaughlin, 'A Constitutional history of the United States', p.310, Appleton Century, New York

[93] Dr. Chakradhar Jha, 'Judicial Review of Legislative Acts', p.163, N. M. Tripathi, Bombay, 1974

2.4.3 Origin and growth of doctrine of judicial review in America

Origin and growth of the doctrine of judicial review in U.S.A. may be discussed under the following heads:

a) Pre Marshall age
b) The age of Marshall
c) The age of Taney
d) The period of judicial constitution making
e) New Deal or the period of unconstitutionality
f) The new era

2.4.3.1 The pre Marshall age

Dr. Bonham's case of lord Chief justice Coke is said to be a great heritage to the American system of judicial review. According to Wills:

> "Dr. Bonham's case was soon repudiated in England but the doctrine announced in Coke's dictum found fertile soil in the United States and sprouted into such a vigorous growth that it was applied by the United States Supreme Court in the decision of cases coming before it."[94]

> The doctrine enunciated in Bonham's case laid an unshakable foundation of judicial review in America. However, this principle was slowly abandoned in 18th century because of the subsequent events, which had proved that there were no legal limitations on the power of the Parliament. The last great judge to accept the principle

[94] Willis, 'Constitutional Law of U.S.A.'. 76, 1936, The Principia Press

wholeheartedly was Holt, who regarded it as part of a judge's daily work to "construe and expound acts of Parliament and adjudge them to be void." However, if the theory disappeared in England, it bore fruits elsewhere, and the close attention with which Coke's writing we read in America had something to do with preparing the way for the system of judicial review as its exists in that country.[95]

John Locke's political writings also influenced the minds of the Americans tremendously. The events giving rise to the foundation to the evolution of judicial review can be briefly described as follow.

i. The judicial committee of the Privy Council declared colonial acts void in three colonial decisions between 1630 to 1776. One of these cases was Winthrop v. Lechmere decided in 1727 in which a Connecticut statute was declared void as being contrary to the laws of England and not warranted by a charter of that colony.[96] Thus, colonial practice of judicial review afforded a background for the federal Supreme Court of America, which assumed the power of judicial review.

ii. The other important step in the evolution of judicial review was the argument by James Otis at Boston in 1761 in the writ of Assistance case.[97] Otis was Advocate General under the crown. He resigned his office in 1761 in protest against the writ of Assistance which authorized officers to enter any house without warrant to search for smuggled goods.

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[95] Theodone Plucknett, ' a concise history of Common Law' p. 337, McGraw Hill Book Co. New York, 1963

[96] Thayer,' Cases on Constitutional Law' (1891) I 34

[97] *ibid*

He argued that such an Act of Parliament would be against the constitution and against natural equity and said that any Act of Parliament against this was automatically null and void. He believed in the sovereignty of the people.

iii. On the eve of the declaration of independence in 1776, the judge Cushing of Massachusetts charged a Massachusetts jury to declare certain acts of Parliament as void and inoperative on the Cokein doctrine of Bonham's case, if the Parliament act was against common right and reason.[98]

iv. In several cases the State acts which were contrary to the state constitution, were declared void by state courts on the 'natural right' dictum of Coke.

v. In the case of *Holms v. Walton* (1780) the Supreme Court of New Jersey refused to carry out a state act which was enacted in conflict with the provisions of the state constitution. The state Act provided a trial of specified class of offenders by jury of six whereas the state constitution provided such trial by a jury of 12.[99]

vi. In the case of *Commonwealth v. caton* (1872) justice Blair of the Virginia court of appeal held that the courts had power to declare any resolution or Act of legislature to be unconstitutional and void.[100]

vii. In 1788, Hamilton wrote Federalist No 78 as a commentary to the constitutional supremacy and judicial review of the legislative Act. According to him the complete independence of court of justice is essential in limited constitution. The power of the people is superior and

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[98] *ibid*

[99] Edward S, Corwin, 'American Constitutional History' p. 10, Harper Torch Books, New York, 1964

[100] Thayer- Cases in Constitutional Law, No. I p.35

where the will of the legislature, declared in its statutes stands in operation to the will of the people declared, in the constitution, the judges ought to be governed by the later, rather than former. They ought to regulate the decisions by the fundamental laws, rather than by that which are not fundamental. His opinion contributed a lot to the evolution of judicial review in U.S.A.[101] The U.S. Supreme Court in *United States v. Yale Todd* declared the Act of March 23, 1792 of Congress unconstitutional. It is said that this was the first case in which the Supreme Court of America declared a statute of Congress unconstitutional and Mar bury v. Madison was the second.[102]

viii. When the Constitution of the United States was framed, it was believed by most of the influential members of the convention that the courts should have power to declare void an act of Congress if it is contrary to or inconsistent with the constitution. In 1789, when the constitution was ratified it was clearly understood that the court had power of judicial review to invalidate a legislative Act, if enacted against the constitutional mandate. Ratifying the convention, Oliver Ellsworth spoke:

> "This constitution defines the extent of powers of general government. If the general legislature should at any time overleap their limits, the political development is in a constitutional check. If the

[101] Hamilton, - Federalist No 78,Popular Prakashan, Bombay pp. 448-450
[102] Dr. Chakradhar Jha, 'Judicial Review of Legislative Acts', p.168, N. M. Tripathi, Bombay, 1974

United States go beyond their powers, if they make a law which the Constitution does not authorize. It is void, and the judicial power, the national judge, who to secure their impartiality are to be made independent, will declare it to be void."[103]

ix. Madison while submitting the national constitution for ratification to state convention, said – " A law violating a constitution established by the people themselves would be considered by the judges as null and void"

x. Chief justice Marshall, before he expressed his views on judicial review in Mar bury v. Madison, spoke in the capacity of delegate to the Virginia convention "If they {legislature} were to make a law not warranted by any of the power enumerated, it would be considered by the judges as an infringement of he constitution which they are to guard. They would declare it void."[104]

Thus, the view prevailed that in America the Constitution makers themselves intended judicial review of the legislative Acts and constitutional supremacy and it was evolved and confirmed by the interpretations of the Hamilton, Marshall and Taney. Reviewing the constitutional literature in America on this point, it appears that judicial review of legislative Acts in the American Constitution was a certainty. It was unavoidable necessity. Its progress was natural. Its tendency was inherent. Its application was the victory of democracy. Judicial review in America is the

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[103] John R. Schemidhauser, 'Constitutional Law in the Political Process', p. 94, rand. McNahy &Co., Chocago 1963

[104] Robert J Carr,' The Supreme Court and Judicial Review' p.52 Renehart & Co. New York 1942

most inevitable adjunct of democracy and is related to the national spirit and Sentiments of American people.

