CHAPTER ONE

INTRODUCTION

* Judicial Review: The Concept
* Evolution of Judicial Review
  * Marbury Vs Madison.
Judicial review is the power of the courts to determine the constitutionality of legislative acts. It determines the ultravires or intravires of the Act challenged before it. In the words of Smith & Zurcher, "The examination or review by the courts in cases actually before them, of legislative statutes and executive or administrative acts to determine whether or not they are prohibited by a written constitution or are in excess of powers granted by it and if so, to declare them void and of no effect."¹ Edward S. Corwin opines that judicial review is the power and duty of the courts to disallow all legislative or executive acts of either the central or the state government, which in the court's opinion transgresses the constitution.²

Judicial review is not an expression exclusively used in Constitutional Law. Judicial review, literally means the revision of the decree or sentence of an inferior court by a superior court. Under the general law, it works through the

remedies of appeal, revision and the like, as prescribed by the procedural laws of the land, irrespective of the political system.

Judicial review has however, a more technical significance in public law, particularly in countries having a written constitution where the courts perform the role of expounding the constitution and exercise power of declaring any law or administrative action which may be inconsistent with the constitution as unconstitutional and hence void. This judicial function stems from a feeling that a system based on a written constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also to restrain governmental organs from exercising powers which may not be sanctioned by the constitution.

A federal constitution effects division of powers - legislative, executive and in some cases judicial also between the General and Regional Governments established under it and which according to the true federal principles are coordinate and independent of each other in the areas allotted to them by the constitution. The two governments thus operate simultaneously upon the same people and territory. In view of the distribution of legislative powers which are strictly defined and limited in relation to the two governments, it is quite likely that the areas and limits may
be mistaken or forgotten, such constitution, although not required is strict theory, is invariably a written constitution.

The distribution of legislative powers, which is the hall-mark of a federal constitution, quite often presents an important question as to who is to decide in case of a dispute as to whether the law made by the state legislative encroaches upon the area assigned to the central legislature or vice versa. The question referred to above is not necessarily limited to strictly federal systems but may also crop up in a constitutional set-up like ours, which, according to many\(^1\), is not federal. For the purpose of resolving such disputes, the power is given to the courts and they are vested with the power of JUDICIAL REVIEW, as to the validity of the laws made by the legislature. The power of judicial review is not limited to enquiring about whether the power belongs to the particular legislature under the constitution. It extends also as to whether the laws are made in conformity with and not in violation of other provisions of the constitution. For example in our constitution, if the courts find that the law made by legislature - union or state

\(^1\) e.g. Dr. K.C. Wheare observes: 'The Indian Constitution has established a form of Government which is at the most quasi-federal, almost devolutionary in character, a Unitary State with subsidiary federal features rather than a federal state with subsidiary unitary features, 48 Allahabad Journal p-21.
is violation of the various fundamental rights guarantee in Part III the law shall be struck down by the courts on unconstitutional under Article 13(2). Similarly where the courts find that the law is violation of Article 301 which makes available to all persons the freedom of trade, commerce and inter-course throughout the territory of India, the law shall be struck down. Again where the courts find that there has been excessive delegation of legislative power a particular case, the parent Act as well as the product, i.e. delegated legislation shall be struck down as unconstitutional.

The interpretative function of the courts is referred to as 'Judicial Review' which can be direct as well as indirect. The direct judicial review involves the court to declare a legislative enactment or an executive act as null and void because it is unconstitutional. This type of judicial review is rather important. In the words of Dowling "indeed the study of constitutional law .... may be described in general terms as a study of the doctrine of judicial review in action".

1. In Hamdard Dawakhana V. Union of India, A.I.R. 1960 S.C. 554; the Supreme Court for the first time struck down an Act made by Union Parliament on the ground of excessive delegation.
In the other type of judicial review, which is termed indirect, the court attempts to give such interpretation to the impugned statute so that it may be held constitutional. Such a situation can arise only in those cases where a statute is susceptible of double meaning— one which would make the statute unconstitutional and the other which would steer clear the element of unconstitutionality and in such a situation the court would be prove to adopt that construction of the statute which would save it from being held unconstitutional. Douglas characterise this practice as 'tailoring an Act to make it constitutional'.

The constitutions of Canada, Australia and U.S.A. do not contain any provisions for direct judicial review, but it has become an integral part of the constitutional law of these countries. It is realised that mere are not suffice to check abuse of power; these "a dependence on the people", Medison says in the content of USA "is, no doubt, the Government, but experience has taught mankind the necessity of auxiliary precautions". So our government is kept within bounds not only by the limitations set by the electoral process but also through separation of powers, federation, due process of law and the wellneigh doctrine of judicial review.¹

¹ Mason and Beaney: American Constitutional Law, 1960, pp.5-6
If the court wants to ignore any law on the ground that it violates the constitution, declaration by the court of its constitutionality is essential. "Even though a law becomes void automatically under Art. 13, without the necessity of any declaration by a court, a declaration that a law has become void is necessary before a court can refuse to take notice of it. The voidness of law is not a tangible thing which can be noticed as soon as it comes into existence, a declaration that it is void is necessary before it can be ignored.\(^1\) The court does not *Suo moto* decide unconstitutionally in the present system of Judicial review in India or in America, unless moved by an aggrieved party and, also, unless the determination of unconstitutionality be necessary for the decision of the case. The legislature itself being the maker of law is not competent to determine the constitutionality of any legislative Acts. An unconcerned, independent and impartial body like the court is the proper authority to look into legislative lapses. This is necessary for the maintenance of the spirit of democracy.

