CHAPTER VI

SUPREME COURT AND JUDICIAL REVIEW AND ITS COMPARISON AND CONTRAST WITH THE SUPREME COURT OF THE U.S.A.

Judiciary and The Judicial Review:

One of the most important features of the era of constitutionalism that has caused many eyebrows to be raised has been admired and given wide recognition, is the doctrine of 'judicial review'. It is the logical outcome of the concept of constitutionalism, which means a limited government ensured by a written constitution. In such a constitutional framework judiciary is endowed with the power of judicial review to see that the government has not offended against the limitations placed on its competence by the constitution. Judicial review means "the power of the highest court of a jurisdiction to invalidate on constitutional grounds the acts of any other governmental agency within that jurisdiction."

In other words it is the examination by the judiciary of the constitutionality of statutes made by the government.

The emergence of the doctrine of judicial review is the result of the ever-continuing struggle of mankind for freedom. This struggle became complex because, as the struggle moved forward the urge in the people to be governed well was also generated. In other words the people wanted to have a good government. This end was sought to be achieved by an increasing degree of intervention

by the state without destroying liberties. Consequently, there were two competing forces viz., the force of authority and the force of liberty. The task before the constitutionalists was to find out some way by which a proper check could be imposed upon the authority of the state and simultaneously to safeguard the liberties of the people. The solution of these two conflicting forces was found in the device of written constitutions. But written constitutions needed some agency to sustain their supremacy. It was felt that a written constitution, "would promote discord rather than order in society if there were no accepted authority to construe it, at least in cases of conflicting action by different branches of government or of constitutional government action against individuals."¹ It came to be widely recognized that judiciary was the one institution which could be trusted with this task and which could be vested with the power to meet the inherent dangers from the positive arms of the government, the executive and the legislative organs of the government.

Judiciary, thus came to be entrusted with the function of being the guardian of the constitution, guardian of the rights of the people and also arbiter in the Centre-State relations in a federal polity. Metaphorically its position can be likened to that of a referee. In the performance of its duty it depends upon its power of judicial review, by holding the acts which are in contravention of the provisions of the constitution as void. Judicial review thus is, "in essence an endeavour to judge positive law in

the light of ultimate value. It is the means by which human aspirations as expressed in constitutional absolutes, are 'concretized' into a living constitution.¹

Judicial review has become a central feature in the present era of constitutionalism but it has its roots in the past. It can be traced to the Rig Veda wherein it is mentioned that the function of the judiciary is to "interpret law for the guidance of mankind and to bring purity to life (Id. 1)....to guide and control the law breaking executive, Indramuravam (Id. 17)...."²

Turning to the Greeks, Aristotle also made a distinction between the legal order in which law was above the rulers and the legal order in which rulers were above the laws. The former was considered as the characteristic of a good state and the latter of a bad state. The Athenian law also maintained a distinction between 'nomoi' and 'psephismata'. The former could not be modified by ordinary legislation and a special procedure for amendment was required and the latter that is 'psephismata' were valid only if in conformity with 'nomoi'.³

In England also Coke pronounced this doctrine in Bonham's case when he observed: "...... 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 and reason, or repugnant or impossible to be

² Rig IV 2.4.
performed, the Common Law will control it and adjudge such law to be void."

This principle of superiority of common law over the Parliament which Coke advocated and defended strongly was however rejected in England and even cost him his job. As a result of the struggle for supremacy between the King and the Parliament in England, Parliament emerged as sovereign which ipso facto deprived the courts the power of judicial review. In the absence of this struggle for supremacy between the King and the Parliament how the concept of judicial review may have fared in England is any body's guess. Since the supremacy of the Parliament is established the courts are not in a position to challenge the validity of any legislation enacted by the Parliament. Affirming this position of the courts, Justice Willies observed in Lee v Dude and Torrington Junction Railway Co.¹, that ".....we do not sit here as a Court of Appeal from Parliament......if an Act of the Parliament has been obtained improperly, it is for the legislature to correct it by replacing it; but so long as it exists as law, the Courts are bound to obey it..."

Coke's dictum though rejected at home, found support in the United States where the doctrine of judicial review found explicit acceptance for the first time. In Europe this doctrine was detested and was not accepted till after the second world war. The function

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Sir Erskine May writes that the "Parliament is not controlled in its discretion and when it errs, its errors can be corrected by itself."

of the judges to test the laws was considered as most objectionable by the well known jurists of the time. Thoma wrote that the "non-exercise of judicial review has been the traditional practice which was - who could deny it? - from the point of view of administration of justice (Justiz) absolutely satisfactory......Non-exercise of judicial review...... is German even European tradition and certainly causa favorabilis."¹ Duguit writing about the French practice wrote that "French jurisprudence has never admitted, nor will admit today that French Courts may refuse to apply a law because of its constitutionality."²

Another jurist Signorel wrote in the same strain that "the power to pass on the validity of laws......is......a very dangerous weapon......for an active participation in the field of politics where they could lose a great deal of authority, prestige and independence."³ This was the trend of most of the jurists of the time in Europe towards judicial review and it continued till the second world war. The theories of the positivists influenced the thinking which in practice resulted in germinating the seeds of totalitarianism which cropped up in the early twentieth century and Europe witnessed the emergence of dictatorships. The freedom of the individual was crushed. The longing for freedom erupted against the dictatorships soon and after the second world war in Europe also the move to safeguard the rights of the individual started,

¹ Thoma, "Das richterliche Prufungsrecht," 43 ARCHIV DES ÖFFENTLICHEN RECHTS 267 at 274 (1922).
³ Ibid p. 556.
which set in the era of constitutionalism there also. The European States looked to the Constitution of the United States and imported the principle of judicial review, though with variance.

In Asia and Africa also most of the newly independent states accepted this doctrine as a legacy from the Privy Council which had been exercising the power of judicial review over colonial legislation. Most of the former colonies have found "that both the high road of rebellion against the doctrine of parliamentary supremacy and the low road of subservience to that doctrine lead to the citadel of judicial review."1

Judicial Review in Democratic and Federal Governments:

In a democratic system abuse of power is intolerable, it carries the seed of corruption and a threat to the entire democratic fabric.2 It is in this context that the concept of judicial review has importance in democracies. It is a great check upon the arbitrary exercise of power by any agency of the government. Administration with no practical limits on its discretion, observes Justice Douglas, can become a "monster" marking the "beginning of the end of liberty."3 In fact it would not be incorrect to say that judicial review is the "soul" of democracy. This proposition can be better understood if an attempt to analyse the position and working of the doctrine of judicial review in democratic countries

in contrast with the position in the totalitarian states is made.

In totalitarian states the Courts are denied the power to review the acts of the governments. In spite of the fact that almost all the communist countries at present have written constitutions, and also provide for fundamental rights, justice is enslaved, for the courts are not the repository of the power to protect these rights. They are in fact required to uphold the ideological regime and are an instrument in furthering the policies of the party in power. They have no authority to test the law, but are bound to enforce that "Law" as is determined by the Party. For example, the Russian Constitution embodies a detailed list of fundamental rights but "the net effect of these rights is the offer of a deception" because the courts in Russia are not empowered sufficiently to protect the individual against the state. The courts are not given the power of judicial review as they have always been distrusted by the communists as the organ which serve the ends of capitalists. "The Court is an organ of power," wrote Lenin, "this is forgotten sometimes by the liberals. But a Marxist commits a sin if he forgets it."2 "In capitalist society," he further observed, "the court was pre-eminently a mechanism of oppression of bourgeois exploitation."3