2.4.3.2 The age of Marshall

John Marshall was appointed as fourth Chief justice of America in 1801 and he continued in his office till 1835. This was the glorious period in the American Constitutional history for the evolution of judicial review. Though John Marshall was the fourth Chief Justice of the U.S. Supreme Court to hold the office but the fist to give dignified and prestigious position to the judicial institution and make it an equal contributor in the making of the American history.[105]

Under his leadership the loose stones provided for the nation's structure were built into a firm foundation.[106] Had John Marshall not been the Chief Justice of the U.S. Supreme court, the course of American history would have been markedly different.[107] He found judicial review a moot question but left it an integral part of the constitutional fabric.[108] Marshallian statesmanship found its first and best expression in Mar bury v. Madison which has been regarded as " the rib of the constitution" and " an example of constitutional law making at its very highest level of both doctrinal and political

[105]Anirudah prasad,'Imprints of Marshallian Judicial Statementship', Published in Journal of Indian Law Institute Vol. 22 p. 242
[106] Harrld H. Burten, 'John Marshall-The Man' p. 104, Uni. Of Penn. L Rev. 3 (1955)
[107] Felix FrankFurther,'Chief Justices I have known'p. 39, Virginia L. Rev. 883 (1953)
[108] Max Lerner, 'John Marshall and the Campaign of History',

significance."[109] It was the test case not for Marshall but for the dignity of judicial institution

Mar bury v. Madison 5 U.S. (1 Cranch) 137. 2 L Ed. (60) (1803)

Brief facts of the case

By the close of 18th century, two major political parties had emerged in the United States of America. The older Federalist Party headed by John Adams, advocated a strong national government, which was under the attack by Thomas Jefferson's republican party made up of those who favored state's rights and strict constitution of powers of the national government. The result of the presidential election of 1800 were announced on Feb. 17, 1801, which were, culminated in the defeat of President Adams and the election of Thomas Jefferson. Forty nine days prior to the result of the election, President Adams with the concurrence of the senate named John Marshall, an outstanding Virginia lawyer and the then acting Secretary of the State, as Chief Justice of the United States to succeed the aging Oliver Ellsworth on the court.

On March 3, 1801 the federalist senate confirmed the appointments of forty-two persons as justices of the peace in the district court of Columbia. These commissions were signed and sealed by midnight of March 31, when the term of the office of President Adams expired but had not yet been delivered and still lay in the office of the acting Secretary of the State. After holding the position of the President, Jefferson ordered his newly appointed secretary of the state, James Madison, to deliver

[109] Gleneden A. Schuler, 'Constitutional Politics' 178 (1960)

twenty-five of these commissions but to withhold the remainder. Among the seventeen who did not receive their commissions were William Mar bury, Dennis Ransey and others who in due course of time applied to the United State Supreme court for a writ of mandamus by invoking Sec. 13 of the Judiciary Act, 1789 to compel the Secretary Madison to deliver their commissions. Provisions of the Judiciary Act, 1789 were relied upon by the petitioners in support of their position that the Supreme Court had jurisdiction to issue writ in this case.

The following were the main issues involved in this case:

- Has the applicant a right to the commission he demands?
- If he has a right, and that right has been violated, do the laws of his country offer him remedy?
- If they do offer him remedy, is it a mandamus issuing from this court?

In answering the first two questions the court was of the opinion that the laws did offer him remedy. On the third question the court first decided that mandamus was the proper remedy and then proceeded to examine the question whether it could issue the writ

On the first and second questions stated above the court concluded that:

> By signing the commission of Mr. Marbury, the President of the United Stated appointed him a justice of peace for the country of Washington in the district of Columbia; and that the seal of United States, affixed thereto by the

Secretary of the State, is conclusive testimony of the veracity of signature and of the completion of the appointment, and the appointment conferred on him a legal right to offer for the interval of five years.

That having this title to the office, he has a consequent right to the commission and a refusal to deliver it is a plain violation of that right, for which the laws of his country afford him remedy.

In considering the third question above, the court inquired into the nature of the remedy sought, mandamus, and the position of the officer to whom it would be directed. In this case the court directed to the Secretary of the State to show cause why mandamus should not issue. The court observed that the secretary of the state has showed no cause, and the present motion is for mandamus. This then is a plain case for mandamus, either to deliver commission or the copy of t from the record; now it only remains to be enquired, whether it can be issued from this court.

