

Preface

When Dr Chakradhar Jha wrote his monumental book “Judicial Review of Legislative Acts”, the debate on scope of “Judicial Review”, more particularly of legislative acts, was at an infant stage. The doyen amongst jurists, the late lamented N A Palkhivala in his foreword of the book had written “The provision for judicial review has been foresightedly in-built in our Constitution, in order that the integrity of the Constitution may be preserved against any hasty or ill-considered changes, “the fruit of passion or ignorance”. As Justice Frankfurter has rightly said, man being what he is cannot safely be trusted with complete power in depriving others of their rights. Had it not been for the prescience of our Constitution-makers, our fundamental rights and liberties would by now have been in sorry tatters”.

The subject of “Judicial Review” more particularly of legislative acts has been the subject of debate and controversy which seem to be never-ending. Judicial Review becomes more focused when it deals with sensitive legislation. It is the fulcrum on which rests the balance of separation of power. An eminent English author, A L Goodhart, remarked that law which is divorced from morality tends to wither and becomes ineffective. The scope of judicial review of legislative acts has become wider and flexible for the preservation of liberty and freedom.

Lord Greene said in 1948 in the famous *Wednesbury* case [1948] 1 KB 223 that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other of the following conditions was satisfied, namely the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. Lord Diplock in *Council for Civil Services Union v Minister of Civil Service* [1983] 1 AC 768 (called the CCSU case) summarised the principles of judicial review of administrative action as based upon one or other of the following viz, illegality, procedural irregularity and irrationality. He, however, opined that “proportionality” was a “future possibility”.

A Constitution is a unique legal document. It enshrines a special kind of norm and stands at the top of a normative pyramid. Difficult to amend, it is designed to direct human behaviour for years to come. It shapes the appearance of the State and its aspirations throughout history. It determines the State’s fundamental political views. It lays the foundation for its social values. It determines its commitments and orientations. It reflects the events of the past. It lays the foundation for the present. It determines how the future will look. It is philosophy, politics, society, and law all in one. Performance of all these tasks by a Constitution requires a balance of its subjective and objective elements, because “it is a Constitution we are expounding.” As Chief Justice Dickson of the Supreme Court of Canada noted:

“The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of

governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.”

Justice Hugo L Black expressed a critical tenet of democratic theory when he wrote: “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which we...must live.”

For democratic theory, what makes governmental decisions morally binding is process: the people freely choosing representatives, those representatives debating and enacting policy and later standing for reelection, and administrators enforcing that policy. Democratic theory, therefore, tends to embrace both positivism and moral relativism.

Whereas democratic theory turns to moral relativism, constitutionalism turns to moral realism. It presumes that “out there” lurk discoverable standards to judge whether public policies infringe on human dignity. The legitimacy of a policy depends not simply on the authenticity of decision makers’ credentials but also on substantive criteria. Even with the enthusiastic urging of a massive majority whose representatives have meticulously observed proper processes, government may not trample on fundamental rights. For constitutionalists, political morality cannot be weighed on a scale in which “opinion is an omnipotence,” only against the moral criterion of sacred, individual rights. They agree with Jefferson: “An elective despotism was not the government we fought for.....” (from *Constitutions, Constitutionalism, and Democracy* by Walter F Murphy).

In Public Law 2005, there are some interesting write-ups which have relevance. They read as follows:

“Judicial review—power of the Court to limit the temporal effect of the annulment of an administrative decision, postpone the date at which it will produce effects and qualify the extent of the nullity.”

Under French welfare law, agreements relating to unemployment allowances are private agreements signed by unions and employers’ associations but they enter into force only if approved by the Minister for Social Affairs. They then become compulsory for all. Several associations defending the rights of the unemployed brought an action against ministerial decisions approving such agreements. Standing was granted. The decisions were quashed on procedural grounds, i.e. the composition of the committee which had to be consulted and the way the consultation took place. The issues at stake related to the date at which this annulment would enter into force and to its effects. The matter was an extremely sensitive one, socially and politically: the scope and amount of unemployment allowances. To say nothing would have led to the application of the principle according to which nullity is retroactive. An annulled decision is supposed never to have existed. It is therefore impossible to maintain its effects for a certain time. Such are the strict requirements of the principle of legality. On the other hand, the Court cannot disregard the practical consequences of its decision, not only for the parties, but for a larger public, especially in such an area. These consequences may affect not only the functioning of a public

service but also the rights of individuals. They may create a legal void, and social havoc.