Where Parliamentary sovereignty prevails and the legislature enacts atrocious, tyrannous and unjust laws or laws in violation of the constitution, the remedy available to the people is to remove the Government itself, or to get

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such law repealed by constitutional agitations, or to attract the mind of the legislatures by strong public opinion to amend or repeal such laws. But where the constitutional supremacy is in force, people have another effective remedy also, i.e. of challenging the legality of the law in law courts and in such case, they may not have any necessity of ending the Government itself. The English constitutional philosophers envisage only the first kind of remedy as Parliamentary Sovereignty prevails there "Democracy provides a peaceful way of getting rid of governments which fail to convince a majority of their adult subjects that they have lively concern for the interest of the governed". But in India, as in America, the aggrieved citizens have personal rights to challenge the validity of law in law courts also.

The decision of the question of constituionality of a legislative Act is the essence of the judicial power under the Constitution of America. Judicial review in its broadest context is the self-assured right of the court to pass upon the constitutionality of legislative acts.


Judicial review of the constitutionality of statutes is a peculiar American phenomenon which has been coped with varying degrees of success by other nations also.¹

The American judicial review, however, is a peculiar Governmental feature among the nations of the world.² It is a limitation on popular government and is a fundamental part of the Constitutional Scheme of America.³ 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, and in the American conception, it is the ultimate source of all political authority. The constitution confers only limited source 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 presence inviolate the will of the people as expressed in the constitution.⁴ The judicial review is not

the judicial of 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 explicitely granted in the American Constitution. It has been inferred by the courts from the existence of the constitutional restrictions.

In this connection Merrill Jensen observes, "by August 28,(1787) the convention had agreed on all the essentials of the judiciary as it appeared in the final draft of the constitution, and it did so with remarkably little disagreement. Neither then nor later did the delegates suggest that the supreme court be expressly authorised to rule on the constitutionality of state and federal laws. They took it for granted that it should and would do so".

The courts protect the legislative powers against their encroachments by other agencies. They defend the Union against the exaggerated claims of the states. They protect the public interests against the interests of private individuals. They conserve the spirit of order against the

innovations of excited democracy. Timothy Walker argues "one cannot easily conceive of a more sublime exercise of powers, than that by which few men through the mere force of reason, without soldiers, and without tumult, pomp, or parade, but calmly, noiselessly and fearlessly, proceed to get aside the acts of either Government, because repugnant to the constitution". Judicial review is the last word, logically and historically speaking, in the attempt of a free people to establish and maintain a non-auto-cretic government. Justice Goldberg also remarks "Judicial review is not a usurped power but a part of the grand design to ensure the supremacy of the constitution". Judicial review means that non-elective and non-removable branch of the Government, has rejected decisions reached by the two elective, removable branches. As John P. Roche says-" The principle of equilibrium required that Judges be more than Puppets of a legislature. In the constitutional scheme of things, it was imperative that some institution exist to protect the fabric of the constitution to ensure that a legislature and an executive would not connive together, to break the equilibrium of forces.

To take recourse to judicial review is the evolution of the mature human thought. Law must be in conformity with the constitution. If law exceeds in its limit, it is not law but a mere pretence of law. Law must be just, virtuous and capable to bringing human prosperity and not arbitrary, unjust and in violation of the constitution. Judicial review is a great weapon through which arbitrary, unjust harassing and unconstitutional laws are checked. Judicial review is the cornerstone of constitutionalism, which implies limited Government\(^1\).

In this connection K.V. Rao remarks - "In a democracy public opinion is passive, and in India it is still worse, and that is all the reason why it is imperative that judiciary should come to our rescue. Otherwise the constitution becomes ill-balanced, and leans heavily on Executive Supermancy, and tyranny of the majority and that was not the intention of the Makers"\(^2\). The concept of Judicial review has its foundation on the following constitutional principles.

(a) The Government that cannot satisfy the governed of the legitimacy of its action cannot expect to be considered legitimate and democratic, and such government also cannot expect


to receive the confidence and satisfaction of the governed.

(b) The government in a democracy is a government of limited powers, and a government with limited powers has to take recourse to a machinery or agency for the scrutiny of charges of legislative vices and constitutional disobedience, and such act of scrutiny can be done impartially and unbiasedly only by the court.

(c) Each citizen in a democracy, who is aggrieved of a legislative Act on the ground of constitutional violation, has to inherent right to approach the court to declare such legislative Act unconstitutional and void.

(d) In a federal state, judicial arbitration is inevitable in order to maintain balance between the Centre and the State.

(e) Where the constitution guarantees the fundamental rights, legislative violations of the rights can be scrutinised by the court alone.

(f) The legislature being the delegate and agent of the sovereign people has no jurisdiction and legal authority to delegate essential legislative function to any other body.

In the democratic state the court is the essential organ for maintaining the fundamental object of the constitution and for keeping the legislature within the limits assigned to its authority by the constitution for saving the people from the dangers of democratic tyranny and
for materialising the aim of the constitution of establishing a harmonious and cohesive society based on ideal common morality. In this way the court is a real participant in the living stream of national life.