The Act to establish judicial courts of the United States authorized the Supreme Court " to issue writ of mandamus in cases warranted by the principles and usages of law, to any court appointed, or persons holding office, under the authority of the United States." The secretary f the state being a person holding an office under the authority of the united states, is precisely within the letter of the description, and if this court is not authorized to issue a writ of mandamus to such an office, it must be because of the laws unconstitutional, and therefore absolutely incapable of conferring the authority and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one Supreme Court and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently in which a state shall be a party. In all other cases the Supreme Court shall have appellate jurisdiction. Marshall observed that Marbury's commission was a valid one and he had a vested right in it, which is to be protected by the government of laws. But the Chief justice maintained that the Supreme Court could issue mandamus only when it had appellate jurisdiction and not original jurisdiction and Sec.13 of the Judiciary Act, 1789 that sought to confer original jurisdiction on the court, was therefore unconstitutional. He solved the gargian knot as to who was the final interpreter of the constitution; was the congress the final interpreter of its own laws or was it the judiciary which could finally interpret the congressional laws? Basing his conclusion on Hamilton's Federalist no. 78 he enunciated clearly the doctrine of judicial review. He elaborated:

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must necessarily expound that rule or law repugnant to the Constitution is void and courts as well as other departments are bound by that instrument."[110]

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[110] Marbury v.Madison5 U.S. (1 cranch) 137. 2 L Ed. (60) (1803)

[110] Albert Beveridge, 'The life of John Marshall' 223 (1919)

Chief justice Marshall, thus, set up a classic example of making court's power of judicial review beyond any doubt and thereby established what has been called 'judicial statesmanship', the great American contribution to world constitutional jurisprudence[111].

Marshall was threatened openly by Republicans of ousting him from office if his verdict were to go in favor of judicial control of legislative acts. The highest judiciary of the country was overawed by the political party. But Marshall had a great sense of nationalism and he possessed extraordinary strength of mind and gave the solemn decision of Mar bury v. Madison establishing constitutional supremacy.

In *Maculloch v. Maryland*,[112] Marshall declared the statute of Maryland unconstitutional. In this case Marshall expanded the powers of the federal government by invoking the doctrine of implied power.

Thus, Marshall brought to the Supreme Court of America a sense of dignity and honor. Jerre S. William remarked – "In case after case, he had been building the constitutional structure with consistent plan and imperishable materials. The political wind blew and always against him but Marshall withstood and built on and on.[113] Marshall had a congenial background for the establishment of judicial review through his constitutional decisions. The dominance of constitutional law over statutory

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[112] 4 Wheat 316 (1819)
[113] Jerre S. William, 'The Supreme Court speaks' p.29, Uni. Of Texas Press, 1956

law was secured by Marshall- thus, enforcing the will of society rather than the will of government.[114]

James A. Garfield is wholly justified when he says, " Marshall found the constitution paper; and he made it power. He found a skeleton and he clothed it with flesh and blood."

In nutshell, Marshall's philosophy of judicial review was that a legislative act in violation of the constitution was void. He did not envisage that even arbitrary and unjust legislation would be considered to be the legislation against the will of sovereign people for which the sovereign people did not delegate power to the legislature and such the law should be void. This development took place later on the enactment of the fourteenth amendment.

2.4.3.3 The age of Taney (1835 – 1864)

Chief justice Taney, the successor of John Marshall has also made great contribution to the system of judicial review by upholding the supremacy of the Constitution. In Dredscott v. Sanford,[115] he observed:

> "And as the constitution is the fundamental and supreme law, it appears that an Act of Congress, if not pursuant to and within the limits of the power assigned to the federal government, it is the duty of the courts of the United States to declare it unconstitutional."

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[114] Randolph Adams, 'Political ideas of American revolution' .142-143, 1956
[115] 19 H.W. 393 (1857)

In this case, the Missorie Compromise Act, 1820 was declared void on the ground that it did not provide for compensation to the state owners for freeing the slaves. This decision was very much hated by the American people and was against the nation's spirit and civil liberties, though considerably advanced the cause of judicial review. This case enlarged the scope of judicial review over the doctrine of judicial review established in *Marbury v. Madison.*

2.4.3.4 The age of judicial Constitution making (1865-1932)

This period was of the constitution agitation, which brought into force the Fourteenth amendment in the American Constitution in 1868 by which the principle of due process was introduced. The Constitution of United States had not the smooth sailing- "No one, in fact, was wholly satisfied with the Constitution. It was a patchwork of compromises, a delicate adjustment of check and balances..."[116] The growing dissatisfaction with the Constitution urged the United States Supreme court to create a new constitutional horizon through judicial review. In America the 'Due Process of Law' became a bulwark against arbitrary legislation. It imposes limitation upon all the powers of the government legislative, executive and judicial. Thus, the Due Process of Law intended to give wide power to the Supreme Court and proved as a great weapon for the enforcement of judicial review.

In 1874, the Supreme Court in Loan Association case[117] adopted the Cokean doctrine of Bonham's case that the statute was void

[116] Nathan Schachner, 'The Founding Fathers', p. 5, Capricorn Books, New York, 1961
[117] Loan Association v. Topeka, 20 Wall 655, (1874)

being against common right and reason. It was a doctrine different from Marshall's dictum of constitutional supremacy. In the cokeian doctrine adopted in loan Association case, the judges had great freedom in violating a legislative Act. The doctrine of constitutional supremacy as enunciated by Marshall and Taney demanded that a statute can be declared void and refused to be enforced only when it is repugnant to the constitution. But the Supreme Court of United States of America in some later decisions have also taken the view that the legislative Acts which are arbitrary, unjust and anti-social are also void.

In a nutshell, the court's attention during the period of Marshall and Taney was confined to the doctrine of constitutional supremacy, expansion of federal power and strengthening of government. The individual liberty was ignored. But in this period the Supreme Court applied its mind to constitutional policy making for the safety of individual liberty. A number of laws dealing with the question of legal tender, child labor minimum wages etc. were declared void. The Supreme Court took wide view in voiding the legislative Acts.

2.4.3.5 New deal or the period of unconstitutionality

The United States Supreme Court, between Jan. 1935 and May 1936, declared acts of congress unconstitutional in twelve decisions, dealing with the New Deal Legislation. Five entire Acts of New Deal Legislation were declared unconstitutional. The previous history of declaring congressional and state Acts unconstitutional was most normal which did not cause much concern in the American life. But in the new Deal period a new

situation grew up and the unprecedented action of the Supreme Court in the process of judicial review evoked an alarming political sentiment causing a great concern to the President and it created an epoch in the history of judicial review of America.[118]

When President Roosevelt assumed his office on March 4, 1933, America was in the grip of great depression and he promised to take bold steps to end the depression. In his inaugural address he said:

> "Our Constitution' is so simple and practical that it is possible always to meet extra-ordinary needs by changes in emphasis and arrangement without loss of essential form."

