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# THE DOCTRINE. OF JUDICIAL REVIEW AND THE. OBLIGATION TO OBEY THE LAW

1998

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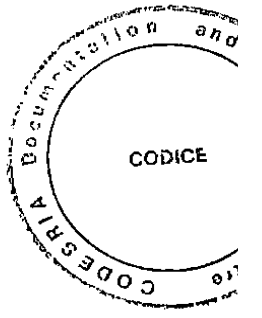


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## CERTIFICATION

This is to certify that this thesis was carried out under my supervision, by OLUWUNMI OLADUNNI IDOWU in the Department of Philosophy, Faculty of Arts, Obafemi Awolowo University, Ile-Ife, Nigeria.

July 28, 1999

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# ABSTRACT

This thesis examined the problem of obligation to obey the law in the light of the practice, exercise and essence of the doctrine of judicial review.

The methodology it employed was critical and conceptual analyses of primary literatures such as Congress V Supreme Court, The Supreme Court and Judicial Review, The Supreme Court and Supreme Law, The Judicial Veto, and secondary literatures such as Legal Obligation, The Nature of Law and other academic journals on the subject matter.

The thesis found that the controversy over our obligation to obey the law consists in whether the obligation is a moral or a peculiarly legal one. This thesis argued that our obligation to obey the law is a moral one considering the essence and practice of judicial review. When judges review a particular legislative law on the basis of a written constitution, what they are found to entrench is not only the provision of constitutional reasons for legislative failure of justice, but also, the moral criteria for the validity, authenticity and obligatoriness of laws.

The thesis concluded that the doctrine of judicial review provides a sound theoretical basis for examining the obligatoriness of laws especially when such powers are exercised within a democratic frame work.

Supervisor: Dr. A.O. Oladosu  Number of Pages: 90

# INTRODUCTION

Law is one of the greatest institutions and social practices ever developed by man. It represents a major step in cultural evolution and if civilization ever perishes it will be due in part to our failure to realize the potential of the rule of law.[1] In recent times, leaders of thought, rulers in general and particularly in Africa where the ideals of democratic governance are yet to be accepted, established and sustained, have often projected the belief that once an Abacha, or a Kabila, or Mugabe issues a law through sinister influence on the legislative arm of government, it is an enough reason or a necessary and sufficient condition that such laws be obeyed irrespective of the content of such laws. This projected belief has led to more of anarchy and disruptive tendencies in the political system of countries. This study is an attempt to show that such an attitude is misconceived and false.

There are several clusters of questions which might be referred to as the core issues of legal and philosophical theory in that they recur again and again as the concern of jurisprudential writers.[2] According to Judith Sklar, philosophical controversies are rarely resolved, but some do fade away. There are a few, however, which have an extra ordinary capacity for survival.[3] The theory of obligation is one of such core, controversial issues of great concern to legal philosophers.

The theory of obligation to obey the law is a problematic issue in socio-political discourse. It has to do with the nature of the law. This research work is concerned with understanding the nature of the problem of the obligation to obey the law, and through the doctrine of judicial review seek to see how the problem can be consistently attacked and answered.



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1 *J.C. Smith, Legal Obligation (London: Athlone Press, 1976) see Preface.*

2 *Ibid., P.1*

3 *Judith Sklar, Legalism (Massachussetts, 1964)P.29*

Respect for law is of fundamental importance and an essential principle in the effective and just operation of popular government, The role of the judiciary is, obviously, an important one in any political system. The task of settling disputes is quite significant in any organised society. It is in the courts that we can find the shade of truth that helps to understand better any possible answer and meaningful contribution to the problem of obligation to obey the law.

One effective weapon with which courts have played an important role in popular government is the practice of the doctrine of judicial review. The purpose of this study therefore, is to understand the practice of judicial review and through it proffer answers to the problem of the obligation to obey the law.To this end, the work is divided into six chapters.

The first chapter is an attempt to understand the nature and historical basis of the doctrine of judicial review. This chapter concludes with the argument that the historical basis of judicial review dating back to the 19th century is Chief Justice John Marshall's leading opinion in *Marbury V.Madison* (1803). The Second chapter is entitled the theoretical basis of judicial review. This is based on the conviction that Marshall's opinion in Marbury V Madison (1803) has a foundation in legal theory in the nature of the law.In this Chapter, it is argued that the doctrine of judicial review has as its theoretical (Jurisprudential) basis the legal Naturalist theory of law. The third chapter deals with the debate on whether the doctrine of judicial review has a constitutional basis i.e whether it can be constitutionally justified especially where it is said that there are no express provision for the doctrine. This chapter examines the constitutional legitimacy of the doctrine of judicial review in the light of the United States Constitution (the most obviously controversial on the exercise of judicial review) and concludes that the doctrine has a constitutional basis i.e legitimacy. The significance of this legitimacy in constitutional terms introduces us to the understanding of the problem of obligation to obey the law in the following chapters. The fourth and fifth

chapters are devoted to the application of the doctrine of judicial review in tackling the problem of the obligation to obey the law. Specifically, chapter four has to do with the concept and problem of the obligation to obey the law while chapter five is an attempt to establish the connection between the doctrine of judicial review and the obligation to obey the law. The sixth chapter consists of the conclusion and the bibliography.

# CHAPTER ONE

# THE NATURE AND HISTORICAL BASIS OF JUDICIAL REVIEW

## 1.1 General Introduction

Philosophical controversies are rarely resolved, but some do fade away. There are a few, however, which have an extra-ordinary capacity for survival. [1] Some of what counts as controversial philosophical issues may, sometimes, centre on the use of words and expressions, which when subjected to critical analysis, are found to melt into rhetorical insignificance.

At other times, such controversies are considered to consist in the development and histories of concepts, doctrines or principles. What may count as controversial in such doctrines, concepts or principles are not, per se, the development and histories of such concepts (although they can be, depending on the interest of the philosopher in question). The philosophically interesting side of such concepts, doctrines and principles which generate the controversies often consists in the basis, legitimacy or justification of such doctrines and concepts. The problem of legitimacy may centre on what those doctrines or principles are founded on which ascribes the quality of their being accepted as valid or true. Sometimes, the question of justification or legitimacy are raised especially where it may be discovered that the basis of justification or legitimacy are mere assumptions rather than a critical and an enlightened understanding of the subject matter. In the light of these analyses, a curious philosopher can raise questions in order to determine the worth of arguments that are given to justify a doctrine, a practice or a concept.

Presented in the light of the above analysis, the doctrine of judicial review is a controversial issue or subject matter in jurisprudential discourse. The polemics more or less centre on the

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1 *Judith Sklar, Legalism (Massachussetts, 1964) P. 29*

legitimacy, justification or the basis of the assumption underlying the very provisions, practice and exercise of the doctrine. In a moderate sense, the legitimacy of judicial review is often questioned in every important case that displeases a sizeable group of people. In the extreme sense, however, judicial review is regarded as anti-democratic because it is said to thwart the will of the people by striking down the work of their elected representatives e.g. the elected legislative and executive representatives of the people.[2]

It is to this end that the very basis of the practice is questioned, because it is said to promote the idea of an omnipotent judiciary. Moreover the practice of judicial review has also been seen as an act of usurpation. For example in the U.S., it is sometimes contended that the doctrine is not a constitutionally granted power, hence, it is often seen as an attempt at judicial self-assertion.

But then, regardless of the web of controversies in which the doctrine of judicial review is enmeshed, some have seen in the essence of the doctrine a way of promoting a vibrant constitutional democracy. In other word, the doctrine of judicial review is significant as a corrective measure against political excesses and abuse of power. Furthermore, it is seen as one of the surest way of curtailing the excesses of the more overtly political branches of government i.e legislative and executive arms of government. It is also seen as the last resort in ensuring, safe-guarding and promoting the rights and freedom of the people against legislative and executive despotism.



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2 *This view is expressed by Harry H. Wellington - "The Nature of Judicial Review" in Yale Law Journal Vol. 91, (1982), pp 486 - 487. To me, however, this criticism is mistaken. Judicial review need not end in striking down of legislative enactment or an executive order every time it is exercised. And where it is so, it is usually done in accordance with specified and laid down procedures or hints. It is true that judges are appointed and selected. But that does not disprove the fact that the appointment and selection are usually done in accordance with certain laid down democratic procedures. Take, for instance in the U.S., candidates for judicial offices are nominated by the president, and they are presented to the Congress for approval of the people. The same is true of the appointment of judicial officers in the Second Nigerian Republic. There are cases where judicial officers are voted into their various offices in popular election although not in the same sense as officers in the overtly political branches of government.*

Having a balanced view of the legitimacy of the doctrine points to the importance of the court of law in exercising this power. If judicial review can be argued to possess that character of constitutional significance, it possesses it because of the role of the courts in the upholding of constitutional democracy, hence the importance of the courts in the sustenance of constitutional democracy.

## 1.2 COURTS AND CONSTITUTIONAL DEMOCRACY

In every modern state with democratic institutions, the court is seen as a vital organ of government. Its functions are of crucial importance in the safeguard of the rights of the citizens and in the preservation of law and order. The sacredness in the work and function of the law court can be seen in the fact that they uphold the law of the land in order to ensure that peace and justice are preserved. And this they do by holding tenaciously to the principles and precepts that form the whole range and scope of the fundamental law- the constitution. Courts also preserve and protect those principles in an impartial and unprejudiced manner especially within the framework of and according to laid down democratic procedures." In order to ensure the considered and careful protection of those principles that constitute our political inheritance" "Says Wellington"," we require a distinctive political force. The special attributes of courts - the fact that judges are disinterested generalist - enables them to serve the distinctive function better than other political institutions. Judges are deliberately removed from the pressures to which many other governmental actors are deliberately exposed.The courts may be seen as the key political institution charged with taking account of our public traditions" .[3]

Are courts political institutions? To claim that they are will rather sound untenable for it will mean equating them to or putting them on the same level as the other political branches. It is true, of course, that they do preserve the "political inheritance" of any democratic state. It is also true that



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3 *Ibid. pp. 493-94*

they are part and parcel of the governmental process. But does that make them political? I rather think not. In the first instance, what makes other institutions political does not apply to the courts. For example, judges are not elected in the same deep political processes that other organs are prone to. They do not campaign on the platform of parties. Furthermore, courts are neutral and are independent of the other political branches. These are called political branches of government but not the court of law. That courts are a distinctive force to reckon with in a democratic order is, no doubt, true. But, it ceases to be a political branch as Wellington claims, when the functions, role and its over all nature are examined under close scrutiny[4].

That courts are not political only goes to show the distinctiveness of their functions. This distinctiveness is somewhat sustained, in the first place, by its insulation from politics, and secondly by its impartial interpretation of the constitution and other laws of the land.We alluded to the fact that the courts, as a result of their role in perpetuating the sacred order of a constitutional democracy, protect and preserve the principle and precepts of the constitution. This, the courts do by a careful interpretation of the constitution. The constitution is the fundamental law of the land from which, in a democratic order, all other forms of law derive their validity and binding effect. From time to time, the meanings of the provisions need to be established. And because of the possibility of conflict in meaning an impartial body, independent of what makes other arms of government partisan and political, is needed to establish the meaning of such constitutional provisions. Moreover, where there is a clash between what is taken to have been enacted by the legislative arm of government and relevant constitutional provisions, the courts are charged with the responsibility of declaring such acts



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4 *A recent dimension to this issue is whether there are some "political Questions" that courts cannot dabble into. For more, the following works are instructive: Scharpf, F.W. "Judicial Review and Political Questions: A Functional Analysis" Yale Law Journal Vol.75, (1966); Weston "Political Questions" Harvard Law Review, Vol.38, (1925); Tollet, "Political Questions and the Law", University of Detroit Law Journal, Vol.42, (1965).*

or statutes as null and void, and of no effect[5]. It is in this sense that the people have reposed their confidence in the court, hence the normal reference to the courts as the "last hope of the common man". This hope is somewhat sustained and enforced through judges' impartial interpretation of the provisions of the constitution, and their readiness to declare as null and void, ultra vires, any congressional, legislative or parliamentary laws or statutes that runs contrary to the very heart and substance of the constitution. The practice of setting aside or upholding legislative acts and declaring legislative statutes as unconstitutional or constitutional is what is called judicial review.

## 1.3 Useful and Important Distinctions

There is a world of difference between the practice of interpretation and that of review. Constitutional interpretation and statutory interpretation have their differences also. What does judicial interpretation mean? What is the meaning of judicial review? What are the differences, and what is the philosophical import of such differences?

In legal parlance, to interpret simply means to construe, to seek out the meaning of language or to translate orally from one tongue to another. In this sense, therefore, "Interpretation", whether of statutes or the constitution means the art or process of discovering and expounding the meaning of statutes, wills, contracts or other written document. To review, on the other hand, implies a re-examination of an act judicially or a re-consideration of same for the purpose of correction[6].

In more concrete terms, judicial review refers to the power of the court to declare actions of the executive branch, the legislature or other agencies of government at any level to be invalid or unconstitutional. It could also mean any courts power to review executive actions, legislative acts,



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5 *This may not be the case in all legal systems. For instance, in the United Kingdom, it is believed that the court hardly pass on the constitutionality or validity of parliamentary laws. The traditional attitude of English Judges is to regard Parliamentary laws as unchallengeable.*

6 *H. C. Black in Black's Law Dictionary, 4th Edition, (Massachusetts: West Publishing Co., 1951), pp. 953, 954, 1483.*

or decisions of lower courts ( or quasi-judicial entities, such as arbitration panels) to either confirm or overturn them[7].

In other words, judicial interpretation implies the attempt by judges to establish or determine the meaning or purpose of either an act or statutes from the legislative arm of government. In this sense, therefore, there is a difference between interpreting an act or statutes and reviewing an act or statutes. When it comes to the issue of interpretation, it is the meaning or the intention of the statutes that is in focus and the object of concern whereas in the case of reviewing, what judges do is simply to examine and consider the validity or the constitutionality of statutes and such other actions emanating from the political branches of government. That is why in the notion of interpretation, there is also a difference between constitutional interpretation and statutory interpretation. The object of focus in both may be to establish the meaning of such acts. However, one is the search for the meaning of the constitution especially in that which it has provided, while the other is the search for the meaning of the statutes emanating from the legislature, a statute that is purported to have derived its validity from the constitutional provisions that should necessarily back it up. In view of these differences, the notion of interpretation is looked at from more than one perspective in any meaningful jurisprudential discourse[8].

In the light of the above analyses, the philosophically interesting points are these: every review starts with interpretation, of either a statute or some chapter of the constitution. In other words, statutory interpretation and constitutional interpretation may end up in review. Moreso, that every review is a step above 'mere' interpretation. This means that every review does not and cannot,



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7 *Shafritz, Jay M. In The Dorsey Dictionary of American Government and Politics. (Chicago: Dorsey Press, 1988), p. 304.*

8 *In actual fact, 6 senses of interpretation are examined in legal theory. One, there is the close interpretation; two, extensive interpretation; three extravagant interpretation; four, free or unrestricted interpretation; five, limited or restricted interpretation; six, predestined interpretation. For fuller details, see H. C. Black op. cit. p. 954. See also Dias Jurisprudence, (1985)*

by virtue of its nature, end in interpretation[9]. When judges are said to review,they start with the act of interpretation of the said act or statutes that is "suspected' to be contrary to the manifest tenor of the constitution, and they do not end there but proceed a step further in either confirming the validity of such statutes or they overturn them as contrary to the provisions of the constitution. It is glaring from these that every act of interpretation does not necessarily imply a review of statutes. In England, for example, judges may interpret acts or statutes in a bid to determine their meaning or the intention[10] of the law makers, but they hardly pass on the constitutionality of such acts or statutes. But in America, judges of the Supreme Court and of lower courts do interpret and in the course of such interpretation may declare a congressional act as contrary to the constitution if,indeed, it is contrary to the provisions of the constitution.

In what can be regarded as philosophically illuminating, the act of interpretation, whether constitutional or statutory, although the bedrock of judicial activity, can and do proceed or emanate from other branches of government,and not invariably from the courts or the judicial arm alone. The



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9 *It may be difficult to see how this follows from a casual reading. Suppose it is argued that the objective of an interpretation is to determine the scope and limit of a law, while the objective of a review is to determine the validity of a law. Now, having established that a law is valid, may we not proceed to determine its scope and limit, in the hierarchy of norms? But the issue is that to determine the scope and limit of a law in the hierarchy of norms will not be the subject of interpretation. Interpretations bother on the meaning or purpose of a law or statute. If we are to establish and determine the scope and limit of a law in the light of other laws that will be the proper province of review, once it is agreed that review does not end only in establishing the validity of law. Scope and limit are weighty aspect of the basis of laws and they are not treated under the act of interpretation. There is not much to interpret in the light of the scope and limit of a statute. The concept of statutory interpretation in general and the various theories coined under it have nothing to do with determining scope and limits; these are the proper object of review, for it is conceivable that why the issue of scope and limit may need to be determined may bother on whether what is purported to have been done in the name of law in question, and of course, in the light of hierarchy of norms or laws can be admitted as lawful, within the limit or scope of that law, hence, the need for review*

10 *The idea of intentionality in parliamentary act is controversial. For example, one could ask whose intention? How does intention fair in the light of a mistaken view of the law by parliamentarians? Does intention make any meaning in the light of the act itself i.e. in the words of the party dictates that influences parliamentarians themselves? See Dias Jurisprudence, chp. 8.*

exercise of the power of review proceeds and consists only in the actions of judges. It is their sole prerogative. For instance, in the act of law making, members of the legislature examine and consult the constitution to know and determine 'what and what' are the opinions of the constitutions that back up the process of law making. Moreover, the executive arm, when embarking on the signing of treaties or the execution of laws also consult the constitution in a bid to determine the extent of constitutional provisions in executing their respective functions.