Constitutional protection can be available to that person only who in fact is aggrieved. A person who desires to assert his constitutional rights must show that his rights are affected and infringed. The court, by evolving the rules of conduct for judicial review, has adhered to the principle that the person who challenges the constitutionality of a legislative Act must show that his right has really been infringed. One of the cardinal limitations on the courts power of judicial review of legislation on constitutional grounds is that it will decide only a ripened controversy in which the results are of immediate consequence to the parties. Willis has said - "In general, it may be said that appropriate person to raise a tax question is one whose taxes will be increased, an eminent Domain question, one whose property is being taken; a police power question, one whose personal liberty is being delimited". Modern democracy demands that if any legislative Act is challenged by an

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aggrieved person in the court of Law, the validity of the Act has to be tested objectively. The Supreme Court of India has laid down that the court has abundant power to look into the validity of law, and the scrutinize if the legislature has over-stepped the field of compelency even indirectly by way of device.

It is not open to the Legislature to contravene and flout the provisions of Part III of the constitution by asking shelter behind the plea that the infringement was accidental and not deliberate. In the case where the impugned provision is held to have violated a fundamental right, it is the bounden duty of the court to give redress to the party even if that involves the striking down of the provisions of a law enacted by the Parliament. It has been further said that the court is under a duty, imposed by Articles 13 and 14 of the constitution, to act as a sort of constitutional censor of all legislations and to scrutinise at the instance of any aggrieved citizen any law, or executive act, to examine its legality and thus ensure that no unconstitutional legislation or illegal state actions slips from its vigilant scrutiny. Judicial Review imprint

2. Deoman Upadhyaya V. State; AIR; 1960 Para 51.
governmental action with the stamp of legitimacy. It check the political branches of Government, when these encroach on the ground forbidden to them by the constitution as interpreted by the Court.

Judicial review relieves the legislature of great responsibility and strain. Through the view expressed by the courts in the process of judicial review regarding the constitutionality of any legislature Act, the legislature recieves great inspiration, and arouses alertness and caution to rectify mistakes and it creates tendency of conformity to the constitution. James Madison spoke on Saturday July 21, 1787, in the constitutional convention, "It (Judicial review) would moreover be useful to the community at large as an additional check against a pursuit of those unwise and unjust measures which constituted so great portion of our calamities". Thus, if the legislature becomes alert and cases to consider the judicial verdict future constitutional lapses can easily be avoided, which may relieve the legislature of a great strain. Judicial review of legislation, has been combined with the theory to set up an effective system of checks and balances to restrict majority rule in favour of interests of minorities. By judicial review the legislature

realises its lapses and becomes alert against future lapses. Existence of judicial review on this consideration is also very essential.

It is now well-settled that the judicial interpretations create precedents and make new laws. Such law is judicial Legislation. It has not the sanction of the established legislature, but has the sanction of the people itself. The Judges in the process of judicial review are governed by the beliefs and feelings of the time, the current economic and social thoughts, constitutional mandates and intellectual and moral tone of nation, and are guided by the high judicial standard of reasoning, aim and philosophy of life and as such the constitutional decisions handed down by the Judges have legislative value. In England, "Judicial legislation, extending over more than two centuries, worked out an extra-ordinary and within certain limits a most effective reform which was logical, systematic and effectual, just because it was the application to the actual and varying circumstances of a clear and simple principle".

In America, judicial review has rendered great service to the nation. Though on occasion, there were determined attempts to curtail its powers but the nation as a whole has accepted it. In India too judicial review has created a very healthy judicial legislation, which can be a perennial guide to the nation.

E V O L U T I O N  O F  J U D I C I A L  R E V I E W

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 the Cokeian theory of Common right and reason and the assimilation of the practical philosophy of Locke and other legal thinkers of Europe. Magna Carta yielded a great influence on Coke and Locke and it gave a great heritage to America for judicial review. The impact of Magna Carta on the American Social Life was so great that the revolt against legislative tyranny was a common phase of the Americans since the time of the Colonial rule. As J.C.Holt remarks- "And just as the Charter was claimed by the English Radicals as a natural birth right, so in America some of its principles came to be established as individual rights enforceable against authority in all its forms, whether legislative, executive or judicial...."¹ Before the Federal Constitution was enacted in the United States of America James Otis, a constitutional lawyer of extraordinary flexibility of mind argued in 1761 in Panton's case on the precedent of Dr. Bonham's case decided by Chief Justice Coke in 1610. "As

to Acts of Parliament, an Act against the constitution is void. An Act against natural equity is void". Justice Gray has said that "Otis argued that the Parliament was not final arbiter of its own Acts and contended that the validity of statutes must be judged by the courts of justice. This argument of Otis foreshadowed the principal of American constitutional law that it is the duty of the judiciary to declare unconstitutionally statutes void". In America judicial review has tended to evolve the national outlook to a great magnitude. It (Judicial review) has guided the development of a very brief constitution of agrarian origins into a great body of constitutional doctrine for the governance of a highly technical industrial civilization. This in itself is a great achievement.

The doctrine of judicial review of the United States of America is really the precursor of judicial review in other constitutions of the world which evolved after the 18th century and in India also it has been a matter of great inspiration.