President Roosevelt introduced certain new legislative measures, which were characterized as 'New Deal' and it occupies an astounding position in constitutional history of America. A large number of socio-economic enactments in the field of industry, agriculture and labor were brought into existence to remove the economic depression. But in the Supreme Court there were two groups of justices- conservative and liberal. Out of ten New Deal measures the Supreme Court declared eight statutes unconstitutional. It is said that the court had wrecked the New Deal in the Shoals and Rocks of unconstitutionality, and by nullifying the New Deal measures the court destroyed the heart of the New Deal Programme.[119] The Supreme Court held that New Deal measures were unconstitutional on the ground that

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[118] Dr. Chakradhar Jha, 'Judicial review of legislative Acts', p. 180, N. M. Tripathi, Bombay

[119] *ibid*

they involved an unwarrantable use of taxing powers of the federal government and violated the rights of the individual states.

It is said that the Supreme Court of America did not act with restraint during this period and their approach in respect of judicial review was based not on the constitutional violations but on judges' own personal judgment and philosophy. But the charge that the judges nullified the Acts of New Deal Legislation without applying rigid tests and restrains do not appear to be substantially correct.

In 1936, President Roosevelt was reelected by a largest majority. He had a great prejudice against the conservative justices of the Supreme Court who had declared New Deal legislations void and he made proposal to reorganize the judiciary by court packing programme. Accordingly, he openly stated that the old judges, who had reached the age of seventy, had lost touch with the spirit of the time and so he warranted retirement of those judges. However, the court-packing plan became very much debatable and could not go through. The Bar Association of America seriously opposed it by making vigorous agitation against the plan and defended the judiciary. In spite of all attempts to pack the court Roosevelt failed to subjugate the judiciary. The court-packing plan had no popular support and it was nipped in the bud. The democratic spirit of judicial liberty is still vibrant in the United States of America. Loren P. Beth remarks- " Whatever may have been though late in 1937, the Supreme Court has not retired from the politico-constitutional battle-ground, on the contrary, it is just as powerful today, and judicial review is as

important today as ever."[120] The court-packing plan had a great slackening effect on the progress of judicial review in America as for several years no legislation of congress was invalidated by the Supreme Court.

2.4.3.6 The New Era

From 1938 a new era emerged in the constitutional history of United States of America. The remarkable feature of this period is that there grew up a tendency in the judicial atmosphere of the Supreme Court to show a great restraint in invalidating the laws either enacted by Congress or the state legislatures. It is said that though the justices of the Supreme Court have not abrogated the power of judicial review, but there developed a marked change in their judicial approach. The main tests of judicial review, which evolved in this period, are: -

i. Whether there is reasonable and rational basis for legislative enactment?
ii. Whether the statute is repugnant to the Constitution?
iii. Reasonable accommodation between the competing interest of Government and of citizens.

Mr. Justice Black, in *Youngstown sheet & Tube Co. v. Sawyer*,[121] observed:

> "In he frame work of our Constitution, the President's power to see that the laws are faithfully executed refutes

[120] Loren P. Deth, 'Politics, the Constitution and the Supreme Court' p. 143, Harper & Row Publisher, Newe York, 1962
[121] 343, US 579 (1952)

the idea that he is a law maker. The Constitution limits its function in law making to the recommending the laws he thinks wise and vetoing the laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws, which the President is to execute.....the Constitution does not subject this law making power of Congress to Presidential or military supervision or control...the founder of this nation entrusted the law making power to Congress alone in both good and bad times."

This case has a great importance in the American constitutional history. It establishes that the court can be protector of the right of legislature also from encroachment at the hand of the executive and the court has to discharge a bigger function in maintaining the separation of powers.

The Supreme Court of America in this new era though not consistent in opinion on some points, has functioned as the 'living voice of the constitution', as Lord Bryce observed," the Supreme Court is the chief protector of the constitution, of its great system of balances, and the peoples liberties, without its vigilance the liberties would scarcely have survived."[122]

Thus, in America judicial review took different turns in different ages. The period of Chief Justice Marshall and Chief Justice Taney were the creative periods of judicial review in the American constitutional history and its form was confined to the

[122] Hennry J. Abraham, 'The Judicial Process', p. 327, Oxford Uni. Press, New York, 1962

principle that the legislation not in conformity to the constitution was void, and the spirit and intent of judicial review was to strengthen the federal powers also. But subsequently on the rise of social and economic conflicts the doctrine of Due process was evolved which gave larger scope and elasticity in the realm of judicial review and the laws which were unreasonable, unfair and harsh were declared unconstitutional and void.

2.4.4 Judicial review in U.S.A.-How far it was intended by the framers of the U.S. Constitution

It is one of the persistent anomalies of the American Constitution that the doctrine of judicial review, though accepted and recognized as an integral part of the Constitutional edifice, finds no mention in the constitutional document that came out of the Philadelphia Convention. For a legal basis and justification of the doctrine, students of the subject are prone to rely more on Chief Justice John Marshall's historic pronouncements in *Marbury v. Madison* and Alexander Hamilton's federalist (No. 78), and on certain implications drawn from a harmonious reading of several scattered clauses in the Constitution, than on any explicit assertion conferring special power on the Supreme Court to declare any Congressional or State Legislation unconstitutional if it ever violated the letter and spirit of the Constitution.

The Constitutional provisions, which are generally referred to in support of the presumed power of judicial review, are, first, the supremacy clause in art. VI; second, the same article requiring judges to swear oath to support and vindicate the Constitution. and, third, the 'jurisdictional' provision of Article III. But by them selves, these provisions were not good enough grounds on which

such an important power could be based and practiced. This conspicuous silence of the Constitution on such a vital subject has, quite naturally, given rose to misgivings and conflicting interpretations about the real origin of judicial review in U.S.A.