Both involve the interpretation, one way or the other, explicitly or implicitly of the provisions of the constitution in the light of its meaning and its effect on their respective functions. The picture presented in the case of judicial review is remarkably different. It may be asserted that judicial review is a politico-legal instrument for a legal check on the political branches of government. The force of expression warranted by the analysis above is the view that incase of doubt in respect of the constitutionality of a legislative statute and executive actions judges or court of law resolve those doubts either on the validity or the invalidity of the statute in question, by making essential pronouncement 'with the effect of rendering the act invalid or vindicating its validity and so putting it beyond challenge in future"[11]. However, the distinctions between judicial interpretation and judicial review, in my opinion is a matter of degree rather than kind. This is true because the same process of interpretation is involved in both; the only and remarkable difference is that one goes a step ahead of the other. In this respect, an important criticism of the exercise of judicial review is that the practice is a form of legislation. But this cannot be true in as much as judicial review differs from judicial interpretation only in degree but not in kind. Given this, it can not be held to be a form of legislation.

In actual fact, when judges pass on the constitutionality of acts of legislature, it does not necessarily mean that such acts are substituted with judicial acts or statutes. On the other hand therefore, judicial review will differ from interpretation not only in degree but also in kind because

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11 *B. O. Nwabueze, The Presidential Constitution of Nigeria (London: C. Hurst and Co. 1982) p. 309.*

then it will not be a matter of interpretation or construction of the meaning and hence, validity; such an effort will be nothing short of proper legislation. To this extent, on the other hand, judicial review will be nothing short of judicial usurpation and interference. Clearly, therefore, Judges 'do not suggest possible substitutes for statutes declared unconstitutional. Their power is closely related to the legislative power, but they do not legislate'[12].

The subject matter of legislation raised above introduces us to another realm of useful distinction for proper study. In the normal coinage and definition of judicial review both executive and legislative action and statutes respectively are often the object of concern. For instance, as quoted earlier, The Dorsey Dictionary of American Government and Politics expresses the nature of judicial review thus 'the power of the ... Supreme Court to declare actions of the president, the congress, or other agencies of government by any level to be invalid or unconstitutional. Furthermore, it states that it is "any courts power[13] to review executive actions, legislative acts or decisions of lower courts or (quasi-judicial entities, such as arbitration panels) to either confirm or overturn them"[14]. While this conception of the doctrine of judicial review is the generally accepted definition, the point of emphasis in this work will be on legislative enactments.

Two points of equal cogency can be cited in support of this: One, the 'necessary evil' that judicial review tends to correct in government often and most of the time emanates from the legislative arm of government. Two, the importance of judicial review in the light of the concept of obligation to obey the law is directly related to legislative acts or laws. The question is whether the barefact that something is enjoined or forbidden by a law is in and of itself a sufficient reason to obey the law.



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12 *Benjamin F. Wright, 'The Growth of American Constitutional Law' (New York: Henry Holt and Company, 1942) p.27. For a contrary view, see Jaffe, L. L. English and American Judges as Law Makers (Oxford: Clarendon Press, 1967) pp. 1 - 30. Jaffe regards judges as Law Makers, drawing from English and American experience.*

13 *See note 7*

14 *ibid*

In the first sense, our attention on judicial review will be on congressional or legislative act or statutes simply because, as Thomas Jefferson once observed, 'All the powers of the government, legislature, executive and judiciary result to the legislative body. The concentration of these powers in the same hand is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands. 173 despots could surely be as oppressive as one..... An elective despotism was not the government we fought for'.[15] In other words, whosoever attentively considers the three arms of government will no doubt admit that the legislative arm appears dominantly powerful because as Alexander Hamilton would put it,' the legislature not only command the purse, but prescribes rules by which the duties and rights of every citizen are to be regulated.'[16] Moreover, it is from this regulation of the citizens rights and duties by the legislature that makes the doctrine of judicial review quite significant in explaining the concept of obligations. Hence for these reasons, my definition and usage of judicial review shall be confined to legislative statutes. In fact, most literatures emphasise the impact of judicial review more on legislative statutes, and this distinction or picture of judicial review, I shall maintain throughout in this work.



## 1.4 The Historical Basis of Judicial Review

From an historical and practical perspective, the doctrine of judicial review seems to be a uniquely American practice. The doctrine was first invented and applied as a rich source of legal check on the political branches of government on the American soil. Bernard Schwartz, a renowned legal scholar, contended that the truly American contribution to human progress has been the development of the notion of law as a check upon power. One rich source of that check is the doctrine of judicial review.

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15 *Thomas Jefferson, writings 222 - 224. Quoted from Raoul Berger's 'Congress V. Supreme Court, (Massachussets: Harvard University Press, 1960). P. 10*

16 *Alexander Hamilton," Federalist Papers No. 78" in Hamilton, Madison and Jay, Selections from the Federalist Papers, Ralph H. Gabriel (ed.) (New York: Pyramid Publications Inc., 1966) p. 164.*

My purpose in exploring the historical basis of the doctrine of judicial review is to argue that, if we are to accept the doctrine of judicial review in the light of its modern realities, the historical basis of the doctrine would have to be located in the leading opinion of Chief Justice John Marshall in *Marbury V. Madison* (1803). I realise that there are series of intellectual attacks on this view, it is still, nevertheless, my strong conviction, that by dint of persuasive argument, the historical basis or grounds for the doctrine would have to be sought for in that case. So, the question is the historical basis of judicial review as the twentieth century is to know it, located in *Marbury V. Madison* (1803) or not?

An important objection to the thesis above is that really, Marbury V. Madison was not the basis, historically for judicial review, that there were before that case, precedents to judicial review. A notable example is Lord Coke's pronouncement in Dr. Bonham's case of 1610. The import of the pronouncement was that the common law will adjudge laws of parliament utterly void when contrary to common reason, repugnant or impossible to be performed. According to Lord Coke,

> And it appears in our books, that in many cases, the common law will control Acts of parliament and sometimes adjudge them to be utterly void, for when an Act of parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void[17].

What do we make of this observation? In the first place, Lord Coke's thesis was not accepted in England. Moreover, his thesis was not anchored on the notion of a higher law i.e.constitution. It was only recognized for practical reason, not as an established political principle nor as a result of conformity, nor non-conformity to a written document. In the end, the English revolution of 1688 established the Supremacy of parliament[18].



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17 *Quoted from T. F. T. Plucknett, 'Bonham's case and Judicial Review' vol. 40. Harvard Law Review (1926). P.30.*

18 *See Robert Carr, The Supreme Court and Judicial Review (Connecticut: Greenwood Press Publishers, 1942) pp. 42 - 43.*

There is also the strong view that the laws enacted by the colonial legislative assemblies were subjected to review and examination for conformity to English law by the privy council. But it is glaring that the grounds for rejection by the Privy council arose from some claim to inexpediency, and not conformity or non-conformity with higher law[19]. The English law that served as standard for such rejection could not establish what really those standards are. The ruling statement of such standard were not clearly defined nor spelt out. Coupled with this is the troublesome fact that English law was not codified in a written form that could serve as a point of reference for future purpose. And what was regarded as inexpediency was subject to problem of interpretation and meaning in special cases. Moreover, according to Benjamin F. Wright, there were doubts on the authenticity of such reviews. For one thing, the committee's review was not a judicial procedure. The decision of those courts were not accepted as final[20].

In actual fact, review done by the Privy council was not judicial review. Why? This is because the review was done almost in the sense of an executive veto, and moreover, it was done by a superior authority, not a coordinate or equal authority[21].

What then about cases of colonial courts, state courts, precedents and constitution's review of state legislative Acts and colonial statute? Why is this not judicial review?

During the colonial period, there was no instance in which a colonial court authoritatively set aside a colonial statute. Some that were argued to be a proper case of review had no records or published reports backing them either for discovery or for citation[22]. Furthermore there was no clear



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19 *Charles G. Haines, The American Doctrine of Judicial Supremacy 2nd Edition (Berkeley: University of California Press, 1932) pp. 44 - 59.*

20 *op. cit. p. 13*

21 *Ibid*

22 *Wright, op. cit. p. 14. See also, Haines, op. cit. p. 57.*

provision of judicial review by state precedent and constitution. Such precedents were very few,[23] and where such precedent pointed to a review of state legislation, the importance of such review or pronouncement of invalidity lies not in their legal effect nor lack of it, but rather in the fact that they gave evidence of a wide spread trend toward judicial safeguarding of the fundamental law. In actual fact, those precedents were not effective[24].

There was also the opinion that judicial review had its precedents in the provisions of institutional devices in three states constitutions in the U.S. before *Marbury v Madison* (1803). For example, that of New York 1777, Pennsylvania in 1776 and Vermont in 1777. Can it not be established that these institutional devices are in themselves judicial review? These institutional devices are not, in the face of argument, judicial review. The reasons are - one, the council's power was only a veto, not judicial review, and this was a veto shared by the executives and judges. Moreover, such a veto could be over-ridden by two-thirds majority of the legislature. A proposal to establish such an institutional device in the federal government was rejected by the majority. A closer look at the Pennsylvania and Vermont constitution of 1776 and 1777 respectively shows the insufficiency of the devices as judicial review. The review council in both states did not succeed because it was an elective body. As a result, it became partisan, just like the legislative body it was to check[25].

It has been suggested that to argue that the historical basis of judicial review, especially in the light of modern debate and reality, is that of *Marbury V. Madison(1803)*, is to miss the point, for, there were provisions for judicial review in the Federal Convention of 1787. In what sense, therefore, can it be argued that the convention never served as basis for judicial review? It is a fact of some



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23 *Wright mentions that such cases exemplifying state precedents on review of legislation were seven and that they held between 1778 and 1787. Berger, Raoul op. cit. Claims that such precedents were very few and transpired between 1776 and 1787. Congruity is not lost in both, accounts, for the idea that precedents were few is still, nevertheless, approximated.*

24 *Wright, p.4.*

25 *Wright, pp. 14-15.*

interest that the federal convention of 1787 never denied the power of review to the judicial arm of government. But discussion in the Federal Convention on the availability of judicial review was not debated in a significantly critical manner. The framers only assumed that there should be such powers. However assumption is not and cannot be a basis for the exercise of judicial review. Such assumption was not based on a systematic and critical analysis of Article 111[26] of the US constitution for if it had been a critical analysis, then it ceases to be an assumption. The assumption of the framers were rather equivocal in character. The proposed plan of a council of revision with authority to examine legislative acts was not judicial review. This is because the authority was an executive veto and the decision was to be taken before the provision went into effect. Moreover, the decision of the council could be rejected without recourse to legal procedure. The basis of the decision to examine legislative act was based upon policy, not constitutionalism. And such state policy could be set aside by the votes of the legislature[27].

Where does all these shades of argument lead us? They lead us to the view that all other periods before *Marbury V. Madison* in (1803) were only preparatory to, but not the actual affirmation of judicial review. In simple terms, therefore, it is my view that the historical basis of judicial review as it is accepted and practised today in the United States of America and some countries that take after the American system of government, *Marbury V. Madison* is also the clearest assertion of the basic statement of that doctrine and its success till date.

The doctrine of judicial review as asserted by Marshall in *Marbury V. Madison* not only provided a useful clue to the operation of constitutional government, but also elevated the power and authority of the Supreme court to strike down the Acts of congress on grounds of constitutionality, and he did so in terms so firm and clear that the power has never since been legally doubted[28].



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26 *Berger, R. op. cit. P. 49*

27 *Wright, P.15-18*

28 *Omoniyi Adewoye," John Marshal and the American Tradition of Judicial Independence. What lesson for Developing African countries?" A paper presented at*

Marshall's opinion, in *Marbury V. Madison*, is devoid of any historical evidence to support his conclusion. It is based solely upon logical reasoning concerning the nature and content of a constitution[29]. The period before this case only indicated that the idea was accepted and that consciousness was already raised in respect of judicial review. No doubt the foundation of judicial review had been laid in preceding centuries but what to build on it had not been determined. Marshall, in this case, determined what to build and effectively did that. The case was original and interesting because of its comprehensive scope and the doctrinal result it achieved for the development of judicial review.

Our interest is not primarily in the legal import of the case; the philosophically more interesting concern is whether the classic expression of the basic statement of judicial review set forth here provides a significant illumination for the elucidation of the jurisprudential problem of the obligation to obey the law. The philosophical essence of Marshall's declaration, to me, is that it provides us with an intellectual attempt and a useful analysis of the concept of the obligation to obey the law. The aim and objective of this work is to explicate the relationship between judicial review and the jurisprudential problem of the obligation to obey the law. This shall be treated in chapter five. To ensure a better treatment of this, the theoretical basis of judicial review shall be the consideration in the next chapter.



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*the Annual conference of the American Studies Association of Nigeria, 1995, p. 1.*

29 *Robert Carr, op. Cit.p. 63. The expression 'devoid of any historical evidence' could possibly mean that there was no single case in a court of law where the power of review was actually affirmed and established as an instrument of governance, before 1803 and which Chief Justice Marshall could base his arguments on or use to support his claims.*

# CHAPTER TWO

# THE THEORETICAL BASIS OF JUDICIAL REVIEW

## 2.1 GENERAL INTRODUCTION

Having considered the historical basis of judicial review as located in Marshall's *Marbury V. Madison* (1803), it is my purpose, in this chapter, to establish a theoretical basis for the doctrine. In establishing this, I shall contend that there is a classical theoretical basis and a Jurisprudential theoretical basis for the doctrine of judicial review. The former refers to the contribution of Alexander Hamilton in Federalists Papers on the nature of the judicial arm of government, while the latter refers to the idea of law in legal theory that establishes a proper theoretical platform on which the doctrine of judicial review can be best discussed and evaluated in the light of the concept of obligation to obey the law.

Hamilton's work is regarded as a very important contribution to the development of the doctrine of judicial review. While some regard him as the author of judicial review as the nineteenth century was to know it[1], some others see him as the first to establish the theoretical basis of the doctrine[2]. The question is in what sense are Hamilton's writings considered as forming a theoretical basis for judicial review? And, in what sense have they been classified as classical? Some are of the opinion that Marshall's exhibition of eloquent indignation in *Marbury V. Madison* (1803) was actually inspired by the theoretical formulation and ready-made model of exposition in Federalist Papers. And that, Marshall only gave a vocal and practical expression of the doctrine when opportunity presented itself; the theoretical formulation, they claim had already been supplied by Alexander Hamilton before



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1 *Benjamin F. Wright, op. cit. P.23*

2 *Shafritz, J. M. op. cit. p.304*

this time[3]. Others point out that Hamilton was part of the outspoken proponent of Judicial review in the Federal convention of 1787 and as such to express has views and persuasion on the doctrine of judicial review above the level of assumption, Hamilton gave a thorough theoretical formulation on what would and should be expected of the nature and essence of the doctrine of judicial review[4]. In all however, it is recognized that the classical theoretical basis for judicial review consists in the writings of Hamilton on the nature of the judicial arm of government and his extensive interpretation of the American constitution, in the Federalist papers. This theoretical basis is classified as classical because of its clear, logical reasoning and analysis on the doctrine of separation of power and the doctrine of the rule of law as basic requirements of the provisions of the constitution in direct relation to the respective organs of government. Now, whether those interpretation are strong enough to constitute a theoretical basis is another inquiry altogether. It is in anticipation of this that I consider constructing a jurisprudential theoretical basis in the light of theories in legal science appropriate. This is jurisprudential because it is an inferential attempt at establishing a theoretical basis for the doctrine of judicial review in the light of the existing, dominant theories in legal or jurisprudential science. It is to be ferreted out of some theory of law. Not only this, it will also furnish a basis for our explication of the connection between judicial review and the jurisprudential problem of the obligation to obey the law.

In terms approximating philosophical exactitude, a theory is essentially a systematic mesh of interconnected concepts which purports to characterise, describe, and explain reality[5]. Furthermore, a theory is a means towards understanding, and the test of scientific theories (and sometimes philosophical theories) is predictability[6]. In constructing a theoretical basis for judicial review,



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3 *Edmond Cahn, Supreme Court and Supreme Law, (connecticut: Greenwood Press Publishers, 1954). P.16*

4 *Robert Carr, op. cit. p.51*

5 *Andrew Vincent, Theories of the State (Oxford: Basil Black-well, 1987). p. 40*

6 *Dias, op. cit. p. 448*

therefore, my aim is to picture, describe and establish a probable prediction on the concept of obligation to obey the law that can be significantly justified through the doctrine.

## 2:2 THE CLASSICAL THEORETICAL BASIS OF JUDICIAL REVIEW

Alexander Hamilton, in 'Federalist papers' established what I call the classical theoretical basis of judicial review. In his words,

> the complete independence of the courts of justice is peculiarly essential in a limited constitution. By limited constitution (I understand one which contains certain specified exceptions to the legislative authority such, for instance as that it shall pass no bill of attainder, no ex post facto laws, and the like). Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void[7].

Furthermore, Hamilton enthused,

> the interpretation of the law is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular at proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred to the statute, the intention of the people to the intention of their agents[8].

The distinction we started out with i.e. between judicial interpretation and judicial review is, I think, underscored in this quotation. That there is a difference between the two is, no doubt, clear. The point is also clearly established that judicial review is a step ahead of judicial interpretation. In other words, that the claims of and exercise of review is stronger than interpretation. And what is more, it also set forth the thesis that every review starts with interpretation, but that not all interpretation ends in or presupposes review.



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7 *Alexander Hamilton, "Federalist Papers 78" by Ralph Gabriel) op. cit p. 165.*

8 *Ibid. P. 166*

Moreover, Hamilton said, 'it therefore belongs to them (Judges) to ascertain its meaning (constitution) as well as the meaning of any particular act proceeding from the legislative body'. This also underscores the difference between constitutional interpretation and statutory interpretation, and the role of judges in such interpretation. Other arms of government may also interpret statutes and where such interpretation involves the constitution (and they will always be) the judges are reposed with the power of ultimate interpretation[9].

The idea of superior obligation in Hamilton's thesis and formulation could possibly mean the superiority of the constitution over legislative laws and statutes.