3. Lenin, V. 14 "The Immediate Tasks of Soviet Authority", Russian ed. Vol.XXII, p. 424. Vyshinsky an authority on Soviet constitutional law, also contributes to the same view. He writes, "a court of whatever sort is an organ of the authority of the class dominant in a given state, defending and guarding its interests. The bourgeois court is one of the keen weapons for repressing the toilers and resisting encroachments upon the system of capitalist relations." Law of the Soviet State (1948), p. 500.
The courts on the other hand are not isolated in this distrust. They are not kept outside politics, rather they serve as the "powerful and actual levers of the proletarian dictatorship," they are "an important and sharp weapon of the dictatorship of the working class." Constitutionally also the judges are "subject to the law," and in this context it is instructive to quote the Moscow University Herald: "this provision expresses subordination of the Judges to the policy of the Soviet regime which finds its expression in the law. . . . . The demand that the Judges be guided by the policy of the Communist Party is considerably wider than the demand for strict observance of the principles of legality, because the law itself gives grounds and leaves latitude for the application of political criteria. . . . ." In the Soviet Union thus the judiciary is not an independent organ to uphold the Constitution, to protect the fundamental rights, but it is required to fight the enemies of Soviet Government, to fight for the consolidation of the new Soviet system and to firmly anchor the new socialist discipline among the working people. The Courts

3. Article 112 of the Constitution of U.S.S.R.
4. Moscow University Herald, November, 1950, Quoted by Herman Finer Governments of European Greater Powers (1956) p. 847. Kalinin writes that "if a judge is a poor Marxist who does not know the Party decisions, is unable to fight strongly enough for the Party decisions he is no good." Quoted by Towster, Political Power in the U.S.S.R., (1948) p.302.
can not afford to be inadvertent to this duty. The press which is government controlled at once condemns the verdict of the judges, if not satisfactory and carries threats of disciplinary action. The Ministry of Justice then issues instructions to the Court to take notice of the comments in the press. Finer is thus not wrong when he says that "No Soviet person can have tranquil and serene faith in justice where the interests of the party and the state are touched."¹

The Constitution of China is more or less based on the pattern of the Constitution of Russia. In China also there is concentration of power in the hands of the party and it controls the entire machinery of the government. The Constitution of China like that of the U.S.S.R. provides for a number of fundamental rights but they are mere 'decoratives' for the judiciary there too, lacks the power to question the acts of the executive or the legislature. The Supreme People's Court, which is the highest court in China is responsible to the National People's Congress and its main function is not to protect the individual against the State, but to ensure the successful carrying out of the socialist construction and socialist transformation of the country.²

"Our judicial work must serve political ends actively," declares Shen Chun-ju, the First President of the Supreme People's Court, "and must be brought to bear on current central political tasks and mass movements." Policy of the party is the soul of the

² Article 3 of the Organic Law of 1954. "Guy Wint writes that the main duty of a judge is not to distinguish right from wrong. It is to further the cause of revolution." See Commonsense About China, p. 122.
legal system, legal work is merely the implementation and execution of party policy. Judiciary is thus 'neither the watch dog of the Constitution, nor a custodian of individual liberties.' The position of the judiciary in other communist countries, Rumania, Poland, Hungary, Albania, Czechoslovakia, North Viet Nam, North Korea, and East Germany is not different. In Cuba also the power of the Supreme Tribunal to test the constitutionality of a statute under the Constitution of 1940, has disappeared with the Cuba becoming communist.

Yugoslavia, however, is the first and the only communist country which has departed from this practice and the Constitutional Court of Yugoslavia has been vested with the power of judicial review under the new Constitution of April 7, 1963. The work of the Court is yet to be assessed. It is however, difficult to view the exercise of judicial review by the Constitutional Court with optimism because of the well founded principle of democratic centralism and single-party system in Yugoslavia. A recent publication on constitutional review in Yugoslavia quoted the Yugoslav writers to the effect that the Constitutional Court must, as a matter of course not retard the socialistic development in the name of abstract democratic principles.

3. Article 241, Paragraph I of the Yugoslav Constitution.
It is apparent from the above that in totalitarian regimes, judicial review finds no place. However in democratic countries it has approved a potential force and the more it protects the rights of the individual, the more it fulfils its purpose.

In a federal state the judiciary has a greater scope to exercise its power of review than in the case in a unitary state because in the former the judiciary is vested with the authority to see that the supremacy of the federal constitution is maintained, and that the centre does not invade the rights of the constituent units.

It is now proposed to examine at some length the working of judicial review in some countries with democratic and federal polity. It may however be pointed out that in some countries the judiciary is not vested with the power of judicial review expressly and that this power is derived from the provisions of the Constitution. The United States of America, Denmark, Greece, Ireland, Norway, belong to this category. The Constitutions of some Latin American countries Argentina, Brazil, Mexico, Chile, Guatemala, Uruguay and of Austria, Cyprus, Germany, India, Italy, Japan, Turkey and Yugoslavia - expressly provide for this power of the Courts.

Again not in all these countries the regular courts perform this task of testing the constitutionality of the acts of government. It is only in the United States, Switzerland, Denmark, Norway, Australia, Canada, Japan and India that the regular courts perform this function. But in Austria, Germany, Italy, Turkey and Yugoslavia, special Constitutional Courts have been established to discharge this function.

It would be proper to discuss judicial review in the United
States first, because it is considered a model by most of the countries the constitutions of which have incorporated the concept of judicial review.

The doctrine of judicial review has been in fact called "the American doctrine." It is by means of this doctrine that the Supreme Court of the United States has attained supremacy over other organs of the government and has been recognised as a unique institution in the world. Willis, an eminent authority on American constitutional law, writes that "it would be as rational to talk of a solar system without a sun" as to talk of a government in the United States without the doctrine of judicial supremacy of the Supreme Court. Whereas so much importance is attached to this doctrine, it is significant that it is nowhere to be found expressly in the Constitution. The Constitution was made the Supreme Law of the land by the framers of the Constitution but nowhere they laid down as to which organ of the government or institution was to sustain that supremacy of the Constitution. Corwin is of the view that "judicial review (of acts of Congress) was rested by the framers of the Constitution upon general principles which in their


2. "No feature of the government of the United States has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration and has been more frequently misunderstood than the duties assigned to the Supreme Court and the functions which it discharges in guarding the Ark of the Constitution." Bryce, The American Commonwealth, Vol.1, (1888), pp. 237, 250.


4. Munro writes "that the framers of the Constitution set boundaries to the power of the Congress and it was their intent that these limits should be observed. But how was such observance to be enforced by the Courts? The Statesman of 1787 did not categorically answer the question." The Government of the United States, 5th ed. p. 62.
estimation made a specific provision for it unnecessary."\(^1\) Hamilton however, clearly pointed out that the "interpretation of laws is the proper and peculiar province of the Courts." He further observed: "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 act 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; or, in other words, the Constitution ought to be preferred to the Statute, the intention of the people to the intention of their agents."\(^2\)

In the First Congress also during the debate on the Judiciary

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Mason and Beaney write in their book 'American Constitutional Law' (1955, p. 6) that in the Philadelphia Convention debates of 1787, at one point it was proposed that each House of Congress might, when in doubt, call upon the judges for an opinion as to the validity of national legislation. Madison said that a "law violating Constitution established by the people themselves would be considered by the judges as null and void." More than once it was suggested and urged with persistence that Supreme Court Justices be joined with the Executive in a Council of revision, and empowered to veto Congressional legislation. Certain delegates objected to this proposal, contending that the Justices would have this power any way in cases properly before them. Any such provision would be objectionable as giving the Court a double check. It would compromise the impartiality of the Court by making them go on record before they were called in due course to give...their exposition of the laws, which involved a power of deciding on their constitutionality. Other members of the Convention expressly denied that the Justices would sit in judgment as to acts of Congress. In the end the power of judicial review was not expressly granted.

