THE JUDICIAL PROCESS

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CHAPTER VII
JUDICIAL REVIEW:
I THE SUPREME POWER (page 251)
DEFINING JUDICIAL REVIEW

Certainly, the most controversial and at times the most fascinating role of the "courts" in the United States in general and of the Supreme Court in particular is the exercise of the power of *judicial review.* It is commonly viewed with equal amounts of reverence and suspicion. In its full majesty and range, it is a power that the *ordinary* courts: i.e. those that are part of the formal judicial structure – of merely a handful of other countries in the world possess with varying degrees of effectiveness; among these are Australia, Brazil, Burma, Canada, India, Pakistan, and Japan, of whom most have federal systems of government. It is all but axiomatic that the practice would be found more readily in federal than in unitary states. Briefly stated, judicial review is the power of any court to *hold unconstitutional and hence unenforceable any law, any official action based upon it, and any illegal action by a public official that it deems*—upon careful, normally painstaking, reflection and in line with the canons of the taught tradition of the law as well as judicial self-restraint—*to be in conflict with the Basic Law, in the United States its Constitution.* In other words, in invoking the power of judicial review, a court applies the *superior* of two laws, which at the level of the federal judiciary of the United States signifies the Constitution instead of some legislative statute or some action of a public official allegedly or actually based upon it.

In the United States which will serves as the chief subject in this treatment of judicial review, this highly significant instrument of power is theoretically possessed by every court, no matter how (page 252) high or low on the judicial ladder. Although admittedly unlikely, it is thus not impossible for a judge in a low-level court of one of the fifty states to declare a federal law unconstitutional! Such a decision would quite naturally at once be appealed to higher echelons for review and almost certain reversal, but the possibility does exist. Conscious of the nature and purpose of federalism and the need to permit legislative bodies to act in accordance with their best judgment, no matter how unwise that may well be at times, courts are loathe to invoke the judicial veto. Yet their power to do so, especially that of the Supreme Court of the United States, serves as an omnipresent and potentially omnipotent check upon the legislative branches of government. While the highest tribunal, has to date (winter 1961-62) declared but 89 provisions of *federal* laws unconstitutional, out of a total of over 65,000 public and private laws passed, some 700 *state* laws and provisions of *state* constitutions have run wholly or partly afoul of that judicial checkmate since 1789. A recent example of of the latter action is the court's unanimous ruling in *Torcaso v Watkins* 367 U.S. 488 (1961) ; In it it struck down a provision of the Maryland Constitution on the ground that to compel officeholders to declare a belief in God, constituted a "religious test for public office" that invaded the individual's right to religious freedom. In many ways the Court's power over state actions is of more significance to the federal system than the much more publicized and well-known power over federal actions.

Tables VII and VIII illustrate in some detail the power of judicial review over legislative enactments, as exercised by Supreme Court at *federal level* only. But it is interesting to note that more statutes of the State of Louisiana have been declared unconstitutional than those of any other state—Louisiana

being the sole *state* with civil law at the base of its judicial system. Regarding the sparse number vof federal statutes held unconstitutional by the post " anti-New Deal" Supreme Court in recent times, the six provisions of congressional enactments that have Fallen since 1937—actually since 1943-all did so because they infringed personal liberties safeguarded under the Constitution, with three involving actions by military authorities who proceeded under congressional statutes. (P 253) The six Court decisions were as follows:

(1) *Tot V The United States* (1943) 319 U.S. 463. A Statutory presumption that a known criminal in possession of firearms or ammunition must have carried them in violation of the Federal Firearms Act section 2(f) was invalidated 8;0 as a violation of the due process of law clause of the Fifth Amendment. ……..(p 254)

State legislation too has—with generally minor exceptions — been held unconstitutional largely because of infringement of civil liberties, although a number of instances involved state interference with national interests. ……..P 255.

Thus, after the famous decision in *Marbury v Maddison* 1 Cranch 137 in 1803, to be described presently, in which Mr Chief Justice Marshall enunciated the doctrine of judicial review—although it was not really the first instance of its application— no other federal legislation was declared unconstitutional by his Court during the remaining 32 years of his long tenure of 34 years. The Circuit court for the District of Columbia did strike down 2:1 a congressional statute, in *US V Benjamin More* only six months after *Marbury v Madison*. Nevertheless, the Marshall Court wielded immense power and guided by the dominant figure of the great Chief Justice did more than the other two branches of the national government to make the young United States a strong, vigorous powerful nation, and its Constitution a living, effective, elastic Basic Law.