The Americans have always pleaded for limited

sovereignty which means that the law-making function of the legislative organ is governed by the fundamental rights of the people and other constitutional limitations. No law can be framed which snatches away the constitutional rights of the people. "If sovereignty is considered to be all-powerful; and uncontrolled any person or party which can acquire by whatever means the happenings of sovereignty can make binding commands, and law would then rest on force and chicanery, which makes nonsense of the normal meaning of law".¹

Retrospect:

The historical background of Judicial Review in American can be divided into the following periods:

1. **The Pre-Marshall Age** (Pre-constitution Period to 1800 A.D.)

   In Bonham's case of Lord Chief Justice Coke is said to be a great heritage to the American System of judicial review. Willis remarks "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 decisions of cases coming before it".²

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This much is certain that the doctrine enunciated in Bonham's case by Chief Justice Coke laid on unshakeable foundation of judicial review in America. Carl J. Friedrich also supports the view that Coke laid down the foundation of the American System of judicial review".... one can see here clear basis for judicial review of legislature Acts as it later became reality under the written Constitution of the United States".  

The doctrine of Common Rights and Reason propounded by Chief Justice Coke and Blackstone's commentaries combined with the philosophy of Locke that the legislature was a were trustee of the sovereign people and has no right to enact law in derogation of the interest of the people, created a congenial atmosphere for judicial review. Colonial decisions, argument of Otis Hamilton Federalist, some Pre-Marshall decisions of the Supreme Court of the United States of America all fostered a broader scope for judicial review of legislative Acts.

The various events leading to the evolution of judicial review in the first period are:

(a) In three colonial decisions between 1630 to 1776, Colonial Acts were declared void and unconstitutional by the Judicial Committee of the Privy Council. The Premise upon which unconsti-tutionality was determined was that the

colonial legislature was subordinate to the British Parliament and any subordinate legislation enacted by the subordinate legislative body of the colonies in contravention of the Parliamentary Acts was void and unconstitutional. This colonial practice of judicial review afforded a background for the federal supreme court of America which assumed the power of judicial review. It appears that the colonial courts and on appeal, the Privy Council of England had the power to declare legislative acts void if in conflict with colonial charters.

(b) The argument by James Otis at Boston in February 1761 in the writs of Assistance case was a substantial step in the evolution of judicial review. The question involved was whether Panton and other British custom officials should be furnished with general search warrants enabling them to search smuggled goods. It was opposed for the Boston merchants mainly by Otis, who argued such an act of Parliament would be "against the Constitution" and "against natural equity" and therefore void. Crown says - "Otis doctrine met with a degree of success enough at least to make it a permanent memory with the men of the time". James Otis was Advocate - General under the Crown. He resigned his

1. Edward S. Corwin, *Doctrine of Judicial Review* 
   Peter Smith, 1963, p.31
office in 1761 in protest against the Writs of Assistance which authorised officers to enter any house without warrant to search for smuggled goods. He grounded his case on 'natural right' and argued that any act of Parliament against this was automatically null and void. Marjorie G. Fribourg remarks - "Otis did not win his case, but he did win the ever-growing support of his countrymen".

(c) The judge Cushing of Massachusetts on the eve of Declaration of Independence in 1776 charged a Massachusetts Jury to ignore certain acts of Parliament as void and inoperative on the Cokeian doctrine of Bonham's case (Rep.107,118) (1610) if the Parliament Act was against common right and reason.

(d) The state courts in several cases declared state Acts void which were contrary to the State Constitution on the natural right" dictum of Coke.

(e) In 1780 in the case of Holmes V. Walton the Supreme Court of New Jersey refused to carry out a State Act which was enacted in conflict with the provision of the state constitution. The state Act provided a trial of specified class of offenders by a jury of six where as the state constitution provided such trial by a jury of twelve. Thus the Act was enacted in direct conflict of the constitutional

provision and intention\(^1\).

(f) Justice Blair of the Virginia court of Appeals concurring with other Judges held in the case of Commonwealth V. Caton in 1782 - "that the court had power to declare any resolution or Act of the legislature, or either branch of it, to be unconstitutional and void". (Thayer - Cases in Constitutional Law, Volume I, p.35)\(^2\).

(g) Travett V. Weeden was decided by the state Supreme Court in 1786, which held that the law was out of harmony with the Rhode Island Charter and therefore unconstitutional. This decision also created a suitable background for future evolution of the doctrine of Judicial review.

(h) Marshall spoke in the Virginia Ratifying Convention of 1787 urging to approve the constitution: "If they (Congress) were to make a law not warranted by any of the power enumerated, it would be considered by the Judges as infringement of the constitution which they are to guard. They are to guard. They would not consider such a law as coming under their jurisdiction. They would declared it


void"\(^1\). The creation of national supreme court in the United States of America from the very beginning was intended to settle constitutional disputes regarding the constitutionality of legislative Acts either Congressional or enacted by the states.

(i) In Bowm\(\text{an} V.\) Middleton, Bay (SC) 252 decided in 1792 the South Carolina Supreme Court declared an earlier colonial statute to have been void abinitio being contrary to "Common Right" and Magna Carta".

(j) In 1794 United States V. Yale Todd was decided by the Supreme Court of the United States of America in which Act of March 23, 1792 of Congress was declared unconstitutional. It is said that this was the first case in which the Supreme Court of America declared a statute of Congress unconstitutional and Marbury V. Madison was the second.