Act most of the members supported the exercise of judicial review by the Courts. Madison speaking in the Congress, on the proposals which became the First Ten Amendments of the Constitution, said that the Courts would "consider themselves in a peculiar manner the guardian of these rights; they would be an impenetrable bulwark against every assumption of power in the legislative or executive, they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."¹

Credit however, goes to John Marshall for exercising the power of judicial review and enunciating the view that the Constitution envisages the power of judicial review to be exercised by the Court. He may truly be called the chief architect of "a new body of American jurisprudence by which guiding principles are raised above the reach of statutes and state, and judges are

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Abraham Baldwin (Ga): "It is their province to decide upon laws and if they find them to be unconstitutional, they will not hesitate to declare it so."
John Page (Va): The Constitution ought to be left "to the proper expositors of it," the Judges.
William Smith (S.C.): Question of removal power should be "left to the decision of the Judiciary," who on a mandamus "would determine whether the President exercised a constitutional authority or not."
Alexander White (Va): Imagine the legislature may construe the Constitution with respect to the powers annexed to their department, but subjects to the decision of the Judges."
Elbridge Gerry: "The Judges are the constitutional umpire on such questions... We are not the expositors of the Constitution. The Judges are the expositors of the Constitution and Acts of Congress. Our exposition, therefore, would be subject to their revisal. The Judiciary may disagree with us and undo what all our efforts have laboured to accomplish."
Charles Warren, The Supreme Court in the United States History (1923), 83-84.
entrusted with a solemn and hitherto unheard of authority and
duty."\(^1\)

It was in *Marbury v Madison*\(^2\), that the doctrine of judicial review was enunciated by Chief Justice Marshall. The occasion for this case arose as a result of political struggle going on amongst the Federalists and Democratic-Republicans. Jefferson's Victory in the Presidential polls in 1800, hit the Federalists, who were in majority in the Congress and till then in control of the Presidency as well. However, before retiring President Adams got the Judiciary Act of 1789, remoulded and a number of judicial positions were created for the federalists. Commissions for these 'mid-night judges'\(^3\) were signed by the President but some of them could not be delivered to the persons concerned when President Adams relinquished his office. One such victim was William Marbury. President Jefferson declined to deliver the commission issued to Marbury by his predecessor. Marbury filed a petition for a writ of mandamus, to compel the delivery of the commission to him. The Supreme Court at that time was packed entirely with the federalists and was presided over by John Marshall\(^4\) who was a staunch

2. 1 Cranch 137 (1803).
3. Chief Justice Marshall's appointment also falls in this category.
4. Henry J. Abraham is of the view that Marshall should have dis-qualified himself from sitting in Marbury's case because of direct interest and personal involvement with both its fundamen-tal issue and its personnel. It may be noted here that Marshall before coming to the Supreme Court as Chief Justice was Secretary of State under Adams' administration and it was he who was responsible for the non-delivery of the commission. (See Abraham, The Judicial Process (1962), pp.273, 276).
There were three questions before the Court:

(i) Has the applicant a right to the commission he demands?
(ii) If he has a right and that right has been violated, do the laws of his country afford him a remedy?
(iii) If they do afford him a remedy, is it a mandamus issuing from this Court?

To the first two questions, the Court answered in the affirmative. It held that the applicant had a legitimate right to the commission, and that the laws of the country did afford him a remedy as well. But answering the third question the Court held that Section 13 of the Judiciary Act of 1789 which conferred jurisdiction upon the Supreme Court to issue a writ of mandamus was unconstitutional. The Chief Justice explained that Section 13 of the Judiciary Act of 1789, was unconstitutional because by incorporating it into the Constitution, the Congress had added to the original jurisdiction of the Supreme Court which Article III of the Constitution does not permit. Consequently, the remedy, that is, the writ of mandamus issued from by the Supreme Court under the authority of unconstitutional power, was also to be unconstitutional. In unmistakable terms, the Chief Justice laid down that "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule......A law repugnant to the Constitution is void......court as well as other departments are bound by that instrument."¹

John Marshall depended for his judgment in the present case

¹ Marbury v Madison 1 Cranch 137 (1803).
on the language and spirit of Article VI, Section 2 and Article 
III, Section 2, of the Constitution. Article VI, Section 2, lays 
down that "This Constitution, and the laws of the United States 
which shall be in pursuance thereof, ......shall be the supreme 
law of the land; ......" And Article III, Section 2, provides 
that "This judicial power shall extend to all cases, in law and 
equity, arising under this Constitution......."1

It is with the support of language in these Articles of the 
Constitution that Marshall pronounced his famous dictum, "We 
should never forget that it is the Constitution we are expounding 
......"2 He made it clear for all times to come that (i) the 
Courts have the power of judicial review, (ii) that the Constitut-
- tion is the supreme law of the land, and lastly (iii) that the 
original jurisdiction of the Supreme Court can not be changed by 
the ordinary law of the Congress3.

Marshall's judgment has been described by his biographer as 
"a coup bold in design and as daringthat by which the Constitution 
had been framed."4 Schubert has called it as "the rib of the 
Constitution."5 But such assertions have not gone unchallenged. 
Westin considers the opinion as a "shimmering exercise in cons-
-titutional logic." And with this he writes, "Marshall launched

1. Marbury v Madison 1 Cranch 137 (1803).
2. Ibid.
Vol. I and III, pp. 323, 141, respectively.
judicial review on a choppy sea." Further, Charles Black dis-
credits Marshall's claim as to the one who gave the authoritative
expression of judicial review and he describes this belief as a
'myth', for before Marshall delivered his judgment in Marbury's case
judicial review had already been established. "Marshall intellect-
ually, was one of those frightening people who have the air of
seizing something by force even when picking up a plum of the
ripest and readiest to fall,"

There is some truth in the above view but it can not be
denied that certainly it was Marshall who for the first time
emphatically and with such a clear vision talked of the concept
of judicial review. Judicial review in fact can not be talked of,
without reference to his name.

Further it may be pointed out that the decision in Marbury's
case has since (that is 1803), evoked protests from many a quarter

1. Charles A. Beard, The Supreme Court and the Constitution,
2. In 1794, in U.S. v Yale Todd, also the Supreme Court declared
a federal statute unconstitutional. This case was however,
never reported.
4. Jefferson who was a republican denounced judicial review in
many of his letters to his friends. He believed that republic-
anism could be measured in no other way than in the complete
control of the people over their organs of the government. In
his letter to William C. Jarvis, he wrote, judicial review was
a "very dangerous doctrine indeed" and incompatible with true
reading of the Constitution, which had "wisely made all the
departments co-equal and co-sovereign within themselves."
Letter dated September 26, 1820.
Cf. M.J.C.Vile, Constitutionalism and Separation of Powers,
Taylor also joined Jefferson in attacking the validity of jud-
icial review. The proper role of judges, he said, was to en-
force law, but "admitting that a power of construing is nearly
equivalent to a power of legislating, why should construction
of law be quite independent of sovereign will, when law itself
is made subservient to it?"
Cf. M.J.C.Vile, Constitutionalism and Separation of Powers,
and the result was that during the fifty years following this decision no federal law was declared as unconstitutional by the Court. But in 1857, in Dred Scott v Sandford\(^1\), the Supreme Court declared an act of the Congress - 'Missouri Compromise' - as unconstitutional\(^2\). After this case the Supreme Court has been exercising this power quite frequently. But the controversy concerning its legitimacy is not yet over in the United States\(^3\).

The controversy has in fact remained 'ever' alive with the steady expansion of the power of the Court. It became acute during the 'New Deal Era' when the 'due process clause' was so interpreted by the Court as to serve the interests of propertied class\(^4\). The 'New Deal Statutes' were declared as unconstitutional so often that the then President, F.D.Roosevelt had to think of reforming the Court. He proposed to the Congress to pass legislation for the reorganisation of the Court. He sought the power from the Congress

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1. 19 Howard 393.

2. The Act was declared violative of the Fifth Amendment of the Constitution because it deprived the slave owners of their property without due process of law.

3. Felix Frankfurter observes that the persistence of this talk that the Supreme Court has usurped the power of judicial review, was due to lack of historical scholarship, combined with fierce prepossessions. Felix Frankfurter, A Note on Advisory Opinions, Harvard Law Review, Vol. 37, 1924, p. 1003.