Hence the idea of allowing the Court, when it annuls an administrative decision, to include in its judgment specific orders as to whether and when the annulment will produce effects and, if so, which persons might be in a special position. Such a discretion has been used for a long time by both European Courts. The European Court of Human Rights' judgment in *Marckx v Belgium* (1979-80) 2 EHRR 330, is an apt illustration. As for the ECJ, it construed broadly the second paragraph of Article 231 EC (formerly Article 174) according to which: "In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive". This derogation to the *ex tunc* effect has been applied in cases relating not only to regulations, but also to preliminary rulings concerning interpretation (Case C-43/75 *Defrenne v Sabena* (1976 ECR 455; Case C-61/79 *Denkavit Italiana* (1980 ECR 1205; Case C-4/79 *Societe Cooperative Providence agricole de la Champagne* (1980 ECR 2823; Case C-109/79 *Maiseies de Beauce* (1980 ECR 2882; Case-145/79 *Societe Roquette Freres* (1980 ECR 2917), directives (Case C-295/90 *European Parliament v Council* (1992 ECR I-4193) and decisions (Case C-22/96) *European Parliament v Council* (1998 ECR I-3231). The ECJ held that the use of such a power was justified in order to take into account "imperious considerations of legal certainty relating to all interests at stake, public and private". In doing so, however, the Court's decisions could harm the rights of the very petitioners who wanted the Court to arrive at the decision it took. Hence the dissenting decisions of several national higher courts, such as the Italian Constitutional Court (April 21, 1989, *Fragd*) and the Conseil d'Etat (June 28, 1985, *Office national interprofessionnel des cereales o Societe Maiseries de Beauce*, concl. Genevois, RTDE, 1986, 145; July 26, 1985; *Office national interprofessionnel des cereales*, p 233, concl. Genevois AJDA, 1985; June 13, 1986, *Office national interprofessionnel des cereales*, concl. Bonichot, RTDE 1986, 533). This is why the ECJ took some precautions to protect the rights of persons who had previously brought an action or an equivalent claim. Some ECJ judgments led to the inclusion of special clauses into the EC Treaty, as shown by the Maastricht Treaty Protocol 2 (the "Barber Declaration") following the ECJ's judgment in Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* (1991 (1) QB 344). This Protocol limits the effects *ratione temporis* (before May 17, 1990) of Article 141 EC. The ECJ has been explicit on the considerations it takes into account to use such powers. They relate, on the whole, to legal certainty *lato sensu*, i.e. to the concrete effects of its decision on existing legal situations, and the desirability of avoiding the creation of a legal void. Many European constitutional courts have a similar power.

The Conseil d'Etat had never affirmed that it had such a faculty. It was not, however, entirely unaware of the issue; in *Vassilikiotis*, June 26, 2001, p 303 it annulled a ministerial decision in so far as it did not state how the permit necessary for guides in museums and historical monuments would be granted to persons with diplomas of other EU Member States. The judgment added precise and compulsory prescriptions telling the administration exactly what it should do, even before revising the regulation. Otherwise an unlawful domestic regulation would have remained in force,

perpetuating discrimination contrary to EC law. It thus held that the administration was under an obligation to enact, after a reasonable delay, the rules applying to the persons mentioned above. Meanwhile the decision forbade the administration to prevent EU nationals from guiding visits on the ground that they did not possess French diplomas. It belonged to the competent authorities to take, on a case-by-case basis, the appropriate decisions and to appreciate the value of the foreign diplomas (see also July 27, 2001, Titran, p 411)

In Association AC, a case that lent itself to such a move, the Conseil d'Etat decided to innovate and to give administrative courts new powers.