Hamilton wrote that the constitution derives its superior obligation from the 'intentions' of the people what I call the people's conscious choice and enduring will. Hence, it is established that the views of the agents of the people i.e. judicial, legislative and executive agents are less preferred to the people's intention. In essence, therefore, the theoretical basis of judicial review in the classical sense can be seen through the proper and peculiar province of the courts in the interpretation of the law. And this province is defined by what Hamilton called a 'limited constitution'. But, if this is taken as established i.e. the Hamiltonian formulation of a theoretical basis of judicial review, it is my view that a theoretical basis can be constructed anew for the doctrine of judicial review drawing from the salient features of the dominant theories in legal philosophy. This is necessitated by the fact that Hamilton's formulation does not capture such a theoretical basis founded on legal theories, and which can be used to explore the connection between judicial review and the jurisprudential problem of the obligation to obey the law.



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9 *If review starts with interpretation, and judges have power of ultimate interpretation, it follows that the power of ultimate interpretation is dovetailed into power of review, hence the opposition to review, in most cases, may well be on the idea of finality. See also Wellington, H. H." The Nature of Judicial Review" in Yale Law journal, vol. 91, (1988).*

## 2:3 A JURISPRUDENTIAL THEORETICAL BASIS OF JUDICIAL REVIEW

The aim of constructing a jurisprudential theoretical basis for judicial review in relation to legal theory is simply to present a picture of the idea of obligation to obey the law that could be found to emerge through the doctrine of judicial review.

This is because it is an established fact in legal philosophy that legal theories furnish the reader with competing theories of obligation. Since there are competing theories as such an jurisprudential theoretical basis for judicial review, seen within the perspective of these theories will, no doubt, help us unrattle some of the aching problem on the idea of the obligation to obey the law[10].

If we take the problem of the obligation to obey the law seriously, one candid, out of many truth that can be deduced from the entire problem would then have to do with the nature of the law. Suppose this observation is true, in what regard can it be said that judicial review sufficiently enhances our understanding of the problem of the obligation to obey the law? I am of the view that judicial review should be found to enhance our understanding of that problem if we can establish that it furnishes us with an idea of what the nature of the law is.

The essence of judicial review and the object it works with i.e. legislative statutes are both concerned with what we can refer to as a law. The constitution which, in most cases, act as a bridge or standard between a valid enactment and one which is not valid, is regarded as a fundamental law. As Benjamin Wright puts it, 'it is evident that judicial review as we know it would be an impossibility without a long antecedent history of legalism, of a high regard for law and for the interpreters of law'[11]. Given this possibility i.e. judicial review being connected with a high regard for law, then



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10 *See chapter 5 for the connection between judicial review and the obligation to obey the law.*

11 *op. cit. p.9*

there is every necessary and sufficient reasons for establishing such a regard by establishing its theoretical basis in the light of existing legal theories.

In the history of jurisprudential debate, the consideration of what the law is, is central. In this respect, two points of equal cogency in considering the nature of the law are: one, are laws man-made or not; Two, should laws take into consideration the idea of moral content, purpose, conformity to a given standard or not? These areas of inquiry are notable points of disagreement between one school of thought and another[12]. Given that these issues are indeed notable points of disagreement between adherents of one school of thought and adherent of another in jurisprudential discourse, the next line of enquiry is to determine whether the problem, of obligation to obey the law are conceivable along these lines of thought. Simply stated, one important dimension of the problem of the obligation to obey the law is that is it a sufficient reason that a law enjoins something or forbids it,that such a law should be obeyed? Another way of saying it is that is our obligation to obey the law grounded in the moral content of such laws? Or are they prudential reasons alone[13]?

On these questions, there are competing theories. They include the National Law Theory, Legal Positivism and the Legal Realist Theory. There are other distinctive theories of law; however, I shall concern myself with the ones stated above[14].



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12 *This does not suggest that these are the only points of disagreement nor does it presuppose the view that these are the only or the most important areas of debate. There are others that are equally important. It is my view that these two issues are sufficient to help establish the thesis of this work.*

13 *These questions may not on their own constitute the problem of obligation to obey the law but they do constitute some of the important dimensions of the problem of obligation to obey the law. Hence, they can be argued for or against on their own merit. However, they constitute the focus of research and debates amongst leading jurisprudential writers on the issue of law and obedience. See Yale Law Journal, vol. 67.( 1981.)*

14 *There are, for instance the pure theory of law,, The Sociological Theory of Law, The Marxist Theory of Law, The Historical Theory of law etc. The reasons for the choice of these three are obvious: one, the long antecedent of historical debates and controversies between them and the modern realities they tend to approximate or deny; two, most of these other theories do not consider these questions in the controversial sense in which these three theories consider and tend to attack them; the concept of obligation to obey law we are concerned with and the problems raised*

The Natural law states that the law for the governance of man and the whole human race consists of fundamental principles superior to any man made rules; that man made rules i.e. positive laws are supposed to conform to; that man made laws derive their validity from these fundamental principles of governance discernible in nature, that man made laws that fails to conform to these principles lose their validity, hence do not create obligation.

In the light of the growth of the tradition and the multiplicity of views expressed within the tradition, the following attributes are deducible from most Natural law writings. These are:

1. Ideals which guide legal development and administration
2. A basic moral quality in law which prevents a total separation of the 'is' from the 'ought'
3. The method of discovering perfect law
4. The content of perfect law deducible by reason
5. The conditions sine quibus non for the existence of law[15].

From the above, three primary features constitute the core of natural law tradition. One, a duality of legal existence: positive law and natural law. Two, positing a hierarchical relationship between the positive law that is and the natural law that ought to be. Three, abridgement of the gulf between what is and what ought to be[16].

Much of what approximate the natural law theory can be seen in the writings of early Greek philosophers. For example, Sophocles Antigone said that "I do not think your edicts (command of the sovereign) strong enough to overrule the unwritten unalterable law of God and Heaven"[17]. In



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*within it are often discussed in the light of these questions. Other theories consider other substantial dimension of the law e.g. historical, societal, class, purposive dimension of law.*

15 *See Dias, op. cit. p. 470*

16 *See Olufemi Taiwo, Legal Naturalism - A Marxist Theory of Law (New York: Cornell University Press,1996) pp. 37 - 38.*

17 *Emphasis mine*

the same vein, Aristotle, in his book "Politics" also wrote that the law is reason unaffected by desire. Surely the ruler cannot dispense with the general principle which exists in law for the rule of law is preferable to that of any individual.

The Aristotelian thesis was fused with the christian doctrine of Natural Law by Saint Thomas Aquinas. Aquinas conceived of law in four perspectives: Natural law, Divine law, Eternal law and Human, positive law. Divine and Natural law are sourced in God's Eternal law which is God's plan or law that applies to the entire universe. In the words of Aquinas, "the very notion of the government of things in God, the ruler of the universe, has the nature of law. And since the divine reason's conception of things is not subject to time, but is eternal.... therefore, it is that this kind of law must be called eternal"[18]. Natural law, according to the Thomist Model is "nothing else than the rational creature's participation of the eternal law"[19]. Every rational creature has a share in that eternal reason or law, and that 'share' is its natural inclination to its proper act and end". This "share" or "participation" in that eternal reason is what Aquinas called the Natural law. Human, positive law, according to Aquinas are derived from Natural law discovered by reason, from the schemes of divine law. According to Aquinas, "every human law has just so much of the nature of law as it derived from the law of nature. But if in any point it departs from the law of nature, it is no longer a law but a perversion of law"[20]. If natural law is man's participation in the external law, and, again, human law are derived from natural law, it follows, according to the Thomist Model that human law is derived from eternal law. This relation of derivation is brought out in Aquinas formulation that "human law has the nature of law in so far as it partakes of right reason..... and



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18 *Saint Aquinas, quoted from The Nature of Law by M.P. Golding (New york: Random House, Inc., 1966). P. 13.*

19 *Ibid. P. 13*

20 *P. 22*

in this respect it is derived from the eternal law. But in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law, but of violence"[21].

Natural law theory does not in my view, deny that laws are man-made or could be man-made. Its central thesis, especially in response to the object of my enquiry is that man made laws i.e. positive laws must conform to principles of natural law from which they are derived. To this end, it is maintained by Natural law theorists that whatever law stands for, the idea of moral goodness, content, purpose, merit and demerit and conformity with a given moral standard must be considered in establishing and maintaining the validity of law. Therefore, what the natural law tradition asserts is that the natural law that ought to be, provides the criteria by which we identify, explain, and evaluate the human, positive law that is in any society.[22]

Legal positivism, on its own, defines and describes the nature of law as command of a superior to inferior i.e. from the sovereign ruler to his subject, who are in the habit of obedience to that sovereign ruler. This definition, however, is misleading if it is taken to represent, in totality, the legal positivist thesis. This is because, a leading Positivist, H.L.A. Hart, by dint of careful analysis, x-rayed the insufficiency of this definition. Nevertheless, the above definition is taken to mean the imperative theory of law of Jeremy Bentham and John Austin.

The legal positivist's view is sharply different from the Natural law thesis. To the positivist, a meaningful notion of the idea of the law is positive, human law i.e. law or command from humans to fellow human. Such commands are not inherent in any order or principles given by nature nor morality. Jeremy Bentham's view is that a law may be defined as an assemblage of signs, declarative of a volition, conceived or adopted by the sovereign in a state concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are supposed to be subject to his power"[23].



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21 *P. 16*

22 *Olufemi Taiwo, op. cit. p. 39*

23 *Jeremy Bentham in Of Laws in General" H.L.A. Hart ed. (1970) p. 1.*

John Austin also conceived of law as the command of the sovereign. In a simple expression, Austin's idea of the law signifies the command of the uncommanded Commander of the state. Every positive law, according to Austin, or every law simply and strictly so called, is set by a sovereign person, or sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme[24]. Law is a general command of the Sovereign backed by sanction. The theoretical absurdity and practical impossibility of Austin's model especially in relation to the Absolutist theory of the state in which his notion of law developed, gave way to a modern treatment of the positivist notion of law by H.L.A. Hart.

H.L.A. Hart conceived of the idea of a rule as significant in any consideration of the nature of law. According to Hart, "where there is a law, there human conduct is made in some sense non-optional or obligatory"[25]. Such rules of obligation are supported by great social pressure which helps to ensure that sanity is maintained in society[26]. The rules of obligation acquire the character of law by their recognition as "primary rules". Primary rules only indicate that such societies are pre-legal, suffering from three defects: defects of uncertainty, the defect of the static character of the rules, and the defect of inefficiency of the diffuse social pressure by which the rules are maintained. These defects are corrected by the introduction of rules of recognition, rules of change, and rules of adjudication. These body of rules form the core of "secondary rules" which translates the pre-legal system to a legal system. According to Hart, "the introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world; since each remedy brings with it many elements that permeate law: certainly all three remedies altogether are enough to convert the regime of primary rules into what is indisputably a legal system"[27]. According to Hart, therefore,



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24 *John Austin," Law as the Sovereign's command" in The Nature of Law by M. P. Golding (ed.) (New York: Random House, Inc., 1966) p. 95.*

25 *Hart, The Concept of Law (Oxford: Clarendon Press, 1961). P. 80*

26 *Ibid. P. 85*

27 P. 91

law can be most illuminatingly characterized as a union of primary rules of obligation with such secondary rules. In other words, primary rules acquire the character of a legal system through union with secondary rules.

With the above in view, the summary of legal positivist view on this nature of law, following the tenor of our inquiry, is that laws are social facts and man-made, not nature's commands. This, according to Legal Positivist, is the correct way in which law is to be conceived. Concerning the second thesis, the views of legal positivist, contrary to Natural law conception, is that the fact that something is a moral rule does not make it a legal rule, and that a legal rule that fails to approximate a moral standard is still a law once it has successfully passed through the normal given criteria of legal validity. This conclusion is better seen in the formulation of H.L.A. Hart. According to Hart:

> ... it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law, and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law[28].

The same standpoint was emphasised by Austin. According to Austin, the fact that a law does not conform to moral standards does not strip it of the quality of being a law. Natural law does and should not according to his positivist inclination, be the standard for deciding the obligatoriness of human, positive law. According to Austin:

> The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one inquiry, whether it or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation or disapprobation[29].

The import of the legal positivist stand on the question whether a moral standard is necessary in considering the nature of the law is what is called the separability thesis. Again, Hart has supplied for the modern era, the language of the separability thesis which is:

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28 *Hart H.L.A., "Positivism and the Separation of Law and Morals", Harvard Law Review, vol. 71 (1957-58), p. 599.*

29 *John Austin, op. cit. p. 95.*

> The simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so[30].

The legal positivist stand appears to reflect in the Legal Realist theory, although there is a point of divergence. The realists believe that laws are a product of human creation, not ideal entities drawn up in heaven. It is a tendency in natural law thinking that what judges do is to decide cases by drawing from laws which are of divine origin, not created by mortals. This view, Legal Realists consider as Transcendental nonsense.

Classic expressions of Legal Realist standpoint on the nature of law are that of Oliver Wendell Holmes Jnr., and that of John Chipman Gray respectively. There are of course, the Scandinavian Realists and American Realist. The uniqueness of the doctrine of judicial review especially in its historical basis in *Marbury V. Madison* (1803) makes the view of American realist, in the light of our search, of compelling importance. Holmes is of the view that the law is what judges say it is. According to him "the prophecies of what the courts will do in fact and nothing more pretensious, are what I mean by the law[31]. According to Gray "whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intent and purposes, and not the person who first wrote or spoke them..... Statutes do not interpret themselves; their meaning is declared by the courts, and it is with the meaning declared by the courts; and with no other meaning, that they are imposed on the community as law"[32].

Concerning the second question i.e. whether law is to be considered in the light of moral goodness, purpose, merit or demerit etc, the realists affirm that all words with moral connotation should be banned from the vocabulary of the law[33]. It is along this line of thought that realist



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30 *H.L.A. Hart, The Concept of Law. P. 181*

31 *Holmes, O. W. (Jnr). "The Law as predictions of what courts will do" in M. P. Golding, op. cit. p. 179.*

32 *J. C. Gray, "The Judge as Law-Giver" in M. P. Golding (ed.). op. cit. pp. 196 - 197*

33 *O. W. Holmes, collected Legal Papers (New York; 1920) p.179*

theory of law is regarded as a thorough-going attempt to dispense with the "oughts" of law. To realists, only the reality of law matters in fact, and 'reality' is what actually happens and no more. To this end ideas of 'ought' and such like were not allowed to distort the perception of clear, simple fact.

In the light of the theses and arguments of these legal theories, the question is What theory is more compatible with judicial review, such that it can be said to form a theoretical basis for the doctrine? I shall argue that judicial review is more compatible with legal naturalism.

In what sense, therefore, is the legal positivist theory not compatible with the doctrine of judicial review? Legal positivism posits that laws are essentially man-made or social facts. Furthermore, that law i.e. positive laws are not limited by legal restraints or check nor by morality. For example, the former can be seen in Hart's analysis of Austin's view. According to Hart, Austin thought that "restraints on the supreme legislative power could not have the force of law, but would remain merely political or moral checks'[34]. And given that such restraints remain 'mere political or moral checks' the question is whether they could limit the bindingness or obligatoriness of a positive law, say, enacted by the supreme legislative power. Austin's view is that "the existence of law is one thing; its merit or demerit is another.... whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation or disapprobation"[35]. Even though Austin did not state specifically the various senses in which we can talk of his reference to "an assumed standard" or 'text' but suppose a moral standard were to be included, it will then follow that a moral standard or check, for Austin, is not enough to affect the existence or validity of a law, say, of the supreme legislative power. In other words, to Austin an immoral law, is still a law even though we dislike it. According to Austin "the most pernicious laws, and therefore those which are



34 *See Harts' "Positivism and the Separation of Law and Morals". P. 599.*

35 *See note 29.*

most opposed to the will of God (or pernicious by the standards of morality), have been and are continually enforced as laws by judicial tribunals"[36]. It must be emphasised that Austin's analysis was greatly influenced by the absolutism of kings when the sovereign rule of kings was accepted as indivisible and illimitable. This, no doubt, had influence on him, although it is rather unclear whether it was his positivism that had influence on his account of the nature of law or it was this trend of absolutism that greatly influenced his positivist account of the nature of law.

The question may then turn out to be how truly representative of legal positivism the view point of Austin is. Of course, it can not be regarded as solely representative of legal positivism. But the fact remains that other legal positivism hold the view that standard of morality cannot constitute a criterion for the validity or enforceability of law. For example Hart posits that "it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and conversely it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.[37] With the latter expression there may not be much to contend with. The former expression in my opinion simply state that positive human laws are not limited by standards of morality. Take for instance, that the supreme legislative power enacts a law supposedly thought to be immoral or morally revolting. The question then is whether such an enactment can be regarded as a rule of law? One may retort that why should the legislative power make such a law? It is because of the moral background that goes into their authority to make laws. To have been limited by these moral facts that we cannot make a law that states that young girls of certain age should appear naked in the public so as to induce men to an affair simply because of the need for population increase for the sake of the country will show that morals constitute a limitation on what is drafted and accepted as a rule of law. Take for instance also a law that states that men of certain age are conscripted into the army for a particular purpose. What purpose? To drop napalm bombs in certain cities. Such a rule of law will,



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36 *John Austin "The Province of Jurisprudence Determined" quoted from* <u>*The Nature of Law*</u> *by M. P. Golding (ed.) p. 96.*

37 *Hart, H.L.A. op. cit. see note 28.*

on the basis of its moral implication or undertone be discarded and unacceptable. This emphasizes the fact that moral limitations constitute one important dimension to the validity of laws.

Furthermore, Hart's analysis and contention above talks of 'standards of morality'. But then it is not at all clear what he means by "standard of morality"; The general label"standards of morality" has the tendency of blurring the distinctions between moral values that are within or in the law and those that are outside the law. And often where the law deals with questions that are characteristically within the realms of morals, or where the legal doctrine so conspicuously overlaps with what we are used to call morals, it should be seen clearly as a limiting factor in what is accepted as a rule of law. To this extent, moral values or questions are crucially authoritative voices in what can be regarded or accepted as a rule of law. The rule of law and the meaning it is purported to have in popular coinage cannot be so in the light of the positivist insistence that a rule of law is not limited by moral values. If it has meaning at all, it is the view that a rule of law reigns supreme because of the rule of a moral order inherent in it. If this is not what is meant by the expression rule of law, then it is not mistaken to say that the concept of law promotes the rule of arbitrary laws or powers. And this is exactly what the positivist thesis conveys. If moral standard are not important in what is accepted as rule of law, then it follows that such rules of law includes forms of arbitrariness.