In this regard two broad trends opinion prevailed. On the one hand It was asserted by Beard and his supporter that the power of the Supreme Court to declare or Congressional or State law unconstitutional in order to hold a balance between the nation and the States and to guard the people in their liberties against the excess of the Congress was not something which came out of the blue, or was a fictitious thinking on the part of designing men, but was positively intended by the Framers of the Constitution to serve as a normal incident of a judicial power. On the other hand, a group of extreme critics of the doctrine saw in the Supreme Court's exercise of this power an unauthorized 'usurpation' which was aided and abetted by Chief Justice Marshall who, by his 'shimmering exercise in constitutional logic', propounded a theory which was neither supported by the precedents nor desired to be specifically incorporated in the constitutional document.[123] In this regard, Corwin strikes a good balance and opines:

> "Judicial review developed because of popular desire to check the abuses of legislative power which arose after 1787, and it was this political development which was

[123] E. S. Corwin, "Doctrine of Judicial review" (1914)

responsible for the emergence of the doctrine, and not the fiery debates of the Constitutional convention."[124]

So, for all practical purposes, therefore, the erstwhile debate on the question whether or not the Constitution framers intended to confer upon the courts the power of judicial review over Congressional and State laws and of declaring them void if contrary to the letter and spirit of the Constitution has lost its open character.

2.5 Evolution, Growth And Development Of Judicial Review In India

2.5.1 Judicial review as the part of Indian heritage

The doctrine of judicial review is not a revelation of the modern world. In India, the concept of judicial review is founded on the principle of the rule of law, which is the proud heritage of the ancient Indian culture and traditions. There has been a characteristic change only in method of its working and its form of application but the basic philosophy upon which the doctrine of judicial review hinges is the same. The basic idea of judicial review is that law should be the generator of peace, happiness and harmony; the ruler has no legal authority to inflict pain, torture, tyranny on the ruled; which is rooted in the ancient Indian civilization and culture. The fundamental object of judicial review is to assure the protection of rights, avoidance of their violations, socio-economic uplifts and to alert the

[124] Edward S. Corwin, "The Constitution as an instrument and as symbol" in American Political Science review, p. 1071, Dec. 1936, vide, S. N. Ray, Judicial review and fundamental rights, p. 42

legislature to enact laws in conformity with the constitution. Such spirit was prevalent in ancient India.

The ancient Indian concept of law is that the law is the king of kings, and nothing can be higher than law by whose aid even the weak may prevail over the strong. As Manu says, " Law in fact, is the sovereign and leader and regulator of the society. The whole race of mankind is kept in order by law.[125] The Vedic concept of sovereignty was that the state was a trust and Monarch was the trustee of the people.

Thus, the spirit of judicial review can be drawn from the fundamental concept of law and governance, which reigned in ancient India. It envisages two important principles:

i. The ruler had no right to promulgate or enforce any arbitrary and tyrannous law.
ii. Law must be beneficial and subservient to the society and the ruler's whole attempt should be to do good to the people.

In ancient period, there was no effective machinery to challenge the legality of law, but the public agitations and dissatisfaction as well as the morality of the rulers were the powerful weapons to operate as potent check on tyranny of law. Laws in ancient India had sanction of the people behind them. They were meant to bring about social, economic and religious justice to the citizens. Thus ancient heritage of India has a living force and the people of free India enacted their Constitution in 1950 which has

[125] Manu VII 17

its foundation on the rule of law, legal culture and constitutional concept of ancient India.[126]

2.5.2 Constitutional growth and judicial review

To study the actual operation of the doctrine of judicial review and its effective functioning in India, it is necessary to understand the process of evolution and characteristics of the Indian Constitution. In order to study the judicial review of the Constitutional Amendments it becomes inevitable to study various aspects of Constitutional law of a country especially concerning its sources and historical perspectives.

The Indian constitutional development from the time of the East India Company to the establishment of the present Indian Republic can be divided into seven periods:

a) From Regulating Act to the Mutiny (1773 -1857)
b) The beginning of the evolution of the Indian constitution (1858 - 1884)
c) Birth of the Indian National Congress (1885 -1920)
d) Direct constitutional movement (1921 -March 1937)
e) Working of federation (April 1937 -Aug. 1947)
f) Establishment of the Indian sovereignty (15 Aug.1947 - Jan. 1950)
g) Inauguration of the new constitution of free India and its working (26 Jan. 1950 to present age]

[126] Dr. Chakradhar Jha, 'Judicial Review of Legislative Acts' p. 116. N.M. Tripathi, Bombay

2.5.2.1 From Regulating Act to mutiny

The East India Company Act, 1933, which is known as the Regulating Act, led to establish of Company rule in India. Section 36 of the Act contained constitutional limitation i.e. Rules, ordinances and regulation which could not be repugnant to the law of realm.

Under Charter Act, 1933, the Governor General in council was the law making authority but Section 43 of the Act contained constitutional restrictions. The Governor General in council had no power to make any law or regulations affecting any prerogative of the Crown or the authority of parliament or against the unwritten laws or constitution of the U.K.[127] It implies that Laws framed in violation of such restrictions were void.

2.5.2.2 The beginning of Evolution of Indian Constitution

With the enactment of Government of India Act, 1858, the East India Company was deprived of the governing power and thus established dual form of government. This Act intended that no statute should be in contravention to the direction of the imperial Parliament. By that time, there was proclamation by Queen Victoria in Nov. 1858 which ensured constitutional guarantee to the people of India, though such guarantee were not enforceable in law courts. It promised the people peace, prosperity, protection of their religion, equality of treatment and

[127] A. C. Banerjee, 'Indian Constitutional Documents', Vol I, pp. 227-227, A. Mukherjee & Co. Pvt. Ltd. 1961

equal share in employment. This was in fact foundation of the guarantee of fundamental rights in present constitution of India.