The new principles affirmed may be summed up as follows:

1. The principle is that an annulled administrative decision is supposed never to have existed.
2. However, such a retroactive effect may have manifestly excessive consequences in view of: (a) the previous effects of the annulled decision and of the situations thus created; and (b) the general interest which could make it desirable to maintain its effects temporarily.
3. If so, administrative courts are empowered to take specific decisions as to the limitation of the effects, in time, of the annulment.
4. They may do so after having examined all grounds relating to the legality of the decision and after asking the parties their opinion on such a limitation.
5. They must take into account: (a) the consequences of the retroactivity of the annulment for the public and private interests at stake; and (b) the effects of such a limitation on the principle of legality and on the right to an effective remedy.
6. Such a limitation should be exceptional.
7. The rights of the persons who brought an action, before the court's judgment, against the annulled decision must be preserved.
8. The court may decide that all or part of the effects of the decision prior to its annulment will be regarded as definitive, or that the annulment will come into force at a later time as determined by the judgment.

In the present case the Conseil d'Etat annulled a number of ministerial decisions. It also annulled other ones, but only from July 1 onwards, thus giving seven weeks to the Minister. The rights of persons who had earlier brought an action were explicitly preserved. The effects of a third group of annulled decisions were declared to be definitive, with the same reservation. Several comments are in order on this important judgment. The influence of the ECJ's case law and of its use of the *ex nunc/ex tunc* effect is evident. The judgment is also an apt illustration of a renewal of the conception of the role of administrative courts. It no longer stops when judgment is given. More and more attention is given to its effects, its practical consequences for all, the way it must be implemented by the administration and its repercussions on the rights of individuals. Hence the attention given to the ways and means to conciliate the two basic principles of legality and of legal certainty (*securite juridique*). The latter is more and more seen as a pressing social need, to borrow the vocabulary of the European Court of Human Rights. A strong illustration is the recent case law of the Cour de cassation restricting the scope not only of *lois de*

validation but also of retroactive “interpretative statutes”, on the basis of Articles 6(1) and 13 ECHR: see Cass.plen. January 24, 2003, Mme X o Association Promotion des handicapés dans le Loiret, and Cass Civ April 7, 2004, in Bulletin d’information de la Cour de cassation, March 15, 2004, with the report of Mme Favre. The discretion of the courts is a twofold one; on whether to use such a faculty and on how to use it. One last prospective-remark: might the next step be the limitation, by the Courts, of the effects in time of a change in the case law?”

A Nine Judge Bench of the Supreme Court in *I R Coelho (D) by Lrs v State of Tamil Nadu* [2007 (2) SCC 1] has elaborately dealt with the scope for judicial review. The innovative path shown by Dr Jha continues to be travelled upon as law can never remain static, it has to become dynamic to be meaningful, to be purposeful. A democratic Constitution is founded upon the Rule of Law. It is an effective weapon not only for the Rule of Law but also for establishing and strengthening the hands of law. Democracy cannot exist if the Rule of Law and universal ideals of justice are abrogated and the fundamental rights and other constitutional limitations and restrictions are allowed to exist only in theory. In the words of Chief Justice Earl Warren of America, “We have in fact accepted not only Rule of Law, but through our unique practice of judicial review of legislation, the Reign of Law” (The Public Papers of Chief Justice Earl Warren).

Dr PC Jha, worthy son of late Dr Chakradhar Jha wanted the book to be revised. It was not an easy task. We have tried our best to make the book up-to-date, and to maintain the *locus classicus* stature of the original.

**April 2009 JUSTICE DR ARIJIT PASAYAT
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Preface to the First Edition

This treatise discusses Judicial Review of Legislative Acts in the context of its history and also in its theoretical and practical aspects.

