CHAPTER I

THEORY OF THE SUPREME COURT

There is divergence of views about the concept of judiciary. One school holds the opinion that a civilised nation is hardly conceivable without judicial organs. "In determining a nation's rank in political civilisation" it is maintained, "no test is more decisive than the degree in which justice as defined by law is actually realised in its judicial administration, both as between private citizens and members of the government." This school is represented among others by Sidgwick, Laski, Kent, Rawle.

The other school is represented by two sections. One


2. Laski holds that "when we know how a nation-State dispenses justice, we know with some exactness the moral character to which it can pretend." Grammar of Politics, (1951) p. 542.

Chancellor Kent is of the view that "where there is no judicial department to interpret and execute the law, to decide controversies and to enforce rights, the government must either perish by its own imbecility, or the other departments of government must usurp powers, for the purpose of commanding obedience to the destruction of liberty." Commentaries, Lecture XIV.


Rawle an American jurist is of the same opinion when he says that "It is indispensable that there should be a judicial department to ascertain and decide rights to punish crimes, to administer justice and to protect the innocent from injury and usurpation, the judicial department is indispensable." On the Constitution, ch. 21.

section which is represented by Gray and other jurists believes that the function of the courts is merely to determine the rights and duties of the members of the State and that if they knew their own rights and duties and the rights and duties of their fellowmen, there would be no need of judicial organs in the State. The other section however, minimises the importance of the courts not on theoretical grounds, but on political grounds and this section is represented by Marx, Engles, Lenin and many others who believe in the communist philosophy. Their distrust of the courts is inherent in their political philosophy. Accordingly Lenin once remarked "we must administer justice ourselves" because courts are an instrument in the hands of the capitalists to exploit the working classes.

Lenin's view of the judiciary obviously seems to be prejudiced as it is politically motivated. In to-day's world judiciary is required not only to interpret laws but to


legislate also where there is no law, administer justice and protect the rights of the individual against the state. The development of judiciary as an important organ of the state is greatly due to Montesquieu's theory of separation of powers. Today judiciary is considered to be at par with other organs of the state. Further with the acceptance of constitutionalism as a norm by the states, the importance of the judiciary has come to be realised all the more. The courts are no more 'slot machines' for the administration of sovereign's will, but they play a creative role in the body politic of a nation. Whether the form of a government is unitary or federal, the judge-made law constitutes quite a large proportion of the law operating in a political community.

The above is true more in the case of countries with written constitutions where judicial activism is much more noticeable than elsewhere. All the branches of the government bear the responsibility of safeguarding the constitution but people look mainly to the judiciary, especially the supreme court to perform this all important function. A constitution is considered to be the supreme law of the land and it is imperative on judges to uphold it and the supreme court becomes the final interpreter and guardian of the constitution. People look to it for an impartial and fearless exposition of the constitutional law. Constitutional law is in fact the judicial gloss upon the

1. Dillon in this context observes that when the answer can not be found in an automatic or push-button fashion, then the opportunity for judicial policy formulation becomes most apparent and the Courts usually have not hesitated to accept the challenge, although the pattern of development varies from State to State.

The text of the constitution provides the skeletal framework, but the flesh and blood of constitutional corpus are found in the authoritative decisions of the supreme court.

Further the supreme court is looked upon as a guardian of the rights of the individual and it is considered one of its important functions to secure these to the individual whenever there is an encroachment on his rights by the state. In contrast with the legislature and the executive, the judiciary does not represent the people but is their agent. It does not carry their will but protects their interests.

Doubt has however, been expressed that an irresponsible judiciary does not always safeguard the interests and rights of the individual. The history of American case law prior to the Warren Court reveals that the Supreme Court acted as the guardian of vested interests, conservatism and stood in the way of progressive legislation. This was one of the reasons which impelled President F. D. Roosevelt to make a serious though unsuccessful attempt to reform the Supreme Court. Again judicial supremacy has been detested by some on the ground that it is undemocratic.


2. Justice Roberts defending the Supreme Court of the United States against this allegation observes that to say that the Court assumes a power to overrule or control the action of the people's representatives, is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an Act of Congress is appropriately challenged in the Court as not conforming to the constitutional mandate, the judicial branch of the government has only one duty, to lay the article of the Constitution which is invoked besides the statute which is challenged and to decide whether the latter squares with the former. All the Court does or can do is to announce its considered judgment upon the question and having done so its duty ends (U.S. v Butler, 297 U.S.I pp. 62-63).
Notwithstanding these allegations, the courts have been recognised in most countries as the repository of the interests of the community. The Supreme Court of the United States has been called the champion of the rights and liberties of the individual. The Supreme Court of India is accorded the same position under the provisions of the Indian Constitution.