4. The propertied class found support from the Bench of the Supreme Court because majority of the judges were conservatives. Out of the nine judges, four judges namely; Justice Butler (67), Justice McReynolds (72), Justice Sutherland(71), and Justice Devanter(74), were the well known die hards of their time. The liberal side was represented by three judges, Justice Brandies(77), Justice Cardozo(63) and Justice Stone(61). The remaining two, Chief Justice Hughes and Justice Roberts held the balance and Roberts occasionally voted with the conservatives.
to appoint one judge for each judge reaching the age of seventy and increase the strength of the Court from nine to fifteen. The calculated aim of seeking this power was to pack the Court with men of his choice, so that his policies were upheld. He charged the Court for acting not as a judicial body but as a policy making body. "The Court in addition to the proper use of its judicial functions," he remarked, "has improperly set itself up as a third House of Congress - a super legislature as one of the Justices has called it - reading into the Constitution words and implications which are not there, and which never were intended to be there."¹

But as the proposals came before the Congress, once again the debate started on the point - whether the power of judicial review was conferred upon the Supreme Court by the Constitution or was usurped by it. The debate attracted both the supporters as well as the critics². The Judicial Committee of the Senate heard all the persons, for and against the Supreme Court's power of judicial review and supporters and opponents of President's bill but at last concluded that "while carefully refraining from giving the Court the power to share in making laws, the Convention did give it judicial power to construe the Constitution in litigated cases." It further observed that a citizen "has a right to demand

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2. Senator McKellar made a strong assault on the Supreme Court by saying that "The Supreme Court of the United States simply amended the Constitution by judicial dictum first and then decision.... The Constitution itself did not give that power to the Supreme Court specifically. In my judgment it ought to have done so.....If it had done so, and had hedged the power about with proper checks and balances, it would have been far better." Congressional Record Vol. 81, 1937, p. 1286. Cf. Charles S.Hyneman, The Supreme Court on Trial,(1963)p.86.
that Congress shall not pass such any act in violation of that instrument, and if Congress does pass such an act, he has the right to seek refuge in the Courts and to expect the Supreme Court to strike down the act if it does in fact violate the Constitution.* A written constitution would be valueless if it were otherwise."1

It may however, be pointed out that though the Judicial Committee of the Senate concluded in favour of the Supreme Court's power of judicial review, it was admitted by majority of those who participated in the debate that the Court was abusing the power. Even Senator Carl A. Hatch who strongly supported the idea that the Constitution did confer power of judicial review on the Supreme Court and signed the Committee report, admitted that there was usurpation of legislative power by the judicial branch of the Government.2

The bill did not receive a favourable reaction either from the members of the two Houses or the public. Even the liberal judges on the Court did not approve of these proposals and at last

*Emphasis is mine.


2. Senator Carl A. Hatch remarked: "I believe that the courts of the land throughout a long period of our history have constantly usurped legislative powers and have rendered policy making decisions, which is something the courts have no right to do......Not only has the Court, in my opinion, invaded the legislative power but in instances it has amended the Constitution of the United States. The Supreme Court of the Nation has usurped the powers reserved to the people of America. I believe that to be a fact." Congressional Record, Vol. 81 (1937), p. 6798. Cf. Charles S. Hyneman, The Supreme Court on Trial, (1963), p. 90.
the bill was dropped. But as it is usually said, the President won the legal battle and the judges won the political one. Subsequently, there was a shift in the attitude of the Court. Hyneman rightly points out that some people think that the judges are intolerably hard of hearing but experience reveals that the Court can be shaken by a storm of public disapproval. This can be witnessed from the fact that the Court afterwards upheld most of the Acts dealing with social legislation.

The Supreme Court after this abdicated its position as censor of the economic policies of the nation. From this however, it can not be concluded that the Supreme Court has given up its power of judicial review, but it has set itself for a new role. The new role as Miller has opined is from that of an "aristocratic

2. There was a change in the personnel also. Van Devantor J., one of the staunch conservatives announced his retirement. This provided the first opportunity to the President to appoint a judge of his own choice and his choice fell on Hugo Black, a strong supporter of his New Deal policies. Soon there were more vacancies and they were all filled with 'New Dealers'. By 1942, President Roosevelt had his seven men in the Court to support his policies. Stanley Reed replaced Justice Sutherland in 1938, Frankfurter replaced Cardozo in 1939. In the same year Justice Brandies resigned and William O.Douglas took his place. In 1940 Justice Butler was replaced by Frank Murphy and in 1941 Justice McReynolds gave place to James F. Byrnes. Chief Justice Hughes also resigned in 1941 and Stone was elevated to Chief Justiceship.
3. A.S.Miller, The Changing Role of the United States, Supreme Court, Modern Law Review Vol.25, No.6, 1962, p. 644. Loren P.Beth observes that "The Supreme Court revolution, then, consisted of the withdrawal of the Court from the field of economic and social legislation - its decision to refrain from judging the wisdom of such legislation or to let its "inarticulate major premises" dictate its constitutional opinions.....once more, then, the march of history had forced the Supreme Court and the Constitution to accommodate them- selves to its changes." Politics, The Constitution and the Supreme Court, (1962), p.126.
censor" to that of a "keeper of the nation's conscience", that is to say from a "negative" check on governmental action to an affirmative instrument of governance. Lately however, the Court has again evoked criticism from the Southern States on its decisions on segregation cases. The Southern States have denounced the Court for substituting its political and social ideas for the established law of the land and have gone to the extent of declaring the decisions of the Court as null and void and of no effect. Nonetheless, the Court continues to exercise the power of judicial review and guard it jealously. It is not even in want of its supporters who uphold its power of judicial review without any reservation. Charles Fairman has echoed the voice of many when he says that the attacks on the Court are unjust and that "it has acted with courage and it merits our confidence and support."2

It would not be out of place to point out here that it is only with the war power of the Congress that the Supreme Court has not interfered by exercising its power of judicial review. The position of judicial review of war powers of the Congress has been aptly summed up by Rossiter when he says that "in time of war Congress can pass just about any law it wants as a 'necessary and proper' accessory to the delegated war powers, that the President can make just about any use of such law he sees fit, and that the people with their overt or silent resistance, not the Court with its power of judicial review, will set the only practical limits


to arrogance and abuse."¹ The Court has a similar attitude towards the conduct of foreign relations. "The Court, save in rare circumstances has been as chary of intruding into the conduct of foreign relations" writes Fullbright, "as has been in the conduct of military affairs during the conduct of war².

Switzerland: The Constitution of Switzerland is also federal in character but the Swiss Constitution vests the Federal Tribunal only with a restricted power of judicial review. The Tribunal can not declare federal laws as unconstitutional in view of Article 113 of the Constitution which expressly provides that the Tribunal shall apply the federal laws and also the decrees rectified by the Federal Assembly. This has led writers like Dicey and Lowell to say that the Swiss Federal Tribunal does not possess the power of judicial review. This view is not correct, because the Federal Tribunal is empowered under the Constitution to examine the validity of a Cantonal Constitution and the Cantonal laws. However, it can not be denied that the Tribunal in point of fact, has extremely limited jurisdiction. Further more, the significance of the federal judiciary as a protector and guardian of the Constitution, of the rights of the people is not realised in the political system of Switzerland because it is scrutinised and controlled by the people by means of the initiative and the referendum.