In a State where the constitutional supremacy prevails, the Constitution can remain a living moral and intellectual force only by the system of Judicial Review. The subject of Judicial Review is of paramount importance and its critical, analytical and objective study is useful as well as interesting. To undertake research in the field of Judicial Review is a matter of great responsibility. Nevertheless, Judicial Review being the main weapon of democracy, the study and research in this area are highly essential and efficacious in the modern world. Through the process of Judicial Review the court has succeeded in moulding the governmental process and regulating the social and economic structure of the society. The history of the practical operation of Judicial Review is a matter of abundant interest and curiosity and pruning out of the unconstitutional legislation through constitutional litigation is the most effective method of upholding the Constitution. Cooley rightly said: “Legislators have their authority measured by the Constitution, they are chosen to do what it permits, and nothing more and they take solemn oath and support it”.¹ The law which is in conflict with the Constitution is no law and the Constitution has imposed a solemn duty on the judiciary to determine the legality of all laws. The process of Judicial scrutiny of the legislative Acts on the touchstone

of the Constitution is technically called “Judicial Review”. The doctrine of Judicial Review is the enforcement of the rights assured and guaranteed under the Constitution through Constitutional remedies. It is one of the great assets of federalism, and is the protector of the fundamental rights. It is a living product of democracy and is a creative force in its evolution. Its historical and philosophical approach leads to the enactment of only legal laws based on ethical and rational thinking, which protects and maintains individual liberty and freedom, creates social and economic harmony and has the glorious role of reconciling political imbalances and despotism by establishing constitutional balance and justice in the society. The fundamental object of Judicial Review is to exert a great moral force upon the Legislature to keep it within the limits of the Constitution and to save the people from the democratic tyranny. But to ensure and effective working of Judicial Review it is necessary to know the history of the Constitution concerned, geographical position, social structure, economic development, racial composition, the history of the impugned legislation, necessity of its enactment and the ethical background as well as its social effect, and also its impact on individual citizens. All these combine to facilitate to a right conclusion about the constitutionality of law in the process of Judicial Review. Where the system of Judicial Review prevails, it has contributed greatly to the constitutional development of the country. The Legislature has to enact laws forsaken of tyranny and in conformity with the will of the sovereign people, embodied in the Constitution. Legislative Acts which are repugnant to the will of the sovereign people, that is against the constitutional limitations, restrictions and prohibitions are void and have no legal sanctity.

Law cannot claim obedience unless it is for the benefit of the society and resistance to law is the fundamental constitutional right, if it be not conducive to the human good. Harold J Laski has remarked: “Its claim to obedience depends upon what it does to the lives of the individual citizens..... The right to resist the law is the reserve power in the society.....”² The most beneficial and effective method of resistance to undesirable and unconstitutional law is through the Judicial organ of the State by Judicial Review. JC Shah, Ex-Chief Justice of India in his Dorabji Tata Memorial Lectures has rightly observed that India has not adopted the British doctrine of the Supremacy of Parliament and rights of Parliament are restricted by clear Constitutional mandates and so the courts are competent to invalidate any trespass by Parliament upon fields outside its authority.³ The Courts however adopt Judicial restraint in discharging their functions of Judicial Review in order to maintain harmony between the Judiciary and the Legislature. “The power of Judicial Review of legislative Acts vested in the High Courts and Supreme Court must be exercised with wisdom, and restraint and not in spirit of cold war between Parliament, or State Legislatures and courts. Non-interference with the view of the majority in Parliament with regard to what is reasonable and interference with what is prohibited by the Constitution may perhaps, be harmonious path for the future.”⁴ The Courts in India have great constitutional responsibility and they cannot be slow in determining the unconstitutionality of an impugned statute as they are guardians and sentinels of the rights of the people. Of course, it cannot be denied that the harmonious workings of the Judiciary and the Legislature always advanced the cause of democracy.

“In any Written Constitution, Sovereignty vests in the people as represented by three wings—the executive, the judiciary and the legislative and no wing can claim supremacy over any other wing. Their spheres are well defined with balances and counter-balances. There may be occasions for a conflict. But if they are solved in a spirit of the ‘Rule of Law’ democracy survives.”⁵