(k) In 1796-1798 the Supreme Court gave the decisions asserting the powers of the court for judicial review.

In 1796 Chief Justice Chase remarked in Hylton V. United States (3 Dall 171)- "It is unnecessary for me to determine whether the court constitutionally possesses the

power to declare an act of the Congress void on the ground of its being contrary to and in violation of the constitution, but if the court has such powers, I am free to declare it but in a clear case".

In 1798 again Chief Justice Chase in Calder V. Bill 3US, 386, 395 observed - "I will not decide any law to be void, but in a very clear case".

(1) Madison when submitting the national constitution for ratification to state conventions said - "A law violating a constitution established by the people themselves would be considered by the judges as null and void".

(m) The Federal Convention was much concerned with the problem of keeping of the powers of congress within constitutional bounds. Chief Justice Marshall before he expressed his view on judicial review in Marbury V. Madison spoke in the capacity of a delegate to the Virginia Convention. "If they (the legislative) were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void".

It is now the confirmed majority view in America that the constitution - makers themselves intended judicial review of the legislative Acts and Constitutional Supremacy which was further strengthened by the interpretations of 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 certainty. It unavoidably needed. It progress was natural. Its tendency was inherent. Its application was the victory of democracy. Laski observed - "The Supreme Court by exercising this power of judicial review, is in fact a third chamber in United States".


John Marshall was appointed the fourth Chief Justice of America in 1801, and he continued in his exalted office till 1835. This was a glorious period in the American Constitutional history for the evolution of the doctrine of Judicial review. His historic decision in Marbury V. Madison was preceded by the famous judiciary debate in the senate in which the power of the judges for judicial review was vigorously asserted.

1. 1 Cr. 137 (1803).
In 1803 Marshall wrote the decision of Marbury V. Madison in which he declared that the legislature has no authority to make laws repugnant to the constitution and in the case of constitutional violation the court has absolute and inherent right to declare the legislative act void. By Marbury decision Marshall did not invent the system of judicial review which was already in the process of evolution, but by this decision he strengthened the system to a remarkable extent. Benard Schwartz says - "From a historical point of view Marbury V. Madison is of crucial importance as the first case establishing the power of the Supreme Court to review constitutionality." The system of judicial review thereafter became the integral part of the American constitutional jurisprudence. Marshall was threatened openly by the Republicans of ousting him from office if his verdict were to go in favour of judicial control of legislative Acts. The threat was also a threat of impeachment. The highest judiciary of the country was overawed by the political party. But Marshall had a great sense of nationalism and he possessed extra ordinary strength of mind and coolness of temper and without being perturbed by


the threatening given to him he gave the solemn decision of Marbury V. Madison establishing constitutional supremacy. By his judicial decision he nurtured in the American mind a great unifying nationalism.

Thus, Marshall brought to the supreme court of America a sense of dignity and honour. Jerre S. Williams remarks - "In case after case, he had been building the constitutional structure with consistent plan and imperishable materials. The political winds blew and always against him. But Marshall withstood and built on and on".

On the whole, Marshall had a congenial background for the establishment of judicial review through his constitutional decisions. The doctrine of judicial review established by Chief Justice Marshall in Marbury V. Madison is still vibrant and its force stands unabated, although it has ever been criticised. By 1803 judicial review had a long history in America.

Marshall's theory of judicial review mostly depended upon his own personal view which he had held long before he became the Chief Justice of the Supreme Court of America. But he was also inspired in his view by Alexander Hamilton who through his essay in 'the Federalist' (1788) had sought to

establish the theory of judicial review. Hamilton's concept of Judicial Review has become a source of great inspiration in the Indian constitutional working. Marshall after Hamilton played a very significant part in the development of American democracy through judicial review.

The American Bar played a very substantial part in the development of the doctrine of judicial review and constitutional interpretations were due to the able and unstinted co-operation given by the members of the bar who possessed extra-ordinary forensic-merits. However, Marshall's concept of judicial review had a limited scope. His philosophy of judicial review was that a legislative Act in violation of the constitution was void. He did not envisage that even an arbitrary and unjust legislation would be considered to be the legislation against the will of the sovereign people for which the sovereign people did not delegate power to the legislature and as such the law should be void. This development took place later on the enactment of the Fourteenth Amendment.

(iii) The Age of Taney (1835-1864)

Marshall was succeeded by Taney as Chief Justice of

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America. Chief Justice Taney also made a great contribution to the system of judicial review by upholding the supremacy of the constitution. He observed that "as the constitution is the fundamental and supreme law, it appears that an Act of Congress if not persuant 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". Chief Justice Taney was born in the tradition of the landed aristocracy. His judicial career has two important features in the constitutional interpretation:

(a) Extreme conservatism, and

(b) Personal conviction in the judicial decisions.

In the Dredscott case he was much swayed by the social philosophy of the time which treated the slaves as chattels and declared the Missouri compromise Act of 1820 void on the ground that it did not provide for compensation to the slave-owners for freeing the slaves. Taney on account of his conservatism did not allow the basic liberty to the slaves.