Australia: The Constitution of the Commonwealth of Australia borrowed the idea of federation from the Constitution of the

¹Clinton Rossiter, The Supreme Court and the Commander in Chief, (1951), p. 100.
United States and as a consequence it modelled its highest judicial tribunal - the High Court, on the pattern of the Supreme Court of the United States. Since the Constitution of Australia does not provide for a bill of rights, the sphere of the jurisdiction of the High Court has been limited in respect of the judicial review. The High Court enjoys superior position over other federal organs for it is the final authority to interpret the Constitution in regard to the cases coming before it. The position of the federal court was made clear in both the Conventions which found themselves in agreement with what Robert Garren had said in 1897 that "there must be federal courts charged with the duty of interpreting and enforcing the Constitution....Every law that comes before them, whether of the Commonwealth or of a State, they will test by the Federal Constitution, and pronounce it valid or void accordingly as it does or does not come within the scope of the powers allotted to the legislature which enacted it."¹

In Australia the doctrine of judicial review is impliedly drawn from two sources namely, Section 74 of the Constitution and Section 30 of the Judicature Act (1903-59). Under Section 74 of the Constitution, the High Court is empowered to be the sole interpreter of the Constitution so far as inter se questions are concerned, while Section 30 of the Judicature Act has enhanced the position of the High Court by endowing it with original jurisdiction in "all matters arising under the Constitution or involving

its interpretation."¹

The study of the functioning of the Australian High Court in its early period under the Chief Justiceship of Griffith shows that it exercised its power of judicial review in favour of federal supremacy². The American doctrines of 'immunity of instrumentalities', 'implied prohibitions', were often applied but there was resistance to the application of these doctrines with the coming of Higgins and Isaacs on the bench. But in defence matters, the High Court like the Supreme Court in the United States does not interfere because the Commonwealth defence power, has a kind of overriding force in relation to the rest of the Constitution and becomes "pivot of the Constitution, because it is the bulwark of the State."³

Though judicial system of Australia is based on that of the United States, the High Court in Australia has exercised comparatively greater restraint than has been done by its counterpart in the United States. "It is always a serious and responsible duty" says Justice Isaacs "to declare invalid, regardless of consequences,

¹. The object of this provision in the Judicature Act was to stop direct appeals from the Supreme Court of the States to the Privy Council. Appeals from the Supreme Courts to the Privy Council can still be made but the jurisdiction of the Privy Council is restricted, for the appeals can be made only on the grant of a certificate from the High Court, a matter which is entirely discretionary.

². Evatts writes that Griffith was extremely anxious lest the newly established Commonwealth should not be subjected to attack, especially from the strongly entrenched States, Toronto Law Journal Vol. III, 1929, p. 9.

what the national Parliament, representing the whole people of Australia, has considered necessary or desirable for the public welfare.... Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will...."¹

This means that in Australia not merely there is no recognition of the essentially creative, legislative role of a judge exercising the power of judicial review of a written constitutional instrument, but also there are judges laying down their own philosophies of action in terms as badly positivist². The High Court of Australia is thus sometimes criticised as being highly legalistic³. It has often refused to recognise political, social, economic and other such considerations in constitutional adjudication. The best example of its strict legalism can be found in its decision in the Bank Nationalisation case⁴, in which the constitutionality of the legislation of the Labour Government nationalising private trading banks was challenged and in which

¹ Federal Tax Commissioner v Munro, (1926), 28 C.L.R., 180.


³ Chief Justice Dixon once observed that there is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism. See Australia Law Journal Vol. 26, No.2, 1952, p. 4.

⁴ (1948) 76 C.L.R. 1.
the High Court refused to admit any economic evidence\textsuperscript{1}.

It has been observed that the Court does not admit political evidence. This is illustrated by the case, Australian Communist Party \textit{v} Commonwealth\textsuperscript{2} in which the Court declared the Act of the Commonwealth Parliament dissolving the Communist Party as invalid. Chief Justice Latham observed that "It is not in my opinion, a function of a Court to determine whether legislation 'goes too far' or 'is incommensurate' or 'is too drastic' or 'is or is not reasonably necessary." He further observed that "The function of the Court, when the validity of legislation is challenged as ultra vires the Commonwealth Constitution, is to determine whether it is legislation with respect to a specified subject matter."

Justice Fullagar's assessment of judicial review in Australia is thus not incorrect when he says that the principle of Marbury \textit{v} Madison is accepted in Australia "as axiomatic, modified in various degrees in various cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs."	extsuperscript{3} Further it has been rightly suggested that

\textsuperscript{1} Justice Dixon in another case pointed out that "on a question of ultra vires, when the end is found to be relevant to the power and the means not inappropriate to achieve it, the enquiry stops. Whether less than was done might have been enough, whether more drastic provisions were made than the occasion demanded, whether the financial and economic concepts inspiring the measure were theoretically sound, these are questions that are not in point. They are matters going to the manner of the exercise of the power, not to its ambit or extent."


\textsuperscript{2} (1951) 83 C.L.R. 1.

\textsuperscript{3} Justice Fullagar, \textit{Australian Communist Party v Commonwealth}, (1951), 83 C.L.R. 1.
the High Court should abandon its mechanical conception of judicial office viz., the fiction that judges never make law but simply apply it and it should recognise frankly the essentially creative role of the judges of a Supreme Court exercising judicial review under a written and rigid constitution.

Canada: The Constitution of Canada which is again federal in character provides for a Supreme Court, which is the highest Court and is charged with the duty to maintain the boundary lines between the authority of the Dominion and the Provincial governments as provided under the Constitution. "Judges will have to say" writes W.H. Henry, "what is constitutional under it is regards general or local legislation." The Supreme Court exercises the power of setting aside an act of the legislature as ultra-vires, if it is in contravention of the provisions of the Constitution. The validity of any law, by-law, decree or regulation whether of Dominion or of a Province (including the local units) can be challenged before the Court. Nonetheless, the scope of the judicial review is narrower in Canada as compared to that of the judicial review in the United States, for the British North America Act of 1867, provides no constitutional guarantees and the Bill of Rights passed by the Canadian Parliament in 1960, has not made any change in the above position of the Supreme Court.

It may however, be pointed out that in Canada opinion is gaining ground that a separate Constitutional Court like the one

in Austria, Germany and many other countries\(^1\) should be established under the Constitution to provide an impartial tribunal, independent of Central as well as of Provincial Governments. The Tremblay Commission in its report in 1956, also pointed out that 'the last word in settling disputes must not rest either with the general government alone or with the regional governments alone.'\(^2\) This point was emphasised by Premier Lesage at the 1960 Federal Provincial Conference. Jacques Yvan Morin an eminent jurist also argues the case for the establishment of a Constitutional Court under the Constitution to serve the ends of a federation in the real sense\(^3\).

**Japan** : The Constitution of Japan though unitary, is the one which expressly incorporates the doctrine of judicial review and empowers the Japanese Supreme Court to examine the constitutionality of the acts of the government. Article 81 of the Constitution lays down:

"The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."\(^4\) Further Article 98 declares the supremacy of the Constitution and provides that "...... no law, ordinance,...... or act of government, or part thereof contrary to the provisions here of, shall have legal force or validity."

The Supreme Court is thus vested with the power of judicial

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1. Other countries which have Constitutional Courts are Ireland, Turkey, Yugoslavia.


3. Ibid pp. 545-552.

4. The Supreme Court is established under Article 76 of the Constitution of November 3, 1946.
review not only of legislation, but executive as well as administrative action.

In practice however, the Supreme Court is least active as compared to its counterpart in the United States. The Court more often than not, resorts to the policy of postponing or avoiding the constitutional cases. In Suzuki v State\(^1\), the petitioner, Suzuki, Chairman of the Central Executive Committee of the Left Socialist Party, challenged the constitutionality of all laws and regulations for the establishment and maintenance of the National Police Reserve on the basis of strict interpretation of Article 9 of the Constitution\(^2\). Suzuki contended that Article 81 empowered the Supreme Court in addition to its judicial functions to determine the constitutionality of governmental action, irrespective of an actual case or controversy. The Supreme Court however, avoided its involvement in this case and rejected the petitioner's contention on the ground that it was beyond the reach of the Court to determine abstract constitutional questions and that it could determine only concrete cases under its judicial power.\(^3\)

Again in spite of the fact that the Constitution guarantees rights to the citizens, the Supreme Court has not protected them as enthusiastically, as the Supreme Court of the United States or