In the democratic federal state the court is considered to be the sole arbiter of the Constitution and is the authoritative interpreter of the will of the sovereign people. Such work of the judiciary with the co-operation of the members of the Bar and supported by the sovereign people is nothing but developing of the cause of democracy in the Republic of India. MC Setalvad has said “The integrated and independent judiciary to which our Constitution has entrusted the life and liberties of the subject is at once a guarantee and bulwark of the freedom of the subject.”⁶ The judiciary under the power of Judicial Review has tried to relieve the people of the legislative tyranny. But the problem of Judicial Review in the Indian democracy needs rejuvenation. In India, Judicial Review should not be allowed to depend merely upon the accident of litigation. The tradition of Judicial self-restraint requires some workable change. Certain innovations in the scope of Judicial Review also requires attention, and as such, in India, the role of the Supreme Court and of the High Courts is that of nation-builders. They have to evolve indigenous and more democratic system of Judicial Review, which may be helpful in lessening legislative tyranny and social tensions. The Judicial version of the Constitution enables the citizens of India to live in a free and just society with pride and dignity and as such the strengthening of Judicial Review may be very luminous efforts on the part of the Indian judiciary to articulate with glory and certainty the aspirations of the people. The task of Judicial Review for Constitutional judges is really heavy and onerous, but the working of Judicial Review with vigilant and searching mind greatly lightens the burden.

The Legislature is not the sole judge of its law-making. All legislative acts are liable to be tested on the touch-stone of the Constitution. Judicial Review is a great weapon, not only for the enforcement of the Rule of Law, but also for establishing and strengthening of the Reign of Law, upon which a democratic Constitution is founded. Democracy cannot prosper if Rule of Law and universal ideal of justice are abrogated, and the fundamental rights and other constitutional limitations and restrictions are allowed to exist only in theory. Chief Justice Earl Warren of America observed, “We have in fact accepted not only the Rule of Law, but through our unique practice of Judicial Review of legislation, the Reign of Law.”⁷

In the constitutional history of the world the first written Constitution which envisaged Judicial Review saw light in 1787, in the United States of America. Although no specific provision of Judicial Review was incorporated in the Constitution, the field for judicial Review was already pregnant with its seeds. Chief justice Marshall gave practical and definite shape to Judicial Review in 1803, in his epoch-making decision in *Marbury v. Madison*.⁸ Thereafter, the Supreme Court of the United States of America strengthened this doctrine by a number of splendid constitutional decisions. The Republic of India has a Democratic Federal Constitution, which is the Supreme Law of the Land, and all other laws are subject to this Supreme Law. In the nascent democracy of India the legislative career is in the process

of maturity. A large number of union and state laws have been enacted in response to political, social and economic urges of the people, but a considerable number of them have been proved to be constitutionally invalid. The tendency in the growth and prolixity of the unconstitutional legislation in India unquestionably signifies a matter of great concern and it requires alertness and determination to cultivate the habit of enacting laws in conformity with the Constitution.

The Constitution-makers of India very wisely incorporated in the Constitution itself, the provisions of Judicial Review so as to maintain the balance of federalism, to protect the fundamental rights guaranteed to the citizens and to afford a useful weapon for equality, liberty and freedom. The system of Judicial Review in India has not only a legal basis but it has also a philosophical and ethical foundation, and the vitality of this system stands mostly on the historical perspective, social and economic view of life, and also on the persuasive conscience of the judiciary. Forced obedience to unjust and arbitrary laws can itself be treated as an impediment and unreasonable limitation on liberty. Locke is of opinion that there is no freedom where obedience to positive laws is mandatory, whether they are just or unjust.⁹ Taking a very rigid view of the scope of Judicial Review, the judicial power to annul unconstitutional Acts of the legislature may perhaps be justified in confining the method of scrutiny to test the legislative acts merely on the plain words of the Constitution, divorced from the moral and philosophical backgrounds. But, such a stunted approach would not always be helpful, and some elasticity in the system of Judicial Review appears to be expedient and necessary in the present complex socioeconomic conditions and developing political uncertainty in this country.

Even AL Goodhart representing the English concept and sentiment of law, where the system of Judicial Review of legislative Acts does not prevail, remarks that law which is divorced from morality tends to wither and becomes ineffective.¹⁰

It seems manifestly clear that for the ultimate benefit of the governed, judicial vision in Judicial Review of legislative Acts has necessarily to be wider and flexible for the preservation of liberty and freedom. The Indian Constitution has worked for the last two decades and in this period of extreme earnestness, Judicial Review has assumed several phases. The political pressures have been counter-balanced by judicial verdicts tending to create an atmosphere of constitutional harmony. Thus, on a pragmatic approach, Judicial Review is unavoidably necessary in a developing country like India, wherever there is a constant danger of legislative lapses and appalling erosion of ethical standards in the society. The absence of Judicial Review in the Indian Constitution might have created extreme social and economic revolutions leading to the complete annihilation of democracy. Thus, researches in the field of Judicial Review, have the practical utility of invigorating and enlivening the cause of democracy. They may reveal better understanding of the nature and process of the working of Judicial Review and may also relieve socio-economic tensions in the nation's life; this may also tend to create a better democratic atmosphere in the country.