This can be clearly seen in John Finnis' criticism of Hart's and the positivist programme of insisting that, it could not follow that a rule violated standards of morality that it was a rule of law or the statement that "it can be claimed for the simple positivist doctrine that morally iniquitous rules may still be law[38] In this case Hart's contention is that such a rule is still the "law but too iniquitous to obey or apply.[39]

Finnis' critique of this positivist stand point is instructive to show why it can be said that judicial review is not compatible with legal positivism. Finnis contends that "the programme of separating off from jurisprudence all questions or assumptions about the moral significance of law is not consistently carried through by those who propose it. Their work are replete with more or less

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38 *Hart, H.L.A. The Concept of Law (Oxford: Clarendon Press, 1961) p. 207*

39 *Ibid. p. 205*

un-discussed (moral) assumptions.[40] To contend like Hart did that some rule which is clearly morally iniquitous and unjust yea, repugnant is still a law and binding is not only an obvious error in thinking but also inconsistent with his idea of general acceptance of a rule as important in any analysis of the concept of obligation. If general acceptance" of a rule is quite important, where then does Hart place this "general acceptance" when it come to the issue of morally iniquitous, unjust laws?

It is also the Positivist's theses, at least according to Bentham and Austin that the study of law or the study of the meaning of legal concept is not only worth pursuing but also to be distinguished "from the criticism or appraisal of law whether in terms of morals social aims, "function" or other wise.[41] This however will be an insufficient account of the nature and study of law. The positivist consider laws as social facts and I wonder how social aims will not be brought to bear in studying, and understanding those laws, if indeed they are social facts according to legal positivism. As Elegido has rightly observed "when a jurisprudential question is raised and answered it will commonly happen that the ideas used in the answer will be themselves in need of explanation. If one keeps rasing questions in this way and pushing the jurisprudential analysis to its limits, it will be found that the ultimate ideas to which reference has to be made do not belong any more to the domain of "law" but rather to those of ethics or political philosophy. This happens in the analysis of rights, duties, the authority of the law, the identity of a legal system, the duty of a judge in reference to the application of unjust laws, the principles of criminal punishment and in many other similar questions.[42]

But then the essence of the practice of judicial review shows that there are some senses in which the meaning and essence of law is limited by consideration and systems of morals and by the social aims and functions and the whole idea of purpose that goes into law-making. Moreover, judicial review, is a limit on the use of law because judicial review conceptually viewed and seen is the high possibility that the law making power of the legislative arm of government ie. what it can do and frame into existence as law is limited and can be controlled. In other words it is the power of the

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40 *John M. Finnis, Natural Law and Natural Rights (Oxford, 1980) pp. 358-9*

41 *Hart, H.L.A. op. cit. p. 601.*

42 *J.M. Elegido, Jurisprudence (Ibadan: Spectrum Books Limited, 1994) p. 67.*

courts to declare a law which Hart considers as morally iniquitous or unjust as not only iniquitous or repugnant but also ultra vires, and of no effect if indeed it is so. And conceptually, where there is this possibility at all, it is within the bounds of reason to conclude that judicial cannot be found compatible with the legal positivist view of the nature study understanding and application of law.

What of legal realist view? Naturally it is easy to assert that judicial review is based on legal realist view of law. I mean if realist consider law in the light of actions and decisions of judges there is the natural tendency to conclude that judicial review is based on legal realism. But it does not follow. Judicial review does not subscribe to the view that judges make law. The idea of making law and all that is connected with it does not admit the practice of judges reviewing a statute as that of legislation or of law-making. They may interpret the law and review it and that does not convey the idea that they do make the law because afterall the law had already been there for them to review. And if the law had been there the idea of judges making law through judicial review will not hold.

Moreover realists are of the view that any word having moral connotation should be banned from the vocabulary of the law. In other words that the idea of 'ought' of law should not come into the nature and end of law. But if we look at judicial review in examining a law or statute and seeking for possible ways in which it has contravened certain standard it is indirectly seeking for ways to uphold the ought of law by the standard of certain express provisions of a constitution. Legal realist point of view that words with moral connotation should be banned from the system of law does not hold because through judicial review the idea of standards being necessary in the application of law are being constantly invoked especially in cases that have to do with review of statutes, legislative laws that are found inconsistent with the standard.

In what sense then do we justify the view that judicial review is theoretically based on natural law theory? My view is that it approximates the idea of a limited government. It is the view that judicial review in its essence and constitutional history posits the view that government are and can be limited in their law making power. That, it is not every law that is promulgated or that exist that is binding, that there can always be a check on what is framed to be the law having an effect on the citizens.

It does not mean that when judges decide in cases of validity and invalidity of statutes and laws they look up to heaven. They are influenced by the idea of a limited government that goes into the making of constitutions especially written one's. That idea of a limited government imposed and defined by constitution of states is what makes judicial review in its essence based on the natural law thinking ie. that there must be a check or limit on the powers of rulers especially through the use of laws. This view point can be read clearly in Marshall's opinion in *Marbury V. Madison* that:

> To what purposes are powers limited... if these limits may, at any time be passed by those intended to be restrained?... The powers of the legislative are defined and limited; and that those limits may not be mistaking, or forgotten the constitution is written.

The question then may be, what justification can there be for the doctrine of judicial review in the constitutional sense and what connection can we then draw between the doctrine and the problem of obligation to obey the law.? These are the focus in the following chapters.

# CHAPTER THREE

# CONSTITUTIONAL JUSTIFICATION OF JUDICIAL REVIEW

## 3.1 General Introduction

It is vital to the correct understanding of the constitutional basis of judicial review to examine what the object of effort is in this chapter. Such a sense of understanding helps us to establish the significance of judicial review in the light of the concept of the obligation to obey the law. Moreover it helps us ascertain what the sense of justification for the doctrine of judicial review can be or should be with particular reference to the United States constitution. But then what could one mean by the "expression constitutional justification of judicial review?". In other words, what sense of justification can be located for the practice and in the practice of judicial review that derives from the provision of the constitution within the frame work of a democratic order? Better still ought there to be an express provision for the practice of judicial review in a constitution before it can be labelled as legitimate?

By the expression "constitutional justification of judicial review" the objective is to delve into the issues that form the heart of the controversies on the subject matter and through the dint of argument establish a view point that may be agreed with or disagreed with. In other words, it is the use of words to marshall arguments that could be seen as justifying a stand point, concept or a practice. Therefore the expression "constitutional justification" does not remove the essence of philosophical discourse which is the use of arguments.

The controversy over the doctrine of judicial review both historically and theoretically can be found to revolve around the United States constitution and America's history of constitutional government and politics. Historically because it was first asserted by the United States Supreme Court under chief justice John Marshall in *Marbury V. Madison* (1803). Theoretically because of the formulation of Alexander Hamilton in Federalists Papers. And of course in the Natural Law theory

because of the idea of a limited government inherent in that legal theory and which had a major influence on the framing of the American constitution. That such a constitution could generate problem on the doctrine of judicial review makes the work interesting on one hand, and surprising on the other. The latter is so for the following reasons: One, it is and has always been a perfect example of constitutional government for others to emulate; two, the practice of judicial review has spanned over two hundred years even in the heat of the controversy connected with its constitutionality. Three, it is an amazing feat of democratic governance that the United States constitution can still stand with only very few amendments without changing the language of the founding fathers on the supposed power of the judicial arm of government.

It is in the light of this fact that a constitutional basis has to be provided and sought for the doctrine of judicial review particularly now by examining the statements of the United State constitution in the light of its historical and theoretical background. One of the bases for a practice may well reside in the function that such practice can be found to perform. And if judicial review has a basis constitutionally it is because it is meant to keep congress i.e. the law making institution, within constitutional limit. This, it is believed a democratic government cannot compromise: the legislative arm and its law making powers has to be kept in check and as such it is the power of courts to declare as null and void any congressional act that runs contrary to the manifest tenor of a constitution.

But the interesting question has always been why such a power was not expressly provided for. For example those who raise this question have constantly expressed the view that the said constitution does not in one word, or many words authorize the supreme court, or any other court, federal or state, to declare acts of Congress unconstitutional[1].Still within the compass of this line of thought, others have argued that "No such power is in terms granted by the federal constitution itself,



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1 *Robert K. Carr, The Supreme Court and judicial Review (Connecticut: Greenwood Press Publishers, 1942) p. 37.*

or by the state constitutions to the courts the right to declare a law unconstitutional and void,[2]" and that curiously there is nothing in the constitution of the United States which expressly vests in the supreme court the power to interpret the constitution with finality.[3] So the question has often been whether the constitution grants such power to the courts in an express manner quite above what a philosopher might call the dogma of a life after death. If the basis of the doctrine is to keep Congress in check does the constitution grant that the courts can declare a congressional law as unconstitutional and void?.

One interesting response to the question and viewpoint above is that which approximates the answer on the balance of assumption and intentionality. In one sense, it is often assumed that judicial review would be available to act as a check on congress while in the other sense it is believed to be the intention of the founding fathers of the American constitution. But to assume that judicial review would be available, is it the same as available in the constitution?. For example to assume that there should be other planets apart from the conventionally accepted nine planets would not be sufficient to establish the factuality of that claim. There should be, at least as a minimum reason a sufficient number of research findings and reports to support such an assumption. Once this is done the claim shifts from the level of mere assumption to concrete scientific and astronomical findings that backs the claim.

The same goes for the constitutional justification of judicial review. To assume there was to be a doctrine of judicial review according to the intention of the founding fathers does not really explain nor resolve the problem generated by the practice of judicial review in the constitutional sense. It has to be proved by pointing to the provision for it. On the second thought however the question is, is power of review possible and available only if it is expressed in the constitution? Suppose a practice is not available in the constitution does it preclude the essence of its existence and



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2 *Horce A. Davis, The Judicial Veto, (New York: Da Capo Press 1914) p. 2.*

3 *Ademola O. Popoola, "Some Aspect of Constitutional Adjudication in Nigeria" - Ph.D. Thesis, Faculty of Law, Obafemi Awolowo University, Ile-Ife, 1992. p. 46.*

practice?. Does availability consist merely in an express provision, or does it consist in that ability to decode the essence of the practice in the light of certain general principles inherent in the constitution. Or is availability inherently defined in the sense of the historical setting in which such a practice is ensconced?.

The above questions are directed mainly at attacking the suggested view that a practice or power can only be validly justified once we can point to an express provision in a document.[4] Take for example the view that judicial review may consist in being able to decode the essence of the practice in the light of certain general principles inherent in the constitution. This frame of argument may appear decisive on the constitutional basis of judicial review. This is because, if really, judicial review is explicitly based on such general principles, then it follows that a search for express grant or provision will appear superfluous. According to Edward Corwin, "no clause was inserted in the constitution for the specific purpose of bestowing this power on the courts, but that the power rests upon certain general principles thought by its framers to have been embodied in the constitution; principles which, in their estimation, made specific provision for it unnecessary.[5]

The question then is what are those principles that Corwin could possibly be referring to.? Furthermore in what ways do they shed light on the doctrine of judicial review?. A quick answer to the first question may take us to citing principles such as separation of powers, checks and balances, the idea of fundamental inalienable rights of individuals etc. But in what ways are these principles found to support the practice of the doctrine of judicial review?. Are these principles themselves expressly provided for in the constitution as such express provision is found to be adequate for the practice of judicial review?.



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4 *Professor Williams W. Crosskey is a strong proponent of the view that the right of judicial review, for the supreme court ought to have been clearly stipulated. See Crosskey's Politics and the Constitution on the History of the United States (Chicago: University of Chicago press, 1953) pp. 968, 971, 973.*

5 *Edward Corwin, "The establishment of Judicial Review" I and II in Michigan Law Review, vol. 9, (1910) pp. 102-125, 283-316.*

My argument on the above can be simply stated thus that to base the doctrine on the existence of general principles in the constitution would confound issues rather than settle them. On the one hand, these principles, once they are accepted as general principles, make their determinate meaning and nature subject to controversy. The reason is that if they are principles, then, of course, it follows that their meaning could depend on the interpretations given to them either as a specific definition or to suit a particular purpose. If they have specific definitions, then they can no longer be taken as principles. As such, judicial review could not be said to inhere in them in as much as their specific meaning would defeat that purpose. But if they are interpreted to suit particular purposes, then as principles, their meaning (determinate)depends on the technicality of interpretation. On the other hand, the view that judicial review is supported by general principles in the constitution would fall back on the issue of interpretation which clearly is the province of the judges. As such, we are back to the point of our initial inquiry:the issue of judges power of interpretation and review. It is in this sense that Raoul Berger contended that if judicial review cannot be found to exist in the constitutional phrase on the judicial organ of government, the controversial Article III, then it cannot be validly drawn from general principles.[6]

But if the justification of the doctrine can not be drawn, according to Berger, from general principles, then it becomes important to consider what the statement of Article III is on the subject of judicial review. In terms precise than ever, it is the statement of the constitutional text in Article III that is the core of the controversy between the protagonist and the antagonist on the subject of judicial review. Article III of the American constitution, section 1 and 2, sub-section 1, states that " the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish. The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made, or which shall be made under their Authority".



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6 *Raoul Berger, Congress V. Supreme Court, (Massachusetts: Harvard University Press 1969), p. 200.*

## 3:2 Between Power and Functions

The problems that normally accompany any critical and enlightened under standing of the constitutional text in Article III on the judicial organ of government can be classified under three headings dovetailing into each other. In the first sense there is the problem of ambiguity. Secondly their is the problem of interpretation and thirdly the problem of meaning or definition.

Under the problem of ambiguity, our query on the provision or statement of article III is whether "judicial power and cases arising under this constitution" refers to cases of congressional acts being declared null and void by the supreme court because it is contrary to the constitution or whether it refers to cases in general. Suppose it refers to the latter, as "all" suggests does it include judicial review?. Suppose, however, it refers to cases of congressional acts being declared null and void by the supreme court, what is the key to interpreting it so?.

Under the problem of interpretation the question is how do we interpret the clause "judicial power shall extend to cases arising under this constitution?" By history? Public view or opinion? Opinions of constitutional scholars? or what?. In pursuance of this aim some have suggested the key to interpretation when a text is ambiguous in the purpose or goal of the provision.For example Prof. Crosskey hinted that when a text is ambiguous,"the rule of interpretation... Were calculated to give a just and well rounded interpretation to every document, to every document in the light of declared purpose or if its purpose was not declared, then in the light of its apparent purpose, so far it could be discovered."[7] But then it behoves us to ask whether, going by the statement in article III, any expression of purpose or apparent ones can be discovered, for purposes whether apparent or real, like the idol of Daedalus do change and are altered by circumstantial innovations or even constitutional amendment. Interpretations being a dicey game in legal and philosophical debate could be seen, others say, from an established fact of the understanding of the framers themselves. As Raoul Berger opines



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7 *See Berger, R. op. cit. chp. 7, Note 4 p. 198.*

"it is their understanding rather than our 20th century doubts that should be controlling[8] in any serious issue that has to do with interpretations. But my own doubt is: how do we establish the understanding of the framers given the fact that many shades of opinion have been expressed over a practice that has spanned over two hundred years?. Also how do we in the 20th century establish that fact when history itself, at every stage has failed to preserve that understanding, culminating in the mass and heap of controversy that the 20th century feels it is its duty to dispel?.

Under the problem of definition or meaning if the statement reads judicial power what is the extent of the power? What is the place of judicial review in the entire scope of judicial power? Why did the statement not read judicial functions and power or functions alone? The above analysis takes us to a very useful clue in determining the constitutional basis for judicial review. The shades of argument proffered against it shows that a distinction ought to be made between something arising out of the exercise of power or out of function. It would seem that what the antagonists of the doctrine of judicial review have often based their antagonism on is the belief that judicial review ought to be a function and not a power. In fact the real anxiety over judicial review is not its counter majoritarian nature as such[9] It is rather the seeming finality of a constitutional pronouncement by the supreme court.[10] In view of this, we shall examine what justification can be argued for judicial review from the position of a possible distinction between functions and power.



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8 *op. cit. p. 199.*

9 *For compendious treatment on this objection see Alexander Bickel, The Least Dangerous Branch (Indiana Polis. Bobbs - Merrill, 1962), pp. 16-17, Jesse Chopper, Judicial Review and the National Political Process (Chicago: University of chicago Press, 1980), p. 6; John Ely, Democracy and Distrust (Cambridge: Harvard University Press, 1980), pp. 4-5, Michael Perry, The Courts, the Constitution, and Human Rights (New Haven: Yale University Press, 1982), p. 9; Harry Wellington, op. cit. p.486-494*

10 *Harry Wellington, op. cit p.4, See also Arthur S. Miller, The Supreme Court - Myth and Reality, (connecticut: Green wood press, 1978), p. 3; see also Benjamin Wright op. cit. pp. 4-5*

To me, an apt consideration of a thing activity or practice as emanating from the exercise of power can be looked at from the following - the nature of that practice, the scope, and the consequence or effects which that practice generates. This analysis applies to judicial review if looked at as a power. For example judicial review has an inherent nature quite different from, say judicial interpretation,[11] its scope is constitutionally determined and it generates certain effects or consequences in its application.

Ordinarily, the concept of power can be defined in the following terms - it could mean ability to perform an act, to control or influence someone to do what he or she would not have ordinarily wished to do. It could also mean the delegation of authority to an individual or institution to carry out a specific assignment with the required resources needed for such assignment. On the other hand, to have a function may simply connote the work something or somebody is designed either naturally or artificially to do. It could also mean an official assignment duty or calling.