1. 6 Supreme Court Reports 783 (1952).
2. Article 9 of the Constitution of Japan renounces war"as a sovereign right of the nation and the threat or use of force as a means of settling international disputes" and it further provides that "in order to accomplish the preceding paragraph, land sea and air forces, as well as other war potential will never be maintained."
3. Also see Tomabichi v State, 7 Supreme Court Reports 305(1953).
that of India has done. The Supreme Court of Japan often applies the 'public welfare test' to give validity to the law at the cost of the rights of the citizens. Masami Ito an eminent authority on Japanese constitutional law, expresses concern over the Supreme Court's tendency to give superiority to public welfare over freedoms guaranteed under the Constitution. Analysing the cases dealing with the freedom to express oneself, he writes that "the public welfare test has come to be a justification for supporting constitutionality of any law limiting freedom to express oneself. This way of thinking deprives the constitutional guarantee of free speech of its substantial significance, for whenever a law is enacted some kind of danger to the public welfare can be easily found as a legal regulation would rarely, if ever, be imposed in case no danger exists. Therefore, under the public welfare test, only extremely arbitrary restrictions upon this freedom are invalid. This attitude over looks not only the distinction between intellectual freedom and its external expression, on the one hand, and economic freedom, on the other, but also between the new Constitution, which guarantees the freedom of expression in absolute words and the old Constitution which had protected it only to the extent permitted by law."¹


Again in the field of administrative law, the Supreme Court has the power to review administrative action. In this connection Kiminobu Hashimoto writes that judges have realised that on the one hand, protection must be given to persons whose rights are
adversely affected by administrative action and that on the other hand the performance by government of its necessary functions must not be unduly hampered. But from the decisions of the Court in Discipline and Passport cases, it appears that it has not maintained that balance. In fact the hesitation is rather apparent and usually its tendency is to give free hand to the administrative agencies in their action. In Miyamoto v Gaimu Daijiu\(^1\), however, there has been a change, though how far the Court will pursue this line of action can not be said.

Maki has commended the Japanese Supreme Court for its performance in the constitutional field and attributes its reluctance to declare laws unconstitutional to the Court's political philosophy\(^2\) that it should not make it a practice to interfere with the legislative branch.

But most of the Japanese and foreign jurists have attacked the Supreme Court for its timid attitude in dealing with the constitutional questions and in safeguarding the civil liberties. Nathanson for example, opines that the Supreme Court has erred in some cases by indulging too far in the policy of postponing or avoiding constitutional questions and he further suggests that following the example of the Supreme Court of the United States, the Supreme Court of Japan also 'must' set the example in providing

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1. *Tokyo District Court, April 28, 1960*, \(\text{ii Gyosai Keishun}\)

2. This philosophy has influenced the practice in Norway, Denmark and France.
judicial protection against petty tyrannies. There is no doubt that there are many difficulties that the Supreme Court has to face before the power of judicial review transplanted by the new Constitution can grow up on the soil of Japan but at the same time the Court must be conscious of its dynamic role that it has to play as the ultimate interpreter of the Constitution. Chief Justice of the Supreme Court of Japan said after the Tokyo Ordinance Case (to the news reporters) that even if there were no decisions holding laws to be unconstitutional, the mere existence of the power of judicial review would have a psychological effect in persuading the legislature to respect the Constitution. This view however, suffers from want of realism. If the power and judicial review is to be kept in tact it must be exercised otherwise, there is likelihood of this power following into destitute. Moreover in power struggle, there is no room for psychological effects or persuasive methods. Ito is not wrong when he says that this kind of thinking may well paralyse judicial review.

Ireland: The Constitution of Ireland also provides for judicial review and vests the regular courts to exercise this power. Article 34(3)(ii) and Article 34(4)(iv)(v), expressly provide that the jurisdiction of the Supreme Court and High Court shall "extend to


2. Only twice, the Supreme Court has held a law unconstitutional and in both the cases by the time the Court gave its decision the laws declared invalid had lost their legal force.
question(s) to the validity of any law having regard to the provisions of this Constitution." This provision enables constitutional points to be taken to these courts by the parties in ordinary law suits.

Further Article 35(5)(1) provides that a person appointed as a judge shall make a declaration to uphold the Constitution and, in default, shall be deemed to have vacated his office.

The Constitution also provides for the exercise of judicial review by means of advisory opinions, which may be rendered on reference by the President under Article 26(1)(1).

The Constitution of Ireland also embodies fundamental rights and the Supreme Court's jurisdiction is frequently invoked for the protection of these rights. But the purpose of a bill of rights, "to withdraw certain subjects from the vicissitudes of political controversy....to establish them as legal principles," is not served as there are many qualifications appended to the clauses providing for rights, which defeat that purpose and present inherent dangers. Further, the Court has also not asserted its authority boldly in defence of these rights. In 1939, the Oireachtas enacted a law empowering the minister concerned to order the arrest and detention of a person guilty of personal behaviour without trial and the validity of this legislation was challenged before the Supreme Court. Chief Justice Sullivan observed that

2. Re. Article 26 of the Constitution and the Offences against the State (Amendment) Bill, 1940. (1940) I.R.470, 481, 482.
the duty of determining the extent to which the rights of any particular citizen or class of citizens, can properly be harmonised with the rights of the citizens as a whole seems to us to be a matter which is peculiarly within the province of Oireachtas and any attempt by this court to control the Oireachtas in the exercise of this function, would be, a "usurpation" of its authority.¹

In the absence of remedies as provided under the Indian Constitution, in case the rights are infringed or abridged, the duty all the more devolves upon the Court to uphold these rights through its power of judicial review.

**Norway**: The Courts in Norway are also empowered to declare the laws not compatible with the Constitution as invalid. The Storting (Parliament) may also request the Hojestet (Supreme Court) to give advisory opinion on the constitutionality of a law. The Courts though given comprehensive power of judicial review, have not had much of opportunity to exercise this because of the sobriety and desire on the part of the Storting to work in a legal and constitutional manner.

**Austria**: Amongst the countries in which the special courts are entrusted with the task of testing the constitutionality of laws, Austria was the first to establish a Constitutional Court (Verfassungsgerichtshof) under the Constitution of 1920. This was abolished under the dictatorship but was resorted to in its modified form in 1929, and after the Second World War in December 1945.

Both the Federal Government (Bundesregierung) and Landes Governments (Landerregierungen) can raise constitutional questions against the laws by each of the laws by each of the two authorities. In 1929, the two Supreme Courts Gerichtshof and Verwaltungsgerichtshof were also given the power to raise constitutional questions when such questions arise before them in a case. The lower courts however, have not been granted this power.

The Constitution also provides for fundamental rights and the Court has pronounced several judgments defending the rights of the individual. The Court has delivered several judgments elaborating its jurisprudence concerning the principle of equality which is granted under Article 7 of the Constitution.

The Constitutions of Italy, Germany, Turkey, Cyprus have followed Austria and after the Second World War established the Constitutional Courts with more or less similar powers.

**Italy** : The Constitution of Italy confers powers under Article 134, on the Constitutional Court (Corte Constituzionale) established in 1955, to judge "controversies concerning the constitutional legality of the laws and acts having the force of law, of the Italian State and the Region." The Court has also the power to judge disputes arising out of the conflict of jurisdiction between the State and the Region or Regions and Regions inter se. It has also jurisdiction over cases in which charges are preferred against the President of the Republic or the Ministers in accordance with the provisions of the Constitution.

Further it may be added that the issue of constitutionality
can be raised only in the course of judicial proceedings. Once the matter comes to the Court, it is bound to decide it, even if the parties concerned do not appear. The State and Regional laws however, can be challenged directly by a Region or the State as the case may be. There is also an improvement over the position as it obtains in Austria for in Italy any court can bring a case before the Constitutional Court whereas in Austria only the two Supreme Courts can do so.

The Constitutional Court is also empowered to protect fundamental rights guaranteed to the citizens. In its decision No. 7 of February 16, 1963, the court upholding the equality of all citizens declared the first paragraph of Article 123 of the transitory provisions of the Civil Code, as unconstitutional being in contravention of Article 3 and Article 30 of the Constitution.

On the whole, the Court does not possess effective power to protect the rights as does its counterpart in Germany possess for the Constitution though provides for a bill of rights, leaves discretion with the legislature to impose restrictions, which in turn restricts the power of the Court.