Though the decision of Dredscott case was against the nations spirit and Civil liberty it considerably advanced the cause of judicial review. Francis H. Heller traces the

1. Dredscott V. Sanford, 19 How 393 (1857).
evolution of judicial review in three stages. The first stage according to him was the decision of *Marbury V. Madison*. The second stage in the development of the power of judicial review was reached in the Dredscott case decided in 1857. This case represented an important enlargement of the scope of judicial review over the doctrine of *Marbury V. Madison*. The court took up the task of determining whether congress has exercised power which the constitution had not delegated to it. The third stage in the development of judicial review starts with the emergence of the court's modern doctrine of Due Process of Law. In *Ableman V. Booth* decided in 1859 Taney enhanced the power of the Supreme Court. Chief Justice Taney observed - "No power is more clearly conferred by the constitution and laws of the United States, than the power of this court (the Supreme Court)." On the death of Taney congress refused to pass a bill providing funds for a Taney bust in the courtroom. Charles Summer spoke on the Senate floor - "He administered justice at least wickedly, and degraded the judiciary of the country, and degraded the age." But in recent years Taney's contribution to Judicial


Review has come into conspicuous prominence. Eminent personalities like Chief Justice Hughes and Chief Justice Warren eulogised the contribution of Taney to the field of constitutional jurisprudence. Rocco J. Tresolini remarks: "Recent Scholarship has demonstrated that Taney was a much better Chief Justice than his critics would have us believe"¹.


The fourth period began with the constitutional agitation, which brought into existence in 1868 the Fourteenth Amendment by which principle of Due Process of Law was introduced. The Fourteenth Amendment came into existence as a result of constant thinking and necessity. No one, infact, was wholly satisfied with the constitution. It was a patchwork of compromises, a delicate adjustment of checks and balances......"². The growing dissatisfaction with the constitution urged the United States Supreme Court to create a new constitutional horizon through judicial review. The year 1868 was a critical year in the development of the constitutional law of America. The phrase 'Due Process of Law' is an equivalent of the phrase "the law of the land" in

Magna Carta. In America the "Due Process of Law" became a bulwark against arbitrary legislation. It imposes a limitation upon all the powers of government legislative executive and judicial. Thus the Due Process clause was a great weapon for the enforcement of judicial review in America. G.G. Venkata Subba Rao says - "Due Process is thus a formula which means that a legislation would be struck down as unconstitutional if in the opinion of the Supreme Court it imposes unreasonable restrictions upon vested rights or upon liberty"¹.

The Dredscott case decided by Chief Justice Taney had created great reaction in the minds of the American people and the Fourteenth Amendment introducing Due Process Clause was intended to give wider power to the Supreme Court in judicial review.

In 1874 the Supreme Court in Loan Association case² adopted the Cokeian doctrine of Bonham's case that the statute was void being against common right and reason. It was doctrine different from Marshall's dictum of constitutional supremacy. In the Cokeian doctrine adopted in Loan Association case the Judges had greater freedom in voiding a

2. Loan Association V. Topeka, 20 Wall 655, (1874).
legislative Act. The doctrine of constitutional supremacy 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 the 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. These decisions are founded on the theory that the legislature is a mere agent of the people and as such the legislature has no authority to make such laws which are not for the public good.

In 1905 in Lochner's case the Supreme Court invalidated a New York statute which limited employment in Bank to a maximum of sixty hours a week and ten hours a day. The supreme court held that there was a deprivation of liberty without due process. In this case the objective standard of invalidating the statute was not the constitutional violation but arbitrary laws violating the personal liberty of a man and this was the guiding principle in many cases.

The court's attention during the periods of Marshall and Taney was confined to the doctrine of the constitutional supremacy, expansion of Federal powers and strengthening of government and the expansion of trade and commerce etc. The

individual liberty was ignored. But in this period the Supreme Court applied its mind in constitutional policy-making for the safety of individual liberty. A number of laws dealing with the question of legal tender, child labour, minimum wages etc. were declared void. The Supreme Court took a wide view in voiding the legislative Acts.

The period of judicial review from 1865-1932 was seriously engrossed with the policy-making and had a great impact on the American National System. The justices in deciding the questions of constitutionality of a legislative Act had to look to the social and economic conditions of the country in order to judge whether the statute is in conformity with the constitution. The Judges of the Supreme Court of the United States of America in this period always attempted to go by the current of time and their decisions do not react merely the personal feelings of the judges but they are based on social and economic visions of the great country.

(v) The Era of New Deal or the Period of Unconstitutionality (1933-36)

Between January 7, 1935 and May 25, 1936, the Supreme Court of America declared acts of Congress unconstitutional in twelve decisions, dealing with the New Deal Legislation. Five entire Acts of the New Deal Legislation were declared unconstitutional. The speed of declaring the congressional Acts unconstitutional was abnormally high and alarming. The
previous history of declaring congressional and State Acts unconstitutional was most normal which did not cause any 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.

President Roosevelt assumed his office on March 4, 1933. America was in the grip of great depression when Roosevelt became President. He promised to take bold steps to end the depression. President Roosevelt introduced certain new legislative measures which were characterised as "New Deal" and it occupies an astounding position in the constitutional history of America. He said, "The New Deal implied a new order of thing designed to benefit the great mass of the farmers, workers and businessmen would replace the old order of special privilege".1

President Roosevelt was confident of success in his plan by his new socio-economic policy. A large number of Socio-Economic enactments in the field of industry, agriculture and labour were brought into existence to remove the economic depression. But 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. The Supreme Court held that New Deal measures were unconstitutional on the ground that they involved an unwarrantable use of the taxing powers of the Federal Government and violated the rights of the individual States.

