Paper- C-4

(Comparative Constitutional System)

Unit - 5: Judiciary in UK, USA and PRC

Reading Material given by

Dr. Amrita Banerjee.

Dept of Political Science.

1 Role of the Judiciary

In the British Constitution there is no authority above the Parliament which can make and unmake any law whatsoever. The sovereignty of Parliament means no court is in a position to decalare properly passed Acts of Parliament invalid or unconstitutional. In the United States there is a system of judicial review based on the idea that some legislative Acts or some actions of the executive may be unconstitutional in terms of the provisions of the constitution. In that country the court plays a crucial role in interpreting the constitution and its judgements affect decision of politicians. In Britain, partly because of the lack of a written constitution, and partly because of the doctrine of parliamentary sovereignty, the court's **political role is limited.** There is no judicial review of legislation. However, there is judicial review of executive actions. The British courts are competent to decide if a minister or his agents have statutory authority for their action and declare the office-holder guilty of *ultra vires* (i.e. acting without authority), or of error in law (i.e. improper Act). The judges are however reluctant to declare an Act of Parliament unconstitutional since, if they do so, they would face the allegation of usurping the legislative function.

Hence the dominant orthodox view that the judicial role is passive and uncritical, as judges simply declare, find and apply the law to particular cases and disputes in an impartial, unbiased and disinterested manner.

This orthodox view of the judiciary has been challenged recently. Lord Reid (the leading Law Lord of the 1960s and early 1970s) said that "there was a time when it was thought almost indecent to suggest that judges make law—they only declare it. But we do not believe in fairy tales anymore. So we must accept the fact that judges make law".

In Britain there are two kinds of laws : statute law and common law. Statute law is made by Parliament and may override common law which is made by judges. As judges decide the cases that come

before them and give the reasons for their decisions, so their judgements gradually form a body of law because of the power of precedents which act as a guide to future judgements in similar cases. There is no doubt that judges make law through the development of "their" common law. The orthodox view, however, fails to recognise that the interpretation of statute law is a "creative" function that also involves the judges in making law. In easy cases the judges apply settled law to disputed facts. But in "hard cases" where the settled legal standard from precedent or statute clash or do not provide a clear answer where the strict application of law may be "unfair", judges quite simply rely on deductive reasoning from law and precedent. In these cases. J. Bell writes, "judges have to make important value judgements in which they create or shape legal standards according to their views as to the best answer they can reach. Inevitably, the judge does not come to a case netutral as to the political values to which he is to give effect, but with a necessary degree of political commitment"; and so in these cases, **judges make law.**[1] Lord Develin, a distinguished jurist, also recognises that judges do make law.[2] In reality, judges have always played a much larger role in law-making and in deciding issues with a political content than has generally been admitted. In Britain, then, judges are powerful political figuers who make law and give direction to society.

2 Characteristics of the Judicial System

If the English judicial system is examined it would reveal a number of distinguishable features. These features are discussed below.

1 **Absence of administrative courts.** The English judicial system is characterised by the absence of a proud distinction between ordinary courts and administrative courts as one finds in the countries of Continental Europe. In recent years, of course, many quasi-judicial administrative tribunals have been established, usually, though not always connected with some Ministry. But whereas in France the officers of the government cannot be sued in the ordinary courts for certain acts done in their official capacity, the English common law has recognised no distinction between the acts of a government official and those of an ordinary citizen. English jurists have laid great stress upon this right of the citizen to summon public officials before the ordinary courts.

2 **Trial by a single judge.** The practice of trial by a single

judge is carried further in England than in any other country. Most cases are tried in the first instance before a single magistrate, although appeals are generally heard by three, or sometimes two, judges sitting together. This practice has prevented the growth of a large and badly paid corps of magistrates.

3 **Extensive use of the jury system.** A third characteristic of the English judicial sytem is its extensive use of juries. Reforms introduced in 1933 have made recourse to a grand jury practically obsolete, but juries are still employed to decide on matters of fact in criminal cases. They are also used in civil cases, although not if they are decided by equity. The judge has a fairly broad degree of discretion to order trial with or without a jury, but there is always a jury whenever a man's personal honour is implicated, as in cases of libel or arbitrary imprisonment. Thus the jury system has not been overworked and over-burdened in England as it has been in the United States.

4 **Double hierarchy of courts.** A fourth characteristic of the English judicial organisation is the bifurcation of court business. Unlike courts in the United States, British courts do not as a rule exercise both criminal and civil jurisdiction.

5 **A compromise between centralisation and decentralisation.** A fifth characteristic of the English judicial system is that the judges normally move about the country or circuit. This helps to avoid the disadvantages likely to be encountered in a system of justice that is highly centralised. It also means that relatively few judges are required, so that their prestige is higher than it would be if they were more numerous. The county courts, with wide powers of jurisdiction in civil cases where the sum involved does not exceed a specified figure, are grouped into 59 circuits. This means that a very small number of judges is still sufficient to enable a court to sit in each district at least once a month. Criminal courts are likewise able to manage with comparatively few judges because the lower courts are not in permanent session. Persons charged with non-indictable offences are mostly tried by Justices of the Peace in Petty Sessions, while other cases are heard at Quarter Sessions or at the Assizes, which are heard three or four times a year in various provincial towns. But all courts of appeal sit in London.