**Turkey**: In Turkey the Constitutional Court was established under Act No. 44 adopted on April 22, 1962, promulgated and came into force on April 25, 1962. It is given the power to deal with actions for annulment of laws or rules of procedure of the National Assembly

which are deemed to be contrary to the provisions of the Constitution. As a High Court, it is empowered to try the President of the Republic, Ministers, the President and members of the Court of Cassation, the Supreme Council of Judges, the Procurator General of the Republic and lastly, its own President and members for any offence committed in the discharge of their duties. The Act also enjoins upon it to deal with the actions brought to secure the dissolution of political parties and also consider actions for annulment brought against decisions of the National Assembly concerning the lifting of parliamentary immunity or the exclusion of deputies by members of the National Assembly or by Ministers who are not its members.

As far as the persons who can raise the question of constitutionality before the Court are concerned, the President of the Republic, political parties of a certain size and their particular factions, and also one-sixth minority of Parliament have the authority to question the constitutionality of a statute or of the standing rules of Parliament.

Another unique feature which is not to be found in other countries providing for such a Court is that the High Judicial Council, the three highest courts in the field of criminal and private law, administrative law and military criminal law and lastly, the universities of Turkey can also challenge before the Constitutional Court, a statute that interferes with their respective functions or their existence.

The Constitution, however, omits certain statutes express verbis, which cannot be submitted to the Court.

**Germany:** In Germany during the period the Weimer Constitution was in force, the doctrine of judicial review was recognised, though the Constitution did not literally speak about it. But the judges were extremely reluctant to exercise it and even if they did, they did it in the conventional form\(^1\). Under Hitler's totalitarian regime, however, there was destruction of the Weimer Constitution and law was distorted to suit his whims and wishes. Judges were appointed only with the consent of the Nazi Party, and were required to play a subservient role and interpret law according to the philosophy of the Party and its boss. Finer points out that judges were continually bullied and bombarded with circulars from the Minister of Justice\(^2\). There was practically an end of freedom.

After the Second World War, the framers of the Constitution were rather conscious to safeguard the liberties of the individual. In their attempt to restore the annihilated rights and liberties to the citizens, it seems that they applied Newton's third law of motion for as much Hitler disregarded, as much were the framers eager to provide maximum of protection. They did not leave the fundamental rules of the Basic Law at the mercy of the legislature but made them inviolable and inalienable\(^3\). Article 19(2) of the


\(^2\) Herman Finer, Governments of European Powers, (1956).

\(^3\) See Article I(1)(2) of the Basic Law of the Federal Republic of Germany 1949.
Constitution lays down that "in no circumstances may any fundamental law be touched in the content of its real nature." It thus paves the way for effective exercise of judicial control and exceeds other continental countries by establishing a Constitutional Court¹ (Bundesverfassungsgericht) to discharge this function. The Court is sufficiently empowered to be the guardian of the Constitution, its federal character and the rights of the citizens guaranteed therein. Article 93(1)(2) makes the Court as an interposing tribunal between the Bund and the Lander whenever there is conflict on any matter.

Both the Federal and the State Cabinets have authority to request the Court to give its judgment on the constitutionality of the matter referred to it. One third of Bundestag (lower house) has also the authority to request to the Court for the same. Even the individual can approach the Court to get a law declared as unconstitutional which infringes his rights. Wilhelm Karl Geck observes in this context that the motive for introducing these proceedings were the following:

(1) All statutes should always conform to the Constitution;
(2) All doubts in this regard should be resolved by the Federal Constitutional Court.
(3) Incidental judicial control alone, since it presupposes a case or controversy, would not guarantee the examination of each questionable statute;
(4) The federal and state cabinets would feel a special responsibility for the constitutional order and utilise these additional proceedings if necessary. The Parliamentary minority was included among the possible applicants just in case the executive organs would not live up to their responsibility².

1. The Constitutional Court is established under Article 92 and Articles 93(1)(2), 99 and 100(1)(2)(3) - provide for the functions that the Court has to discharge.
From the study of case law, it appears that the Court has lined up to the expectations of the framers. It has been quite active as compared to its counterparts in Austria, Turkey, Cyprus and Yugoslavia but at the same time unlike the Supreme Court in the United States, it has shunned the path of activism in political matters. It has exercised great caution and restraint up to now. Edward McWhinney points out that wherever possible, making time an ally it postpones its decision in political controversies, if necessary, in the hope that the political would resolve themselves and render judicial arbitrament unnecessary. The Communist Party case was withheld by the Court for five years. In the European Defence Community case again it applied the same tactics. The facts of the case were that the Adenauer Government wanted to participate in the European Defence Community. The Constitution however, is silent on defence matters. It was considered desirable that the government should introduce an amendment so as to be authorised to participate in that defence community. But the government could not afford to do that for it lacked two-thirds majority necessary under the amending procedure provided in the Constitution. Also forty-five social democratic members of the federal legislature requested the Court to issue an injunction prohibiting the German nationals from participating in that defence establishment, till an amendment was duly made in the Constitution. After the government had concluded European Defence Community treaties, the opposition amended its petition and sought

the injunction prohibiting the rectification of treaties by the legislature. The First Senate of the Court heard the petition and declared on July 30, 1952 that judicial review was available only of statutes which had been duly passed by the legislature. However, before this decision, the President of the Bund made a request to the Constitutional Court to give its advisory opinion upon the matter, whether the said treaties which authorised Germany's participation were in accordance with the Basic Law.

In the meantime, on December 5, 1952, the Government secured the passage of ratification bill by a simple majority and the following day it filed a petition relying upon Article 42(2) to the Second Senate (Black Senate) which was known for its pro-government attitude, to get its declaration that the Bundestag had the right to ratify the treaty by a simple majority.

On December 8, 1952, the plenum of the Court, fearing that its advisory opinion may not clash with the decision of the Second Senate, passed a resolution by a twenty to two vote, that its advisory opinion was binding upon both the Senates.

The consequence was that on December 10, 1952, the Bund President under the pressure of the Chancellor, to avoid repercussions that might follow if the plenum declared the European Defence Community treaties as unconstitutional, withdrew the request for advisory opinion. The Second Senate also rejected the Government's petition on March 7, 1953 on the basis of procedural disposition.

On March 19, 1953, however, the treaty rectification bills were passed by the Bundestag. Consequently again one hundred and
ten members of the House petitioned to the First Senate, challenging the validity of the retification of treaties. Again thus, the matter came into the arena of the Court from the political field and the Court applied the delaying tactics keeping in the view the coming general elections which might change the course of events. In fact it happened like that, for the Adenauer government increased the seats and in the elections held on September 6, 1953 it got bare majority with the result that the amendment of the Basic Law was carried on March 26, 1954 which facilitated the German participation in the European Defence Community. But then French Assembly rejected the plan on August 30, 1954 which brought an end to the matter. Nonetheless the Court saved itself from the political onslaughts. McWhinney concludes that the Constitutional Court has survived its most dangerous and searching test and though somewhat scared by the bitter partisan attacks made on it especially by government supporters during the whole controversy, had shown a most commendable institutional solidarity and spirit without which it might have been overwhelmed in partisan struggles.

From the above discussion, it would not be an exaggeration to say, that the Constitutional Court of Germany has fared better than the other such Courts. But none of these Courts has been able to achieve that distinction, which the Supreme Court in the United States has been able to achieve.

Judicial Review in India and Comparision with Judicial Review in the United States:

Judicial review in India flows from the fact that the Indian Constitution like the Constitution of the United States is written.

The Supreme Court of India is vested with the power of limiting and superintending the operations of legislative authority in accordance with the provisions of the Constitution. The Constitution provides for parliamentary form of government but the omnipotence of the legislature is not accepted. The Court is empowered to nullify the acts of the legislature without appeal save through the process of constitutional amendment. The Constitution is the supreme law of the land and the Supreme Court of India like its counterpart in the United States is the guardian of the Constitution. Unlike the latter, however, the Court in India has been expressly endowed with the power of judicial review under the Constitution.