The Indian Council Act, 1861was enacted by the British Parliament in which for the first time legislative council was introduced. This Act provided that the measures passed by this legislative council was not to become valid unless they received assent of the Governor General of India. Moreover, constitutional restrictions against the making of any law, which is in contravention of the provisions of the Indian Council Act, were also provided. Further, it provided that any violation of such provisions became a matter for judicial review, though there was no specific provision for judicial review in the Act.

2.5.2.3 Birth of Indian National Congress

With the establishment of the Indian National Congress in 1885, the expansion of legislative council was demanded by it. In 1904, the Indian National Congress launched agitation for establishing federal form of government. Apart from this, the Indian National Congress, since its foundation strove earnestly for the recognition of fundamental rights of the Indian people by the British Parliament. On account of continuous constitutional agitation by the Indian National Congress, the Montague – Chelmsford Reforms committee was constituted and according to its suggestion the Government of India Act, 1919 was enacted by the British Parliament, which introduced diarchy system between center and provinces.

The demand for federation was not considered favorably as Montague and Chelmsford wrote against it in their report. But

diarchy was in effect the first concrete step towards federalism.[128] Further, this period was marked by an important feature- Mahatma Gandhi preached Satyagrah against unjust laws and he suggested civil resistance as remedies.[129] It appears that, this cult of Satyagrah against legislative tyranny may also impressed the mind of the Constitution makers to incorporate the principle of judicial review in the Constitutions of India of 1950

2.5.2.4 Direct constitutional movements and the introduction of Federation

The reforms introduced by the Government of India Act, 1919 were not satisfactory to the people. The federal form of government was the pressing demand of the Indian people. To examine these demands Simon Commission was appointed, which submitted its report on 30th May 1929. But it did not recommend a federation. However, the First and Second Round Table Conference gave shape to federal scheme and ultimately, the Parliamentary Joint Select Committee in 1933 in its report adopted federalism and in 1935 The Government of India Act passed by the British Parliament giving a federal structure of government to the Indian people. The federation in India conferred on the provinces an autonomy, which they never possessed.

Thereafter the agitation led by Dr, Harisingh Gaur, Pundit Motilal Nehru and Mahatma Gandhi resulted into the establishment of Federal Court in India. The federal court

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[128] Montague-Chelmsford Report of 1918 on Indian Constitutional Reform p.78

[129] C. H. Phillips, 'The Evolution of India and Pakistan' 1858 to 1947, Select documents Voil. IV p.260 Oxford Uni. Press, London 1962

became the interpreter of the Constitution. However, the Government of India Act, 1935 contained certain fundamental constitutional limitations and restrictions. Like under Section 275 the bar of disqualification in respect of appointment on the ground of sex was removed. Under Section 299, the legislatures were debarred from framing any law of compulsory acquisition, which did not provide for compensation. This gave rise to various constitutional litigation for decisions for federal courts. Though there were no specific provisions for judicial review by implications the Government of India Act, 1935 conferred upon the court the powers of judicial review in the cases arising out of the violation of the constitutional restrictions.

2.5.2.5 Working of Federation

With the establishment of the Federal Court, a large number of cases cropped up in the provinces relating to the constitutional violations regarding the distribution of powers. The High courts and Federal Court of India successfully decided the constitutional conflicts. In 1937, the working committee of the Congress demanded for Constituent Assembly to be set up, as it was the only democratic method of framing the Constitution of a free country. After a struggle for four years, the first meeting of the Constitution Assembly of India to frame the Constitution of India was held on Dec. 9, 1946. Ultimately in July 1947, the British Parliament passed the Indian Independence Act by which India was divided into two dominions. On 15th August 1947, the dominion of India came into existence.

2.5.2.6 Establishment of the Indian Sovereignty

After independence, India got absolute right to frame her own Constitution. The Constitution Assembly met soon after the mid-night of Aug. 14, 1947 as a sovereign Constituent Assembly of India. The framing of the Constitution was finalized on 26th Nov. 1949 and on the same day the Constitution was declared as adopted. The Constituent Assembly was framed under the Indian independence Act, 1947, which evolved the present Constitution of the Indian democratic Republic, declaring the sovereignty of the people and the long drawn bloodless revolution succeeded in a most unique manner

2.5.2.7 Inauguration of the New Constitution of Free India and its Working

On January 26, 1950 the Constitution of India came into force. The present Constitution of India is the out come of sincere and cautious democratic thinking. The present Constitution symbolizes the spirit of Rule of law and individual liberty.

Judicial review embodied in the Constitution has been the most effective and potent method. During the last 54 yrs, the Supreme Court of India has shown extreme care and caution and has taken great pains in exercising the power of judicial review.

It has discharged its delicate function with great restraint and balance. The process of constitutional growth under the impact of judicial review reveals the dynamism of the Indian constitution.

Characteristics of Indian Constitution

- As in America, the constitution of India upholds the sovereignty of the people who created the constitution.

- The Indian Constitution has adopted the doctrine of separation of power. But the separation of powers is not like that in the United States of America. The executive has right to override the judicial decision by special legislative enactment. In America, the separation of power is very rigid which results in the check on the power of the legislature to nullify the judicial decisions of the court.

- The principles of parliamentary democracy in India are a product of the British influence and the working of the government of India Act, 1935. Fundamental difference between the constitution of England and India is – in India the judiciary acts as interpreter of the scheme of distribution of powers and the system of judicial review prevails in India, while in England it is not so.