6 **Independence of the judges.** One of the outstanding characteristics of English judges is their independence. In the words of Jennings, "No allegation of partiality or corruption or political

influence is ever made against British Judges". The judges are appointed by the Crown and hold office for life or during good behaviour. Parliament cannot criticise the decisions of the judges. They are free from the control of both the executive and Parliament.

7 **Absence of power of judicial review.** In the United States a law enacted by Congress may be declared unconstitutional, void, by the Supreme Court but the English judiciary does not possess such power. In England no law enacted by Parliament can be declared unconstitutional by the courts, for nothing that Parliament does can be overruled by any court. The English courts can interpret Acts of Parliament but they cannot declare a parliamentary statute invalid simply because it contradicts the provisions of Magna Carta, the Petition of Right, the Habeas Corpus Act, the Bill of Rights, etc. But a law made by American Congress can be declared invalid, if it contradicts a provision of the American Constitution.

8 **Judiciary as the protector of citizens' rights.** In the United States, China, India and many other countries the right of the citizens are guaranteed to them in the constitutions of their country. The English citizen has no constitutional right in this sense. But in England the rights of a citizen rest simply on the age-old assumption by the courts that a citizen is free to do anything except what the law forbid him to do. Thus the judiciary in England acts as the protector of the rights of a citizen. The courts retain full jurisdication over all acts of the government.

9 **Legislative organ as a court.** A unique feature of the English judicial system is that the House of Lords is the highest court of appeal in the country. Neither in the United States nor in India an organ of the Legislature can play this role. Of course, all the members of the House of Lords do not hear cases. Ten Law Lords—the Lord Chancellor (the presiding officer of the House and a member of the Cabinet) and nine Law Lords—exercise judicial function which belongs to the House as a whole.

10 **Speedy trial but costly litigation.** The English judicial administration is characterised by its speed. Cases are settled more rapidly in English than in American courts. This is mainly due to the greater discretion which English judges possess in dealing with legal technicalities. But the greatest defect of English justice is its expense, litigation is costly in England. The Labour Government tried to tackle this problem by the Act of 1948, which extended the scope of legal aid instituted under previous legislation. Much more still need to be done, however, before the judicial system will

be truly democratic and no citizen ever debarred from going to law simply on ground of expense.

3 Judicial Organisation

The courts which apply the law in England and Wales are divided, broadly speaking, into civil and criminal courts.

1 Civil courts

The most important of the primary civil courts in England and Wales are:

1 County Courts. For civil cases, county courts form the bottom rung of the judicial hierarchy. They have wide jurisdiction and in fact decide a large number of civil actions. There are some four hundred County Courts in the country, and they are so arranged that there is no part of the country more than reasonable distance from any of them. Their jurisdiction includes nearly all common law actions, provided that the amount claimed does not exceed £ 400. Cases which fall under the specific jurisdiction of the County Courts, however—e.g., those connected with hire-purchase agreements and rent restrictions—are tried irrespective of the amount involved. County Courts are presided over by a paid judge, who almost always sits alone, though he may sit with a jury.

2 The High Court of Justice. Civil proceedings may also be instituted in the High Court of Justice, the higher court of common law, which can decide whether to try the case itself or remit it to a County Court. The High Court of Justice is made of three divisions. The Queen's County Bench Division, staffed by Judges who are mainly concerned with the more important civil actions, but who also hear criminal cases at assizes; the Chancery Division, in which actions involving settlements, trust, the administration of the estates of deceased persons, company and bankrupt matters, and some tax cases are heard, and the Probate, Divorce and Admiralty Division, dealing with the proof of wills with Admiralty and Shipping cases, and with divorce. The High Court has original jurisdiction and also hears appeals or points of law from Quarter Sessions and Magistrate's Courts.

3 The Court of Appeal. It is a central tribunal sitting in London. The Court of Appeal hears civil appeals from the County Courts and the High Court. It is headed by a judge called the 'Master of the Rolls', assisted by eight Lord Justices of Appeal.

4 The House of Lords. From the Court of Appeal a further appeal is possible to the Supreme Court of Appeal in civil cases—

the House of Lords. Such appeals are usually heard by five of the nine Lords of Appeal in Ordinary.

2 Criminal courts

Criminal Courts deal predominantly with criminal actions. Such Courts include :

1 Magistrates' Courts. For criminal cases, the lowest courts are those of Justices of the Peace. These are courts of summary jurisdiction where persons accused of all kinds of minor offences and a large number of the less serious indictable offences may be tried without a jury. These Courts are also used for preliminary inquiries by magistrates into indictable offences, to determine whether or not an accused person should be committed for trial in a higher court.