According to Dias, the concept of power can be looked at from two perspective: One physical power and two power in the juridical and legal sense. While the former is regarded as inert in itself, lacking the inherent power of action, however great it may be, the latter refers to the ability to alter, change and affect jural relations. The abuse of power, in the second sense, by governments is what is called 'rule by law' i.e law as instrument of promoting government policy whereas 'rule of law' is the use of law to curb the misuse of law-making power by government.[12] Looking at Dias conception of power the question is, how do we draw the line of demarcation between law that corrects abuse of the law making power?. In other words, what is the index for establishing the difference.?

A useful analysis of the notion of power and that is quite relevant and which approximate's the sense of power in focus is that which makes a philosophical attempt to see how the notion of



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11 *For apt distinction between the two, see chapter one under the sub - heading "Useful and Important Distinctions"*

12 *Dias, R.W.M. op. cit p. 87*

power dovetails into the notion of authority. Authority may be divided into two: authority over belief and authority over conduct.[13] Proper categorization of political authority often goes along with conduct. The idea of conduct in political authority makes it less difficult to see the connection between authority and power. It is not however in every case that power and authority are connected or the same. For example, the exercise of power over the conduct of another which involves coercion i.e. the use of coercive powers to win submission or obedience in respect of the performance of an action does not entail authority. Authority and power in this sense are mutually exclusive.

In what sense, then, are the concepts of authority and power connected?. Michael Bayles distinguishes between social scientific concept of power and the ordinary concept of power.[14] The latter, according to Bayles, is the one described above i.e. concept of power that has to do with coercion. This is what Dias called physical or naked conception of power. This conception is not the sense of power mentioned in article III on "judicial power". The social scientific concept of power according to Bayles are two:one " the power exercised by one individual over another arising from the promises of reward for obedience and threat of harm for doing other wise; Two power over an individual by another over his performance of an action arising as a result of persuasion. This means the power A has to persuade B that it is best to do action X. To see the connection drawn between power and authority in the light of persuasion and the idea of power in article III, a third conception of power must be drawn out.

According to Bayles, this conception of power shows the connection between power and authority especially in relation to the existence of legal system. It is the power or the ability specified by rules to issue directives or do other things..."[15] This is not the power to command or issue directives, it is simply the ability to issue directives generated by the existence of rules in that respect.



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13 *Michael D. Bayles "The Functions and Limits of Political Authority" in Authority: A Philosophical Analysis by R. Baine Harris (ed.) (Alabama: University of Alabama Press, 1976) p. 101*

14 *Ibid. p. 102*

15 *p. 104.*

So, in the reading of Article III one gets the meaning that the idea of power mentioned has to do with the idea of the authorization of the supreme court to "alter jural relations", to use Dias' expression, where such ability power or authority is generated or specified by rules i.e. something of a rule of recognition using the Hartian language.

In the critical sense therefore the notion of "power" mentioned in Article III cannot be said to refer to mere function. An activity or practice can be as a result of being a function i.e. what one is designed to do but one may lack the power or simply the ability or controlling influence or ability to effect it into the desired end. In this sense, therefore a function does not necessarily connote the idea of power, where as, an exercise of power can or may have some thing to do with a function. For instance, a police man has by law the function of controlling traffic and quelling internal crisis. To be able to effectively function in that capacity he is given by law, the power of force. In exercising his power he is able to perform his functions properly but without the weapon of force he may not function effectively especially where he is opposed by another individual of greater power, say an armed robber.

So in every sense a power is different from function. A power can be a legal capacity or ability to control, change or influence jural relation especially in the use of the rule of law, where such ability to issue directives that control or influence such relations are given by rules. Judicial review in this sense ceases to be a mere function of judges because by nature, scope and consequences it generates, it exercises that legal power to influence or control legal relation between the organs of government and the citizenry. Since article III refers to judicial power it is a telling argument to establish that the power or authority of review is entailed in that whole orbit and range of power mentioned therein.



## 3:3 Judicial Review and Balance of Governmental Power and Relations

In pursuing further the claim that the doctrine of judicial review has a constitutional basis, it is expedient to examine the place of judicial review in respect of the constitutional statement on the

arms of government in general and the balance of relations and control of power by each organ on others. In my analysis above I hinted at the view that when power is spoken of in the legal sense there is the reference to the use of law to affect control or alter legal or jural relation. When law is spoken of in this sense, it suggests the idea that law can be used to control the balance of power and power relations between the arms of government. This explains the view that the three arms of government can by recourse to law control each other. Just as the two political branches can control each other and the judicial organ in like manner the latter should also be able to exercise influence on relations between itself and the two in the entire frame work of government. But then, as one may note, this is the very claim in question. Ought there not to be a corresponding power conferred on the judicial arm of government to control the other organ of government within the bounds of constitutional limit?

My argument and position is that there ought to and that indeed there is. It is an established fact that the American constitution has some fundamental features that underlies every statement of its provision. Some of these features are the idea of separation of powers between the organs of government the institution of checks and balances etc. All these are geared towards, so the provision says "establishing justice and securing the blessings of liberty to all and sundry."[16] The doctrine of separation of power, for instance, was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but by means of the inevitable friction incident to the distribution of governmental powers among three departments to save the people from autocracy.[17] To this end the constitution grants the power of impeachment to the legislative arm to try every act of misconduct by any official of government; the executive arm particularly the president is accorded the power of veto over bills and recommendation from the legislative arm and accordingly and correspondingly the power of review is accorded the judiciary over legislative laws and executive actions.



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16 *See the "Article of faith" of the American Constitution*

17 *Justice Louis D. Brandeis, quoted from B.F. Wright op. cit. p. 143.*

But the question still is even if such balance of relations are meant to exist between the organs of governments the powers of impeachment and veto are specifically and clearly stated but that the constitution is silent on a supposed power of review to the judicial arm of government. How do we determine and establish that the judicial arm is constitutionally placed to exercise its role in that balance of relations and governmental power?. The simple and straight forward answer is that it does by the power the constitution grants the judiciary to try cases arising under the constitution. The text says in section 2 sub-section 1 that, explaining the context and the circumstances in which the judicial power mentioned in section 1 is supposed to act and operate ,"the judicial power shall extend to "all cases" in law (Legislative acts, statutes and enactments) and Equity (executive and administrative actions that tampers on fairplay), arising under this constitution, the Laws of the United States..." where the law making powers of the United States is clearly granted to the congress.

Cases are decided by courts. By this I mean that the decision of courts are proper constituents of cases and cases are the constituents of the decision of courts.When the legislative arm of government makes a law and such a law is challenged either as encroaching or relegating the recognition of a citizen's fundamental rights, to me, such cases arises under the constitution and as such the constitution says the judiciary is granted that power with the scope or extent of deciding on it. Such matters become a constitutional issue and it is glaring that the constitution grants the courts the power to adjudicate on such "arising under the constitution" cases. In other words, a statutory invasion of a constitutional right by the congress presents a case arising under the constitution so that courts by virtue of Article III can consider whether an act of congress is within the limits of its delegated or conferred powers.

Further exposition on Article III section 2 sub-section reveals the more the constitutional basis of judicial review. It states that" the judicial power shall extend to all cases in law and equity arising under this constitution - to controversies between... a state and citizens of another state... One may then ask what can be the object of controversy between a state and the citizens there of? And how does it present itself as a " case arising under this constitution" to which the judiciary has been granted the power by the constitution to adjudicate?

In the first place it is an established fact that the state is the embodiment and expression of rule and governance and that rule and governance is actually upheld by the law the state makes of which the citizens are said to be under obligation to obey. If the state makes a law which runs contrary to principles enshrined within the constitution as, for example, contained in Article i,iv,ii or any other article of the first Ten Amendments often referred to as The Bill of Rights, In the event that this happens, this presents a case arising under the constitution i.e. controversy between the state and the citizens thereof" as such the judicial power is extended to it for adjudication and proper dispense of justice.Article 1 of the Bill of Rights for example state that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise therefore; or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." Now to make a law contrary to this provision presents to the judicial organ a case arising under "the" constitution. As such it is in the province of the power of the courts according to the constitution to decide such cases and in deciding such cases it is reasonable to affirm that the end to which the power is granted the judiciary is to obviate the source of danger and establish the blessings of liberty on whom it is due. But then it could be retorted that why would the congress make such a law? I rather feel that in answering that question the answer is not as important as in saying that congress can make no law contravening that provision of the constitution as in the fact that there is a curb or control over what it makes which is and can always be found to arise as a case under the constitution of the United States of America especially when such is unconstitutional. To regard such, under the power of review,as null and void by the judiciary is simply stating that it arises under the constitution. On the one hand, therefore, the constitution states what can be constitutional as arising under it and on the other hand it also presents a power that operates under what "arises under the constitution". On and at both levels the constitution is the focal point of interest and whatever is done at both levels attracts or provides a constitutional basis for the said activity or practice. Hence from the manifest tenor of the reasoning sketched out above, judicial review has a constitutional basis i.e. legitimate and justified from that point of view.

About all that has been said this is the sum. The prevalence of either of two sets of conditions sufficiently establishes the legitimacy or justification of judicial review in the constitutional sense. One, an express provision in the constitution that backs up the practice or exercise. Two, the idea of imputation i.e. a power gleaned from different areas of the constitution that sums up the validity or legitimacy of the doctrine. It has been demonstrated in the preceding pages that whichever way we look at the constitutional statement on the judicial power, we can validly establish that either in the sense of express provision or by the idea of imputation the doctrine of judicial review is justified and legitimate as a judicial practice of controlling, reviewing and declaring as null and void any congressional law that are contrary to the express provisions of the constitution.

The argument marshalled in this work for establishing the justification of the doctrine of judicial review in the light of the American constitution has much to do with the idea of power mentioned in Article III, the Bill of Rights which expressly provides that congress can make no laws in respect of certain items or against given or stated provision. It is in the case of going outside the stated boundary, according to the constitutional statement, which presents " a case arising under this constitution " of which the judicial arm of government has been accorded the power to decide.

Herein lies the constitutional justification of the doctrine of judicial review in the light of the American constitution. Because of the seeming finality that its exercise attract, its significance in legal theory especially in relation to the jurisprudential problem of the obligation to obey the law, drawing from the American democratic experience, is the object of the next two chapters.If it is a choice men have made in relation to respect for law could it be a moral or legal choice in their obedience to the law?

# CHAPTER FOUR

# THE CONCEPT AND PROBLEM OF THE OBLIGATION TO OBEY THE LAW

## 4:1 General Introduction

In the history of legal and political ideas, one fundamental concept over which political and legal philosophers are divided is the concept of obligation[1]. In some instances, what philosophers are divided over, on the concept of obligation, may cluster around views on the nature of our obligations.Indeed, with all sense of curiosity aroused, one may establish that the concept of obligation raises some questions in our mind. For example, one could ask what are obligations? Do we have and need to have obligation?.At some other instances, the questions philosophers have gone ahead to ask is, if indeed we have obligations, on what are those obligations grounded or what is their basis?

The two levels of inquiry above form the object of my task in this chapter. In specific terms, my intention is to delve into the connection that could be found to exist between the doctrine and practice of judicial review and the jurisprudential problem of the obligation to obey the law. To pursue this intention to its logical conclusion, I shall be concerned to ask two questions in line with my purpose. These questions are is there always an obligation to obey the law irrespective of "other



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1 *The evidence for this assertion is the vastness of writings and essays in moral, legal and political philosophy on the concept of obligation. See, for example, A. John Simmons, Moral Principles and Political Obligation (Princeton: Princeton University Press, 1979). Rolf Sartorius," Political Authority and Political Obligation" Virginia Law Review vol. 67 (1981), Harry Beran, The Consent Theory of Obligation (London: Croom Helm, 1987); Michael Walzer," The Obligation to Disobey," in Edward Kent, ed., Revolution and the Rule of Law (Englewood cliffs, N.J: Prentice-Hall, Inc., 1971); Tony Honore," Must we Obey? Necessity as a Ground of Obligation" in Virginia Law Review vol. 67, Feb (1981); J.C. Smith, Legal Obligation (London: Athlone Press, University of London, 1976); R.J. Bernstein," Prof. Hart on Rules of Obligations," Mind vol. 73 (1964); Henry Hart, "The aims of the Criminal Law" in Law and Contemporary Problems vol. 23 (1958), A.C. Woozley, Law and obedience (1979); Hart, H.L.A." Legal and Moral Obligations" in A.I. Melden (ed). Essays in Moral Philosophy (Seattle: University of Washington Press, 1958); Joseph Raz, The Authority of Law (Oxford: Oxford University Press, 1979) etc.*

else" so long as the rule in question is a law? Can it always be maintained that a "law prohibited" and a "law allowed"[2] can create equal obligation? These questions cannot be answered through the doctrine of judicial review without some analysis of the idea of the obligation to obey the law and the various opposing viewpoints on the subject matter.

## 4.2 The Nature of Obligation and Duties

An enlightened understanding of the idea of the obligation to obey the law, in my opinion, establishes the importance of the question is there an obligation to obey the law? In answering a question such as this, it is my conviction that a proper treatment of the subject-matter presupposes a consideration of the idea of obligation itself. The question then is what are obligations?The concept of obligation is often used synonymously or interchangeably with the idea of duties. Both concepts are further seen to have the same structure with 'ought' statements. In these statements, there is an expression of judgement and evaluations. Some actions are weighed, evaluated and judged according to certain or specified standards, and on those bases evaluated either as wrong or right. A statement emphasising or embodying such judgements or evaluations that someone 'ought to do,' someone has the obligation or the duty to do some thing, or their opposites in general is in part a declaration that there are good reasons for the doing of the act or some consequences for failing to do them. That is why, in most 'ought', 'obligation', statements that expresses such judgements and evaluations, the expression 'why' in most cases, not all, are found to accompany them[3]. But then the question is what is obligation? what are duties? What are the structure of 'ought' and obligation statements?



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2 *The expressions in inverted Comma's are taken from the judgement of Chief Justice John Marshall in Marbury v. Madison (1803). The expressions, to my mind, are inundated with controversies. My view is that such controversies can be argued out to establish their import. Also, it answers the question whether an act declared invalid is still a law or not.*

3 *J.C. Smith Legal Obligation (London: Athlone Press, University of London, 1976) p.35*

According to A. John Simmons, obligations are moral requirements generated by the performance of a voluntary act.[4] According to the same author, duties are either positional or moral.[5] The former refers to those duties owed by virtue of holding a particular position or office, moral duties are those owed by virtue of our membership of the human race. Hence, the former talks of a public officer such as a judge, police man and such other public officer with specified and spelt out functions or duties to carry out. The latter refers to our natural duty as humans to aid fellow humans who are in need. To this end, positional duties, according to Simmons, are morally binding only when the office is voluntarily undertaken.

In the light of this analysis, talk of obligation can be better comprehended also, by an intellectual discourse on the nature of duties and the various distinctions that can be made on the concept of duties. This is because duties are species of obligation in as much as it can be established that both are normative words i.e. expressive of judgement and evaluations, although it is not in every sense that obligation convey the same meaning as duties. To this end, there is a distinction between prima facie duties and actual duties. Prima facie duties are duties that have presumption in favour of obedience. To argue against those presumptions underlying the basis of such duties is to advance reasons to show that some one does not have such duties. And, in case those reasons are not strong enough or there are no reasons given to back such claim to lack of such duties, such duties become what one ought to do.[6] In this case, those duties become actual duties which are, by their nature, self explanatory e.g. the duty of a father to his son or of a mother to her child.

Moreover, there are moral duties and legal duties. The former refers to duties that have prevailing morality explaining their origin which, after a while are perpetuated or continued as an anachronism in legal form. The pressure which backs up claim to conformity then becomes solely

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4 *A. John Simmons in Moral Principles and Political Obligation (Princeton: Princeton University Press, 1979), p. 11*

5 *Ibid. p. 12*

6 *Tony Honore," Must we Obey? Necessity as a Ground of Obligation" in Virginia Law Review vol. 67 Feb (1981) p. 48*

respect for law.[7] The respect henceforth becomes duties couched in legal directive or promulgation hence, legal duties. But the most interesting question is at what point does this exchange occur between moral and legal duties? and, how do we establish whether the respect for law that takes over now is not traceable to the morality that initially gave birth to such duties, and that, in fact, those respects are really the morality inherent in those laws?[8] It is along this line of reasoning that the idea of a duty or obligation to obey the law becomes interesting, and dicey too. So, the question often is is there a prima facie duty or obligation to obey the law?

However, there are certain pertinent truths that can be gleaned from the analysis so far. Simmon says obligations are "moral requirements generated by the performance of a voluntary act". To my mind, this explains that obligation are owed, created, assumed or accepted. In other words that obligations are not imposed nor necessarily enforced by pointing to the existence of sanctions or force. If Simmon is right that they are generated (and I understand the word "generated" as excluding the idea of an imposition) then it shows that obligation are not imposed, nor do they have to do necessarily with sanctions. In other words that fear of sanctions does not and need not establish obligations. Another question I see inherent in Simmon's definition is this: if obligations are moral requirements, are those moral requirements generated just because the acts that are performed in line with them are voluntary or is it that such acts performed are voluntary just because it is within the confine of a moral requirements, and not legal requirements? Simmons seem not to have answered this question. My reason for raising this question is to show the level of distinction one can draw between voluntary acts that are induced by moral requirements and voluntary acts that are induced by legal requirements, if there are. But then what are moral requirements?



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7 *See Dias, Jurisprudence, chp. on "Obligation and Duty" (London: Butterworths and co publishers, Ltd, 1985) fifth ed. p. 229*

8 *These questions underscore one of the controversial dimension on the debate whether there is a necessary connection between law and morality. See the exchange between Professors Hart and Fuller in Harvard Law Review vol. 71, (1958); see also Edmond Cahn, The Moral Decision (1955); Bloom Cooper and Drewry, G. Law and Morality (1976); Norman Saint John-Stevas, Life, Death and the Law, (1961).*

If we answer the question in the following way - that they are obligations, we would not have answered the question. It then becomes question begging. A possible answer is that these moral requirements are moral standards by which our performance of the expected acts are possible because they are accepted, created. In other words, that those standards explain the reason why our performance of those acts, within given expectation, are said to be accepted or owed, not imposed. In short, that they are acts we ought to do i.e. actions generated, owed, accepted or created by standards suitable for an ideal human being.[9] This therefore shows the connection between ought language and, obligation and duty statements. There is always a logical relationship between the concept of 'a reason' and ought statements.[10] We may therefore draw the conclusion that if it is the case that some one ought to do something, or something ought to be done, then it is the case that there are good reasons for that thing being done[11] or for not being done at all.