P 267. A Historical Note;

The notion that courts, or some other body, should exercise judicial review as the guardian of a basic law or constitution stems primarily from the early European rejection of the idea of the inviolability of enacted law. One of the first statements clamoring for a type of judicial review was made in England—oddly enough in view of the subsequent rejection of the concept (that led to the demise of the British Empire sic). It arose out of the famous *Dr Bonham's case* in (1610). The King had granted to members of the London College of Physicians, the exclusive right to practice medicine in that city. Dr Bonham was charged with practicing medicine illegally, for he was not a member of that college. When the case came before Sir Edward Coke, he declared the charter void as a violation of the common law. Holding the latter to be supreme, Sir Edward thus stated that the courts could declare Acts of Parliament null and void: therefore, he held, common law was to be supreme: "When an act of Parliament is against common right and reason—the common law will control it and adjudge such act to be void." 8 co 188a .

But if Sir Edwards view was ever seriously adopted at all in England , it was promptly superseded when the Glorious Revolution of 1688 established the supremacy of Parliament.

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In any event the evidence is persuasive that the vast majority of the delegates, Anti Federalists as well as Federalists favoured it—although for quite different reasons. …. The delegates… concurred in the pronouncement by Gouverneur Morris of Pennsylvania that the courts should decline to give weight of law, to "a direct violation of the Constitution."

Morris admitted that such control over legislation might have "its inconveniences" but it was nonetheless necessary because " even the most virtuous citizens will often as members of a legislative body concur in measures which afterwards in their private capacity they will be ashamed of."

Murphy J in 1984 stated the true position in Australia.
WHEN THE CONSTITUTION IS UNDERSTOOD ALL LAW BECOMES CERTAIN.
The late Lionel Murphy, an eminent lawyer and High Court Justice, said in THE UNIVERSITY OF WOLLONGONG v. MOHAMED NAGUIB FAWZI AHMED METWALLY and others [1984] HCA 74; (1984) 158 CLR 447 (22 November 1984), the following passage, that should be framed and hung upon every lawyer's wall beside his qualifications.

Inconsistency

4. Our legal system is based on the principle that there cannot be inconsistent laws. This principle operates at federal and State levels and whatever the source of law (constitutional, legislative, delegated legislative or decisional (common) law). If these laws would produce an inconsistency, then one prevails; the other or others are not law, and are often described as invalid or inoperative. The supremacy between what would otherwise be inconsistent laws is resolved in a number of ways. For example, where two laws emanate from one legislature, the later prevails. Where they emanate from different legislatures, constitutional law provides that one is superior, and its law will prevail. In Australian constitutional law, there are two general supremacy clauses, one in the covering clauses of the Commonwealth of Australia Constitution Act (s.5) and the other in the Constitution proper (s.109). Another limited clause is s.105A (agreements with respect to State debts). Section 106 subjects State Constitutions to the Constitution; s.108 similarly subjects State laws to it.

Justice Murphy should have added that any law whatsoever that is inconsistent with the words of the Australian Constitution is automatically avoided, by reference to Section 15A *Acts Interpretation Act 1901* (Cth). Materially that section says: **Construction of Acts to be subject to the Constitution.** Every Act shall be read and construed subject to the Constitution and so as not to exceed the legislative power of the Commonwealth. To the intent that any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

The Scholarship of Henry J Abraham did not take account of the work of Holdsworth: whose History of English Law, underpins Australian Law, by the means of the Australian Courts Act 1828 S 24. (unrepealed).

A HISTORY OF ENGLISH LAW by Sir William Holdsworth KC DCL Hon LL.D

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In the Tudor and early Stuart period there were signs that judicial control might be superseded by the administrative control of the Council, The Star Chamber, and the Provincial Councils and the control of the judges of assizes was at that period administrative as well as judicial. But the result of the Great Rebellion and the Revolution had been to abolish this administrative control, and to make **the system of judicial control in effect the only control to which the organs of local government were subject.** The only way in which the justices could be forced to perform their duties, and the only way in which they could force the subordinate officials and units of local government to perform their duties, was by taking proceedings before the courts of law. Hence during the 18th Century, this judicial

control of the units of local government is elaborated; and this elaboration is as we shall see the reason why special bodies of law connected with local government begin to be developed.