2 Courts of Quarter Sessions. Under the Criminal Justice Administration Act (1962), Courts of Quarter Sessions in both counties and boroughs are authorised to hold as many sessions as they think necessary with a minimum of four sessions annually. Their jurisdiction covers all but the most serious indictable offences, though they are debarred from trying any crime that carries the death sentence or imprisonment for life. Trial by jury applies at both borough and county sessions. They are presided over by a legally qualified chairman (known as a 'Recorder', in borough sessions).

3 Courts of Assize. These are branches of the High Court held in the country towns and big cities three times a year. The assize judge work in circuits covering England and Wales, trying the most serious criminal offences committed in the country. They may also hear certain civil cases, although most of the time is devoted to criminal work.

4 The Court of Criminal Appeal. Its jurisdiction covers appeals from persons convicted of crime at the Assize Courts and Quarter Sessions. Appeals on question of law may be brought as a right, but on other grounds only by leave. The Court of Criminal Appeal consists of the Lord Chief Justice and a number of Queen's Bench judges, three is the usual number. The Criminal Appeal Act (1964) allows the Court of Criminal Appeal to order a new trial where this is in the appellant's interest, either because he has asked for new evidence to be heard or because new evidence has come to the notice of the Home Secretary and been referred to the Court. Where there has been an acquittal, however, no new trial can be ordered.

Under the Administration of Justice Act (1960) a further appeal from the Court of Criminal Appeal to the House of Lords can be brought if the Court certifies that a point of law of general public importance is involved and it appears to the Court or the House of Lords that the point is one that ought to be considered by the House.

The Criminal Appeal Act 1966 provided for the abolition of the Court of Criminal Appeal and the transfer of its functions to the Court of Appeal which now has a civil division and a criminal division.

4 The House of Lords as a Court

The House of Lords is the supreme tribunal of England and Wales, Scotland and Northern Ireland, in which is vested the ancient jurisdiction of the High Court of Parliament. It is the highest court of appeal in the United Kingdom. At one time, it claimed original jurisdiction to try civil cases. The exercise of such jurisdiction in the case of *Skinner v. East India Company* (1666) led to a prolonged dispute between Lords and Commons, and the Lords were forced in the end to abandon their claim. About the same time the case of *Shirley v. Fogg* established the right of the Lords to hear appeals from the Chancery Court.

The present position is this : **The House of Lords no longer exercises any original jurisdiction.** For England, Wales, and Northern Ireland (and for Scotland in civil cases only) it is the *court of last resort.*

Appellate jurisdiction in civil cases. By the Appellate Jurisdiction Act of 1876 appeals lay to the House of Lords from the Court of Appeal in England, and from any Court in Scotland or Ireland from which error or appeal lay to the House of Lords before 1876.

Every appeal is brought by way of petition for the reversal, variation or alteration of the order or judgment appealed against, or that the petition may have such other relief "as Her Majesty the Queen in Her High Court of Parliament may seem meet". Since the Administration of Justice (Appeals) Act, 1934, no appeal lies from the Court of Appeal to the House of Lords save by leave of the one or the other.

Appellate jurisdiction in criminal cases. Before 1907 there was no general right of appeal to the House of Lords in criminal

cases, although in exceptional cases a writ of error might be brought. The Criminal Appeal Act, 1907, made the House of Lords the final court of appeal in all cases cognizable by Court of Criminal Appeal. Not only may the defendant appeal, but the Director of Public Prosecutions or Prosecutor may appeal against the quashing of a conviction. The House of Lords has not yet allowed an appeal by the Crown against the quashing of a conviction.

Appeal lies to the House of Lords from the Court of Criminal Appeal in Northern Ireland under similar conditions, and also from the Courts-Martial Appeal Court. There is, however, no appeal in criminal cases from Scottish Courts.

The sittings of the House of Lords for judicial business are ordinary sittings of the House. But this does not mean that the thousand and odd members of the House hear and determine the technical points of law which come up on appeal from the courts below. By convention, all such appeals are heard by the Lord Chancellor, the nine Lords of Appeal in the Ordinary (Law Lords, as they are commonly called), ex-Lord Chancellors, and such other peers who hold or have held high judicial office. Although members of the House of Lords, they usually are not hereditary peers. The Lord Chancellor, a Cabinet member is the presiding officer of the House. The Law Lords hold peerages for life. They are men of high judicial distinction, eminent judges or lawyers who are made life peers in order that they may exercise judicial functions which belong to the House as a whole.

On the hearing of appeals there must be three Law Lords. They hear arguments separately from the House as an Appellate Committee (which may sit simultaneously in two divisions), but their judgment is delivered when sitting as the House of Lords. Technically, it takes the form of motion, each judge making a speech, which may be printed instead of reading aloud, expressing his concurrence or dissent.

5 Independence of the Judiciary

The independence of the judiciary from political control or influence is a "key principle of the British Constitution".[2] In Britain the independence of judges has been ensured in the following ways :

1 Appointment and removal of judges. Judges of the High Court and the Court of Appeal, with the exception of the Lord

Chancellor (who is a member of the Cabinet), are appointed by the Crown, but are not normally removable by the Crown. They are, ostensibly at least, appointed and promoted on professional rather than political grounds.