From the foregoing analysis, it behoves one to state that if obligation, duty statements are expressible also in ought language or have the same structure of concept as ought language, then we can establish that to say that there are obligations to obey the law is to invite the reason why a citizen has the duty, or obligation to obey the law of the state. So, ought I to obey the law of the state? Do



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9 *To equate Simmon's "Moral requirement" with the idea of moral standards may sound simple and straight forward; however, it may be misleading. One, there are many standards in moral philosophy. Which of this can we say is that requirement? Two, moral standards are not static, they change. And if they change, and are said to form the basis of Simmon's moral requirements for obligation, then it follows that obligation statements are not static. In other words, what could serve as grounds of obligation now may be eroded by future conceptions. Finally, there are three levels by which we pass judgement: the standards that we require, those that we desire, and the ones we revere. Obviously these are different level of standards and if obligation statements are grounded in them, they may create problem. How do we then move forward if there is a deadlock in the analysis of the nature of duties and obligation? My response is this: whatever moral standards are invoked, it is still sufficiently true that moral standards by which we pass judgement are necessarily connected with the structure of ought language. That is why I said that those actions that are generated by such standards are possible because they are owed or created i.e. what we ought to do.*

10 *J.C. Smith op. cit. p. 35*

11 *Ibid., p. 59*

I have the duty or obligation to obey the law? This shift my attention to the debate, in legal philosophy, on the obligation to obey the law.

## 4:3 Is There an Obligation to Obey the Law?

The question is there an obligation to obey the law? has assumed quite an important and dramatic role in the history of jurisprudential thinking. In some cases, the nature of and core matter in the debate is what is the nature of law from which such obligations are said to arise? At some instances, it could be the question, "under what condition is the individual obligated to obey the law"? Divergent views have been expressed on the question, "is there an obligation to obey the law? "On the one hand, there are those who deny the existence of such an obligation, while, on the other hand, there are those who assert that there is such an obligation, and actually went on to prove their claims. My aim here is to highlight the various viewpoints and arguments used to advance and establish their positions, and how they fair in the light of critical examination.



### The Statement of the Problem

Suppose there is a problem on a given subject matter, I am sure the first thing is to express the problem in a statement one can understand and, from this, establish whether it is indeed a problem, or a pseudo-problem, or simply a misunderstanding that centres on the use of words, or misinterpretation of terms, or even evaluating the whole problem from a totally irrelevant perspective. The subject matter of obligation to obey may be one of such tendencies. What then is the problem of obligation to obey the law? The heart of the problem of the obligation to obey the law is this: is our being obligated or having an obligation to obey simply from a legal point of view? Is it purely a moral issue or is it the dictate of prudence and prudence alone, strictly divorced from morality that accounts for our obligation to obey the law? These questions form the heart of the problem of the obligation to obey the law. To this end, various arguments have been adduced by scholars showing why we have the obligation or how it can be shown that we do not have that obligation. Both

positions on the question of the obligation to obey the law have been defended with strong arguments. I shall take the proponent of the view that we have an obligation to obey the law. Afterwards, I shall present the sceptical view.

### 4.3.1 Proponent of an Existent Obligation to Obey the Law

In contemporary jurisprudential writings, the analysis of the idea of obligation to obey the law received earlier treatment in the work of John Austin. His viewpoint on the existence of an obligation to obey the law has often been a starting point for others to follow. Though his views are rejected as wrong it is the view of scholars that he was clearly wrong. His argument for the existence of an obligation to obey the law derives from his theory of law.What then is Austin's conception of law? According to John Austin,

> Every Positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme[12].

Who is a Sovereign individual or body of individuals? According to Austin, the sovereign is that individual or body of individuals that receives habitual obedience from the bulk of society without paying such obedience to any like superior. In his words,

> If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society is a society political and independent[13].

How does the idea of obligation come into the nature of law advocated by Austin? For Austin, obligation to obey the law arises out of the sovereign's command that a particular thing be done, failure to comply attracting a punishment. In other words, that obligation is legal, for, according to

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12 *John Austin, "Law as the Sovereign's Command" in The Nature of Law by M.P. Golding (ed.) (New York: Random House, Inc., 1966) p. 95.*

13 *Ibid, p. 94*

austin, " a law without an obligation is a contradiction in terms"[14] meaning that the question of law and the obligation it creates is sourced in the legal bindingness and enforceability of that law. What a law forbids or enjoins is binding and to that extent obligatory. In his famous expression,

> The existence of law is one thing, it's merit or demerit is another. Whether it be or be not is one inquiry, whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists is a law, though we happen to dislike it, or though it vary from the text by which we regulate our approbation and disapprobation....[15] the most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals.[16]

In summary, Austin's view on the idea of obligation is not only that there exist an obligation to obey the law, but that the obligation in question is simply legal, and no other. It is legal because a law has necessarily, the feature of an obligation i.e. it is binding and that to talk of law without obligation is to engage in contradiction. Moreover, Austin considers the salient feature of this obligation in terms of the pain that can be inflicted on an individual in case of failure to obey. In short, therefore, obligation to Austin, is legal, not moral nor prudential. There is no question of disobedience, laws have to be obeyed, and that they are in themselves a sufficient reason for doing what the law enjoins.

Austin's critics see in his work a fundamental error. H.L.A. Hart who built on Austin's theory of obligation posits that Austin's theory is entirely defective to reflect a fine picture or account of obligation. There are two sides to H.L.A. Harts critique of Austin's work: a critique of the nature of law as given by Austin and a critique of the idea of obligation that stems from it. In the first sense, Hart criticized Austin's theory of law on the grounds that to define law as the command of the Sovereign is to present a lopsided view on the nature of law. Austin's model would cut off right-conferring laws which are, practically, not indicative of commands. Not only this, Hart also criticized



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14 *p. 96*

15 *p. 95*

16 *p. 96*

Austin's model of the nature of law as speaking only in horizontal terms i.e. command of a superior to inferiors. These are laws, according to Hart, that bear vertical relation[17].

On his theory of obligation, Hart's criticism is not that there is no obligation to obey the law. The additional comment is that they are not conceivable only in coercive terms. Hart agrees with Austin that obligation to obey the law is legal i.e. that they are connected with the internal aspects of the rules of law. However, for Hart, Austin's analysis of obligation flatly exaggerates the relation between having an obligation to obey the law and being obliged to obey. He calls Austin's analysis as the case of a gun man writ large, because Austin regards a legal system as non-existent if its rules do not inflict pain in the case of disobedience[18] Moreover, Austin's theory presents the view that no obligation exists for the individual if there is no possibility of threat or coercion, or even of being caught at all. It is an account so oblivious of the reasons why people obey or should obey and to that extent is insufficient to establish the practical realities that underlie the relationship between a legal system and the citizens under it. What then are the views of Hart on the idea of obligation to obey the law in the light of the defects in Austin's analysis?

According to H.L.A. Hart, theory of obligation is explainable in words such as "ought", 'obligation,' ' being bound', 'having a duty' etc because of their connection to the internal aspects of the rules of law. In his words,

> If we have an obligation to do something there is some sense in which we are bound to do it, and where we are bound there is some sense in which we are or may be compelled to do it"[19].

In other words, it is because what we have the obligation to do, we ought to do, that obligations bind us. Given this interpretation, how then do we establish that a law creates obligation for us? In other words, following Hart's analysis, what is it that furnishes to our understanding, the

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17 *See Hart, H.L.A. "Positivism and the Separation of Law and Morals" Harvard Law Review, vol. 71 (1958) pp. 600-606*

18 *Hart, H.L.A. "Obligation and Coercion" in The Nature of Law by M.P. Golding (ed.) (1966), pp. 104-106*

19 *Ibid p. 104*

ought of law that shows we have the obligation to obey such laws? In what sense can we say we are bound to obey the law?

In his book "The Concept of Law" Hart states some factors that establishes that an individual has the obligation to obey the law. One, the existence of social rules, making certain types of behaviour a standard; two, the distinctive function of such a statement is to apply such a rule to a particular person by calling his attention to the fact that his case falls under it[20]. But not all social rules create obligations for the individual. How then do we distinguish between those rules that create obligations and those that do not? Moreover, why does the rule apply to the person in question and why is it that it can be said that his case falls under such rules?

Hart explains further that a particular rule, say x, imposes obligation if and only if it has the following characteristics. One, if x establishes that there is social insistence for conformity; two, that x is necessary to the maintenance of social life; three, that x involves renunciation and sacrifice.[21] However, according to Hart, what furnishes to our understanding the oughtness of law is the idea of a social pressure. Those pressures create in the mind of the individual that the society insist that he should conform. This can be taken to mean that the issue is not the content of those rules which are said to impose obligations on him, but on what the society insists that he must do. These pressures, according to Hart, provide the ought of law.

Such obligation, Hart contends, are similar to obligations that arise out of promises. In both, there are meanings to the obligations created because of its "dependence on the actual practice of a group", therefore, there is" possible independence of content" and the use of coercion[22]. But I ask, is coercion necessary in fulfilling obligations arising out of promise, and by extended application, obligations to obey the law? Hart thinks it does . Do the content of such rules create a difference?



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20 *Hart, H.L.A. The Concept of Law (Oxford: Clarendon Press, 1961) p. 83*

21 *Ibid, pp. 84-85.*

22 *Hart, H.L.A. "Legal and Moral Obligation" in A.I. Melden (ed.) Essays in Moral Philosophy (Seattle: University of Washington Press, 1958), p. 103.*

Hart does not think so. For him, what matter is "the use of the procedure by the appropriate person in the appropriate circumstances"[23].

On a final note, the deduction we can make out of Harts analyses of the obligation to obey the law is that which explains obligation in terms of the existence of rules i.e. laws. In line with austin's view, Hart concludes that the 'oughtness' of obligation arises from social pressure which insists that the prescribed standard of behaviour as outlined in the existent social rules be conformed with. In actual fact, Hart has only succeeded in explaining how people view rules when they accept them as standards. He has not explained why they accept certain rules as guides for conduct[24]. It is the "why" that fully explain why people consider that the law ought to be obeyed and should therefore be accepted by them as constituting a standard for their behaviour.[25] In the analysis on the structure of ought language, it was established that the response "why" are often found to accompany such statement. So, if Hart meant to explain the oughtness of obligation in respect of the law, the explanation ought to take care of why it binds or why such laws are obligatory. This Hart did not give.

According to R.J. Bernstein, Hart's explanation was insufficient to demonstrate the difference between rules that create or impose obligations and those that do not. He gave an example of standard which do not create obligation but nevertheless, attract severe social pressure on those who deviate[26]. And what is more, Hart's undue emphasis on social pressure as the binding force of obligation falls short of the claim that "People exert social pressure on others to comply because of the existence of an obligation" and that an "obligation does not exist because people apply social pressures"[27]. That



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23 *Ibid. p. 102*

24 *J.c. Smith, op. cit. p. 28.*

25 *Ibid.*

26 *Bernstein, R.J. "Prof Hart on Rules of Obligations", Mind vol. 73 (1964), p. 563. An example Prof. Bernstein gave is nakedness.*

27 *J.C. Smith, op. cit p. 33*

people apply social pressure does not, indicate that obligations exist. It is conceivable that people may apply social pressures and insist that a certain minimum standard of behaviour be conformed with without such standard raising a cogent element of obligations.

On his part, Prof Henry Hart remarked that there is an obligation to obey the law and that such obligations are legal. It is the breaking of such laws that makes it possible to label the offender as a criminal. According to Hart "Knowing or reckless disregard of legal obligation affords an independent basis of blame worthiness justifying the actors condemnation as a criminal".[28] This argument fails to realize the reasons why an individual could act in disregard of what the laws states, and to argue that one cannot be justified in acting illegally is to miss some of the salient features of a constitutional provision for expression of grievances against the state.

Tony Honore adopts a different argument. To him, it can be established that an individual has the obligation to obey the law. His view is that it can be established that they have the obligation if each member in a society in which membership is compulsory have a duty to comply with the requirements of the other members when these requirements are brought to his attention in proper constitutional form[29].

According to these authors, the bare fact that a law enjoins or forbids some action is a necessary and sufficient condition to establish not only that there is obligation to obey the law, but that, infact those laws impose obligations on the affected party and to that extent, the law is binding. The question of the content of such laws should be held independent of what the obligations of the individual is. But is the basis of their arguments sufficiently strong to explain the 'oughtness of obligation'? and, how suitable logically is it to derive the 'ought' of legal obligation from an 'is' statement of fact. A law that enjoins or forbids a particular action, is a statement of fact. If we describe the ought of our obligation in terms of the existence of laws, how then do we distinguish



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28 *Henry Hart, "The Aims of the Criminal Law" in Law and Contemporary Problems vol. 23 (1958) p. 401, 418.*

29 *op. cit. p. 44*

between ought that are legal and ought that are strictly moral? Or, are legal obligations in the same sense as moral obligations? what would then differentiate obligations that are moral from those that are legal? These are questions relevant to a critical scrutiny of the view that there are obligations to obey the law and that such obligations are legal i.e. derived from legal directives. There are views, however, that explain that we do not have obligation to obey the law.

### 4.3.2 Sceptical Views on the Obligation to Obey the Law

The issue or question that bothers these sceptical philosophers is, is the fact that the law requires something in and of itself a necessary and sufficient condition for doing it? Joseph Raz in the opening pages of the chapter "Obligation to obey the law" in his book The Authority of Law[30] asserted that there is no obligation to obey the law. Prof A. Woozley in his book Law and Obedience opined strongly that to explain that the reason why a law is obeyed is because it is the law is no reason at all. According to Woozley "If political leaders and police chiefs had their way all of us would believe that a powerful reason (possibly the principal, if not the only, reason) that we should obey a law is that it is a law. Infact, with the exception of a special class of laws, it is no reason at all"[31]. That a law enjoins or forbids the performance of an act may not constitute in itself a sufficient reason for our obedience to such laws. A law simply state that something should be done, why it should be done is outside the purview of the law.

Alan Simmon also holds the view that there is no prima facie obligation to obey the law. According to Simmon, governments do not normally have the right to be obeyed by their citizens, or to force them to obey, or to punish them for disobedience[32]. In another sceptical conclusion,



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30 *J. Raz, The Authority of Law, Essays in Law and Morality, (Oxford: Clarendon Press, 1979). p. 233.*

31 *A.Z. Woozley, Law and Obedience, (1979) p. 72*

32 *Simmon, op cit pp. 193 - 195*

M.B.E. Smith asserted that there is no prima facie obligation to obey the law.[33] The meaning is that there are always strong reasons to show that there is no such presumption in favour of a duty of obedience to the law. There are and can be, always, strong reason to show that one is not obligated to do what the law commands simply because it is the law. Richard Wasserstrom, on his part, debunked the view that if an individual acts illegally, there cannot be strong reasons to justify his acting illegally.

All these are sceptical answers to the question whether the barefact that something or an action is enjoined or forbidden by a law is in itself a necessary and sufficient condition for doing or refraining from doing what the law states. However, viewed from a softer perspective, there are exceptions to these sceptical conclusions. Joseph Raz, for instance, says that a person who actually respects the law of his state is bound to obey. To respect a particular system, to him, explains that certain obligations follow. But in what respect can it be said that respect is a necessary and sufficient condition for the existence of duty of obedience? There are, of course, many instances in which one manifest the attitude of respect to a given system without being obligated to do what the system enjoins. Take for example, as a Nigerian one may and do have respect for the American legal system because of the sophistication in it, yet it does not follow that I am duty bound to follow the rules. I have the respect but for me obligations does not follow even where those laws in that other country is better placed and suited to advance the rights of the weak than the laws in one's country. Respect is not necessary to the prima facie duty of obedience. Duty to fellow citizens is based on dependence on them, not friendship. Otherwise there would be a positive advantage in an attitude of disrespect.[34]

Woozley, on his part, conceded the fact that only special class of laws convey an idea of our being bound to do what the law says and that will be a sufficient reason. For example constitutive



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33 *M.B.E. Smith "Is There a Prima Facie Obligation to Obey the Law? Yale Law Journal vol.82 (1973) p.950*

34 *See Tony Honore op cit. p. 50*

laws on voting[35] For one to vote and vote in the proper sense, it is incumbent on one to consider the law on voting as sufficiently strong to explain why that law is obeyed. Except where one chooses not to vote at all, and that would mean there is a weightier moral reason for refraining from voting. All these sceptical philosophers, apart from their sceptical answer admit that there are independent moral reasons for doing what the law require. However, the important question is where and to what end does these viewpoints lead us in our discussion of the problem of the obligation to obey the law? Whether obligations are moral or legal depends on what goes into saying that an obligation is moral or legal. Moral obligation views our obedience to any law as something external to that law. In other words, that what adequately explains that a law is morally binding on an individual is that it achieves the desired end of human existence i.e. happiness in the light of which that law can be said to be justified. An immoral law i.e. one that fails to achieve the desired end of human existence creates or carries no obligation. The argument is not that every moral rule automatically becomes a legal rule but that whatever legal rule is made to be binding morally, ought to admit of the minimum standard of a moral rule. In other words, that the 'ought' of a legal rule is furnished by a moral 'ought' in that if it is the case that a person is legally obligated to do x, then it is the case that he ought to do it in a moral sense.[36] This is suggestive of Natural law thinking. Aquinas and Augustine's famous thesis "an unjust law is no law at all" convey the import of the view above. The same is hinted at in Prof. Lon Fuller's work "The morality of Law" wherein he argues that there is a morality that makes law possible, hence binding or obligatory. This he called the "Inner or Internal morality of law," and "The external morality of law."[37] The latter explains the morality that makes law possible i.e. some required moral foundations necessary for the existence of a legal order or system. The former Fuller described as those moral principles to which every attempt at law making must conform or fail. These



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35 *op cit. p. 6*

36 *J.C. Smith op cit. p. 6.*

37. *Lon Fuller, The Morality of Law (Connecticut: Yale University Press, 1964), pp. 152-184. See also "Positivism and Fidelity to Law - A Reply to Prof Hart" in Harvard Law Review, vol. 71 (1958), pp. 630-72*

moralities, according to Lon Fuller, serve as the basis, of our obligation to obey the law. To him the obligation cannot be legal because law is not and cannot be built on law alone. In his word,

> There is a two fold sense in which it is true that law cannot be built on law. First of all, the authority to make law must be supported by moral attitudes that accord to it the competency it claims. Here we are dealing with a morality external to law, which makes law possible .. We still cannot have law until our monarch is ready to accept the internal morality of law itself.[38]

The same views are to be found in the work of John Finnis. Finnis, following the Natural law tradition, claims that the obligation to obey the law has to do with extent to which the law in question either contravene or enforce the idea of what he calls 'basic values' and 'practical reasonableness'. Laws that contravene them are termed unjust because they are the ideas that help achieve the common good. Those that enforce or approximate them are just. Hence, "the moral authority of the law depends ... on its justice or at least its ability to secure justice"[39]. Such sense of justice, according to Finnis, is not self-directed but others-directed i.e. it has to do with relations to others[40]. It is a duty owed to another such as a rulers duty to his subjects i.e. a duty to ensure the administration of just laws. That such a duty is others-directed help establish, further, that obligation to obey the law is not prudential. According to Finnis, our obligation to obey the law, prima facie, is a moral obligation once it can be validly established that those laws are just i.e directed toward achieving the common good. The import of this viewpoint is conveyed in the following:

> The ruler has, very strictly speaking, no right to be obeyed; but he has the authority to give directions and make laws that are morally obligatory and that he has the responsibility of enforcing. He has this authority for the sake of the common good... Therefore, if he uses his authority to make stipulations against the common good or against any of the basic principles of practical reasonableness, those



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38 *See " Fuller's Positivism and Fidelity to Law," Harvard Law Review vol. 71 (1958) p. 645.*

39 *John Finnis, Natural Law and Natural Rights, (Oxford: Clarendon Press, 1980) p. 260*

40 *Ibid p. 161*

> stipulations altogether lack the authority they would other wise have by virtue of being his[41].