The courts in free India have examined the constitutionality of legislative Acts in the discharge of their solemn duty and responsibility imposed upon them by the Constitution with patience, judicial poise and self-restraint. The legal profession has equally extended its whole-hearted

co-operation to them in this onerous task with prudence and ability, which has advanced to a great magnitude the cause of the Constitutional supremacy in India. In America, justice Frankfurter, while he was Professor of law, used to say to his students “The Supreme Court is the Constitution.”¹¹ And about lawyers, Roscoe Pound has said, “Law and hence Lawyers are the enemies of autocracy Thus our Constitutional polity is so legal as to be depended upon lawyers for interpretation, application and maintenance against official absolutism and legislative encroachment.”¹² In the constitutional polity, the courts and the lawyers make conjoint endeavour to alleviate legislative imbalances and tyrannies and to sustain and develop constitutional democracy. In India also, as in America, practical rules and procedures and also various cautionary measures concerning Judicial Review, have evolved through constitutional decisions. An analytical and comparative study of the principles and procedures of Judicial Review in its historical background and objective reality is immensely necessary, not only for the members of the Bench and the Bar, but also for the legislators, the general public and the students of constitutional jurisprudence.

My attempt has been to present a picture of the study of Judicial Review in its historical, theoretical and practical aspects and to describe in broad outlines the nature, functions, system of workings and fundamental limitations of Judicial Review. In the study of Judicial Review it is necessary to know the fundamental concept of constitutional limitations and their fundamental characteristics, theories of sovereignty and many other cognate matters. Each of such topics has an inevitable correlation. Comprehensive study of all these connected matters is very essential for Judicial Review and with this end in view, it was considered necessary to deal with all such matters, to have a clear perspective and vision of Judicial Review. Durga Das Basu, Judge of the Calcutta High Court, encouraged me in this research work and he wrote—“Legal Research was practically unknown in India until a few years back, and even now, the need for a study and development of law as a science cannot be said to have been fully realised by all concerned. In the realm of Constitutional law, in particular, any work should be welcome, because this is a branch of jurisprudence which was introduced in India only a decade and a half ago and it is highly essential that the Bar and the Bench as well as the citizens of the Republic should have a proper understanding of the organic instrument by which we swear...”¹³ Thus, the study of Judicial Review of Legislative Acts cannot be fruitful unless it is accompanied by historical and theoretical considerations.

As the subject is so very vast, it requires elaborate treatment and hence the volume of work necessarily increased. This treatise has been divided into eleven chapters. Chapter one deals with the concept and fundamental problems of the Constitution; Chapter two with the functions of the court under the Constitution; Chapter three with a brief historical review of the Constitution of India, England, the United States of America, Canada and Australia and their characteristics; Chapter four with the concept of sovereignty and its relevance with Judicial Review; Chapter five with the fundamental concept of Judicial Review in India, England and America. As discussed above, historical approach to the problem is imperative and without it the study of Judicial Review would remain incomplete. “We cannot ignore the past. . . Continuity with the past is a necessity.”¹⁴ So

Chapters three and six have been devoted to the history of the constitutions concerned and with the history of Judicial Review. Chapter seven discusses the constitutional growth in India under Judicial Review and its impact on the social structure. Chapter eight deals with the unconstitutionality of Statutes; Chapter nine with the Political question, stare decisis, severability and other relevant matters; Chapter ten with some fundamental considerations regarding Judicial Review with personal observations and comments; and lastly Chapter eleven contains the summary and the conclusion.