2.5.3 Recognition and development of the doctrine of judicial review after independence

Judicial review was prevalent in India since the establishment of the British rule. But its true nature then was quite different. There was no constitutional consciousness and no guarantee of fundamental rights in pre-independence period. The form of government too was unitary. On the basis of the American

idealism there was agitation in India for securing the guarantee of Fundamental Rights and for making India a federal state. Prior to 1935 also enactment of laws in derogation of parliamentary mandate given in the constitutional documents of India gave rise to judicial review. On the introduction of federalism in the constitution of 1935 the attention of the Indian courts was drawn to the need to adjudicate about the matters relating to federalism. In the Constitution of 1950 Fundamental Rights were guaranteed and federalism was strengthen after strenuous efforts. Various other restrictions and limitations were also incorporated in the Constitution which gave rise to innumerable cases of judicial review. Mahatma Gandhi's civil disobedience and *satyagrah* also had some impact on the minds of Constitution- makers for the explicit provisions of judicial review in India. In the last five decades various legislative acts and constitutional amendments were declared void as they violated the constitutional limitations. India is a vast country of diverse social, economic, racial and political problems and legislative enactments and constitutional amendments are mostly due to political decisions of the party in power. Sometimes they want to enforce their political decision without consideration of constitutional limitation and ethical ideology.

The sentimental political behavior about the enactment of new legislation and constitutional amendments gives rose to many legislative tyrannies and lapses which affect the fundamental rights guaranteed to the citizens of India and affect the progress of the nation. But the Indian judiciary has grown much stronger, has gained wider experience and has firm grip over the problems of the nation has broaden its vision by the study of socio-economic and cultural condition of the country and as such it

has been boldly exercising the power of judicial review by declaring the legislative acts unconstitutional which are directly in conflict with the Constitution.

Judicial review in India for the first time saw its light in *Emperor v. Burah.*[130] The Calcutta High court as well as the Privy Council adopted the view that the Indian courts had power of judicial review under certain limitations.

Under the Government of India Act, 1935 federation was introduced and the experiment in judicial review took a new turn. Under the Constitution of 1950 judicial review assumed an important role in Indian democracy. The changing social and economic standards and ideals generate new openings for judicial review under the constitutional working and it is very difficult to assign a limit to its exhaustion. In discharging the function of judicial review, the Indian courts have to fulfill many duties and obligations such as:

i. To interpret the constitution.
ii. To declare a law unconstitutional if it be contrary to any constitutional provision
iii. To protect the fundamental rights guaranteed in the constitution of India.
iv. To preserve and maintain the federal system in India.
v. To guard against the delegation of essential legislative powers by the legislature and to maintain the balance between the executive and the legislature.
vi. To relieve the people of legislative excesses and tyrannies.

[130] Emperor v. Burah, LLR, 3 Cal. 63 (1887)

vii. To maintain harmony between the individual liberty and social needs.

viii. To give relief to the citizens by refusing to apply the legislative Act which is found unconstitutional by the court.

ix. To alert the legislature to conform to the constitution and to avoid the constitutional lapses.

x. To help in the regeneration and development of the socio-economic structure of the country.

The question may arise as to why the power to declare any legislative act unconstitutional is given to the judicial branch of the Government. The reason is that the constitution is a legal instrument and that, accordingly, the function of interpreting this law belongs to the courts, as in the case of other laws, and because the Constitution is the Supreme law of the land, it must prevail in case of conflict with an ordinary law.

There is another basic reason why the interpretation of the Constitution cannot be left to the judgment of the legislative or executive organs of the state. Historically, the very concept of a written constitution and of engrafting a guarantee of individual rights therein, grew out of the need to impose limitations upon the Legislature and the Executive to protect the individual from arbitrary action motivated by temporary political forces, and most of the provisions of a constitution, such as that of the U.S.A., are expressly couched as prohibitions against the legislature and the executive.[131]

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[131] D.D. Basu, 'Limited Government and Judicial Review' p. 289 S.C. Srkar & Sons Pvt. Ltd.

No controversy can possibly raised in India, as to the legal nature of our Constitution because, apart from the fact that the Constitution is drafted in the form of a statute, starting with a preamble, followed by the enacting provisions in the form of Articles and clauses and ending with schedules, - by providing that the general clauses Act is to be applied for its interpretation, the Constitution leaves no doubt that, for the purpose of interpretation, the Constitution is to be treated as if it were " an act of the legislature of the dominion of India." The superiority of the constitution to other laws made by the legislature of India is, however, ensured by the clear provision in Art. 13(2). It is futile; therefore, in India to assert that Parliament has the final authority to define its own powers.[132] Indian Parliament is the creature of the Constitution of India.

Unlike the U.S.A., the constitution of India explicitly establishes the doctrine of judicial review in several articles, such as, 13, 32, 131-136, 143, 226 and 246.

The doctrine of judicial review is firmly rooted in India, and has the explicit sanction of the constitution. Keeping this aspect in mind, the Supreme Court in *Madras v. Row*, observed that the constitution contains express provisions for judicial review of legislation as to its conformity with the constitution and that the courts "face up to such important and none too easy task" not out of any desire "to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the constitution."[133] Also, the Supreme Court observed in Copeland:

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[132] *ibid*
[133] AIR 1950 SC 27 Supra 576, 579

"In India it is the constitution that is supreme" and that a "statute law to be valid, must in all cases be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not" and if a legislature transgresses any constitutional limits, the court has to declare the law unconstitutional."[134]

So, in India, judicial review is a function, which has been assigned to the judiciary. It is a delicate task; the courts may even find it embarrassing at times to discharge it, but they cannot shirk their constitutional responsibility. In Golak Nath, Subba Rao, C.J. emphasized on the law making role of the Supreme Court in the following words:

".....Arts. 32, 141, and 142 are couched in such wide and elastic terms as to enable this court to formulate legal doctrines to meet the ends of justice. To deny this power to the Supreme Court on the basis some outmoded theory that the court only finds the law but does not make it is to make ineffective3 the powerful instrument of justice placed in the hands of the highest judiciary of this country."[135]

Golak Nath demonstrates a new phase of Indian jurisprudence having direct comparison with the Marbury case. Like Marbury, the appellant could not got relief, though decision was in his favour. Restrictions were imposed on parliamentary powers though government was not affected in the case. Had John Marshall followed the precedent on Section 13 of the Judiciary

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[134] *ibid*
[135] AIR 1967 SC 1643 at 1669

Act, it would not have been possible for him to decide the case in that manner. Similarly, had Chief justice Subba Rao adhered to the precedent on the amending power, the decision would have been otherwise. Like, Mar bury, Golak Nath also aroused great controversy and the opponents may regard it as a revolutionary coup. Like *Marbury* it is daring and reflects the boldness and judiciousness, and statesmanship of Chief Justice Subba Rao.