The supporters of the New Deal contended that the test laid down in Lochner case\(^1\) was to be rigidly applied in this period. The constitutional violation could not be the guiding principle. The test adopted was whether the legislation was arbitrary, unnecessary and unreasonable. It was asserted that the court assumed the legislative function and acted as "super legislature". But really the Court was dominated with the social feeling that the New Deal legislations vitally affected the economic liberty of the governed and they are vitally against the spirit of the constitutional guarantee.

(vi) **The Court-packing Plan or the Year of Revenge** (1937).

President Roosevelt was re-elected in 1936 by the largest electoral majority. He had a great prejudice against those Judges of the Supreme Court who had opposed the New

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Deal legislation. On February 5, 1937 he made his proposals to reorganise the judiciary, that is, to "pack the court". Six judges at that time were aged about 70. The President planned that if they did not retire, the President would increase the number of judges to fifteen by appointing six more judges. There were already three judges who were supporting the legislation.

In this connection the President openly stated that the old judges on account of their cloistered existence had lost with the spirit of the time and so he wanted retirement of judges who had reached the age of 70.

The Court packing programme became very much debatable and could not go through. The Bar Association of America seriously opposed it by launching agitations against the plan and defended the judiciary. Alphens Thomas Mason says- "The Court packing plan itself left judicial power intact. The judiciary retreated, it did not surrender."¹

But inspite of all attempts to pack the court, Roosevelt failed to subjugate the judiciary. There was a great public agitation against the court-packing plan and the American people did not support this plan of President Roosevelt.

But one thing is very significant. The court packing plan had a great slackening effect on the progress of judicial review in the United States of America as for several years no legislation of congress was invalidated by the Supreme Court. "Mean while, the Supreme Court began to find constitutional support for later New Deal Laws. No act of congress was declared unconstitutional by the Supreme Court from 1936 untile 1952"\(^1\).

(vii) **The New Era** (1938 to the Present)

From 1938 a new era emerged in the constitutional history of the 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 legislatives. 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 tendency of the court to uphold legislative enactment expansive of national power probably reflected judicial aguiescence in these policies rather than retirement from the umpire's role. In sum, the

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Supreme Court's policy of selective self-restraint, which has been so much in evidence since 1937, ought not be mistaken for abandonment of its determinative role as federal arbiter. For rather than an indication of abdication, such a policy is manifestation of the Supreme Court's continued exercise of the power as guardian of American federalism. \(^1\)

The year 1954, is a remarkable year of the American Constitutional jurisprudence. On May 17, 1954 Chief Justice Warren gave majority decision in Brown's case. \(^2\) It was in that year that the Supreme Court of America attempted to establish through the process of judicial review the long-craved social equality. Thus in America in judicial review, the Judges have been mostly governed by the impulse of the time and the constitutionality of a legislative Act has been determined after consideration of the social, economic, religious and moral sentiments of the people. The period of Chief Justice Earl Warren is to be in gold in the annals of the Constitutional history of the world.

In Ferguson's case the Supreme Court of America through Mr. Justice Black expressed the majority opinion that the Supreme Court cannot strike down a law which is not in

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violation of some specific constitutional prohibition. But Justice Black's view in the present American Society can not claim to have much effect on the judicial environment of the United States of America, and it also can not be claimed to be the representative view of the American Judicial temperament and environment.

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 characterised it. "The Supreme Court is the Chief Protector of the constitution, of its great system of balances, and the people's liberties. It may have retreated even yielded to pressures now and then, but without its vigilance of liberties would scarcely have survived".

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MARBURY VS MADISON

The institution of judicial review is attributed to Chief Justice John Marshall of U.S. Supreme Court who for the first time laid it down in Marbury V. Madison\(^1\). The circumstances in which that decision was given were somewhat remarkable and require a brief analysis. Marshall belonged to the Federalist party and was Secretary of state in the Cabinet of President Adams, who succeeded Washington as the President of the United States. He was nominated by President Adams to the additional office of Chief Justice of the Supreme Court in January, 1801. He held both offices during the final weeks of the Adams administration. In November, 1800, Adams was defeated in the Presidential election and Jefferson, author of the declaration of American Independence and leader of the Republican party was elected as President. The Federalists who had been the ruling party in control of the destiny of the country till then faced a future in which the country was no longer to be theirs to rule. They still had a card up their sleeves. Until the inauguration of the New President on 4th March, Adams would still be President and congress would still be Federalist. Congress hastily set about providing for the future of many faithful Federalists. Following a plan of Hamilton the mastermind of the

\(^1\) (1803) 1 Cranch 137=2L.Ed.60.
Federalists, they passed a law creating many new Federal Districts courts. The Judges were to be appointed for life, so that they could not be removed by the incoming Republican administration. As Jefferson, still sitting at the head of the Senate pointed out there were at that time already more Federal Courts than the country needed, but that had nothing to do with the plan. The main purpose was to fill the new posts with Federalists. The law was hurriedly passed and the judges were appointed. Time was passing swiftly and by the evening of 3rd March, several of the commissions had not yet been signed. Late into the night, Chief Justice Marshall, acting as Secretary of state, sat at his desk filling out the commissions and signing them. Jefferson chose Levi Lincoln as his Attorney - General, gave him his watch and ordered him to take possession of the state Department on the stroke of midnight when Jefferson would become President. At midnight, Lincoln dramatically entered Judge Marshall's office. "I have been ordered by President Jefferson" he said solemnly" to take possession of the office and its papers". "Why, Mr. Jefferson has not yet qualified," exclaimed that startled Chief Justice and Secretary of State. "It is not yet twelve O'Clock" and he draw out his watch. Thereupon Levi Lincoln drew out his and showed it to Marshall. "This is the President's watch", he said," and rules the hour."