The source materials of the work are the important constitutional and judicial decisions in India and other relevant countries and various other allied and cognate books, which have been duly cited in the footnotes. Many of the books and decisions have not been cited but they also helped me immensely in preparing this work. The ancient Indian texts, such as the Vedas, the Smritis and the Upanishads, writings on the ancient European legal philosophy and the American Constitutional history and jurisprudence, along with the modern writings on the Constitution and books on many allied and related subjects have afforded valuable materials and have contributed to the preparation of this work.

The fundamental aspect of the system of Judicial Review has a moral and ethical background, which leads to the creation of a form of society able to generate harmonious adjustment between the government and the governed and to evolve an ideal and well-developed socio-economic structure in the country. In India, so long as Constitutional democracy prevails, judicial democracy is sure to have a firm stand. The Indian courts have to rise to the occasion and to meet the new circumstances to relieve the citizens of India of legislative and executive impositions repugnant to constitutional rights, the national spirit and the natural liberties of the people. The powers of the Indian Courts are wider in this respect than those of the American Courts. But the present Constitutional amendments may have some diminishing effect. It may not be out of place to mention that strengthening of the Indian democracy is possible only when we have a better and real understanding of the working of the Supreme Court, as well as of the High Courts of India, in the region of the determination of the constitutionality or otherwise of legislative Acts. The legislators are not to be worried about such function of the courts, which the Constitution obliges them to discharge and the Courts have also to be very firm in their obligations. The executive and the members of the legislature have often failed to appreciate this solemn constitutional obligation of the judiciary, as is apparent from the observation made by MC Setalvad. "Though the power of Judicial Review was implicit in the Government of India Act, 1935, and had been frequently exercised by the courts, the average politician has not apparently fully appreciated its implications. The power was however expressly conferred by the Constitution; and the Constitution went further in enabling courts to act, as it were, in a supervisory capacity over the legislatures, enabling them to judge whether legislation was in certain circumstances reasonable in the general interests of the public or not. When, after the Constitution was enacted, this power came to be exercised by the courts, there was an unusual ferment among politicians and legislators, who thought that the courts were trying to arrogate to themselves powers which they did not possess. . . . the legislator continued to be agitated

about what he thought to be an invasion of his right.”¹⁵ But the recent decisions of the Supreme Court made it clear that the judiciary is firm in its constitutional obligations; and for the ultimate benefit of the nation, it will always continue to be the guardian of the rights and liberties of the citizens of India. It was rightly observed in the very beginning of the functioning of the Constitution. If, then the courts in this country face up to such important and none too easy task, it is 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..... While the court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute.”¹⁶ Curbing the power of the Court regarding Judicial Review is a prominent issue in the present political atmosphere in India. There had been some agitations in the United States of America also, to curb the power of the court in this respect, but the public opinion was all along so antagonistic to such agitations that the proposals to curb the power of Judicial Review were nipped in the bud. In India, political ideology is fast changing and it is drifting towards stronger legislative supremacy. The controversy regarding Judicial supremacy *versus* Legislative supremacy is merely a colourable and pretensive fight. The Court’s power of judicial Review is founded on its wider experience of life and impartial vision. Politicians and legislators generally have to fathom in its perspective the impact of particular legislative enactment. The legislative lapses and the Constitutional vices of legislative enactments are easily removed by the judicial check-up. A statute may have chance of being unconstitutional, but the unconstitutionality can be deciphered effectively only when the court has uncurbed power of Judicial Review over legislative Acts. Judicial Review unshakably fosters balance between the individual rights and liberties and legislative aspirations and actions, specially in consideration of the fact that the Republic of India consists of diverse political units and religions and various shades of people having conflicting linguistic and economic interests.

“If the court is convinced the statute is hurtful to the litigant as well as unconstitutional, and if the dispute is one ripe and suitable for settlement in court, the litigant will be protected. That is a great deal. But it is nothing like “Judicial Supremacy.”¹⁷ Thus the Constitution of India should not be so moulded as to establish the supremacy of the executive or the legislative branch, which is generally pliant to the influence of political mood. The rights of individual liberty and freedom can be protected only when the power of court of judicial Review is allowed to remain unimpaired and uninterrupted.

1 December 1973
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