Senior judges have also security of tenure. They hold their offices 'during good behaviour'. They may be removed by the Crown only upon an address of both the Houses of Parliament. This remedy has never been used since it was laid down in the Act of Settlement (1701).

2 **Salaries of judges.** The salaries of the judges are fixed and not voted annually by Parliament. The salaries are paid directly from the Consolidated Fund.

3 **Freedom from executive control.** The legal system is formally under the control of the Lord Chancellor, a distinguished lawyer holding Cabinet rank. The Lord Chancellor supervises the courts but does not intervene in the administration of justice.

4 **Freedom from legislative control.** A judge cannot be criticised in Parliament except on a substantive motion which implies clear evidence of misbehaviour. If an address for the removal of a judge is presented to the Crown by the House of Commons, the judge is entitled to be heard.

5 **Judicial immunity from civil actions.** Under the common law, no action will lie against a judge for any acts done, words spoken in his judicial capacity in a court of justice.

Despite these safeguards it **cannot be said judges are completely separated from the world of politics.** The Lord Chancellor, the head of the British judiciary, is a member of the Cabinet, presides over the House of Lords, and yet plays a judicial role. The House of Lords has a judicial function, acting as the supreme court of appeal, the Law Lords sit in the Lords and usually speak on legal matters. In short, the judiciary is an arm of the state and judges have always played a role in deciding issues with a political and policy content. Governments have been prepared to use the judiciary—and above all the *image* of the judiciary—for political purposes; for example, Lord Widery's inquiry into 'Bloody Sunday' in Londonderry (1972), Lord Denning's inquiry into the security aspects of the Profumo affairs (1963), Lord Scarman's inquiry into the Brixton riots (1981), Lord Justice Taylor's enquiry into the Hills borough football tragedy (1989) and Sir John May's inquiry into the convictions of the Guildford Four (1989).

Some critics point out that judges may be independent and they may try to be fair and impartial but there are limits on this independence. In matters of "national security"—a phrase which can cover a multitude of sins—the judiciary will not question executive action. In 1942 the Lords acquiesced in the suspension by the executive of *habeas corpus (Liversidge v. Anderson)*. John Griffith has illustrated how judges have frequently been partial to the interests of the authorities in cases involving property rights and law and order and been hostile to trade unions. The **political views promoted by judges are "normally associated with the Conservative Party"**.[3] This is so because judges "are the product of a class and have characteristics of that class". The senior judges constitute a distinct elite group that comes from middle-class professional families, independent schools, Oxford and Cambridge, and by virtue of the job and the pay, they stay locked within that class. Judges are humans with human prejudices. No wonder therefore that their class, religious and ethnic background are likely to influence their general attitudes, which in turn will be translated into particular views on particular legal issues. The personal views and attitudes of judges intrude on their making of legal decisions.

Chapter 10
The Federal Judiciary

1 Judicial Review : Origin and Development

The expression "judicial review" refers to the power of a court to review a legislative act or an executive action to see whether it is inconsistent with the country's constitution, and if the court finds that it is, to declare it unconstitutional and hence unenforceable. This is a great power enjoyed by the Supreme Court of the United States. Its exercise by the Supreme Court, or the possibility that it would be exercised, has been an important factor in the development of American political system. No other court in the world exercise this power as it is exercised by the Supreme Court of the United States.

Origin of judicial review

Ironically, the constitution does not in express terms give the Supreme Court the power to pass on the constitutionality of legislative acts or executive actions. However, most historians agree that the Founders of the constitution favoured judicial review—narrowly conceived. Its textual basis is the Supremacy Clause and Article III, Section 2, of the constitution which states that judicial review shall extend to all cases in law and equity arising under the constitution. The purpose of judicial review was, the founders held, to keep the legislature within limits. The framers of the constitution therefore believed the Supreme Court might declare unconstitutional acts of Congress that plainly contradicted specific provisions of the constitution. In addition, judicial review furnished the court with a means of self-protection against legislative encroachment. But, in no case, the framers believed that judicial review would be a policy-making power as it has been today.

It was however the Supreme Court itself which established its power of judicial review through actual exercise of that power. This it did in the famous case of *Marbury v. Madison* decided by Chief Justice John Marshall in 1803.

In the election of 1800 President John Adams and the Federalists were defeated by Thomas Jefferson and the Democratic Republicans. The outgoing President Adams appointed the Federalist John

Marshall as chief justice, and in the last hours before Jefferson took over the presidency he appointed many other Federalists to positions in the Federal Judiciary. In its last-minute attempt to fill the judicial posts with good Federalists, the Adams administration had not been able to deliver commission to one William Marbury as justice of the peace for the district of Columbia. When Jefferson took office, he and his secretary of state, James Madison, resented the attempt of the Adams administration to pack the court with so many Federalists holding life-time appointments. They refused to deliver the last few commissions.