Under Article 246 of the Constitution, the Parliament and the State Legislatures are supreme in their respective spheres of legislation. In case of transgression by either, that is the Parliament or the State Legislature, it is the Supreme Court which is to declare the validity of such legislation. "A statute law to be valid," observes Justice Mukherjea, "must, in all cases, be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is unconstitutional or not."¹

Part III of the Constitution, further places limitations on the legislative authority of the government by guaranteeing certain fundamental rights. The Supreme Court is empowered expressly to declare such a law as void which infringes any of the fundamental

rights. Article 13 needs mention here since it is imperative on this point. Clause (1) of this Article provides that pre-Constitution laws be declared void if inconsistent with the provisions relating to fundamental rights. And clause (2) of the same Article places a limitation on the enactment of future laws, that no law shall be made by the State which takes away or abridges the rights conferred by Part III and any law made in contravention of this clause shall to the extent of contravention be void. Article 13, thus clearly confers the power of judicial review on the Supreme Court. Chief Justice Kania, however, holds the view that "The inclusion of Article 13(1)(2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by the legislative, the Court has always the power to declare the enactment to the extent it transgresses the limits, invalid."¹

The power of judicial review is further supplemented by Article 32 of the Constitution which empowers the Court to issue writs in the nature of habeas corpus, mandamus, certiorari, quo warranto and prohibition to enforce the fundamental rights against the authority of the State. The Supreme Court is thus the guardian and protector of the sanctity of fundamental rights. This power however, is limited as compared to that of the Supreme Court of the United States. The Constitution of the United States does not admit of the right of the Congress to impose restrictions. The rights are guaranteed under the Bill of Rights and are absolute in

nature. Further the 'due process clause' in the Fifth and Fourteenth Amendments, provides an ample scope for vague and unrestricted right of interpretation to the Court.

The Constitution of India however, does permit the legislature to impose reasonable restrictions in specified circumstances, thus limiting the authority of the Court to uphold the rights. But the Court maintains that it is competent to test the reasonableness of restrictions imposed on the fundamental rights. "The determination by the legislature of what constitutes a reasonable restriction" the Court held in Chintaman Rao v State of M.P.¹,"is not final or conclusive, it is subject to supervision by this Court." Objections were raised against the power of the Court testing the reasonability of restrictions imposed by the legislature on the ground that such a power not only placed the Court above the Parliament but turned the Court itself into a legislature. It is however, overlooked that the Constitution itself empowers a judicial review. So when the Court expresses its views on reasonableness of restrictions, it does so in pursuance to powers vested in it by the Constitution². In this context the observation of Chief Justice P. N. Bhagwati deserves notice: "..........our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted

1. 1950 S.S.R 759 (765).
"due process" clause in the Fifth and Fourteenth Amendments. If, then, the Courts in this country face up to such import and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the fundamental rights, as to which this Court has been assigned the role of a sentinel on qui vive. While the Court naturally great weight to the legislative judgment, it can not desert its own duty to determine finally the constitutionality of an impugned statute.¹

It is evident thus that the power of judicial review is explicit in the Constitution but it is not an unrestricted power so as to establish the supremacy of the Supreme Court over the legislative authority as in the United States. In the United States the framers of the Constitution provided only a base of the Constitution and left the rest of the task to be accomplished by the Court. This provided ample scope for the role of the Supreme Court of the United States.² Unlike the American Constitution, the Indian Constitution, which is in the nature of a treatise, is too comprehensive and detailed, thus, limiting the scope of judicial review by the Supreme Court of India. In India the

2. Charles B.Blackmar has aptly remarked in his article, The Supreme Court as a Government Institution, that in practice, certain provisions of the Constitution were so broad, and their meaning so indefinite, that the Court had the power to do almost as it willed not only invalidating legislative acts but even in legislating itself. See Saint Louis University Law Journal, Vol. 12, No. 2, 1967, p. 237.
position of the Court is somewhere between the Courts in England and the United States. In this context Justice Das observes that "Our Constitution, unlike the English Constitution, recognises the Court's supremacy over the legislative authority, but such supremacy is a very limited one, for it is confined to the field where the legislative power is circumscribed by limitations put upon it by the Constitution itself. Within this restricted field the Court may, on a scrutiny of the law made by the Legislature, declare it void if it is found to have transgressed the constitutional limitations. But our Constitution, unlike the American Constitution, does not recognise the absolute supremacy of the Court over the legislative authority in all respects, for outside the restricted field of constitutional limitations our Parliament and the State Legislatures are supreme in their respective legislative fields and in that wider field there is no scope for the Courts in India to play the role of the Supreme Court of the United States. It is well for us to constantly remember this basic limitation on our own powers." 1

Further it may be pointed out that though the Court is conscious of its duty to examine the constitutionality of an act when challenged, has acted in a more restrained and cautious manner than the Supreme Court of the United States. In the United States, the Court has very vaguely interpreted the 'due process clause' to scrutinise legislation. Accordingly, many a time the Court has been attacked for substituting its own political and social ideas

for the established law of the land and has been called as usurper. The Supreme Court of India has on the other hand refused to declare an act as void unless expressly in violation of any provision of the Constitution. "The Courts are not at liberty" observed Chief Justice Kania, "to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature we can not declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument." ¹

He further observed that "It is difficult upon any general principles, to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority. It is also stated, if the words be positive and without ambiguity, there is no authority for a Court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of Justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private

The scope of judicial review in India is thus much more restricted than in the United States. But it is evident that the power of judicial review is not inferential and is both formal and material. Consequently, the legitimacy of judicial review in India has never been questioned.

Conclusion:

It has been seen that the resiliency of the constitution can be preserved only by the judiciary. Without a judiciary empowered to construe the meaning of the words of the constitution and a power to uphold the supreme law of the land, a written constitution would indeed promote discord rather than order in the society for its injunctions may be disobeyed and the positive regulations

1. A.K. Gopalan v State of Madras, A.I.R. 1950 S.C. 27(42). Justice Mahajan made a similar observation in this case: "There can be no doubt that the legislative will expressed herein would be enforceable unless the legislature has failed to keep within constitutional limits. It is obvious that the Court can not declare a statute unconstitutional and void simply on the ground of unjust and oppressive provisions or because it is supposed to violate natural, Social or political rights of citizens unless it can be shown that such injustice is prohibited or such rights are guaranteed or protected under the Constitution." A.I.R. 1950 S.C. 27(80).

2. See Deo v State of Orissa 195*+ S.C.J. 597. Chief Justice Mukherjea observed in this case: ".............. transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect.........In other words, it is the substance of the Act that is material and not merely the form or outward appearance.......The Legislature cannot violate the constitutional prohibitions by employing an indirect method."
neglected or contravened. Judicial review is thus a necessary concomitant of a written constitution. But this is admitted only in democratic countries. In totalitarian states with monolithic regimes, the concept of judicial review is incompatible with the omnipotence of the Party. Yugoslavia is the only communist country which has a separate Constitutional Court to examine the constitutionality of the acts of the government. In democratic countries, especially with federal polity, judicial review is considered essential to safeguard the rights of the individual against the authority of the state and that the federal government and constituents work within the specified limits laid down in the constitution. In some countries the courts are expressly conferred with this power of judicial review and in others it is derived from the provisions of the constitution. Again in some countries the regular courts perform this function while in others special constitutional courts are established to examine the constitutional validity of enacted laws.

The doctrine of judicial review occupies a significant place in the working of the Constitution of the United States. The Supreme Court of the United States which has attained a unique position as a consequence of the exercise of this power, is not conferred with this power expressly under the Constitution. It remains a moot point ever in the United States whether the framers of the Constitution intended the Supreme Court to exercise this power or not. The Supreme Court has even been called a usurper but the Court continues to exercise the power of judicial
review and it jealously guards this power.

Other federal countries have modeled their judicial systems on the judicial system of the United States. But in Germany and few other countries the Constitutional Court exercises this power. In India the Supreme Court like the Supreme Court of the United States exercises the power of judicial review. The Supreme Court of India is however, expressly empowered to examine the constitutionality of the laws enacted by the legislature. But the scope of judicial review is restricted in India as compared to judicial review in the United States, because of the comprehensive nature of the Constitution of India. The Court has, however, given some significant judgments in the realm of constitutional law exercising its power of judicial review.