Courts are thus indispensable in all organised societies, though their organisation and functions vary with different form of government. The hierarchy of courts is essential in every state whatever the form of government, to maintain the certainty and uniformity of law. But the role of the highest court, be it the supreme court or the high court, definitely varies with the form of government. It has been witnessed that the highest court enjoys a better status in a federal polity than in a unitary state, because of the important functions it has to perform vis-a-vis the federation and its constituents. This calls for a brief discussion of the relative position of the highest judicial organ in a federation and a unitary state.

Place of Supreme Court in a Unitary Government:

In England which is a unitary state the House of Lords which is the highest court, is required only to interpret the law as laid down by the Parliament. The law interpreted by the highest judicial body is binding upon all inferior courts. It can not declare any statutory law as invalid because of the supremacy of Parliament. Public opinion may oppose and denounce any enacted law which may infringe the most sacred rights and cherished traditions of the people but the court dare not to do it¹. Again

¹. J.W. Garner, Political Science and Government, (1958) p. 696. Carter writes it is typically British in avoiding the use of
the highest judicial body that is the House of Lords can not be said to be independent of and separate from the legislative and executive organs of the government. The nine Law Lords who function as the highest court are members of the House of Lords which is the upper chamber in England and the Lord Chancellor, the highest judicial dignitary is a member of the cabinet.

In France the position is more or less the same inspite of the fact that France has a written constitution. The Constitution of 1958, for the first time introduced judicial review of the statutes, but to the French the concept of judicial review is foreign and is a violation of the theory of separation of powers¹.

Like France many other continental countries also have written constitutions with unitary set up and the position is basically the same as in Britain because of the absence of judicial review. The continental experience shows that a constitution which can not be judicially enforced contains but empty words².

Place of Supreme Court in a Federal Government:

The position of the supreme court in federations is however,

special institutions for protection and in relying, instead, on such general rules and traditions as the rule of law, the recognition of implied restraints upon state power, and the application of the rule of reason to any and all of the system's manifestation. Thus again, Britain illustrates the importance, beyond constitutional procedures and institutional devices, of national tradition for the maintenance of a constitutionalism which is nowhere more safely anchored than in that country.


unchallengeable. It is one of the criteria of a federal government that there should be an independent supreme court because federal government is a 'legalistic government'. Federation is "a political contrivance intended to reconcile national unity and power with the maintenance of State rights."¹ There are however, numerous and varied problems of legal nature involved in respect of division of powers between the centre and the constituent units. In order that neither may encroach upon the jurisdiction of the other, and to reconcile the sovereign and sub-sovereign concepts of the centre and the units, the need for an independent judicial organ as an arbiter becomes essential. The supreme court which performs this function, acts as the 'fulcrum' in the maintenance of this crucial balance. It upholds the supremacy of the constitution by interpreting and applying its provisions in the case of asserted claims and conflicts. It settles not only the controversies between the centre and the states but also between the states inter se. Again it is required to promote the uniformity of federal laws by interpreting and applying the provisions of federal legislation. In addition to this it serves to adjudicate controversies affecting ambassadors, public ministers and consuls accredited to the federation².

The role of the supreme court in a federation is thus of great importance. The American federation which came into existence as a result of centripetal forces, has been firmly cemented by the Supreme Court. The Supreme Court of the United

States evolved various doctrines, that of instrumentalities, immunities, implied powers, in the beginning to maintain the national supremacy. This trend which started in 1793 in Chisholm v Georgia\(^1\), was kept alive by Chief Justice Marshall during his tenure (1801-1835)\(^2\). The Court denied the state sovereignty pretensions during this period. Marshall warned against any such construction of the Constitution by which the powers expressly granted to the government of the Union could be contr-acted and the original powers of the States be retained by any possible construction. He further maintained that some powerful and ingenious minds may "by a course of well digested but refined and metaphysical reasoning founded on these premises, explain away the Constitution of our country, and leave it, a magnificent structure, indeed to look at, but totally unfit for use."\(^3\)

The successor of Marshall, Taney\(^4\), however, did not accept the theory of national supremacy. On the other hand he advocated the creed of nation-state equality, the creed of 'dual sovereignty'. "The judicial power" he wrote, "was justly indispensable not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the general government........... So long...........as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial

1. 2 Dall. 419, 1 L. Ed. 440.
2. McCulloch v Maryland, 4 Wheaton 316, 4 L.Ed. 579 (1819); Cohens v Virginia, 6 Wheaton 264, 5 L. Ed. 257 (1821); Gibbons v Ogden, 9 Wheaton I, 6 L.Ed. 23 (1824).
3. Gibbons v Ogden, 9 Wheaton I, 6 L. Ed. 23 (1824).
4. Taney remained on the bench of the Court from 1835 to 1864.
proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of forces."