Failing to obtain his commission, Marbury, acting under section 13 of the Federal Judiciary Act of 1789, applied to the Supreme Court for a rule or preliminary writ to Madison to show cause why a mandamus should not be issued directing the secretary of state to deliver the commission. When the preliminary writ was issued, Madison ignored it as a judicial interference with the executive department.

At the Court's next session, Chief Justice Marshall gave the ruling that Marbury had the right to his commission and Madison should deliver it. As the commission had not been delivered, Marbury had been denied of his right and hence he had a right to sue, and the proper court had a right to issue a writ of mandamus even against the high public official, the Secretary of State. That is, the courts did have authority over the executive.

Having staked out the Court's claim, Marshall considered whether the Supreme Court had jurisdiction over the issue at hand. Under the Judiciary Act of 1789, Section 13, the Supreme Court had been authorised "to issue writs of mandamus to persons holding office under the authority came within the description but the Supreme Court could not issue a writ to such an officer because the law is unconstitutional". Why? Marshall argued that the constitution prescribed specifically the court's original jurisdiction, that this jurisdiction did not include the power to issue writs of mandamus to federal officials, and the Congress had no power to alter this jurisdiction. Therefore section 13 of the Federal Judiciary Act was unconstitutional, because it tried to extend the court's jurisdiction beyond what the constitution specifies.. Consequently, Marbury's application for a mandamus was not granted.

Having declared void a section of the Judiciary Act, Marshall then advanced his famous argument defending the court's power to declare an Act of Congress unconstitutional. His argument rests on three

general principles. First, it is the particular duty of the courts to interpret the law—that is, to say what the law is, and since the constitution is law the Supreme Court is duty-bound to interpret the constitution. Second, the constitution is "the fundamental and paramount law of the nation" and therefore superior to congressional law. Third, the judges while assuming office have taken oath to protect and uphold the constitution. The Court will therefore enforce those acts of Congress that conform to the constitution. This means that where a congressional law contradicts a provision of the constitution, the court will enforce the constitution, the fundamental law, and ignore the law of Congress, that is, the court will refuse to enforce the unconstitutional law.

Marbury v. Madison ruling was crucial in establishing the Court's power of judicial review but the case did not define the scope of judicial review. As President Jefferson and other Republicans reasoned, the ruling merely meant that the court could strike down laws that affected the judiciary itself (as the Judiciary Act of 1789 did), but it had no power over matters falling within the jurisdiction of the other two branches of government, because each was the judge of the constitutionality of matters within its own province. Not until the *Dred Scott Case* (1857) in which the Supreme Court invalidated Congress's attempt to abolish slavery in the territories, did the court destroy Jeffersonian theory and finally established the power of judicial review.

Development of power of judicial review

Between 1890 and 1937 the Supreme Court began to exercise its judicial power in a manner that provoked challenge to its authority and precipitated a constitutional crisis in 1930. During this period the court behaved like a super-legislative guardian of a free-enterprise system by striking down legislations designed to control the ill-effects of industrialisation. The issue involved was property rights and how much power the government had to regulate the economy. While standards of reasonableness of regulation of the economy should be matter of legislative decision the Supreme Court claimed this authority for itself. The Court gave a novel interpretation to the "due process clause" of the Fourteenth Amendment of the constitution by holding that if the justices considered regulation of private interests unreasonable it would mean denial of persons their property without due process of law (i.e. principle of natural justice).

This thinking doninated the court in the early part of this century and continued into the 1930s when by a majority of five it struck down many New Deal laws—the heart of President Roosevelt's Recovery Programme from the Great Depression—as beyond the constitutional authority of the government. The Supreme Court did not allow any governmental policy of regulating the economy that failed to satisfy its own test of reasonableness. This meant that policy-making power in the country would be determined finally by the judicial branch of the government and not by the elected branches of the government. In the words of Justice Robert Jackson, the period between 1890 and 1937 was a period of "judicial supremacy" when the substance of public policy depended on the outcome of litigation. It was a period in which "American government was government by lawsuit".

The decisions of the court concerning highly controversial issues provoked the sharpest kind of public debate as the economic crises called for strong action—regulation of private enterprise and promotion of employment by the government. Even the court gave its verdict by a bare majority of five against four. President Roosevelt, following his re-election in 1936, decided upon a showdown with the court as the Supreme Court, in his view, was acting like "a third house of the national legislature". He tried to curb the court's power over his programmes by introducing a court reorganisation bill. One section of the bill sought to permit the President to appoint additional justices equal to the number sitting on the court who had reached the age of 70 and had not retired. But a large body of opinion, both inside the Congress and outside it, interpreted the proposal as a deliberate attempt to pack the court with justices who would reverse the courts' previous decisions. Ultimately, the congress rejected President's court enlargement plan.

However President Roosevelt won the war in the court room. One of the five justices, who invalidated social and economic legislations began in 1937 to vote with the four on the other side. The court ceased to strike down President's New Deal Programmes. With this change, the era of the courts' pre-occupation with property rights came to an end.