From the following analysis, that there is an obligation to obey the law and that the basis of such obligation is moral, in simple terms, explain the view that our obligation to obey the law is derivative i.e. the conformity of the legal norm with some external norm. In other words, it means the moral content of the law defines or decides whether one falls under the obligation to obey the law. It would be totally misleading to label such views as strictly Natural law thinking. Natural law thinking may be said to have the natural tendency towards such views. There are, however, some leading contemporary legal positivists who have this inclination. At least, Joseph Raz comes to mind. Raz bluntly asserted that there is no obligation to obey the law. He, however, softened his sceptical conclusion with the exception that there are independent moral reasons for doing what the law requires.

How sufficiently sound is the thesis that obligation to obey the law is founded on moral reasons or on the content of the law? In most cases, the very point that those who oppose the view that our obligation to obey the law is moral want to avoid is conceding to the view that there is then a necessary connection between law and morals. In other words, it is to admit that there is no sharp dividing line between what the law is and what it ought to be. And this is the very viewpoint that legal positivist would want clarified i.e the Separability thesis. The separability thesis as Prof. H.L.A. Hart conceives it says " it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."[42]

Is it inconsistent to admit a minimum content of morality into legal rules for them to create or generate for us the obligation to obey the law we are talking about and then still careless whether law is necessarily connected with morality? If the individual concerned i.e. obligee is accepted as a moral agent, the argument that his obligation to obey the law can be founded on moral reason is no



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41 *p. 359-360.*

42 *Hart, H.L.A. The Concept of Law (1961) p. 181.*

misnomer. It is both theoretically and practically a feasible standpoint to maintain. A law that deals with a subject matter that is known characteristically to belong to morality will, no doubt, have obligation to obey it influenced greatly by as much quantity of morality it elicits. And where it is silent on a moral issue it is within the bound of reason to assert that the idea of moral obligation to obey it becomes an open matter. This distinction we ought to maintain.

What then, about legal obligation? From the above, are we saying obligation is moral, rather than legal? Or are there distinctively legal obligations? There are scholars who maintain that there are legal obligations. I have dealt much with this under the proponent of an existent obligation to obey the law. H.L.A. Hart, John Austin are notable examples although with differences in details. However, there are salient features of the view that there is a legal obligations to obey the law and that, infact, to obey the law is to be legally obligated. That there are legal obligation convey the idea that obligation to obey the law is internal to the legal process itself. "The source of legal obligation", says Smith", is to be found in the authoritative coercive power by which the laws are enforced, rather than being derived from the content of the law."[43] The important element of such authoritative power, will, no doubt, be coercion. Such views are therefore described as coercive theory of obligation. According to Smith, "Coercion deals with means rather than ends, consequently legal theories having a coercive theory of obligation, will be positivistic. Coercion is related to command and a command is generally an expression of the will rather than of the reason, as it doesn't logically invite justification in the way that an appeal to reason does".[44]

Given the above, does it not follow that to advance the view that obligation to obey the law is legal may fall in the light of criticisms? For one thing, we establish in our analysis of the idea of the concept of obligation, duties and structure of ought language that the idea of a 'why' is entailed in having them. But if law is law and hence should be obeyed without asking the reason or



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43 *Smith op. cit. p.7*

44 *Ibid*

justification, in an intellectual and academic manner, that form their basis, then it is sure that such does not or fail in the light of analysis, to convey the idea of obligation. And this should be the case, if indeed the element of coercion appears prominently fused into the idea of legal obligation. But, suppose the existence of the law and its demands is a reason for saying that an individual has the obligation to obey it, then on that platform, it should be immediately obvious that is no reason at all. It is to beg the question.

Moreover, idea of legal obligation as presented above conveys the belief that all obligation does not exist or is not created for an individual where there is no possibility of his being caught and punished.[45] It is true, according to Hart, that if a man is said to have or lie under an obligation, there is some sense in which one is bound to do what one has obligation to do. But it does not follow nor is it true that he has to be compelled to do it. Hart, along this line, often speaks of an imposed obligation. Obligations are not imposed because that picture conveys an idea of a forced obligation. Obligation are not imposed but rather, are created, assumed, owed or accepted.

From the above, it can be said that the debate over whether there is an obligation to obey the law and in what it consist fall, between the camp of those who claim it is moral and those who claim it is legal. Of course, there are those who claim that it is prudential. In the next chapter, I shall examine the connection between the doctrine of judicial review and the jurisprudential problem of the obligation to obey the law. The nature of my enquiry then will be: In the light of the jurisprudential problem of obligation to obey the law, does the doctrine of judicial review support the view that obligation to obey the law is prudential, moral or legal? The conclusion of the next chapter will form the position I plausibly can defend, using the doctrine of judicial review.



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45 *Theodore Benditt, Law as Rule and Principle (England: The Harvester press Ltd., 1978) p. 118*

# CHAPTER FIVE

# JUDICIAL REVIEW AND THE OBLIGATION TO OBEY THE LAW

The jurisprudential problem of the obligation to obey the law, as we have established in the last chapter, centres on what the nature of our obligation to obey the law is. But is the barefact that something is enjoined or forbidden by law in and of itself a sufficient reason for doing what the law says? As we have considered, there are those who have argued that our obedience to the law or our obligation to obey the law is legal. Others have posited that such an obligation is moral; while there are those who claim that such obligations are prudential i.e. informed by self-interest.

The object of this chapter is to analyse the connection between the doctrine of judicial review and the obligation to obey the law. In specific terms, it is to determine whether the doctrine of judicial review supports the view that obligation to obey the law is legal, or whether it is moral or whether it is prudential. The obvious question I see as necessary for consideration at this point is this, is there any connection between judicial review and obligation to obey the law?

Where the doctrine of judicial review is spoken of, it is spoken of in relation to the validity of laws. In other words, the exercise of judicial review has to do with the authority of courts to review and declare unconstitutional enacted legislation. In other words, it is declaring that an occasional, specific law of the law making organ has been found either in part or the whole void, due to an encroachment on certain provisions of the constitution. Since it is the laws made by the law-making body i.e. legislature that control and regulate the every day lives and activities of citizens, it then follows that whatever practice or exercise is found constitutionally to alter or affect its control over lives and activities of citizens will have very significant consequences in respect of the citizen's obligation to such laws.

Given such a theory of constitutional law, that a statute which does not conform to the commands and limitations of the constitution is utterly void and of no effect i.e. not binding, it then

follows that " no duties are imposed by it; no rights can be founded on it; it furnishes no protection to those who undertake to obey it..."[1] It is this possibility that I wish to explore as significant in an intellectual discussion on the idea of our obligation to obey the law. The objection could be that, in the light of the existing jurisprudential debate, judicial review has no connection with the problem of obligation to obey the law, that the simple fact that judicial review proves or establishes why I do not fall under the duty of obeying a law that is declared unconstitutional does not explain why one has obligation at all.

In what follows, I shall try to address the objections raised above concerning the significance of judicial review in the light of the problem of obligation to obey the law. It is, of course, the case that judicial review when positively exercised explains why an act or law of the law making organ is null and void and why an individual who seeks redress in a court of law is not under obligation to obey such law. In other words a statute declared unconstitutional does not impose nor create duties for those affected or on whom it is meant to be binding.

The bindingness of law is considered to be a matter of or giving rise to obligations. In other words, that what a legal requirement, say a legislative enactment or law, give rise to are legal obligations which are held to be distinct from moral obligations. That means that those who support the view that obligations to obey the law are legal are in effect saying that the barefact that something is enjoined or forbidden by the law is a necessary and sufficient reason for doing or refraining to do what that law states. That would mean that obligation to obey a law is independent of the content of that given law.

But when judges exercise the power of review over legislative laws, what it emphasizes is that the bindingness that arises out of legal requirements is not a sufficient reason for establishing that citizens have obligation to obey such laws or laws in general. The possibility of reviewing and setting aside legislative laws that infringe against fundamental moral rights such as liberty of conscience,



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1 *Horace Davis, op. cit. p. 17*

freedom of thought, freedom of association, freedom of occupation and choice of carriers, political participation, freedom to pursue one's own plan of life etc is a telling argument that obligation to obey the law is not just because the legal directive in question is a law. In fact, to raise such argument would be to beg the question. If a law is said to give rise to obligations because it is the law, and if it is a possibility that such laws, regarding their content, are subject to review i.e. either being established as alright in terms of content or being set aside because the content is lacking in adequate consideration of fundamental rights, it follows, therefore, that obligations that arise out of a legal directive is not simply one of a legal type. It would be one that is derivative i.e. content regarding. This is another way of saying that the idea of conformity of laws to a given or assumed standard is paramount in the whole enterprise of law making. This, in plain language, is what judicial review in its essence and constitutional justification strives to established and affirm.

The argument is not oblivious of the fact that the exercise of judicial review is subject to abuse just as the legislative procedures through which laws are made are also prone to abuse. But what the argument so far has been concerned to stress and established is that when the practice of judicial review is properly exercised within a democratic and constitutional framework and order, it is an intellectually sound approach for correcting the obvious error inherent in the view that whatever legal directive or requirements comes out of the legislative processes gives rise to obligation. In other words, it debunks the view that such a legal directive is binding to all intent and purpose, and that such bindingness can be qualified in terms of obligation to the extent that a citizen is bound to obey such laws. What judicial review does, in essence, is a way of cultivating and establishing a shared sense of justice and the public good that are necessary components of laws and enactments.

According to Samuel Freeman, " the practice of the court of publicly justifying its decisions by issuing reasoned opinions makes public (in a way legislative procedures do not) the reasons and purposes behind legislation, and examine laws in light of the constitution. In upholding legislation against constitutional challenge, the court seeks to legitimate laws by showing how they are consistent

with the constitution"[2]. Furthermore, in his argument Samuel Freeman also hinted at the moral foundation that is found to inhere in the authorization to make laws, and the sense of justice that are expected to feature in every attempt at law making. In his words, Samuel Freeman opined that courts, through the practice of judicial review, "publicly demonstrate that laws are not unduly coercive but are consonant with democratic freedom. And in holding legislation unconstitutional, the court does not just check legislative failures of justice; it also supplies constitutional reasons for these failures. In both of these ways, judicial review can work to establish a public reading of the constitution and its moral foundations, and examine the laws in light of these principles"[3]

A possible intelligent meaning to the above, and to the entire bulk of arguments on the supposed connection between judicial review and the obligation to obey the law, in my own view, is this: Whoever would be obliged to obey a law that is constitutional is justified also, in refusing to obey or is under obligation to disobey a law that is declared unconstitutional. The reverse of the above statement should be something like this: whoever is not unprotected from being under obligation to obey an enactment (a law) of the legislature whose constitutional validity is not confirmed not upheld by the court, is also under obligation to obey an enactment which is found to be constitutionally valid. Such a case may not be each time, for example, where the power or review is clearly seen to have been abused or subject to misuse. But we are talking about situations where it can be clearly established that the courts are acting strictly in the light of the evident and available principles of democratic freedom. In such an atmosphere, the individual is under obligation to obey an enactment that is constitutionally valid. But the real question is how true is this standpoint or thesis?

My argument for that thesis is that the constitution through which we have established the standard for testing the validity of legislation represent a focal point of agreement amongst rational,



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2 *Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review" in Law and Philosophy vol. 9, 1990-91 p. 365.*

3 *Ibid*

self interested individual. This agreement is what Samuel Freeman calls "a shared precommitment". In his words, such an agreement is not a compromise nor is it born of a fundamental conflict of interest. It is rather a representation of "democratic citizens shared fundamental interest in maintaining the conditions of their equal sovereignty"[4]. Furthermore, according to Freeman, that "agreement captures their shared acceptance of and commitment to maintaining their equal status in the free pursuit of their ends"[5]. This "shared acceptance" and "precommitment" is perfected by the making of a constitution in which the a,b,c of the terms of their agreement is contained. It is this which necessitates the creation of "political institutions that tie themselves into the terms of this agreement. Judicial review, as one among several features of that constitution, is a part of democratic citizens precommitment to just social forms"[6]. Because the constitution contain the terms of agreement amongst self-interested and rational individuals and because the power and authority (either directly or indirectly) to amend that constitution is also with them, it is intelligible to assert that because terms of the agreement is a shared precommitment on their part, what the courts confirm to be constitutionally valid, and which is really held to be so of popular legislation, within the framework of this constitutional and democratic choice becomes what they owe or accept as obligatory on their part. "Popular will has its clearest and most original expression in a democratic constitution. And their is nothing about that agreement that would require delegating to those with the authority to make ordinary laws the final authority to decide the nature of constitutional conditions for the validity of those laws".[7] The obligations that this constitutional choice gives rise to are obligations that are voluntarily accepted, owed and created; they are not imposed.

It is in this sense that the doctrine of judicial review in its practice and essence is found to be intelligently connected with the idea and concept of obligation to obey the law the way it has been



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4 *Ibid. p. 356*

5 *Ibid*

6 *Ibid*

7 *Ibid. p. 360.*

conceived in this work. In a simple sense, therefore, one can state that an individual or a citizen of a democratic society who has a sense of shared acceptance and commitment to maintaining his equal status with others in the free pursuit of their end and interest, in an agreement with others of like status and profession, within the framework of a constitutional arrangement and choice, has, by the terms of that agreement, the obligation to obey such a law once it can be established that such laws are valid according to the terms of that constitutional arrangement and framework which he is a party to. It is in upholding the terms of this obligation to obey the law of the law making institution that he seeks redress in a court of law where the term of agreement and the specifics of that precommitment, documented in the form of a written constitution, is contravened. What judges do when they exercise that power of review over legislative laws is supply constitutional reasons either that those laws are consonant with democratic ideals enshrined in the constitution or that those laws are contrary to the constitutional standard of justice. On both hands, judicial review examines the laws in the light of the terms of agreement outlined in the constitution.

So, whenever the power of review is exercised by judges either of two results will obtain: the enactment is certified as constitutional by the court or, the enactment is declared unconstitutional. If the former holds, an obligation is owed by the norm-subject, not imposed. If the latter is the case, the norm-subject is not counted as owing any obligation because the enactment declared unconstitutional ceases to be a valid law i.e. "dead law". As a result, it is not enforceable. In both of these ways, the idea of obligation to obey the law feature through the exercise of judicial review. When legislature is upheld, it is upheld for a reason and the presence of a vital factor necessary for every attempt at law making, hence the obligatoriness of such constitutionally certified acts. And where the opposite holds, it is the case that talk of obligation is mute because of the absence of vital factors necessary to the idea of law and its making. It is these "present and absent vital factors" emphasized through the exercise of judicial review that attracts my attention, and which informs my position in asserting that the doctrine of judicial review is connected with the idea of obligation to obey the law. The answer which judicial review gives to the question is the barefact that something

is forbidden or enjoined by the law a necessary and sufficient condition for obeying it is that the fact that something is forbidden or enjoined by the law is not sufficient reason for lying under the obligation to obey it. The idea of conformity to a given and established standard is of relevant importance. The question now is whether those standards are legal or moral.

Given this picture of the idea of obligation that arises out of the exercise of the power of review, my view is that such obligation are moral, and not legal. I shall have to dispense with the idea of prudential obligation and those who subscribe to it and what the arguments for such are. The reason is that the controversial perspective in which the concept of obligation to obey the law is approached resides more in those who believe that it is legal and those who think it is moral. As earlier said, the various theories of law have their competing theories of obligation and it is an established fact that the durable antagonism amongst these various theories of law, and which are carried over to the idea of obligation to obey the law, consist in whether that obligation is moral or whether it is peculiarly legal. This is the next task to tackle.

It was established in chapter two under the theoretical basis of judicial review "that the doctrine of judicial review of legislative enactment would be an impossibility without a long antecedent history of legalism of a high regard for law and for the interpreters of the law[8]. In a conceptual sense, the history of legalism" and the high regard for law mentioned, in my view, consists of moral principles enshrined in the constitution in the form of authorization.