The manner in which this judicial control was exercised can be grouped under three main heads.
(i) **There is control which is exercised by proceedings initiated in the name of the Crown.** All through the eighteenth century the duties of townships and parishes in relation to such matters as road maintenance and poor relief; the many duties imposed upon the justices and upon the quarter sessions by the common law and by statute, were enforced either by the machinery of presentment and indictment, or by means of a criminal information, or by the prerogative writs. Even the departments of the central government, though they might advise, could not compel, except through the machinery of the courts. Thus, when the County of derby failed to comply with the Militia Acts of 1757, 1765, and 1769, the government was obliged to issue a Writ of mandamus against the justices to compel them to raise their statutory quota of 560 men or pay 5pound per man. On the issue of this writ, the justices ordered the sum of two thousand eight hundred pounds to be raised.; but nothing was done until another mandamus was threatened in 1773. Hence the departments of central government like the private citizen, could only compel if they could show that an official or a community was subject to a legal duty, and that he or it had not fulfilled that duty. (p 157)
(ii) **The judicial control could be applied at the suit of the private citizen.** The private citizen could set in motion the different forms of procedure open to the Crown, and in addition he could bring a civil action. **This power to bring a civil action was an effective control, a safeguard of the liberty of the subject, and one of the best of all the securities for the maintenance of the supremacy of the law.** Since breaches of the law, either arising from misfeasance or non-feasance, were generally a cause of action at the suit of the individual injured by them, civil proceedings could be taken against **all officials of the local government** by persons who had been injured by willful or negligent breaches of the law committed by them. **This responsibility of the officials of the local government to the law , at the suit of an injured individual had been a well-recognized principle of the mediaeval common law; and we have seen that as a result of the Great rebellion and the Revolution, it had been extended to all servants of the Crown from the highest to the lowest.** The formality of the common law procedure, and the strictness of the rules of pleading sometimes caused this rule to press hardly on officials. ……..But it was a valuable check upon the arbitrary exercise of their powers in an age when judicial control was the only effective check to which they were subject.

(iii) It often happened that a dispute arose between units of the local government —between parishes or between counties –as to the incidence of the liability for the performance of their duties. A dispute, for instance, might arise between parishes as to which of the two was liable to relieve a pauper or as to which of the two was liable to maintain a road. All these disputes were settled by an appeal to the courts; and we shall see that much of the law upon such subjects as poor relief and highways originated in the decisions of the courts in these cases.

This mediaeval idea that **the organs of local government were autonomous, subject only to the control of the law, was and still is a leading principal of English public law**. It was applied in the Eighteenth and Nineteenth century much as it was applied in the sixteenth and seventeenth centuries. It is true that in the nineteenth century we can see the growth of an administrative control by departments of the central government, which recalls the control which the council of Star Chamber had begun to exercise in the sixteenth and early seventeenth centuries. But except in so far as statutes have transferred this control to departments of the central government, this judicial control is still dominant. Since therefore this particular mediaeval idea is as much part of the public law of the eighteenth century as of the earlier centuries, I shall deal with its bearings on the public law of the

eighteenth century when I speak of the relation of local to the central government. ……..
The Growth of Modern Ideas.

The autonomy of the organs of local government, subject always to the control of the law, was as much the outstanding characteristic of English Local Government in the eighteenth century as it had been in the Middle Ages. But we have seen that in the fourteenth and fifteenth centuries, it has been recognized that the law which controlled the activities of all persons , whether officials or not, and of all communities and corporations was a law that could be changed and added to by Parliament. The legislation of the Tudor period had built up a system of local government that sufficed for the needs of a modern state. Similarly, the legislation of the eighteenth century attempted, not wholly successfully, to adapt that system to the needs of that century, this (p 159) legislation took three main forms. …..

General and Local Legislation;

We have seen that the stream of statutes, which gave the Justices of the Peace their position of decisive importance in the government of the counties and the boroughs, had begun to flow in the Tudor period. …….