Since 1937 the court's primary interest has been confined to protecting the personal liberties of individuals against infringement by either the national government or the states. The court has been very active in the last 45 years, voiding 44 federal laws from 1938 to 1983. The most active period of the court however began in

1953 when Earl Warren became Chief Justice. The court made landmark decisions concerning civil rights, desegregation, and equality of the races; civil liberties, such as freedom of speech, freedom of the press, separation of the church and the state by abolishing school prayer, and the rights of the accused, such as the right to counsel.

Thus judicial review puts a powerful weapon in the hands of the Supreme Court. However, for the most part the power has been used with considerable restraint, particularly with respect to federal laws. In the some 183 years since Marbury, the court has declared unconstitutional all or part of 110 congressional laws, an average of less than one a year; and many of these were relatively unimportant.

According to most constitutional scholars, the real significance of power of judicial review lies in the awareness of the Congress that all of its acts are subject to a final veto by the Supreme Court. With a few exceptions, the court has interpreted the legislative power to enact specific laws broadly as it has viewed its own authority to sit in review of statutes.

The use of power of judicial review has not been uniform over the years because the major issues facing the court have changed over the years. The more fundamental however has been the attitudes of individual justices that underlie the positions they take. Felix Frankfurter, an associate justice, observed that the words and phrase, in the constitution, such as "due process" of law and "equal protection" of law, are so vague and undefined that they compel a judge to read his views into them. Though personal values do not always control a case, there is little question that in exercising the right of judicial review, the Supreme Court justices have considerable discretion in deciding cases on the basis of their own value systems. As Max Lerner commented, "Judicial decisions are not babies brought on by constitutional storks". As a result, justices of the Supreme Court, like the legislature and the executive, make public policy. The court can decide not only the constitutionality of the actions of the other two branches of government but also can declare an Act of Congress void if it finds it unreasonable and unjust. In this way, the Supreme Court as the final interpreter and guardian of the Constitution has become, in the words of Lord Bryce, "the living voice of the constitution."

decision making by the court.

2 The Structure of the Federal Court System

Federal Court are of two types—constitutional and legislative. Constitutional courts are those created, or envisioned, by Article III of the Constitution. The best known constitutional courts are the three courts of general jurisdiction that handle most Federal legal matters—the Supreme Court, 93 District Courts, and the Courts of Appeals.

The legislative courts differ from constitutional courts mainly in that they are endowed with non-judicial powers, of a legislative and administrative nature, in addition to their judicial power. There are only two legislative courts : the United States Court of Military Appeals and the Text Court.

A distinctive feature of the Federal judiciary is that it is a trilevel pyramid, comprised of district courts at the bottom, court of appeals in the middle, and the Supreme Court at the top. Of these, only the Supreme Court is provided in the Constitution. The other courts have been created by the Congress.

District Courts. District courts are trial courts of the Federal judiciary. There ar 89 district courts in 50 states; one in the District of Columbia and one in Puerto Rico. As the trial courts in the federal judicial system, the district courts use juries. Their work mainly involve the enforcement of federal laws. All final decisions of the district courts are subject to review by the courts of appeal. Judges of the district courts, who are appointed by the President, usually serve in the district and State in which they live.

Circuit Courts of Appeal. Immediately above the district courts in the federal judicial hierarchy stand what are called the circuit courts of appeal. There are now eleven judicial circuits in the whole country. There is also a United States Court of Appeal in the District of Columbia which is regarded as a judicial district. The courts of appeal hear appeals from the district courts. They are courts of final appeal for most cases, since only a few of the cases heard there are eventually carried on to the Supreme Court. The cases are heard and decided by at least three judges. Each circuit court of appeal has a Chief Judge who presides over its proceedings and supervises and coordinates the work of his court and of all the district courts in the circuit.

The Supreme Court. The Supreme Court of the United States stands at the apex of the federal judicial system. It consists of the Chief Justice and eight associate justices. As a court of last resort, it is the highest judicial tribunal in the nation. It is the ultimate authority on question of law and constitutional interpretation. Its decisions are final. Although the Congress did not create the Supreme Court, it has the power to pass various laws about its organisation and work.

In addition to the above, there are also three Federal Courts of special jurisdiction : the Court of Claims, the Customs Court and the Court of Customs and Patent Appeals. The Court of Claims has jurisdiction over most cases involving suits against the Government for damages. The Customs Court hear appeals from the rulings of customs collectors concerning the appraisal of imported goods and the collection of import duties. The Court of Customs and Patent Appeals reviews the ruling of the Customs Court, hears appeals from

some ruling of the United States Patent Office, and also reviews certain findings of the United States Tariff Commission as to unfair practices in the import trade. Decisions of these courts are subject to the Supreme Court review under much the same procedures as cases from other Federal Courts.

3 Appointment and Tenure of Judges

The judges of the Federal courts including the Supreme Court are appointed by the President, by and with the advice and consent of the Senate.

Characteristics of judges. The American constitution does not prescribe specific qualifications for the judges of the Supreme Court. But no non-lawyer has ever been appointed to the Supreme Court bench. Thus the most basic qualification for Supreme Court judgeship is membership in the legal profession. This is not a legal requirement but an informal custom.