After Chief Justice Taney the Court did not stick to either concept but applied sometimes the concept of national supremacy and other times upheld the concept of 'dual sovereignty'. The Court has now developed a new concept viz., that of cooperative federalism to suit the changing conditions. The Court has since endorsed this stand in many of its decisions that both the Union and the States co-exist in the same territory and that the problems of either are a matter of common concern, to solve which cooperation is required between the nation and the states. The Constitution, the Court has held, does not prohibit such cooperation. The Court, it may thus be said has helped to evolve and develop federalism in the United States in a very smooth manner by interpreting the Constitution in the light of the existing circumstances.

In Australia also the highest court, viz., the High Court is the ultimate arbiter on the question of the exercise of power by the Commonwealth and the States. The Commonwealth has exclusive power to make laws and regulations in matters of defence. In this respect the Court has throughout followed a liberal policy to uphold the impugned Central legislation. It has however, declared

   Also see Dred Scott v Sandford, 19 Howard 393 (1857).
2. See Whitfield v Ohio, 297 U.S. 431;
   Fonzi v Fessenden, 258 U.S. 254;
   Carmichael v Southern Coal and Coke Co., 301 U.S. 495, 525.
more often than not that it will not decide political questions and that it is concerned only with the legal issues, whether or not the Commonwealth has the power to legislate. Beyond this the Court has held it shall not travel. "Questions of the abuse of power" the Court holds, "are for the people and Parliament. We can only determine whether the power exists, and if so whether Parliament has in fact and substance acted within it." It has further declared that "It is not for a Court to impose upon any Parliament any political doctrine as to what are and what are not functions of government." Though the Court has reiterated this in all its decisions, it is nevertheless felt that the judges in fact are influenced by their own political point of view. Thus when the Federal Government is found claiming power to regulate the marketing of apples and pears, to regulate the admission of students to the University, to control advertising, to adjust mortgages of land, to control the employment of women, to

1. Osborne v Commonwealth (1911) 12 CLR 345.
2. Ibid.
3. South Australia v Commonwealth (1941) 65 CLR 373; Also see Farey v Burvett (1916) 21 CLR 433; Pankhurst v Kiernan (1917) 24 CLR 120; R v University of Sydney (1943) 67 CLR 95; Ferguson v Commonwealth (1942) 66 CLR 432.
5. R v University of Sydney (1943) 67 CLR 95.
regulate holidays and pay\(^1\), to regulate the sale of cars\(^2\) all under the defence power, it is difficult not to feel that the decisions were in fact political decisions, based on facts and the judges' views as to these facts, rather than on pure law\(^3\).

In matters other than defence, the Court has maintained that neither the Federal nor the State governments are supreme. They are independent however, within the spheres of their limit as provided under the Constitution.

The Constitution of India, though nowhere in the Constitution the word federation is used, also provides for a federal structure. It creates an independent highest judicial organ, the Supreme Court of India\(^4\) which is vested with original jurisdiction to entertain controversies to which the Centre and the State or States are parties; or inter-State cases\(^5\). The jurisdiction of the Court is however, circumscribed by the comprehensive nature of the provisions elaborating the Centre-State relations under the Constitution. Further the jurisdiction of the Court is not extended to inter-State disputes on boundaries and river waters.

The Supreme Court is however, occasionally called upon to interpret the provisions dealing with the relations between the

1. Pidoto v Victoria (1943-44) 68 CLR 87.
4. Article 124 of the Constitution of India.
5. Article 131. The jurisdiction of the Court under this Article has been discussed in detail in Chapter IV, pp. 65-69.
Union and the States. The Court has evolved many a doctrine, to name a few, the doctrine of territorial nexus, pith and substance, colourable legislation, to smooth the relations between the federation and the constituent units. The Court it may be pointed out can not be alleged to be pro-Central, because the Constitution itself is biased for a strong centre.

Conclusion:

Thus it would have been seen that the Supreme Court is a unique institution of the government, an indispensable institution of constitutionalism, irrespective, whether a country is a unitary or a federal state. The need for the existence of the highest judicial body is recognised, not merely to maintain uniformity and certainty of law, but to uphold the supremacy of the Constitution, to protect the sanctity of the rights of the individual against the state. It is a different matter that the circumference of the jurisdiction of the Supreme Court differs from country to country. In a federal polity, as is seen, the court has more functions to perform than in a unitary set-up. But the existence of a highest judicial tribunal is fundamental in the body politic of a state.

In India the Constitution accepts the theory of the Supreme Court and makes it the highest judicial tribunal in the land. It is the purpose of the following pages to deal at some length with the Supreme Court, its organisation, function and role in the Indian polity.