Where it can be established that laws made are contrary to what is contained within that authorization, and the end for which they are made, it is to this extent that it can be said that the party to that morally-committed agreement is not bound morally to obey such laws. And where the laws are in conformity to the morally committed agreement, he assumes and owes it as binding, morally, to act in accordance with what is either forbidden or enjoined. In both of these ways, what feature prominently is the moral dimension of the obligation and non-obligatoriness of the individual.



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8 *See note 11. in chp. 2*

From the idea of authorization, it is evident that talk of legal obligation falls. The bindingness of law is taken to give rise to obligation which are not moral but legal. If it is legal, it means that what is enjoined or forbidden by a law is obligatory, independent of the content of that law. But this cannot be true, if it is accepted that the authorization that confers authority on the law makers are moral. Like I said, such authorization are issued or given in what is described as a morally-committed agreement. It will then not be a sufficient reason that something is enjoined or forbidden by law, therefore it must be obeyed or obligatory.

It is where the moral dimension of this authorization is forgotten or encroached on by law makers that often leads to an individual seeking redress in a court of law to correct, so to say, a moral error. If the error is in the legislature, it may be corrected by the document of authorization, and if in the constitution, it may be corrected by the people. The people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. A resister could in this sense be one who looks on the judge to acquit him.[9]The judge, in exercising the power of review over a legislative act determines one of three things. One he determines whether an individual has received constitutional treatment under a law or not. Two, determine whether a law made is constitutional, providing constitutional reasons for confirming such laws and showing how they are consistent with the constitution, therefore establishing it beyond challenge in the future. Three, hold a legislation unconstitutional by declaring it unjust, injurious to fundamental rights and ultra vires. Where a judge, through the power of review, establishes any of these stand point, what he is found to entrench is not only the provision of constitutional reasons for legislative failure of justice, but also, the moral criteria for the validity and authenticity of laws. Moreover, he is found to refer to the moral limitation placed on law makers by virtue of the authorization - moral trust, authority handed over to them at the point of election into the various political institutions created for law making. In essence, therefore, the possibility before us is that of establishing that it is not a sufficiently powerful



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9 *Elliot Jonathan Debates on the Several State Conventions on the Adoption of the Federal Constitution, second Edition, 5 vols., (J.B. Lippincott, 1881) pp. 94,433*

reason that something is enjoined or forbidden by the law and therefore, one is under obligation to obey the law. Indeed, it is saying that, according to what is done through power of review, there is no prima facie obligation to obey a bad or unjust law where there are moral limitations on the authorization of the law making authority. It is this moral limitation on the authorization of law makers that judges, through power of review, brings into focus and public knowledge, when they provide constitutional reasons for legislative failure of justice. It is saying, with all effort, that our obligation to obey the law is moral when considered through the significance of the doctrine of judicial review.

Aside from the above, another useful way of looking at the moral dimension of our obligation to obey the law through the doctrine of judicial review is to examine the intellectual background or the historical context of specific political and democratic system wherein the doctrine of judicial review has been accepted and entrenched as part of the process of governance and democratic freedom. For example, the American tradition provides such a rich source of an intellectually significant analysis of the moral bases of judicial control on legislative enactment. This moral bases of such an intellectual background are arguments in favour of the view that respect for law ingrained in the American ideal of democratic freedom are moral rather than legal. The idea of conformity that are raised through the practice of judicial review, considering the intellectual background of the American constitution, have to do with the moral principles that supports the provisions of the constitution. In this sense, therefore, the essence of the constitutional legitimacy of the doctrine of judicial review are the moral principles littered all over in the document, and to that extent, the idea of conformity entailed in striking down acts or legal directives as unconstitutional are moral criteria. This being the case, this expresses the belief that obligation to obey the law, according to the constitutional essence of judicial review is external to the law i.e has to do with the content. This means, therefore, that obligation to obey the law is derivative. What then are the moral basis or criteria in this intellectual background?

The intellectual background, origin and sources of the American constitution, for example, reached back deep into the distant past before the ratification of 1787. "Its sources", says Gordon S. Wood, "have often seemed to be the whole of previous history. No thinker, no idea, has been too remote, too obscure, to have been involved somehow in the making of the constitution"[10]. Questions of political philosophy and theory were such that the founders of the American state were deeply interested in, and these set of issues, ideas and principles formed the prevailing political culture that dominated the tenor and nature of provisions that are found literally littered all over in the constitution. The question then is what is the characteristics of that political culture and in what sense does it establish, the idea of a moral basis as significant not only to an enlightened understanding of that constitution, but also as an adequate account of the moral basis of the obligation that are said to arise from the constitution? According to Gordon Wood, "the most pervasive characteristic of that political culture was republicanism, a body of ideas and values so deeply rooted that it formed the presuppositions of American thinking. This body of thought not only determined the elective political system the Founders believed in; it also determined their moral and social goals"[11]

The civic and moral values that form the basis of the social and moral goals which this republican political culture strove to achieve had their origin in the great era of the Roman Republic. This period of Roman Enlightenment saw writers such as Cicero, Sallust, Tacitus, Plutarch etc leaving "a collection of writings embodying beliefs and values - about the good life, about citizenship, about political health, about social morality that have had an enduring effect on Western culture"[12]. One such enduring effect can be seen in the period of the Renaissance interlude, a period that emphasized



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10 *Gordon S. Wood, "The Intellectual Origin of the American Constitution" in The National Forum - The Phi Kappa Phi Journal, vol. lxiv number 4, 1984, p. 5*

11 *Ibid. p. 5*

12 *Ibid. p. 6*

the tradition of a classical conception of political morality ie. a morality that stresses sound moral character of the independent citizen as the prerequisite to good politics.[13]

The effect of this classical conception of political morality was passed into the culture of Northern Europe[14]. The evidences for this can be located in the writings of English philosophers and political theorists such as John Locke, John Trenchard, Thomas Gordon and the Social Contract ideals of Jean - Jacques Rousseau. The prevailing tenor of the writings of these men was not only the idea of republicanism, a prominent part of their writings are the theory of balanced government, and the doctrine of separation of powers.[15] These were the early writings that drew much from the natural law doctrine prevalent at that time of political crisis, upheavals and instability. The idea of personal and political liberty, constitutional and institutional limitations on the use of governmental powers, of the rule of law and not rule by law, of private and property rights[16] and the whole idea of a fundamental, natural rights of all mortals, quite germane and expressible in the natural law doctrine of the time were ideals of moral and social significance on the intellectual background of the American constitution. It is to this period that scholars trace the "natural law foundations" of the American constitution.[17] And because of the natural law foundation that it has, it is a telling argument that the basis of the support or the rejection of the people for law derives from the moral values that are inherent in such laws or that are found missing. The constitutional philosophy was founded on the idea of justice, liberty for all, principles which are drawn from the natural law tradition. And the constitutional reality - of which the doctrine of judicial renew is one - is that laws will conform to these standards and safeguards which constitute the basis of that constitutional philosophy.



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13 *Ibid p. 6*

14 *Ibid. p. 6*

15 *Ibid p. 7*

16 *Ibid p. 8*

17 *Lon Fuller, op. cit. p. 99*

In the light of these, therefore, the idea of obligation that stems from the doctrine of judicial review is one that is moral, (or more suitably) one that derives from the content of the law. Such an obligation is external to the law. From this, it is clear that an individual or citizen, given the experiences and theoretical under pinnings of what judicial review does and establish, and its essence all together, is under obligation to obey the law once it can be established that such a law is made in conformity with constitutional standards whose ruling philosophy is the idea of justice, equality and liberty for all, principles which find themselves expressible, most suitably in the natural law doctrine.

Given this picture of the connection between judicial review and the obligation to obey the law does it then follow that an invalid act is no law? This objection can be stated in the varying attitude or shades of opinions in which it can be expressed. In the first place, it could mean that actually what was declared ultra vires or invalid was not a law. It could also mean that acts or statutes of the legislative organ are only presumed to have only the 'shadow of law' not 'the substance or figure of law' until it has passed through some institutional or popular test, judicial review being one of those tests. It could also mean that what judicial review does, in actual fact is to question the procedural legislation, not the substance of the enactment, such that what is declared invalid is never the law but the formal procedural criteria of law making. The reasoning behind all these shades of opinion is the view that "What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law... it is the law that prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law ... is illegal".[18]

These are intelligible objections to the significance of judicial review and the obligation to obey the law. However, my contention is that these arguments are misconceived. In the first instance, it could not be true that what was declared invalid was no law at all. If it were no law at all, then it behoves us to ask why it was brought before the court of law in the first instance as law or why it



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18 *J.Ungoed - Thomas, in Cheney v. Conn (1968) ALL ER 779 at 782,*

was conceived as having or imposing obligation on individuals at all. When judges declare such as invalid, it stands as a fact that such statutes are followed or there is a refusal to follow because of the fact that they are laws already, and that it is by virtue of that fact that they are laws, that informs us of the reason for their being brought. The argument often is that what is a law, having passed through the formal procedural criteria cannot be declared as no law at all. But this is not true. There are cases of law that have passed through such formal procedural criteria and yet, they cease to be laws if set aside by an higher authority for certain reasons. Take for example, in a federal structure where the federal and a particular state government make law on their own level of authority, but apparently with clashes in the substance. The former authority often takes precedence and that of the latter ceases to be law. In such cases one valid law gives way to the other. One ceases to be a law the defining tune always couched in the expression "to the degree of the inconsistency declared void". The fact that judges interpret statutes (and review them) and keep shaping and reshaping their contents does not mean that they are not 'laws' until interpreted (and reviewed). Clay is clay before, during and after it has been moulded[19]. It is possible for judges to declare an act as void ab initio meaning that it was no law from the beginning but it is also possible to declare them invalid or no law at that point of review without saying from the beginning. In the light of the above, therefore, it is still intelligible and nothing is misconstrued in saying that judicial review does declare a congressional law or statute as invalid, and to that extent cease to bind the individual or create obligations for them.

Arising from the above, the second shade of objection i.e. that statutes are only 'shadow' not substance of law falls. If they are only shadow, then they will not be presented as law. But the fact remains that they are presented and also, followed as law regulating lives of people. However, the third objection appears critically strong i.e that what it does is not to declare an enactment as invalid but only the procedural criteria. In other words, that "judicial review is concerned, not with the



19 *Dias, op cit p.452 emphasis mine*

decision but with the decision-making process ...."[20]. But then it can be argued that what makes judicial review applicable to the decision-making process also, by extension, makes it applicable to the decision itself, for lack of care for decision-making process could as well reflect in the decision or the substance of the statute made. As such judicial review is not only concerned with the decision making process, but also the very substance of the law. The enactment of a bad, unjust law can be declared invalid and hence, no law once such enactment are contrary to the constitutional limitations. The conceivable thing is not why such a law should have been accepted but rather, the conceivable thing is that judicial review, within constitutional justification, can declare such laws invalid i.e. as no law at all to the extent of its inconsistency and non-conformity.

On the whole, therefore, the essence of the doctrine of judicial review is sourced in the natural law foundation inherent in the American Constitution. This is in consideration of the intellectual background and the philosophical and political ideals i.e. moral and social goals and values of a limited government, balanced government etc upon which it is founded. From this it follows that what judicial review does, in the light of the constitutional provision, just like the ideals of the natural law doctrine, is that it provides the criteria by which we identify, explain, and evaluate the positive law[21] that operates within the framework of that democratic society. Therefore, an adequate account of the justification and obligatoriness of positive law, within that democratic framework, will be sought by recourse to the criteria or the basis by which such positive law are identified, explained and evaluated altogether. Once this is the true picture of judicial review and its essence, it becomes clearer that judicial review, by supplying such an evaluative criteria, not only establishes that obligation to obey the law is more of moral consideration than legal, but also, that it has momentous lessons to teach us on the jurisprudential problem of the obligation to obey the law.



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20 *Lord Brightman, in Chief Constable of North Wales Police V. Evans (1982) 3 ALL ER 141 at 154, (1982) 1 WLR 1155 at 1173.*

21 *See Olufemi Taiwo, op. cit. p. 39*

# CHAPTER SIX

# CONCLUSION

The thesis examined in this study is the view that our obligation to obey the law, particularly laws enacted by the legislative body or any law-making constitution in a democratic system of government, such as the congress in the United States of America, is moral rather than legal. By saying such obligations are moral I mean that the obligation in question derives from the content of the law. In other words, that such law does not create obligation just because it is a "law" but that such obligation is created once it can be established that the law in question promotes justice and that the liberty of individuals are left intact.

In sustaining this viewpoint, this study focuses attention on the essence and practice of the doctrine of judicial review. It is my conviction that a precise understanding of the doctrine of judicial review as distinct from judicial interpretation, provides a significant approach through which the problem of obligation to obey the law can be best elucidated and from that stand point, answered. Judicial review, in this context," is the power of the court, in appropriate proceedings before it, to declare a legislative or executive act either contrary to, or in accordance with the constitution, with the effect of rendering the act invalid or vindicating its validity, and so, putting it beyond challenge in future".[1]

In its essential form, judicial review is held to be distinct from judicial interpretation. The former seeks to establish the validity and authenticity of law in the light of its obligatoriness, and enforceability while the latter only seeks to know or perhaps, establish the meaning of legislative acts. To this end, judicial review is argued to be aptly connected with the idea of obligation to obey the law. In fact, a critical look at the leading opinion of chief Justice John Marshall in *Marbury V. Madison* (1803) wherein the historical basis of judicial review is located, reveals a glaring connection between judicial review and the idea of obligation to obey the law. According to John Marshall, "the

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1 *B.O. Nwabueze, The Presidential Constitution of Nigeria ( London: C. Hurst and Co., 1982) p. 309.*

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 act prohibited and acts allowed are of equal obligation ... " It is a proposition too plain to be contested that in a true, democratic government, the constitution plays the role of a fundamental law which regulates the framing and making of all other laws. It also spells out the limits and power of all organs of government. It states the conditions according to which all laws we made. According to Freeman, "the foundation of the constitution, and therewith the laws, of a democratic society is the equal freedom of individuals, based in the capacity of each to determine and rationally pursue his good in accordance with social requirements... Freedom is not doing what one pleases in the absence of law and all other conditions, but the rational determination of one's good in accordance with laws a person can prescribe for himself. A condition of freedom in this sense is that a person be able to accept the constraints imposed upon his conduct by positive laws and other social conventions[2] that are made in conformity with the foundation of justice, fairplay and liberty inherent in the constitution to which he is a party.

As I have argued in chapter five[3], whoever is obliged to obey a law that is constitutional, is justified also, in refusing to obey or is under obligation to disobey a law that is declared unconstitutional, and conversely, whoever is not unprotected from being under obligation to obey an enactment (a law) of the legislature whose constitutional validity is not confirmed nor upheld by the court i.e is also under obligation to obey an enactment which is found to be constitutionally valid. The assumption is that the circumstances in which this holds is a true democracy.

The study, in the light of the fact that a democratic system is needed to justify some of its assumptions and hypotheses, draws heavily from the American experience and history where applicable. The understanding of the exercise and essence of the doctrine of judicial review established in this study and from which the idea of the obligation to obey the law is looked at is, no



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2 *Samuel Freeman, op. cit. P. 341.*

3 *See chapter five, p. 72.*

doubt, uniquely American. This choice is guided by certain convictions. In the first sense, the practice is uniquely an American practice. By that I mean that it was first invented and applied as a rich source of legal check on the overtly political branches of government on the American soil. Secondly, the system of government practised in the American situation and condition is and has been an ideal example of a democratic system of government. It is within this system of government that the essence and purpose of the doctrine of judicial review can be best practised to achieve its natural purpose(s). Thirdly, the independence and freedom which the judicial arm of government requires to exercise the power of review over legislative laws can be found fruitfully existent in the American condition. While it is true that the English system of government is also democratic, and pretty well maintains public liberty,. it is, nevertheless, no misnomer that the judicial branch of government does not enjoy that authority of constitutional review as practised in the American system of government. Fourthly, the American system of government has presented to the observing world a rich history of legalism. This manifests in the respect for law and for the interpreters of the law over a long period of time. Moreover, it has presented one of the most stable systems of government with the constitution still intact for a very long time with only very few amendments. Lastly, an academic mind seeks for truth and knowledge wherever it can be found.

To deal with a general problem such as that of the obligation to obey the law, another situation or condition of a general nature is expected to be utilized. This is the reason why the American experience has been used to explain the fact that, granted that a true democracy can exist in all countries, the existence of the practice of judicial review can be seen as a means of sustaining the argument that our obligation to obey the law is more of a moral one rather than legal. In specific terms, this study has made use of the American practice, experience and history in examining the historical and constitutional basis of the doctrine of judicial review. The section on the connection between obligation to obey the law and the doctrine of judicial review in the fifth chapter also draws much from the American experience.

The conclusion drawn from the whole body of this work is that once we come to the understanding of the practice and essence of the doctrine of judicial review, then we can accept and establish the view that our obligation to obey the law stems from the moral worthiness of the content of the law. To my mind, the primary idea, emphasized through the doctrine of judicial review, is the view that the conformity of legislative laws, which are said to create obligation on individuals, with an higher fundamental law is necessary and significant in the principles of constitutional government; that when judges or the courts review a particular legislative law on the basis of a written constitution, what they are found to entrench is not only the provision of constitutional reasons for legislative failure of justice but also, the moral criteria for the validity, authenticity and obligatoriness of laws. To this end, obligation to obey the law is derivative i.e. informed by the moral worthiness of such laws rather than legal. There are always challenges to what is framed into a law in a democratic order, especially where such laws are found wanting in the agreed details of democratic ideals and principles entrenched and outlined in the constitution of democratic systems of government. As a result, the doctrine of judicial review not only enhances our understanding of the fact that obligation to obey the law is moral; it also establishes the democratic significance of the doctrine of judicial review. This democratic significance rests on the assumption that the courts can, and do play a crucial role in maintaining the conditions of democratic and popular sovereignty.

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