Another important qualification of Supreme Court judges is public experience. All except one of the 102 judges who have served on the Supreme Court were previously engaged in public service at some level of government (as city, country or state prosecutors or district attorneys, or United States attorneys or their associates or solicitor general of the United States).

Some appointments have also been made on the basis of their judicial experience either in the federal district courts or in state courts.

But the most important factor that the President takes into consideration in making appointments to Supreme Court Judgeship is that his nominee shares his general political philosophy and views on public policy issues. To quote Tipheus T. Mason, "The Supreme Court has always consisted largely of politicians, appointed by politicians in furtherance of controversial political objectives". "Federal judgeships traditionally go to persons of the President's political party. In apparent contradiction of the American ideal of an independent non-partisan judiciary, the process of selecting federal judges is pure politics."[1] However, this effort of Presidents often comes to nothing. Justice often behave in ways not anticipated by their benefactors: for example, Chief Justice Earl Warren was more liberal than President Eisenhower expected and the court (which included four justices appointed by President Nixon) unanimously ruled that the President had to turn over the Watergate tapes to Congress.

Tenure. The judges of the Federal Court hold office for life "during good behaviour". They can be removed from office, through impeachment, by the Congress for treason, bribery, or other high crimes or misdemeanours. Nine Federal judges have so far been impeached by the House of Representatives, though only four have been convicted by the Senate. The life tenure of judges has created a problem in that judges who, because of age or health, are unable efficiently to perform their duties insist on remaining of the bench.

4 The Supreme Court

The Supreme Court of the United States is a unique institution. It has enjoyed a prominence in the American system of government unrivalled by judiciaries in other nations.

Organisation and jurisdiction

The Supreme Court stands at the pinnacle of the Federal court system. It consists of a Chief Justice and eight associate justices. All justices are appointed by the President by and with the advice and consent of the Senate. Since no qualifications are stated in the Constitution, the President is forced to appoint anyone who is likely to be favoured by the Senate. The historical record of Supreme Court appointments is that about one in five presidential nominations has either been rejected outright or not acted on by the Senate.

The judges hold office for life "during good behaviour". They can be removed by the Congress, through the process of impeachment, for treason, bribery, or other high crimes or misdemeanours.

Salaries of the judges are fixed by the Congress; they can be increased at any time but cannot be diminished during the tenure of any particular judge.

The Supreme Court has jurisdiction of both original cases and appeals from lower court decisions. **Original jurisdiction** means that a case starts, or originates, before the Supreme Court. It has original jurisdiction in all cases (1) that affect ambassadors, other public ministers and consuls, and (2) those in which a State is a party. All other cases reach the Supreme Court by way of lower Federal and State Courts. The Constitution gives the Court **appellate jurisdiction**, both as to law and fact, "with such exceptions, and under such regulations as the Congress shall make." The types of cases that may be taken from lower courts to the higher court has been defined by the Congress.

There are three methods that may be used to bring cases under appellate jurisdiction : certification, appeal or certiorari. Certification is a technique whereby a lower court asks the Supreme Court for guidance

in a particular case. It is infrequently used because, if the case raises important questions, the Supreme Court itself considers and decides those questions instead of offering its guidance to the lower court.

Appeals are more frequently resorted to in trying to obtain review. A losing party may appeal his case to the Supreme Court (1) where a Federal Court has declared a State law unconstitutional or has issued an injunction against the enforcement of an act of Congress; (2) where the highest court of a State has declared unconstitutional a Federal law, executive order, or treaty, or has sustained the validity of a State law against a substantial challenge that it violates the United States Constitution.

However, most cases heard by the Supreme Court are presented by petitioning for a writ of certiorari (from the Latin, "to be made more certain"). A writ is an order issued in the name of a court, and certiorari means to call up for a review. The losing party in a US Court of Appeals or in the highest court of a State, if his claim involves a question of Federal law, may petition the Supreme Court to review his case. Granting certiorari, that is, agreeing to hear that case, is strictly a matter of discretion : the Court may grant or deny review. Although about 80 per cent of the Supreme Court's business arises from petitions for certiorari, comparatively few petitions are granted.[2]

Chapter 7
The Judiciary

1 The Judicial System

The judiciary of China consists of four kinds of people's courts. At the apex of the judicial system stands the Supreme People's Court, and below it are the local people's courts at various levels, military courts and other special people's courts.

The President of the Supreme People's Court is elected by the National People's Congress. The judges of the local people's courts are elected by the local people's congress. . The judges of all courts are elected for 5 years, subject to recall by their electorate.

All cases in the People's Courts are tried in public, unless otherwise provided by the law. The accused has the right of defence. The Constitution forbids any interference by administrative organs, public organisations or individuals in the judicial functions of the People's Courts.

The Supreme People's Court, the highest judicial organ, administers justice in accordance with the Constitution, laws and 'decrees'. It supervises the work of local people's courts at various levels and of special people's courts. The people's courts at the higher levels supervise the work of the people's courts at the lower levels.