One cannot deny the fact that there have been occasions when judicial pronouncements have not been palatable to the government and the legislature in India. The exercise of the power of judicial review has at times generated controversies and tensions between the courts, the executive, and legislature. For example, the judicial pronouncements in the area of property rights, legislative privileges, and constitutional amendments have been controversial and have led to several constitutional amendments which were under taken to undo or dilute judicial rulings which the government did not like. Efforts were made by Parliament in India to curtail the scope of judicial review power of the courts in some cases.

The doctrine of basic structure has taken birth only because the Supreme Court has presumed that the power of amendment is limited whereas the power of judicial review is unlimited. According to the Court its power is not confined to the judicial review of legislative acts but also extends to the constitutional amendments.[136]

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[136] M. K. Bhandari, 'Basic structure of the Indian Constitution' p. 362 Deep & Deep Publication

Indian Supreme Court is the only court in the World to have power of judicial review of constitutional amendments on the ground of implied and inherent limitation. The U.S. Supreme Court, which innovated the doctrine of judicial review in *Marbury v. Madison*, has also restrained itself from declaring the constitutional amendments as unconstitutional, on the ground of inherent and implied limitation. In *National Prohibition* case, [137] in which the validity of 18th amendment of the U.S. constitution was challenged, the Supreme Court brushed aside the argument that there are no implied limitations whatever on the power of amendment and that the framers of the constitution did not intend to make an unalterable framework of government in which in which only minor details could be changed by amendment. In England, the doctrine of judicial review initiated by lord coke in *Dr. Bonham's case* is now relic of the past. But the Supreme Court of India has gone to the extent of applying it to the constitutional amendment.

The scope of judicial review in India is somewhat circumscribed as compared to that in the U.S.A. In India, the fundamental rights are not broadly worded as in the U.S.A., and limitations thereon have been stated in the constitution itself and this task has not been left to courts.

The Constitution-makers adopted this strategy as they felt that the courts might find it difficult to work out the limitations on fundamental rights and same better be laid down in the constitution itself. The constitution makers also felt that the

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[137] *ibid*

judiciary should not be raised at the level of super legislature.[138] And thus wanted to restrict the scope of judicial review in India. The Indian Constitution does not does not afford the same scope of judicial creativity as does the U.S. Constitution.

In spite of all this, the Supreme Court does play a significant role in the Indian constitutional process. Since the commencement of the Constitution, the Supreme Court has rendered hundreds of decisions expounding various provisions of the constitution, and, thus, distinct constitutional jurisprudence has come into existence. In many cases, the Supreme Court has displayed judicial creativity of a higher order.

The high-water mark of such judicial creativity in India has been in such landmark cases as *Golak Nath*[139], *Keshavananda Bharti*[140] and *Maneka Gandhi.*[141] In these cases, the role of the Supreme Court is comparable to being 'Constituent' or Constitution making.[142]

Judicial review has a very old heritage. The whole objective behind it is that law should not be subversive of human rights and liberties, but it must bring harmony and happiness to the mankind. Such law can be enacted only when the lawmakers are bereft of narrow political sentiments and prejudices and a balancing force should dominate their mind. It appears that the ingredients of judicial review were present even in the ancient

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[138] Austin, 'The Indian Constitution', 164, VII CAD 1195, IV CAD 1195-6
[139] AIR 1967 SC 1643
[140] AIR 1973 SC 1461
[141] AIR 1978 SC 597
[142] M. P. Jain, 'Indian Constitutional Law' p.1824 4th edition, Wadhawa & Co. Nagpur

legal culture which has played an important role in the evolution of the modern concept of judicial review.

In Ancient India the ruler was beneath the law and he was always supposed to do good to people, the morality of law created a great harmony between the rulers and the ruled. In ancient Europe, Greek legal philosophers preached against the tyranny of law. Plato emphasized the need for ethical element in law. Aristotle interpreted the philosophy of Plato in a more concrete and practical form in his "policies."

According to him law must be in conformity to the Constitution and the law which possesses this virtue is necessarily just. [143]The Roman legal philosopher Cicero also pleaded for reasonableness of law.[144]

The great legal philosophers who gave a practical shape to judicial review are Chief Justices Coke and Locke. On the foundations laid down by them the doctrine of judicial review really began to grow and develop in America. And the American system of judicial review spread in various other countries also, such as Canada, Australia, Japan etc. Before its introduction in the Indian Constitution of 1950 it developed as an acknowledged institution of democratic republicanism. And instances of *Golak Nath's case, Fundamental right's case, Bank nationalization case,* have revealed to the world that in India the judiciary is the only organ competent to deal with the legislative lapses and to create harmony between the rulers and the ruled.

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[143] Eaenest Barker, 'The Politics of Aristotle', p. 127, Uni. Press, Oxford, 1946

[144] Francis William Coker, 'Marcquews Tullius Cicero, The Republic and the Laws' p. 151, Macmillian Co. New York, 1961

The Indian Judiciary is really foreword-looking and progressive and only when individual liberty and fundamental freedom were at stake or when violation of constitutional provisions was in issue the judiciary came forward to vindicate the rights and liberties of the people and to restore justice assured by the Constitution. Thus, judicial review has become the workable weapon in India to keep the democracy alive.