John Marshall looked longingly at the unfinished commission on his desk. But in his pocket he had a few of the
commissions and the men who finally received them were called "John Adams, midnight Judges". Among papers left on the table were seventeen commissions as Justices of the Peace, which had been duly sealed by John Marshall as Secretary of State. John Madison, the new Secretary of state refused to deliver them after the close of the Adams administration. William Marbury was one of these midnight appointees and he brought an action invoking the original jurisdiction of the Supreme Court to secure a writ of mandamus to compel Madison to deliver his commission. The writ of mandamus was the usual remedy to compel executive officers to perform ministerial acts. Thus arose the case of Marbury V. Madison\(^1\), the most famous case in American Judicial annals.

Marshall made up his mind to give effect at the earliest opportunity to the power of judicial review proclaimed by the Federalists. That opportunity came to him in Marbury V. Madison. It might be supposed that John Marshall who as Secretary of state had been responsible for the failure to deliver the commission, would refuse to sit on the case because of his personal connection with it. Nevertheless, with characteristic boldness, he proceeded to seize the opportunity believing as he did that constitutional opportunity knocked but once. He held, first,

\(^1\) (1803) 1 Cranch 137=2L.Ed.60.
that Marbury had a right to the Commission because the appointment was legally completed with the signing and sealing of the commission and that the Government was acting illegally in withholding it. Secondly, he held that mandamus was unquestionably the appropriate remedy. Thirdly, he held that under S.B of the Judiciary Act of 1789, invoked by Marbury, the Court had been expressly granted jurisdiction to issue the writ of mandamus to any person holding office under the authority of the United States and so to the Secretary of State who definitely came within that description. He then proceeded to observe that "if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional and so void". He then argued that the constitution prescribed specifically the Supreme Courts' original jurisdiction, that this jurisdiction did not include the power to issue writ of mandamus to federal officers and that congress had no power to alter this jurisdiction. Therefore, the attempt of congress in the judiciary Act of 1789 to give the supreme court authority to issue writs of mandamus to public officers" appears not to be warranted by the constitution". Consequently, Marbury's application for a mandamus was dismissed. Thus while the application before the court was dismissed, an Act of congress, the supreme legislative body of the nation, had be pronounced unconstitutional and void. John Marshall had
proclaimed the power of judicial review while deciding immediate issue in favour of the administration. In order to appreciate fully the origin of the doctrine of judicial review, it would be better to reproduce the opinion of Chief Justice John Marshall in Marbury V. Madison (1803) which runs as under:

"The question whether an Act repugnant to the constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well-established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conducive to their happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it; nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental and as the authority from which they proceed is supreme, and can seldom act they are designed to be permanent.

"This original and supreme will organise the government and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments."
The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing if these limits may, at any time, be passed by those intended to be restrained. The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act.

"Between these alternatives there is no middle ground. The constitution is either a superior paramount law unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people to limit a power, in its own nature, illimitable....

"Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and
paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

"If an act of the legislature, repugnant to the constitution, is void, does it, not withstanding its invalidity, bind the courts, and oblige them to give it effect? or in other words though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory, and would see at first view, an absurdity too gross to be insisted on.

"It shall, however, receive a more attentive consideration.

"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 of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and
constitution apply to a particular case, so that the court must either decide that case, conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case; this is the very essence of judicial duty. If then the courts are to regard the constitution and constitution is superior to any ordinary act of the legislatures the constitution, and not such ordinary act, must govern the case to which they both apply.

"Those then who controvert the principle that the constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which according to the principles and theory of our government is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces
to nothing, what we have deemed the greatest improvement on political institutions, a written constitution, would, of itself, be sufficient, in America, where written constitutions have been viewed with so much reverence for rejecting the construction......

"There are many other parts of the constitution which serve to illustrate this subject. It is declared that no tax or duty shall be laid on articles exported from any state'. Suppose a duty on the export of cotton, of tabacco, or of flour; and a suit instituted to recover it. Ought judgement to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law.

"No person' says the constitution' shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

"Here, the language of the constitution is addressed specially to the courts. It prescribes directly for them a rule of evidence not to be departed from. If the legislature should change that rule and declare one witness or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

"Frome these and many other selections which might be made, it is apparent that the framers of the constitution contemplated that instrument as a rule for the government of
courts, as well as of the legislature.....

"It is also not entirely unworthy of observation that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned: and not the laws of the U.S. generally but those only which shall be made in pursuance of the constitutions have that rank.

"Thus the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all the written constitutions, that a law repugnant to the constitution is void; and that courts as well as other departments are bound by that instrument".