The Supreme People's Court is responsible and accountable to the NPC and its Standing Committee. Local people's courts at various levels are responsible and accountable to local people's congresses at the corresponding levels.

As an integral part of the judiciary, the Constitution establishes a system of people's procuratorates. These are state organs created for supervision. They act as the 'watchdog' of socialist legality in China's judicial system. The Supreme People's Procuratorate is elected by the NPC and its Standing Committee. It directs the work of the local People's Procuratorates at different levels.

2 Characteristics of the Judicial System

The judicial system of China as introduced by the new Constitution exhibits the following characteristic features.

1 **Democratic character.** Like the judiciary of the erstwhile Soviet Union, the judiciary of China is based on democratic principle. All courts in China, from top to bottom, are elected. The Supreme People's Court is constituted by the National People's Congress and its Standing Committee.

The judges of the local people's courts are elected by local people's congresses.

2 **Accountability and recall of judges.** A related, and second feature of the Chinese judiciary is the responsibility and accountability of the judges to their electors. If a judge deviates from the law, he may be recalled by his electors. This ensures public control over the administration of justice.

3 **Trial of cases with participation of people's assessors.** One of the distinctive features of the present Chinese judicial system is trial of cases with participation of "people's assessors". The people's assessors are the representatives of the people. They are the exact counterparts of people's assessors in the courts of the erstwhile Soviet Union. While discharging their functions in court, the assessors participate in deciding not only questions of fact but questions of law. The participation of the people's assessors ensures that each case will be thoroughly examined, and the legitimate interests and rights of the accused duly protected.

4 **A simple judicial procedure.** The Chinese judicial procedure is simple and intelligible to the masses of people. Since the judges are elected and responsible, people have confidence in the courts. The trial of cases is not delayed.

5 **Right of the accused to defence.** The right of the accused to defence is guaranteed in the Constitution. The ways of exercising this right are regulated in detail by the legislation on criminal court procedure. The courts and the procuratorate must do everything so that the accused may defend himself in the statutory manner against the charges brought against him.

Procuratorate. Like the office of the Procurator-General of the erstwhile Soviet Union, the Chinese procuratorate system is a distinctive feature of the judicial system. The Supreme People's Procuratorate works as the watchdog of the Chinese socialist legality. It possesses the supreme authority to supervise the observance of the Constitution and the law by the ministries and its subordinate bodies and citizens.

Absence of judicial review of legislation. An important feature of the Chinese judiciary is that the Supreme People's Court has no power to interpret the law. The power of interpreting the law is vested in the Standing Committee of the National People's Congress. The court has no authority to decide on the constitutionality of an action or order of the Government.

3 The Supreme People's Court

The highest judicial body of China is the Supreme People's Court.

Composition

The Supreme People's Court is composed of a President, Vice-President and several judges. There is also a Judicial Committee of the Supreme People's Court.

The judges are elected. The President of the Court is elected by the National People's Congress, and other justices including the Vice-Presidents

are elected by the Standing Committee of the NPC at the suggestion of the president of the Court. All judges are elected for 5 years. But they may be removed by their electors before their term of office expires.

Powers and Functions

The Supreme People's Court stands at the apex of the judicial system of the country. The Constitution has described it as "the highest judicial organ of the country. But its powers are not wide. It administers justice in accordance with the Constitution and law of the country. It supervises the activities of the local people's courts at various levels and of the special people's courts. It is responsible and accountable to the National People's Congress and its Standing Committee.

4 Supreme People's Procuratorate

The Supreme People's Procuratorate is an exact replica of the procurator's office of the erstwhile Soviet Union. It stands at the apex of the procuratorate system in the country. The Chinese Constitution of 1954 established the system but it was abolished during the Cultural Revolution. The 1978 Constitution reintroduced the system and 1982 Constitution maintains it.

The Supreme People's Procuratorate is composed of the Procurator-General and several procurators. The Procurator-General is elected by the National People's Congress for 5 years but may be removed by NPC before his term expires. The other procurators are appointed by the Standing Committee of the NPC for five years subject to recall.

Powers and functions. As an integral part of the Chinese judicial system, the Supreme People's Procuratorate occupies a very important position in the constitutional system of the country.

The Supreme People's Procuratorate is duty bound to watch over the observance of the Constitution and law by all ministries, departments, local government bodies, officials and citizens generally. In content and scope of powers, general supervision is the broadest and most extensive branch of procuratoral activity. But this supervisory function is confined to questions of legality, it does not extend to efficiency or expediency. The duty of supervision means the duty to detect violations of the law by any state organ, official or citizen. In exercising this function the Supreme People's Procuratorate acts as the guardian of rights of the accused.

In addition to the above functions, the Supreme People's Procuratorate has the constitutional duty to direct the activities of local people's procuratorates at various levels and of special people's procuratorates.

5 Local People's Courts

In China there exists a system of local people's courts at different levels of local governmental system. These courts are elected by their respective local people's congresses and they remain responsible to them. Under the Constitution, the local people's courts function under the supervision of the higher courts.